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The Law and Psychology of Jury Instructions

J. Alexander Tanford
Indiana University Maurer School of Law, tanford@indiana.edu

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* Professor of Law and Ira C. Batman Faculty Fellow, Indiana University, Bloomington, Indiana 47405. This Article was written while the Author was a CIC Exchange Scholar in law and psychology at the University of Iowa. I am grateful to the Consortium for Institutional Cooperation, to Dean William Hines and Professor Michael Saks at the University of Iowa College of Law, and for the continuing support of Dean Bryant Garth and the Center for the Study of Law and Society, Indiana University School of Law.

I. INTRODUCTION

In 1959, the Nebraska Law Review published the remarkable results of an experiment on jury instructions.[1] Researchers with the University of Chicago Jury Project had discovered that when subjects in simulated jury trials were admonished to disregard evidence of insurance, they did the exact opposite of what they were told. The admonition did not reduce the impact of this inadmissible evidence;[2] it increased the prejudicial effect.[3] Subsequent studies confirm that jurors appear to be unable or unwilling to follow this kind of instruction.[4]

In *Carter v. Kentucky*,[5] the Supreme Court had the opportunity to put these data to use. It had to decide whether the jury should be admonished to disregard the fact that a defendant had not testified. Although jurors "may well draw adverse inferences from a defendant's silence" unless some steps are taken to prevent it,[6] the research by psychologists demonstrates that instructing jurors to disregard the silence will not accomplish the task. The research was ignored. Instead, the Supreme Court asserted that an admonition was a "powerful tool" with "unique power . . . to reduce . . . speculation to a minimum."[7] The Justices apparently believed that an admonition would actually "remove from the jury's deliberations any [negative] inferences."[8]

Is *Carter* simply an isolated case of bad decision-making, or is it representative of a wide-spread problem of ignorance concerning jury

1. Broeder, *The University of Chicago Jury Project*, 38 NEB. L. REV. 744 (1959).
2. *See, e.g.*, FED. R. EVID. 411 (evidence of liability insurance not admissible upon the issue of whether the defendant acted negligently or otherwise wrongfully).
3. Broeder, *supra* note 1, at 753-54 (verdicts averaged $33,000 if there was no evidence of insurance, $37,000 when insurance was mentioned, and $46,000 when jurors were told to disregard it). *See also* Kalven, *A Report on the Jury Project of the University of Chicago Law School*, 24 INS. COUNSEL J. 368, 377-78 (1958)(reporting same results).
4. *See* Oros & Elman, *Impact of Judge's Instructions Upon Jurors' Decisions: The Cautionary Charge in Rape Trials*, 10 REPRESENTATIVE RES. IN SOC. PSYCHOLOGY 28, 32 (1979); Sue, Smith & Caldwell, *Effects of Inadmissible Evidence on the Decisions of Simulated Jurors: A Moral Dilemma*, 3 J. APPLIED SOC. PSYCHOLOGY 345, 350-51 (1973); Wolf & Montgomery, *Effects of Inadmissible Evidence and Level of Judicial Admonishment to Disregard on the Judgments of Mock Jurors*, 7 J. APPLIED SOC. PSYCHOLOGY 205, 213-16 (1977). *See also* Thompson, Fong & Rosenhan, *Inadmissible Evidence and Juror Verdicts*, 40 J. PERSONALITY & SOC. PSYCHOLOGY 453, 457-58 (1981).
5. 450 U.S. 288 (1981).
6. *Id.* at 301.
7. *Id.* at 303.
8. *Id.* at 301 (quoting Lakeside v. Oregon, 435 U.S. 333, 340 (1978)).

instructions? This question strikes at the heart of the legitimacy of our current litigation system. As the Supreme Court has noted, our jury trial system depends on the "crucial assumption . . . that juries will follow the instructions given them by the trial judge."[9] The purpose of this Article is to explore that assumption and its ramifications. Part one classifies and describes the main types of jury instructions. Part two synthesizes the psycholegal research concerning the effectiveness (or, more commonly, the ineffectiveness) of various jury instruction practices. Part three uses this literature to critically examine jury instruction procedures now in use. Part four makes some suggestions for law reform that could improve the jury instruction process and thus restore legitimacy to our system of trial by jury.

II. TYPES OF JURY INSTRUCTIONS

Much confusion and ambiguity exists in the classification and nomenclature of jury instructions. They are referred to somewhat interchangeably as instructions, admonitions, and charges.[10] They are grouped into various vaguely defined categories, such as explanatory, cautionary, limiting, written, oral, verdict-directing, curative, pattern or preliminary. Some have colorful names like the "dynamite charge."[11] At times, the taxonomy of instructions can assume significant proportions. In *James v. Kentucky*,[12] for example, whether a defendant was procedurally barred from raising a constitutional issue on appeal depended on the distinction between an "admonition" and an "instruction" under Kentucky law. Both the Kentucky and United States Supreme Courts devoted their opinions to discussing the amount of difference between the two, agreeing that the defendant's ability to press his appeal depended on the answer.[13]

In most jurisdictions, instructions are classified according to the

9. Parker v. Randolph, 442 U.S. 62, 73 (1979), *cited with approval in* Marshall v. Lonberger, 459 U.S. 422, 438 n.6 (1983). *See also* Opper v. United States, 348 U.S. 84, 95 (1954)("Our theory of trial relies upon the ability of a jury to follow instructions").

10. *Cf.* Note, *Jury Instructions v. Jury Charges*, 82 W. VA. L. REV. 555, 555-56 (1980)(drawing distinction between instruction and charge).

11. Also called a "hammer" or "Allen" charge, the "dynamite charge" is based on United States v. Allen, 164 U.S. 492 (1896), in which the Court approved an instruction given to a deadlocked jury urging them to try to overcome their differences and reach a verdict.

12. 466 U.S. 341 (1984).

13. At trial, the defendant had requested a jury "admonition" rather than an instruction. The Kentucky Supreme Court held that there was a vast difference between the two and the defendant had waived the right to appeal by asking for the wrong remedy. The United States Supreme Court acknowledged the right of a state to define its law of jury instructions but concluded that with such specificity, "the substantive distinction between admonitions and instructions [was] not always clear or closely hewn to." *Id.* at 345-49.

time during trial at which they are given: preliminary and mid-trial instructions, the concluding charge, and mid-deliberation instructions.[14] The problem with this approach is that the same instruction may be given at various times. For example, the instruction on burden of proof usually is included in both preliminary instructions and the concluding charge; limiting instructions may be given mid-trial and repeated in the charge. Therefore, for purposes of this Article, instructions will be classified into two main categories according to their purpose: 1) *charging instructions* that tell jurors about the law and procedure they are supposed to follow; and 2) *admonitions* that warn jurors that they should not consider some kinds of information in arriving at a verdict.

A. Charging Instructions

The most important instructions are those that make up the jury charge. Charging instructions explain the jury's role, describe relevant procedural and substantive law, and provide suggestions on how to organize deliberations and evaluate evidence. In almost every jurisdiction, charging instructions now come exclusively from books of approved pattern jury instructions.[15] They traditionally are given at the end of the trial, either before or after closing arguments,[16] although some judges also give the jury an abbreviated charge at the beginning of the trial.[17]

Four varieties of instructions appear in the jury charge. First, general introductory instructions describe the jurors' duties. Typically, these instructions inform jurors that they must accept the law from the court but determine the facts for themselves, treat the charge as a whole, base their verdict only on the evidence, evaluate the credibility of witnesses, recognize that the attorneys' arguments are not evidence, act impartially, and reach a unanimous verdict.[18] Some portions of the

14. *See, e.g.*, E. DEVITT & C. BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS (3d ed. 1977); FEDERAL JUDICIAL CENTER, PATTERN CRIMINAL JURY INSTRUCTIONS (1982).

15. *See* R. NIELAND, PATTERN JURY INSTRUCTIONS: A CRITICAL LOOK AT A MODERN MOVEMENT TO IMPROVE THE JURY SYSTEM 10 (1979)(as of 1980, 43 states had pattern jury instructions available); Perlman, *Pattern Jury Instructions: The Application of Social Science Research*, 65 NEB. L. REV. 520, 526-28 (1986) (discussing the history of jury instructions and the use of pattern instructions as a 20th century phenomenon).

16. *See* Schwarzer, *Communicating with Juries: Problems and Remedies*, 69 CALIF. L. REV. 731, 755-56 (1981).

17. *See id.*; Steele & Thornburg, *Jury Instructions: A Persistent Failure to Communicate*, 67 N.C.L. REV. 77, 77-78 (1988). *See, e.g.*, MICH. CT. R. 2.516(B)(preliminary instructions required explaining duties of jurors and law applicable to the case).

18. *See* D. AARONSON, MARYLAND CRIMINAL JURY INSTRUCTIONS AND COMMENTARY §§ 1.01-1.09 (2d ed. 1988); FLORIDA STANDARD JURY INSTRUCTIONS IN CRIMINAL

jury-function instructions, such as the caution not to discuss the case with anyone or listen to news reports of the trial, may be repeated several times throughout the trial.[19]

Second, jurors are instructed in the rudiments of procedure. For example:

> The State has the burden of proving, based upon the evidence introduced at trial, every fact necessary to convict the defendant of the crime with which he is charged. This burden remains with the State throughout the trial. The defendant does not have the burden of proving his innocence or of producing any evidence. If you are not convinced that the State has proved beyond a reasonable doubt each and every element of the offense with which the defendant is charged you must find the defendant not guilty. On the other hand, if you find from your consideration of all the evidence that the State has proved each of the elements of the offense beyond a reasonable doubt, then you should find the defendant guilty.
>
> Every defendant in a criminal case is presumed to be innocent. You should not assume that the defendant is guilty because he is on trial. The presumption of innocence remains with the defendant throughout the trial unless and until he is proven guilty beyond a reasonable doubt. . . .
>
> Reasonable doubt, as the name implies, is a doubt based on reason, a doubt for which you can give a reason. It is not a fanciful doubt, nor a whimsical doubt, nor a doubt based on conjecture. It is such a doubt as would cause a juror, after a careful and impartial consideration of all the evidence, to be so undecided that the juror cannot say that he or she has an abiding conviction of the defendant's guilt.[20]

Third, jurors are instructed about the elements of the relevant substantive law. For example:

> [Proximate cause is] a cause which, in a natural and continuous sequence, produces damage and without which the damage would not have occurred.[21]
>
> A motorist who is making a left-hand turn is required by law to exercise ordinary care to ensure that such movement can be made without endangering others. In addition to signalling his intention, he must yield the right-of-way to any vehicle approaching from the opposite direction. He must also yield the right-of-way to any oncoming traffic which is so close as to constitute a hazard.[22]

Fourth, cautionary instructions point out potential problems with certain kinds of evidence and suggest methods the jury can use to evaluate their reliability. The leading example concerns eyewitness evidence.

> Identification testimony is an expression of belief or impression by the witness. Its value depends on the opportunity the witness had to observe the offender at the time of the offense and to make a reliable identification later.

CASES §§ 2.05 (1981); VIRGINIA MODEL JURY INSTRUCTIONS-CRIMINAL §§ 2.050 (Repl. ed. 1985 & 1988 Supp.).

19. *See, e.g.*, E. DEVITT & C. BLACKMAR, *supra* note 14, § 5.07.
20. D. AARONSON, *supra* note 18, at §§ 1.02-1.04 (redundant and bracketed portions omitted).
21. ARKANSAS MODEL JURY INSTRUCTIONS—CIVIL § 501 (3d ed. 1989).
22. G. DOUTHWAITE, JURY INSTRUCTIONS IN AUTOMOBILE NEGLIGENCE ACTIONS 249 (1986).

> In appraising the identification testimony of a witness, you should consider the following:
>
> (1) Are you convinced that the witness had the capacity and an adequate opportunity to observe the offender?
>
> Whether the witness had an opportunity to observe the offender at the time of the offense will be affected by such matters as how long or short a time was available, how far or close the witness was, how good were lighting conditions, whether the witness had had [sic] occasion to see or know the person in the past.
>
> (2) Are you satisfied that the identification made by the witness subsequent to the offense was the product of his own recollection? You may take into account both the strength of the identification, and the circumstances under which the identification was made.
>
> If the identification by the witness may have been influenced by the circumstances under which the defendant was presented to him for identification, you should scrutinize the identification with great care. You may also consider the length of time that lapsed between the occurrence of the crime and the next opportunity of the witness to see [the] defendant, as a factor bearing on the reliability of the identification.
>
> (3) You may take into account any occasions in which the witness failed to make an identification of defendant, or made an identification that was inconsistent with his identification at trial.
>
> (4) Finally, you must consider the credibility of each identification witness in the same way as any other witness, consider whether he is truthful, and consider whether he had the capacity and opportunity to make a reliable observation on the matter covered in his testimony.[23]

Cautionary instructions also are given in conjunction with accomplice testimony,[24] a defendant's confession that may have been coerced by police "persuasion,"[25] testimony by previously hypnotized witnesses,[26] and arguments by attorneys that pain and suffering damages can be calculated according to a per diem mathematical formula.[27]

B. Admonitions

Admonitions are given spontaneously in an effort to prevent jurors from misusing potentially prejudicial information. They come in two main varieties: admonitions that jurors must completely disregard information and instructions to limit their use of evidence. Judges generally admonish the jury at the time the information is disclosed,

23. United States v. Telfaire, 469 F.2d 552, 558-59 (D.C. Cir. 1972)(bracketed portions omitted). *Cf.* Commonwealth v. Yarris, 519 Pa. 571, 549 A.2d 513 (1988)(if judge believes eyewitness is reliable, no instruction is needed).

24. *See, e.g.*, People v. Allen, 45 Cal. 3d 1268, 756 P.2d 221, 248 Cal Rptr. 834 (1988); Mims v. United States, 254 F.2d 654, 655 (9th Cir. 1958).

25. *E.g.*, Conner v. State, 106 So. 2d 416 (Fla. 1958). *Cf.* Payne v. Arkansas, 356 U.S. 560, 566-68 (1958)(constitutional limits to using coerced confession).

26. *E.g.*, State v. Johnston, 39 Ohio St. 3d 48, 54-55, 529 N.E.2d 898, 905-06 (1988).

27. *See* Botta v. Brunner, 26 N.J. 82, 138 A.2d 713 (1958). *See also* People v. Boyde, 46 Cal. 3d 212, 254-55, 758 P.2d 25, 49 (1988)(general cautionary instruction that the arguments of the attorneys are not evidence).

although a reminder may also be given in the court's final charge. Admonitions are often misleadingly called "curative" instructions.

An admonition to disregard information warns jurors not to consider it for any purpose whatsoever. For example, a court might tell the jury: "The defendant is not compelled to testify and the fact that he does not [testify] cannot be used as an inference of guilt and should not prejudice him in any way."[28] This kind of admonition commonly is used after a witness gives testimony that violates the rules of evidence, *e.g.*, by disclosing that a defendant has a criminal record,[29] mentioning polygraph tests,[30] or disclosing that a civil defendant had offered to settle the case.[31] Judges also admonish jurors to disregard improper remarks and comments by attorneys that violate the rules of trial law, *e.g.*, mentioning that the defendant has insurance,[32] stating a personal opinion about the merits of the case[33] or making blatant appeals to sympathy.[34] Occasionally, a judge may admonish the jury to disregard the judge's own improper conduct,[35] or the conduct of outsiders not involved in the trial.[36]

Limiting instructions admonish jurors not to consider evidence for a particular purpose, although it may be considered on other issues. For example, a judge might tell the jury:

> The evidence you are about to receive concerning evidence of other crimes allegedly committed by the defendant will be considered by you for the limited purpose of proving [motive, opportunity, intent, etc.] on the part of the defendant and you shall consider it only as it relates to those issues.[37]

Limiting instructions are commonly given when the rules of evidence specify that otherwise prohibited evidence is admissible for a limited purpose. For example, Federal Rule of Evidence 404(b) pro-

28. This is the instruction requested by the defense in Carter v. Kentucky, 450 U.S. 288, 294 (1981). *See supra* note 13 and accompanying text.
29. *See* Gowin v. State, 760 S.W.2d 672 (Tex. Ct. App. 1988)(in driving under the influence prosecution, witness mentioned that defendant had prior arrests for drunk driving); Martin v. State, 528 N.E.2d 461 (Ind. 1988)(police officer testified he believed defendant had been involved in a series of robberies).
30. *See, e.g.*, Lusby v. State, 217 Md. 191, 141 A.2d 893 (1958).
31. *See, e.g.*, Streeter v. Sears Roebuck & Co., 533 So. 2d 54, 62 (La. Ct. App. 1988).
32. *See, e.g.*, Tellefson v. Key Sys. Trans. Lines, 158 Cal. App. 2d 243, 322 P.2d 469 (1958).
33. *See, e.g.*, Martin v. State, 98 Ga. App. 136, 105 S.E.2d 250 (1958).
34. *See, e.g.*, State v. Mead, 544 A.2d 1146 (R.I. 1988).
35. *See* Montgomery v. State, 760 S.W.2d 323, 327-29 (Tex. Ct. App. 1988)(judge improperly informed jury about parole laws); Jackson v. State, 756 S.W.2d 82 (Tex. Ct. App. 1988)(judge suggested defendant's case was weak); Maulding v. State, 296 Ark. 328, 757 S.W.2d 916 (1988)(judge criticized defense attorney).
36. *See, e.g.*, Stahl v. State 749 S.W.2d 826 (Tex. Crim. App. 1988)(victim's mother cried out from audience, "May he burn in hell, oh my baby"). *See also* D. AARONSON, *supra* note 18, at § 1.11(b)(disregard newspaper, television and radio reports).
37. FLORIDA STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES 50 (1981).

vides that evidence of a defendant's prior criminal acts are not admissible to prove his culpability, but may be used for the limited purpose of proving identity, low credibility, or a state of mind, such as intent, knowledge, notice, and absence of mistake.[38] Similarly, limiting instructions may accompany the introduction of hearsay evidence offered not to prove the truth of the facts asserted, but to show that the person who heard them was put on notice[39] or to impeach as prior inconsistent statements.[40]

Limiting instructions also are used when multiple defendants or multiple offenses are joined into a single trial.[41] If evidence is admissible against one defendant but inadmissible against the other, judges may admonish the jurors to limit their use of the evidence accordingly. For example, a confession is admissible against the person who made it, but inadmissible hearsay if offered against other parties.[42] In joint trials involving confessions, the judge usually will instruct the jurors to consider each confession only against the person who made it, even if it incriminates others.[43] Similarly, when one defendant is charged with multiple offenses or sued under different causes of action, evidence may be admissible to prove one charge but legally inadmissible on the other. For example, evidence of subsequent safety measures are inadmissible in negligence cases, but may be admissible in products liability trials. If a defendant manufacturer is being sued on both grounds, a judge is likely to use a limiting instruction rather than order inefficient separate trials.[44]

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38. *See* United States v. Dunn, 841 F.2d 1026 (10th Cir. 1988)(criminal convictions were admissible for limited purpose of impeaching defendant's credibility); United States v. Cuch, 842 F.2d 1173, 1176-77 (10th Cir. 1988)(although evidence that rape defendant had previously committed sexual assault was not admissible to prove he committed rape, it was admissible to prove his intent); Howard v. State, 549 A.2d 692 (Del. 1988)(evidence that defendant purchased narcotics was admissible only to show his motive for forging check).

39. *See* State v. Curry, 436 N.W.2d 371 (Ia. 1988).

40. *See* D. AARONSON, *supra* note 18, at § 2.08 ("Prior statements are admitted into evidence solely for your consideration in evaluating the credibility, or worthiness of belief, of the witness. If you find the prior statements to be inconsistent, you may consider such statements only in your evaluation of the truth of the witness' present testimony in court. You must not consider the prior statements as establishing the truth of any fact contained in that statement").

41. *See, e.g.*, FED. R. CRIM. P. 8.

42. *See* FED. R. EVID. 801(d)(1).

43. *See* Richardson v. Marsh, 481 U.S. 200, 208 (1987); United States v. Gordon, 253 F.2d 177, 182-83 (7th Cir. 1958); Durkin v. Equine Clinics Inc., 376 Pa. Super. 557, 546 A.2d 665 (1988). *Cf.* Bruton v. United States, 391 U.S. 123, 135 (1968)(limiting instruction may not be adequate if incriminatory nature of confession makes it unlikely jury can, in fact, adhere to instruction).

44. *See* Enterprise Prod. Co. v. Sanderson, 759 S.W.2d 174 (Tex. Ct. App. 1988).

III. THE PSYCHOLOGY OF JURY INSTRUCTIONS

In the thirty years since the University of Chicago Jury Project first demonstrated that jurors are either unwilling or unable to obey some kinds of instructions, psychologists have conducted extensive research on a wide range of related issues.

A. Empirical Research About Charging Instructions

The empirical research by psychologists on pattern instructions that make up the jury charge has focused on three topics: their general comprehensibility, the effect of varying the timing at which they are given, and the impact of the number of times the instructions are repeated.

1. General Comprehensibility

Several researchers have investigated whether jurors understand charging instructions on the substantive law, evidence, and burdens of proof. They all reach the same conclusion: typical pattern jury instructions, drafted by lawyers in an effort to be *legally* precise, are incomprehensible to jurors.[45] Forston found that after hearing instructions, 80% of his subjects still did not understand basic rules of evidence and the burden of proof.[46] Strawn and Buchanan found that after instructions, 43% of jurors still did not believe that circumstantial evidence was valid, 50% did not understand the presumption of innocence, and 23% thought that if they had doubts because the evidence was evenly balanced, the defendant should be convicted.[47] Elwork, Sales and Alfini found that after they had been charged, 44% of their subjects still could not correctly answer more than half of a legal comprehension questionnaire.[48]

Jurors' abilities to understand pattern instructions vary with the subject matter of the instruction. Severance and Loftus found that after hearing an instruction on reasonable doubt, many jurors showed

45. *Cf.* Reed, *Jury Simulation: The Impact of Judge's Instructions and Attorney Tactics on Decisionmaking*, 71 J. CRIM. L. & CRIMINOLOGY 68, 71-72 (1980)(although jurors did not understand their instructions, the instructions had an effect on their verdicts). For a marvelous collection of Texas appellate cases illustrating various juror misunderstandings of their instructions, see Steele & Thornburg, *supra* note 17, at 80-83.

46. Forston, *Justice, Jurors and Judges' Instructions*, 12 JUDGES J. 68 (1973)(using Iowa jurors).

47. Strawn & Buchanan, *Jury Confusion: A Threat to Justice*, 59 JUDICATURE 478, 480-81 (1976)(using Florida jurors). *See also* Taylor, Buchanan, Pryor & Strawn, *Avoiding the Legal Tower of Babel*, 19 JUDGES J., Summer 1980, at 10, 15 (summarizes communication literature and concludes that old instruction practices are too complex and abstract for jurors to understand).

48. Elwork, Sales & Alfini, *Juridic Decisions: In Ignorance of the Law or In Light of It?*, 1 LAW & HUM. BEHAV. 163, 170-71 (1977)(using Nebraska subjects).

better understanding of the concept than before, although 26% still did not understand it.[49] Similarly, introductory instructions significantly helped their subjects understand their general roles and duties as jurors, but a substantial number still made errors on a comprehension test.[50] However, a mens rea instruction on intent did not improve their subjects' comprehension of that element of the substantive law.[51] Borgida and Park discovered that jurors could understand an instruction on the subjective test for entrapment that focuses on the defendant's predisposition to commit an offense, but could not understand an instruction explaining the objective test that focuses on government conduct.[52] These studies, together with research by Elwork, Sales and Alfini,[53] suggest that although pattern instructions may be effective in reminding jurors of concepts with which they already are generally familiar, they do not improve comprehension of new, difficult, or counter-intuitive laws.

Much of the empirical research has focused on how to improve that comprehension. Researchers assert that the attempt to make them *legally* precise[54] has resulted in instructions so full of jargon and modifying clauses that they are not understandable. There is general consensus that the first step should be to rewrite pattern instructions using simpler language. Psycholinguists suggest that comprehension

49. Severance & Loftus, *Improving the Ability of Jurors to Comprehend and Apply Criminal Jury Instructions*, 17 LAW & SOC'Y REV. 153, 180 (1982)(32.1% error rate reduced to 26.2% error rate; $F(2,210) = 4.03$, $p<.02$). *See also* Kerr, Atkin, Stasser, Meek, Holt, & Davis, *Guilt Beyond a Reasonable Doubt: Effects of Concept Definition and Assigned Decision Rule on the Judgments of Mock Jurors*, 34 J. PERSONALITY & SOC. PSYCHOLOGY 282, 287 (1976)(varying the definition of burden of proof contained in the instructions affected both individual and group verdicts; using a more stringent standard produced more not-guilty verdicts than a laxer burden).

50. Severance & Loftus, *supra* note 49, at 181 (27.5% error rate reduced to 20.8% error rate; $F(2,210) = 5.29$, $p<.006$).

51. *Id.* at 180-81 (39.1% and 35.2% error rates not statistically significant difference; $F(2,210) = 0.87$, $p =$ n.s.).

52. Borgida & Park, *The Entrapment Defense: Juror Comprehension and Decision Making*, 12 LAW & HUM. BEHAV. 19, 28 (1988).

53. Elwork, Sales & Alfini, *supra* note 48, at 175-76 (testing whether jurors understood concept of contributory negligence, *i.e.*, if both parties were at fault, the defendant wins; pattern instructions were not effective in helping jurors translate factual situation of mutual fault into a correct legal decision that the defendant wins).

54. *See, e.g.*, CALIFORNIA JURY INSTRUCTIONS—CRIMINAL: BOOK OF APPROVED JURY INSTRUCTIONS 44 (1950)("The one thing an instruction must do above all else is correctly state that law. This is true *regardless of who is capable of understanding it*")(emphasis supplied), cited in Severance, Greene & Loftus, *Toward Criminal Jury Instructions That Jurors Can Understand*, 75 J. CRIM. L. & CRIMINOLOGY 198, 201 (1984). *Cf.* Perlman, *supra* note 15, at 535 (defending the use of legal jargon because instructions are addressed not only to jurors, but also to lawyers and judges where precision is necessary).

would be improved if instructions were written along the following guidelines:

1. Eliminate nominalizations (making nouns out of verbs) and substitute verb forms; *e.g.*, changing "an *offer* of evidence" to "items *were offered* into evidence."[55]
2. Replace the prepositional phrase "as to" with "about;" *e.g.*, changing "you must not speculate *as to* what the answer might have been" to "you must not speculate *about* what the answer might have been."[56]
3. Relocate prepositional phrases so they do not interrupt a sentence; *e.g.*, avoiding sentences such as "proximate cause is a cause which, *in a natural and continuous sequence*, produces the injury."[57]
4. Replace words that are difficult to understand with simple ones; *e.g.*, changing "agent's negligence is *imputed* to plaintiff" to "agent's negligence *transfers* to plaintiff."[58]
5. Avoid multiple negatives in a sentence; *e.g.*, "innocent *mis*-recollection is *not un*common."[59]
6. Use the active rather than passive voice; *e.g.*, changing "no emphasis is intended by me" to "I do not intend to emphasize."[60]
7. Avoid "whiz" deletions (omitting words "which is"); *e.g.*, by changing "statements of counsel" to "statements *which are* made by counsel."[61]
8. Reduce long lists of words with similar meanings to only one or two; *e.g.*, shortening "knowledge, skill, experience, training, or education" to "training or experience."[62]
9. Organize instructions into meaningful discourse structures that avoid connecting unrelated ideas in ways that make them seem related.[63]

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55. Charrow & Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 COLUM. L. REV. 1306, 1321-22, 1336 (1979)(emphasis supplied).
56. *Id.* at 1322, 1336 (emphasis supplied).
57. *Id.* at 1323, 1336 (emphasis supplied).
58. *Id.* at 1324, 1336 (emphasis supplied). *See also* A. ELWORK, B. SALES, & J. ALFINI, MAKING JURY INSTRUCTIONS UNDERSTANDABLE 176-80 (1982)(avoid ambiguous homonyms like "information" when repeating a concept, use the same word rather than a synonym and use positive words like "rude" rather than antonyms such as "impolite").
59. Charrow & Charrow, *supra* note 55, at 1324-25, 1337 (emphasis supplied); A. ELWORK, B. SALES & J. ALFINI, *supra* note 58, at 172-73.
60. Charrow & Charrow, *supra* note 55, at 1325-26, 1337-38; A. ELWORK, B. SALES & J. ALFINI, *supra* note 58, at 175-76.
61. Charrow & Charrow, *supra* note 55, at 1323, 1338 (emphasis supplied).
62. *Id.* at 1326, 1338.
63. *Id.* at 1326-27, 1338-39 (*e.g.*, change "If in these instructions any rule is repeated,

10. Avoid embedding subordinate clauses in sentences; *e.g.*, "you must not speculate *to be true* any insinuation *suggested by a question asked a witness.*"[64]

Experiments with rewritten instructions consistently show improved juror comprehension of rules of law.[65]

Rewriting is not a panacea, however. Even after receiving rewritten instructions, subjects in these experiments still showed up to 75% error rates on comprehension tests.[66] Nor do rewritten instructions significantly improve comprehension in all situations. Elwork, Sales and Alfini found that rewritten instructions did not help jurors' accurately translate factual decisions into legal ones where the concepts were familiar. For example, when jurors were asked to decide whether speeding constituted legal negligence, the type of instruction had no effect. This may be because jurors are already familiar with the rules of road and have preconceptions about whether speeding is negligent. However, when a legal concept is outside the jurors' experiences and contrary to common sense, such as the old contributory negligence rule, revised instructions can produce a dramatic increase in legally correct decisions.[67]

The research suggests that complex language and bad grammar are not the only factors making communication difficult. The abstract nature of many instructions also interferes with comprehension. Apparently in an effort to avoid commenting on the evidence, American judges tend not to place legal concepts in the context of the actual facts of the case.[68] Psychologists have demonstrated that knowledge

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no emphasis thereon is intended; for that reason, you must consider these instructions as a whole; the order in which they are given has no significance" to "There are three things you must keep in mind: first, repetition of an instruction does not mean I am emphasizing it; second, you must consider all the instructions together; and third, the order has no significance"). *See also* A. ELWORK, B. SALES & J. ALFINI, *supra* note 58, at 149-67 (other organizational principles).

64. Charrow & Charrow, *supra* note 55, at 1324-25, 1337; A. ELWORK, B. SALES & J. ALFINI, *supra* note 58, at 168-72.

65. Elwork, Sales and Alfini, *supra* note 48, at 175, found that rewritten instructions had a significant impact on jurors' understanding of legal concepts based on scores on a comprehension test ($F(1,112) = 9.50$, $p < .005$). *See also* Charrow & Charrow, *supra* note 55, at 1331 (improved comprehension for rewritten instructions); Severance & Loftus, *supra* note 49, at 183-95 (revised instructions produced lower error rate on comprehension test and more accurate applications of law in hypothetical situations than did pattern instructions); Steele & Thornburg, *supra* note 17, at 90 (comprehension improved).

66. *See* Severance & Loftus, *supra* note 49, at 190, Table 6 (revised instruction on intent, 24.9% error rate; revised instruction on reasonable doubt, 20.2% error rate); Steele & Thornburg, *supra* note 17, at 90-92 (75% failure rate for subjects asked an open-ended question to paraphrase rewritten instructions).

67. Elwork, Sales & Alfini, *supra* note 48, at 176 (pattern instruction produced 38% error rate, revised instruction only 13% error rate).

68. Schwarzer, *supra* note 16, at 741; Steele & Thornburg, *supra* note 17, at 101-03.

of context is necessary for effective comprehension of prose passages.[69] Instructions therefore would be better understood if judges would provide context, refer to the actual evidence, use examples from the real world, and use the names of persons, places and things rather than generic terms such as "plaintiff."[70] On the other hand, sentence length appears to have little effect on comprehension.[71]

One other obvious problem with traditional instructions is that they are given orally, rather than in writing. It undoubtedly is difficult for jurors to recall several hours of oral instructions.[72] Would providing written instructions improve comprehension? Some judges and psychologists think so,[73] but apparently the issue has not been the subject of empirical investigation.[74]

2. *Timing and Repetition*

A number of legal commentators believe that one of the reasons jurors do not understand and follow their instructions is that they do not hear them until the end of the trial.[75] Jurors might do a better job if they heard the instructions at the beginning. This assertion finds some support in two psychological theories. Encoding theory predicts that if the charge were given at the start, jurors could more easily identify and focus on the central disputes during the presentation of

69. Bransford & Johnson, *Contextual Prerequisites for Understanding: Some Investigations of Comprehension and Recall*, 11 J. VERBAL LEARNING & VERBAL BEHAV. 717 (1972).

70. *See* A. ELWORK, B. SALES & J. ALFINI, *supra* note 58, at 178; Severance, Greene & Loftus, *supra* note 54, at 202, 207-08; Strawn, Buchanan, Pryor & Taylor, *Reaching a Verdict, Step By Step*, 60 JUDICATURE 383, 387 (1977).

71. A. ELWORK, B. SALES, & J. ALFINI, *supra* note 58, at 167-68; Charrow & Charrow, *supra* note 55, at 1319-20.

72. *See* Schwarzer, *supra* note 16 (federal judge suggests intuitively that instructions should be kept to a maximum of 20-30 minutes).

73. *See* Weltner, *Why the Jury Doesn't Understand the Judge's Instructions*, 18 JUDGES J., Spring 1979, at 18, 21 (conclusion based on interviews with jurors).

74. *See* A. ELWORK, B. SALES, & J. ALFINI, *supra* note 58, at 18-20 (fact that written instructions would be more easily understood than oral is so obvious from research on educational and cognitive psychology that no experiment with jury instructions is necessary).

75. *See* Forston, *supra* note 46. *See also* Avakian, *Let's Learn to Instruct the Jury*, 18 JUDGES J., Summer 1979, at 40 (judge's personal experience is that instructing before, during, and after trial improves juror comprehension); Hunter, *Law in the Jury Room*, 2 OHIO ST. L.J. 1, 8-9 (1935)(intuition says that instruction at end of long day of listening is not likely to be effective); Prettyman, *Jury Instructions—First or Last?*, 46 A.B.A. J. 1066, 1066 (1960)(makes intuitive sense to tell jurors the rules of the game at the beginning); Weltner, *supra* note 73, at 20 (based on juror interviews, judge recommends that instructions be given at the beginning of the trial); Note, *Memory, Magic and Myth: the Timing of Jury Instructions*, 59 OR. L. REV. 451, 461 (1981)(concludes that Oregon should adopt the practice of giving preliminary instructions).

evidence.[76] Information integration theory holds that jurors arrive at judgments by weighing all pieces of information, including instructions, after each item has been assigned some scale value along a guilt-innocence dimension.[77] Because of ordering effects, salient information received early in the trial may be given the greatest weight.[78]

Kassin and Wrightsman have found mild empirical support for a beneficial preliminary instruction effect. They discovered that giving subjects an instruction on the burden of proof at the end of trial had no impact on their verdicts compared to no instruction at all, but giving the instruction at the beginning of trial did affect verdicts, although the effect was marginal.[79] They hypothesized that jurors decide how they will vote at some time before the end of the trial.[80] Therefore, instructions given at the end may come too late to have a meaningful impact on juror decisions.

However, other researchers have found that giving preliminary instructions either have no effect or decrease comprehension. Cruse and Brown gave subjects a full set of standard instructions and found that it made no difference on verdicts whether they were given before or after the evidence.[81] Greene and Loftus tested limiting instructions in joined criminal trials, with no difference in result regardless of when the instruction was given.[82] Elwork, Sales and Alfini found that instructions given at the end of the trial actually produced better results on a comprehension test than if they were given in the beginning, but they did not measure effect on verdicts.[83]

The one point upon which all researchers are agreed is that repeating the instructions two or more times aids comprehension and improves the accuracy of verdicts. Elwork, Sales and Alfini found that

76. *See* Cruse & Browne, *Reasoning in a Jury Trial: The Influence of Instructions*, 114 J. GEN. PSYCHOLOGY 129, 132-33 (1987).

77. *See* Kaplan & Kemmerick, *Juror Judgment as Information Integration: Combining Evidential and Nonevidential Information*, 30 J. PERSONALITY & SOC. PSYCHOLOGY 493, 493 (1974).

78. *See id.*; Kassin & Wrightsman, *On the Requirements of Proof: The Timing of Judicial Instruction and Mock Juror Verdicts*, 37 J. PERSONALITY & SOC. PSYCHOLOGY 1877, 1884 (1979).

79. Kassin & Wrightsman, *supra* note 78, at 1880-81, 1884 (instructions given before evidence had marginally significant effect on verdict compared to no instructions ($F(2,101) = 2.90$, $p<.06$), instructions given after evidence had no effect compared to no instructions).

80. *See also* H. KALVEN & H. ZEISEL, THE AMERICAN JURY 488-89 (1966)(jurors make up minds before deliberations).

81. Cruse & Browne, *supra* note 76, at 131-32.

82. Greene & Loftus, *When Crimes Are Joined at Trial*, 9 LAW & HUM. BEHAV. 193, 203-04 (1985)(result may have been caused by the combination of general incomprehensibility of instructions and jurors' tendencies to ignore admonitions of this sort).

83. Elwork, Sales & Alfini, *supra* note 48, at 177-78 (although scores of 7.5 and 8.05 are not statistically significant, they are in predicted direction).

subjects who had been instructed twice had higher scores on comprehension tests.[84] Cruse and Browne found that giving a full set of standard instructions twice significantly increased verdict accuracy.[85] Forston suggests that ideally instructions should be given not only at the beginning, but also throughout the trial as appropriate.[86]

3. *Cautionary Instructions*

Four studies that specifically focused on the effect of cautionary instructions yielded mixed results. Kassin and Wrightsman tested whether a cautionary instruction concerning coerced confessions would help jurors determine the reliability of the confession. They varied both the level of coercion surrounding the extraction of the confession and the giving or withholding of two kinds of cautionary instructions. In two experiments, the cautionary instructions had no measurable effect, either on the verdict or on subjects' judgments as to whether the confession was voluntary.[87] Katzev and Wishart measured the effect of cautionary instructions concerning problems with eyewitnesses. They found that giving the instruction had a marginal effect, but not enough to be statistically significant.[88] Greene also obtained marginal results when she tested the traditional eyewitness instruction. In her experiments, the instruction had no overall effect, although it tended to affect the number of hung juries.[89] Oros and Elman did find that giving a cautionary instruction concerning rape victims significantly affected jurors' decisions.[90] However, the cautionary instruction that the charge of rape is easy to make and difficult to disprove[91] is no longer used.[92]

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84. *Id.* at 177 (not quite statistically significant; $F(2,112) = 2.07$, $p<.15$).
85. Cruse & Browne, *supra* note 76, at 131-32 (Chi-square $(1,160) = 3.9$, $p<.05$).
86. Forston, *Sense and Non-sense: Jury Trial Communication*, 1975 B.Y.U. L. REV. 601, 612-16. *See also* Cruse & Browne, *supra* note 76, at 130 (psychological theory predicts that giving instructions before and again midway through the trial will improve jurors' comprehension and produce better verdicts).
87. Kassin & Wrightsman, *Coerced Confessions, Judicial Instructions, and Mock Juror Verdicts*, 11 J. APPLIED SOC. PSYCHOLOGY 489 (1981). *See also* Note, *Helping the Jury Evaluate Eyewitness Testimony: The Need for Additional Safeguards*, 12 AM. CRIM. L. REV. 189, 216 (1984)(summarizes some of the psychology literature on problems and possible ineffectiveness of cautionary instructions).
88. Katzev & Wishart, *The Impact of Judicial Commentary Concerning Eyewitness Identifications on Jury Decision-Making*, 76 J. CRIM. L. & CRIMINOLOGY 733 (1985)(Chi-square = 4.04, $p<.10$). The study found that initial guilty decisions by individuals dropped from 12/60 to 7/60 when the cautionary instruction was given. In addition, cautionary instructions significantly reduced deliberation time. *Id.*
89. Greene, *Judges's Instruction on Eyewitness Testimony: Evaluation and Revision*, 18 J. APPLIED SOC. PSYCHOLOGY 252, 258, 266 (1988).
90. Oros & Elman, *supra* note 4, at 32.
91. *See* People v. Elliott, 158 Cal. App. 2d 623, 322 P.2d 1029 (1958).

B. Empirical Research About Admonitions

Researchers with the University of Chicago Jury Project were the first to conduct experiments on admonitions. They concluded that neither instructions to disregard nor limiting instructions were effective. Subjects appeared unable or unwilling to follow them.[93] Admonitions, like charging instructions are difficult for jurors to understand,[94] but the problem is more complicated. Admonishing jurors often provokes the opposite of the intended effect. For example, in one classic expiriment, when civil jurors found out that a defendant was insured, mean verdicts increased from $33,000 to $37,000, but increased to $46,000 when they were instructed to disregard it.[95]

Subsequent experiments on the effect of instructions to disregard a variety of types of evidence all show similar results.[96] Sue, Smith and Caldwell tested the effect of instructions to disregard illegally obtained incriminating evidence. They found that introducing the evidence without comment increased the conviction rate by 26%, but that instructing the jury to disregard it increased the conviction rate by 35%.[97] Oros and Elman tested unfavorable character evidence, and found that telling jurors to disregard it only made them judge the defendant more harshly.[98] Wolf and Montgomery tested both incriminating and exculpating evidence, and discovered that admonitions tend to aggravate the effect of evidence in both directions. If jurors are instructed to disregard incriminating evidence, they are more likely to find the defendant guilty; if instructed to disregard exculpatory evidence, they are more likely to acquit.[99]

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92. *See, e.g.*, State v. Gong, 115 Idaho 86, 764 P.2d 453 (1988)(the improper cautionary instruction stated no existing rule of law).
93. Note, *Other Crimes Evidence at Trial: Of Balancing and Other Matters*, 70 YALE L.J. 763, 777 (1961). This is consistent with the "halo" effect. Psychological theory predicts that jurors will infer other negative characteristics about a person when some unfavorable information has been received. *See* Doob & Kirshenbaum, *Some Empirical Evidence on the Effect of § 12 of the Canada Evidence Act Upon an Accused*, 15 CRIM. L.Q. 88, 89-90 (1972).
94. *See* Severance & Loftus, *supra* note 49 (jurors given limiting instruction concerning use of a defendant's prior record showed no greater understanding of concept than those given no instruction).
95. Broeder, *supra* note 1, at 753-54; Kalven, *supra* note 3, at 377-78.
96. The phenomenon may be culturally relative. *Cf.* Cornish & Sealy, *Juries and the Rules of Evidence*, 1973 CRIM. L. REV. 208, 215 (British jurors did follow instructions to disregard evidence).
97. Sue, Smith & Caldwell, *supra* note 4, at 350-51.
98. Oros & Elman, *supra* note 4, at 32.
99. Wolf & Montgomery, *supra* note 4, at 213-16. *Cf.* Thompson, Fong & Rosenhan, *supra* note 4, at 457-58 (although jurors ignored instructions to disregard exculpatory evidence, they did have some ability to disregard incriminating evidence; however, methodological problems, including the failure to measure whether the particular "incriminating" evidence — a police officer's opinion — actually had any impact on guilt in the first place, cast doubt on the efficacy of the finding).

Empirical studies of limiting instructions show similar results: they are likely either to be ineffective or to make matters worse. Doob and Kirschenbaum's research showed that evidence of a defendant's criminal record of similar offenses had a significant impact on jurors' guilt decisions. Admonishing them to limit their use of that evidence to the issue of the accused's credibility did not reduce its impact, and had a marginal tendency to aggravate it.[100] Hans and Doob found similar effects using a single prior offense.[101] Wissler and Saks varied both the seriousness of the crime charged and the similarity of the prior convictions, and measured both guilt and credibility ratings. They found that when jurors were instructed to limit their use of the evidence to the credibility issue, they tended to do the opposite. Even prior convictions for perjury had no effect on credibility, but any prior similar conviction increased subjects' assessments of guilt.[102] Tanford and Cox replicated this result in the context of a civil case, finding that instructing jurors to limit their use of criminal record evidence to the defendant's credibility increased judgments of liability.[103]

Similar results have been obtained in experiments on the effect of joinder. Limiting instructions appear to be ineffective in preventing a spillover effect from one charge or defendant to another. Horowitz, Bordens and Feldman demonstrated that if two cases are joined into a single trial, and the jury is admonished to consider each charge independently, the likelihood of conviction goes up anyway.[104] Greene and Loftus found that if trials are joined, there is a significantly greater likelihood of conviction on each count than if they were tried separately, whether or not a limiting instruction is given.[105] Tanford and Penrod also found that joinder increases the conviction rate when charges are similar, and that an admonition has no effect.[106]

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100. Doob & Kirchenbaum, *supra* note 93 (in this experiment, the defendant did not supply any important evidence of his own innocence so that his credibility should not have played a significant role in the outcome of the case).

101. Hans & Doob, *Section 12 of the Canada Evidence Act and the Deliberation of Simulated Juries*, 18 CRIM. L.Q. 235, 242-49 (1975). *Cf.* Borgida & Park, *supra* note 52, at 31 (instruction had no effect).

102. Wissler & Saks, *On the Inefficacy of Limiting Instructions*, 9 LAW & HUM. BEHAV. 37, 41-44 (1985).

103. Tanford & Cox, *The Effects of Impeachment Evidence and Limiting Instructions On Individual and Group Decision Making*, 12 LAW & HUM. BEHAV. 477, 484-87 (1988).

104. Horowitz, Bordens & Feldman, *A Comparison of Verdicts Obtained in Severed and Joined Criminal Trials*, 10 J. APPLIED SOC. PSYCHOLOGY 444, 448-54 (1980)(compared to trying the cases separately).

105. Greene & Loftus, *supra* note 82, at 201-04.

106. Tanford & Penrod, *Social Inference Processes in Juror Judgments of Multiple-Offense Trials*, 47 J. PERSONALITY & SOC. PSYCHOLOGY 749 (1984). *Cf.* Tanford, Penrod & Collins, *Decision Making in Joined Criminal Trials: The Influence of Charge Similarity, Evidence Similarity, and Limiting Instructions*, 9 LAW &

IV. SENSE AND NONSENSE IN THE COURTROOM

The availability of this research provides an excellent opportunity to critically examine current jury instruction procedures and determine if jurors are being instructed effectively. The question is vital because of the central importance of the jury instruction to our trial system.[107] The answer, however, is not encouraging. Using the psychology literature as a guide, an analysis of the law of jury instructions reveals that courts predominantly rely on ineffective methods.

A. The Supreme Court

Since jury instruction practices tend to be matters of local procedure, the Supreme Court rarely reviews them directly. However, when the Court does have occasion to consider a trial judge's use of jury instructions, it usually reviews them only for their legal correctness without paying any attention to the problems of incomprehensibility.[108] When the Justices do explicitly express their views on how they think jury instructions affect jury behavior, they display appalling ignorance. Most commonly, the Justices reiterate their unquestioned belief in the "crucial assumption . . . that juries will follow the instructions given by the trial judge."[109] By starting from this erroneous premise, the Court has reached some bizarre conclusions.

Two related cases are illustrative. In *Lakeside v. Oregon*,[110] the defendant elected not to testify at trial. The defense attorney asked the judge to forgo giving the jury an instruction to disregard the de-

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HUM. BEHAV. 319 (1985)(limiting instruction had a marginal effect although authors doubt the efficacy of the result).

107. *See, e.g.*, Parker v. Randolph, 442 U.S. 62, 73 (1979)(crucial assumption underlying jury trial system).

108. *See* Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717 (1988) (instructions in anti-trust case); City of St. Louis v. Praprotnik, 485 U.S. 112 (1988)(instructions in § 1983 case); Lowenfield v. Phelps, 484 U.S. 231 (1988)(whether *Allen* charge is coercive); Monessen Sw. Ry. v. Morgan, 486 U.S. 330 (1988)(instructions on reducing future damages to present value); United States v. Kozminski, 487 U.S. 931 (1988)(instructions on involuntary servitude).

109. Parker v. Randolph, 442 U.S. 62, 73 (1979). *See also* Coy v. Iowa, 108 S. Ct. 2798, 2810 (1988)(Blackmun, J., dissenting)("we must assume [jurors are] intelligent and capable of following instructions"); Greer v. Miller, 483 U.S. 756, 766 n.8 (1987)("we . . . presume that a jury will follow instructions"); Richardson v. Marsh, 481 U.S. 200, 206 (1987)("invariable assumption of the law that jurors follow their instructions"); City of Los Angeles v. Heller, 475 U.S. 796, 798 (1986)("juries act in accordance with the instructions given them"); United States v. Lane, 474 U.S. 438, 450 n.13 (1986)(Court will not assume the jury misunderstood or disobeyed their instructions); Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 604 (1985)("we must assume that the jury followed the court's instructions"); Marshall v. Lonberger, 459 U.S. 422, 438 n.6 (1983)(crucial assumption is that juries will follow the instructions given them by the trial judge).

110. 435 U.S. 333 (1978).

fendant's failure to take the stand. The defendant argued that the instruction would only draw attention to the defendant's silence and would be like "waving a red flag in front of the jury."[111] The judge gave the instruction anyway and the defendant was convicted.

The psychology literature supports the defendant's objection. An admonition will not reduce the likelihood that jurors will draw adverse inferences from the defendant's silence, but will tend to aggravate its prejudicial impact.[112] However, because the Justices erroneously assume that jurors always follow their instructions, the Supreme Court reached the opposite conclusion. According to the Court, the judge had a duty to make sure that the jury did not use the defendant's silence against him and, therefore, correctly gave the instruction. The Court criticized the defense objection as based on "very doubtful assumptions," scoffing at the notion that jurors would "totally disregard the instruction, and affirmatively give weight to what they have been told not to consider."[113] Of course, the Court is wrong; that is exactly what jurors do.

Carter v. Kentucky,[114] presented the opposite situation. Again, the defendant elected not to testify at trial. This time, however, the defense attorney wanted the jury to be instructed to disregard the defendant's silence.[115] The trial judge did exactly what the empirical research suggests is the solution most favorable to the defendant and refused to give the instruction.[116] Nevertheless, the defendant complained to the Supreme Court that the trial judge's action harmed him.

This time, the psychology literature does not support the defendant. If the trial judge had given the requested admonition, it would either have had no effect or would only have made matters worse. However, because the Court erroneously assumes that instructions always work, it again reached the opposite conclusion. The Justices stated their belief that the instruction should be given because an admonition was a "powerful tool" that would "reduce . . . speculation to a minimum"[117] and effectively remove from deliberations any adverse inferences the jurors might draw.[118]

111. *Id.* at 339-40.
112. *See supra* text accompanying notes 95-99.
113. Lakeside v. Oregon, 435 U.S. 333, 340 (1978). *See also* Greer v. Miller, 483 U.S. 756, 766 n.8 (1987)(presumes jury followed instruction to disregard prosecutor's comment on defendant's silence); Commonwealth v. Rolan, 520 Pa. 1, 549 A.2d 553 (1988)(cautionary instruction to disregard prosecutor's comment on defendant's silence cured prejudice).
114. 450 U.S. 288 (1981).
115. *Id.* at 294.
116. *See supra* text accompanying notes 97-99.
117. Carter v. Kentucky, 450 U.S. 288, 303 (1981).
118. *Id.* at 301.

In a variety of other situations, the Court has reached decisions inconsistent with the empirical research on jury instructions. When reviewing charging instructions, the Justices assume that jurors act in accordance with their instructions[119] after correctly deciphering even confusing ones.[120] When reviewing admonitions, they usually assume that instructions to disregard prejudicial information will be effective.[121] Similarly, the Court asserts that while it may not always be easy for the jurors to perform the mental gymnastics necessary to follow a limiting instruction, "carefully crafted limiting instructions" reduce to a minimum the risk of prejudice in cases involving misjoinder,[122] evidence of other crimes[123] and codefendant confessions.[124] The Court has steadfastly adhered to this belief:

> The rule that juries are presumed to follow their instructions is a pragmatic one, rooted less in the absolute certitude that the presumption is true than in the belief that it represents a reasonable practical accommodation of the interests of the state and the defendant.[125]

B. Jury Instruction Practices Generally

The Supreme Court's erroneous beliefs about juror behavior are unfortunate but have little impact on the way in which actual juries are instructed because decisions on proper instruction procedures are made by lower, primarily state, courts. Therefore, it would be premature to conclude that all current jury instruction practices are questionable based on the Court's sparse decisions and dicta.

Nor is there any other single source that will adequately provide information about procedures for all the different types of instructions. Charging instructions tend to be written by advisory committees that are set up by courts or bar associations and given the task of drafting and modernizing pattern instruction books. Admonitions tend to be part of the case law decided by appellate judges. Therefore,

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119. *See* City of Los Angeles v. Heller, 475 U.S. 796, 798 (1986).

120. *See* Martin v. Ohio, 480 U.S. 228, 234 (1987)(instructions on burden of proof in self-defense case were adequate even though confusing).

121. *E.g.*, Waller v. Georgia, 467 U.S. 39, 47 n.6 (1984)(taint from prejudicial publicity is "attenuated where . . . the jurors have been . . . instructed not to . . . read or view press accounts of the matter"). *Cf.* Coy v. Iowa, 108 S. Ct. 2798 (1988)(screen placed between child witness and defendant probably affected jurors' perception of accused despite instruction to disregard it).

122. United States v. Lane, 474 U.S. 438, 449-50, 450 n.13 (1986).

123. *See* Marshall v. Lonberger, 459 U.S. 422, 438 n.6 (1983)(proof of prior crimes is acceptable despite prejudice to defendant if "accompanied by instructions limiting the jury's use of the conviction").

124. Richardson v. Marsh, 481 U.S. 200, 208 (1987). *See also* Tennessee v. Street, 471 U.S. 409, 417 (1985)(limiting instruction was an appropriate way to limit use of hearsay consistent with confrontation clause).

125. Richardson v. Marsh, 481 U.S. 200, 211 (1987).

to explore the issue of whether jurors are being instructed effectively, both sources must be considered.

1. Charging Instructions

Pattern instructions generally are drafted by advisory committees consisting of judges and lawyers, and more rarely, law professors.[126] These committees frequently update the instructions to reflect changes in the law. Most states have revised their pattern instructions since the publication of the literature on improving comprehensibility. Have they tried to incorporate psycholinguistic principles in the latest versions of their charging instructions, or do they continue to use their old, legalistic style of incoherent instruction?

There have been some notable efforts to draft comprehensible instructions. Dean Perlman and Professor Saltzburg, in preparing civil instructions for Alaska[127] and federal criminal jury instructions,[128] have tried to incorporate psycholinguistic principles. They specifically set out to write a modern set of understandable pattern instructions by following the suggestions made by Charrow and Charrow,[129] and Elwork, Sales and Alfini.[130] Other attempts to write comprehensible instructions according to these principles have been undertaken in Pennsylvania, Florida, Arizona,[131] and Michigan.[132]

However, most states have made no effort to simplify and improve their pattern jury instructions.[133] Indeed, they often continue to use the very instructions proven to be difficult for jurors to comprehend. In civil cases, for example, the traditional causation instruction defines proximate cause as "a cause which, in a natural and continuous sequence, produces damage, and without which the damage would not have occurred."[134] In two studies, this instruction was found to be in-

126. R. NIELAND, *supra* note 15, at 11, 71-105.
127. H. PERLMAN & S. SALTZBURG, ALASKA PATTERN CIVIL JURY INSTRUCTIONS (1981).
128. S. SALTZBURG & H. PERLMAN, FEDERAL CRIMINAL JURY INSTRUCTIONS (1985).
129. Charrow & Charrow, *supra* note 55.
130. Elwork, Sales & Alfini, *supra* note 48. *See* Perlman, *supra* note 15, at 523-24. Interestingly, Perlman and Saltzburg, both lawyers, did not use the assistance of a psycholinguist, but decided to prepare the instructions themselves.
131. R. NIELAND, *supra* note 15, at 24-27. *See, e.g.*, FLORIDA STANDARD JURY INSTRUCTIONS xviii-xix (2d ed. 1981)(committee stated its intent to draft simpler, more comprehensible instructions).
132. *Compare* MICHIGAN STANDARD JURY INSTRUCTIONS - CIVIL § 15.01, § 21.01 (1970)(proximate cause, burden of proof respectively) *with* MICHIGAN STANDARD JURY INSTRUCTIONS § 15.01, § 16.01 (2d ed. 1981)(both instructions rewritten and improved).
133. By comparison, 27 states require that insurance contracts be written in plain English. *See* Andrews, *Trial By Language*, STUDENT LAW., Oct. 1983, at 11.
134. ARKANSAS MODEL JURY INSTRUCTIONS—CIVIL § 501 (2d ed. 1974). *See also* CALIFORNIA JURY INSTRUCTIONS—CIVIL § 3.75 (5th ed. 1969).

comprehensible.[135] Nevertheless, most states continue to use it.[136] One of the studies which specifically tested California's version of this instruction, found that jurors could not understand it and published the results in a prominent law review.[137] However, when California revised its instructions in 1988, it kept the old incomprehensible version intact.[138] Other kinds of common civil instructions that are difficult for jurors to understand, such as burden of proof and contributory negligence,[139] also remain unchanged in many states.[140]

The same situation appears in criminal cases. For example, several investigators have found that the traditional instructions on the presumption of innocence and burden of proof beyond a reasonable doubt are not understood by jurors.[141] Nevertheless, most states continue to use them.[142] Researchers also found that jurors have difficulty understanding the customary circumstantial evidence charge[143] and instructions on the state of mind necessary for the crime of attempted

135. Charrow & Charrow, *supra* note 55, at 1323.

136. *Compare* ARKANSAS MODEL JURY INSTRUCTIONS—CIVIL § 501 (2d ed. 1974) *with* ARKANSAS MODEL JURY INSTRUCTIONS—CIVIL § 501 (3d ed. 1989)(no change). *Compare* TEXAS PATTERN JURY CHARGES § 2.02 (1969) *with* TEXAS PATTERN JURY CHARGES § 2.04 (2d ed. 1987)(no change). *Cf. compare* COLORADO JURY INSTRUCTIONS—CIVIL § 9:24 (1969) *with* COLORADO JURY INSTRUCTIONS—CIVIL § 9:26 (3d ed. 1989)(minor changes unlikely to affect comprehension, *e.g.*, changing "without which the claimed injury would not have been *sustained*" to "not have been *incurred*").

137. Charrow & Charrow, *supra* note 55, at 1323.

138. *Compare* CALIFORNIA JURY INSTRUCTIONS—CIVIL § 3.75 (5th ed. 1969) *with* CALIFORNIA JURY INSTRUCTIONS—CIVIL § 3.75 (7th ed. 1988)(identical).

139. *See* Elwork, Sales & Alfini, *supra* note 48, at 176; Charrow & Charrow, *supra* note 55, at 1350-51.

140. *Compare* ARKANSAS MODEL JURY INSTRUCTIONS—CIVIL § 202, § 302 (2d ed. 1974)(burden of proof and contributory negligence, respectively) *with* ARKANSAS MODEL JURY INSTRUCTIONS—CIVIL § 202, § 2102 (3d ed. 1989)(no changes). *Compare* CALIFORNIA JURY INSTRUCTIONS—CIVIL § 3.50 (5th ed. 1969)(contributory negligence) *with* CALIFORNIA JURY INSTRUCTIONS—CIVIL § 3.50 (7th ed. 1986)(basic definition unchanged). *Compare* OREGON JURY INSTRUCTIONS FOR CIVIL CASES § 21.02 (1964)(burden of proof) *with* OREGON JURY INSTRUCTIONS FOR CIVIL CASES § 21.02 (2d ed. 1984)(no change). *Cf.* CALIFORNIA JURY INSTRUCTIONS—CIVIL § 2.60 (7th ed. 1986); COLORADO JURY INSTRUCTIONS—CIVIL § 3.1 (3d ed. 1989)(minor changes in burden of proof instructions compared to earlier versions).

141. A. ELWORK, B. SALES & J. ALFINI, *supra* note 58, at 321; Severance, Greene & Loftus, *supra* note 54, at 203-04; Strawn & Buchanan, *supra* note 47, at 481.

142. *Compare* CALIFORNIA JURY INSTRUCTIONS—CRIMINAL § 2.90 (3d ed. 1970) *with* CALIFORNIA JURY INSTRUCTIONS—CRIMINAL § 2.90 (5th ed. 1988)(no significant change in wording). *Compare* ILLINOIS PATTERN JURY INSTRUCTIONS—CRIMINAL § 2.03 (1968) *with* ILLINOIS PATTERN JURY INSTRUCTIONS—CRIMINAL § 2.03 (2d ed. 1981)(no change). *Compare* D. AARONSON, MARYLAND CRIMINAL JURY INSTRUCTIONS AND COMMENTARY §§ 1.02-1.04 (1975) *with* D. AARONSON, MARYLAND CRIMINAL JURY INSTRUCTIONS AND COMMENTARY §§ 1.02-1.04 (2d ed. 1988)(no major changes).

143. *E.g.*, Strawn & Buchanan, *supra* note 47, at 480-81.

murder.[144] Yet these instructions also remain unchanged in most states.[145]

Apart from changes in the wording of pattern instructions, psychologists have suggested that comprehension is maximized if the jury charge is given in writing or repeated several times. In addition, instructions which are related contextually to the facts of the case are more comprehensible.[146] The practice in most states, however, remains inconsistent with these suggestions. Courts seem to go out of their way to make it impossible for jurors to understand their instructions.

Few states require that a written copy of the charge be given to the jury.[147] Indeed, the common law, for some bizarre reason, prohibits the judge from giving the jury written instructions.[148] Although some jurisdictions have modified the rule to *permit* the judge to give the jury a written copy of the instructions, most do not require it.[149] Even among the few judges who use their discretion to allow the jury to see written instructions, some do not allow them to be taken to the jury room.[150]

Most states do not require, or even suggest, that instructions be repeated.[151] The accepted procedure is that a full set of instructions is

144. *E.g.*, Severance, Greene & Loftus, *supra* note 54, at 204, 207.

145. *E.g.*, *compare* ILLINOIS PATTERN JURY INSTRUCTIONS—CRIMINAL § 3.02 (1968)("Circumstantial evidence is the proof of facts or circumstances which give rise to a reasonable inference of other facts which tend to show the guilt or innocence of the defendant. Circumstantial evidence should be considered by you together with all the other evidence in the case in arriving at your verdict. You should not find the defendant guilty unless the facts and circumstances proved exclude every reasonable theory of innocence") *with* ILLINOIS PATTERN JURY INSTRUCTIONS—CRIMINAL § 3.02 (2d ed. 1981)(identical). *Compare* CALIFORNIA JURY INSTRUCTIONS—CRIMINAL § 1.22 (3d ed. 1970)(definition of malice similar to that used in study by Elwork, Sales & Alfini) *with* CALIFORNIA JURY INSTRUCTIONS—CRIMINAL § 1.22 (5th ed. 1988)(no change).

146. *See supra* text accompanying notes 70-74 and 84-85.

147. For some that do require written instructions for jurors, see Id. R. Civ. P. 51; Nev. R. Civ. P.; N.D. R. Crim. P. 30; Tex. Code Crim. P. 36.18.

148. *See* United States v. Hooper, 575 F.2d 496 (5th Cir. 1978); Wofford v. State, 271 Ind. 518, 394 N.E.2d 100 (1979). *See also* R. NIELAND, *supra* note 15, at 28 (written instructions flatly prohibited in seven states). *Cf.* MD. CRIM. C. 4-325(c)(written instructions require consent of parties).

149. *Compare* United States v. Brighton Bldg. & Maintenance Co., 598 F.2d 1101 (7th Cir. 1979)(no error for trial judge to send written copy of instructions to jury room) *with* United States v. Quilty, 541 F.2d 172 (7th Cir. 1976)(no error for trial judge to refuse to send instructions to jury room). *See* MICH. CT. R. 2.516(B)(5)(judge "may" provide written instructions to jury). *But cf.* Parker v. State, 270 Ark. 897, 606 S.W.2d 746 (1980)(instructions must be sent to jury room).

150. *E.g.*, MD. CRIM. C. 4-326(a)(instructions may be taken to jury room only with permission of court). *See* Schwarzer, *supra* note 16, at 756-57 (matter for judicial discretion). *Cf.* Severance, Greene & Loftus, *supra* note 54, at 215 n.59 (customary practice in Seattle is to send copy to jury room).

151. Michigan is one of the few states which requires that instructions be repeated.

given only once at the conclusion of the trial.[152] Even some states which have used psychological principles to rewrite simplified instructions have not followed the psychologists' advice that judges should be required to read instructions more than once so jurors will remember them. For example, Florida's revised instructions encourage giving instructions more than once, but leave it to the individual judge's discretion.[153]

Few states permit the judge to place abstract instructions into the concrete context of the facts of the case[154] because of the prohibition against commenting on the evidence. This prohibition, prompted by a fear that judges will display favoritism, prevents judges from expressing their views on how the facts could be applied to the law.[155]

States using special verdicts, or verdicts with interrogatories, generally prohibit judges from telling jurors the legal effect of their answers to the questions.[156] Courts fear that if the jury clearly understands the law, it might try to manipulate its answers to achieve a certain result in derogation of the law.[157] In other words, in this instance courts are deliberately *trying* to make the law incomprehensible so the jury cannot evade it! If this is the mentality of our policy-making appellate judges, it is little wonder that there has been no rush to adopt psycholinguistically rewritten instructions that would improve comprehension.

See MICH. CT. R. 2.516(b)(preliminary instruction on the applicable law must be given).

152. *E.g.*, MISSOURI APPROVED JURY INSTRUCTIONS xxxviii (3d ed. 1981)(although giving instructions more than once is discretionary, the elements of law should not be repeated). *See also* VIRGINIA MODEL JURY INSTRUCTIONS—CRIMINAL § 2.050 (Repl. ed. 1989)(preliminary instruction does not include elements of law); WISCONSIN JURY INSTRUCTIONS—CIVIL 50 (1981 & Supp. 1989)(preliminary instruction does not include an explanation of the controlling law). *Cf.* Elchin v. State, 47 Md. App. 358, 365, 424 A.2d 155, 159 (1980)(instructions may be given more than once).

153. FLORIDA STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES vii (1981).

154. *E.g.*, MISSOURI APPROVED JURY INSTRUCTIONS xcvi (3d ed. 1981)(unless there are multiple plaintiffs or defendants, parties should not be referred to by name but as plaintiff and defendant).

155. *See* R. NIELAND, *supra* note 15, at 33 (states are split); Steele & Thornburg, *supra* note 17, at 101-03. *Cf.* MICH. CT. R. 2.516(B)(3)(comment on evidence permitted at judge's discretion). *Contra* State v. Hardwick, 1 Conn. App. 609, 610-11, 475 A.2d 315, 318 (1984)(judges may comment on evidence as long as they do not show favoritism).

156. Steele & Thornburg, *supra* note 17, at 103-04.

157. *See* McGowan v. Story, 70 Wis. 2d 189, 198, 234 N.W.2d 325, 329 (1975); Holland v. Peterson, 95 Idaho 728, 732, 518 P.2d 1190, 1194 (1974). In the federal courts, the judge has discretion to tell the jury about the effect of its answers. *See* Steele & Thornburg, *supra* note 17, at 104. Some states also allow such an explanation. *E.g.*, Roman v. Mitchell, 82 N.J. 336, 345-47, 413 A.2d 322, 327 (1980).

2. Admonitions

Admonitions, largely the product of case law,[158] have been shown to be ineffective. However, since the first studies demonstrating their ineffectiveness were published in 1958,[159] appellate courts have *approved* their use in approximately 21,000 cases — a ninety-five percent approval rate.[160] The very fact that they are still used with such regularity, despite the empirical evidence that they do not work, suggests that a problem exists.

a. Instructions to Disregard

The empirical research clearly demonstrates that instructions to disregard are ineffective in reducing the harm caused by inadmissible evidence and improper arguments.[161] Yet when appellate courts review the use or nonuse of these instructions, many start from the erroneous presumption that they are completely effective. These courts state that the law "directs (and properly so) that a jury is presumed to have followed the instructions of the court" to disregard improper information.[162] They "presume not only that the jurors followed the court's instructions, but that they followed them *to the letter*."[163] Therefore, the courts conclude, if the trial judge instructs the jury to disregard incriminating evidence, the instruction "fully protect[s] the defendant's rights"[164] and is just as effective as retrying the case without any mention of the evidence.[165]

Other courts incorrectly assume that an instruction to disregard improper evidence must be at least *partly* effective. Therefore, the giving of the instruction ordinarily reduces the amount of harm caused by the evidence and converts reversible to non-reversible er-

158. *Cf.* FED. R. EVID. 105 ("When evidence . . . is admissible . . . for one purpose but not . . . another . . . , the court . . . shall restrict the evidence to its proper scope and instruct the jury accordingly").

159. *See supra* text accompanying notes 93-95.

160. A LEXIS search for all state and federal cases since 1958 referring to admonitions by their various alternative names yielded 41,158 citations. Close examination of several samples indicated that about 55%, or 23,000, actually involved an issue concerning the propriety of admonitions. Of that 23,000, only about 5% (1,650) disapproved of their use.

161. *See supra* text accompanying notes 95-99.

162. State v. Foster, 755 S.W.2d 846, 849 (Tenn. Crim. App. 1988)(instruction to disregard evidence of a defendant's uncharged criminal activity). *See also* State v. Johnson, 762 S.W.2d 110, 116 (Tenn. 1988)(jury presumed to follow their instructions).

163. Montgomery v. State, 760 S.W.2d 323, 327 (Tex. Ct. App. 1988)(emphasis in original)(instruction to disregard information about parole laws). *See also* Dewitt v. State, 763 S.W.2d 524, 526 (Tex. Ct. App. 1988)(prompt instruction to disregard inflammatory remark sufficient to cure error).

164. People v. Brock, 143 A.D.2d 678, 679, 532 N.Y.S.2d 903, 904 (1988).

165. State v. McNellis, 15 Conn. App. 416, —, 546 A.2d 292, 301-03 (1988).

ror.[166] This is called the "cured-error" doctrine.[167] Courts state in their opinions that instructing a jury to disregard otherwise prejudicial evidence is "adequate,"[168] "sufficient,"[169] or will be deemed[170] to remove the damaging effect of prejudicial evidence,[171] thereby reducing the level of prejudice. Even if it does not completely eliminate all harm, this "cures" the error,[172] and, at worst, only harmless error remains.[173]

The end result is that if jurors are exposed to prejudicial information during a trial and the judge *emphasizes* it by instructing them to disregard it the appellate courts will not consider ordering a new trial because of these mistaken assumptions. For example, in criminal cases, exposure to adverse media coverage has been shown to significantly increase jurors' tendencies to vote guilty.[174] Instructing the jury to disregard the publicity is likely only to make things worse. However, courts insist that such instructions provide adequate protection to the defendant and, therefore, take care of the problem.[175]

There are other examples. If jurors find out that a criminal defendant has a record of committing similar crimes, the likelihood of conviction increases significantly.[176] Although admonitions will only

166. Cuesta v. State, 763 S.W.2d 547, 555-56 (Tex. Ct. App. 1988).

167. *See* Tanford, *An Introduction to Trial Law*, 51 MO. L. REV. 623, 706-09 (1986)(general discussion of cured error doctrine).

168. Commonwealth v. Rolan, 520 Pa. 1, 9, 549 A.2d 553, 556 (1988); Tomaszewski v. Godbole, 174 Ill. App. 3d 629, 634, 529 N.E.2d 260, 264 (1988).

169. Tzystuck v. Chicago Trans. Auth., 124 Ill. 2d 226, 245, 529 N.E.2d 525, 533 (1988)(insinuating that attorneys suborned perjury); Streeter v. Sears Roebuck & Co., 533 So. 2d 54, 62 (La. Ct. App. 1988)(offer to pay damages); Woodward v. State, 533 So. 2d 418, 432-33 (Miss. 1988)(criticizing other attorney).

170. State v. Sims, 764 S.W.2d 692, 695-96 (Mo. Ct. App. 1988).

171. State v. DeGroot, 230 Neb. 101, 105-06, 430 N.W.2d 290, 292-93 (1988).

172. *In re* Times-World Corp., 7 Va. App. 317, —, 373 S.E.2d 474, 480 (1988); People v. Olivencia, 204 Cal. App. 3d 1391, 1403, 251 Cal. Rptr. 880, 888 (1988); Crawford v. State, 188 Ga. App. 841, 842, 374 S.E.2d 781, 781-82 (1988); Burnett v. Martin, 405 So. 2d 23, 25 (Ala. 1981).

173. Rodriguez v. State, 757 S.W.2d 420, 421 (Tex. Ct. App. 1988); State v. Odom, 529 So. 2d 154, 155 (La. Ct. App. 1988); State v. Weaver, 158 Ariz. 407, 407-10, 762 P.2d 1361, 1363 (Ct. App. 1988).

174. *See* Padawer-Singer & Barton, *The Impact of Pretrial Publicity on Jurors' Verdicts*, in THE JURY SYSTEM IN AMERICA 134 (R. Simon ed. 1975)(59% of subjects exposed to pretrial publicity voted guilty while only 35% of unexposed subjects voted guilty). *Cf.* Hoiberg & Stires, *The Effect of Several Types of Pretrial Publicity on the Guilt Attributions of Simulated Jurors*, 3 J. APPLIED SOC. PSYCHOLOGY 267 (1973)(pretrial publicity affected female subjects' tendency to conclude defendant was guilty).

175. *E.g., In re* Times-World Corp., 7 Va. App. 317, —, 373 S.E.2d 474, 480 (1988); People v. Bunyard, 45 Cal. 3d 1189, 1219-20, 756 P.2d 795, 815 (1988). *Cf.* State v. Biegenwald, 524 A.2d 130, 172 n.12 (N.J. 1987)(Handler, J., dissenting)(empirical evidence suggests that "jurors are influenced by prejudicial publicity and carry that bias into jury deliberations, regardless of the court's instructions").

176. Cornish & Sealy, *supra* note 96, at 217; Doob & Kirschenbaum, *supra* note 93, at

exacerbate the problem, courts stubbornly insist they eliminate prejudice.[177] If jurors find out that a civil defendant is insured, the amount of damages awarded increases significantly.[178] Even though instructing the jury to disregard insurance will only make things worse, courts consistently hold to the contrary, *i.e.*, that admonitions eliminate prejudice.[179] If jurors discover the judge's views on the merits of the case, it can affect their verdicts.[180] Again, courts continue to assert that the instructions dispel prejudice even though admonitions to disregard are only likely to make matters worse.[181]

b. Limiting Instructions

A similar systematic counterproductiveness is found in courts' use of limiting instructions. Empirical research clearly demonstrates that they are not effective in preventing the jury from improperly using information.[182] Yet many appellate courts continue to assume that jurors can and will obey limiting instructions. The courts state that admonitions "ensure that there is no . . . abuse"[183] and guarantee that the jury has a "proper understanding of the evidence,"[184] thereby preventing any improper use of it.[185] Other courts assume that limiting instructions will work,[186] or at least that they are adequate to re-

92-95; Hans & Doob, *supra* note 101, at 242-43; Wissler & Saks, *supra* note 102, at 41-42.

177. *E.g.*, Martin v. State, 528 N.E.2d 461, 464 (Ind. 1988)(instruction cured error when evidence of involvement in other robberies was admitted against defendant charged with robbery); Gowin v. State, 760 S.W.2d 672, 676 (Tex. Ct. App. 1988)(instruction cured error when evidence of other drunk driving charges was admitted against defendant charged with driving while intoxicated).

178. *See* Broeder, *supra* note 1, at 753-74; Kalven, *supra* note 3, at 377-78 (experiment in which simulated juries' verdicts increased when they were told the defendant was insured).

179. Clark v. Vandermeer, 740 P.2d 921, 925 (Wyo. 1987). *Cf.* Barsema v. Susong, 156 Ariz. 309, 314, 751 P.2d 969, 974 (1988)(insurance should be admissible for limited purpose if judge carefully instructs the jury about it).

180. *See* Katzev & Wishart, *supra* note 88, at 738-41 (effect of judicial comment on merits of case affected some individual and group guilty verdicts).

181. *E.g.*, Maulding v. State, 296 Ark. 328, 333-35, 757 S.W.2d 916, 919 (1988)(no error when judge instructed jury to disregard his comments critical of defense); Montgomery v. State, 760 S.W.2d 323, 328 (Tex. Ct. App. 1988)(jury was presumed to have followed instructions to disregard an unconstitutional instruction about parole laws given earlier by the same judge).

182. *See supra* text accompanying notes 100-06.

183. United States v. Alvarez, 860 F.2d 801, 827 n.27 (7th Cir. 1988).

184. Howard v. State, 549 A.2d 692, 695 (Del. 1988).

185. Mullen v. Princess Anne Vol. Fire Co., 853 F.2d 1130, 1134-35 (4th Cir. 1988)(instead of excluding evidence, trial court could issue a cautionary instruction that racial epithets could only be considered on the question of discriminatory intent).

186. United States v. Alvarez, 860 F.2d 801, 827 n.27 (7th Cir. 1988)(very explicit instruction prevented prejudice); State v. Banta, 15 Conn. App. 161, 171, 544 A.2d 1226, 1232 (1988)(emphatic instruction).

duce the level of prejudice below the reversible-error point.[187] Therefore, most courts hold "unquestionably" that limiting instructions should be given,[188] and once given, "cure" any error.[189]

The result is similar to what occurs when courts rely on instructions to disregard. Evidence that could have a profound, improper effect on the verdict is routinely admitted, and objections to it are not given serious consideration by the appellate courts because of the mistaken notion that the admonition will prevent any prejudice. The prime example is evidence of uncharged criminal acts, admitted under rule 404(b)[190] when the purpose is to show motive, intent, identity, common scheme, and so forth. Numerous studies with simulated juries show that proof of a defendant's involvement in similar crimes significantly increases guilty verdicts,[191] and that jurors cannot or will not limit their use of that information. However, courts insist that evidence of similar crimes should be routinely admitted, even when offered only to prove minor issues, because jurors will obey the admonition not to consider it on the issue of culpability.[192] Similarly, experiments suggest that joining multiple offenses or defendants into a single trial significantly increases conviction rates[193] and that limiting

187. *See* United States Football League v. National Football League, 842 F.2d 1335, 1370-71 (2d Cir. 1988)(instructions sufficient for their purpose); State v. Woodson, 551 A.2d 1187, 1193-94 (R.I. 1988)(limiting instruction constituted "adequate safety measure").

188. State v. Rose, 112 N.J. 454, 503-08, 548 A.2d 1058, 1083-85 (1988)(in view of the repetitive and highly inflammatory nature of the evidence, failure to instruct jury was clearly prejudicial).

189. State v. Porambo, 226 N.J. Super. 416, 425-26, 544 A.2d 870, 874-75 (1988). *See also* People v. Tinning, 142 A.D.2d 402, 408, 536 N.Y.S.2d 193, 197 (1988)(made error harmless). *Cf.* Thompson v. United States, 546 A.2d 414, 424-26 (D.C. 1988)(court stated that limiting instructions *generally* work even though they probably did not in this case).

190. FED. R. EVID. 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.

191. *See supra* note 176.

192. *See* United States v. Cuch, 842 F.2d 1173, 1176-77 (10th Cir. 1988)(in prosecution for sexual assault, evidence of a similar assault was admitted to show intent); Young v. State, 296 Ark. 394, 396-97, 757 S.W.2d 544, 546 (1988)(in sexual assault case, evidence of a prior homosexual act was used to show depraved sexual instinct); People v. Tinning, 142 A.D.2d 402, 536 N.Y.S.2d 193 (1988)(evidence that defendant had killed other children was admitted in murder case to show intent and absence of mistake); State v. Ramos, 553 A.2d 275, 280-81 (N.H. 1988)(prior drug conviction used to impeach defendant in prosecution for sale of narcotics).

193. *See* Greene & Loftus, *supra* note 82, at 201 (murder case tried by itself produced 19% guilty verdicts; rape case tried by itself produced 29% guilty verdicts; joint trial produced 44% guilty verdicts in murder case, 46% in rape case). *Cf.* Horowitz, Bordens & Feldman, *supra* note 104, at 453 (mixed results); Tanford,

instructions do not reduce this spillover effect. Nevertheless, most courts, including the Supreme Court, approve of joined trials because they are more efficient, insisting that limiting instructions prevent prejudice to defendants.[194]

c. *Procedural Default Doctrine*

In the interests of an orderly and efficient judicial system, the appellate courts generally will not consider an issue unless it was first presented to the trial court. A party must have objected during trial and requested the remedy that is now asked for on appeal; otherwise, the appellant is said to have implicitly waived the right to appeal on that issue. This is known as the procedural default doctrine.[195] Because judges erroneously believe that admonitions effectively reduce the harm associated with prejudicial evidence, the procedural default doctrine requires that parties request counter-productive admonitions. The cases hold that a party cannot appeal based on the erroneous admission of prejudicial evidence if it failed to request an instruction to disregard that evidence.[196] Similarly, a party cannot get the courts to hear an appeal based on the prejudicial spillover effect of evidence admissible for a limited purpose unless it requested a limiting instruction.[197]

The consequence is that the party who is harmed by prejudicial evidence is caught like Odysseus between Scylla and Charybdis. For example, suppose that a defendant is on trial for smuggling cocaine. After the defendant testifies, the trial judge allows the prosecutor to impeach the defendant by proving a prior misdemeanor conviction for possession of drugs.[198] This is an erroneous decision since the rules of

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Penrod & Collins, *supra* note 106, at 328-29, 332-33 (increased conviction rate when similar or identical charges joined).

194. *See* Richardson v. Marsh, 481 U.S. 200, 209-11 (1987); United States v. McCoy, 848 F.2d 743 (6th Cir. 1988); United States v. Pierce, 733 F.2d 1474 (11th Cir. 1984); United States v. Nolan, 700 F.2d 479 (9th Cir. 1983); State v. Barnes, 94 N.C. App. 484, 372 S.E.2d 352 (1988).

195. *See* Tanford, *supra* note 167, at 702-06 (describing doctrine and its consequences).

196. *See* Dominguez v. State, 759 S.W.2d 185 (Tex. Ct. App. 1988); Reed v. Spencer, 758 S.W.2d 736 (Mo. Ct. App. 1988). *See also* Dugan v. Weber, 175 Ill. App. 3d 1088, 530 N.E.2d 1007 (1988)(underlying issue was waived when judge offered instruction and party refused); State v. McNellis, 15 Conn. App. 416, —, 546 A.2d 292, 301-03 (1988)(similar).

197. *See* Hardy v. Johns-Manville Sales Corp., 851 F.2d 742, 745 n.4 (5th Cir. 1988); United States v. Manteos-Sanchez, 864 F.2d 232, 237-38 (1st Cir. 1988); Mares v. State, 758 S.W.2d 932, 935 (Tex. Ct. App. 1988). *See also* United States v. Perry, 857 F.2d 1346 (9th Cir. 1988)(evidence admissible for unimportant purpose, no objection or request for instruction); Commonwealth v. Mandile, 403 Mass. 93, 525 N.E.2d 1322 (1988)(issue waived when defendant neither objected to joinder nor requested limiting instruction).

198. *See* United States v. Manteos-Sanchez, 864 F.2d 232, 237-38 (1st Cir. 1988). *See also* United States v. Perry, 857 F.2d 1346 (9th Cir. 1988)(defendant charged with

evidence permit only felonies and crimes involving false statements to be used to impeach credibility.[199] The judge's error is prejudicial because it significantly increases the likelihood that the jury will find the defendant guilty[200] and, thus, may be considered reversible error if the defendant appeals.

Now what does the defendant do? If he requests an admonition in order to preserve the issue for appeal, his tactical position at trial is worsened because the admonition will probably backfire and increase the defendant's chances of conviction. The request also will worsen the defendant's position for appeal. If the judge gives the admonition, the appellate courts will consider the error cured even though the actual level of prejudice increased. If the defendant does not request an admonition, however, he will still worsen his position for appeal. Failure to request an admonition will bar an appeal from the trial judge's original prejudicial decision because of procedural default. Although a rule of evidence has been violated, and the defendant has been prejudiced, the error is not reversible no matter what the attorney does. It is a Catch-22 worthy of Joseph Heller.

d. Ineffective Assistance of Counsel Rule

The dilemma in which lawyers find themselves provides fertile ground on which defendants may collaterally attack their convictions for ineffective assistance of counsel. Under the standards set by the Supreme Court in *Strickland v. Washington*,[201] the benchmark for judging a claim of ineffectiveness is whether counsel's conduct undermined the proper functioning of the adversary system so that the trial cannot be relied on as producing a just result.[202] This is determined by a two part "error and prejudice" test: Did the lawyer's conduct fall below an objective standard of reasonableness?[203] And, is there a reasonable probability that, but for counsel's errors, the result would have been different?[204]

The interaction of the *Strickland* doctrine with the courts' erroneous assumptions about admonitions can produce surreal results. For example, consider the problem stated above in which a defendant is on trial for one crime and prejudicial evidence of other crimes is errone-

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tax evasion and mail fraud, judge admits evidence of prior bankruptcy fraud); People v. Fana, 142 A.D.2d 684, 531 N.Y.S.2d 29 (1988)(defendant charged with robbery could be impeached by prior burglary convictions).

199. *E.g.*, FED. R. EVID. 609(a).

200. *See supra* text accompanying note 176.

201. 466 U.S. 668 (1984). *See* Nix v. Whiteside, 475 U.S. 157, 164-66 (1986)(*Strickland* followed). *See also* Amadeo v. Zant, 108 S. Ct. 1771, 1776-80 (1988)(standards for excusing defendant from procedural default).

202. Strickland v. Washington, 466 U.S. 668, 684-86 (1984).

203. *Id.* at 687-91.

204. *Id.* at 691-96.

ously admitted by the trial judge. If the attorney requests an admonition, she would seem to have acted unreasonably. She has increased the chances that her own client will be convicted and triggered the cured error doctrine that prevents the underlying evidentiary error from being reviewed. The defendant is now in a considerably worse position. Even though both parts of the *Strickland* test would appear to be met, most courts approve the attorney's conduct and affirm convictions under these circumstances.[205]

On the other hand, if the attorney has read the psychology literature, and therefore does not request an instruction that the jury disregard or limit their use of the evidence, then her conduct has been reasonable. It improves the client's trial position compared to requesting an admonition, and has no effect on the client's *appeal* position because the error cannot be reversed either way. The defendant would seem to have no claim of ineffective assistance of counsel. Yet, despite the general reluctance of federal courts to grant *any* habeas petitions,[206] some of these nonsensical claims have been granted.[207]

V. SUGGESTIONS FOR LAW REFORM

Using psychology to critique current jury instruction procedures reveals significant problems: courts give incomprehensible instructions that jurors do not understand or follow, and that in many cases may cause jurors to do the opposite of what the judge wants them to do. Can (or should) anything be done about it?

A. Rewritten Pattern Instructions

The consequences of jurors not understanding the law can be profound. In *Sellars v. United States*,[208] the jury found the defendant guilty of homicide when it meant to free him. Jurors later told the court that they had misunderstood the self defense instruction. They believed that if the defendant acted in self defense he still had to be convicted of manslaughter. Nevertheless, neither the trial judge nor

205. *See* Cape v. Francis, 741 F.2d 1287, 1301 (11th Cir. 1984)(attorney who failed to object to prejudicial evidence, but later asked for and received an instruction to disregard, provided effective representation).

206. *See* Engle v. Isaac, 456 U.S. 107, 126-29 (1982). *See* Hoffmann, *The Supreme Court's New Vision of Federal Habeas Corpus for State Prisoners*, 1989 SUP. CT. REV. 165.

207. *See* Julius v. Johnson, 840 F.2d 1533 (11th Cir. 1988)(failure to request limiting instruction rendered representation ineffective); Lyons v. McCotter, 770 F.2d 529, 534-35 (5th Cir. 1985)(conviction reversed when failure to request limiting instruction rendered representation ineffective); Vela v. Estelle, 708 F.2d 954, 963-64 (5th Cir. 1983)(failure to request instruction to disregard resulted in ineffective representation); Camillo v. State, 757 S.W.2d 234, 239-41 (Mo. Ct. App. 1988)(instruction to disregard).

208. 401 A.2d 974, 980-82 (D.C. Ct. App. 1979).

the court of appeals would allow the verdict to be changed. Steele and Thornburg document eighteen additional cases in which erroneous verdicts based on jurors' misunderstandings of the law were affirmed.[209] The courts hold that misinterpretation of the charge is to be expected,[210] does not constitute jury misconduct,[211] and, therefore, is not grounds for a new trial.[212] Rules of procedure protecting the secrecy of jury deliberations make erroneous verdicts based on a misunderstanding of law almost impossible to detect.[213] Therefore, a chorus of law reformers advocate the use of psycholinguistics to write better pattern instructions to try to prevent misunderstanding at the start.[214] Everyone seems to agree that this would be an important step toward better trials.

Despite this consensus, it is not at all clear that rewriting instructions will result in anything more than trivial improvement in jury performance. Certainly, the psycholinguists have made good suggestions, and it is always worthwhile to try to improve the clarity and simplicity of pattern instructions. But several factors suggest that this may not result in much of a net improvement of the jury trial system.

Rewriting some instructions may be a pointless task because it is the law itself that is incomprehensible. Law professors have tried for years to find clear, simple, and understandable ways to explain complicated legal doctrine to their students, but there is little evidence we have succeeded. If we cannot explain in several weeks to our students what proximate cause means,[215] even the most clearly written paragraph defining this concept is unlikely to be satisfactorily understood by jurors. If the law itself is incoherent,[216] no amount of redrafting of pattern instructions is going to result in jurors understanding it.

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209. Steele & Thornburg, *supra* note 17, at 80-83.
210. *E.g.*, Whited v. Powell, 155 Tex. 210, 216, 285 S.W.2d 364, 368 (1956).
211. *E.g.*, Compton v. Henrie, 364 S.W.2d 179, 184 (Tex. 1963).
212. *E.g.*, Davis v. Pacific Diesel Power Co., 41 Or. App. 597, 600-01, 598 P.2d 1228, 1230-31 (1979); Hoffman v. Deck Masters, Inc., 662 S.W.2d 438, 443 (Tex. Ct. App. 1983).
213. *See* FED. R. EVID. 606(b)(former jurors incompetent to testify to anything that occurred during deliberations, their mental processes, or the reasons they voted a particular way); Pope, *The Mental Operations of Jurors*, 40 TEX. L. REV. 849, 851-52 (1962); Tanford, *supra* note 167, at 698-99.
214. *See* Imwinkelreid & Schwed, *Guidelines for Drafting Understandable Jury Instructions: An Introduction to the Use of Psycholinguistics*, 23 CRIMINAL L. BULL. 135, 137-38 (1987); Perlman, *supra* note 15, at 528-31; Schwarzer, *supra* note 16, at 743-47; Severance, Greene & Loftus, *supra* note 54, at 199; Steele & Thornburg, *supra* note 17, at 108-09; Taylor, Buchanan, Pryor & Strawn, *supra* note 47, at 11.
215. *See* Steele & Thornburg, *supra* note 17, at 100 n.122 (first-year torts casebooks devote 80-100 pages on causation).
216. The classic assertion that the law is often incoherent can be found in K. LLEWELLYN, THE BRAMBLE BUSH 66-69 (1951). For more recent discussions of the extent to which law is incoherent, and the political ramifications of it, see Kennedy, *Legal Formality*, 2 J. LEGAL STUD. 351, 351-54 (1973); Kress, *Legal Indeterminacy*,

Even when the law is sufficiently clear that jurors could comprehend it if it were clearly and simply explained, why do we blame the judge's instructions if they do not? When the jurors in the *Sellars* case mistakenly convicted the defendant because they misunderstood the law of self-defense, why do we assume the problem lies in the charge and will therefore go away if we rewrite the pattern instructions, give jurors written copies, or repeat the instructions several time during trial? Focusing exclusively on the comprehensibility of the instructions misses one important point—trials are adversary proceedings in which the parties have lawyers. One possibility in *Sellars* is that the judge failed to give the jury a comprehensible instruction on the law. The other possibility, however, is that the defendant's attorney completely neglected to make sure the jury understood the self-defense rule and that the failure is the attorney's rather than the court's. Examining the problem of jurors' comprehension of the law as if the instructions were their only source of information, as other commentators have done, is not a helpful way of approaching the question of whether and how we need to reform our jury instruction practices.

The suggestions for improving comprehension through better instructions are essentially four: rewrite instructions so they more clearly explain the law; give the jurors preliminary instructions on the basic issues to help them focus on what is important; repeat the instructions several times to make sure the jurors remember them; and place the instructions in context. These suggestions merely duplicate what a competent trial lawyer already does in voir dire, opening statement, and closing argument.

In voir dire, competent attorneys discuss the important legal issues to make sure that jurors understand the major points of law upon which the case relies. The trial lawyer's task is to simplify and explain the law, discuss the burden of proof, and question jurors about their comprehension of and willingness to follow those legal rules.[217] Any juror who does not understand or is unwilling to abide by the law is subject to challenge.[218] For example, in the trial of Huey Newton for killing a police officer, his attorney engaged in the following voir dire:

> Q: As you sit there, Mr. Strauss, in your opinion, right now while you are sitting there this minute, is Huey P. Newton guilty or not guilty?
> A: Well, I don't know for sure whether he shot the officer, but the officer is dead.

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77 CALIF. L. REV. 283, 295-301 (1989); Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 11-14 (1984).

217. *See* M. BELLI, MODERN TRIALS 796-98 (1954); 1 F. LANE, GOLDSTEIN TRIAL TECHNIQUE § 9.73 (2d ed. 1971); Crump, *Attorneys' Goals and Tactics in Voir Dire Examination*, 43 TEX. B.J. 244 (1980).

218. *See, e.g.*, Wainwright v. Witt, 469 U.S. 412, 424-26 (1985)(jurors who are unwilling to impose death penalty subject to challenge for cause).

Q: [J]ust because the officer is dead, you are going to say that Huey Newton did it; is that right?
A: Well, that's got to be proven.
. . .
Q: Now, the District Attorney . . . has the burden of bringing some evidence in . . . before anything can happen. Do you understand that?
A: Yes.
Q: Now, if the District Attorney does not produce any evidence at all, the man is not guilty. Isn't that correct?
A: That's right.
[Q: So, as] Huey Newton sits here next to me now, in your opinion is he absolutely innocent?
A: Yes.
Q: But you don't believe it, do you?
A: No.
The Court: Challenge is allowed.[219]

In opening statements, trial lawyers will again outline the legal bases for their claims and defenses and focus the jury's attention on the important legal issues so jurors will be able to make better sense out of the evidence that will follow.[220] Here, the lawyer's task is to tell the jury in plain, ordinary language the legal basis for the complaint and answer and to explain the general nature of the dispute the jury will have to solve.[221] For example:

> The prosecution has charged Philip Green with murder; that is, they say he intentionally killed the deceased, planned it in advance, knowing what he was doing. We have an honest defense. We do not deny that Phil Green caused the death of the deceased. But he was not responsible for this act. At the time the deceased was killed, Phil Green did not know what he was doing or that what he was doing was wrong. He had been driven crazy with fear of the deceased.[222]

In closing arguments, competent trial practitioners spend considerable time discussing relevant jury instructions. In the literature on trial techniques, it has always been assumed that it is the attorneys' responsibility to clearly explain the elements of the law. If instructions bear repeating, require simplification or being put into writing, or have to be placed into context, the lawyers have the opportunity and obligation to do this in summation. It is not the exclusive province of the trial judge.

Initially, the attorneys' task is to read relevant instructions to the jury, explain which issues are contested, and make sure the jurors understand them.[223] Difficult instructions, such as burden of proof and

219. A. GINGER, JURY SELECTION IN CRIMINAL TRIALS 539-44 (1975).
220. *See* 1 ABA STANDARDS FOR CRIMINAL JUSTICE 3-5.5, 4-7.4 (2d ed. 1980).
221. F. BAILEY & H. ROTHBLATT, SUCCESSFUL TECHNIQUES FOR CRIMINAL TRIALS 118 (1971).
222. J. TANFORD, THE TRIAL PROCESS: LAW, TACTICS AND ETHICS 279-80 (1983).
223. E. IMWINKELREID, HANDBOOK FOR THE TRIAL OF CONTRACT LAWSUITS 358 (1981); T. MAUET, FUNDAMENTALS OF TRIAL TECHNIQUES 311, 317-18 (1980); J. TANFORD, *supra* note 222, at 156-59.

circumstantial evidence, should be explained and illustrated with analogies to every-day life.[224] For example, every neophyte trial lawyer knows how to illustrate burdens of proof by demonstrating with his or her hands how far the scales of justice must tip.[225] The lawyer also should place the instructions in the context of the facts of the case. For example, if counsel is arguing that a particular witness should not be believed because he was impeached, the lawyer should at that point refer to the instruction that prior inconsistent statements can be used to evaluate credibility.[226]

Thus, by the time the court reads the final jury charge, all important legal issues should have been explained to the jury in simplified language three times by each side. If the lawyers were minimally competent, the jury will have been alerted at the beginning to the important issues and jurors who cannot comprehend the law will have been removed. In argument, the law will have been placed in the context of the facts of the case and probably written in outline form on a chalkboard. Therefore, most of the suggestions by psycholinguists merely duplicate what a competent trial attorney already does.[227] Although rewriting and simplifying instructions would certainly be an improvement, its benefits are overstated. In conjunction with the attorneys' performances, it would add little to the process of educating jurors about the law.

However, in some jurisdictions, rules of trial procedure do not permit the attorneys to do all these things. Citing the need for efficiency and the fear that attorneys will misstate the law, some states prevent attorneys from fulfilling this educational role in voir dire and opening statement. Although most jurisdictions permit attorneys in voir dire to inquire into prospective jurors' understanding of and willingness to abide by law,[228] some judges prohibit such inquiries because of the fear that attorneys will brainwash jurors into believing erroneous

224. T. MAUET, *supra* note 223, at 299; McElhaney, *Analogies in Final Argument*, LITIGATION, Winter 1980, at 37.

225. *See* R. MCCULLOUGH & J. UNDERWOOD, CIVIL TRIAL MANUAL 655-56 (2d ed. 1980).

226. T. MAUET, *supra* note 223, at 297-98, 317-18.

227. *See* Crump, *supra* note 217, at 244:

> When done by skillful lawyers on both sides, this dialectic may lead to a better understanding by the jury of the [legal] concepts involved. When the skill of the lawyers is not balanced, however, the law can be lopsided. If one or both lawyers are incompetent, the entire premise that fair trials result from adversary presentations is cast into doubt. In such situations, justice is not likely to be restored simply by improving the quality of the jury instructions.

228. *See* Tanford, *supra* note 167, at 640 (permissible to ask about major issues in cases such as insanity or alibi defenses, narcotics, gambling, or obscenity charges, disinheritance, intra-family torts, child abuse, strict liability, etc). The leading case is People v. Williams, 29 Cal. 3d 392, 628 P.2d 869 (1981).

statements of the law. Indeed, such irrational[229] fears of attorney abuse have caused some jurisdictions to prohibit any meaningful involvement in voir dire by the parties.[230] Similarly, some jurisdictions prohibit discussion of law in opening statement under the outdated notion that the jurors may only receive the law from the court.[231] Like the proverbial baby thrown out with the bathwater, courts sacrifice the chances of improved comprehension of law to guard against a trivial threat of occasional abuses by attorneys.

If we really want to reform the rules of trial procedure in a way likely to increase jurors' comprehension of their instructions, the better solution is to allow the parties to fully perform their adversary function. Attorneys should be allowed to participate meaningfully in voir dire and to discuss the legal issues in opening statement. They should be given enough time in closing arguments to fully discuss the law and its ramifications.[232] Ultimately, this is likely to be a more effective and efficient way of assuring that jurors are fully informed about the law and how it applies to the case than trying to rewrite simple, neutral instructions.[233]

B. Abandoning Admonitions

The legal literature's focus on rewriting charging instructions has diverted attention from the more difficult problem of admonitions.[234] Admonishing jurors is an ineffective way to prevent harm from improper evidence. Indeed, research suggests that admonitions tend to aggravate the very harm they are intended to reduce. The psychological literature has offered theoretical explanations of why admonitions do not work but has not offered an alternative solution. Nor has any specific proposal for meaningful reform of the law sanctioning admonitions appeared in the law reviews.[235] I now offer one, on the

229. The fears are irrational because they overlook that there is an attorney on the other side who can object, and a judge who can correct, any misstatements of the law.

230. *See* Tanford, *supra* note 167, at 628-29 (non-participation is common in federal courts).

231. *See id.* at 650-51.

232. *See* Tanford, *Closing Argument Procedure*, 10 AM. J. TRIAL ADVOC. 47, 72-73 (1986)(reviewing cases imposing time limits as short as five to ten minutes).

233. *See generally* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 917-18 (1982)(court may look to arguments as well as instructions to determine if jury was properly informed about scope of damages).

234. *See, e.g.*, Schwarzer, *supra* note 16, at 749-50, 754 (apparently unaware of the psychological literature on the subject, discusses benefits of rewriting instructions but suggests that curative admonitions should be given).

235. In fact, with the exception of a few student notes, nothing appears to have been published in the law reviews on admonitions since Broeder, *supra* note 1, and Kalven, *supra* note 3, announced the findings of the Chicago Jury Project in the 1950's. *See* Note, *supra* note 93 (limiting instructions are ineffective when evi-

assumption that courts are serious about minimizing the harm associated with inadmissible and limited-admissibility evidence.[236]

1. In the Trial Court

First, courts must accept that admonitions do not work and may be counterproductive. The assumption that they are effective by themselves should be replaced with the recognition that instructions interact with the adversary system. The only way in which an admonition might help offset the prejudicial effect of improper evidence is if the parties discuss and explain the problem in their arguments to the jury. Therefore, at the trial court level, admonitions should not be given unless requested by an affected party who wants to incorporate it into its argument.

To demonstrate how this approach would work, reconsider the two Supreme Court cases on instructing the jury to disregard a defendant's refusal to testify. In *Carter v. Kentucky*,[237] the defense attorney requested the instruction. If the attorney were competent, he would not have done so unless he also discussed the possibility of his client's silence in voir dire, alerted the jury to their duty not to hold it against him in opening statement, and spent time in closing argument making sure the jury understood the fifth amendment. Under these circumstances, the defendant himself focuses the jury's attention on his silence. An admonition probably will do no additional harm and will reinforce the attorney's argument. The trial judge should have given it.

On the other hand, in *Lakeside v. Oregon*,[238] the defense attorney adopted a different strategy. He decided not to emphasize his client's silence. He presumably did not discuss it in voir dire, opening statement, or closing argument. Under these circumstances, the judge's decision to nullify the defense strategy and alert the jury to the

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dence of other crimes is introduced); Note, *supra* note 75, at 614-15 (instructions to disregard defendant's silence are probably somewhat effective); Note, *To Take the Stand or Not to Take the Stand: the Dilemma of the Defendant With a Criminal Record*, 4 COLUM. J.L. & SOC. PROBS. 215, 218 (1968)(most attorneys and many judges think limiting instructions are ineffective); Note, *Eyewitness Identification Testimony and the Need for Cautionary Jury Instructions*, 60 WASH. U.L.Q. 1387, 1429-30 (1983)(conceding limiting instructions are problematic, but arguing that they must work, or why else would courts rely on them?).

236. In criminal cases, some appellate judges appear to want to maximize convictions of both the innocent and guilty, in order to assure that the courts further a crime control strategy. *See* Seidman, *Factual Guilt and the Burger Court: An Examination of Continuity and Change in Criminal Procedure*, 80 COLUM. L. REV. 436, 437-38 (1980)(suggesting this is the goal of the conservative Burger Court). Such judges might want to keep using admonitions for the very reason that they tend to aggravate the prejudice to the defendant.

237. 450 U.S. 288 (1981). *See supra* text accompanying notes 114-18.

238. 435 U.S. 333 (1978). *See supra* text accompanying notes 110-13.

defendant's silence by giving an admonition probably caused the increased harmful effect seen in many experiments. The trial judge should not have given the instruction and the Court's decision to approve the procedure is wrong.

What should the trial judge in *Lakeside* have done instead? No clear answer is found in the psychology literature. However, a tentative solution can be pieced together from a variety of sources. The first principle for judges trying to minimize the damage caused by improper information should be the same as for physicians deciding how to treat an injury: Do no harm.[239] The presumption should be that, because of the danger, no admonition should be given even if asked for by an affected attorney. No physician lets an ignorant patient prescribe remedies for his own illness. By the same token, no judge should give a dangerous admonition merely upon request. Instead, the instruction should be given only if the attorney seems aware of their side effects but wants the instruction as part of a strategy to try to deal with it through education and reasoning with the jurors.

Instead of admonishing jurors, it may be more helpful for the trial judge to instruct the jury at the beginning of trial that they are to disregard evidence to which an objection is sustained, and that any evidence of a defendant's criminal record may not be considered as evidence of guilt. Psychologists have shown that this kind of forewarning of subjects about upcoming prejudicial information can reduce their susceptibility to it.[240] Then, during voir dire, *before* they hear any evidence, jurors should be interrogated about these two rules and asked to promise to obey them. Psychologists also have demonstrated that obtaining a public commitment from a person to act in a certain way increases the likelihood that the person will in fact engage in the desired behavior.[241] During the trial itself, objections should be sustained but no admonition given.[242] Finally, in her concluding

239. *Cf. Hippocrates, The Physician's Oath*, in J. BARTLETT, FAMILIAR QUOTATIONS 79 (15th ed. 1980)("I will use treatment to help the sick according to my ability and judgment, but never with a view to injury and wrongdoing; I will abstain from all intentional wrongdoing and harm").

240. *See* McGuire, *Inducing Resistance to Persuasion*, in 1 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 191 (L. Berkowitz ed. 1964); Petty & Cacioppo, *Forewarning, Cognitive Responding, and Resistance to Persuasion*, 35 J. PERSONALITY & SOC. PSYCHOLOGY 645 (1977).

241. McGuire, *Attitudes and Attitude Change*, in 2 HANDBOOK OF SOCIAL PSYCHOLOGY 293 (G. Lindzey & E. Aronson 3d ed. 1985); Pallak, Cook & Sullivan, *Commitment and Energy Conservation*, in 1 APPLIED SOC. PSYCHOLOGY ANN. 235 (1981). *See generally* C. KIESLER, THE PSYCHOLOGY OF COMMITMENT (1971)(broad theoretical overview).

242. *Cf.* Caretta & Moreland, *The Direct and Indirect Effects of Inadmissible Evidence*, 13 J. APPLIED SOC. PSYCHOLOGY 291, 298-99 (1983)(judge's ruling evidence inadmissible without admonition reduced jurors' use of that evidence).

charge, the judge should repeat the general instruction if requested.[243]

2. *On Appeal*

Obviously, once courts recognize that admonitions do not work, appellate courts will need to modify or abandon the cured error doctrine. In its present form, this doctrine allows appellate courts to avoid reviewing claims of prejudice at trial whenever the judge admonished the jury,[244] even though such instructions by themselves are ineffective. The doctrine should be replaced with one that is based more on the conduct of the attorneys than of the judge. If the risk of prejudice results from a party's own decision, as in the case of a defendant who elects not to testify, then the party should be expected to deal with it through voir dire and argument. If the party does so, the error should be deemed cured;[245] if they fail to do so, the error is invited.[246] Reversal is appropriate only if counsel provided ineffective assistance.[247] On the other hand, if prejudice results from an opponent's conduct, the courts should use the harmless error test. The defendant should be entitled to a new trial unless the prejudice is minor or the other evidence overwhelming. Admonitions become irrelevant to this equation because they have no ameliorative effect.

Courts also should abandon that part of the procedural default doctrine that forces the lawyer to request an admonition as a prerequisite to appeal.[248] The existing rule effectively insulates from review errors with a significant probability of having affected the verdict. If the attorney requests and receives an instruction, the error is deemed cured; however, if the attorney does not request the instruction, the error is waived. In place of this nonsensical doctrine, courts can use the more common default rule based on failure to object: as long as the attorney objects to improper evidence, the issue is preserved for appeal.[249]

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243. Wolf & Montgomery, *supra* note 4, at 216, found some support for this approach, although they did not specifically test for it.

244. *See supra* text accompanying notes 166-73.

245. *Cf.* Tanford, *supra* note 167, at 706 (many courts recognize a variation of the cured error doctrine based on the attorneys' conduct).

246. *See id.* at 709-11 (discussion of invited error rule). *But cf.* Belsky, *The Retaliation Doctrine: Promoting Forensic Misconduct*, 50 ALB. L. REV. 763, 776-99 (1986) (criticizing invited error doctrine).

247. *See supra* text accompanying notes 201-07.

248. *See supra* text accompanying notes 195-200.

249. *See* Tanford, *supra* note 167, at 702-06. Under the usual default rule, it is not considered a waiver of the claim if the attorney both objects and tries to reduce the damaging effect of improper evidence through argument. *E.g.*, State v. Ashley, 616 S.W.2d 556 (Mo. Ct. App. 1981); Lockhart v. Robbins, 386 So. 2d 424 (Ala. 1980); Fullerton v. Robson, 61 Ill. App. 3d 93, 377 N.E.2d 1044 (1978).

3. *The Problem That Won't Go Away: The Defendant's Criminal Record*

Finally, courts will have to reconsider the cavalier way in which they admit evidence of a defendant's prior criminal record. Currently, despite almost universal criticism of the practice by legal scholars,[250] courts routinely admit evidence of other crimes on the assumption that a limiting instruction will prevent prejudice to the defendant.[251] Courts must accept the fact that this is not so. When other crimes are used against the defendant—at least when they are similar to the crime charged — there is an inevitable spillover effect. Limiting instructions may only make the situation worse.[252]

The convenient fiction that jurors obey their admonitions has enabled legal policy-makers to avoid the difficult political decision of whether trials should only determine guilt of the offense charged or whether they should be the vehicle for getting criminals off the streets with a semblance of legitimacy.[253] If trials are supposed to determine guilt only for the present charge, then rule 404(b) should be changed. The rule should generally prohibit the introduction of any evidence that the defendant was involved in similar criminal activity regardless of the reason why the prosecutor is offering it.[254] Individual exceptions, such as proving the defendant's involvement in other identical crimes to establish identity, should be carefully reconsidered, recognizing that every exception increases the likelihood that an otherwise innocent defendant will be found guilty.

VI. CONCLUSION

Experimental research by psychologists has revealed a number of substantial problems with the way courts use jury instructions. Charging instructions that are drafted by lawyers and read once tend to be difficult for jurors to understand. Comprehension would be improved by rewriting instructions according to psycholinguistic principles, giving preliminary instructions, repeating important ones several

250. *E.g.*, Imwinkelreid, *The Need to Amend Federal Rule of Evidence 404(b): The Threat to the Future of the Federal Rules of Evidence*, 30 VILL. L. REV. 1465, 1470-71 (1985); Kuhns, *The Propensity to Misunderstand the Character of Specific Acts Evidence*, 66 IOWA L. REV. 777 (1981); Uviller, *Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom*, 130 U. PA. L. REV. 845 (1982).

251. *See supra* text accompanying notes 183-94.

252. *See supra* text accompanying notes 100-03.

253. *See generally* Tanford, *A Political-choice Approach to Limiting Prejudicial Evidence*, 64 IND. L.J. 831, 859-71 (1989)(courts treat the problem of prejudicial evidence generally in a way that masks the true political nature of the decisions).

254. A similar argument can be made for changing FED. R. EVID. 411 to flatly prohibit proof of insurance, rather than allow it to show agency, ownership, control, or witness bias.

times, and placing abstract instructions in the context of the facts of the case. Admonitions are not only misunderstood but may provoke jurors into doing the opposite of what they are told.

Despite this research, courts continue to presume that jurors understand and obey their instructions. With a few exceptions, the states have neither rewritten their pattern instructions to make them more comprehensible nor required preliminary or repeated instructions. They also continue to recommend that trial judges respond to prejudicial evidence with admonitions. On appeal, courts adhere to the nonsensical cured error doctrine that denies a new trial when prejudicial evidence is made even more damaging by the judge's instructions. Even more absurd are the procedural default and ineffective assistance of counsel rules that effectively require the attorney to ask for an admonition that will only worsen the case against her client.

Previous proposals for law reform have centered on the need to rewrite pattern instructions and revise jury charge procedures so that important instructions are repeated more than once. Such proposals overlook the fact that competent trial attorneys routinely undertake the tasks of explaining the law, making sure jurors understand its important elements, and removing jurors who will not abide by their instructions. Thus, improving the judge's delivery of the basic charge is likely to have little net effect in improving the trial system.

This Article proposes that more meaningful reforms can be made if we concentrate on admonitions and rules of law based on the erroneous assumption that it is possible to prevent misuse of evidence merely with an instruction. At trial, the litigants probably would receive fairer trials if judges stopped using admonitions and, instead, gave preliminary instructions to ignore evidence ruled inadmissible. On appeal, the cured error doctrine should be abandoned because it is based on a faulty premise. The procedural default rule requiring parties to ask for admonitions should be replaced with one that merely requires them to object. Perhaps most importantly, abandoning the convenient fiction that admonitions work will compel courts to face up to the difficult task of deciding whether to admit evidence that has both probative and prejudicial qualities. Decisions based on empirically correct assumptions about juror behavior may be more difficult, but ultimately will make the jury trial system operate more coherently.