

# JURY INSTRUCTIONS: A PERSISTENT FAILURE TO COMMUNICATE

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*Jury instructions play an essential role in the American judicial system, bridging the gap between the law, the evidence as presented by the parties, and the jury. In light of their importance, one would expect careful drafting to maximize juror comprehension of instructions. Professors Steele and Thornburg demonstrate through empirical research that such is not the case.*

*The authors' research shows that jurors conscientiously try to follow their instructions, but that most of those instructions cannot be understood by most jurors. The authors then show that jury instructions can be written to greatly enhance the jurors' level of comprehension.*

*Finally, the authors analyze the forces inherent in the American judicial system that inhibit any individual efforts to improve the comprehensibility of jury instructions. They conclude that improvement is unlikely unless institutional changes are made that will create incentives for lawyers and judges to write instructions that juries can understand.*

In any case tried to a jury, the instructions governing the jury's activities play a central role. Before the trial begins the judge instructs the jury about its duties and about proper and improper behavior during the trial. During the trial the judge may further instruct the jury about the proper treatment of various types of evidence or occurrences. At the end of the trial the judge provides the jury with lengthy instructions explaining the law applicable to the case and directing the jurors to find the facts in accordance with certain legal definitions and instructions.<sup>1</sup> Juror comprehension of instructions, then, is essential to the jury's ability to fulfill its role as contemplated by the law.

Lawyers and judges have suspected for some time, however, that many ju-

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1. Juries have not always been instructed in the law. Until the nineteenth century, American juries were presumed to be capable of deriving the law from community norms, and judges did not instruct them on applicable law. See Schwarzer, *Communicating with Juries: Problems and Remedies*, 69 CALIF. L. REV. 731, 732-36 (1981).

rors do not understand their instructions.<sup>2</sup> These suspicions are confirmed by numerous reported cases in which jury confusion peeks through.<sup>3</sup> Recent social science research has demonstrated empirically that juror comprehension of instructions is appallingly low.<sup>4</sup> Some of that research further demonstrates that rewriting instructions with clarity as the goal can dramatically improve comprehensibility.<sup>5</sup> Despite these findings, and despite the existence of books<sup>6</sup> and articles<sup>7</sup> explaining how to write instructions more clearly, lawyers and judges continue to produce jury instructions that are incomprehensible to juries.

This Article examines the comprehensibility of jury instructions and explores the reasons for the continued use of instructions that are incomprehensible to most jurors. The Article describes two empirical studies of juror conduct done by the authors in order to document the existence of juror confusion and its impact on jury verdicts. First, we tested the extent to which jurors understand pattern jury instructions<sup>8</sup> commonly used in civil and criminal cases. We discovered, as have earlier researchers, that the jurors understood less than half the content of the tested instructions and that the level of comprehension doubled when the instructions were rewritten. Second, to learn how and to what extent jurors actually referred to the court's charge during the deliberative process, we surveyed people who had recently served on juries that actually reached a verdict. We discovered that most jurors try to use the instructions but that many are confused about their meaning and about the deliberative process itself.

This Article attempts to identify the forces that have contributed to the continued use of incomprehensible instructions. First, much of the legal community is unaware of the seriousness of the problem. Most of the existing research is not easily understood by practicing lawyers and judges who lack a background in statistical analysis or in the science of linguistics.

Second, and more important, a number of forces within the American legal

2. Cook, *Instructionese: Legalistic Lingo of Contrived Confusion*, 7 J. MO. B. 113 (1951); Head, *Confessions of a Juror*, 44 F.R.D. 330 (1967); Hoffman & Brodley, *Jurors on Trial*, 17 MO. L. REV. 235 (1952); Hunter, *Law in the Jury Room*, 2 OHIO ST. L.J. 1 (1935); Winslow, *The Instruction Ritual*, 13 HASTINGS L.J. 456 (1962).

3. See *infra* text accompanying notes 14-39.

4. See *infra* text accompanying notes 40-87.

5. See, e.g., Charrow & Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 COLUM. L. REV. 1306 (1979) [hereinafter Charrow].

6. A. ELWORK, B. SALES & J. ALFINI, *MAKING JURY INSTRUCTIONS UNDERSTANDABLE* (1982).

7. See, e.g., Imwinkelried & Schwed, *Guidelines for Drafting Understandable Jury Instructions: An Introduction to the Use of Psycholinguistics*, 23 CRIM. L. BULL. 135, 137-50 (1987).

8. Pattern jury instructions, sometimes known as standard, model, uniform, approved, or recommended jury instructions, are designed to be accurate and impartial statements of the law that can form the skeleton for the judge's charge to the jury. Pattern instructions are generally drafted either by the judges of a state supreme court, state bar association, or judicial council. Occasionally, pattern instructions are created through an administrative office of a court or by private effort. See R. NIELAND, *PATTERN JURY INSTRUCTIONS: A CRITICAL LOOK AT A MODERN MOVEMENT TO IMPROVE THE JURY SYSTEM* 2-3, 11 (1979).

While pattern instructions, as a concept, have been widely endorsed, there is little agreement on how courts should use them. Some states require the pattern instructions to be used verbatim while others discourage strict adherence to the patterns. *Id.* at 3. Pattern instructions also vary widely in their comprehensibility.

system and legal profession reward the status quo and deter attempts to rewrite jury instructions. The first such force is lawyer resistance. Many lawyers, while acknowledging a problem, are reluctant to rewrite instructions due to lack of writing skills, lack of time, fear that appellate courts will find error in the rewrites, or belief that confusing instructions benefit certain clients. Another force deterring change is the difficulty of the task. The complexity of the law and the law's occasional vagueness make rewriting difficult even for those willing to try. A third force deterring change can be found in the attitudes of appellate courts and in substantive law governing appellate courts' review of instructions. Appellate courts tend to scrutinize jury instructions for pinpoint legal accuracy while ignoring comprehensibility altogether.<sup>9</sup> Also, certain rules of procedure governing the submission of jury instructions make the drafting of comprehensible instructions more difficult.<sup>10</sup> A fourth force is the role of jury instructions in the adversary system, with each side more concerned with its clients than with clarity. The structure and pressure of the adversary system inhibit efforts at change.<sup>11</sup>

This Article will demonstrate that jurors do not understand their instructions and that their level of comprehension improves dramatically when instructions are rewritten for clarity. Further, it will demonstrate that this rewriting *can* be done by lawyers untrained in linguistics, using existing research and their native common sense as a guide. The Article argues, however, that most practicing lawyers will *not* rewrite instructions because powerful forces in the legal system punish rather than reward their efforts. Therefore, the Article suggests specific changes in the law and efforts that the organized bar and judiciary must make before understandable instructions will become the norm rather than the exception.

## I. DOCUMENTED JURY CONFUSION

### A. Case Law

Rules of evidence and procedure usually protect the mental processes of jurors from inquiry.<sup>12</sup> As a result, the extent to which a jury understood or did not understand the court's instructions is hard to discover. Two lines of case law, however, document juror misunderstanding of jury instructions: cases re-

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9. What a crop of subsidiary semi-myths and mythical practices the jury system yields! Time and money and lives are consumed in debating the precise words which the judge may address to the jury, although everyone who stops to see and think knows that those words might as well be spoken in a foreign language—that, indeed, for all the jury's understanding of them, they are spoken in a foreign language. Yet, every day, cases which have taken weeks to try are reversed by upper courts because a phrase or sentence, meaningless to the jury, has been included in, or omitted from the judge's charge.

J. FRANK, *LAW AND THE MODERN MIND* 181 (1930).

10. See *infra* text accompanying notes 132-52.

11. See *infra* text accompanying note 153.

12. See, e.g., FED. R. EVID. 606(b); TEX. R. EVID. 606(b); Pope, *The Mental Operations of Jurors*, 40 TEX. L. REV. 849, 851-52 (1962); see *infra* text accompanying notes 132-52.

vealing notes sent by the jury to the judge during deliberations,<sup>13</sup> and cases from states that allow testimony about conversations among jurors during deliberations. These two lines of cases demonstrate that jurors seriously misunderstand instructions given them by the court.

In *Whited v. Powell*<sup>14</sup> the Texas Supreme Court discussed at length an instance of misunderstanding by the jury. The jury was asked to determine whether the defendant discovered that plaintiffs were in a position of peril within such time and distance that by the exercise of ordinary care and the use of all means at his hand consistent with the safety of himself, his passenger and his automobile, he [defendant] could have avoided the collision in question.<sup>15</sup>

During deliberations one juror opined to the others that this question required a finding of deliberate misconduct: "We can't answer that 'Yes'; if we do it will be saying this boy is the same as a murderer. I won't vote to make a criminal of the boy."<sup>16</sup> Another juror, based upon the erroneous statement by the first juror, changed his vote. The court held that this event was "express misconstruction of the court's charge,"<sup>17</sup> but seemed unsurprised by the misunderstanding and refused to order a new trial. "[I]t would be most unrealistic to expect that all members of the jury as ordinary laymen would thoroughly understand every portion of a complicated charge. . . . Most of our jury verdicts would be of little value" if the stated misconstructions of one or more jurors were grounds for new trial.<sup>18</sup>

Shocking as it is, *Whited v. Powell* is not an aberrant case. Case law provides ample proof that the problem of jury confusion exists. It further demonstrates that short-sighted judicial attitudes perpetuate rather than solve the problem. In *Compton v. Henrie*<sup>19</sup> one juror repeatedly told the other jurors that "preponderance of the evidence" was the same as "reasonable doubt," so that the defendant could not be found liable unless his "guilt" was proven beyond a reasonable doubt.<sup>20</sup> The court refused even to reach the issue of the harm inherent in the juror's misstatement; it held that the juror's "statements amounted to nothing more than a misinterpretation of the court's charge; and were, consequently, not misconduct."<sup>21</sup>

Jurors are often confused about instructions regarding measure of damages but their mistakes tend to go uncorrected. In *Hoffman v. Deck Masters, Inc.*<sup>22</sup> the jury miscalculated damages because of a misunderstanding of its instructions. The court held that while a unanimous clerical error in recording the

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13. See Meyer & Rosenberg, *Questions Juries Ask: Untapped Springs of Insight*, 55 JUDICATURE 105, 106 (1971).

14. 155 Tex. 210, 285 S.W.2d 364 (1956).

15. *Id.* at 212-13, 285 S.W.2d at 365.

16. *Id.* at 213, 285 S.W.2d at 365.

17. *Id.* at 215, 285 S.W.2d at 367.

18. *Id.* at 216, 285 S.W.2d at 368.

19. 364 S.W.2d 179 (Tex. 1963).

20. *Id.* at 183.

21. *Id.* at 184.

22. 662 S.W.2d 438 (Tex. App. 1983).

verdict would have justified a new trial, a unanimous misconstruction of the language of the charge did not. Therefore, despite affidavits from eight jurors demonstrating that they misconstrued the language of the charge relating to the damage issues in reaching their decision,<sup>23</sup> the defective verdict was allowed to stand.<sup>24</sup>

Case law also reveals significant juror confusion about causation and the apportionment of negligence. In *O'Brien v. Neiditz*<sup>25</sup> the jury sent the judge a second note after only an hour and a half of deliberation. The note demonstrated that the jury did not understand its instructions regarding negligence and contributory negligence. Rather than explaining further, the judge instructed the jury to reach a verdict: "I want you to go back and consider in your deliberations some of the things I have mentioned, which comes from an old established charge that has been used, not just in Connecticut but throughout the United States."<sup>26</sup>

Jury confusion also arises from the definitions that the court provides to jurors. Case law shows juror misunderstanding of definitions of "actual notice,"<sup>27</sup> "undue influence,"<sup>28</sup> "pledge,"<sup>29</sup> "homestead,"<sup>30</sup> and "consent."<sup>31</sup> Mis-

23. *Id.* at 443.

24. *Id.*; see also *Downum v. Muskogee Stockyards & Livestock Auction, Inc.*, 565 P.2d 368, 369 (Okla. 1977) (jury subtracted from total damages plaintiff's percentage of negligence); *City of Nederland v. Benski*, 631 S.W.2d 547, 548 (Tex. App. 1982) (two jurors believed that they were limited to a choice between the witnesses' testimony in awarding damages); *Sanchez v. Texas Employers Ins. Ass'n.*, 618 S.W.2d 837 (Tex. Civ. App. 1981) (statement of one juror that the case was limited to past, not future, compensation); *Texaco, Inc. v. Haley*, 610 S.W.2d 224, 228 (Tex. Civ. App. 1980) (jurors apportioned damages by a negligence calculation based on number of negligent acts). See also *Smith v. Morris*, 574 P.2d 568, 570-71 (Kan. Ct. App. 1978) (jury misunderstood instructions and rendered a quotient verdict); *Thompson v. Walker*, 565 S.W.2d 172, 174 (Ky. Ct. App. 1978) (jury confused about damage instruction and judge refused to elaborate).

25. 33 Conn. Supp. 778, 372 A.2d 525 (1976).

26. *Id.* at 779, 372 A.2d at 526. Similarly, in *Davis v. Pac. Diesel Power Co.*, 41 Or. App. 597, 600, 598 P.2d 1228, 1230-31 (1979), the jury misunderstood the law of concurrent causation, believing that it could find defendant liable only if defendant's negligence was the primary cause, rather than merely a contributing cause, of the deaths and injuries. The court "solved" the problem by defining it as a nonproblem: "Confusion or misunderstanding of instructions is not misconduct justifying a mistrial." *Id.* at 601, 598 P.2d at 1231 (quoting *Biegler v. Kirby*, 281 Or. 423, 429, 574 P.2d 1127, 1130 (1978)). In *Kindle v. Armstrong Packing Co.*, 103 S.W.2d 471, 473 (Tex. Civ. App. 1937), the jury thought that "proximate cause" meant whole cause. This was not grounds for new trial.

If we could listen in on the deliberations of most of the juries passing upon a series of questions . . . we would probably hear various interpretations and applications of the definitions, pro and con, in an effort to reach a decision. . . . When trained legal minds and the courts differ in the interpretation of the law, what is to be expected from the laymen impaneled upon a jury? If such argument or deliberations honestly made but improper is to be considered an overt act of misconduct of the jury . . . then when would the verdict of a jury be certain and of any value?

*Id.* at 474. *But see Pache v. Boehm*, 60 A.D.2d 867, 867-68, 401 N.Y.S.2d 260, 261-62 (1978) (jury misunderstood instructions regarding apportionment of negligence and contributory negligence; new trial ordered "to prevent a miscarriage of justice").

27. *Coakley v. Crow*, 457 S.W.2d 431, 435 (Tex. Civ. App. 1970), *cert. denied*, 402 U.S. 90 (1971).

28. *Stephens County Museum, Inc. v. Swenson*, 517 S.W.2d 257, 259-60 (Tex. 1974).

29. *Martin v. U.S. Trust Co.*, 690 S.W.2d 300, 309 (Tex. Ct. App. 1985).

30. *Norman v. First Bank & Trust*, 557 S.W.2d 797, 803-04 (Tex. Civ. App. 1977).

31. *Cortez v. Medical Protective Co.*, 560 S.W.2d 132, 135 (Tex. Civ. App. 1977).

taken notions about the definitions of such operative words lead to mistaken verdicts, but courts again refuse to grant new trials based on misunderstood definitions. A Texas court explained, "It is not misconduct for jurors to misunderstand or misinterpret a portion of the court's charge and to argue an erroneous interpretation to the other jurors where facts and law outside the record are not brought to the jury's attention."<sup>32</sup> Assuming jury misconduct is the only ground for concern, the court again defines jury misunderstanding of instructions as a nonproblem that needs no correction.

The law in some states goes so far as to prohibit the trial judge from attempting to clarify juror confusion. In *Teaney v. City of St. Joseph*<sup>33</sup> the jury sent the judge a note which showed that it did not understand an instruction. The trial court sent a note back to the jury, pointing to two relevant instructions and highlighting particular parts of their language.<sup>34</sup> It was agreed by all parties that the judge's clarifying instructions were accurate. The appellate court, however, held that it was error to elaborate on a pattern instruction.<sup>35</sup> Even though the jurors' note showed clearly that they did not understand, the court stated that "[i]mplicit in a scheme of approved pattern instructions . . . is the central idea that such instructions do not require further clarification or amplification."<sup>36</sup> This time the problem was avoided with a legal fiction: these instructions are perfect, so the jury must understand them.<sup>37</sup>

Even courts that admit the existence of juror confusion are reluctant to order cases retried on that basis. Some courts note that juror comprehension is simply not the point of jury instructions:

Throughout the development of our present method of jury submission, the emphasis has been placed upon the use of a form of charge which will satisfy certain legal requirements, including separate submission of each relevant and ultimate issue, proper placing of burden of proof, avoiding comments on the weight of the evidence, concealment from the jury of the legal effect of their answers, and the use of definitions which are technically correct from a legal standpoint. The clarity of the charge from the standpoint of the jury has occupied a subordinate role.<sup>38</sup>

The courts' reluctance to respond to juror misunderstanding of the charge

32. *Id.* at 137.

33. 548 S.W.2d 254, 255-56 (Mo. Ct. App. 1977).

34. *Id.* The jury was confused about whether all or only some elements of a claim had to be proved, and the judge pointed out that they were connected by the word "and." The judge also referred the jury to the instruction on burden of proof.

35. *Id.* at 256.

36. *Id.* In this holding, the court was following the Missouri Supreme Court decision in *Houston v. Northrup*, 460 S.W.2d 572 (Mo. 1970) (en banc).

37. The trial courts are urged to answer questions from the jury by stating:

The law requires the court to instruct the jury in writing at the conclusion of the case. The court's instructions . . . contain all the law which you require for reaching a verdict. I am unable to give you further instructions. Please return to the jury room, review the court's instructions, and see whether you are able to reach a verdict.

*Teaney*, 548 S.W.2d at 257.

38. *Whited v. Powell*, 155 Tex. 210, 215, 285 S.W.2d 364, 367 (1956).

stems in part from a desire to avoid interrogating the jurors as to their understanding of the instructions.<sup>39</sup> However, the courts' refusal to correct a verdict based on a misunderstood charge underscores the importance of writing comprehensible instructions initially. A verdict based on misconstrued instructions will stand.

### B. *Social Science Research*

As explained above, an analysis of appellate cases confirms the intuition of lawyers and judges that juries often misunderstand instructions. In recent years social scientists have documented that misunderstanding. Social science experiments have shown a significant gap between what judges instruct and what jurors understand.<sup>40</sup> A few empirical studies by psycholinguists<sup>41</sup> have further shown that juror comprehension can be improved dramatically if jury instructions are rewritten to improve their vocabulary, syntax, and organization.

Social scientists studying group behavior have conducted tests on juries to determine the uses jurors make of their instructions. Forston did two such empirical studies in the early 1970s.<sup>42</sup> In the first test he tried to determine how juries process information, organize their deliberations, and arrive at verdicts. Using actual county jurors from the Minneapolis and Chicago areas, Forston grouped the jurors into sixteen panels<sup>43</sup> and had them deliberate and reach a verdict in a simulated case. Researchers videotaped and analyzed the deliberations. Forston found that the juries spent an average of 9.5% of their time applying the instructions, with those juries who had received only oral instructions spending 6% of their time on instructions and those who were given a written copy of the charge spending 14% of their time on instructions.<sup>44</sup> More important, a qualitative analysis showed "numerous instances of individual jurors' misunderstanding, as well as entire jury confusion over legal terminology, trial procedures, jury instructions, and jury room procedures."<sup>45</sup> Forston concluded from this test "that jury instructions, when understood, have considerable influence on the decision-making of juries."<sup>46</sup> Forston's second test focused specifically on juror misunderstanding of jury instructions. His goal was to learn what

39. See *Bradley v. Texas & Pac. Ry.*, 1 S.W.2d 861, 863 (Tex. Comm. App. 1928). Appellate courts fear that the finality of verdicts would be undermined if every case in which a juror misunderstood the instructions had to be retried.

40. For discussions of the importance of jury instructions to the jury, see R. BRANSON, *THE LAW OF INSTRUCTIONS TO JURIES IN CIVIL AND CRIMINAL CASES* (1936); R. MCBRIDE, *THE ART OF INSTRUCTING THE JURY* (1969); R. NIELAND, *supra* note 8; Broeder, *The University of Chicago Jury Project*, 38 NEB. L. REV. 744 (1959); Hervey, *The Jurors Look at Our Judges*, 18 OKLA. B.A.J. 1508 (1947); Hunter, *supra* note 2; O'Reilly, *Why Some Juries Fail*, 41 D.C.B.J. 69 (1974); Schwarzer, *Communicating with Juries: Problems and Remedies*, 69 CALIF. L. REV. 731 (1981).

41. Psycholinguistics applies the techniques of experimental psychology to the problems of language processing and comprehension. Charrow, *supra* note 5, at 1308 n.7.

42. Forston, *Sense and Non-Sense: Jury Trial Communication*, 1975 B.Y.U. L. REV. 601.

43. *Id.* at 607. Six of the panels were given "fact sheets" about the trial testimony, six listened to an audiotape of the trial, and four panels watched a live trial.

44. *Id.* at 609-10.

45. *Id.* at 610.

46. *Id.* at 612.

percentage of the instructions individual jurors and deliberating jurors retain and comprehend. For this test, Forston used two short sets of instructions, one civil (personal injury) and one criminal (murder). His subjects this time were 114 experienced jurors in Polk County, Iowa.<sup>47</sup> Again the jurors were divided into groups. Each group was given detailed background information about its case and read a set of instructions. Each individual juror was given a multiple choice retention-comprehension test.<sup>48</sup> Then the jurors, in groups of six, were given the test as a deliberating group and told that they had to agree unanimously on the answers. The results again showed confusion and misunderstanding. While the deliberating juries scored ten to fourteen percent better than the mean of individual jurors,<sup>49</sup> large numbers of the deliberating juries misunderstood important instructions. "[Eighty six percent] of the criminal juries were unable to respond accurately to what [constitutes] proof of guilt."<sup>50</sup> Less than half of the civil juries correctly answered the question on proximate cause.<sup>51</sup> Eighty percent of the juries missed at least one of the three questions on evidence.<sup>52</sup>

Other studies of jury behavior have noted both the influence of instructions and juror misunderstanding of those instructions. In one study, a videotaped reenactment of a murder trial<sup>53</sup> was shown to people called for jury service in three Massachusetts counties.<sup>54</sup> The researchers videotaped and analyzed the jury deliberations. When all the juries were analyzed, the researchers found that an average of twenty-five percent of the juror discussions referred to the judge's instructions.<sup>55</sup> Analyzing one jury in detail, the researchers again found that twenty-five percent of the jurors' deliberations cited material from the instructions.<sup>56</sup> They found further that jurors made seven incorrect statements about the meaning of the judge's instructions, only one of which was corrected by other jurors.<sup>57</sup>

By the mid 1970s, researchers began to try to identify which parts of jury instructions were most confusing to the jurors. The first published results came from Strawn and Buchanan.<sup>58</sup> Their earliest experiment tested Florida pattern criminal instructions on 116 people who had been summoned for jury service

47. *Id.* at 612-13. The jurors were on their last day of three weeks of jury service. The jurors were not told that their comprehension of jury instructions was being tested.

48. The test had fifteen multiple choice questions, each with five possible answers. *Id.*

49. *Id.* at 614. This part of Forston's experiment has been criticized because, by using the same jurors for the individual and group tests, he created a learning effect that he did not account for in his analysis of the data. Charrow, *supra* note 5, at 1308 n.8.

50. Forston, *supra* note 42, at 615.

51. Forston, *supra* note 42, at 615.

52. Forston, *supra* note 42, at 615.

53. The jury could find the defendant guilty of first degree murder, second degree murder, manslaughter, or not guilty because he was acting in self defense.

54. R. HASTIE, S. PENROD & N. PENNINGTON, *INSIDE THE JURY* (1983).

55. *Id.* at 85-86.

56. *Id.* at 262.

57. *Id.*

58. Strawn & Buchanan, *Jury Confusion: A Threat to Justice*, 59 *JUDICATURE* 478 (1976); Strawn, Buchanan, Pryor & Taylor, *Reaching a Verdict, Step by Step*, 60 *JUDICATURE* 383 (1977).



but not chosen for a jury.<sup>59</sup> The jurors were divided into two groups. One group was shown a twenty-five minute videotape of instructions in a burglary case. The other group was given no instructions. Both groups were then given a forty item multiple choice and true/false test. The group that had been given instructions did sixty to seventy percent better than the uninstructed group.

A significant percentage of jurors, however, still failed to understand or refused to accept certain instructions. Specifically, forty-three percent believed that circumstantial evidence was of no value despite instructions to the contrary.<sup>60</sup> Twenty-three percent believed that, when faced with two equally reasonable constructions, one consistent with the defendant's guilt and one with his innocence, the defendant should be convicted.<sup>61</sup> Despite an instruction on presumption of innocence and reasonable doubt, "only [half] of the instructed jurors understood that the defendant did not have to present any evidence of his innocence."<sup>62</sup> Large percentages of jurors also failed to understand instructions about the use of out-of-court statements, the meaning of a not-guilty plea, and impeachment of witnesses; they also misunderstood words used in the instructions.<sup>63</sup>

Strawn and Buchanan's second experiment compared pattern instructions with instructions that were organized to tell the jury what to do one step at a time.<sup>64</sup> The rewritten instructions used a combination of sequential special-issue-like instructions and instructions about the process of deliberation.<sup>65</sup> When the instructions were tested using a videotape of a real trial, the jury using the pattern instructions was unable to reach a verdict but the jury using the rewritten instructions reached a verdict in ninety-five minutes. This test, then, showed that not only the language but also the organization of jury instructions affects the quality of jury deliberations.

A smaller number of studies took their experiments one step further and tested whether juror comprehension could be improved with rewritten instructions. Studies by Elwork, Alfini, and Sales led to the publication in 1982 of their book, *Making Jury Instructions Understandable*. In one of their tests volunteer jurors were recruited from various community groups. After seeing a videotape of a personal injury case, the jurors were given either no instructions, pattern instructions, or rewritten instructions. The jurors were then asked to fill out questionnaires.<sup>66</sup> Analysis of the questionnaire answers revealed that jurors un-

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59. Strawn & Buchanan, *supra* note 58, at 480. These people averaged more than twelve years of formal education. *Id.*

60. Strawn & Buchanan, *supra* note 58, at 481.

61. Strawn & Buchanan, *supra* note 58, at 481.

62. Strawn & Buchanan, *supra* note 58, at 481.

63. Strawn & Buchanan, *supra* note 58, at 481. Only 51% of the jurors understood the word "demeanor." *Id.* at 481-82.

64. Strawn, Buchanan, Pryor & Taylor, *supra* note 58, at 387-89.

65. Strawn, Buchanan, Pryor & Taylor, *supra* note 58, at 387-88. The jurors were told, for example, not to begin their deliberations by taking a straw poll. *Id.* at 388.

66. Elwork, Sales & Alfini, *Judicial Decisions: In Ignorance of Law or in Light of It?*, 1 *LAW & HUM. BEHAV.* 163, 173 (1970). The questionnaires were: 1) a general verdict form; 2) questions about the facts; 3) questions about the relative negligence of plaintiff and defendant; 4) tests for comprehension of legal issues; 5) a second general verdict form (in case they wanted to change their

derstood the rewritten instructions better than the pattern instructions,<sup>67</sup> but that jurors receiving pattern instructions did *not* score higher than jurors who had received no instructions at all.<sup>68</sup> Unclear instructions, then, provided no useful information. In applying law to facts, jurors who received pattern instructions "made a significantly greater proportion of errors" than those who received rewritten instructions, especially when deciding contributory negligence issues.<sup>69</sup> The researchers attributed the better understanding of the rewritten instructions to improvements they had made in vocabulary,<sup>70</sup> grammar,<sup>71</sup> and organization.<sup>72</sup>

The next set of tests by the Elwork group also compared pattern and rewritten instructions. These tests used two or three sets of instructions (pattern and rewritten), each with an accompanying hypothetical case.<sup>73</sup> The subjects of the first test were 314 paid volunteers from the voter registration lists in Lincoln, Nebraska. The subjects were given a brief summary of the case and then shown a videotape of a judge reading pattern or rewritten instructions. Each subject was then taken to a room with an examiner and asked a series of short answer questions about the duties of jurors and the law of the case.<sup>74</sup> The testing sessions were taped and scored by two independent examiners.

The results were consistent with the earlier social science research. In a murder case the pattern instructions yielded an average of 51% correct answers per juror, the first rewrite 66% correct answers, and the second rewrite 80% correct answers.<sup>75</sup> In a burglary case the pattern instructions led to 65% correct answers per juror, while the rewritten instructions led to 80% correct answers per juror.<sup>76</sup>

In a second test the researchers showed videotaped trials to eighteen juries,

minds); 6) tests to see if the jurors had seen through the testing method; and 7) demographic questions about the individual jurors. *Id.* at 174-75.

67. *Id.* In the early 1980s, Severance, Greene, and Loftus conducted similar tests using questionnaires. While their results sometimes found the opportunity to deliberate or the experience and educational level of the jurors to be the most important variables, they concluded that clearly written instructions led to better understanding by inexperienced jurors and jurors with limited education. Severance, Greene & Loftus, *Toward Criminal Jury Instructions that Jurors Can Understand*, 75 J. CRIM. L. & CRIMINOLOGY 198, 233 (1984).

68. Elwork, Sales & Alfini, *supra* note 66, at 175.

69. Elwork, Sales & Alfini, *supra* note 66, at 176.

70. The instructions were rewritten to eliminate legal jargon and unfamiliar words, use concrete words, and minimize the use of negatively modified words. Elwork, Sales & Alfini, *supra* note 66, at 165-67.

71. The rewrites tried to avoid compound complex sentences and to use the passive voice only when the logical object of the sentence needed emphasis. Elwork, Sales & Alfini, *supra* note 66, at 167-68.

72. Elwork, Sales & Alfini, *supra* note 66, at 169.

73. Elwork, Alfini & Sales, *Toward Understandable Jury Instructions*, 65 JUDICATURE 432, 434-35 (1982). The more complex set of instructions was for an attempted murder case with lesser included offense instructions and an insanity defense. The simpler instructions came from a burglary case.

74. The murder case jurors were asked 89 questions, and the burglary case jurors were asked 30 questions. *Id.* at 435.

75. *Id.* at 436.

76. *Id.* Because of limitations on time and money, the researchers only rewrote the burglary instructions once.

each of which had five to seven jurors. The juries deliberated, half using pattern instructions and half using rewrites. After each jury reached a verdict, the researchers questioned two or three randomly chosen jurors from each panel. Those jurors from panels using the pattern instructions answered only 40% of the questions correctly, while the jurors from panels using rewritten instructions answered 78% of the questions correctly.<sup>77</sup> Rewriting the instructions entailed reorganizing them, minimizing sentence length and complexity, using the active voice, avoiding jargon and uncommon words, and using concrete rather than abstract words.<sup>78</sup>

Probably the most thorough of the psycholinguistic studies of jury instructions was done by Robert and Veda Charrow in the late 1970s.<sup>79</sup> While the earlier studies revealed that rewriting jury instructions could improve comprehension, they had not tested empirically the linguistic features that impeded comprehension. The Charrows set out to isolate the linguistic features that cause comprehension problems in jury instructions.<sup>80</sup> Their study consisted of two major experiments, each conducted on people called for jury service in Prince Georges County, Maryland.

In the first experiment thirty-five jurors paraphrased each of fourteen pattern jury instructions.<sup>81</sup> In the second experiment the instructions were rewritten to eliminate the words and constructions that seemed to cause confusion in the first experiment. The rewritten instructions then were tested on 48 new jurors. The results showed dramatic improvement in juror comprehension. For example, comprehension of the instruction about agency improved 93%,<sup>82</sup> comprehension of the instruction about the difference between assumption of the risk and contributory negligence improved 78%,<sup>83</sup> and comprehension of an instruction about the use of evidence improved 52%.<sup>84</sup> Overall comprehension improved 35%.<sup>85</sup> This improvement occurred even in those instructions which were conceptually quite difficult, casting doubt on many practicing lawyers' argument that it is the conceptual complexity of a jury instruction that creates comprehension problems and that therefore rewriting instructions will not help.<sup>86</sup> Most significantly, Charrow and Charrow isolated specific linguistic features of jury instructions that cause juror confusion, thus providing an empirical measure that willing appellate courts could use to judge the comprehensibility of jury instructions.<sup>87</sup>

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77. *Id.* at 442.

78. *Id.* See A. ELWORK, B. SALES & J. ALFINI, *supra* note 6, at ch. 7.

79. Charrow, *supra* note 5.

80. Charrow, *supra* note 5, at 1307-08.

81. In a paraphrase task, the subject either listens to or reads some material and is then asked to explain it in his or her own words. Paraphrase testing measures comprehension insofar as the subject will not be able to paraphrase accurately material that he or she has not understood.

82. Charrow, *supra* note 5, at 1370 (Table 14).

83. Charrow, *supra* note 5, at 1370 (Table 14).

84. Charrow, *supra* note 5, at 1370 (Table 14).

85. Charrow, *supra* note 5, at 1370 (Table 14).

86. Charrow, *supra* note 5, at 1334.

87. Charrow, *supra* note 5, at 1359-60. For example, the Charrows demonstrated that constructions such as nominalizations, phrases beginning with "as to," misplaced phrases, multiple

## II. EMPIRICAL RESEARCH: CONFUSION AND CURE

### A. *Research Method*

The subjects for our test of juror comprehension of instructions were people called to jury service in Dallas County, Texas, who had not yet served on a jury.<sup>88</sup> Thus, our experimental subjects were actual and potential jurors, demographically identical with the group we wanted to learn about. We were not required to rely upon paid volunteers, college students, or other simulated jurors. Use of actual jurors avoided inaccuracies that might be present in some of the previous research.<sup>89</sup> We selected five pattern jury instructions for testing: (1) proximate cause; (2) new and independent cause; (3) negligence; (4) presumption of innocence; and (5) accomplice testimony.<sup>90</sup> We chose these particular instructions because juries in civil or criminal cases are often confronted with these instructions. Furthermore, these instructions present an even mix between short and long sentences, between simple and difficult vocabulary, and between straightforward and convoluted syntax. The instruction on accomplice testimony, in particular, was selected because of its unusual length and syntactical problems.

The task of rewriting the selected instructions to make them more comprehensible posed a number of problems. Some pattern jury instructions were badly organized, presenting the jury with information in a sequence that was difficult to process.<sup>91</sup> Others used complex sentence structure, making the instruction difficult for a lawyer or a layperson to follow.<sup>92</sup> All of the instructions used legal terms of art and other difficult vocabulary. The translation of these concepts out of lawyerese into simple English sometimes required explanations which were themselves hard to understand by virtue of their length. The most significant problem was to accomplish all of these tasks without changing the meaning of

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negatives, and passives were confusing to jurors and that instructions rewritten to eliminate these constructions were significantly better understood. *Id.* at 1335-58.

88. In Dallas County, potential jurors are called daily and assembled in the "Central Jury Room." If not called to a jury panel by the end of the day the potential jurors are released. If selected for a jury, the jurors must serve for the duration of that trial and are then released.

89. All of the social science research that has kept demographic information on test subjects has concluded that the higher the subject's educational level, the better the subject's comprehension of jury instructions. Therefore, to the extent to which test subjects are better educated than most jurors, the experiment will be biased in favor of greater understanding. *See, e.g.,* Charrow, *supra* note 5, at 1320-21 and Tables 7 and 8; *see also* Severance, Greene & Loftus, *supra* note 67, at 75 (reporting an empirical study of the degree of comprehension achieved by college students and actual jurors receiving jury instructions).

90. The pattern instructions are presented in Appendix A. The civil instructions are from State Bar of Texas, 1 TEXAS PATTERN JURY CHARGES (Supp. 1986). The criminal instructions are from P. McCLUNG, JURY CHARGES FOR TEXAS CRIMINAL PRACTICE (1987).

91. The pattern instruction on presumption of innocence, for example, contains information about reasonable doubt and burden of proof in two different places, separated by a discussion of the need to disregard the defendant's arrest or indictment. It concludes with information about the functions of judge and jury. We reorganized the instruction to begin with the information about the jury's role, combined the information on burden of proof and reasonable doubt, and concluded with the directions to disregard the defendant's arrest or indictment. *See* Appendices A and B.

92. The pattern instruction on new and independent cause contains verbs with unclear subjects (e.g., "not reasonably foreseeable" by whom?) and multiple clauses whose relationship to each other is very confusing to most listeners. *See* Appendix A.

the instruction in the process of rewriting it. We went through numerous drafts before we were satisfied that the reworded set of five pattern instructions was improved in comprehensibility *and* correctly stated the law.

With two sets of instructions in hand—five pattern instructions and a corresponding set of five rewritten instructions—the next step was to test whether the “simplified” language in the rewritten set enhanced comprehension. To do this we created audio tapes to be played for the jurors. Each tape contained five instructions selected from the five pattern and five rewritten instruction sets. These five were selected in such a way that each tape had both pattern and rewritten instructions; however, to avoid any “learning effect” no tape contained both the pattern and the rewritten version of the same instruction. Further, no single tape was more difficult than another because each tape contained some version of the five instructions.<sup>93</sup>

Each tape began with the same introductory remarks: a voice explaining what was about to take place. Following that brief opening, a “judge” read a pattern instruction and a layperson responded with what she thought that instruction meant. This recorded beginning of each tape served as an example for the experimental subject to consider. The balance of each tape was a recorded mix of the five jury instructions read by the same judge who presented the recorded example.<sup>94</sup> Each experimental subject heard one of the four tapes. We played each tape to fifteen subjects for a total of sixty subjects used in the experiment.<sup>95</sup>

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93. The mix was as follows:

P1 = Proximate Cause Pattern  
 P2 = Proximate Cause Rewritten  
 NI1 = New and Independent Cause Pattern  
 NI2 = New and Independent Cause Rewritten  
 N = Negligence Pattern  
 N2 = Negligence Rewritten  
 I = Presumption of Innocence Pattern  
 I2 = Presumption of Innocence Rewritten  
 A = Accomplice Testimony Pattern  
 A2 = Accomplice Testimony Rewritten

Tape A

P1, I2, NI1, A2, N

Tape B

N, A2, NI1, I2, P1

Tape C

P2, I, NI2, A, N2

Tape D

N2, A, NI2, I, P2

94. The tapes were played for the test subjects without any preparation such as a videotape of a simulated trial or explanation of relevant facts. Since our purpose was to test comprehension of the court's instructions in and of themselves we believed that the test subjects should give their answers based only on the instructions and not on surmises from supplementary contextual information.

95. As mentioned, our subjects were people in a central jury panel room waiting to be called to a court for possible jury service. On test days we passed out a letter to these assembled people. The letter was a brief explanation of the experiment and it requested those willing to volunteer for the

We used a testing method known as a "paraphrase test": each subject was asked to explain the instructions in her own words.<sup>96</sup> We played each taped instruction for the subject only once.<sup>97</sup> After each instruction was played, we stopped the tape player and started a tape recorder into which the subject stated her understanding of the meaning of the instruction just played.<sup>98</sup> That process was repeated until the subject had heard and paraphrased all five instructions.

In order to calculate the accuracy of each subject's responses, we developed a score sheet for each instruction that listed the legally significant elements of that instruction. Some of the phrases in any jury instruction are more important than others. Therefore, it would be misleading simply to dismember an instruction into component phrases and test to see what phrases were and were not understood. That method would weigh a trivial phrase as heavily as a significant phrase. Thus the score sheets we used for this test<sup>99</sup> contained only those elements of the jury instructions that we believed had legal significance.<sup>100</sup>

We awarded a score of "1" on the score sheet for each element of the instruction correctly paraphrased by the test subject; "-1" on the score sheet for an incorrect paraphrase of an element; and "0" on the score sheet if the subject failed to mention an element of the instruction indicated on the score sheet. After we scored all responses, as outlined above, the percentages were calculated for each of the three possible responses, e.g. legally correct paraphrase, represented by "1" on the score sheet; legally incorrect paraphrase, represented by "-1" on the score sheet; and finally, no paraphrase (test subject did not even mention those elements of the charge) represented by a "0" on the score sheet.

### B. *Results of the Experiment*

The figures we obtained, expressed in readily comprehensible percentages, confirmed that the jurors understood the rewritten instructions much better than the pattern instructions. Averaging the score sheet results for each set of five instructions revealed that only 12.85% of all of the paraphrases of the pattern instructions were correct, compared to 24.59% correct paraphrases of the

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test to assemble in the back of the room. We did not keep demographic data on those who volunteered, but they seemed to us to comprise a reasonably even mix as to race, age, and sex. The letter used to secure volunteers is presented in Appendix C.

96. The validity of that method is supported by extensive psychological literature, and is based on the notion that a test subject will discuss (e.g. paraphrase) that which is understood and fail to discuss that which is not understood or is ignored. For a thorough discussion of paraphrase testing, see Charrow, *supra* note 5, at 1309-11.

97. Our decision to play each instruction only once was a decision based in part on considerations of the amount of time available to spend with each subject, and in part on the fact that in an actual case a juror would hear an instruction spoken by the judge only once. Although in jurisdictions which allow it jurors are entitled to refer to written instructions as they deliberate, a majority of jurisdictions send the jurors to the jury room without written instructions. Hence, we felt justified in allowing our subjects to hear each instruction only once, although many of our subjects complained about this technique.

98. The subjects were asked to "tell us what they thought the judge meant."

99. The score sheets are reprinted in Appendix D.

100. This kind of scoring is similar to the "approximation measure" used by the Charrows. Charrow, *supra* note 5, at 1315. Unlike the Charrows, however, we did not give the jurors full credit for giving only one of a list of items since those items are not synonymous.

rewritten set of instructions, an impressive 91% gain in understanding.<sup>101</sup>

The tables for each set (pattern/rewritten) of the five instructions are set forth below. The percentage figures represent the percentage out of the total variables for each instruction. For example, if an instruction had 10 variables on the score sheet, and two of the ten were correctly paraphrased, the percentages would be 0% legally incorrect, 80% no paraphrase, and 20% legally correct. The results for multiple jurors were cumulated to get the results set out in the tables. Note that the most frequently found response by far was no paraphrase. In other words, for the most part, the subjects failed to comprehend large portions of the instruction, and thus were unable to paraphrase them.

#### New and Independent Cause

	% of Legally Incorrect Paraphrases	% of no Paraphrases	% of Legally Correct Paraphrases
Pattern Instruction	1.67%	92.50%	5.83%
Rewritten Instruction	1.00%	69.33%	29.67%

#### Accomplice Testimony

	% of Legally Incorrect Paraphrases	% of no Paraphrases	% of Legally Correct Paraphrases
Pattern Instruction	0.44%	90.26%	9.30%
Rewritten Instruction	1.07%	79.17%	19.76%

#### Negligence

	% of Legally Incorrect Paraphrases	% of no Paraphrases	% of Legally Correct Paraphrases
Pattern Instruction	1.54%	78.97%	19.49%
Rewritten Instruction	0.00%	64.72%	35.28%

101. The table set forth below represents the collated findings for all five instructions.

#### Collated Results For All Five Instructions

	% of Legally Incorrect Paraphrases	% of no Paraphrases	% of Legally Correct Paraphrases
Five Pattern Charges	1.50%	85.66%	12.85%
Five Rewritten Charges	0.75%	75.67%	23.59%

	<u>Proximate Cause</u>		% of Legally Correct Paraphrases
	% of Legally Incorrect Paraphrases	% of no Paraphrases	
Pattern Instruction	0.91%	84.55%	14.55%
Rewritten Instruction	0.77%	75.90%	23.33%

	<u>Presumption of Innocence</u>		% of Legally Correct Paraphrases
	% of Legally Incorrect Paraphrases	% of no Paraphrases	
Pattern Charge	3.86%	78.77%	17.37%
Rewritten Charge	0.61%	76.06%	23.33%

The results become much more vivid when presented in rank order according to the percentage gained in comprehension between the pattern instruction and the corresponding rewritten instruction. That table is set forth below.

<u>Instruction</u>	<u>Gain in Comprehension</u>		
	<u>Pattern Correct</u>	<u>Rewrite Correct</u>	<u>Percentage Gain</u>
New and Independent Cause	5.83%	29.67%	408%
Accomplice Testimony	9.30%	19.76%	112%
Negligence	19.49%	35.28%	81%
Proximate Cause	14.55%	23.33%	60%
Presumption of Innocence	17.37%	23.33%	34%

To the uninitiated, the most telling statistic in our findings may be that the percentage of correct responses is very low in all of the charts, ranging from a low of 5.83% for the pattern new and independent cause instruction to a high of only 35.28% for the rewritten negligence instruction. These figures, though low, correspond favorably with those reported by other researchers, proof once again that comprehension by jurors of the instructions given them is dysfunctionally low.

We anticipated that our particular experiment might produce somewhat lower comprehension rates because we purposely designed our experiment to minimize any learning effect that might have been inherent in the results of previously reported research. For example, our subjects heard each instruction read only once.<sup>102</sup> We believed that one reading duplicated what an actual juror would hear in court, and since our primary goal was to reach out to the practic-

102. The Charrows, for example, played each instruction twice for their test subjects. Charrow, *supra* note 5, at 1313.



ing bar with useful, convincing data we chose to maximize reality, even at the cost of diminished result.

Second, we played instructions to each subject without the benefit of any preconditioning factual context. Our subjects responded based solely on what they understood from hearing a charge read one time. Prior researchers provided their subjects with some sort of factual context before they tested for comprehension of the charge. For instance, some provided a brief written description of the facts produced at a hypothetical trial,<sup>103</sup> or showed a video of an abbreviated trial.<sup>104</sup> We chose not to provide our subjects with any such information so that we could measure the subject's comprehension of the language of the instructions independent of context. Accordingly, our subjects' scores were not always as high as those of other researchers. However, our results are not burdened with alternative interpretations. We tested for one thing only—comprehension of a jury instruction; and our results established those patterns conclusively.

In spite of the relative lack of informational cues, our results show a dramatic improvement in comprehension. Recall that we selected the instruction on use of accomplice testimony in a criminal case because it seemed unduly long and convoluted in its pattern form.<sup>105</sup> Rewriting this instruction was very difficult and we felt that the utility of our final product was problematic. Just as we suspected, the overall comprehension rate for this instruction remained relatively low.<sup>106</sup> Nevertheless, we achieved an overall improvement of 112%.

The instruction on new and independent cause turned out to be both the least understood and the most improved by rewrite of the five instructions tested. Only 5.83% of the responses to the pattern new and independent cause instruction were correct. This is probably due both to its conceptual difficulty and to the extremely confusing organization and syntax of the original. On the other hand, 29.67% of the responses to the rewritten instruction were correct for a gain in understanding of 408%. Thus an instruction that remained conceptually difficult was made much more comprehensible through rewriting.

The task was definitely not a simple one. The reader should note, however, that we did successfully rewrite the instructions and that neither of us has any advanced training in English composition. Our rewritten instructions were simply the work product of two lawyers who set out to write instructions with comprehensibility as the primary goal. These rewritten instructions were not produced by linguistic experts, utilizing methods and resources far beyond the reach of the average lawyer. We wanted practicing lawyers to view our experiment as realistic and as a task within their reach. Consequently, we embarked

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103. See, e.g., Charrow, *supra* note 5, at 1313; Elwork, Alfini, & Sales, *supra* note 73, at 434; Forston, *supra* note 42, at 612.

104. See, e.g., R. HASTIE, S. PENROD & N. PENNINGTON, *supra* note 54 at 85-86; Elwork, Sales, & Affini, *supra* note 66, at 174; Strawn & Buchanan, *supra* note 58, at 388.

105. See *supra* text accompanying notes 90-91. For the text of the accomplice testimony instruction, see Appendices A and B.

106. There were 9.30% correct responses for pattern instruction and 19.76% correct responses for the rewritten version.

on the experiment with a set of rewritten instructions that were produced with a conventional common sense approach that any practicing lawyer could use.<sup>107</sup>

### C. *The Significance of the Results*

Our experiment demonstrated, in part, that jurors do not adequately understand instructions as currently drafted. This finding, which is consistent with the findings of other researchers, raises two important concerns. The first relates to the impact of jurors' difficulties in understanding trial outcome: (1) Will a jury that misunderstands its instructions render the verdict it intends? (2) Will a jury that misunderstands its instructions render the same verdict that it would if it understood the instructions? The second concern relates to the vitality of the jury system regardless of effect on outcome. The use of incomprehensible instructions sends a message to jurors that the law is an undecipherable mystery and that juror understanding of the law is not important.

It seems reasonable to assume that juries render verdicts that are actually incorrect under the law because they do not understand the jury instructions as to that law. This assumption is supported by research and case law. Some of the social science research has demonstrated that the level of juror comprehension affects trial outcome in simulated trials.<sup>108</sup> In a 1960 study of sixteen juries

107. The rewritten instructions are presented in Appendix B. We were greatly aided in our rewriting efforts by the findings reported in Charrow, *supra* note 5, and the advice in A. ELWORK, B. SALES & J. ALFINI, *supra* note 6, at ch. 7. Any lawyer attempting to write clear jury instructions should consult these works for guidance as well as using innate writing skills and common sense.

A comparison of the pattern instructions in Appendix A and the rewritten instructions in Appendix B illustrates our use of the Charrow and Elwork principles. Our changes fall into three general categories: organization, sentence structure, and word choice.

In terms of organization, we tried to do two things. First, we tried to provide the jurors with information to help them process what they heard. We did this by beginning the instructions with general contextual information ("An event often has many causes;" "A person can become negligent in two ways;" "This instruction is in two parts. First, I am going to tell you about the kind of witness known as an accomplice."). We also provided context and helped the jurors understand and remember by organizing the instructions as numbered lists where appropriate. See Appendix B. The jurors tested often remembered these contextual clues even when they forgot some of the substance, making statements such as "I remember there were five things but I don't remember the other two." Cf. Charrow, *supra* note 5, at 1339 (reporting the same type of juror reaction). Our second organizational change was to move the information within the instruction so that logically related information was placed together. Compare the organization of the pattern instruction on Presumption of Innocence (Appendix A) with the rewrite (Appendix B).

At the sentence structure level, we tried to replace long sentences of the pattern instructions with shorter sentences in the rewrite. Compare the pattern instruction on Proximate Cause (Appendix A) with the rewrite (Appendix B).

At the level of word choice, we tried to replace difficult words and phrases with more commonly understood synonyms, or to rewrite the sentences to eliminate the need for the difficult word or phrase. For example, in rewriting the Accomplice Testimony instruction, we replaced the sentence, "Mere presence alone, however, will not constitute one a party to the offense," with the sentence, "Merely being at the scene of the crime does not make a person an accomplice." We also replaced words such as therefrom, causal connection, agency, prudence, circumstances, inference, credibility, thereto, transpiring, commission, and corroborated. Those who wish to rewrite instructions can identify difficult words by using resources such as Thorndike and Lorge's book, *THE TEACHER'S WORD BOOK OF 30,000 WORDS* (1944).

108. Researchers have reported that the nature of the court's charge affects the outcome of a case. Katzev and Wishart investigated the impact on juries of cautionary instructions about the weight they should accord eyewitness testimony. They found that the use of such cautionary instructions did have a measurable impact. Katzev & Wishart, *The Impact of Judicial Commentary*

that heard a mock personal injury case, only one found for the defendant under the original instructions while four found for the defendant under the rewritten instruction. Twelve of the juries awarded plaintiff damages for pain and suffering under the original instructions, but only six did so under the rewritten version.<sup>109</sup> Elwork and his associates showed identical videotaped trials to juries, half using pattern instructions and half using rewritten instructions. They found a statistically significant difference in the verdicts reached by the two groups.<sup>110</sup> Elwork found in a different test that when jurors were asked to render general verdicts, the verdicts were inconsistent with what the jurors understood the law to be regarding comparative negligence, and that their verdicts regarding negligence were inconsistent with their understanding of the facts of the case.<sup>111</sup> Appellate cases also reflect instances in which juror confusion caused the jury to reach a flawed verdict.<sup>112</sup> Lawyers should be concerned about any process that could conceivably have an adverse effect on the accuracy of a jury verdict.

The integrity of jury verdicts is not the only reason why the clarity of jury instructions should be improved. The right to trial by jury has symbolic as well as actual importance to Americans. For most Americans, jury service is their only contact with the judicial system. Through our traditions and through the physical arrangement of our courtrooms we make clear to jurors that the judge represents the majesty of the law and that the instructions coming from the judge represent objectivity in the heat of battle. Incomprehensible instructions send jurors an undesirable message about the judicial system:

Consider the likely feelings of jurors who failed to understand parts of the trial procedures. . . . [T]hey are not told what they are to determine until the end of the trial; and are then instructed in jargon. . . . Jurors faced with such conditions are likely to believe that the court's real, though unspoken, message is that the charge is a necessary ritual which they are not expected to understand.<sup>113</sup>

At present, the message we send to the American citizen "lucky" enough to be selected for jury service is a message of confusion to the extent that many jurors may simply disconnect from the law and try to reach a just verdict on their own. They may also lose faith in the legal system as a whole. We may never be able to quantify the actual harm in terms of incorrect verdicts done by conventional jury instructions. The facts before us, however, indicate a heavy price in the integrity of the legal profession being paid by its failure to address comprehensibility of jury instructions as a serious problem.

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*Concerning Eye Witness Identifications on Jury Decision Making*, 76 J. CRIM. L. & CRIMINOLOGY 733 (1985). In another study on the deliberations of mock juries, the researchers demonstrated that juries frequently reach an improper verdict when a misunderstanding of the court's instructions misguides the deliberation process. R. HASTIE, S. PENROD & N. PENNINGTON, *supra* note 54, at 232.

109. Mathewson, *Verbatim*, 15 STUDENT LAWYER 6 (1986).

110. A. ELWORK, B. SALES & J. ALFINI, *supra* note 6.

111. Elwork, Sales & Alfini, *supra* note 66, at 174-76.

112. See *supra* notes 14-39 and accompanying text.

113. Wilcox, *The Craft of Drafting Plain-Language Jury Instructions: A Study of a Sample Pattern Instruction on Obscenity*, 59 TEMPLE L.Q. 1159, 1184 (1986).

#### D. *A Second Experiment*

The research reported above, concerning comprehension of jury instructions, assumes implicitly that deliberating jurors actually *use* the court's instruction. One could theorize, on the other hand, that deliberating jurors make less than full use of the court's instructions as guideposts for their decisions. After all, jurors might just as easily use their common sense and collective feel for justice and fair play when reaching their verdicts. Just how much weight do deliberating jurors give to the court's instructions? We attempted to find out.

We decided to contact ex-jurors who had recently served on a case where a verdict was reached and to ask them questions about the use to which they put the court's charge. Since personal interviews could corrupt the results due to the interviewer subconsciously suggesting answers, we decided to use a questionnaire. We mailed the questionnaire to four members of each jury from one hundred and fifty-five juries. If we received no response we re-mailed to all members of the jury. In this fashion we gained responses from each of the juries. It is important to note that we did not tolerate any bias in the data by relying on information that came only from "responsive" juries while ignoring "non-responsive" juries. We received a response from every jury in our initial sample of 155 juries. The questionnaire that was used to gather the data is set forth below.

#### JURY RESEARCH PROJECT

1. At any point in time were *all* of the judge's instructions reread aloud in the jury room by one or more of the jurors?
 

\_\_\_\_\_ Yes  
\_\_\_\_\_ No
2. In deciding how to reach a verdict did any jurors talk about the judge's instructions?
 

\_\_\_\_\_ Yes  
\_\_\_\_\_ No
3. Did two or more jurors openingly disagree about the meaning of some part of the judge's instruction?
 

\_\_\_\_\_ Yes  
\_\_\_\_\_ No
4. If your answer to question #3 is "Yes" did everyone agree about the meaning of the instruction before the jury reached its verdict?
 

\_\_\_\_\_ Yes  
\_\_\_\_\_ No

Although each reader can judge the merit of the questionnaire for himself, the questionnaire was designed to adequately cover the extent and nature of the use a deliberating jury might make of the court's charge. We attempted to ask objective questions ("did jurors openly disagree"; "did you read the instruction out

loud") rather than subjective questions ("did jurors understand the instructions"; "did jurors pay attention to the instructions").<sup>114</sup>

## 2. The Results

Preliminary analysis of the data from the first group of returned questionnaires indicated considerable disagreement among respondents on the same jury as to what had taken place during deliberations. Accordingly, we decided to drop from the sample all juries where only one juror responded, thus avoiding reliance upon a single respondent who might not be truly representative of the jury. As a consequence, we analyzed the data from 133 juries from the sample of 155.

Respondents from the same juries, then, did not always agree about what took place during their jury deliberations. Since we wanted to learn about typical behavior, we decided to use probability theory. For each question, we estimated the probability that a correct response for a typical jury would be "yes."<sup>115</sup> This involved calculating the percentage of "yes" responses to each question, jury by jury, and then deriving the overall probability for all juries by averaging those percentages over the 133 juries.<sup>116</sup> We then obtained an interval estimate of the overall probability of a "yes" at the 95% confidence level.<sup>117</sup> The results of this probability analysis are shown below.

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114. Other researchers have discovered a significant gap between what jurors *think* they understand and what they actually understand. See, e.g., R. NIELAND, *supra* note 8, at 24-25.

115. For example, we estimated for question 1 the probability that the jury reread all of the judge's instructions aloud in the jury room.

116. Our reasoning was as follows. Since jurors do not agree on what took place, we will use the proportion of "yes" answers as a "best estimate" of what actually happened. The overall average for all the juries, then, represents a "best estimate" of the probability of a "yes" answer for a typical jury. We calculated the proportion of "yes" answers for each question for each jury. For example, if 3 people from the same jury responded and two responded "yes," the probability that the jury action was "yes" was estimated as 2/3. Then for each question, we calculated an average over all the 133 jury probabilities.

117. A 95% confidence interval refers to the statistical methodology involved and is based on certain assumptions about the estimator of the probability of a "yes." Roughly speaking, if we are estimating the true probability of a "yes" response, our statistical methodology would result in an interval estimate of the true proportion of the time a jury response would be "yes." This interval estimate will be accurate 95% of the time. For further discussion of this methodology see G. SNEDECOR & W. COCHRAN, *STATISTICAL METHODS* (1980); Louis, *Confidence Intervals for the Binomial Parameter After Observing No Successes*, 35 *STATISTICIAN* 154 (1981). We also ran a second analysis using only "clean" data: data from juries on which all responding jurors gave the same answers. The results of this second "clean data" analysis were consistent with the results using the answers of all jurors.

Summary of Questionnaire Results

<u>Question</u>	<u># juries</u>	<u>Probability of "yes"</u> <u>% Yes Answers</u>	<u>Interval Estimate</u>
1	133	61%	from 57% to 65%
2	133	87%	from 83% to 91%
3	133	37%	from 32% to 41%
4	82 <sup>118</sup>	82%	from 77% to 89%

Responses to questions 1 and 2 indicate a probability that a jury rereads aloud all the judges instructions of between 57% and 65%, and a probability that they talk about the judge's instructions of between 83% and 91%. Responses to question 3 indicate that the probability of an open disagreement between two or more jurors is from 33% to 41%. However, responses to question 4 indicate that if such a disagreement does occur the probability that it is resolved is between 77% and 89%. These results support the general proposition that jurors almost always talk about the judge's instructions and about two thirds of the time reread all the instructions aloud. As to the other questions, about a third or more of the juries disagree about the meaning of the instructions, but most of those come to accommodation among themselves about the meaning of those instructions before reaching a verdict.

This experiment demonstrates that a typical jury makes a good faith effort to use its instructions for the purpose intended, that is, to reach a verdict according to the law. Our other experiment dealing with comprehension, however, shows that the jury's efforts are seriously undermined because of the badly organized, jargon-filled, convoluted prose used by lawyers and judges who write jury instructions.

### III. WILL THE SYSTEM CHANGE?

#### A. *Forces Supporting the Status Quo*

Although the research reported in this article and by other authors makes a convincing case for change in our present method of drafting jury instructions, overwhelming forces supporting the status quo may present an insurmountable obstacle. A number of factors make it difficult to bring about meaningful change in the way jury instructions are drafted. Some lawyers and judges resist change. Others are deterred by the difficulty of rewriting. Even those lawyers and judges who are willing and able to rewrite jury instructions face serious obstacles in certain existing laws governing jury instructions and in the role of the adversary system in drafting jury instructions.

#### 1. Resistance to Change

Many lawyers and judges simply do not believe that juror confusion is a

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118. Answering question 4 was contingent on answering question 3 "yes." There were 142 juror responses of "yes" to question 3, representing 82 juries.

serious problem. Since they understand the instructions, they believe that jurors understand them as well. This position, however, is not supported either by empirical research or by case law. None of the studies that have been done show that jurors understand their instructions at an acceptable level.<sup>119</sup> On the contrary, all of the empirical studies show juror comprehension of pattern instructions to be so low as to be dysfunctional. Many of these studies, however, are published in journals seldom read by the trial bar, or require a working knowledge of statistical and linguistic terminology to be fully understood.

Other lawyers, while accepting the existence of confusion, believe that it benefits their clients and therefore support the status quo rather than efforts to achieve greater clarity. Legal lore has it that when jurors fail to understand their instructions, their confusion works to the benefit of personal injury plaintiffs in civil cases and the state in certain criminal prosecutions. The belief, apparently, is that if the jury fails to understand certain "technical" defenses, the party with the burden of proof, or the one more aligned with the jury's instinctive feelings of "justice," will prevail. None of the empirical studies, however, have demonstrated any tendency of the jury's misunderstanding to benefit one side or the other.<sup>120</sup> Others resist change simply because of the cost of rewriting. Using a pattern instruction out of a book or language quoted from an appellate case takes much less time than finding the law and then rewriting it for clarity. The time required to rewrite instructions must either be billed to the client or absorbed by the lawyer. Neither of these alternatives may be attractive to the lawyer wishing to maximize client satisfaction and law firm profits.

Another form of resistance is brought about by fear on the part of trial lawyers and judges. Since trial lawyers and judges who draft jury instructions are subject to review by appellate courts, they are unlikely to risk having a case reversed on appeal because they failed to use language already approved by the appellate court. But appellate opinions, while acceptable as intraprofessional communications, are not written for the purpose of explaining the law to lay persons. Thus, there are competing linguistic universes: one for the bar, and one for the lay persons who comprise juries. When language written for one audience is directed instead to another, the resulting confusion should not be surprising. Unless trial lawyers and trial judges writing instructions, and appellate judges reviewing instructions, exert the effort to differentiate between the linguistic universe for lawyers in which the appellate opinions are couched and the linguistic universe for lay persons in which the courts' charge *should* be couched, no progress can be made.

## 2. Difficulty of Rewriting

Lawyers and judges who do not resist change are still faced with some difficulties in rewriting jury instructions. Some are inherent in the nature of the law and cannot be eliminated. Some problems with confusing instructions, however,

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119. See *supra* text accompanying notes 42-87.

120. Mathewson, *supra* note 109, at 7 (quoting Bruce Sales, Professor of Law, Psychology and Sociology at the University of Arizona).

are the result of habit rather than law and are the easiest for lawyers and judges to address.

One inherent difficulty in writing jury instructions stems from the complexity of the law itself.<sup>121</sup> Complicated concepts are more difficult to express clearly than simple ones. It is difficult to explain in a paragraph concepts that first year law students spend months learning.<sup>122</sup> Difficult, however, does not mean impossible.

The complexity of the law, and the difficulty of rewriting it, often stems from the subtleties of meaning acquired by legal terms of art and other legal language. This subtlety of meaning, however, "attaches as a function of usage, and not because of any inherent property of the word itself."<sup>123</sup> As lawyers speaking to each other use certain words, their knowledge of the underlying case law communicates something more to them than a simple dictionary definition of the word would show. This kind of extra communication, however, is restricted to members of the profession who understand the usage behind the word. It does not extend to lay people on juries. An explanation that would communicate a term of art to a jury with all of its professional resonances, then, might need to be quite lengthy.<sup>124</sup>

A related roadblock to simplicity is the law's occasional vagueness. Some legal concepts are inherently general: "reasonable person"; "reasonable doubt"; "preponderance of the evidence"; "unconscionable." To redefine such concepts so that they can be standardized or quantified could have two unfortunate results. First, it might make the cost of litigation prohibitive by requiring quantifiable proof.<sup>125</sup> Second, greater specificity might rob the law of its flexibility, its ability to evolve with changing times and changing community standards.<sup>126</sup> Because of these problems, we would not propose a redefinition of the concepts to achieve greater clarity.

Other kinds of writing problems, however, are problems of writing style and can be changed. As the social science researchers have demonstrated, cer-

121. The Charrows' research found, however, that even the most legally complex instructions can be rewritten to improve comprehension. See *supra* text accompanying notes 79-87.

122. Most first year Torts casebooks, for example, spend eighty to one hundred pages discussing causation. See, e.g., C. GREGORY, H. KALVEN & R. EPSTEIN, *CASES AND MATERIALS ON TORTS* 247-324 (1977); P. KEETON, R. KEETON, L. SARGENTICH & H. STEINER, *CASES AND MATERIALS ON TORT AND ACCIDENT LAW* 366-456 (1983); W. PROSSER, J. WADE & V. SCHWARTZ, *CASES AND MATERIALS ON TORTS* 281-380 (1982); H. SHULMAN, F. JAMES & O. GRAY, *CASES AND MATERIALS ON THE LAWS OF TORTS* 285-373 (1976).

123. Perlman, *Pattern Jury Instructions: The Application of Social Science Research*, 65 NEB. L. REV. 520, 536 n.65 (1986).

124. *Id.* Perlman and Saltzburg, for example, in rewriting the Alaska Pattern Civil Jury Instructions, had to dramatically lengthen the relevant instructions in order to adequately explain "bailor" and "bailee." *Id.* at 532.

125. Perlman notes, for example, that to change "substantial likelihood of confusion among consumers" to a quantified standard such as confusion of 65% of prospective customers would greatly increase the cost of trademark litigation. *Id.* at 538.

126. Vagueness, while making rewriting more difficult, does not mean that it should not be attempted. While some are fearful that rewriting such instructions will change their meaning, others disagree. "Any attempt to rewrite the current approved jury instructions raises the fear that differences in interpretation will come to the surface and create disruption, while if you leave it in legalese everyone can nod and smile and believe whatever they want." Mathewson, *supra* note 109, at 7.



tain tendencies of legal writing frequently found in appellate opinions are responsible for a great deal of juror confusion. The worst culprits are: (1) the use of terms of art and other difficult vocabulary;<sup>127</sup> (2) problems with phrases and clauses such as "as to" phrases, deletions of the phrase "which is," long word lists, and misplaced modifiers;<sup>128</sup> (3) problems with sentence structure such as sentence length, embedded clauses, and use of the passive voice;<sup>129</sup> and (4) poor organization of the information contained within the instruction.<sup>130</sup> These problems are neither inherent in the law nor required by rules of procedure, but are nevertheless pervasive in jury instructions as currently written<sup>131</sup> solely because of the habits which now comprise a part of the lawyers' art form. But what we have is art for art's sake, when what we need is functional art. Put simply, lawyers and judges must change the habit of speaking to jurors in the argot of the legal profession and learn to turn outward towards the lay community in their choice of words and style when writing jury instructions. Since this is more difficult than copying old models, it is seldom done. We have demonstrated in our research, however, that such writing is possible.

### 3. Law Governing Instructions

Some of the rules of procedure governing the submission of jury instructions also hinder efforts at rewriting. Two notable examples are rules prohibiting the judge from commenting on the evidence and rules prohibiting the judge from informing the jury of the effect of its answers. Under common law tradition, while the jury was the final arbiter of the facts, the judge had a duty to aid the jury's comprehension of the evidence by summarizing and commenting on that evidence.<sup>132</sup> Under the common law approach, the judge was cast in the role of tutor to the jury:

This practice [the common law right of the judge to express opinion on weight of evidence] has long been regarded as a valuable feature of the jury system. While carefully preserving the traditional functions of court and jury, leaving the latter as sole triers of the facts, it has the inestimable advantage of affording the jury the assistance of an analyti-

127. Charrow, *supra* note 5, at 1326; A. ELWORK, J. ALFINI & B. SALES, *supra* note 6, § 7-2(C); Forston, *supra* note 42, at 617; Imwinkelried & Schwed, *supra* note 7, at 138-42; Perlman, *supra* note 123, at 532; Schwarzer, *supra* note 1, at 740-43; Strawn & Buchanan, *supra* note 58, at 482-83; Wilcox, *supra* note 113, at 1166.

128. Charrow, *supra* note 5, at 1322-26; Imwinkelried & Schwed, *supra* note 7, at 142-44.

129. See authorities cited *supra* in note 127.

130. A. ELWORK, J. ALFINI & B. SALES, *supra* note 6, § 7-2(A); Imwinkelried & Schwed, *supra* note 7, at 146-50; Schwarzer, *supra* note 1, at 740.

131. Other practices unrelated to the way in which instructions are written can affect the jury's ability to understand its job and follow the instructions. For example, studies have demonstrated that jurors who receive written copies of their instructions pay more attention to the instructions and reach more accurate results, yet only 16 jurisdictions currently allow the jury to take copies of the instructions into the jury room. Forston, *supra* note 42, at 619. Also, some studies have indicated that jurors who are instructed in certain aspects of the law at the beginning as well as at the end of the trial are better able to evaluate evidence and understand their instructions. See, e.g., Prettyman, *Jury Instructions—First or Last*, 46 A.B.A. J. 1066 (1960).

132. See *State v. Baldwin*, 178 N.C. 687, 100 S.E. 348 (1919); see also Annotation, *Propriety of Instructions as to the Significance of Evidence Concerning the Defendant's Good Character as an Element Bearing Upon the Question of Reasonable Doubt*, 10 A.L.R. 112 (1921).

cal and dispassionate review of the evidence.<sup>133</sup>

Allowing the judge to comment on the evidence in jury instructions helps to create literate, comprehensible jury instructions.

Unfortunately for the prospects of comprehensible instructions, this common law tradition has been abandoned by most states, although it still thrives in the federal system.<sup>134</sup> The reason judges were prohibited from commenting on the evidence is not altogether clear,<sup>135</sup> but the process seems to have been completed by the late 1920s.<sup>136</sup> Although a few states retain the common law approach,<sup>137</sup> most do not, and the Uniform Rules of Criminal Procedure now provide:

The court may not summarize the evidence, express or otherwise indicate to the jury any personal opinion on the weight or credibility of any evidence, or give any instruction regarding the desirability of reaching a verdict.<sup>138</sup>

Numerous states have similar express statements, either in their statutes, rules of procedure, or state constitutions.<sup>139</sup>

Pervasive as it may be, the effect of the practice of strictly forbidding the

133. Walker, *Judicial Comment on the Evidence in Jury Trials*, 15 A.B.A. J. 647, 647 (1929).

134. "A trial judge is, however, more than a mere moderator and is under a duty to question witnesses and comment on evidence when it appears necessary." *United States v. Block*, 755 F.2d 770, 775 (11th Cir. 1985). See also Sunderland, *The Inefficiency of the American Jury*, 13 MICH. L. REV. 302, 309 (1915) ("It is hard to account for this widespread departure from the well settled principles which have always governed the jury trial.")

135. Roscoe Pound offered this explanation:

In particular it may be shown that legislation restricting the charge of the court has grown out of the desire of eloquent counsel, of a type so dear to the pioneer community, to deprive not merely the trial judge but the law of all influence upon trials and to leave everything to be disposed of on the arguments.

R. POUND, *THE SPIRIT OF THE COMMON LAW* 125 (1921).

136. See Sunderland, *supra* note 134, for a discussion of early developments. By 1927, the common law rule had been abrogated in a majority of the states. Hoyt, *The Judge's Power to Comment on the Testimony in His Charge to the Jury*, 11 MARQ. L. REV. 67, 67 (1927).

137. Among the states retaining the common law approach are California, Minnesota, Pennsylvania, North Carolina, and Connecticut. See CAL. CONST. art. VI, § 19 ("The court may . . . make such comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the proper determination of the case."); see also *State v. Hardwick*, 1 Conn. App. 609, 475 A.2d 315, 318, *cert. denied* 193 Conn. 804, 476 A.2d 145 (1984) ("Judges in this state, however, are given wide latitude to comment fairly and reasonably upon evidence received at trial, but the court must refrain from making improper remarks which are indicative of favor or condemnation, or which disparage a defendant before the jury."); *State v. Minneapolis Milk Co.*, 124 Minn. 34, 44-45, 144 N.W. 417, 421 (1913) ("trial judge may review the evidence in his instructions to jury, and may state to them that it tends to prove certain facts."); *State v. Craven*, 312 N.C. 580, 324 S.E.2d 599 (1985) (court's instruction that judge will explain what some of the evidence "tends to show" upheld); *Commonwealth v. Ott*, 417 Pa. 269, 207 A.2d 874 (Pa. 1965) (trial judge in a criminal case may express opinion on the weight and effect of evidence so long as warranted by evidence and so long as does not amount to a binding instruction).

138. UNIF. R. CRIM. P. 523(d).

139. The Nevada Constitution provides that "[j]udges shall not charge juries in respect to matters of fact, but may state the testimony and declare the law." NEV. CONST. art. VI § 12. The Texas Code of Criminal Procedure notes that in instructing a jury, the judge must be sure that he is "not expressing any opinion as to the weight of the evidence, not summing the testimony, discussing the facts or using any argument in his charge calculated to arouse the sympathy or excite the passions of the jury." TEX. CODE CRIM. P. art. 36.14. The same is true in civil cases. See TEX. R. CIV. P. 272. When two related factual elements are controverted and one must be mentioned in inquiring about

judge from making any comment whatsoever on the evidence causes the court's instructions to be extremely awkward. Furthermore, the prospects of rewriting instructions in comprehensible prose diminish greatly when the author must constantly avoid making comments about the evidence, even when such comments seem to be compelled in normal prose.

For example, in *Thomason v. State*<sup>140</sup> defendant was charged with receiving and concealing stolen lumber. The evidence showed that after taking possession of the lumber defendant sawed it into different lengths, apparently in an attempt, to disguise the lumber. The following instruction was held to be an improper comment on the weight of the evidence: "[I]f you believe . . . [that the defendant] handled such lumber in a manner that would throw the owner . . . off . . . guard in the search or investigation of the theft . . . this would amount to concealing said lumber."<sup>141</sup> The language of this instruction is relatively understandable and a correct statement of the law. However, under compulsion not to comment on the weight of the evidence, such a straightforward statement is not possible. Instead, the instruction would have to read something like this:

If you should find and believe from the evidence that the defendant possessed the lumber, if he did, and if you should find and believe from the evidence beyond a reasonable doubt that the defendant changed the dimensions of said lumber, if he did so, and if you should further find and believe that the defendant's conduct in changing the dimensions of the lumber, should you find that he changed the dimensions of the lumber, was done in a manner to throw the owner off guard in the search or investigation for the lumber, if the owner was making such a search, then should you so find, you might consider said facts as an indication that the defendant performed such conduct, if any, in an attempt to conceal said lumber, if he did.

This kind of silliness should not be required by law. A rule of law that forbids any comment on the evidence, while perhaps useful in some respects,<sup>142</sup> is extremely damaging to any effort to write comprehensible jury instructions.

A second procedural limitation on instructions also tends to decrease comprehensibility. In a number of jurisdictions in which juries render special rather

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the other, the issue must include the phrase "if any" or some equivalent to avoid error. G. HODGES, SPECIAL ISSUE SUBMISSION IN TEXAS (1959).

Discussing the Louisiana Code of Criminal Procedure, the Louisiana Court of Appeals stated: "The purpose of this Article is to insure that the jury is in fact the judge of the law and of the facts on the question of guilt or innocence of the defendant after it has been charged as to the law applicable to the case by the presiding judge." *State v. Pettaway*, 450 So. 2d 1345, 1365 (La. App.), *cert. denied*, 456 So. 2d 171 (La. 1984).

140. 147 Tex. Crim. 629, 183 S.W.2d 973 (1944).

141. *Id.* at 632, 183 S.W.2d at 974.

142. Some of the early cases explained their abandonment of the common law rule as a means of allowing the jury to think independently rather than trying to please the judge.

Any person who carefully notices the trial of a cause before a jury must surely observe the attention which they give to the remarks, gestures, facial expressions, or tones of voice which the judge may adopt, in their evident desire to gain from him some information as to the kind of verdict they think he would expect in the case. Any language, therefore, which might seem even to hint at what the court thought of the merits, ought always to be avoided at a trial of the issue before a jury.

*State v. Bartlett*, 50 Or. 440, 448, 93 P. 243, 246 (1908).

than general verdicts,<sup>143</sup> jurors may not be informed of the effect of their answers.<sup>144</sup> Those jurisdictions which prohibit this information from reaching the jury do so for three reasons. First, they believe that since the jury's function is fact-finding it should have no interest in the application of the law.<sup>145</sup> Second, they fear that a jury motivated by bias or sympathy might try to manipulate its answers to achieve a desired result.<sup>146</sup> Third, they think that such instructions might confuse the jury.<sup>147</sup>

The federal courts,<sup>148</sup> and a number of state courts,<sup>149</sup> have rejected these arguments in favor of informing the jury about the legal effect of its findings. These jurisdictions believe that jury findings based on ignorance of the law "may be premised on an erroneous concept of the law and can result in a molded judgment far different from that intended by the jury."<sup>150</sup> They further believe that a fully-informed jury is better able to fulfill its fact-finding function.<sup>151</sup> Finally, these jurisdictions note that a jury verdict based on misunderstanding, bias, or prejudice can be set aside.<sup>152</sup> In jurisdictions that refuse to inform juries of the effect of their answers, however, jury confusion will continue.

143. There are two different methods of submitting a case to a jury. One is the general charge in which the judge instructs the jury on all applicable principles of law and asks who wins. The other method of submission is by special verdict. The judge asks the jury separate questions about different disputed facts, or mixed questions of law and fact. The jury must be given definitions of terms, but it need not be told the significance of its answers, and it need not consider who is to win. In some jurisdictions, such as the federal system, both methods are in use. D. CRUMP, *CASES AND MATERIALS ON CIVIL PROCEDURE* 723-24 (1987); see also FED. R. CIV. P. 49.

144. See, e.g., *Holland v. Peterson*, 95 Idaho 728, 732, 518 P.2d 1190, 1194 (1974) (reversible error for trial court to instruct jury as to effect of answers on final outcome); *Erb v. Mutual Serv. Casualty Co.*, 20 Wis. 2d 530, 536, 123 N.W.2d 493, 496 (1963); see also *Fehrman v. Smirl*, 20 Wis. 2d 1, 19-20, 121 N.W.2d 255, 265 (1963) (jury instructions are objectionable when they tend to inform jury of legal effect of particular answers). See generally Annotation, *Reversible Effect of Informing Jury of the Effect that their Answer to Special Interrogatories or Special Issues May Have Upon Ultimate Liability or Judgment*, 90 A.L.R.2d 1040 (1963).

145. See, e.g., *Sommese v. Maling Bros.*, 36 Ill. 2d 263, 267, 222 N.E.2d 468, 470 (1966) ("[T]he function of a special interrogatory is to require the jury's determination as to one or more specific issues of ultimate fact and is a check upon the deliberations of the jury."); *McClure v. Neuman*, 178 N.E.2d 621, 624 (Ohio App. 1961) ("Where the court indicates how liability will be determined, it warns the jury of the result of its answers and permits the jury to trim its course accordingly."); *McGowan v. Story*, 70 Wis. 2d 189, 198, 234 N.W.2d 325, 329 (1975) (refusing to give ultimate outcome instruction in comparative negligence case).

146. See cases cited *supra* note 145; see also *Collett v. Schnell's*, 194 Kan. 75, 397 P.2d 402 (1964) (error to tell jury that its answers to general and special verdict were inconsistent); C. HEFT & C. HEFT, *COMPARATIVE NEGLIGENCE MANUAL* § 7.40 (1978).

147. *McGowan v. Story*, 70 Wis. 2d 189, 198, 234 N.W.2d 325, 330 (1975). Courts expressing this fear do not seem to have explored the possibility of writing the instructions in such a way that they will not confuse a jury. See, e.g., *Gardner v. German*, 117 N.W.2d 759, 762 (Minn. 1962) (Jury confused about meaning of "proximate cause" and ultimate effect of its answers. "[W]e are not concerned with what the jury hoped the outcome would be.").

148. FED. R. CIV. P. 49 gives the trial judge great discretion as to the form of jury instructions.

149. See, e.g., *Porche v. Gulf Mississippi Marine Corp.*, 390 F. Supp. 624, 632 (E.D. La. 1975); *Loup-Miller v. Brauer & Assoc.-Rocky Mountain*, 572 P.2d 845, 847 (Colo. App. 1977); *Seppi v. Betty*, 99 Idaho 186, 195, 579 P.2d 683, 688-92 (1978); *Krengel v. Midwest Automatic Photo, Inc.*, 295 Minn. 200, 211, 203 N.W.2d 841, 848 (1973); *Roman v. Mitchell*, 82 N.J. 336, 345, 413 A.2d 322, 327 (1980).

150. *Roman*, 82 N.J. at 345, 413 A.2d at 327.

151. See cases cited *supra* note 149.

152. *Roman*, 82 N.J. at 347, 413 A.2d at 327; *Seppi*, 99 Idaho at 195, 579 P.2d at 692. But see *supra* text accompanying notes 14-39.

#### 4. Effect of the Adversary System

Even if the problems of resistance, difficulty, and procedural stumbling blocks were overcome, those lawyers wishing to rewrite jury instructions would face another challenge. The form that jury instructions take in actual cases is not under the control of any single lawyer. Instead, the drafting of jury instructions, like other parts of a trial, is a part of the adversary system and involves both sides of the dispute plus the judge.

There are, then, at least three parties advocating different versions of instructions. Because of the adversary system, the lawyers have to be primarily concerned with presenting instructions that benefit their clients, and only secondarily concerned with improving the legal system as a whole by drafting clear instructions.<sup>153</sup> More important, the ultimate decision on the form of instructions is made by the trial judge. Unfortunately, judges are the ones with the least to gain by using comprehensible but unorthodox instructions. Lawyers, at least, may be interested in rewriting instructions if they perceive that it benefits their clients. Judges, however, lack that motivation and instead risk reversal by deviating by one word from the pattern instruction or the language of appellate opinions. The adversary system, then, tends to discourage lawyers from writing the clearest possible instructions and puts the ultimate control in the hands of the party with the least incentive to change.

#### B. Forces for Change

It requires only the most cursory examination of the American trial process to realize that lawyers *do* care about how well they communicate with jurors. Voir dire, which occurs at the earliest stage of the jury trial process, is actually a highly developed form of communication whereby each lawyer vigorously attempts to find the right jurors for the case at hand.<sup>154</sup> Following voir dire, the lawyers often make opening statements in which they try to explain their cases clearly to the jurors who have been chosen. Opening statements are followed by presentation of evidence, perhaps the ultimate communication. Presentation of evidence is the end product of a very lengthy and very intensive trial preparation process that the lawyer undertakes for the sake of effective communication.<sup>155</sup> Finally, the trial lawyer's job ends with what is hoped will be a dramatic and persuasive summation speech delivered to the jury at the end of the trial itself.<sup>156</sup>

Lawyers want to communicate with juries effectively and lawyers are will-

153. C. WOLFRAM, *MODERN LEGAL ETHICS*, § 10.4.2 at 583 (1986); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-101; EC 8-1 (1980).

154. See, e.g., B. BONORA & E. KRAUSS, *JURY WORK* (2d ed. 1983); R. KEETON, *TRIAL TACTICS AND METHODS* §§ 7.3-7.7 (2d ed. 1973); Blue & Boudreaux, *The "Liability Crisis" and Voir Dire: How to Find "Tort-Reform" Proponents Among Prospective Jurors*, TRIAL, Feb. 1987, at 59.

155. K. HEGLAND, *TRIAL PRACTICE AND SKILLS*, chs. 2-4 (1978); Colley, *Friendly Persuasion, Gaining Attention, Comprehension and Acceptance in Court*, TRIAL, Aug. 1981, at 42 (1981); Imwinkelreid, *Demeanor Impeachment: Law and Tactics*, 9 AM. J. TRIAL ADVOC. 183 (1985).

156. R. KEETON, *supra* note 154, §§ 7.12-7.19; see, Bernard, Cohen & Lupfer, *The Influence of Juror's Level of Moral Reasoning and the Nature of Closing Arguments in Determining the Verdict in a Civil Case: A Report of Two Experiments*, 9 LAW & PSYCHOLOGY REV. 93 (1985); Goldberg, *Courting the Jury to Reduce Damages*, 29 FOR THE DEFENSE 10 (1987).

ing to spend prodigious amounts of their time, effort, and financial resources to do so. Absent countervailing forces, lawyers *will* make the effort to communicate with jurors when provided with the necessary insights and tools.

How would the process of change work, assuming adequate motivation? The models are found in the experience of the bench and bar in formulating codes of procedure and codes of evidence. Although the process is painful and costly, the American bench and bar have managed quite well to come together in compromise to improve codes of trial procedure and codes of evidence. In each instance these efforts are undertaken on the highest plane, motivated by a recognition of the need for improvement, and through a selfless willingness to make uncomfortable changes in the interest of abstract justice. Using these same structures, lawyers and judges could come together to improve the comprehensibility of jury instructions.

In fact, committees of lawyers and judges have created pattern jury instructions in a number of jurisdictions. Although there were abortive efforts in other states, California's *Book of Approved Jury Instructions*, published in 1938, was the first important set of pattern instructions.<sup>157</sup> It was enthusiastically received, and was soon followed by pattern instructions in the District of Columbia, Florida, Chicago, Nebraska, Colorado, and Utah.<sup>158</sup> Other states followed in the 1950s and 60s.<sup>159</sup> Today almost every state has pattern instructions of some kind.<sup>160</sup>

One of the primary goals of the committees drafting pattern instructions has been increasing juror understanding.<sup>161</sup> Unfortunately, this goal has seldom been reached. Because pattern instructions are drafted by committees of judges, lawyers, and law professors, concerns about legal accuracy and comparative advantage tend to outweigh concerns about clarity. Indeed, most of the social science research that has proved instructions to be unintelligible, including the research reported in this Article, has been done using pattern instructions.<sup>162</sup>

Two relatively minor changes in the techniques of committees drafting pattern instructions would go a long way towards solving the problem of incomprehensible instructions. First, the emphasis of the lawyers and judges charged with the responsibility of drafting pattern jury instructions must change from one of stating the law in every minute detail to one of clearly stating the law so that jurors can understand it. Second, the membership of such drafting committees must include lay persons. Lawyers and judges must realize that the education and experience that produces good lawyers and judges does not necessarily produce good writers of conventional prose.<sup>163</sup> Further, the socialization of

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157. See R. NIELAND, *supra* note 8, at 6-8.

158. R. NIELAND, *supra* note 8, at 6-8.

159. R. NIELAND, *supra* note 8, at 6-8.

160. R. NIELAND, *supra* note 8, at 12, 71-105.

161. R. NIELAND, *supra* note 8, at 22.

162. See, e.g., Charrow, *supra* note 5, at 1311.

163. Few law schools offer courses which identify or discuss the component parts of jury instructions, their arrangements, and their purpose. This void in the formal educational process is generally filled by attorneys blindly copying instructions offered in similar cases

lawyers into legal discourse prevents them from "hearing" the instructions as jurors would. It may take a person without legal training to anticipate certain comprehension problems.

These suggestions are so minor that one wonders why they have not already been adopted. Some states have made such efforts. In Pennsylvania, a subcommittee headed by two psycholinguists tested proposed pattern instructions for clarity.<sup>164</sup> A committee sponsored by the supreme court and state bar of Arizona tested the existing pattern instructions, found that jurors understood only half of them, and rewrote the instructions using principles of learning and communication theory.<sup>165</sup> In the late 1970s Professor Stephen Saltzburg of the University of Virginia Law School and Dean Harvey S. Perlman of the University of Nebraska College of Law were hired to draft a set of civil pattern jury instructions for the Alaska courts. Saltzburg and Perlman used the techniques recommended by Elwork and his colleagues<sup>166</sup> and successfully drafted the instructions with simplicity of expression as their prime concern.<sup>167</sup>

Since that time, the Alaska instructions have undergone several revisions; however, they continue to be excellent models of clarity. An example illustrates the point. Consider the relatively simple legal issue of a driver's duty when executing a left turn. A typical jury instruction on that issue reads as follows:

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.<sup>168</sup>

The corresponding Alaska instruction reads :

A driver of a vehicle intending to turn left (within an intersection) (into an alley) (from a highway into a private road or driveway) must yield the right-of-way to a vehicle approaching from the opposite direction if the approaching vehicle is so close as to prevent the left from being made safely.<sup>169</sup>

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by other attorneys practicing in the community. Little regard is given for style, composition and word choice. Time constraints upon the typical attorney preclude creative, stylistic writing. Moreover, trial lawyers will occasionally delay writing the instructions until the trial has started, anticipating that the case may settle on the courthouse steps or a plea bargain may be reached as the jury is impaneled. The inevitable result is a confused set of hastily prepared instructions.

Farrell, *Communication in the Jury Room: Jury Instructions*, 85 W. VA. L. REV. 5, 21 (1982).

164. R. NIELAND, *supra* note 8, at 25.

165. R. NIELAND, *supra* note 8, at 26.

166. *See supra* note 78 and accompanying text.

167. H. PERLMAN & S. SALTZBURG, ALASKA PATTERN CIVIL JURY INSTRUCTIONS (1981). Saltzburg and Perlman also developed a set of pattern instructions for federal criminal cases. S. SALTZBURG & H. PERLMAN, FEDERAL CRIMINAL JURY INSTRUCTIONS (1985); *see* discussion in Perlman, *supra* note 123, at 531-34.

168. G. DOUTHWAITE, JURY INSTRUCTIONS IN AUTOMOBILE NEGLIGENCE ACTIONS 249 (1986).

169. H. PERLMAN, *supra* note 167, § 5.13.

A comparison reveals subtle but distinctive differences. Note that the number of words used in the Alaska instruction has been held to a minimum. Note also that the Alaska instruction avoids the use of jargon found in the quoted typical instruction, e.g. "exercise," "ensure," "such movement," and "hazard." The Alaska instruction is better organized, and is also written so as to eliminate confusion regarding the relationship between ordinary care and avoiding a hazard. Such differences, although minor when considered separately, have a cumulative effect significant enough to produce a meaningful difference in the comprehensibility of the Alaska instruction. Similar rewriting could be undertaken by the courts or bar association of any state.

#### IV. SUGGESTIONS, OBSERVATIONS AND CONCLUSION

Increased awareness of the problem of juror comprehension is not enough. Although books and articles demonstrating juror confusion continue to appear, there has been no discernible change in the way most cases are submitted to juries. The forces against change are simply too strong for individual lawyers to overcome. If we really want comprehensible instructions to be the norm, these forces must be minimized or overcome.

First, changes in jury instructions would need to be supported by changes in the law that would create incentives for lawyers to worry as much about comprehensibility as they do about technical correctness. These changes might take the form of rules of evidence and procedure allowing lawyers to prove that jurors misunderstood the instructions and making such misunderstanding grounds for reversal.<sup>170</sup> Alternatively, appellate courts could use an objective standard of comprehensibility, judging the instructions by a standard such as that provided by the Charrows' research.<sup>171</sup> Under either alternative, juror comprehension must be an important factor on appeal so that judges concerned about their reversal rates and lawyers wanting to sustain their victories on appeal will make the effort to write comprehensible instructions.

Second, changes must be made in the law governing the submission of jury

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170. This "subjective misunderstanding" approach could create other problems. Tests have shown that juror perception of their own degree of understanding is sometimes unreliable. *See, e.g., O'Mara & von Eckartsberg, Proposed Standard Jury Instructions—Evaluation of Usage and Understanding*, 48 PA. B. A. Q. 542, 549-51 (1977). Some people fear that jurors with second thoughts about their verdicts would feign misunderstanding in an effort to force a new trial. Appellate courts have expressed fears that a requirement of subjective understanding would cause too many cases to need retrial. *See, e.g., Whited v. Powell*, 285 S.W.2d 364, 367-68 (Tex. 1956). It could also be difficult to decide how many jurors would need to demonstrate misunderstanding before the error would be considered a harmful one. These problems could be mitigated through the use of rules governing jury investigations and through a requirement that juror misunderstanding be serious. *Cf. Crump, Jury Misconduct, Jury Interviews, and the Federal Rules of Evidence: Is the Broad Exclusionary Principle of Rule 606(b) Justified?*, 66 N.C.L. REV. 509, 539-43 (1988). Because the problems are not completely soluble, however, we prefer solutions that focus on prevention rather than cure.

171. Charrow, *supra* note 5, at 1359-60. Critics of an objective standard doubt the courts' ability to evaluate instructions for comprehensibility. In other contexts, however, courts often evaluate various writings to see if they can be understood by the average person. *See, e.g., Manzo v. Ford*, 731 S.W.2d 673, 676 (Tex. Ct. App. 1987) (courts construe language in contracts by determining how the "reasonable man" would have understood the language).



instructions to eliminate requirements that hinder comprehension. Judges should be permitted to comment on the evidence and to inform the jury of the effect of its answers.<sup>172</sup> From a mechanical standpoint, juror comprehension could be improved if each juror were given a copy of the instructions to take into the jury room.<sup>173</sup>

Third, the movement to draft clear jury instructions must be taken out of the realm of the adversary system. It is unreasonable to expect opposing counsel in the heat of battle to worry about juror comprehension as much as wording slanted to benefit their clients. It is unrealistic to expect judges to worry about juror comprehension as much as their reversal rates. For these reasons, it is the pattern jury movement that provides the best hope for improvement. Although pattern instructions to date have failed to communicate clearly more often than they have succeeded, better knowledge of psycholinguistic factors, expanded membership of drafting committees, and actual testing of proposed pattern instructions could greatly improve the clarity of pattern instructions. Such a project would require a coordinated effort by the judiciary and both sides of the trial bar.

The problem is evident: juror comprehension of their instructions is pitifully low. Likewise, the general scheme of solutions is evident. Unfortunately, prospects for actual change appear to be dim, because those in control lack the motivation to make the needed changes. Real change would require all the parties involved, trial and appellate courts, state bar committees, and the trial bar, to rise above their narrowly perceived self-interest and act instead in the interests of justice.

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172. See *supra* text accompanying notes 132-52.

173. R. HASTIE, S. PENROD & N. PENNINGTON, *supra* note 54, at 231 (1983) (arguing that providing jurors with a written copy of the court's instructions aids jury comprehension and understanding).

## APPENDIX A

## PROXIMATE CAUSE

(Pattern Charge)

“Proximate cause” means that cause which, in a natural and continuous sequence, produces an event, and without which cause such event would not have occurred; and in order to be a proximate cause, the act complained of must be such that a person using ordinary care would have foreseen that the event, or some similar event, might reasonably result therefrom. There may be more than one proximate cause of an event.

## NEW AND INDEPENDENT CAUSE

(Pattern Charge)

“New and independent cause” means the act of a separate and independent agency, not reasonably foreseeable, which destroys the causal connection, if any, between the act inquired about and the occurrence in question, and thereby becomes the immediate cause of the occurrence.

## NEGLIGENCE

(Pattern Charge)

“Negligence” means failure to use ordinary care; that is to say, failure to do that which a person of ordinary prudence would have done under the same or similar circumstances, or doing that which a person of ordinary prudence would not have done under the same or similar circumstances.

## PRESUMPTION OF INNOCENCE

(Pattern Charge)

All persons are presumed to be innocent and no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt. The fact that the defendant has been arrested, confined or indicted for, or otherwise charged with, the offense gives rise to no inference of guilt at his trial. In case you have a reasonable doubt as to defendant’s guilt after considering all of the evidence before you, and these instructions, you will acquit him. You are the exclusive judges of the facts proved, and of the credibility of the witnesses and the weight to be given their testimony, but the law you shall receive in these written instructions, and you must be governed thereby.

## ACCOMPLICE TESTIMONY

(Pattern Charge)

An accomplice, as the term is here used, means anyone connected with the crime charged, as a party thereto, and includes all persons who are connected with the crime, as such parties, by unlawful act or omission on their part transpiring either before or during the time of the commission of the offense. A

person is criminally responsible as a party to an offense if the offense is committed by his own conduct, by the conduct of another for which he is criminally responsible, or by both. Mere presence alone, however, will not constitute one a party to an offense.

A person is criminally responsible for an offense committed by the conduct of another if, acting with the intent to promote or assist the commission of the offense, he solicits, encourages, directs, or aids or attempts to aid the other person to commit the offense. The term "conduct of another" means any act or omission and its accompanying mental state. A conviction cannot be had upon the testimony of an accomplice unless the jury first believes that the accomplice's evidence is true and that it shows that the defendant is guilty of the offense charged against him, and then you cannot convict the defendant upon said testimony unless the accomplice's testimony is corroborated by other evidence tending to connect the defendant with the offense charged, and the corroboration is not sufficient if it merely shows the commission of the offense, but it must tend to connect the defendant with its commission.

## APPENDIX B

### PROXIMATE CAUSE

(Rewritten)

An event often has many causes. In order to be a "proximate cause," three things must be true. First, the cause naturally and continuously led to the event. Second, the event would not have happened without the proximate cause. Third, a person using ordinary care would have foreseen that the proximate cause might reasonably lead to the event or to some similar event. There may be more than one proximate cause of an event.

### NEW AND INDEPENDENT CAUSE

(Rewritten charge)

Sometimes when a natural chain of events is set in motion, that chain is broken by a "new and independent cause." The law defines "new and independent cause" in its own particular way. To be a "new and independent cause" the cause must be all of the following:

First: The cause must, indeed, break a chain of events already set in motion so that it becomes the immediate cause of what happens.

Second: The cause must come from a source that is separate and independent from the defendant.

Third: The cause must be one that the defendant could not have foreseen using ordinary care.

### NEGLIGENCE

(Rewritten Charge)

A person can become negligent in two ways. The first way a person becomes negligent is by doing something that a person of ordinary care would not have done in the same situation or in a similar situation. The second way a person becomes negligent is by failing to do something that a person of ordinary care would have done in the same situation or in a similar situation.

## PRESUMPTION OF INNOCENCE

(Rewritten Charge)

My job as judge is to tell you about the laws that apply to this case. As jurors, you have two jobs.

First: In reaching your verdict you must follow the laws that I am explaining to you; and

Second: You must decide what the facts are in this case. In other words, you must decide what happened.

To decide what the facts are you will have to decide how much of each witness's testimony you believe, and how much weight to give what is believed.

Our law states that anyone charged with a crime is presumed to be innocent unless the prosecution proves each part of the crime beyond a reasonable doubt. In deciding whether the prosecution has proved each part of the crime beyond a reasonable doubt you must think about all of my instructions and about all of the evidence before you. After you have done this, if you have a reasonable doubt about the existence of any part of the crime you must find the defendant not guilty.

As part of the normal legal process, the defendant has been arrested, jailed, and charged, but these facts do not suggest that the defendant may be guilty, and you must not consider these facts as any evidence of the defendant's guilt.

## ACCOMPLICE TESTIMONY

(Rewritten Charge)

This instruction is in two parts. First, I am going to tell you about the kind of witness known as an accomplice. The second part of the instruction will tell you when you can consider testimony from an accomplice.

To be an accomplice, a person must intend to help with the crime, and with that intention, a person must engage in one or more of the following activities by act or by omission either before or during the commission of the offense:

1. Solicit another person to commit the crime;
2. Encourage another person to commit the crime;
3. Direct another person to commit the crime;
4. Help another person to commit the crime; or
5. Try to help another person to commit the crime.

Merely being at the scene of a crime does not make a person an accomplice.

Now, when can you use testimony from an accomplice?

You cannot use the testimony of an accomplice to convict the defendant unless:

First, you believe that the accomplice testimony is true.

Second, you believe that the evidence from the accomplice shows that the defendant is guilty of the crime charged in this case.

Third, there is some evidence *other than* the evidence from the accomplice which tends to connect *the defendant* with the commission of the crime. It is not enough that this other evidence shows that the crime was committed by *someone*. It must tend to show that the defendant committed the crime.

Without all three things you must totally ignore the evidence from an accomplice.

## APPENDIX C

Dear Juror:

Like you, we want our jury system to be as good as it can be. We are curious about whether the instructions judges give to jurors at the end of a trial are clear and understandable, so we have designed an experiment and we have received permission to conduct the experiment here in the central jury room. We need your help to make the experiment work.

All you have to do to help us with the experiment is go now to the table in the back of the room and listen to a cassette tape that will be played for you individually. We do not need to know your name or anything about you personally. We will not give you a test.

On the tape you will hear a judge reading instructions to a jury. After each instruction you will have a chance to speak into a cassette recorder and say what you think the judge on the tape meant. No one will ask *you* any questions! Remember, *we are not testing you* — we are testing the instructions that judges give.

The experiment will take about 20 minutes. If you want to help with the experiment please come to the back of the room now.

If someone else is listening to the tape, please take a seat in the last row of chairs and we will call you as soon as we are ready.

Sincerely,

Walter W. Steele, Jr.  
Professor of Law

Elizabeth G. Thornburg  
Director of Legal Research & Writing

APPENDIX D  
PROXIMATE CAUSE  
(Pattern)

- \_\_\_\_\_ 01 produces an event in a natural sequence
- \_\_\_\_\_ 02 and
- \_\_\_\_\_ 03 produces an event in continuous sequence
- \_\_\_\_\_ 04 without it the event would not have occurred
- \_\_\_\_\_ 05 a person using ordinary care
- \_\_\_\_\_ 06 would have foreseen
- \_\_\_\_\_ 07 that the event
- \_\_\_\_\_ 08 or some similar event
- \_\_\_\_\_ 09 might reasonably
- \_\_\_\_\_ 10 result from the proximate cause
- \_\_\_\_\_ 11 there may be more than one proximate cause of an event

PROXIMATE CAUSE (Rewritten)

- \_\_\_\_\_ 12 an event has many causes
- \_\_\_\_\_ 13 a proximate cause has three components
- \_\_\_\_\_ 14 lead naturally to the event
- \_\_\_\_\_ 15 and
- \_\_\_\_\_ 16 lead continuously to the event
- \_\_\_\_\_ 17 without the proximate cause event would not happen
- \_\_\_\_\_ 18 a person using ordinary care
- \_\_\_\_\_ 19 would have foreseen
- \_\_\_\_\_ 20 that the proximate cause
- \_\_\_\_\_ 21 might reasonably
- \_\_\_\_\_ 22 lead to the event
- \_\_\_\_\_ 23 or lead to some similar event
- \_\_\_\_\_ 24 there may be more than one proximate cause

NEW AND INDEPENDENT CAUSE (Pattern)

- \_\_\_\_\_ 25 an act of a separate agency
- \_\_\_\_\_ 26 and
- \_\_\_\_\_ 27 of an independent agency
- \_\_\_\_\_ 28 not reasonably foreseeable
- \_\_\_\_\_ 29 by the defendant
- \_\_\_\_\_ 30 which destroys the connection between the original cause and
- \_\_\_\_\_ 31 the event in question
- \_\_\_\_\_ 32 becomes the immediate cause of what happens

NEW AND INDEPENDENT CAUSE (Rewritten)

- \_\_\_\_\_ 33 sometimes a chain of events is broken
- \_\_\_\_\_ 34 by a new and independent cause
- \_\_\_\_\_ 35 new and independent cause must be all of the following
- \_\_\_\_\_ 36 it must break an existing chain of events

- \_\_\_\_\_ 37 and become the immediate cause of what happens
- \_\_\_\_\_ 38 it must come from a source separate from the defendant
- \_\_\_\_\_ 39 it must come from a source independent from the defendant
- \_\_\_\_\_ 40 it must not be foreseeable
- \_\_\_\_\_ 41 by the defendant
- \_\_\_\_\_ 42 using ordinary care

#### NEGLIGENCE (Pattern)

- \_\_\_\_\_ 43 means failure
- \_\_\_\_\_ 44 to use ordinary care
- \_\_\_\_\_ 45 failure to do
- \_\_\_\_\_ 46 what a person of ordinary prudence would do
- \_\_\_\_\_ 47 under same circumstances
- \_\_\_\_\_ 48 or
- \_\_\_\_\_ 49 similar circumstances
- \_\_\_\_\_ 50 or
- \_\_\_\_\_ 51 doing
- \_\_\_\_\_ 52 what a person of ordinary prudence would not do
- \_\_\_\_\_ 53 under same circumstances
- \_\_\_\_\_ 54 or
- \_\_\_\_\_ 55 under similar circumstances

#### NEGLIGENCE (Rewritten)

- \_\_\_\_\_ 56 ways to be negligent
- \_\_\_\_\_ 57 does something that
- \_\_\_\_\_ 58 person using ordinary care
- \_\_\_\_\_ 59 would not have done
- \_\_\_\_\_ 60 in the same situation
- \_\_\_\_\_ 61 or similar situation
- \_\_\_\_\_ 62 or
- \_\_\_\_\_ 63 fails to do something that
- \_\_\_\_\_ 64 person using ordinary care
- \_\_\_\_\_ 65 would have done
- \_\_\_\_\_ 65A in same situation
- \_\_\_\_\_ 65B or similar situation

#### PRESUMPTION OF INNOCENCE (Pattern)

- \_\_\_\_\_ 66 all persons (defendant) presumed innocent
- \_\_\_\_\_ 67 no person (defendant) can be convicted unless
- \_\_\_\_\_ 68 each element of the offense
- \_\_\_\_\_ 69 proved by prosecution beyond reasonable doubt
- \_\_\_\_\_ 70 no inference of guilt because defendant:
- \_\_\_\_\_ 71 arrested
- \_\_\_\_\_ 72 jailed
- \_\_\_\_\_ 73 indicted or charged with offense
- \_\_\_\_\_ 74 after considering evidence



- \_\_\_\_\_ 75 and
- \_\_\_\_\_ 76 after considering these instructions
- \_\_\_\_\_ 77 if have reasonable doubt
- \_\_\_\_\_ 78 as to defendant's guilt
- \_\_\_\_\_ 79 must acquit
- \_\_\_\_\_ 80 exclusive judge of facts
- \_\_\_\_\_ 81 exclusive judge of credibility of witnesses
- \_\_\_\_\_ 82 exclusive judge of weight to be given testimony
- \_\_\_\_\_ 83 law comes from instructions
- \_\_\_\_\_ 84 must follow law in instructions

#### PRESUMPTION OF INNOCENCE (Rewritten)

- \_\_\_\_\_ 85 judge explains the law
- \_\_\_\_\_ 86 jurors have two jobs
- \_\_\_\_\_ 87 follow the law (1)
- \_\_\_\_\_ 88 decide what happened (2)
- \_\_\_\_\_ 89 must decide how much of each witness's testimony to believe
- \_\_\_\_\_ 90 must decide how much weight to be given to what is believed
- \_\_\_\_\_ 91 any person charged presumed innocent
- \_\_\_\_\_ 92 unless prosecution proves
- \_\_\_\_\_ 93 each part of the crime
- \_\_\_\_\_ 94 beyond reasonable doubt
- \_\_\_\_\_ 95 to decide that must think about judge's instructions
- \_\_\_\_\_ 96 to decide that must think about all evidence
- \_\_\_\_\_ 97 after done that
- \_\_\_\_\_ 98 if have reasonable doubt
- \_\_\_\_\_ 99 about existence of any part of crime
- \_\_\_\_\_ 100 must find not guilty
- \_\_\_\_\_ 101 part of normal legal process is:
- \_\_\_\_\_ 102 arrest
- \_\_\_\_\_ 103 jail
- \_\_\_\_\_ 104 charged
- \_\_\_\_\_ 105 does not mean defendant guilty
- \_\_\_\_\_ 106 must not consider as any evidence of guilt

#### ACCOMPLICE TESTIMONY (Pattern)

- \_\_\_\_\_ 107 accomplice is anyone connected with crime charged
- \_\_\_\_\_ 108 by unlawful act
- \_\_\_\_\_ 109 or omission
- \_\_\_\_\_ 110 before offense
- \_\_\_\_\_ 111 or
- \_\_\_\_\_ 112 during offense
- \_\_\_\_\_ 113 by his own conduct
- \_\_\_\_\_ 114 or
- \_\_\_\_\_ 115 conduct of another
- \_\_\_\_\_ 116 for whom he is criminally responsible

_____	117	or
_____	118	by both
_____	119	mere presence not significant
_____	120	criminal responsibility for conduct of another if:
_____	121	with intent to promote commission of offense
_____	122	or
_____	123	with intent to assist commission of offense:
_____	124	solicit
_____	125	encourage
_____	126	direct
_____	127	aid
_____	128	or attempt to aid
_____	129	“conduct of another” means:
_____	130	act
_____	131	or omission
_____	132	and
_____	133	accompanying mental state
_____	134	no conviction on testimony of accomplice
_____	135	unless believe accomplice evidence is true
_____	136	and
_____	137	accomplice evidence shows defendant guilty
_____	138	but still cannot convict
_____	139	unless accomplice testimony corroborated
_____	140	by other evidence tending to connect defendant to crime charged
_____	141	and
_____	142	corroboration not sufficient
_____	143	if merely shows offense
_____	144	to be sufficient must tend to connect defendant

#### ACCOMPLICE TESTIMONY (Rewritten)

_____	145	accomplice intends to help with the crime
_____	146	with that intent
_____	147	by act
_____	148	or
_____	149	by omission
_____	150	does one
_____	151	or more
_____	152	before
_____	153	or
_____	154	during
_____	155	the commission of the offense
_____	156	solicit
_____	157	encourage
_____	158	direct
_____	159	help

\_\_\_\_\_ 160 try to help  
\_\_\_\_\_ 161 merely being there not enough  
\_\_\_\_\_ 162 cannot use accomplice testimony unless  
\_\_\_\_\_ 163 believe it (1)  
\_\_\_\_\_ 164 and  
\_\_\_\_\_ 165 but still cannot convict unless  
\_\_\_\_\_ 166 shows defendant guilty (2)  
\_\_\_\_\_ 167 there is additional evidence (3)  
\_\_\_\_\_ 168 and  
\_\_\_\_\_ 169 that evidence tends to connect defendant with crime  
\_\_\_\_\_ 170 additional evidence not sufficient  
\_\_\_\_\_ 171 must show defendant committed crime  
\_\_\_\_\_ 172 must totally ignore accomplice testimony without above

