



Tennessee Journal of Law and Policy

Volume 5 | Issue 2

Article 3

April 2014

Asking Jurors to do the Impossible

Peter Tiersma
Loyola Law School

Follow this and additional works at: <https://trace.tennessee.edu/tjlp>



Part of the [Law Commons](#)

Recommended Citation

Tiersma, Peter (2014) "Asking Jurors to do the Impossible," *Tennessee Journal of Law and Policy*. Vol. 5 : Iss. 2 , Article 3.

Available at: <https://trace.tennessee.edu/tjlp/vol5/iss2/3>

This Article is brought to you for free and open access by Volunteer, Open Access, Library Journals (VOL Journals), published in partnership with The University of Tennessee (UT) University Libraries. This article has been accepted for inclusion in Tennessee Journal of Law and Policy by an authorized editor. For more information, please visit <https://trace.tennessee.edu/tjlp>.

ESSAY

ASKING JURORS TO DO THE IMPOSSIBLE

*Peter Tiersma**

I. Introduction

Being a juror has never been easy. Several hundred years ago, English jurors were confined “without meat, drink, fire, or candles” until they had finished their deliberations.¹ If they failed to reach a verdict before the judges left town (English judges would travel from the royal courts at Westminster to various cities to try cases), the jurors were supposed to be placed in a wagon and “carted” to the judges’ next destination.²

Today, the rigors of jury service are more prosaic. Jurors are paid almost nothing in most jurisdictions, so unless they work for the government or have an employer who will pay them for not working, being on a jury can be a substantial financial hardship. Arranging for childcare and even finding a parking space near the courthouse are further annoyances. Judges and court administrators have worked hard to alleviate these burdens.³ I would be an ungrateful guest at this symposium if I failed to mention that the courts of Tennessee have enacted a number of

* Professor of Law and Hon. William Matthew Byrne, Jr. Chair, Loyola Law School.

¹ J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 88-89 (3rd ed. 1990).

² *Id.*

³ See A.B.A. PRINCIPLES FOR JURIES AND JURY TRIALS, <http://www.abanet.org/juryprojectstandards/principles.pdf> (last visited Mar. 29, 2009) for some proposals to alleviate these problems. See also G. Thomas Munsterman, *A Brief History of State Jury Reform Efforts*, 79 JUDICATURE 216 (1996).

significant jury reforms.⁴ Nonetheless, for many citizens it can still be quite burdensome to perform this important civic duty.

Once a jury is empanelled, the difficulties continue and may even worsen. Our legal system commonly asks jurors to do things during trial and deliberations that are either quite hard to do, or may actually be impossible. In the rest of this article I will list some of the difficult or impossible tasks that we expect jurors to perform.

I will end by proposing some solutions. Sometimes all the legal system can do is honestly admit that it sometimes expects jurors to do something that no human being can accomplish. On other occasions, it may need to break down a complex task into smaller parts, accompanied by clear instructions in plain English. I anticipate that some of the other speakers at this symposium will advance other ideas.

II. Travel Back in Time

Jurors are routinely told that their job is to decide “the facts,” or “what actually happened,” or simply “the truth.”⁵ Sometimes the “facts” of a case relate to an existing state of affairs. However, more commonly, the jury has to decide what happened in the past. Typically, the truth is a hotly disputed issue, and each party’s narrative may be at least partly accurate, making it necessary for the jury to reconstruct the facts based on incomplete or conflicting evidence. Even more difficult is

⁴ Neil P. Cohen & Daniel R. Cohen, *Jury Reform in Tennessee*, 34 U. MEM. L. REV. 1 (2003). On the issue of the comprehensibility of jury instructions, which is my main area of interest, the changes in Tennessee have been more procedural (mostly involving timing and providing written copies) than substantive. *Id.* at 49-59.

⁵ See Judicial Council of California, Criminal Jury Instructions, No. 104; Revised Ariz. Jury Instructions (Crim.), No. 1 [hereinafter Calcrim].

to try to determine the contemporaneous mental state of those who participated in the events.

The legal system therefore often expects jurors to travel back in time and, once there, to ascertain exactly what happened and the intentions of those who made it happen. Doing so with complete confidence is impossible, of course.

The law's answer to this problem is to redefine "the truth" as that state of affairs that the jury finds is more likely than not to be true, or clearly and convincingly true, or true beyond a reasonable doubt.

In addition, the legal system uses legal presumptions and the burden of proof to resolve factual indeterminacies. If what actually happened is unclear, the party who has been assigned the burden of proof will probably lose its case.

Standards of evidence and burdens of proof are a reasonable solution to the impossibility of traveling back in time. Yet they are to some extent inconsistent with the system's insistence that jurors must determine "the facts," "the truth," or "what really happened."

My impression is that jurors are sometimes distressed by this rhetorical dissonance. It is not unusual for them to return to court for additional instructions on the burden of proof or on the meaning of reasonable doubt.⁶ Most judges are afraid to try to explain it, and they are even more reluctant to give the jury examples to illustrate the concept. Some of the difficulties could be resolved by using clearer language to explain the burden; many existing instructions are quite convoluted and full of archaic language.⁷ Illustrations from cases that have been upheld on appeal might also be helpful.

All the same, sometimes we should probably just admit to jurors that they cannot really travel back in time.

⁶ See *People v. Ruge*, 35 Cal. Rptr. 2d 830 (Cal. Ct. App. 1994).

⁷ PETER TIERSMA, *LEGAL LANGUAGE*, 194-95 (1999).

Absolute truth is unattainable, so they should just do the best they can. It is not unusual for judges to admit as much to juries that have deadlocked, as is the case in Illinois: “In a large proportion of cases absolute certainty cannot be expected nor does the law require it.”⁸ Why not say so right at the beginning of every trial.

III. Divine the Future

We are not yet finished with time travel. The law also expects jurors to be oracles or fortunetellers. Obviously, traveling to the future is even more difficult than transporting oneself to the past. It truly is impossible.

The issue occasionally arises in the criminal context. In capital cases, for instance, jurors may sometimes need to decide a defendant’s future dangerousness. The question arises more often in civil trials, especially with respect to damages. For example, juries may have to predict what type of employment a badly injured teenager would have obtained once he grew up and how much money he would have earned from the time that he would have begun work until he would have retired, absent the injury.⁹ Once it has made this prediction, the jury typically needs to predict what the interest rate or rate of inflation will be in future years so they can properly reduce the amount to present value.¹⁰

Likewise, where a woman’s husband is severely injured and can no longer perform household tasks or provide affection or engage in sexual relations in the future, a jury may need to predict how many hours a week he would have worked around the house, absent the injury,

⁸ Ill. Pattern Instructions, No. 1.06.

⁹ See *Athridge v. Iglesias*, 950 F.Supp. 1187 (Dist. D.C. 1996). A judge decided the *Athridge* case, but it could just as well have been a jury.

¹⁰ See, e.g., Tenn. Pattern Jury Instructions, Civ., No. 14.54.

how much affection he would have provided, absent the injury, and the quantity and quality of the sexual relations that the couple would have had, absent the injury. Then it must place a dollar figure on these activities. Most jurisdictions further require that compensation for household services also be reduced to present value, but not the damages for lost affection and sexual relations.

In the Arizona Jury Project, which involved videotaping around 50 civil trials (including deliberations), one of the cases required calculating the plaintiff's probable life expectancy, which was complicated because the plaintiff was in poor health and greatly overweight before the injury. One juror aptly commented: "we need a crystal ball."¹¹

Again, the burden or standard of proof can be helpful, but at the same time it is bizarre to think that a jury can decide that more likely than not a badly-injured teenager would have become a brain surgeon at age 29 earning \$150,000 per year until she retired at age 67. The preponderance standard makes little sense in this context. The jury might decide that this is the most likely outcome in light of the evidence available to them, but it is not accurate to say that this specific outcome is more likely than all the other possible options.

The best approach, once again, is to be honest with jurors and to admit that no one can predict the future. Tell them that someone has to decide these difficult questions, that they have been selected to be that "someone," and that they should do the best they can based on the evidence that they received.

IV. Ignore the Obvious

There is a popular expression that goes, "Don't think of a pink elephant." Of course, the first thing that you

¹¹ Shari Seidman Diamond & Neil Vidmar, *Jury Room Ruminations on Forbidden Topics*, 87 VA. L. REV. 1857, 1873-74 (2001).

will think of is a pink elephant. It is hard to ignore the obvious. Efforts to suppress a thought tend only to make it more salient.¹²

Jury instructions occasionally admonish jurors to ignore the obvious. In just about every criminal case, judges tell jurors that the fact that the defendant is on trial is not evidence that he might have committed the crime. This is a bedrock principle in the common-law system of justice. Yet as a factual assertion, it is hard to justify. If it is really true (as defense lawyers are wont to suggest) that it is no more likely that the defendant committed the crime than any randomly-selected person on the street, our criminal justice system would long ago have collapsed. No doubt, police and prosecutors are sometimes stupid, corrupt, or politically-motivated, but as a factual matter the defendant in a criminal case is much more likely to have committed the crime in question than the average local citizen.

There is research indicating that jurors do not always comprehend traditional instructions on the burden of proof and the presumption of innocence.¹³ Part of the reason may be that, as noted above, these concepts contradict ordinary logic. Whenever legal concepts are counterintuitive, it is that much more important to convey the information as clearly as possible. Understandable statements of the presumption of innocence are therefore critical.

In addition, as research by Shari Diamond and Jonathan Casper suggests, an admonition is more likely to

¹² See Daniel M. Wegner, *Ironic Processes of Mental Control*, 101 PSYCHOL. REV. 343 (1994).

¹³ Joel D. Lieberman & Bruce D. Sales, *What Social Science Teaches Us about the Jury Instruction Process*, 3 PSYCHOL. PUB. POL'Y & L. 589, 600 (1997).

be effective if you explain the reason for it.¹⁴ I would therefore tell jurors that because the defendant is on trial, it may seem logical that he is the most likely person to have committed the crime in question. Nevertheless, I would continue by pointing out that the police and prosecutors can and do make mistakes, and that therefore the presumption of innocence is an important legal principle that requires the state to prove that the defendant is guilty beyond a reasonable doubt.

Similar issues arise when a criminal defendant is physically restrained. California judges inform jurors that they should not speculate on the reason for the restraints and that they should not discuss it or consider it for any purpose.¹⁵ Yet it is very hard to ignore something that is potentially so relevant. Logically, the defendant is dangerous or he is a flight risk. Either conclusion is relevant information, especially if he is accused of having committed a crime of violence.

Instructing jurors to ignore a defendant's restraints is clearly the right thing to do. Of course, it would be better to avoid the situation entirely by devising a less obvious way of controlling the defendant. Technologies like "stun belts" (which deliver an electrical shock) may sometimes be an acceptable option, although their use is subject to accidents and possible abuse.¹⁶ When a visible restraint is the only option, judges may have no choice but to tell jurors to ignore the obvious.

Judges also tell criminal jurors not to consider punishment.¹⁷ They are simply to decide guilt or innocence. For the most part, this seems reasonable

¹⁴ Shari Seidman Diamond & Jonathan D. Casper, *Blindfolding the Jury to Verdict Consequences: Damages, Experts, and the Civil Jury*, 26 LAW & SOC'Y REV. 513, 534 (1992).

¹⁵ Calcrim, *supra* note 5, at No. 204.

¹⁶ *People v. Mar*, 52 P.3d 95, 97-98 (Cal. 2002).

¹⁷ Calcrim, *supra* note 5, at No. 200.

enough. Yet what has changed the situation recently is the passage of “three strikes” laws in some jurisdictions, which require judges to impose draconian punishments for a third offense. If that offense involved serious violence, most people would probably not object to a long prison sentence. Yet sometimes defendants have received very lengthy sentences for minor third offenses.¹⁸ If prosecutors and judges do not have the good sense to ensure that the punishment fits the crime, we may need to rely on jurors to do so.

V. Forget You Ever Heard This

Related to ignoring the obvious is the direction to forget that you ever heard certain information. This creates the conundrum of “unringing the bell.” For example, a judge may tell jurors that if she ordered testimony stricken from the record, they should disregard that testimony and proceed as though they had never heard it.¹⁹ Trial lawyers are keenly aware of how difficult it can be to ignore potentially relevant evidence, so they sometimes make a strategic decision not to object to such evidence in order to avoid highlighting it.

Perhaps even more problematic is ordering jurors to consider evidence only for a limited purpose.²⁰ Consider *State Farm Insurance Company v. Campbell*, one of a series of Supreme Court decisions aimed at reining in punitive damage awards. The Court held that under the Due Process Clause, juries, when setting the amount of punitive damages, should not be allowed to consider evidence of a defendant’s conduct outside the jurisdiction.

¹⁸ See FRANKLIN E. ZIMRING, GORDON HAWKINS, & SAM KAMIN, *THREE STRIKES AND YOU’RE OUT IN CALIFORNIA: PUNISHMENT AND DEMOCRACY* (2001).

¹⁹ Calcrim, *supra* note 5, at No. 104.

²⁰ *Id.* at 303, 345 (corpus delicti).

Yet they *can* consider out-of-state conduct on the question of whether the defendant's behavior in the case before them was reprehensible (for instance, to prove that the defendant's conduct was not an isolated incident).²¹

Prior conviction evidence presents similar difficulties. It can generally be used only on the issue of credibility, not guilt. Yet studies show that limiting instructions have limited effectiveness.²² As Shari Diamond and Neil Vidmar have concluded, it is "psychologically challenging, and probably impossible" to use a defendant's criminal record on the issue of whether to believe the defendant's testimony, but not to decide his guilt.²³

In fact, there are indications that a limiting instruction can make the inadmissible evidence more salient than when the evidence is admitted without such an instruction.²⁴ To the extent that these evidentiary prohibitions are required by the Constitution, there is probably no alternative. Judges will have to ask jurors to engage in very difficult or perhaps even impossible mental gymnastics.

What would make this task easier, in my opinion, is for the judge to specify the evidence or statements to which the instruction applies.²⁵ For example:

You have heard evidence that defendants A, B, and C went to the gun store to buy a semi-automatic weapon. You

²¹ State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 422 (2003).

²² Neil Vidmar & Valerie P. Hans, American Juries: The Verdict 162 (2007); Roselle L. Wissler & Michael J. Saks, *On the Inefficacy of Limiting Instruction: When Jurors Use Prior Conviction Evidence to Decide on Guilt*, 9 LAW & HUM. BEHAV. 37, 43 (1985).

²³ Diamond & Vidmar, *supra* note 11, at 1864.

²⁴ M. Cox and S. Tanford, *Effects of Evidence and Instructions in Civil Trials: An Experimental Investigation of Rules of Admissibility*, 4 SOC. BEHAV. 31 (1989).

²⁵ See bench notes to Calcrim, *supra* note 5, at No. 305.

may consider this evidence only against defendants A and B, not against C.

Clearly, limiting instructions are extremely problematic, even if made as informative as possible. Have you ever tried to forget something? It often seems that the harder you try, the more deeply it is etched in your mind.

VI. Do Not Discuss This Case With Anyone

Jurors are routinely told that they should not discuss the case, or any of the people involved in it, with anyone, including their families.²⁶ Of course, it is possible for people not to talk about a particular subject. Spies and government officials with security clearances are probably accustomed to uttering “no comment” every time a friend or family member asks how their day at work went. However, this is extremely unnatural for ordinary people. It must be very hard for someone to sit on a jury all day and then return home for supper, refusing to tell her family what happened.

This “silencing” rule applies to conversations with other jurors as well. The instructions generally stipulate that jurors should not discuss the case among themselves until they begin their deliberations.²⁷ This is also strange. During the length of the trial, the only people that jurors can have a conversation with (during meals and breaks) tend to be other jurors. About all they have in common is their experience on the jury. It is only natural that they would want to comment on what a witness said or what they think of a particular lawyer.

It makes sense to tell jurors not to discuss the case with outsiders, difficult as it may sometimes be, since talking about the trial might lead to attempts to influence their decision. The prohibition against discussing the case

²⁶ Calcrim, *supra* note 5, at No. 101.

²⁷ *Id.*

with fellow jurors is harder to defend. A strong opponent of the rule has been Judge Michael Dann of Arizona, who argues that it reflects an outdated model of jurors as passive recipients of information served to them by the lawyers and witnesses, with jurors being expected to suspend all judgment until the deliberations begin. As he points out, it is highly unlikely that average human beings can process information in this way.²⁸

The situation has slowly begun to change. The recently-adopted *ABA Standards Relating to Jury Trials* recommends giving civil jurors a limited right to discuss the evidence during breaks in the trial proceedings, but only if all jurors are present and they reserve judgment about the outcome until they have formally deliberated.²⁹ A few jurisdictions, most notably Arizona, have begun experimenting with allowing pre-deliberation discussions.³⁰ A noted group of jury researchers, including Shari Diamond and Neil Vidmar, videotaped some of the trials as well as the deliberations in one of these jurisdictions. They concluded that when jurors were allowed to discuss the evidence, they used the opportunity to fill in the gaps in their knowledge, review testimony, and clarify misunderstandings. The juries that were allowed to discuss the evidence also showed a better understanding of expert testimony. Although the study also identified some

²⁸ B. Michael Dann, "Learning Lessons" and "Speaking Rights": *Creating Educated and Democratic Juries*, 68 IND. L.J. 1229, 1262-64 (1993).

²⁹ A.B.A., *supra* note 3, at 13(F).

³⁰ ARIZ. R. CIV. P. 39(f). For some other jurisdictions, *see* Shari Seidman Diamond, Neil Vidmar, Mary Rose, Leslie Ellis, & Beth Murphy, *Juror Discussions During Civil Trials: Studying an Arizona Innovation*, 45 ARIZ. L. REV. 1, 3-4 and n. 7 (2003). For a discussion of the Arizona jury innovations, *see* Janessa E. Shtabsky, Comment, *A More Active Jury: Has Arizona Set the Standard for Reform With Its New Jury Rules?*, 28 Ariz. St. L.J. 1009 (1996).

potentially negative consequences, the researchers rendered a generally positive verdict.³¹

It is time to put an end to the unrealistic view of jurors as passive recipients of carefully filtered information. Letting them discuss the case before deliberations is one way to do so.

VII. Base Your Decision Solely on the Evidence

Judges also typically tell jurors to base their decision only on the evidence presented in court.³² They prohibit jurors from doing any research, consulting a dictionary, or using the internet or other reference materials. They also tell jurors not to conduct experiments or visit the scene.³³ It is an attempt to create a hermetically sealed universe, in which access to information is strictly controlled, and jurors—as noted above—are enjoined to do nothing but sit back and listen. There are often good reasons for restricting information in this way, but to some extent, it conflicts with the basic duty of jurors to decide the facts. Jurors may need to decide whether an intersection of two streets is safe based on photos and testimony of an engineer, rather than taking the most logical course of action: driving through the intersection to see for themselves if it seems safe.

Not only should jurors decline to do any research, but also they are generally forbidden from considering any

³¹ Diamond et al., *supra* note 30, at 74-76. Similar conclusions were reached by Valerie P. Hans, Paula L. Hannaford, & G. Thomas Munsterman, *The Arizona Jury Reform Permitting Civil Jury Trial Discussions: The Views of Trial Participants, Judges, and Jurors*, 32 U. MICH. J.L. REFORM 349 (1999).

³² Ninth Circuit Manual of Model Criminal Jury Instructions, 54, 60 (2003).

³³ Calcrim, *supra* note 5, at No. 101; Prosecuting Attorneys Association of Michigan, Jury Instructions, http://www.paamtraffic.safety.com/www/jury-instructions_2.htm (last visited Mar. 29 2009).

evidence they might accidentally encounter or discover. A juror who stumbles upon such information may not share it with other jurors.³⁴ These rules are also very counterintuitive. Although I have never been allowed to serve on a jury (perhaps for obvious reasons), I am forced to sit through the selection process every two or three years. One morning, when I arrived in court for jury selection, I made a stop at the bathroom and encountered the defendant, who was accused of possessing a small amount of heroin. His breath had a strong smell of alcohol to it. Had it been a public intoxication or drunk driving case, and had I been selected, could I really be expected to ignore this “out-of-court” evidence?

The net effect of the “closed universe” of the courtroom is to require jurors to decide what happened based on what in some cases is incomplete information. Either jurors must ignore relevant evidence, or they must decide “the truth” knowing they do not have access to all of the facts.

VIII. Forget Everything You Ever Learned

As we discussed in the previous section, jurors are expected to operate in a closed universe with access only to specified information. At the same time, they are expected to bring certain knowledge and capabilities with them. They need to speak and understand the English language, and can be excluded if they do not. They are expected to have and use their common sense, knowledge of the world, and their experiences as members of our culture and society. For instance, jurors are often expected to draw inferences from the facts, but doing so invariably requires knowledge about how the world works. Tracks in the snow are evidence that a rabbit has passed over the snow only if

³⁴ Calcrim, *supra* note 5, at No. 101; Ninth Circuit Criminal Manual of Model Jury Instructions, *supra* note 34, at 60.

jurors know that there are animals called rabbits, that they can move themselves forward, and that they leave a certain type of impression in the snow when doing so. Thus, the Ohio instruction on circumstantial evidence explicitly invokes the “common experience of mankind.”³⁵

It is clearly acceptable and, indeed, desirable for jurors to take certain pre-existing knowledge and experience into the courtroom. Yet tensions can arise when the notion of the jury as inhabiting a closed universe, with strict rules of admissibility of evidence into that universe, conflicts with the jurors’ pre-existing knowledge. The law then requires jurors to ignore certain aspects of their knowledge and experience. This can be very hard—perhaps impossible—for many people to do.

Although jurors must be able to speak English, they are sometimes expected to temporarily forget the normal meaning of certain words. Psychologist Vicki Smith has examined this phenomenon. Almost every English speaker is familiar with the term *burglary*, for instance. In common usage, it means something like “breaking into a house or perhaps other building and taking something with an intent to steal.” The legal meaning is quite different: to enter a house or building without authorization while intending to commit a felony inside.³⁶ Legally, therefore, breaking into a house with an intent to kill the occupant, but taking nothing, would be a burglary.

Smith asked research subjects to list the features that they associated with various crimes.³⁷ The most common feature associated with burglary (54%) was that something of value was taken.³⁸ This is consistent with the

³⁵ Ohio Jury Instructions, No. 405.01 (2006).

³⁶ Vicki L. Smith, *Prototypes in the Courtroom: Lay Representations of Legal Concepts*, 61 J. PERSONALITY & SOC. PSYCHOL. 857, 857-61 (1991).

³⁷ *Id.* at 859.

³⁸ *Id.* at 861.

ordinary meaning of the word *burglary*, but it is not a legal element of the crime in most jurisdictions. Smith also asked participants about assault. Around 90% of them believed that an assault involved a physical attack, even though this is—once again—not a legal requirement (it is an element of the related crime of battery).³⁹ The two most common features that her subjects listed for a kidnapping were that there was a ransom demand (63%) and that the victim was a child (60%).⁴⁰ These are likewise not elements of the crime, legally speaking.⁴¹ Smith's results and analysis are more complex than I have suggested, but they clearly show that jurors have pre-existing knowledge and concepts that differ from legal requirements.

Smith also found that jury instructions did not alter the results significantly; the effects of pre-existing knowledge persisted even after subjects were instructed on the law.⁴² Her subjects continued to be heavily influenced by the ordinary meaning of words like *burglary*, *assault*, and *kidnapping*, even after hearing the instructions.⁴³ This raises the question: could instructions that are more comprehensible do a better job in dislodging previous knowledge?

Mathew Curtis and I have done some research on this issue. We presented undergraduate students at the University of Southern California with the state's old jury instruction on circumstantial evidence, which is phrased in traditional legalese. Other students received the revised instruction, which had been drafted to state the law in ordinary language, to the extent possible, and which in

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 866.

⁴³ *Id.*

addition contained an example.⁴⁴ The circumstantial evidence instruction is interesting because many people seem to believe that such evidence is equivalent to weak evidence. Legally speaking, it is evidence that is based upon an inference, and it can be either weak or strong.

After they read either the old or new instruction, we presented participants with factual scenarios that required them to decide whether the evidence was direct or circumstantial. It turns out that the ordinary meaning of the phrase heavily influenced both groups of participants.⁴⁵ Those who received the old instructions in legalese had an overall correct response rate that was very close to chance. The participants who received the new instructions did significantly better, but they still had substantial difficulty distinguishing the two types of evidence.⁴⁶ Our results to some extent confirmed Smith's conclusion. It is difficult to overcome pre-existing knowledge. Yet instructions written in plainer English are more effective than those in traditional legalese.

The law not only expects jurors to forget the ordinary meaning of words, but it sometimes demands that they forget their native language entirely. To be exact, when there is testimony by a witness or the defendant in a foreign language, judges typically inform jurors that even if they understand the original testimony, they must follow the English translation provided by the interpreter. Judges sometimes add that such a juror may not retranslate the testimony or point out to other jurors that the interpretation is wrong.⁴⁷

⁴⁴ Peter Tiersma & Mathew Curtis, *Testing the Comprehensibility of Jury Instructions: California's Old and New Instructions on Circumstantial Evidence*, 1 J. CT. INNOVATION 231 (2008).

⁴⁵ *Id.* at 256.

⁴⁶ *Id.*

⁴⁷ See Calcrim, *supra* note 5, at No. 121.

Of course, if you understand Swahili, it is humanly impossible to ignore what the witness is saying in Swahili and to listen only to the English translation. It would also be very frustrating to have the judge essentially issue a gag order forbidding you from telling the other jurors that the interpreter made a mistake. Imagine that you, as a speaker of English, decide to retire in Spain and learn to speak Spanish well enough to serve on a jury. If a witness testified in English, would you be able to close your ears and listen only to a bad translation of the testimony into Spanish?

Of course, interpreters are generally qualified professionals who tend to be very offended if someone questions their translation. Yet they are not always well qualified, and even excellent interpreters can make mistakes under pressure. The best compromise may be to tell jurors to follow the translation, but if they believe that the interpreter made a mistake, to inform the bailiff or some other court official.⁴⁸

IX. Be a Lie Detector

Jurors are supposed to decide what happened, at least when the facts are in dispute. To do so, they need to determine the credibility of witnesses.⁴⁹ Unfortunately, human beings are not very good lie detectors.⁵⁰ Furthermore, mechanical lie detectors are not much better.⁵¹

Perhaps the reason that we leave the credibility of witnesses up to the jury, even though it may be difficult or

⁴⁸ *See id.*

⁴⁹ *See Calcrim, supra* note 5, at No. 105.

⁵⁰ *See* ALDERT VRIJ, *DETECTING LIES AND DECEIT: THE PSYCHOLOGY OF LYING AND THE IMPLICATIONS FOR PROFESSIONAL PRACTICE* (Wiley 2000).

⁵¹ The seminal case is *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

impossible for them to determine who is telling the truth, is that the collective judgment of twelve ordinary citizens is probably as accurate as the decision of a single judge or a machine. Some day there may be a reliable technological solution, but for now a jury can sniff out the truth as well as any of the alternatives currently available. The jury's decision may not always be factually correct, but it is legally correct by virtue of the mere fact that it was made by a jury.

X. Follow My Instructions

Judges almost always tell jurors that they must follow the instructions, even if they disagree with them.⁵² In other words, the instructions are not just suggestions. They constitute the law that governs the case. Until about a hundred years ago, juries had a certain amount of power, or at least some discretion, to decide what the law is. Today it is well settled in almost all American jurisdictions that the judge decides what the law is, and the jury determines the facts. How nullification fits into this picture is hard to say exactly. The general rule seems to be that the jury has the *power* to nullify, but does not have the *right* to do so. The prevailing view is also that the judge should not inform them that they have this power.⁵³

Of course, if the jury has to follow the judge's instructions, it must remember them. This is problematic if they were only conveyed orally, especially if the legal standards are fairly complex. Even if it receives a written copy, a jury has to understand the instructions. A well-known study by Robert and Veda Charrow involved playing 14 pre-recorded civil jury instructions to people who had been called for jury duty, but who did not serve. They were then asked to paraphrase the instructions as best

⁵² Calcrim, *supra* note 5, at No. 200.

⁵³ *People v. Williams*, 21 P.3d 1209 (Cal. 2001).

they could. Roughly speaking, about one-third to one-half of the information conveyed by the instructions made its way into the paraphrases.⁵⁴ The rest, presumably, had been forgotten or was not comprehended.

Obviously, jurors cannot follow instructions that they cannot remember or did not understand. For this reason, several experts have recommended that juries should always receive a written copy. Whether to provide written copies is usually left to the discretion of the trial judge, and many prefer not to do so. Some judges are actually prohibited from providing copies of the instructions, most notably in the New York criminal courts. Perhaps they fear that jurors will fixate too much on the exact text, or that they will focus on one part of the text to the exclusion of others. This is not an unreasonable position. People tend to interpret written materials much more literally than speech, and they tend to focus on exact words, at least when the author seems to have taken great care in formulating the words of a text.⁵⁵

American judges, whether individually or as part of a jury instruction committee, spend a fair amount of time drafting the precise text of jury instructions. Directions to the jury are quintessentially written texts. It is therefore problematic when they are delivered purely by word of mouth. As compared to spoken language, writing is much denser (more information is conveyed in fewer words), there is less repetition, the language is more formal and difficult to understand, and the syntax is more complex.⁵⁶ Written language is meant to be read, not heard. Readers

⁵⁴ Robert P. Charrow & Veda R. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 COLUMB. L. REV. 1306 (1979).

⁵⁵ Peter M. Tiersma, *The Textualization of Precedent*, 82 NOTRE DAME L. REV. 1187, 1274 (2007).

⁵⁶ Peter Tiersma, *A Message in a Bottle: Text, Autonomy, and Statutory Interpretation*, 76 TUL. L. REV. 431 (2001).

can take as much time as they need to figure out what it means.

When people listen to spoken language, on the other hand, they have to process it immediately, because usually more speech is on its way. As a result, they may not understand or remember the exact details of what the speaker said, especially if the message is complicated. Hearers tend to remember only the gist of what was said, not the exact words.

The message is that if judges want jurors to remember and apply carefully formulated and complex instructions, they need to give jurors an exact copy of the text. On the other hand, if a judge wants the jury to decide the case on relatively general or straightforward principles, and the case is legally uncomplicated, delivering the instructions orally should be fine. In an English case that I once observed at the Old Bailey, the judge's instructions on the law consisted of telling the jury that rape involved sexual intercourse without the woman's consent, and that the jury had to be "sure" of its verdict. The judge was not reading from a written script, so there would have been no written copy to give to jurors. Nor would there have been a need to provide jurors with written instructions.

Accordingly, if a judge delivers only oral instructions, she should keep it simple. The instructions should truly be oral language. If the instructions are long and complicated enough that the judge has to write them out and read them, he or she should give a copy of those written instructions to the jury. Because almost all American judges these days read carefully drafted written text to jurors, they should normally give the jury a copy of that text.

XI. Read My Mind

Just as the factual information given to jurors may sometimes be incomplete, the same may apply to the instructions. Critical information may sometimes be missing, or the instructions may contain an ambiguity. If the jury asks for clarification, the judge might provide it or he might just re-read the original instructions.⁵⁷

One of my colleagues at Loyola Law School of Los Angeles, Christopher May, served on a jury and afterward wrote a short article about his experience. As expected, the jurors had trouble correctly understanding some of the instructions, although they certainly understood the gist of the matter. What surprised him was that the problem was not limited to comprehension of the meaning of words and sentences. He found that jurors—even when they understood the instruction—had little idea what to do with the information.⁵⁸ Presumably, jurors know what the end product of their deliberations should be, but how do they get there? What should they do first? Then what should they do?

I would assume that most judges give jurors a general overview of what they can expect during the trial.⁵⁹ Beyond some general admonitions, they tend to be quite coy about how jurors should approach deliberations. Consider homicide. In many cases, jurors must process two or three options, such as first-degree and second-degree murder or manslaughter. In California, at least, judges refuse to give the jury any advice on where to start or how to proceed, although our new instructions do

⁵⁷ Phoebe C. Ellsworth, *Are Twelve Heads Better than One?*, 52 L. & CONTEMP. PROBS. 205, 223-24 (Autumn 1989).

⁵⁸ Christopher N. May, *What Do We Do Now?: Helping Juries Apply the Instructions*, 28 LOY. L.A. L. REV. 869 (1995).

⁵⁹ See Calcrim, *supra* note 5, at No. 100.

include a general summary of the how the different types of homicide relate to each other.

Judges also hide the ball on some other issues, sometimes because they fear that they will slant or bias the matter in some way. A good example is the California instruction on evaluating the credibility of eyewitness identifications.⁶⁰ The instruction starts with a long list of basic principles, such as how well the witness knew the defendant, how well she could see him, and so forth. Almost all of these principles are relatively self-evident. Still some potentially important information, which may be less obvious, is missing. One of the last items on the list is whether the witness and the defendant are of different races. Research has shown that cross-racial identifications are much more problematic than those within a race.⁶¹ The California Supreme Court has acknowledged the point.⁶² It seems to me that this is one of the critical issues that the instruction is meant to address. Yet all the instruction does is hint at this conclusion, rather than state it directly. If jurors want to know why it might matter that the witness and the defendant are of different races, they need to guess, or do some independent research (which is strictly prohibited!).

Or they need to read the judge's mind.

XII. You Be the Judge

Sometimes judges ask juries to make legal decisions. An example is a California instruction involving assault with a deadly weapon on a peace officer who is lawfully performing his duties. It specifies that the officer is not lawfully performing his duties if he is making an

⁶⁰ *Id.* at No. 315.

⁶¹ Sherri Lynn Johnson, *Cross-Racial Identification Errors in Criminal Cases*, 69 CORNELL L. REV. 934, 936 (1984).

⁶² *People v. McDonald*, 690 P.2d 709, 717-18 (Cal. 1984).

unlawful arrest or using excessive force.⁶³ In order to decide whether the officer was “lawfully” performing his duties, jurors are referred to another instruction that explains, in great detail, when an arrest or detention is permissible and how much force the officer is allowed to use in specific circumstances.⁶⁴ This, of course, requires jurors to be informed of concepts like “probable cause” and “exigent circumstances.” Such issues can be hard enough for *judges* to determine. It is asking many ordinary *jurors* to understand and apply the rules of criminal procedure. Surely, they must be thinking, “Doesn’t the state pay the judge to make these decisions?”

On other occasions, the law expects jurors to understand and apply constitutional law. Thus, California’s stalking law contains a defense if the accused person was engaged in constitutionally protected activities. Jurors may therefore be called upon to decide whether specified conduct, which would otherwise constitute stalking, is protected by the Constitution.⁶⁵ This is, once again, the sort of decision that is normally made by judges, and even they find it difficult to draw clear lines in this area.

Perhaps special interrogatories, which simply ask jurors to decide whether certain facts are true or not, would be a better solution. The court could then assess, based upon those facts, whether the constitutional defense should be available.⁶⁶

Jurors, like judges, may also need to understand the intricacies of the law of evidence. California has an instruction dealing with a non-expert witness giving an “opinion” on some matter. Once they have figured out

⁶³ Calcrim, *supra* note 5, at No. 860.

⁶⁴ *Id.* at No. 2670.

⁶⁵ Cal. Pen. Code, § 646.9(f) and (g) (2008); *Id.* at No. 1301.

⁶⁶ This solution may not be practical in states, like California, which are extremely reluctant to allow special interrogatories in criminal cases. *See* *People v. Perry*, 499 P.2d 129 (Cal. 1972).

which part of the testimony was an “opinion,” jurors can give it “whatever weight they think appropriate,”⁶⁷ although they are not told what an “opinion” is in a legal sense. The average person will probably understand it as defined in the American Heritage Dictionary: “A belief or conclusion held with confidence, but not substantiated by positive knowledge or proof.”⁶⁸ If that is what jurors think an “opinion” is, they should give opinions no credence whatsoever!

Judges could make life easier for jurors by specifying which parts of the witness’ testimony were “opinion” from a legal perspective. They might tell jurors: “The bartender at Pete’s Place testified that the defendant was drunk when he left the bar on the night in question. The law refers to this as ‘opinion testimony.’ There are special rules for evaluating opinion testimony. . . .”

Another judicial function that jurors must sometimes perform is statutory interpretation. Whenever judges instruct jurors using legalistic language that it is taken verbatim from a statute, they are inviting—perhaps even requiring—jurors to engage in statutory interpretation. For instance, a California law makes it illegal to possess an incendiary device “in an arrangement or preparation,” language imported verbatim into a criminal instruction.⁶⁹ What in the world is a *device in an arrangement or preparation*? If the judge does not explain it, jurors will have to figure it out on their own. In other words, they will have to interpret statutory language, an activity that is usually considered the exclusive domain of judges.

Occasionally, appellate courts have held that jurors should *not* interpret statutes. In *Godfrey v. Georgia*, a jury

⁶⁷ Calcrim, *supra* note 5, at No. 333.

⁶⁸ American Heritage Dictionary of the English Language 1233 (4th ed. 2006).

⁶⁹ Calcrim, *supra* note 5, at No. 1550, based on Cal. Pen. Code § 453 (2008).

sentenced the defendant to death for a murder that was “outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.”⁷⁰ The Supreme Court overturned the penalty because the judge did not explain what these terms meant.⁷¹ Notice that this phrase is quite ambiguous. Is it enough if a murder is horrible, or does it also have to involve torture? In other words, does the phrase “in that it involved torture, depravity of mind, or an aggravated battery to the victim” modify only “inhuman,” or both “horrible or inhuman,” or does it in addition modify “vile”? The judge did not interpret the statute for the jurors, leaving them to their own devices. They could have decided that the statute merely required that the crime be “horrible,” an adjective that could be applied to any intentional killing. Likewise, a New Jersey court has held that “[a] court’s obligation to guide the jury includes the duty to clarify statutory language . . . when clarification is essential to ensure that the jury will fully understand and actually find [the elements of the crime].”⁷²

Yet, as Lawrence Solan has pointed out, many courts have approved instructions that mimic statutory language, without any further explanation.⁷³ Indeed, it remains common practice for jury instructions to track statutes verbatim, or almost verbatim. Much statutory language is reasonably comprehensible, of course. When it is not, jurors will have to place their own gloss on it.

⁷⁰ 446 U.S. 420 (1980).

⁷¹ *Id.*

⁷² *State v. Alexander*, 643 A.2d 996, 1000 (N.J. 1994).

⁷³ Lawrence Solan, *Jurors as Statutory Interpreters*, 78 CHI.-KENT L. REV. 1281, 1307 (2003). See also Darryl K. Brown, *Plain Meaning, Practical Reason, and Culpability: Toward a Theory of Jury Interpretation of Criminal Statutes*, 96 MICH. L. REV. 1199 (1998); Nancy S. Marder, *The Myth of the Nullifying Jury*, 93 NW. U. L. REV. 877 (1999).

Several academics, including Solan, give at least cautious approval to having jurors interpret statutes, arguing that it will allow the jury to acquit when “the prosecution is more aggressive than the ordinary meaning and the jury’s sense of decency permit.”⁷⁴

What many judges seem not to realize is that when they give the jury instructions that are full of legalese, as happens when they parrot the language of statutes or judicial opinions, they invite the jury to interpret that language as they think best. This is, as Solan and others admit an invitation to engage in a type of nullification.⁷⁵ Personally, I have very conflicting views on giving jurors this power. The notion that juries are champions of justice and bastions against oppression is certainly an attractive one. Yet the rule of law is also an extremely important value, one that the power of nullification undermines.

This is not the time or place to debate nullification. My point is simply that if we want jurors to follow the law, we need to ensure that the jurors understand it. Otherwise, judges will be delegating their power of statutory interpretation to the jury. You can be the judge as to whether that is a good idea.

XIII. You Be the Expert

In addition to sometimes having to perform the functions of a judge, jurors may be called upon to be experts in a number of disparate fields. They may have the assistance of expert witnesses at times, but on other occasions, the jury simply has to figure it out as best it can (without doing any research, of course!).

⁷⁴ Solan, *supra* note 75, at 1311.

⁷⁵ See generally *id.*

A. Lexicography

The legal system expects jurors to have an immense vocabulary. Jurors must function like lexicographers (scholars who study the meaning of words and compile dictionaries). Of course, they have no training in this very specialized field. Moreover, lexicographers have a large number of reference works at their disposal. Jurors, in contrast, commit misconduct if they look up words in a dictionary or conduct a search for it on the internet.

Perhaps the most troubling example is contained in death penalty instructions. They often tell jurors to compare “mitigating” to “aggravating evidence” in order to decide whether a defendant should be sentenced to death or life in prison. Yet “mitigate” is a relatively unusual word outside the law, and even people familiar with it sometimes confuse it with “militate.” Nonetheless, several courts have held that it is a word of ordinary meaning that does not need to be defined.⁷⁶ If that were true, why is it that in at least ten published capital cases, six of them from California, juries have asked the judge to explain the meaning of this word?⁷⁷

“Aggravation” is indeed an ordinary word, but its legal meaning differs dramatically from how ordinary people generally use it. For the average person, to “aggravate” is to annoy. Your neighbor’s loud stereo music can be very aggravating, but this is not a reason to have him executed.

The list of examples of highly unusual or literate vocabulary is long, so I will limit myself to a few additional illustrations. Some criminal jury instructions use the word

⁷⁶ Peter Tiersma, *Dictionaries and Death: Do Capital Jurors Understand Mitigation?*, 1995 UTAH L. REV. 1, 13; Tiersma, *supra* note 7, at 233-40.

⁷⁷ Tiersma, *Dictionaries and Death*, *supra*, note 78, at 15-17.

“importune,” for instance.⁷⁸ If you are familiar with older translations of the Bible, you may know what this word means: “Do this now, my son, and deliver thyself, Seeing thou art come into the hand of thy neighbor: Go, humble thyself, and importune thy neighbor. . . .”⁷⁹ Today, most people would probably call the sheriff if they thought you were importuning your neighbor.

A way to determine the rarity of “importune” is to compare its frequency of occurrence with “beg,” a close synonym. Today, the internet is a convenient way to do so. Using the search engine Google, and limiting ourselves to English websites, we find the word “importune” occurring just over 373,000 times.⁸⁰ “Beg” occurs around 31 million times.⁸¹ Of course, the internet is constantly changing and the number of hits will probably increase over time. The ratio of one word to the other is likely to remain roughly the same, however. In this case, “beg” occurs around 83 times more often than “importune.”⁸²

A printed resource is *The Educator’s Word Frequency Guide*.⁸³ It is based on a corpus of over 17 million words, containing over 150,000 word types (i.e., distinct words). The corpus consists of samples of text from textbooks, literature, and popular works of fiction and nonfiction. In this large corpus, the verb “beg” occurs 538 times, whereas “opportune” occurs 4 times. Thus, “beg” is about 134 times as common as “importune.”⁸⁴

⁷⁸ Colo. Jury Instr., Criminal 7:35; 5 Conn. Prac., Criminal Jury Instructions § 5.3 (4th ed.); 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 19.01 (3d ed.); NJ J.I. CRIM 2C:11-3a(3).

⁷⁹ Proverbs 6:3 (New American Standard Version).

⁸⁰ Search conducted by author on Jan. 15, 2009.

⁸¹ *Id.*

⁸² *Id.*

⁸³ SUSAN M. ZENO ET AL., *THE EDUCATOR’S WORD FREQUENCY GUIDE* (1995).

⁸⁴ In each case, all variants of the word were counted (beg, begged, etc.).

There are many other rare words used in jury instructions. A few examples follow. The number of Google search results is in parentheses, followed by a slash and then the number of occurrences in *The Educator's Word Frequency Guide*:

captious (in the reasonable doubt instruction⁸⁵)
(306,000/1)

extenuate (in death penalty instructions⁸⁶)
(220,000/4)

inveigle (in kidnapping instructions) (141,000/3)

preponderate (used for civil burden of proof⁸⁷)
(294,000/0)

Obviously, we should not be talking to jurors using terminology that is so extremely rare in ordinary speech and writing.

The words below are similar in meaning to those above, and they give an impression of the number of occurrences of more common words:

petty (31,200,000/240)

reduce (205,000,000/1720)

entice (5,500,000/23)

likely (278,000,000/1918)

I was surprised by the relatively low frequency of “entice,” which I thought was a fairly normal word. Although not nearly as rare as “captious” and “preponderate,” the low number of results on the internet is fairly consistent with its relatively rare occurrence in the corpus of *The Educator's Word Frequency Guide*. If possible, it would make sense to use “persuade” instead, for which Google reports over 17 million hits, and the word

⁸⁵ The word “captious” was part of the Tennessee reasonable doubt instruction, *State v. Robinson*, 146 S.W.3d 469, 522 (Tenn. 2004), but has recently been deleted, *Tenn. Pattern Instructions, Criminal 2:03*.

⁸⁶ *Cal. Jury Instructions, Criminal, No. 8.85*.

⁸⁷ *Id.*, No. 2.50.2.

frequency guide reports 543 occurrences.⁸⁸

Word frequency is only a rough indicator of how likely it is that jurors will understand a word. Yet it can provide some useful insights. Because the internet is essentially a huge corpus, which is easily accessed by means of search engines, it has become possible for almost anyone to conduct a frequency count. You, too, can be an amateur lexicographer! Of course, jurors are forbidden to conduct this sort of research, or even to use a dictionary. For that reason, the legal system should use words of relatively high frequency, words that jurors can understand.

B. Etymology (and Historical Lexicography)

A jury may also need to have expertise in etymology (the study of the origin of words) and historical lexicography (the study of what words meant in the past) in order to properly perform its task.

In California, it is illegal to *manufacture* an incendiary device.⁸⁹ The word originally meant “to make by hand,” as indicated by the presence of the Latin root *manus* “hand.”⁹⁰ The modern meaning is “to make or process goods, especially in large quantities and by means of industrial machines.”⁹¹ It sounds very odd to say that someone manufactured a cake or a basket or a birdhouse, unless those objects are made in mass quantities by machine. A modern juror might well think that the defendant is only guilty of manufacturing incendiary devices if he was mass-producing them.

⁸⁸ Search, *supra* note 82.

⁸⁹ Calcrim, *supra* note 5, at No. 1550.

⁹⁰ Eric Partridge, *Origins: A Short Etymological Dictionary of Modern English* (4th ed. 1966) 195-96 (etymology of “fact” at paragraph 3).

⁹¹ *The American Heritage Dictionary of the English Language* 1067 (4th ed. 2000) (definition of “manufacture”).

Statutes relating to forgery commonly use terminology that jury instructions use in an archaic sense. Often they define the crime as “uttering” or “publishing” a false or counterfeited “instrument.”⁹² The word *utter* is related to *out*, and it originally meant something like “to put out or forth.” Today it refers exclusively to sending out speech by means of the vocal chords, except in instructions, where its old significance still holds sway. Much the same is true of *publish*, which originally meant “to make public,” but which in modern English is used mostly in the sense of making public by printing. The meaning is currently being extended to placing text and images on the internet, but the older meaning of *publish*, which is the sense in which it is used in forgery cases, is fairly archaic. It would sound very odd if someone said that she “published” a poem by doing a poetry reading or by giving a few handwritten copies to some friends.

Some jury instructions use the word *subscribe* in an outdated sense, to mean “sign.” Originally, the word referred to writing something (Latin *scribere* “write”) at the bottom of a document (Latin *sub* means “under”). Today it refers primarily to ordering a periodical or pledging money to a good cause. For the average person, a *subscription* is no longer a signature, but a contract to pay for the receipt of a periodical.

Finally, the phrase *abandoned and malignant heart* can still be found occasionally in instructions for murder. *Malignant* is sometimes still used in its original sense of “evil” or “pernicious.” When used in a medical sense (as the word *heart* suggests), it usually means “cancerous.” The adjective *abandoned* seems to mean something like “uninhibited” in its legal sense, but that sense has largely been lost in modern usage. Not only are these adjectives used in an archaic (or, at least, extremely unusual) sense,

⁹² Cal. Jury Instructions, Criminal, 15.01.

but the notion that emotions and intentions arise in the heart is also highly anachronistic.

We should leave etymology and historical lexicography to the real experts in this area.

C. Economics

Economics is another field in which juries may have to master, both in criminal and civil cases. In tax cases, jurors may be asked to decide whether the defendant had unreported taxable income. They may need to apply the net worth method, the bank deposits method, the cash expenditures method, or the specific items method.⁹³ For instance, under the bank deposits method, jurors must decide that the defendant engaged in an activity that produced taxable income, that the defendant regularly deposited money in bank accounts, and that the money did not come from nontaxable sources. Nontaxable sources include gifts, inheritances, and loans.⁹⁴ Considering that many people cannot even calculate their *own* taxes, it seems a lot to demand that jurors calculate someone else's.

In the civil context, present value calculations present another example of where jurors need to function as economic experts. Typically, juries are required to reduce certain economic damage awards (those intended to compensate for a future expense) to present value. This requires that juries predict what the inflation and the interest rates will be in future years. That is impossible, of course, even for Nobel-prize-winning economists.

Assuming jurors can make an educated guess regarding interest rates and inflation, they still need to know how to do the calculation. As illustrated by the

⁹³ Calcrim, *supra* note 5, at No. 2842-45.

⁹⁴ *Id.* at 2843.

Tennessee instruction, judges typically explain the concept in relatively abstract terms.⁹⁵

Present cash value” means the sum of money needed now which, when added to what that sum may reasonably be expected to earn in the future when invested, would equal the amount of damages, expenses, or earnings at the time in the future when the damages from the injury will be suffered, or the expenses must be paid, or the earnings would have been received. You should also consider the impact of inflation, its impact on wages, and its impact on purchasing power in determining the present cash value of future damages.⁹⁶

It can help a great deal to provide an example or illustration. Bethany Dumas suggests the following:

If you know that a person will need \$1,000 five years from now, you would normally not give him the \$1,000 now, but if you were *required* to give him money now, you would give him only the amount which, *when invested*, would equal \$1000 in five years. How much that money should be now is for you to decide.⁹⁷

Special verdict forms might also be worth using. Such forms might ask, “How much will the Mr. Akbar need for future medical treatment?” The next question could ask jurors to decide what the rate of inflation is likely to be in the ensuing five years. The judge could then do the math, but since judges are also not economists, they would probably invoke the assistance of an accountant.

D. Other areas of expertise

There are several other areas in which jurors need to make decisions that we would normally leave to experts.

⁹⁵ Tenn. Pattern Instructions, Civil, No. 14.54 (8th ed. 2008).

⁹⁶ *Id.*

⁹⁷ Bethany K. Dumas, *US Pattern Jury Instructions: Problems and Proposals*, 7 FORENSIC LINGUISTICS 49, 61 (2000).

Some instructions relating to sexual crimes, for instance, require jurors to become specialists in human anatomy. Jurors may need to become gun experts to deal with weapons offenses or they may have to distinguish between types of drugs if the case involves controlled substances. Finally, they may need to be statisticians. Jurors presented with DNA evidence may have to decide questions of statistical probability, for instance. The available research generally concludes that they do not comprehend such issues very well.⁹⁸

Given our legal system, there may be no way to avoid having jurors act as experts from time to time. It is usually not impossible for them to do so, but it can surely be difficult. Juries obviously need some guidance from comprehensible jury instructions and expert testimony. We are making progress on the goal of producing more understandable instructions. Now we just need to figure out a way to persuade expert witnesses to explain their fields of expertise more clearly.

XIV. Helping Jurors Do the Impossible

I have already mentioned some solutions to the problem of asking jurors to do the impossible. I anticipate that other participants in this symposium will elaborate on these solutions or offer additional ideas. What follows is a summary of some ways to ease the burden on jurors.

A. Find Someone Else to Do It

If it truly is impossible for jurors to do something, an obvious solution is not to ask jurors to do it in the first place. Of course, how judges interpret the scope of the right to trial by jury will limit what can be done in this respect. Logically, however, it seems silly to have juries be

⁹⁸ Vidmar & Hans, *supra* note 22, at 182.

the judge when a judge is available and qualified to make a decision, such as whether an arrest or detention was legal.

Having juries comprised of experts in highly technical areas may also make sense on occasion. If a case involves tax fraud, a jury made up of accountants might not be a bad idea, or we might have the case decided by an ordinary jury, but ensure that two or three accountants are also on the jury. Lawyers will probably object. They often seem to strive to exclude from the jury anyone who knows anything about the subject matter. Still, what could be more sensible than having a few economists on a jury that needs to decide a complicated case involving damages resulting from price-fixing?

In reality, most American judges would be very hesitant to allow specialized juries. Unlike English judges, who can keep an overly complex case from the jury,⁹⁹ American judges sometimes have juries decide very complicated issues. They apparently have a great deal of confidence in the ability of jurors to understand the evidence. Moreover, there is a real danger that specialized juries will be biased toward one of the parties, or that they are not representative of the community. What are called “special juries” were once relatively common in the United States, but because of concerns such as these they are rare today.¹⁰⁰

Thus, juries will have to decide some very complicated factual issues, which require them to make sense of expert testimony. The research on this issue, as summarized by Vidmar and Hans, suggests that juries do indeed find it hard to process highly technical evidence, but that they do their best and for the most part do a credible job.¹⁰¹ Moreover, a study by Lynne Foster Lee and Irwin Horowitz suggests that certain reforms, such as allowing

⁹⁹ *Id.* at 37.

¹⁰⁰ *Id.* at 68-69.

¹⁰¹ *Id.* at 153-57.

jurors to take notes and giving them some instructions before the evidence is presented, helps jurors to make sense of complicated information and to base their decisions upon the evidence.¹⁰² On the other hand, when the language in which the information is presented is highly complex, even pre-instructions and note taking do not suffice.¹⁰³

What happens when jurors do not understand the testimony of experts? Research by Joel Cooper and others suggests that jurors shift to “peripheral processing.”¹⁰⁴ They focus on factors like the experts’ credentials and rate of pay.¹⁰⁵ Thus, they tend to follow the conclusions of the experts who have the best credentials and charge the most money for their testimony.¹⁰⁶

Although it may sometimes be possible to have a judge or jury of experts decide a specific issue or even an entire complicated case, a jury of ordinary citizens is likely to remain the standard. Because ordinary jurors are not experts on the law, the legal system needs to ensure that it is explained to them in a way that they can comprehend. Since they cannot be experts in economics or medicine, such testimony must be presented in an understandable way. If that is not feasible, we should probably let the experts decide the case.

B. Find an Alternative Solution

Some things are impossible not just for juries, but for anyone. Predicting the future is the best example. Because no one can know the future, it may make more

¹⁰² Lynne Foster Lee & Irwin Horowitz, *The Effects of Jury-aid Innovations on Juror Performance in Complex Civil Trials*, 86 JUDICATURE 184 (2003).

¹⁰³ *Id.* at 188.

¹⁰⁴ The research is summarized in Vidmar & Hans, *supra* note 22, at 180.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

sense to wait until the future becomes the present (as with damages for future lost wages or medical costs). There is already a trend towards allowing periodic payments or some kind of trust fund or structured settlement approach, where damages for lost future wages can be paid over time, and the expenses of future medical treatments can be distributed when they are incurred. It not only eliminates the difficulty of estimating the amount of future economic losses, but also the need to make a present value calculation.

This solution will not work in all areas. Not only is it impossible to predict how much pain someone will have in the future, but it is impossible with any certainty to place a dollar amount on the pain that someone is suffering right now. In such cases, the law seems to be using jurors to legitimize a calculation that no human being can really make, but that must nonetheless be made. The resulting decision is correct not because jurors can predict the future or place an economic value on pain, but because a jury of twelve citizens made it.

C. Explain Clearly What the Jurors are Expected to Do

If the law expects jurors to perform difficult or impossible tasks, it needs to tell them what to do in a way that makes sense to them. I have a watch with a digital display that tells me time, the day of the week and the date. It has four buttons that change the display, start and stop a stopwatch or countdown timer, place phone number into a phonebook, access the phonebook, and so forth. The four buttons have to be pressed in a particular order, and often multiple times, to achieve any one of these goals. Whenever the time changes, I need to adjust the clock. Although embarrassed to admit it, I cannot figure out how to do this without consulting the manual. Six months later,

I have forgotten how to do it and again have to pull out the instructions. The procedure is not intuitive, with the result that it is virtually impossible for me to set the time on this watch without assistance. Fortunately, the instructions are reasonably clear, as long as I read them carefully and do exactly what they tell me.

The moral is that what started out as an impossible task may become completely doable by means of clear, step-by-step instructions. This lesson applies to juries also. What might be impossible for a jury to figure out on its own may become entirely feasible if the jury receives understandable directions. I have elsewhere laid out some general principles for preparing comprehensible jury instructions,¹⁰⁷ so the following is merely a short summary.

1. Speak plainly

The most obvious requirement for drafting understandable instructions is to use ordinary language to construct relatively short and straightforward sentences. Jurors should not have to be lexicographers. Nor should they have to be experts in syntax.

2. Speak concretely

A second basic principle is to make the instructions as concrete as possible. Statutes are typically abstract principles of law. Jurors will need to apply those principles to the facts. The judge's instructions should help them so do.

One way to be more concrete is to insert the names of the parties whenever possible. Many current criminal instructions track statutory language by referring to "a

¹⁰⁷ Peter M. Tiersma, *Communicating with Juries: How to Draft More Understandable Jury Instructions* (National Center for State Courts, 2006).

person” (when they really mean the defendant) and “another person” (when referring to the victim). They also tend to speak in the present tense (“a person commits murder. . . .”) when the jury’s task is to decide what happened in the past. It would be more informative for the judge to tell the jury that Jane Jones is guilty of murder if she intentionally killed Sam Smith and did not act in self-defense. Of course, the law of homicide is complicated, but it should generally be possible to state legal principles in concrete terms that make sense in the context of the specific case that the jury must decide.

3. Be positive

Jury instructions tend to waddle in negativity. Perhaps the best illustration is the short phrase, “innocent misrecollection is not uncommon.” If we count the prefixes *un-* and *mis-* as negatives (as we should), this five-word clause has no less than three negative elements.¹⁰⁸

California’s old reasonable doubt instruction is another example. It began: “Reasonable doubt is defined as follows: It is not a mere possible doubt. . . .”¹⁰⁹ When the instruction got around to defining what a reasonable doubt is (as opposed to what it is not), it once again did so in the negative: “It is that state of the case which...leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge.”¹¹⁰

Of course, tinkering with the reasonable doubt instruction is fraught with peril.¹¹¹ In many jurisdictions reforming it may require legislative action. Yet it seems to me that all that need to be said is that jurors, after carefully

¹⁰⁸ Tiersma, *supra* note 7, at 66.

¹⁰⁹ *Id.* at 194-96.

¹¹⁰ *Id.*

¹¹¹ *See, e.g.,* State v. Sullivan, 69 P.3d 1006 (Ariz. Ct. App. 2003).

considering all the evidence, must be “firmly convinced” of the truth of the charge.¹¹² However the standard is defined, it should be done as positively as possible.

4. Tell the jurors what to do

As mentioned, a judge should speak plainly, concretely, and positively to the jury. Yet much of the law, even if explained in the most understandable language, remains conceptually very complex. The best way to ensure that someone completes a complicated task is to break it down into smaller and more manageable tasks, along with step-by-step instructions that explain what to do first and what to do next.

Consider the directions for a CD or DVD player. Suppose that (as is often true), they merely explain what the function of each button is: “button A turns the power off and on; button B is used to play and pause the disk; button C selects the output channel,” and so forth. Experienced users of such equipment will have no trouble figuring it out, but many people would not know where to start. It is far more effective to specify what you need to do to accomplish a particular goal. For instance, to play a DVD disk, you should

- turn the player on by pressing the power button;
- press the eject button to open the tray that holds the DVD disk;
- place a disk in the tray;
- press the eject button again to close the tray; and
- push the “play” button to start viewing your DVD.

And, of course, an illustration of the device that points out the location of each button would also be very useful.

In the case of jury instructions, judges should not just read a list of abstract legal principles. They also need

¹¹² For a case requiring such language, see *State v. Portillo*, 898 P.2d 970 (Ariz. 1995).

to tell jurors what to do with the information. Thus, a judge might advise jurors that they first must decide whether the defendant committed murder. To do that, they need to consider the elements for murder and determine whether each of those elements is true beyond a reasonable doubt. If so, they need to decide the degree of murder. If not, they should proceed to the manslaughter instruction and repeat the process.

An even better way to accomplish this goal is by means of verdict forms. The committee that created California's new civil instructions crafted an extensive series of such forms. Their use in criminal cases is likely to be more controversial, but when available they can greatly simplify the jury's task. Imagine being given a copy of the Internal Revenue Code and directed to use it to compute your tax. This would be impossible for just about anyone. Yet quite a few people can determine how much tax they owe using Form 1040, filling in the blanks, and making some simple computations.

5. Explain why you are asking jurors to do something

If a judge is asking jurors to ignore the obvious or forget about something, they are more likely to comply if they believe that there is a good reason for the judge's request. Rather than simply commanding jurors not to draw an inference from the fact that the defendant in a criminal case did not testify, the instructions will be more effective if they explain that the right to remain silent is an important constitutional principle, that its purpose is to protect people from coercion, and that for this reason the defendant can choose not to take the stand. Furthermore, if the defendant decided not to testify, the jurors should respect this decision by not assuming that this choice is evidence that he committed the crime.

6. Use illustrations and examples

Any competent teacher realizes how important it is to include pertinent examples and illustrations. Not only do they help students understand the material, but they also serve to make the course less dull. In law school classes, we use not only actual cases but also many hypothetical scenarios.

Although there are some exceptions,¹¹³ judges tend to be very leery of examples or illustrations. It is certainly wise to be cautious in this regard, because a badly-chosen example may do more harm than good. Nonetheless, they can be quite effective in illuminating difficult concepts. If a jury is to have any hope of distinguishing direct from circumstantial evidence, or reducing damage awards to present value, an example is almost certainly essential.

7. Answer the jury's questions

Finally, why not let jurors—after they have received their instructions or before they begin deliberations—ask the judge any questions they might have about the law governing the case or the procedures they should follow in reaching a verdict? Of course, they can ask questions during their deliberations, but the process is usually quite cumbersome. Typically, the presiding juror or foreman must write the question on a piece of paper and give it to the bailiff, who in turn hands it to the judge. The parties and attorneys are then summoned back to court and allowed to argue how the question should be answered. Then the jurors return to court to receive an answer.

It would be much easier to invite the jurors to ask questions in open court before they leave to deliberate. Admittedly, this is a fairly radical suggestion. Yet consider once again the classroom. At medieval universities,

¹¹³ See Ninth Circuit Criminal Jury Instructions, 1.05, comment.

professors would read from a book or from their notes to their students (this is what “lecture” meant originally). The students, who could probably not afford to buy many books, would write down what the professor said. That was it. Questions were not encouraged. It sounds a lot like modern jury instructions, doesn’t it?¹¹⁴

It is very rare to find a teacher today who does not allow students to pose questions. Not only do questions give teachers an opportunity to clarify the material, but they also provide important feedback on how well the students understood it. Maybe the time has come to bring the instruction of juries out the dark ages.

Any questions?

¹¹⁴ ROBERT S. RAIT, LIFE IN THE MEDIEVAL UNIVERSITY 44-45 (1918).

