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Pattern Jury Instructions: The Application of Social Science Research

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Pattern Jury Instructions: The Application of Social Science Research

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I. INTRODUCTION

In the earliest common law cases, there was little question of the competence or ability of jurors. Each juror had personal knowledge of the events that formed the basis of the trial. Further, medieval society was technologically simple; few trials presented subject matter beyond the jurors' own level of knowledge.

* Dean, University of Nebraska College of Law. This paper was originally prepared for and delivered at a Wingspread Conference, "The American Jury and the Law" on November 18-20, 1985, sponsored by the American Judicature Society and the Johnson Foundation. David G. Newkirk, Class of 1987, made a significant contribution, both in substance and documentation, in adapting the paper for publication. Keith Miles, Class of 1987, assisted in the research for the original presentation. I also benefited from comments received when an early draft of the paper was presented to the Law-Psychology workshop at the University of Nebraska. Any errors or misstatements that survived in spite of this assistance are mine.

The Renaissance and the growth of cities changed not only society but the administration of law. Population increase meant that jurors no longer knew the litigants. At the same time, the legal system began to wrestle with the consequences of scientific progress. Specialization forced the legal regulation of increasingly diverse areas, many of which were undoubtedly alien to the juror.

Modern criticism of the jury takes at least two forms. One popular lay perception is that the jury system is inefficient and perhaps unworkable.¹ This line of criticism has its origins in the public's disenchantment with the delay and sometimes questionable verdicts in jury trials.² There is in this view the implication of an inherent flaw in the idea that untutored lay persons can have a sensible role in legal decisionmaking. Another line of criticism focuses on the size and conceptual complexity of some modern litigation. In its most extended form this criticism has led some courts to create a "complexity" exception to the right to a jury trial guaranteed in the seventh amendment.³

Some jury decisions do startle the legal profession and the body politic. Permissive joinder rules and extended discovery have produced a more factually complex litigation and hence difficulties for the jury. The sheer bulk of issues and evidence in some litigation borders on unmanageability.⁴ The conceptual difficulty of some suits has

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1. See, e.g., Friedrich, *We, the Jury, Find the . . . That Irsome, Boring, Vital, Rewarding, Democratic Experience*, TIME, Sept. 28, 1981, at 44; Zoeller, *Beyond a Jury's Ability*, A.B.A. J. Sept. 1985, at 39. Although this criticism has its roots in the lay public, the legal community has also repeated similar criticisms. Chief Justice Burger has been a frequent critic of the jury system. See, e.g., Burger, *The State of the Federal Judiciary—1971*, 57 A.B.A. J. 855, 858 (1971); *Interview with Chief Justice Warren Burger*, 69 U.S. NEWS & WORLD REP. 32 (Dec. 14, 1970); Burger, *Is Our Jury System Working?*, READER'S DIG. Feb. 1981, at 126.
 2. See Friedrich, *supra* note 1, at 46-47. See also Farrell, *Communication in the Courtroom: Jury Instructions*, 85 W. VA. L. REV. 5, 15-16 (1982).
 3. The seventh amendment states in full:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

U.S. CONST. amend. VII.

- A number of courts have used a variety of theories to create an exception to this language in large, complex suits. See, e.g., *In re Japanese Elec. Prod. Antitrust Litig.*, 631 F.2d 1069 (3d Cir. 1980); *Bernstein v. Universal Pictures, Inc.*, 79 F.R.D. 59 (S.D.N.Y. 1978); *In re Boise Cascade Sec. Litig.*, 420 F. Supp. 99 (W.D. Wash. 1976). See also *infra* note 8.
4. One suit, *In re United States Fin. Sec. Litig.*, 609 F.2d 411 (9th Cir. 1979), *cert. denied sub nom.* *Gant v. Union Bank*, 446 U.S. 929 (1980), is illustrative of the kind of case that modern jurors sometimes face. The suit involved 18 joined suits surrounding the collapse of a coast-to-coast real estate developer. Pre-trial discovery generated 150,000 pages of depositions and at least 100,000 pages of documentary evidence. "[F]rom a lawyer's perspective, reading those 100,000 pieces of paper would be like sitting down to read the first 90 volumes of the Federal Reporter, 2nd Series—including all the headnotes." *In re United States Fin. Sec.*

also proven troublesome for the jury. When one jury in a complex antitrust suit deadlocked, the court asked the jury foreman whether that type of case should be tried before a jury. The foreman indicated that the only qualified juror would be "both a computer technician, a lawyer, [and] an economist."⁵

Whatever inherent limitations exist in jury trials, there are a variety of reforms that have altered and quite likely improved the functioning of the jury trial even in complex cases. Appointment of special masters⁶ and bifurcated trials⁷ may have made some trials more manageable, and permitting juries to ask questions and to take notes may enhance the decisionmaking process. Central to the proper functioning of a jury in simple as well as in complex cases is the effectiveness of the instructions on the law.⁸ There is much to be said for Chief

Litig., 75 F.R.D. 702, 707 (S.D. Cal. 1977). See also *In re Japanese Elec. Prod. Antitrust Litig.*, 631 F.2d 1069 (3d Cir. 1980). This suit involved a discovery process "which after nine years has produced millions of documents and over 100,000 pages of depositions." *Id.* at 1073.

5. *ILC Peripherals Leasing Corp. v. International Business Machs.*, 458 F. Supp. 423, 447 (N.D. Cal. 1978), *aff'd on other grounds sub nom. Memorex Corp. v. International Business Machs.*, 636 F.2d 1188 (9th Cir. 1981) (mem.).

6. FED. R. CIV. P. 53.

7. FED. R. CIV. P. 23(d)(1).

8. A number of sources have indicated that drafting comprehensible jury instructions may be a more appropriate response to complex cases than denying a litigant the right to a jury trial. In one study of complex suits, the author recommended that the jury be supplied with written instructions. He continued by noting that the "[a]vailability [of written instructions] is a waste, however, unless the instructions are written to be understood. The parties should be encouraged to engage in comprehension testing and redrafting." A. AUSTIN, *COMPLEX LITIGATION CONFRONTS THE JURY SYSTEM: A CASE STUDY* 104 (1984). Other sources have not gone this far, but have noted that well-written instructions would improve complex suits for the jury. See, e.g., *S.R.I. Int'l v. Matsushita Elec. Corp.*, 775 F.2d 1107, 1131-33 (Fed. Cir. 1985) (additional views of Markey, C.J.); Sperlich, *Better Judicial Management: The Best Remedy for Complex Cases*, 65 *JUDICATURE* 415, 418-19 (1982); Withrow & Suggs, *Procedures for Improving Jury Trials of Complex Litigation*, 25 *ANTITRUST BULL.* 493, 507 (1980).

Research that shows that juror comprehension is improved by drafting more comprehensible instructions undermines all three of the legal theories used to justify a "complexity exception" to the seventh amendment. The first legal theory used to limit the seventh amendment is that "the principles of procedural due process would seem to impose some limitations on the range of cases that may be submitted to a jury. . . ." *In re Japanese Elec. Prod. Antitrust Litig.*, 631 F.2d 1069, 1084 (3d Cir. 1980). Due process thus precludes a jury trial when the jury cannot perform its "task with a reasonable understanding of the evidence and the legal rules." *Id.* (emphasis added). Psycholinguistic research indicates that the jurors do not understand because the lawyers fail to communicate. Presumably, the availability of the less dramatic alternative—improvement of jury instructions—reduces the need to abandon the seventh amendment in the face of due process concerns.

A second theory is that "[e]quity has jurisdiction over cases in which there is no adequate remedy at law. The inability of a juror to handle complex cases and

Judge Markey's observation that "[t]here is no peculiar cachet which removes 'technical' subject matter from the competency of a jury when competent counsel have carefully marshalled and presented the evidence of that subject matter and a competent judge has supplied carefully prepared instructions."⁹

Regardless of the complexity of the case, the clarity of the jury instructions must have some impact on jury decisionmaking. Many lawyers intuitively have assumed that the highly jargoned instructions so common in modern litigation were not comprehended by lay jurors. But in recent years this intuition has given way to scientific proof as social scientists have documented the gap between what is instructed and what is understood. Behavioral scientists also have provided guidance for the drafting of jury instructions designed to improve juror comprehension.

In the 1970's, Professor Stephen Saltzburg¹⁰ and I had an opportunity to use the psycholinguistic techniques recommended by Elwork, Sales and Alfini¹¹ to draft a set of civil pattern jury instructions for the Alaska courts.¹² Our proposal to simplify the instructions using the techniques recommended by Elwork and his co-authors struck a responsive chord. Alaskan juries range from an urban composite in Anchorage and Fairbanks to predominately rural and native juries

render a fair decision means that there is no adequate remedy at law. Therefore, complex cases are within equity jurisdiction and there exists no right to jury trial in them." *In re United States Fin. Sec. Litig.*, 609 F.2d 411, 417 (9th Cir. 1979). If the juror's ability to handle complex cases is improved by simplified instructions, this basis for equitable jurisdiction may disappear.

The third justification for a complexity exception seizes on the significance of a footnote in *Ross v. Bernhard*, 396 U.S. 531 (1970). In *Ross*, the Court stated that the considerations in determining whether the seventh amendment applies to a given suit include "the practical abilities and limitations of juries." *Id.* at 538 n.10. The majority of courts after *Ross* have treated the statement as dictum. *See, e.g., In re United States Fin. Sec. Litig.*, 609 F.2d 411, 417 (9th Cir. 1979); *Radial Lip Mach., Inc. v. International Carbide Corp.*, 76 F.R.D. 224, 226-27 (N.D. Ill. 1977). However, if *Ross* is perceived as having constitutional dimensions, psycholinguistic research shows that jurors may have fewer "limitations" than is commonly believed.

9. *SRI Int'l v. Matsushita Elec. Corp.*, 775 F.2d 1107, 1130 (Fed. Cir. 1985) (additional views of Markey, J.).
10. Professor Saltzburg is Professor of Law at the University of Virginia Law School. Although he bears his fair share of the responsibility for the Alaska and federal jury instructions, he is not responsible for this Article. He has, however, made helpful suggestions.
11. *See A. ELWORK, B. SALES & J. ALFINI, MAKING JURY INSTRUCTIONS UNDERSTANDABLE* (1982); Elwork, Alfini & Sales, *Toward Understandable Jury Instructions*, 65 JUDICATURE 432 (1982) [hereinafter cited as *Elwork I*]; Elwork, Sales & Alfini, *Juridic Decisions: In Ignorance of the Law or in Light of It?*, 1 L. & HUM. BEHAV. 163 (1977) [hereinafter cited as *Elwork II*].
12. H. PERLMAN & S. SALTZBURG, *ALASKA PATTERN CIVIL JURY INSTRUCTIONS* (1981).

above the Arctic Circle. Simplicity of expression was a prime concern. We were encouraged to use any available methodology to simplify the instructions.

The completion of the civil instructions for Alaska coincided with the publication of *Making Jury Instructions Understandable* by Elwork, Sales and Alfini.¹³ The book outlines a step-by-step process for lawyers who wish to draft more understandable jury instructions. Given the apparent interest in the subject, we developed a set of pattern instructions for federal criminal cases using the authors' methodology. This venture coincided with the increasing interest of the Federal Judicial Center and various federal circuits in simplified instructions.¹⁴ The resulting product was a three volume set on Federal Criminal Jury Instructions¹⁵ in which we again attempted to implement the teachings of the social science community.

Although we incorporated what social scientists told us about the art of instruction drafting, the Alaska civil and federal criminal instructions are the work of lawyers.¹⁶ We cannot be certain that we implemented what we learned from social scientists or that, if we did, it had the desired result of improving juror comprehension. We tried to be faithful to science until our intuition convinced us that a particular context called for a departure.

This Article reviews some of the studies relating to jury decision-making and the drafting of jury instructions. It then describes in greater detail some of the decisions we made in the process of drafting instructions for Alaska and the Federal system. The Article concludes with my own observations regarding the role of the jury and the theoretical and practical problems of attempting to implement the research of social scientists in the real world.

II. SOCIAL SCIENCES AND JURY INSTRUCTIONS

The jury system has been a favorite focus of social scientists. The American juror is without special knowledge and expertise; he is particularly easy and cheap to replicate for experimental purposes. College students, for example, provide an easily accessible, captive, and qualified pool of subjects.

A jury trial is also a rigidly controlled decisionmaking process. Evidence is presented in a structured format, and the jury is instructed to

13. A. ELWORK, B. SALES & J. ALFINI, *supra* note 11.

14. See generally Quade, *Federal Judges Simplify Jury Instructions*, 68 A.B.A. J. 1066 (1982).

15. S. SALTZBURG & H. PERLMAN, *FEDERAL CRIMINAL JURY INSTRUCTIONS* (1985).

16. One difference between a social scientist and a lawyer may be that the scientist tests his instincts empirically while the lawyer remains content to act upon his intuition. We did not attempt to go beyond the most casual of empirical tests on any of the instructions we drafted or the conclusions we reached.

ignore everything else. It is fairly easy for social scientists to replicate this controlled environment and to manipulate the few operative variables.

Finally, the jury is a favored source of experimentation because some in the legal arena express concerns about the jury and its role. Many lawyers trained to resolve complex controversies may be dubious of the wisdom of turning controversies over to untutored and largely undisciplined laypersons.¹⁷ On the other hand, those lawyers supportive of the jury are also supportive of reforms designed to improve and thus preserve it. Trial judges, increasingly captives of their growing case loads, may be impatient with the inefficiencies of a jury trial. Social scientists find then a profession that is fairly receptive to their challenges of current jury practices and their proposals for reform. Presumably social scientists, like the rest of us, prefer to work on issues that are perceived to be problems by those in a position to adopt proposed solutions.

A. Kalven and Zeisel—The American Jury

The most heroic studies of the American jury remain those conducted at the University of Chicago during the 1950's. That effort was brought together by Harry Kalven and Hans Zeisel in *The American Jury*, published in 1966.¹⁸ The core of the study was a review of actual jury cases and the measurement and evaluation of the agreement or disagreement between the jury and the trial judge as to the preferred outcome in each case. Some 3000 criminal cases formed the basis of the study.

Kalven and Zeisel did not focus extensively on the role that jury instructions might have played in causing agreement or disagreement between the jury and the judge. One important implication of the study, however, is that in approximately seventy-five percent of the cases, the judge and jury agreed on the preferred outcome.¹⁹ In these cases one might assume either that the jury understood the instructions, or understood what the judge intended by the instructions, or that any misunderstanding of the instructions did not influence the outcome.

17. "Plain language" pattern jury instructions initially met with similar resistance. One trial judge stated:

Ours is a respectable profession, quasi-scientific in nature, and comprised of learned men, and to require them to indulge in the language of the streets in preference to a more literary style is to debase an honorable calling, which, in this skeptical age, could use a little increase in stature rather than the contrary.

Laub, *Trial and Submission of a Case from a Judge's Standpoint*, 34 TEMP. L.Q. 1, 10 (1960).

18. H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* (1966).

19. *Id.* at 56, 63.

Kalven and Zeisel isolated five possible explanations for those cases in which judge and jury disagreed. Disagreements were attributable to:

- | | |
|--|------------------|
| 1. Different sentiments on the law | 29% |
| 2. Different sentiments on the defendant | 11% |
| 3. Issues of evidence | 54% |
| 4. Facts only the judge knew | 2% |
| 5. Disparity of counsel | 4% ²⁰ |

Although issues of evidence caused more than half of the disagreements, Kalven and Zeisel discovered no empirical support for the hypothesis that the jurors misunderstood the evidence. However, they did find empirical support for three alternative explanations: the liberation hypothesis—that conflicts in evidence freed the jury to follow its sentiment about the law or the particular defendant;²¹ the credibility hypothesis—that the jury and judge had different views on the credibility of witnesses;²² and the reasonable doubt hypothesis—that the jury and judge applied different thresholds of reasonable doubt.²³

The Kalven and Zeisel study concluded that the jury agreed with the judge in a large percentage of the cases. Within the cases of disagreement the jury was disciplined by the evidence; where doubt arose the jury allowed its sentiment to sway it in one direction or another.²⁴ The study also demonstrated, however, that the judge and jury disagreed very little in those cases in which the judge exercised substantial control over the jury through instructions, a summary of the evidence, and observations on the weight and credibility of the evidence.²⁵

If Kalven and Zeisel's study is correct, the range of jury departure from the judicial base line is small and can be controlled by the trial judge if he chooses to intrude substantially into the trial. Within the relatively narrow range of disagreement between judge and jury, the comprehensibility of the jury instructions may have some role to play in harnessing juror sentiment and reducing the incidence of disagreement.

B. History of Jury Instructions

The history of jury decisionmaking and jury instructions provide interesting insights into the problem of testing for and improving juror competency. Prior to the fifteenth century, jurors knew the facts

20. *Id.* at 115.

21. *Id.* at 164-67.

22. *Id.* at 168-81.

23. *Id.* at 182-90.

24. *Id.* at 164-67.

25. *Id.* at 425-27.

of the events they judged and exercised broad decisionmaking discretion.²⁶ Judges exercised control over juries through the method of "attaint," a system of calling a second jury to review the verdict of the first. If the second jury disagreed with the first jury's decision, the members of the first jury were subject to severe punishment.²⁷

The fifteenth century jury evolved into an unbiased and detached decisionmaking body that resolved disputes based on the evidence at trial. If the judge believed the jury decided the case incorrectly, members of the jury could still be punished.²⁸ Although judges were not expected to instruct juries unless requested by the jury, jurors soon realized that it was wise to see in advance how the judge thought the case ought to come out rather than risk punishment if they guessed wrong.

In 1670 in *Bushnel's* case,²⁹ an English court finally held that jurors could not be personally punished for failing to decide the case as the judge desired.³⁰ Attaint by a second jury sufficiently checked the decisionmaking of the first, and since this was the only check, juries became the ultimate decider of the law as well as the facts. It was not until the eighteenth century that judges could grant a new trial to cure a faulty jury verdict.

In the United States early juries were not instructed at all and were regarded as equal to the judge in their ability to interpret the common law. The common law was believed to be built on commonly shared values and thus who better to decide the law than the jury.³¹ It

26. The jury was a body of neighbours called in, either by express law, or by the consent of the parties, to decide disputed questions of fact. The decision upon questions of fact was left to them because they were already acquainted with them, or if not already so acquainted with them, because they might easily acquire the necessary knowledge. For this reason, it has been said that the primitive jury were witnesses to rather than judges of the facts.

1 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 317 (7th ed. 1956).

27. "If the original jury was convicted by the attaint jury, sentence followed in one stereotyped form. They were imprisoned for a year, forfeited their goods, became infamous, their wives and children were turned out, and their lands laid waste." *Id.* at 341.

28. The combination of attaint and the judge's power to punish the jury often posed a cruel dilemma: "If they do follow his direction, they may be attainted, and the judgment revers'd for doing that, which if they had not done, they should have been fined and imprisoned by the judge . . ." *Bushnel's Case*, Vaughan's Rep. 135, 147, 124 Eng. Rep. 1006, 1012 (1670).

29. Vaughan's Rep. 135, 124 Eng. Rep. 1006 (1670).

30. *Id.* at 147-48, 124 Eng. Rep. at 1012-13.

31. Two early American documents reflect this belief that "[t]he general Rules of Law and common regulations of Society, under which ordinary Transactions arrange[d] themselves, . . . [were] well enough known to ordinary jurors." W. NELSON, AMERICANIZATION OF THE COMMON LAW 26 (1975) (quoting 1 LEGAL PAPERS OF JOHN ADAMS 230 (L. Worth & H. Zoebel eds. 1965)). A second source explained to the jurors that they "need[ed] no Explanation [since] your good sense

was not until the end of the nineteenth century that state legislatures and courts required that the trial judge instruct the jury and empowered him to grant a new trial as a means of exacting compliance with his instructions. In 1895 in *Sparf and Hansen v. United States*,³² the Supreme Court held that jurors did not have the right to decide questions of law, even in criminal cases.³³ The law applicable to the case, therefore, had to be given to the jury by the trial judge.

Thereafter, appellate courts reviewed jury instructions as a means of insuring that trial judges stated the law accurately, and in response, trial judges began to expand and fashion their instructions in an effort to avoid appellate reversal. As instructions became more and more protective and complex, pattern jury instructions evolved—instructions drafted in advance to be used in all applicable cases. The Los Angeles Superior Court adopted the first set of pattern instructions in the late 1930's, an event that led to the adoption of state-wide pattern jury instructions in California.³⁴ Since then, almost all jurisdictions have adopted some form of pattern jury instructions.

The history of trial by jury is instructive. Throughout much of its development, the jury had control of law as well as fact. The jury was thought to bring some measure of community consensus to legal decisionmaking—the same phenomenon that Kalven and Zeisel argued explained much of the jury-judge disagreement in more recent cases. Thus, some degree of discretion to depart from the judge's view of the case has been an historic characteristic of the jury. It is also comforting to realize that our concern about juror comprehension of instructions is relatively new, and that we are only ninety years away from the time when juries decided questions of law.

C. Social Science Investigations

Since 1970 a series of empirical studies have documented first, that pattern jury instructions are not completely understood by the jurors to whom they are addressed, and second, that the use of certain techniques of drafting and organization improve juror comprehension.

In 1976 Strawn and Buchanan examined juror comprehension of

& understanding will Direct ye as to them." W. NELSON, *supra*, at 26, (quoting Grand Jury Charge, 1 CUSHING PAPERS (1759) (collection of Mass. Hist. Soc'y, Boston)).

32. 156 U.S. 51 (1895).

33. *Id.* at 106-07. Two Justices dissented, stating that "[i]t is our deep and settled conviction . . . that the jury . . . have the right, as well as the power, to decide, according to their own judgment and consciences, all questions, whether of law or of fact, involved. *Id.* at 114 (Gray, J., dissenting).

34. THE JUDGES OF THE SUPERIOR COURT OF LOS ANGELES COUNTY, CALIFORNIA, BOOK OF APPROVED JURY INSTRUCTIONS (1938).

Florida's criminal pattern jury instructions.³⁵ Randomly selected Florida jurors were shown videotaped jury instructions and were then tested by a multiple choice, true/false test to measure their comprehension. A control group was given the test without viewing any instructions. Jurors who had received instructions knew more than those who had not, but the instructed jurors still missed thirty percent of the test items, and on four issues regarded by the study's authors as critical, including an understanding of the concept of "reasonable doubt," the instructed jurors showed no better understanding than the control group.³⁶

In 1977, Elwork, Sales, and Alfini published the first results of a large study they conducted utilizing the Michigan civil pattern instructions.³⁷ Again, random subjects viewed videotaped instructions and were then compared against a control group that had been given no instructions. In one study the subjects watched an entire videotaped trial to provide a factual context. Again, the authors found that traditional pattern jury instructions did not provide a significant measure of comprehension beyond that of the control group.³⁸ They found, in fact, a nearly forty-percent rate of misunderstanding among those who viewed the traditional pattern instructions.³⁹

However, Elwork, Sales, and Alfini went further. Utilizing psycholinguistic literature, and, I think they will admit, a substantial measure of common sense, they redrafted the traditional instructions to improve juror comprehension. The literature they employed and the techniques they adopted focused on vocabulary, grammar, and organization. They replaced legal jargon with common words, abstract words with concrete words, and negative words with positive words. Homonyms—words with multiple meanings—were avoided.

Their revised instructions were sensitive to grammatical construction that had been shown empirically to improve comprehension. They avoided, where possible, embedded and compound sentences and the passive voice. They adopted what some social scientists termed a hierarchical and algorithmic organization scheme which breaks down

35. Strawn & Buchanan, *Jury Confusion: A Threat to Justice*, 59 JUDICATURE 478 (1976).

36. *Id.* at 480-83. Although I disclaim any expertise in empirical validity, as a lawyer I am uncomfortable with these findings. The jurors did not deliberate, they did not have a context within which to understand or apply the instructions as they did not see a trial, and they were not asked to apply the instructions. They were, in fact, given a test much like students in a classroom. Judged in that context a 73% on a test is by any normal measure a passing grade. This study, although not conclusive, did encourage more sophisticated efforts.

37. *Elwork II*, *supra* note 11.

38. *Id.* at 175.

39. *Id.* at 176. The authors found 10 errors out of 25 in a control group, and 15 errors out of 39 with traditional pattern instructions.

general concepts into component parts such that concepts flow from previously explained concepts. Empirical tests demonstrated that their revised instructions heightened comprehension by lay jurors.

In 1982 the same authors published a book-length treatment of the subject entitled *Making Jury Instructions Understandable*,⁴⁰ which reports on a wider test sample, refines the linguistic rules that demonstrably improve comprehension, and then sets out a step-by-step process through which lawyers (or others) may both rewrite instructions to improve understanding and empirically test their efforts.

A similar project was conducted by Charrow and Charrow and published in the *Columbia Law Review* in 1979.⁴¹ In their study subjects listened to instructions and were then asked to paraphrase what they had heard.⁴² Comparing the traditional to the linguistically revised instructions, they concluded again that much could be done to improve juror comprehension.⁴³

In two more recent studies,⁴⁴ Severance, Green, and Loftus carried the empirical observations a step further. To find sources of misunderstanding, they surveyed those cases in which juries had asked the judge questions during deliberations. They isolated three particularly bothersome instructions—those dealing with intent, reasonable doubt, and the use of evidence of prior convictions.⁴⁵

In the first study, jury-eligible college students viewed an hour-long videotape of a burglary trial and were then divided into six groups. One group received no instructions, one received a general instruction telling it what its duties were, and one received specific pattern instructions on the three areas to be studied. Half of each of these groups deliberated, the other half did not.

The authors examined the "jurors" through a questionnaire to determine whether they could distinguish between correct and incorrect expressions of the relevant law.⁴⁶ In a separate test to determine whether jurors could apply the instructions to novel fact situations, the jurors were given ten hypothetical situations and asked to evaluate the outcome.⁴⁷

Comprehension measures replicated the earlier studies. Subjects

40. J. ALFINI, B. SALES & A. ELWORK, *supra* note 11.

41. Charrow & Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 *COL. L. REV.* 1306 (1979).

42. *Id.* at 1309-11.

43. *Id.* at 1358-59.

44. Severance, Greene & Loftus, *Toward Criminal Jury Instructions that Jurors can Understand*, 75 *J. CRIM. L. & CRIMINOLOGY* 198 (1984); Severance & Loftus, *Improving the Ability of Jurors to Comprehend and Apply Criminal Jury Instructions*, 17 *L. & SOC'Y R.* 153 (1982).

45. Severance, Greene & Loftus, *supra* note 44, at 203-04.

46. *Id.* at 205-06.

47. *Id.* at 206.

receiving no instructions missed 35.6% of the questions on comprehension, subjects receiving the general instruction only missed 34.7%, and subjects receiving the specific instructions erred 29.6% of the time.⁴⁸

In measuring the subject's ability to apply the law to new situations, subjects receiving specific instructions did apply the law correctly more often, but the specific instruction on intent actually diminished that ability.⁴⁹

The authors then redrafted the specific instructions using the psycholinguistic techniques developed by the Charrows and Elwork groups and obtained consistently more accurate responses. Jurors receiving the redrafted specific instructions had an error in comprehension of 20.3%.⁵⁰

In a second, more detailed study, the same authors used both ex-jurors and persons who had been called for jury duty. They discovered that the more experienced jurors had greater accuracy of comprehension. They also replicated the finding that their revised instructions aided comprehension, particularly when jurors were able to deliberate.⁵¹ They also used the Charrow technique of asking jurors to paraphrase instructions and again found their revised instructions were better understood.⁵²

The Severance group also surveyed trial judges throughout the country to determine whether the group's set of revised instructions were regarded as correct statements of the law. They concluded that judges would accept as accurate their revised instructions.

III. ALASKA CIVIL AND FEDERAL CRIMINAL JURY INSTRUCTIONS

Against the background of these social science efforts, we drafted both the Alaska civil and federal criminal jury instructions. Elwork, Sales and Alfini influenced us most since their work was really a "how to" manual for drafting jury instructions. Interestingly, most of their rules for clear writing are as applicable to drafting jury instructions as to anything else.

The first object was to improve the organization of the sets of instructions. In most pattern instruction books, each instruction is a pebble in alien juxtaposition to others. We tried to think through a case of negligence or mail fraud and draft a set of instructions that

48. *Id.*

49. *Id.* at 207.

50. *Id.* at 213. By comparison, jurors receiving the pattern instruction had a 24.3% error rate, and jurors receiving no instruction had an error rate of 29.3%. The difference was statistically significant.

51. *Id.* at 218-19.

52. *Id.* at 221-24.

reflected an understandable organizational scheme. We tried to develop transitions necessary for understanding.

Our first instruction within any set became a general "elements" instruction that tells the jury what the case is about and, in a one, two, three format, what the jury must decide. The general elements instruction is followed, where necessary, by further instructions on each of the elements. We also used transitions and road-map instructions such as, "First, I will tell you what things you need to decide and then I will explain each of these things to you."⁵³

Of course, a major task of simplifying instructions is to replace legal jargon with simple words. For example,

We use:	Instead of:
win	prevail
help or encourage	aid or abet
trick or plan	device, scheme, or artifice
deliberately	willfully

In most instances, however, legal terms are shorthand expressions for detailed concepts, and our approach was generally to describe the concept for the jury in simplified language. Three examples of these efforts are reproduced in the appendices to this Article. The first is our attempt to define obscenity without using the term "prurient."⁵⁴ The second example from the Alaska instructions attempts to avoid using the terms "bailor" and "bailee."⁵⁵ The third represents an effort to explain how to define a product market in antitrust litigation without using the term "cross-elasticity of demand."⁵⁶

Legal terms are often used in pattern instructions as a method of generalization. Thus the term "security" is a general term for a variety of financial instruments such as stocks, bonds, certificates of indebtedness, etc. Pattern instructions tend to use the generic terms because they are written in the abstract outside the context of a particular case. We have urged judges through the structure of our instructions to refer to the case-specific item when possible. If common stock is involved the instructions should use the term "common stock." It is only when an ambiguous instrument is involved that the general term "security" followed by a definition is necessary.

53. For an example of a "traditional" mail fraud instruction, see 2 E. DEVITT & C. BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS §§ 47.03-47.05 (3d ed. 1977). By contrast, our simplified instruction uses transitions, road maps, and a one, two, three structure. See *infra* Appendix A.

54. See *infra* Appendix B. A more traditional instruction (*infra* Appendix C) is shorter but involves legal connotations that may be lost on a lay jury.

55. See *infra* Appendix D. For an example of a more traditional instruction using the terms "bailor" and "bailee," see *infra* Appendix E.

56. See *infra* Appendix F. For an example of a traditional instruction defining a product market using legal jargon, see *infra* Appendix G.

Pattern instructions can bridge the gap between abstraction and case-specific instructions by providing opportunities for the judge to adapt the instruction to the facts of a particular case. We also urge judges in our commentary to limit instructions to the case at hand. There is no reason to educate the jury for education sake.

Even the revised instructions retain some legal terms. There are really two approaches to simplifying legal terms. One can substitute common words or extended descriptions or one can use the legal term and provide a definition. We employed both techniques as our intuitions dictated.

Social scientists may tell us the definition approach is less satisfactory. However, in many instances legal terms will be used by the judge and the lawyers throughout the trial and to avoid these terms in the instructions may divorce the instructions from the language of the trial. Thus we do not avoid the words "obscenity" or "interstate commerce" or "materiality."

In some instructions legal language is used because of historical controversies long since settled. An example is the instruction that tells the jury that matters can be proved by both direct and circumstantial evidence. In the past there had been dispute over the role of circumstantial evidence. The Federal Rules of Evidence no longer draw a distinction,⁵⁷ and we recommend no instruction be given.⁵⁸

We also abandoned use of the terms "presumption" and "inference" in jury instructions. Inferences from evidence are always necessary and always made. To highlight some but not all such occasions may be confusing. There are times, however, when the law requires an instruction. In these instances we propose that the process of drawing inferences be explained.⁵⁹

Jury instructions often employ legal terms in order to structure but not to eliminate the discretion of the jury. These terms are left without bright parameters in order to facilitate the jury's obligation to impose some form of community standard. In civil cases the best example is the concept of negligence in which the law invites the jury to apply the community standards of reasonable care without much "legal" direction.⁶⁰

On the criminal side, reasonable doubt may be a similar concept, and accordingly we have urged judges not to attempt to define it with too much precision. For example, in the mail fraud instructions we

57. See FED. R. EVID. 401 and advisory committee note.

58. 1 S. SALTZBURG & H. PERLMAN, FEDERAL CRIMINAL JURY INSTRUCTIONS § 1.13 (1985).

59. See *infra* Appendix H. By contrast, a traditional instruction (*infra* Appendix I) explains the term, not the process.

60. See *infra* Appendix I. For an example of a California instruction using a more traditional "reasonable prudence" type of formulation, see *infra* Appendix K.

incorporate the burden of proof as to each element and propose a general instruction on "burden of proof."⁶¹

Reforming the language of jury instructions alone will not solve the problem of jury misunderstanding. Peripheral issues are also important. For example, if the instructions are in simplified language, it is counterproductive to have the judge read to the jury a complex and jargon-filled indictment or statute. Instead, trial judges should summarize the indictment and statute in simple language. The prosecution may resist this recommendation since it is advantageous to the prosecutor to have the judge read what amounts to the prosecution's opening statement.

In some instances jury instructions could also be simplified by leaving more to the arguments of counsel. Some traditional instructions tend to state a decision for the jury followed by a list of factual elements the jury can use to make its decision. Although these kinds of instructions may be inevitable, we generally urge in the comments that factual discussions be left to trial counsel. The more detailed instructions are a subtle means of judicial comment on the evidence and our bias is to leave the trial to the lawyers.

The timing of the instructions and other procedures that surround the giving of instructions also affect juror understanding. There is literature to confirm the common sense notion that giving instructions only at the end of the trial is not the most effective method to increase juror understanding of the case.⁶² We propose sets of general instructions for use at the outset of the trial, during the trial, and at the end of the trial. We suggest that at the beginning of the trial the judge give a brief summary instruction of the elements of the case to give the jury some framework to evaluate the evidence. We also suggest instructions for juror notetaking and for giving jurors written copies of the instruction.

IV. IMPLEMENTING SOCIAL SCIENCE INTO THE REAL WORLD

The true skeptic might say that the social science studies of juror comprehension have only confirmed what any lawyer or judge already knew from experience. To some degree this is correct; most lawyers and judges who think about the traditional instructions they use recognize that those instructions have limitations for juror comprehension. Very little in the social science literature is counter-intuitive, yet

61. See *infra* Appendix L. A traditional burden of proof instruction is set out *infra* Appendix M.

62. See, e.g., A. AUSTIN, *supra* note 8, at 104; Prettyman, *Jury Instructions - First or Last?*, 46 A.B.A. J. 1066 (1960); Schwarzer, *Communicating with Juries: Problems and Remedies*, 69 CALIF. L. REV. 731, 755-56 (1981); Winslow, *The Instruction Ritual*, 13 HAST. L.J. 456, 470-71 (1962).

lawyers and judges are often reluctant to direct wholesale change in legal process based on their intuition, particularly when the alternatives are not readily available. The recent attention focused on juror understanding by social scientists has highlighted and given an objective, empirical confirmation of the legal profession's suspicions and has thus created a receptive climate for reform.

System-wide change in the law, as in most industries, will not come from without but must percolate up from within. Social scientists alone cannot, regardless of the force of their arguments or the power of their statistics, effectuate broad-scale change. Lawyers must do it. The work of Elwork, Sales, and Alfini and the Charrows is particularly helpful social science. The Charrows provide a list of techniques for drafting simplified instructions⁶³ and Elwork's group not only provides the techniques but a method of testing the results.⁶⁴ Both of these studies go beyond proving juror misunderstanding by providing tools for lawyers to improve the drafting of instructions.

Now that social scientists have confirmed that a significant amount of juror misunderstanding results from current jury instructions, the path of reform is wide and clearly marked. Much can be accomplished in simplifying the language of jury instructions. At the same time, juror comprehension, if carried to an extreme, may sacrifice other equally important attributes of the jury system. It may not be premature to explore some of the limitations and restraints that might arguably temper the search for simplified instructions.

A. Balancing the Need for Specialized Language against the Goal of Juror Comprehension

Jury instructions continue to serve as the media for multiple messages. The focus of social science research has been to facilitate the communication of legal rules to a lay juror for their application by him to the facts of a particular case. This is a very important function of jury instructions, but it is not the only function. In the context of a jury trial the instructions also perform a major procedural function in focusing for counsel and the court the legal matters in dispute.

At the trial, the jury sees only a small part of the jousting between the contending parties. Arguments over the applicable law take place between judge and counsel and are directed toward the instructions ultimately given the jury. The instructions are the medium for this essentially intraprofessional discussion, and they serve a similar function when an appellate court reviews the case on appeal. Because the

63. Charrow & Charrow, *supra* note 41, at 1336-40. *See also supra* notes 40-42 and accompanying text.

64. A. ELWORK, B. SALES & J. ALFINI, *supra* note 11, at 73-140. *See also supra* note 39 and accompanying text.

instructions preserve the law as perceived to be applicable by the trial judge, most appeals on the law revolve around the instructions.

One can of course argue that there might be much to gain if these intralawyer discussions were conducted in simplified language and that no true professional interest militates against simplified instructions. That view overlooks the possibility that legal language serves some useful purposes that may be lost if simplified. The extensive use of specialized language in all fields, including social science, suggests that all professionals find real value in its use. Simplified jury instructions trade off these values in favor of juror comprehension. When the value of specialized language is dubious, common sense leads to the conclusion that little is lost in exchanging the legal jargon for simplified instructions. The value of specialized legal language, however, is not always questionable. The task of the legal profession is to identify those legitimate uses of specialized legal language that, if abandoned through a rigid commitment to juror comprehension, may create problems equal to or greater than jury misunderstanding.

There may be several plausible explanations for the extensive use of jargon. A cynical explanation is that each profession seeks to insulate itself from competition by use of terms only its members are trained to understand. It is doubtful that this explanation has much force given the alternative means available to the legal profession to secure its monopoly.

The most often asserted justification for specialized language is that it communicates some subtlety of meaning that cannot be duplicated in simplified English. It is a common assertion that there are terms in other languages or in specialized professional jargon that cannot be translated exactly into common English. There are legal terms for which a single common word cannot be found, but if one is prepared to write expansively most legal terms can be sensibly explained.⁶⁵

If there are in fact some legal terms that are so subtle as to defy simplification, they may reflect distinctions that are not sufficiently important to capture in a jury instruction. There must be some appropriate point at which the gains from refinement in legal doctrine exceed the process costs of implementation. Legal terms that cannot be simplified may signal a need to rethink the legal distinction.

65. The "subtlety of meaning" involved in a term of art (in law or any other discipline producing jargon) attaches as a function of usage, and not because of any inherent property of the word itself. The process of education in a specialty attaches connotations to a word that are unavailable to those outside the specialty. "The speaking of a language is part of an activity or a form of life." L. WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* § 23 (1953). This suggests that any term of art can be translated for a jury, although a sufficient explanation may be lengthy. See also *supra* note 54 and accompanying text.

A more plausible explanation for jargon is that it facilitates efficient communication between professionals. By analogy to price theory, if the "supply" of communication is measured by the output of the speaker, the "demand" for communication must be the amount of reception by the listener. Communication presumably requires some equilibrium of output and input and at least on the time dimension supply might easily outrun demand.

The point is the old one of not using four words when one will do. Professionals use jargon to reach an equilibrium of communication.⁶⁶ Very often, simplification of these terms requires breaking out a variety of different thoughts and greatly lengthening the verbiage necessary to communicate the same concept. This can be seen in the Alaska instructions where the terms "bailor" and "bailee" were avoided at the expense of greatly lengthening the instructions.⁶⁷

To the extent that the legal process requires intraprofessional communication as well as communication with the juror, the attempts to simplify language may have their costs in efficiency of communication between the lawyers and the judge and the appellate courts. And, even looking exclusively at the jury, there must be some point where the length of an instruction begins to diminish the gains from simplification.

It is also possible that some of the obfuscation associated with legal terms of art is not only intentional but necessary for the legal system to function. Courts, unlike other decisionmakers, cannot avoid decisions; the disputes that are brought to court must be resolved. Intuition and reason combine to surface the factors that are appropriately applied to reach decisions, but oftentimes limitations of knowledge or the costs of acquiring facts prevent application of these factors with any degree of certainty.

In personal injury cases, intuition confirms that victims suffer substantial detriments beyond their out of pocket costs, but our ability to measure these intangible losses is limited. To instruct a jury that they may award damages for "the nature and extent of the injury" or for "pain and suffering" may cause initial confusion or lack of understanding, but it permits the cases to be decided.

The costs of fact-gathering may also be prohibitive. In trademark cases the second user of a mark is liable only if his use will create a

66. This notion is similar to the concept of a "language game" found in linguistic philosophy. The use of the "game" concept focuses on the idea that language is a goal-oriented activity conducted according to rules. To complete the economic analogy, imagine two masters playing chess, as opposed to a player teaching the rules to a neophyte. See L. WITTGENSTEIN, *THE BLUE AND BROWN BOOKS* 81 (1958). See generally Carpenter, *Wittgenstein's Language-Game—A Tool for Cognitive Developmentalists*, 4 *TRANSACTIONS NEB. ACAD. SCI.* 161 (1977).

67. See *supra* note 55.

“substantial likelihood of confusion among consumers.” Testing jurors as to what they think “substantial” means or what they think “likelihood of confusion” means would produce divergent responses. Yet if the law were to be more specific and thus more simple—if it were to say, for example, that sixty-five percent of prospective customers must be confused by the mark—the costs of trademark litigation would rise considerably. And to the extent that trademark enforcement costs increase, the value of trademarks declines.

Ambiguity of doctrine may also be designed to give the appearance of stability with the reality of growth and change. Cases with historically heavy jury involvement seem to have core concepts that are not and cannot be clear or simple. What is negligent today may not be negligent tomorrow. Just as constitutional phrases such as “due process” are adjusted with the times, perhaps notions of “reasonable doubt” or some issues of intention in the criminal law should also follow the ebb and flow of community consensus. There is much to be said for certainty and comprehension in the law just as there is comfort and understanding in viewing a photograph or a realistic painting. But at times the law may also need to be viewed like an abstract expressionist painting where the response evoked is more emotional than rational and where the true meaning lies in the eye of the beholder.

B. Practical Limitations on Simplifying Instructions

Although in many instances the benefits of juror comprehension may outweigh the perceived need for specialized legal language, the implementation of simplified instructions may be limited by practical considerations. In evaluating the prospects of or planning strategy for reform, it seems important to recognize the different realities that confront the relevant parties.

Whatever the style of the instructions, they will inevitably emerge from an adversary process in which two lawyers seek to have the instructions read to favor their respective clients. Lawyers may believe it is in their best interest to resist simplified instructions. The instructions are only a fraction of what the jury hears. To some extent the judge and the lawyers engage in a three-sided contest to educate the jury. The lawyer, particularly in closing argument, but also at various other stages throughout the trial, has an opportunity to educate the jurors as to how they should decide the case. To the extent the judge’s similar message is garbled or difficult to understand, the greater the latitude the lawyer has to have his message adopted.⁶⁸

68. The situation is analogous to the *seriatim* charge given to the early law-finding juries. In a *seriatim* charge, “each judge was free to state to the jury his opinion of the law and each jury was free to select the opinion it preferred . . .” W.

The trial judge, of course, will ultimately decide which instructions are given. If the trial judge is sensitive to the prospects of reversal on appeal, he can be counted on to move toward instructions that do not unduly favor either side. But he may also have a tendency to repeat language of the appellate courts to assure legal accuracy. Increasing judicial caseloads make it less likely that trial judges will take the time to simplify their instructions. It is not uncommon for trial judges to require the lawyers to submit instructions and for judges to work with these submitted instructions at least as a starting point.

Trial judges may have other goals that tend to make jury instructions longer than necessary in a particular case. In jurisdictions where judges are not free to comment on or to summarize the evidence, judges may tend to extend the instructions to accomplish the same result. Instructions that explain general concepts like negligence by listing or ranking factors the jury should use in reaching its decision are subtle forms of judicial comment.

C. Inherent Limitations on Instruction Reform

In addition to these restraints within the legal process, there are some built-in limits to the ability of instruction drafting to clarify the law for lay jurors. No jury instruction can clarify a law that is itself ambiguous. An example given in one of the social science studies to demonstrate the need for improved drafting techniques involved a case in which the court was criticized for adopting an instruction on intent that was a mirror image of statutory language.⁶⁹ The social scientist argued the example demonstrated that clarity could be best achieved by avoiding repetition of statutory language—an argument with which I wholeheartedly agree. But the appellate court reversed, not because the instruction was ambiguous, but because the statute was too ambiguous to support a criminal conviction.⁷⁰ Amendment by instruction is a peculiar method of legal reform.

Nor should restyled jury instructions be used to reform legal doctrines that may have been purposely designed to provide an open-ended opportunity for the jury to follow its own sentiments. Much of the discussion in the social science literature focuses on the instructions surrounding the definition of "reasonable doubt."⁷¹ There is much empiricism to suggest that individual jurors have difficulty with

NELSON, *supra* note 31, at 166. Similarly, a garbled or incomprehensible instruction allows a modern jury, limited in theory to fact-finding, greater latitude to engage in policy choices. *See infra* note 73 and accompanying text.

69. Severance, Greene & Loftus, *supra* note 44, at 200-01.

70. *State v. Shipp*, 93 Wash. 2d 510, 515, 610 P.2d 1322, 1325 (1980).

71. *See, e.g., Elwork I*, *supra* note 11; Farrell, *supra* note 2, at 24; Severance, Greene & Loftus, *supra* note 44, at 203-04; Severance & Loftus, *supra* note 44, at 172; Strawn & Buchanan, *supra* note 35, at 481-82.

the concept. However, the answer may not be to refine the definition of reasonable doubt. Indeed, there were several questionable attempts by judges to define the standard of reasonable doubt in terms of a percentage of certainty, e.g., ninety-percent certainty.⁷²

Defining reasonable doubt may be a task that justifiably requires the jury to exploit its own intuition and common sense. Of course the jury can be told that the state must prove the elements of the offense beyond a reasonable doubt. But beyond that, there may be nothing more of content than the jury's deliberative and collegial views of the matter.

There is a view within Anglo-American jurisprudence that it is quite proper for a jury to follow its own conscience rather than the legal rules reflected in the instructions.⁷³ One has a difficult case defending the jury system if its decisionmaking process is too rigidly cabined by the judge's instructions. It can hardly be thought that the jury is a more efficient or a more sensitive fact-finder than an experienced trial judge. The empirics tell us that juries lack understanding of the instructions on the law, and common sense suggests that it may be easier for the judge to apply the law than to tell a jury how to do so. If the commitment to the jury system means anything, presumably the jury is to bring a community's conscience to bear on legal disputes, to moderate and perhaps eventually to amend the more insulated professional viewpoint. There may be within the justification for the jury a built-in percentage of departure from instructions that is explained not because the jury misunderstood the problem but because they understood it all too well.

My last point is in some sense to state the obvious but the implications to me seem difficult to resolve. Law teachers must be amused at how some regard as startling the fact that jurors do not have one-hundred percent comprehension of the instructions. Indeed, some of us would regard a seventy-five percent accuracy rate averaged over the students in our classes as remarkable. The fact is that education is

72. These cases are usually reversed on the theory that quantification of the burden allows the jury to convict on something less than the "subjective state of near certitude" required by *Jackson v. Virginia*, 443 U.S. 307, 315 (1979). See, e.g., *U.S. v. Anglada*, 524 F.2d 296, 300 (2d Cir. 1975) ("bundle of twigs" analogy impermissible); *Commonwealth v. Sullivan*, 20 Mass. App. Ct. 802, ___, 482 N.E.2d 1198, 1200 (1985) (speculation on quantitative nature of burden produces reversal). See generally *Simon & Mahan, Quantifying Burdens of Proof: A View from the Bench, the Jury, and the Classroom*, 5 L. & Soc'y REV. 319, 324 (1971).

73. This is the phenomenon of "jury nullification," which continues to be a source of controversy. See *Farrell, supra* note 2, at 22. Compare *Marshall, Jurors Must Respect the Law*, 72 A.B.A. J. Mar. 1, 1986, at 36, with *Osterman, Law Must Respect Consciences*, 72 A.B.A. J. Mar. 1, 1986, at 36. See generally *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 478 F. Supp. 889, 938-42 (E.D. Pa. 1979), *rev'd sub nom. In re Japanese Elec. Prod. Antitrust Litig.*, 631 F.2d 1069 (3d Cir. 1980).

not an easy task in the best of circumstances and jury instructions are not the best of circumstances even in the best of circumstances.

V. CONCLUSION

The work of social scientists in confirming the fact of juror misunderstanding of instructions has significantly enhanced the opportunities for real reform. There is evidence, here and there, that progress is being made and will continue to be made toward simplified jury instructions. The best hope for significant change lies with trial and appellate courts that can insist that the instructions submitted to them—and the pattern instructions developed under their auspices—be free of unnecessary complexity.

Although the movement toward simplified jury instructions is only in its infancy, it may still be important at this stage to consider the ultimate objectives and some of the limitations and restraints that might appropriately temper reform. In the end, perfect comprehension by jurors is unattainable and, when measured against the function of the jury, perhaps undesirable.

APPENDIX A

Federal Criminal Jury Instructions
S. Saltzburg & H. Perlman
(Vol. 2, Miche 1985)

24.01

MAIL FRAUD

In this case the government charges that the defendant(s) [insert name(s)] (is) (are) guilty of using the United States mail to commit a fraud. To find the defendant(s) guilty as charged, you must believe beyond a reasonable doubt that the following things are true:

1. that the defendant deliberately:

(a) used a trick or participated in a plan to cause someone else to act upon a false impression about a state of facts; or

(b) obtained money or property by [insert one or more of the following: "making a false statement of a material fact"; "making a promise he did not intend to keep"; "pretending something was true that was not true"]; or

(c) created a false impression about a state of facts by failing to disclose a material fact in circumstances in which he had a duty to disclose; and

2. the defendant intended to cause someone to act on a false impression of a state of facts; and

3. the United States mail was used in an important way to execute the fraud, and the defendant knew or reasonably should have known that the fraud would involve the use of the United States mail.

Unless you believe beyond a reasonable doubt that all of these things are true, you must find the defendant not guilty.

24.05

SCHEME OR ARTIFICE TO DEFRAUD

The government claims the defendant deliberately participated in a plan to cause someone else to act upon a false impression about a state of facts.

The government has tried to prove a plan existed by showing a number of things were done as part of a plan. For you to find that such a plan existed, you do not have to believe beyond a reasonable doubt that each of these things happened; but, you do have to believe enough of these things happened so that you also believe beyond a reasonable doubt that there was a plan to cause someone else to act upon a false impression about a state of facts.

A plan can be formed or carried out by one person or by many persons.

To find the defendant guilty as charged, you do not have to believe the plan succeeded or that anyone lost money or that anyone profited from the plan.

24.07
MATERIALITY

The government charges the defendant with (making a false statement of a material fact; leaving a false impression by omitting a material fact). I will now explain how you decide whether a particular fact is "material."

A fact is material if a reasonable person would attach importance to the fact in making a decision.

24.08
"INTENT" (DELIBERATELY) DEFINED

To find that the defendant committed a fraud "deliberately," you must believe beyond a reasonable doubt that either he:

1. knew he was causing or was likely to cause a person to act upon a false impression of a state of facts; or
2. had serious doubts about whether or not he was causing or was likely to cause a person to act upon a false impression of a state of facts; or
- (3. deliberately closed his eyes to what would otherwise be obvious to him and in this way avoided determining whether or not he was causing or was likely to cause a person to act upon a false impression of a state of facts.)

The defendant did not act deliberately if he caused a false impression by an honest or careless or inadvertent mistake.

24.09
GOOD FAITH

A person does not commit a deliberate fraud if his words and actions are done in good faith. A person speaks or acts in good faith if

- (1. He honestly believes that what he said is true); or
- (2. He honestly believes that his business idea is practical and has a reasonable chance of success even though you might believe with the benefit of hindsight that the plan was impractical and unlikely to succeed); or
- (3. He honestly intends to carry out his promises.)

24.11
USE OF JURISDICTIONAL FACILITIES

To find the defendant(s) guilty as charged, you must believe beyond a reasonable doubt that the United States mail was used in an important way to execute the fraud, and the defendant knew or reasonably should have known that the mails would be used to help carry out the fraud.

(The fraud involved the use of the mails if you believe beyond a

reasonable doubt that [insert claim of government as to use of mails sufficient to constitute jurisdiction, i.e., the defendant knew that receipts for purchase of stock would be mailed to the purchaser].)

(The use of the mails is important if the use is more than incidental or collateral to execution of the fraud.)

APPENDIX B

Federal Criminal Jury Instructions
S. Saltzburg & H. Perlman
(Vol. 2, Miche 1985)

40.02

"OBSCENITY" DEFINED

The Constitution of the United States protects freedom of speech. The Constitution does not protect obscene material, however. In this case, the government claims that [describe material—e.g., book, movie, etc.] is obscene. If you believe beyond a reasonable doubt that this is correct, then the defendant may be convicted and punished for mailing it. If you do not believe this beyond a reasonable doubt, you must find the defendant not guilty.

Freedom of speech is one of the most important rights protected by our Constitution. You should keep this in mind as you decide whether or not the [describe material] is obscene.

Something is not obscene simply because you do not like it.

Something is not obscene simply because you disagree with it.

Something is not obscene simply because it involves sex.

Something is not obscene simply because it involves nudity.

Something is not obscene simply because it offends your personal taste.

To find a [describe material] obscene, you must examine the [describe material] as a whole, not looking at isolated parts. And you must believe beyond a reasonable doubt three things:

1. That it has no serious literary, artistic, political or scientific value; and
2. That the average person who considered the [describe material] as a whole, not looking at isolated parts, in the light of contemporary community standards would find that the [describe material] shows (describes) sexual acts in a patently offensive way; and
3. That the main theme of the [describe material] appeals to an interest in sex that the average person would regard as unhealthy and undesirable.

APPENDIX C

Federal Jury Practice and Instructions
E. Devitt & C. Blackmar
(Vol. 2, 3d ed. West 1977)

§ 62.03 "Obscene"—Defined

Although the indictment includes the words of the statute, namely, the adjectives "obscene", "lewd", "lascivious", "indecent" and "filthy", the gist of the offense alleged in the indictment is the charge that the defendant willfully misused the United States mail for the delivery of obscene photographs or pictures.

"Obscene" means something which deals with sex in a manner such that the predominant appeal is to prurient interest; which, by the current standards of the community as a whole; and which, taken as a whole, lacks serious literary, artistic, political or scientific value.

An appeal to prurient interest is an appeal to a morbid interest in sex, as distinguished from a candid interest in sex.

APPENDIX D

Alaska Pattern Civil Jury Instructions
H. Perlman & S. Saltzburg
(1981)**21.01 INTRODUCTION**

In this case [the plaintiff (name of plaintiff) claims] the defendant (name of defendant) obtained possession of plaintiff's (insert bailed article). The plaintiff claims a loss (losses) resulting from

(1) (damage) (destruction) of the (insert bailed article) for which the plaintiff claims the defendant is responsible; and

(2) failure of the defendant to return the (insert bailed article) when requested to do so; and

(3) unauthorized use of the (insert bailed article) by the defendant.

The plaintiff wants the defendant to pay him for this loss [these losses]. The defendant denies that he is legally responsible for this loss [these losses].

21.02 BAILMENT CONTESTED

The plaintiff says the defendant obtained possession of the plaintiff's (insert bailed article) in the following way:

(Insert claim of bailment)

If you decide that it is more likely than not that the defendant obtained possession of the plaintiff's (insert bailed article) in the way the plaintiff says, you must consider plaintiff's claim(s) that the defendant should pay (him) for (his) loss. If you decide otherwise, you must return a verdict for the defendant.

21.03 BAILEE'S LIABILITY—DAMAGE TO GOODS

I will now describe the plaintiff's [first] claim and how you must decide it.

The plaintiff claims that after the defendant obtained possession of the (insert bailed article), but before the defendant returned it to the plaintiff or to (insert a person authorized by the plaintiff to receive it), the item was (damaged).

You must decide if it is more likely than not that this is true. If it is, then the defendant must pay for the plaintiff's loss unless (he) is excused for a reason that I will explain to you. Otherwise, the defendant does not have to pay anything.

21.04 EXCUSE—REASONABLE CARE

Now that I have described the plaintiff's (first) claim to you, I will describe the defendant's claim that the law excuses (him) from responsibility for any harm suffered by the plaintiff.

The defendant (first) claims he is excused from legal responsibility because (he) took reasonable care under the circumstances to protect the (insert bailed article) from harm. A person uses reasonable care when he does what a reasonably careful person would do under similar circumstances.

You must decide if it is more likely than not that the defendant used reasonable care. If he did, the defendant is excused from legal responsibility and does not have to pay for the plaintiff's loss. Otherwise, the defendant is not excused [for this reason].

APPENDIX E

Colorado Supreme Court Committee on Civil Jury Instructions,
Colorado Jury Instructions 2d - Civil
(1978)

16:1 BAILMENT—BAILOR—BAILEE—DEFINED

A bailment is a delivery of personal property by one person to another, for a special object or purpose, to be returned when that purpose is accomplished.

A bailor is the person who delivers the property and a bailee is the person who receives it.

16:2 BAILOR NOT LIABLE TO THIRD PERSONS FOR NEGLIGENCE OF BAILEE

A bailor is not legally responsible to third persons for injuries or damages caused by any negligent use of the personal property by the bailee.

16:3 GRATUITOUS BAILMENT—DUTY OF BAILOR TO BAILEE

A bailor (lending) (furnishing) an article without payment (or other consideration) owes a duty to the bailee to warn him of dangers or defects in the article which are known to the bailor and which make the article dangerous in its intended use and which the bailee could not have been expected to discover by the exercise of reasonable care. The bailor owes no duty to inspect the article to see that it is free from defects or dangers.

16:4 NON-GRATUITOUS BAILMENT—DUTY OF NON-COMMERCIAL BAILOR TO BAILEE

A bailor who furnishes an article (for payment) (or) (for some reciprocal benefit) owes a duty to the bailee either:

1. to use reasonable care to provide that the article is safe for its intended use and is free from any defects of which the bailor has knowledge or could have discovered by a reasonable inspection; or
2. to warn the bailee of any known defect or of any failure on the bailor's part to make a reasonable inspection.

APPENDIX F

Federal Criminal Jury Instructions
S. Saltzburg & H. Perlman
(Vol. 2, 1985)

20.10

“RELEVANT MARKET” DEFINED

In order to decide whether a restraint of trade has an adverse effect on competition, you must first define the relevant market in which the restraint is claimed to have that effect. The term “relevant market” has two separate parts: The first is called the product market; the second is called the geographic market.

In this case the government claims that the relevant product market is [insert government’s claim].

To define the relevant product market you are really being asked to decide which products compete with those made by the defendant. Products are in the same product market, that is they compete with each other, if, as a practical matter, a substantial number of buyers regard the products as reasonable substitutes for each other considering their respective prices, uses, and special characteristics. Some products are almost perfect substitutes. One bushel of corn is usually a near perfect substitute for another bushel of corn. On the other hand two products do not have to be identical to be in the same product market.

In this case the government claims the relevant geographic market is [insert government’s claim].

To define the relevant geographic market you are really being asked to decide which firms within the relevant product market compete with the defendant. Firms compete with each other if a potential buyer might rationally turn to either firm for the products he needs or if either firm might rationally offer what the buyer needs. The geographic area of competition may be small or as large as the entire United States or larger.

APPENDIX G

Federal Jury Practice and Instructions
E. Devitt & C. Blackmar
(Vol. 3, 3d ed. West 1977)

§ 90.28 "Relevant Market" Explained

Within the broad, world-wide market for the products in issue, sub-markets may exist which in themselves constitute product markets for agricultural purposes.

The boundaries of such a sub market may be determined by examining such practical indicia as industry or public recognition of the sub market as a separate economic entity; the products peculiar characteristics and uses; economic production facilities; distinct customers; distinct prices; sensitivity to price changes and specialized vendors.

. . . .

Congress prescribed a pragmatic, factual approach to the definition of the relevant market, and not a formal or legalistic one.

. . . .

In determining the relevant market, the "area of effective competition" must be determined by reference to a product market and a geographic market.

The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it.

APPENDIX H

Federal Criminal Jury Instructions
S. Saltburg & H. Perlman
(Vol. 2, Miche 1985)

33.08

PERMISSIVE INFERENCES; RECENT POSSESSION

If you find that the defendant possessed a stolen [insert object] that had recently been moved from inside a state to outside of that state, you may reason that he knew that [insert object] was stolen and that he either moved the [insert object] or had someone else move it for him. But you are not required to reason in this way. You must decide whether this evidence is important and how important it may be.

(A person has possession of an object if he has it on his person or if it is in a place where he alone or with others has control over it.)

(You may consider the length of time that passed between a theft and possession in deciding whether to reason that if the defendant possessed [insert object], he knew that it was stolen and he either moved it or had someone else move it for him.)

APPENDIX I

Federal Jury Practice and Procedure
E. Devitt & C. Blackmar
(Vol. 1, 3d ed. West 1977)

§ 15.02 Direct Evidence—Circumstantial Evidence

There are two types of evidence from which you may find the truth as to the facts of a case—direct and circumstantial evidence. Direct evidence is the testimony of one who asserts actual knowledge of a fact, such as an eyewitness; circumstantial evidence is proof of a chain of facts and circumstances indicating the guilt or innocence of a defendant. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. Nor is a greater degree of certainty required of circumstantial evidence than of direct evidence. You should weigh all the evidence in the case. After weighing all the evidence, if you are not convinced of the guilt of the defendant beyond a reasonable doubt, you must find him not guilty.

§15.03 Inferences from Evidence

Inferences are deductions or conclusions which reason and common sense lead the jury to draw from facts which have been established by the evidence in the case.

As applied to this case, the law declares that you may regard proof of (presence of the defendant at a still) as sufficient evidence that (he is engaged in the business of distilling). The law, however, does not require you to so find. You are the sole judge of the facts. Since proof (that the defendant is engaged in distilling) is an essential element of the offense charged in the indictment, as defined elsewhere in these instructions, you may not find the defendant guilty unless you find beyond reasonable doubt that the defendant (is engaged in distilling without having given bond).

APPENDIX J

Alaska Pattern Civil Jury Instructions
H. Perlman & S. Saltzburg
(1981)

3.01 NEGLIGENCE—WHEN PLAINTIFF ENTITLED TO RECOVER

The plaintiff, (name) claims that (he) was (injured) (damaged) because of the negligence of the defendant, (name), and wants payment from the defendant for (his) loss. For the plaintiff to win on this claim you must decide that it is more likely than not *both*

1. that the defendant was negligent, and
2. that the negligence was a legal cause of the plaintiff's loss.

I will define negligence and legal cause for you in a few moments.

3.03A NEGLIGENCE DEFINED

I will now explain negligence to you.

A person is negligent if he does not use reasonable care. Negligence may result from action or inaction. A person is negligent if he does not act as a reasonably careful person would act under similar circumstances.

In this case you must decide whether or not (plaintiff) (defendant) (both plaintiff or defendant) used reasonable care under the circumstances.

APPENDIX K

The Committee on Standard Jury Instructions, Civil
of the Superior Court of Los Angeles County, California
California Jury Instructions—Civil
(1977)

BAJI 3.10
NEGLIGENCE AND ORDINARY CARE
DEFINITIONS

Negligence is the doing of something which a reasonably prudent person would not do, or the failure to do something which a reasonably prudent person would do, under circumstances similar to those shown by the evidence.

It is the failure to use ordinary or reasonable care.

Ordinary or reasonable care is that care which persons of ordinary prudence would use in order to avoid injury to themselves or others under circumstances similar to those shown by the evidence.

APPENDIX L

Federal Criminal Jury Instructions
S. Saltzburg & H. Perlman
(Vol. 1, Miche 1985)

3.59

“REASONABLE DOUBT” DEFINED

You will hear me say throughout my instructions on the specific charges made against the defendant(s) by the government that you may not convict the defendant(s) of any crime unless you believe that he is (they are) guilty beyond a reasonable doubt. It is the government that brings charges and it is the government that must prove these charges. It must prove them beyond a reasonable doubt.

[Although the following two paragraphs are provided for judges who believe some further definition is required, we believe the first paragraph is sufficient.]

Few things in life are absolutely certain. To say that you believe something beyond a reasonable doubt is to say that you are confident in your judgment. It does not require you to be absolutely certain. You may have a reasonable doubt about something if you are hesitant to accept it as true after you evaluate the evidence.

You must carefully examine the evidence that has been presented to you and recall the arguments concerning the significance of that evidence. You must carefully weigh that evidence and analyze the arguments. You must pay careful attention to the law that I give you. And then you must ask yourselves whether on the basis of your reason and judgment you have a reasonable doubt about the matters I instruct you to decide. You must find the defendant not guilty when you have a reasonable doubt. You may find him guilty when you have none.

APPENDIX M

Federal Jury Practice and Instructions

E. Devitt & C. Blackmar
(Vol. 1, 3d ed. West 1977)

§ 11.14 Burden of Proof—Reasonable Doubt

The law presumes a defendant to be innocent of crime. Thus a defendant, although accused, begins the trial with a “clean slate”—with no evidence against him. And the law permits nothing but legal evidence presented before the jury to be considered in support of any charge against the accused. So the presumption of innocence alone is sufficient to acquit a defendant, unless the jurors are satisfied beyond a reasonable doubt of the defendant’s guilt after careful and impartial consideration of all the evidence in the case.

It is not required that the government prove guilt beyond all possible doubt. The test is one of reasonable doubt. A reasonable doubt is a doubt based upon reason and common sense—the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt must, therefore, be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it in the most important of his own affairs.

The jury will remember that a defendant is never to be convicted on mere suspicion or conjecture.

The burden is always upon the prosecution to prove guilt beyond a reasonable doubt. This burden never shifts to a defendant; for the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

So if the jury, after careful and impartial consideration of all the evidence in the case, has a reasonable doubt that a defendant is guilty of the charge, it must acquit. If the jury views the evidence in the case as reasonably permitting either of two conclusions—one of innocence, the other of guilt—the jury should of course adopt the conclusion of innocence.