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**SYMPOSIUM:** COMMUNICATING WITH JURIES: Jury Trials: Lay Jurors, Pattern Jury Instructions, and Comprehension Issues

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### **BIO:**

\* Associate Professor of English, University of Tennessee. J.D., University of Tennessee; M.A., Ph.D., University of Arkansas. Portions of this Article are based on materials that I presented at conferences of the International Association of Forensic Linguists in 1997 (with U.S. Magistrate Judge Dennis H. Inman) and 1999 (with Michael G. Johnson) and at the Law & Society Association meeting in 1998. I am grateful for my co-authors' assistance and also for feedback received from conference participants. I also want to thank members of the Tennessee Bar Association Jury Reform Commission (on which I served from 1998 to 1999) for their feedback and commentary as some of the ideas presented here were being developed. Some of those ideas are also included in my article U.S. Pattern Jury Instructions: Problems and Proposals, 7 *FORENSIC LINGUISTICS* 49 (2000). I am grateful also for comments by U.S. Magistrate Judge Dennis H. Inman of the Eastern District of Tennessee and James W. Volberding, both of whom read draft versions of portions of this Article and who provided other assistance. Jean E. Moore, Reference Librarian at the University of Tennessee College of Law, provided invaluable assistance in the completion of this Article, as did members of the Editorial Board of the **Tennessee Law Review**. Thanks also to the interlibrary loan offices at the University of Tennessee and the University of North Carolina at Chapel Hill. Errors and omissions in this article are solely mine.

### **SUMMARY:**

... Criminal convictions are rarely reversed for jury instruction failure. ... \* These instructions should be given after the jury is sworn but before opening statements so counsel may refer to the content of the instructions during opening statements. ... \* Experts in communication and other fields should be utilized to train both new and experienced judges in effective communication and jury instruction techniques. ... Each expert testified that this failure of the jury instruction satisfied the standard for instructional error established by the Supreme Court in *Boyde v. California*. ... Few professors begin a class without a syllabus or some outline of course content. ... In its suggested revision for the Tennessee Pattern Jury Instruction for reasonable doubt, the TBA Report addresses the syntactic complexity. ... The following extract from the Tennessee pattern jury instruction on the meaning of "present cash value" illustrates the difficulties inherent in some pattern instructions:

... To see how pattern language might be revised, let us examine one additional extract from Tennessee's pattern jury instruction on comparative fault and compare it with a rewritten version

that is syntactically simpler, though also longer, because some roadmaps have been added. ...

**TEXT:**

[\*701] Lay jurors are essential participants in our trial system. Unfortunately, they often perceive their service as oppressive, thankless, and unnecessarily difficult. In recent years, a number of reforms of the jury process have been initiated, notably in Arizona n1 and California, n2 with the goal of reducing the extent to which service seems oppressive, improving the quality of jury service, and making jury service less difficult. One of the greatest difficulties is the language of jury instructions, which jurors often find to be incomprehensible.

Legal scholars and social scientists have long thought that jurors have difficulty understanding the instructions of the trial court. n3 However, serious [\*702] empirical study of juror comprehension by social scientists did not begin until the early 1970s. n4 Since then, findings by many social scientists consistently confirm that lay persons are frequently bewildered by the wording of jury instructions. n5 The exact syntactic and semantic bars to juror comprehension [\*703] of instructions are now well-documented by linguists and psycholinguists. n6 These scholars have demonstrated that instructions can be made more comprehensible by simplifying sentence structure and by giving additional information about the meanings of abstract terms in both civil and criminal cases. Given the clear cross-disciplinary consensus about the difficulties of dealing with long, complex sentences and such terms of art as "mitigation" n7 and "reasonable doubt," n8 it has been difficult to understand why the legal [\*704] system has been so slow to modify the pattern instructions used in most U.S. jurisdictions. Yet substantial improvement has not taken place, due partly to judicial reluctance to relinquish any control over the jurors. n9

Information about juror confusion comes from several sources: case law reporting the contents of "notes sent by jurors to judges during deliberation," n10 "cases from states that allow testimony about conversations among jurors during deliberations," n11 and empirical evidence showing that rewritten instructions providing context, synonyms for difficult terms, and shorter sentences are much better understood than are pattern instructions. n12

As recently as January, 2000, the U.S. Supreme Court decided by a narrow margin in *Weeks v. Angelone* n13 (discussed below) that a trial judge who presides over a death penalty case is not obliged to clear up the jury's confusion over a crucial sentencing instruction by doing anything more than pointing to the controlling language of the instructions. n14 Typically, trial judges respond to such questions by simply re-reading the relevant portion of the instructions. However, there is no evidence to suggest that mere reiteration of instructions is helpful when jurors report confusion. In fact, some studies suggest that the typical judicial response to juror questions about instructions treats the lack of comprehension as though it were a matter of not having heard, rather than not having understood. n15

Chief Justice Rehnquist's majority opinion in *Weeks* presupposes a communication model that reflects a widespread naivete about the nature of communication. His opinion states that it can be presumed that jurors understand their instructions. n16 Apparently, in his view, mere exposure to language guarantees comprehension! Badly needed is a model for reform that draws upon the recognition that the jury's role as finder of fact has to compete with the judicial perception that the jury must be highly constrained and controlled. Such a model must draw upon a discourse model that focuses on the entire discourse event, not merely the text of the instructions themselves. Issues such as timing and delivery are also important, as are ancillary issues such as whether jurors are permitted to ask questions and talk among themselves during the trial.

This Article briefly examines how lay persons currently perceive jury service, articulates the constitutional and

procedural rationale for juries and [\*705] jury instructions, and surveys recent concerns with the jury process, in particular, the comprehensibility of instructions. The Article then summarizes the linguistic attributes of the pattern instructions usually given to jurors and suggests ways in which such instructions can be made more comprehensible both by modifying sentence structure and by giving additional information about the meanings of abstract terms in both civil and criminal cases. Examples of rewritten instructions are provided. The abstract terms discussed include "causality," "negligence," and "present cash value" in civil cases and "mitigation," "reasonable doubt," "knowingly," "intentionally," and "deliberately" in criminal cases. The discussion concludes by describing the nature of the discourse scenario in which jurors are instructed and suggests that improvements in the process, particularly during the delivery of jury instructions, will improve comprehensibility. In order to illustrate inadequacies in the usual judicial model of the communication of instructions to jurors, two cases will be analyzed, *Weeks v. Angelone* and *Jacobs v. Johnson*, n17 a Texas capital case that has just moved from state to federal court.

## I. LAY PERCEPTIONS OF JURY SERVICE

Jury trials constitute one of the few arenas in which lay persons are called upon to render judgments about property and punishment without necessarily having had the benefit of professional training in law or other specialized domains of contemporary life. Further, only in jury trials do lay persons pay close heed to the legal process as relatively disinterested persons. In other words, jury duty is where ordinary citizens meet the trial process in a capacity other than as parties to litigation or witnesses.

Of course, not every citizen serves on a jury, but those who do often have strong opinions about the nature of jury duty and the trial process based on their experiences. What are their opinions? Jury reform commissions have had occasion in recent years to hear answers to that question. These commissions have consulted lay jurors, who often serve on jury reform commissions, about their perceptions, asking such questions as "What is jury duty like?" "Have you ever served on a jury?" "What was it like for you?" and "How would you describe the process?" n18

Perceptions vary, but anecdotal evidence strongly suggests that many citizens view jury duty as pointless, thankless, and even oppressive. One respondent said recently:

Jury duty (at least the selection round) is a sham. No attorney seems to want anybody who (1) is educated above the high-school level; (2) is articulate in [\*706] answering questions; (3) has any previous experience (*e.g.*, as an expert witness, etc.) in the process; or (4) has the temerity, nay, utter gall, to ask the attorneys or judge a question during selection. n19

Two other respondents focused on how jurors are treated. One reported:

I frequently felt like part of a herd of livestock being moved from place to place. Lunch and parking cost more than the "pay" for jury duty. If you want to be on a jury panel, keep quiet, daydream during the questioning, and look vapid. If you want to get off jury duty, answer every question the lawyers ask. Bring plenty of reading material for recess. n20

Another person (from New York City) said:

We, the prospective jurors, were treated like veritable criminals. We are to set aside up to two weeks (not just a day) to be seated. The room where we were housed, in between being called to

various panels, was in the old, decrepit Criminal Court building in Manhattan. We spent virtually all day in a large waiting room, with very uncomfortable chairs. The bathroom facilities were appalling--dirty, smelly, barely functional. The "civil servants" who worked there were verbally abusive and rude. We were only rarely permitted to leave the room to make phone calls. I spent three days in that room before finally being seated on a jury--once that happened, things were a little better. But I highly resented the way I was treated, and will do everything in my power to avoid jury service again in the future as a result. n21

Others complained about not being permitted to take notes and not having their questions answered by the judge. Individuals thought it outrageous that they were apparently supposed to come to a decision about a person's life based on their memories of three days of testimony and instructions that were not clarified upon request. n22

We know from reported research that another area of complaint is jury instructions. n23 Given the highly specialized nature of legal process and the relative opaqueness of much legal language, it is obvious that the instructions given by a trial judge to jurors before and after the presentation of evidence are crucial if jurors are to do their jobs. Yet the instructions are poorly understood by jurors. A recently published study on the instruction at issue in *Weeks* showed that when mock jurors were given the same instruction [\*707] without the clarification the real jurors had sought, *forty-one percent* responded incorrectly that they were required to impose a death sentence if they found an aggravating circumstance. n24 In his majority opinion, Chief Justice Rehnquist wrote there was at best a "slight *possibility* that the jury considered itself precluded from considering mitigating evidence" and mistakenly believed a death sentence to be mandatory once the state proved the existence of an aggravating factor. n25 Clearly, a large gap exists in many cases between the optimal level of comprehension and the actual level of comprehension.

## II. THE RATIONALE FOR JURIES AND THE NEED FOR JURY INSTRUCTIONS

The right to a jury trial in federal and state courts in the United States emanates from the Sixth and Seventh Amendments to the U.S. Constitution, assuring the right in criminal cases to "a speedy and public trial, by *an impartial jury of the State and district wherein the crime shall have been committed,*" n26 and in civil cases "where the value in controversy shall exceed twenty dollars, the *right of trial by jury.*" n27

The rationale for the jury trial is the assurance of fairness. During a jury trial, the adjudication of facts, as distinct from the elucidation and application of the law, is performed by lay persons, not legal experts:

The Anglo-American jury is a remarkable political institution . . . . It recruits a group of twelve laymen, chosen at random from the widest population; it convenes them for the purpose of the particular trial; it entrusts them with great official powers of decision; it permits them to carry on deliberations in secret and to report out their final judgment without giving reasons for it; and, after their momentary service to the state has been completed, it orders them to disband and return to private life. The jury thus represents a deep commitment to the use of laymen in the administration of justice . . . . It opposes the cadre of professional, experienced judges with this transient, ever-changing, ever-inexperienced group of amateurs. n28

Early in its history, the Anglo-American jury shifted from playing an active role to a passive one, as control of

the institution passed increasingly into the hands of attorneys and judges. Today, many proposed reforms would create greater juror participation, returning jurors to a more active role in the trial process. n29 Surely, some of the opposition to jury reform results from [\*708] judges and attorneys who stand to give up some of their control. n30

As noted earlier, jury trials are one of the few arenas in which lay persons are called upon to render judgments about lives and property without having had the benefit of professional training in law. Indeed, jurors are never considered to be experts on law. They are triers of fact. But at a certain point during a trial, lay jurors must apply the law to the facts of the case. Thus, there is in every American jury trial a point at which the trial judge instructs the jurors about substantive law and judicial process. While some instructions may be offered before or during trial, most instructions are delivered to the jurors after the presentation of evidence. The essence of the instructional process is that specialized knowledge from one domain (law) is communicated to another domain (the laity, the "ordinary, reasonable people," the fact-finders). In effect, jurors are "judges for a day" with respect to the facts.

In carrying out the instructional task, every trial judge seeks to ensure that the applicable law is stated accurately and completely, a goal that was specified as early as 1895 in *Sparf v. United States*. n31 There are subsidiary goals, in particular the goal of avoiding appellate reversal. The importance of this goal is reflected in the great reliance in most jurisdictions on pattern instructions. Pattern instructions are standard instructions designed to save time for judges and lawyers by eliminating the need to write instructions separately for each case n32 and also, theoretically at least, to "reduce the number of appeals for faulty instructions." n33

The problem with pattern instructions is that they are written in the dense, complex language favored by lawyers in their written documents. In addition, they are often modeled upon the language of appellate opinions, which are written by judges specifically for other judges to read. n34 Further, they are designed to be read by, not read aloud to, the addressed party. The judicial habit of precisely tracking appellate language is based on the fact that such instructions are unlikely to give rise to a reversal for error. In other words, the reason that jury instructions are full of "legalese" is that the wording comes from judicial opinions. The lawyers and judges know that courts of appeal are [\*709] far less likely to reverse if the trial courts use the same language that appellate courts used in deciding earlier cases involving similar issues. Criminal convictions are rarely reversed for jury instruction failure.

Pattern instructions represent a step forward with respect to consistency and economy of time and effort. However, their use fails to address the lack of juror comprehension of jury instructions, a problem explicitly identified as early as the 1970s. n35 The reader should also keep in mind the wide array of types of instructions that are used in trials. n36

### III. RECENT CRITICISMS AND REFORM EFFORTS

Jury instructions are obviously essential to the American judicial system, which requires the use of juries as finders of fact. They permit the "bridging [of] the gap between the law, the evidence as presented by the parties, and the jury. In light of their importance, one would expect careful drafting to maximize juror comprehension of instructions." n37 Yet, research conducted from the early 1970s through the 1990s demonstrates empirically that "most of those instructions cannot be understood by most jurors." n38 One law professor has gone so far as to suggest that "in a very real sense these studies call into question the legitimacy of the jury system itself" n39 and that "the law is simply too complicated for lay juries to understand," in which case, "we should abolish the jury entirely" or limit its use to certain kinds of cases. n40 Specialized jurors are another possibility. n41

The issue of comprehensibility is one reason the entire American jury system has been very closely scrutinized in recent years at both the federal and state levels. Major studies have been completed by the American Bar

Association, n42 the National Center for State Courts, n43 California, n44 the District of Columbia, n45 New York, n46 Tennessee, n47 and Arizona, n48 which has made [\*710] important and influential changes in the jury system. Most of the Arizona Committee's fifty-five recommendations were adopted by the Arizona Supreme Court in 1995, n49 and one study has reported n50 positive results. Both the methods and conclusions of the reform commissions that carried out some of the studies are quite similar. In most cases, lawyers (both prosecutors and defense lawyers in criminal cases and plaintiffs' lawyers and defense lawyers in civil cases), judges, and jurors studied the existing jury system and the scholarly evaluations of that system, then made specific recommendations for change. Each reform commission recommended changes in many facets of jury procedure, though none has recommended wholesale changes that will alter the traditional character of the American jury.

The history of the Tennessee Bar Association Jury Reform Commission is representative. The impetus for its creation was a presentation at the 1997 Annual Dinner of the National Center for State Courts in Washington, D.C. The TBA president-elect, Pam Reeves, heard Judge Michael Dann of Arizona describe the groundbreaking Arizona effort and similar jury reform projects in other states. After consultation with several members of the Tennessee Supreme Court, Reeves appointed the Tennessee Jury Reform Commission to review existing Tennessee jury practices, recent social science research, and developments in other jurisdictions. The Commission was then asked to make any appropriate recommendations for improving the Tennessee jury system.

The Commission met monthly from June, 1998 to May, 1999. Members were divided into three committees. One committee looked at jury administration and management, pretrial management, and postverdict issues. A second committee studied jury selection and trial procedures. The third committee examined jury instructions. Each committee made recommendations, which were submitted to the entire Commission for discussion and approval. The conclusions of the Commission are contained in the Report of the Tennessee Bar Association Commission on Jury Reform (*Report*). The *Report* has been accepted by the Board of Governors of the Tennessee Bar Association, and steps are underway to begin implementation of all recommendations of the Committee. Implementation of the recommendations in the *Report* will require action by virtually every entity involved with Tennessee juries, including Tennessee trial judges and supreme court justices, the Tennessee legislature, and county governments. Enactment of jury reforms will also necessitate changes in the Tennessee rules for both civil and criminal procedure. n51 The Commission has opined:

[\*711] A common theme in all the American reports is that jurors are too passive. This passivity interferes with the quality of their factfinding and their sense of accomplishment. Moreover, jurors are often treated poorly, paid meagerly, and hindered needlessly in their efforts to be accurate in their factfinding. The commissions' recommended changes focus on making jury service more respected, tolerable, efficient, and effective. n52

With respect to the wording and delivery of jury instructions to jurors, the *Report* identified these specific problems:

A number of techniques (such as an opening statement by counsel to the venire during voir dire, interim commentary during trial, juror notetaking, juror questioning of witnesses, juror notebooks, early jury instructions, and written jury instructions in civil cases) that research and the experiences of other jurisdictions have shown to assist the jury in understanding the trial process, their role, and the evidence are not used enough or at all in Tennessee because the existing civil and criminal rules do not specifically authorize them. n53

Needlessly incomprehensible jury instructions hinder and frustrate Tennessee juries. With respect to those issues, the *Report* made these recommendations:

#### 9.1. Instructions at Beginning of Trial

- \* At the beginning of trial, courts should briefly instruct the jury on the general law of the case.
- \* These instructions should be given after the jury is sworn but before opening statements so counsel may refer to the content of the instructions during opening statements.
- \* The Tennessee Rules of Civil and Criminal Procedure should be amended to require pretrial jury instructions.

#### 9.2. Written Jury Instructions in Civil Cases

- \* The Tennessee Rules of Civil Procedure should be amended to require that jury instructions be reduced to writing and given to jurors for use during deliberations.

#### 9.3. Timing of "final" Jury Instructions

- \* The Tennessee Rules of Civil and Criminal Procedure should be amended to authorize jury instructions on law before closing argument upon the request of either party or, if no such request is made, in the judge's discretion.

#### 9.4. Comprehensible Jury Instructions

- \* A committee of experts and lay persons should be formed to assist in rewriting Tennessee pattern jury instructions so that they can be understood by average jurors.

#### [\*712] 9.5. Delivery of Jury Instructions

- \* Judges should be sensitized to the importance of the communication process in instructing jurors.
- \* Experts in communication and other fields should be utilized to train both new and experienced judges in effective communication and jury instruction techniques.
- \* Judges should be encouraged to make use of advance summaries or "roadmaps" which tell the jury what to expect next, why it is important, etc., and to use parenthetical pauses which introduce examples, clarifications, and the like.
- \* Judges should be encouraged to make use of multimedia aids (such as charts, bullet summaries, and decision trees) to help clarify difficult or important parts of the instructions. n54

The specific recommendation that "a committee of experts and lay persons should be formed to assist in rewriting Tennessee pattern jury instructions so that they can be understood by average jurors" n55 is controversial and raises both legal and communicative issues. Specific proposals for both sets of issues are discussed below. First, though, let us examine the current state of case law on the issue of the comprehensibility of jury instructions.

#### IV. CURRENT CASE LAW

One troubling aspect of the issue of comprehensibility has been addressed by a few appellate courts that have answered the question of how a trial judge should respond to a jury when it asks for a "layman's explanation" of a legal term, such as "reasonable doubt." That question has now been answered by the U.S. Supreme Court in its recent decision in *Weeks v. Angelone*. n56 Led by Chief Justice Rehnquist, a slim majority held that the trial court may simply reiterate the prior instruction and presume that the jurors understand what they have already heard once. n57 Many appellate decisions not only limit severely the judge's discretion in answering such questions, but they also suggest that the very asking of such questions is potential error. For instance, in *People v. Redd*, n58 a New York appellate court upheld a conviction for first-degree robbery of the defendant. After the trial, the defendant's lawyer objected to the fact that the trial judge, in response to a jury question asking for a "layman's explanation" of reasonable doubt, "simply reiterated his initial charge to the jury." n59 The defense argued that the trial judge's failure to answer the question in a manner that provided additional guidance led to a [\*713] confused jury. The verdict was thus unreliable, as it may have been based on a misunderstanding of the concept of reasonable doubt. Although the majority of the court rejected the appeal as unpreserved, it stated that it would have in any event rejected the appeal on the merits on the basis that the initial standard charge, read twice, "provided . . . adequate guidance." n60

In his concurring opinion to *Redd*, Judge Saxe agreed with the majority result, but reasoned that the reality of some standard instructions is that they are as a matter of fact arcane and difficult for nonlawyers to understand. n61 Saxe wrote that he "[could not] conclude, as does the majority, that the jury was not perplexed by the reasonable doubt charge." n62 Saxe went on to say that despite that fact, trial judges must "decline to attempt such a thing" when asked by jurors to give a legalese-to-English translation, even though the definition in the standard instructions may be difficult for a lay juror to decipher. n63 Saxe went on to write:

It has been repeatedly recognized that jury charges in general, and the standard reasonable doubt charge in particular, are long-winded and full of language not commonly used elsewhere. . . . Our jury charges are written by highly educated people and, intentionally or not[,] for highly educated people. . . . It should come as no surprise that a jury would ask for a translation of it to laymen's terms. n64

However, Judge Saxe cautioned that trial judges must resist the temptation to attempt such a translation. n65 Saxe argued that consistency within the criminal justice system is a more important goal than clarification of language for the benefit of the jury:

We seek to assure that all criminal defendants receive consistent treatment by the trial courts throughout the State, that all convictions are based upon the same standard. The further a judge's instructions diverge from the standard, the greater the probability that the jury's determination was not based upon the same standard. n66



As noted above, in *Weeks v. Angelone*, the Supreme Court recently held [\*714] that it is adequate for a trial judge to answer a jury's question about the meaning of instructions by reiterating the language of the original instructions. n67 The specific issue in *Weeks* was whether a trial judge is obligated by the Constitution to do more than refer the jury to a specific portion of jury instructions when the jury has a question about the meaning of an instruction. n68 Typically, trial judges respond to such questions by simply re-reading the relevant portion of the instructions. During the penalty phase of *Weeks*, the jury questioned the trial judge concerning sentencing alternatives. n69 The judge conferred with Weeks's counsel, but concluded that he could not answer their question more clearly, so he merely referred the jury to the appropriate section of the jury instructions. n70 The U.S. Court of Appeals for the Fourth Circuit affirmed, n71 and that decision was affirmed by the Supreme Court. n72 The final opinion thus declares it to be the law of the land that "jurors are presumed to understand instructions." n73

Presuming that jurors understand instructions is a bit like presuming that university students understand lectures. University professors do not generally make such presumptions; instead, they test for comprehension by giving examinations, requiring journals and research papers, and so forth. It is clearly impractical to give examinations to jurors or to require them to display comprehension by writing term papers. However, pattern instructions can be tested for general comprehensibility before they are used in actual cases. Testing pattern instructions for comprehensibility could guarantee a higher rate of comprehension than we can guarantee now.

A federal case pending on habeas corpus appeal in Texas, *Jacobs v. Johnson*, n74 involves a petitioner who was convicted in 1987 for capital murder in Dallas County, Texas. Acting upon the jury's findings in sentencing, the trial judge sentenced Jacobs to death. The conviction and sentence were automatically appealed to the Texas Court of Criminal Appeals, which affirmed the conviction. In 1996, the Court of Criminal Appeals appointed counsel to write and file Mr. Jacobs's first state application for a writ of habeas corpus. A petition for relief was filed; the petition was denied.

Jacobs was convicted of the residential stabbing murder of a sixteen-year-old victim, near whose home a knife was found. No fingerprints were identified. Jacobs was identified by some witnesses as having been in the vicinity of the crime, and he was eventually arrested.

At trial, following rest and rebuttal by both sides in the conviction phase, [\*715] the jury found Jacobs guilty of capital murder. At the punishment phase, the jury answered two special issues affirmatively, and the trial court ruled that Jacobs should be executed.

One issue in the case was whether jurors adequately understood Texas's complex instructions in capital murder trials. Defense counsel obtained the services of specialists in speech, communications, rhetoric, psychology, and English. These specialists provided affidavits stating that, in all probability, the jurors had failed to grasp certain critical issues intrinsic to the decision to execute the defendant. Specifically, these experts presented social science evidence demonstrating that there was a reasonable likelihood that the jurors failed to understand the degree to which the court's charge permitted them to consider mitigating evidence. Each expert testified that this failure of the jury instruction satisfied the standard for instructional error established by the Supreme Court in *Boyde v. California*. n75

*Boyde*, on which Chief Justice Rehnquist relied heavily in drafting the *Weeks* opinion, was also written by the Chief Justice. In *Boyde*, Rehnquist appears to have been more concerned with a description of the "reasonable likelihood" standard than with the issue of how to determine whether a particular trial has complied with it. n76 In *Boyde* and *Weeks*, Justice Rehnquist does not, in fact, appear to be concerned with whether jurors actually understood the instruction, but with the issue of whether states would be allowed to develop and impose their own standards with respect to such issues. n77

It remains to be seen how these issues will be resolved in federal court for Jacobs, particularly in light of *Weeks*. In *Jacobs*, counsel obtained affidavits [\*716] from six experts, each of whom testified (via affidavit) that the jury instructions at issue were of supreme importance at both the conviction and sentencing phases of trial. Moreover, the experts were in agreement that Jacobs's jurors could not have adequately understood their instructions and that common assumptions of juror comprehension of legal concepts are misplaced.

As an example of the testimony offered by the experts in this case, I offer my own comments and revision of the concept of "lesser included offense":

One section of the instructions addresses the issue of the possibility of conviction of a lesser included offense. The opening paragraphs of this section state the conditions under which the jury may convict of capital murder or murder. However, the summary section is confusing: "Unless you so find beyond a reasonable doubt, or if you have a reasonable doubt thereof, you will acquit the defendant of capital murder, and next consider whether or not he is guilty of the lesser [sic] included offense of murder." n78

In my affidavit, I identified problems and illustrated them by offering a rewritten version of the instruction:

This paragraph presents serious comprehension problems. First, it contains the archaic word "thereof," a word that few ordinary citizens are completely comfortable with. Second, it contains difficult and nonparallel syntax ("Unless you so find beyond a reasonable doubt, or if you have a reasonable doubt thereof"). Third, it does not spell out explicitly what the options are. Fourth, it does not define the term "lesser included offense," and that term (like the term "reasonable doubt") is not defined either in the definitions section of the instructions or anywhere else. The simplest way to illustrate clearly the problems is to examine a rewritten version of the paragraph, one that replaces all the problematic words with more ordinary words and replaces all the confusing syntactic constructions with simpler ones:

"If you do not find beyond a reasonable doubt that the defendant committed capital murder, as defined above, then you must acquit the defendant of capital murder. Next, you must consider whether or not the defendant has committed the lesser included offense of murder. A lesser included offense is one which is composed of some, but not all elements of a greater offense, here capital murder. Capital murder is the intentional causing of the death of an individual in the course of committing or attempting to commit the offense of burglary of a habitation. Murder is the intentional causing of the death of an individual." n79

As set forth in the petitioner's brief,

[\*717] the sentencing instructions were brief. The charge told the jurors that they were required to answer two questions, called special issues. The jurors were told that the State must prove each issue beyond a reasonable doubt. They were further told they "may not answer either issue 'Yes' unless the jury unanimously concurs." The court further instructed that the jurors "may not answer

either issue 'No' unless ten or more jurors concurring shall individually sign the special verdict."

Jurors were also informed that if they answered both questions "Yes," then Jacobs would automatically be sentenced to death. If the jury answered either question "No," then he would be sentenced to life in prison. The charge allowed the jury to "take into consideration all of the facts shown by the evidence admitted before you in the full trial of this case, and the law as submitted to you in this charge, and the charge heretofore given to you by the Court.

The two special issues were as follows:

Special Verdict No. 1: Do you find from the evidence beyond a reasonable doubt that the conduct of the defendant, Bruce Charles Jacobs, that caused the death of the deceased, Conrad Harris, was committed deliberately and with the reasonable expectation that the death of the deceased would result?

Special Verdict No. 2: Do you find from the evidence beyond a reasonable doubt that there is a probability that the defendant, Bruce Charles Jacobs, would commit criminal acts of violence that would constitute a continuing threat to society? n80

In analyzing these instructions, Jacobs's counsel first noted that "several shortcomings of these instructions become apparent immediately. The most critical terms are left undefined. . . . Jurors were left to guess the meaning of vital words." n81 They also noted that there appears to be "no option permitting jurors to sentence Jacobs to life without parole. Nor is there any indication that jurors could consider 'society' to mean Jacobs' society among inmates in a structured prison environment." n82 More importantly, there is no definition of the terms "mitigating circumstances" or "deliberately." As Jacobs's counsel wrote, it is likely that the jurors in Jacobs's trial

failed to understand that the law permitted them to consider and give effect to the mitigating evidence offered by Jacobs' lawyers in the punishment phase. It is also likely that the jurors failed to understand that the term "deliberately" used in the first special punishment issue had special legal significance that meant far more than "intentionally." n83

[\*718] Jacobs's counsel argued that their arguments were "supported by the findings of five social science specialists," all of whom "concluded that there was *at least* a reasonable likelihood that the instructions failed in these two vital respects." n84 The defense position in *Jacobs* is that social science evidence is both appropriate and necessary if the assessment of juror comprehension is to be other than a guessing game.

#### *B. Weeks v. Angelone*

In *Weeks*, the Supreme Court has now ruled on the specific issue of whether a trial judge must answer jurors' questions about the meaning of instructions by doing something other than referring the jury to the instructions already read. n85 A Virginia jury found Weeks guilty of capital murder, and the state put on proof during the penalty phase to show two "aggravating circumstances." n86 The deliberating jurors sent a note to the judge

"asking whether, if they believed Weeks guilty of at least one of the aggravating circumstances, it was their duty to issue the death penalty, or whether they must decide whether to issue the death penalty or a life sentence." n87 The judge replied only by reiterating the following paragraph in their instructions:

If you find from the evidence that the Commonwealth has proved, beyond a reasonable doubt, either of the two [aggravating circumstances], and as to that alternative, you are unanimous, then you may fix the punishment . . . at death, or if you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment . . . at [life] imprisonment. n88

The jury came back two hours later with verdict reading: "Having unanimously found that [Weeks's] conduct in committing the offense [satisfied one of the aggravating circumstances], and having considered the evidence in mitigation . . . [we] unanimously fix his punishment at death." n89 A poll of the jury revealed that all of them had agreed with the verdict as it had been published. n90 The Virginia Supreme Court ultimately affirmed Weeks's conviction and death sentence and dismissed his state habeas petition. n91 The U.S. District Court for the Eastern District of Virginia denied Weeks's petition for federal habeas relief; the Fourth Circuit denied a [\*719] certificate of appealability and dismissed the petition. n92

At trial, when the presentation of evidence at the penalty phase was over, the judge read the jury four separate instructions. One of these, "Instruction No. 2," read thus:

You have convicted the defendant of an offense which may be punished by death. You must decide whether the defendant shall be sentenced to death or to imprisonment for life or to imprisonment for life and a fine of a specific amount, but not more than \$ 100,000.00. Before the penalty can be fixed at death, the Commonwealth must prove beyond a reasonable doubt at least one of the following two alternatives:

1. That, after consideration of his history and background, there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society; or
2. That his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, that it involved depravity of mind or aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt either of the two alternatives, and as to that alternative you are unanimous, then you may fix the punishment of the defendant at death or if you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment of the defendant at life imprisonment or imprisonment for live [sic] and a fine of a specific amount, but not more than \$ 100,000.00.

If the Commonwealth has failed to prove beyond a reasonable doubt at least one of the alternatives, then you shall fix the punishment of the defendant at life imprisonment or imprisonment for live [sic] and a fine of a specific amount, but not more than \$ 100,000.00. n93

Unlike an earlier jury wrestling with the same instruction, n94 the jury in *Weeks* requested clarification of the instruction:

If we believe that Lonnie Weeks, Jr. is guilty of at least 1 of the alternatives, then is it our duty as a jury to *issue* the death penalty? Or must we *decide* (even though he is guilty of one of the alternatives) whether or not to issue the death penalty, or one of the life sentences? What is the Rule? Please clarify? n95

The defense asked the court to "instruct the jury that even if they find one or both of the . . . factors that have been proved beyond a reasonable doubt, [\*720] that they still may impose a life sentence, or a life sentence plus a fine." n96 The judge declined to do so and instead responded: "See second paragraph of Instruction # 2 (Beginning with 'If you find from . . .')." n97 The judge simply told the jury to reread the confusing instruction. n98

One study has explored lay comprehension of the instruction at issue and suggested reasons for likely confusion:

[A] juror certainly *could* have misconstrued Instruction No. 2 [to require her to impose a death sentence], even if she had been given Instruction No.4. Instruction No. 2 starts out by defining the two possible aggravating factors and explaining the state's burden of proof. It next says that if the jury members unanimously find that the Commonwealth has met its burden, "then you may fix the punishment at death or if you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment of the defendant at life imprisonment . . . . Like the *Weeks* dissenters, we too suspect that this clause contains the confusion that prompted the jury's question.

Under what circumstances should a juror conclude that the death penalty is "not justified"? As the *Weeks* dissenters explained, the answer is unclear because the instruction is ambiguous. According to one interpretation, a juror might think that she is initially supposed to decide if the state has proven the existence of one of the two aggravating circumstances and *only then* decide whether the death penalty is or is not justified based on all the evidence, including the evidence in mitigation. Alternatively, a juror might think she is supposed to consider all the evidence, including the evidence in mitigation, but *only* insofar as it relates to the state's success or failure in proving the existence of one of the aggravating circumstances, with death being required if the state has successfully carried its burden. The first reading is constitutional; the second is not.

In short, a juror certainly *could* have read the instruction in the way *Weeks* suggested. But that still leaves the real question: Would a reasonable juror have misinterpreted the instruction in this way, especially where, as in *Weeks*, the jury asked for clarification and the judge said in reply to go back and reread the original instruction? The Supreme Court thought not. But the evidence, to which we now turn, points to the opposite conclusion. n99

The same study concludes:

The jurors who sentenced Lonnie Weeks to death did not understand the law. They asked the trial judge for help. Based on our mock study, the answer he gave probably did precious little good. Consequently, when the jurors voted to condemn Weeks, some of them probably still didn't [\*721] understand the law and continued to think that they had to vote for death. n100

It remains to be seen what the exact effect of *Weeks* will be. The two possibilities seem to be that the decision will either (1) solidify appellate resistance to needed reform or (2) provoke an insistence on reform that addresses the issues identified above, issues that have been identified by social scientists over the past decades.

## V. SOCIAL SCIENCE RESEARCH AND JURY INSTRUCTIONS

### A. Overview

The two decades between 1979 and 1999 saw an enormous amount of research into the jury process, including an examination of the comprehension of jury instructions. The research was conducted by social scientists (linguists and psychologists, in particular), by lawyers and judicial teams, and by jury reform commissions. n101 A 1979 article by Robert P. Charrow and Veda R. Charrow n102 was a pioneering effort on the topic of jury instructions, one to which many of us remain indebted. n103 The Charrow article and other social science research into the comprehensibility of jury instructions have been recently assessed in a heavily annotated article by Joel D. Lieberman and Bruce D. Sales. In their article, Lieberman and Sales first provide a discussion of the methodological limitations of such research and then assess contemporary research. n104 Lieberman and Sales conclude that

the issue of comprehension remains paramount. For a jury to function in its intended manner and apply the law in an unbiased way to the evidence presented, it must first understand the law. It is essential for courts and legislatures to follow the lead of commissions and incorporate the general recommendations that have been made by social science research. We believe that failure to do so results in denying defendants their constitutional right to a fair trial, but the legal support for this assertion must await a future article. n105

That conclusion is reminiscent of the one articulated in 1988 by Walter W. Steele, Jr. and Elizabeth G. Thornburg, who suggested that explicit steps [\*722] must be taken to overcome the forces against change:

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

Second, changes must be made in the law governing the submission of jury instructions to eliminate requirements that hinder comprehension. Judges should be permitted to comment on the

evidence and to inform the jury of the effect of its answers. From a mechanical standpoint, juror comprehension could be improved if each juror were given a copy of the instructions to take into the jury room.

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

The problem is evident: juror comprehension of their instructions is pitifully low. Likewise, the general scheme of solutions is evident. Unfortunately, prospects for actual change appear to be dim, because those in control lack the motivation to make the needed changes. Real change would require all the parties involved, trial and appellate courts, state bar committees, and the trial bar, to rise above their narrowly perceived self-interest and act instead in the interests of justice. n106

In the face of the findings from social scientists and others, why is reform taking so long? There appears to be some judicial resistance to the probabilistic findings of social scientists. Why else would Chief Justice Rehnquist insist, as he did in *Weeks*, on having explicit proof that a given jury failed to understand a jury instruction--in the face of evidence that a jury found an instruction confusing and in the face of a complete lack of evidence [\*723] that the jury later did understand the instruction? n107 Another possibility may be that judicial statements about jurors' comprehension serve at least partly to divert attention from other issues, such as whether individual states should be allowed to create their own rules for deciding whether jurors understand such concepts as mitigating circumstances. n108

Should there be judicial resistance to the probabilistic findings of social science? How trustworthy are the studies of the comprehensibility of jury instructions? The major limitation of social science research on jury instructions stems from the fact that it has had to rely primarily on experimental methods of research, rather than correlational methods. However, as the passage below illustrates, the overall rate of comprehensibility of jury instructions is so low that the findings from experimental methods probably reflect reality.

The majority of research studies on jury instructions have been performed using experimental methods, in which simulations of trials are presented to mock jurors. The quality and realism of the simulations have varied greatly. In the least generalizable simulation, jurors are given a description of the facts of a case. Because this simulation is so far removed from the dynamics of an actual trial, it is very difficult to place high levels of confidence in the findings. Other researchers have presented participants with simulated or edited transcripts of trials. Such tactics constitute improvements, but still lack the audible and visual components of an actual trial. A better methodology is to provide a videotaped trial to participants. The videotape format provides a highly engaging simulation, one that is quite similar to an actual trial. Consequently, researchers can place greater faith in such studies. All simulations can, however, be criticized because they lack the realism of an actual trial. In addition, mock jurors may not pay as close attention to judicial instructions as actual jurors because no one's fate hangs in the balance.

Alan Reifman and his colleagues attempted to address this last criticism by sending questionnaires to people who had sat on trials and those who were called but did not serve and then comparing their responses. n109

Respondents were questioned on either the pattern instructions that had been presented to them during the trial or what could have been presented to them had they served on these trials. For questions regarding substantive law, the difference in the number of correctly answered questions between instructed jurors and noninstructed jurors was not significant. n110 However, those exposed to judicial instructions did have significantly higher comprehension rates for [\*724] procedural questions of law than those who were not called for jury duty. n111 Thus, it appears that instructions do improve understanding of procedural law. Unfortunately, any benefit of instruction was tempered by the fact that the overall level of understanding for instructed jurors on both procedural and substantive law questions was lower than fifty percent. n112 This low rate of comprehension is similar to those found in laboratory experiments, n113 which suggests that the findings of empirical studies on comprehension are representative of actual juror comprehension. n114

### *B. Linguistic and Psychological Research*

Linguistic and psychological research on the jury instruction process has concentrated generally on three topics: (1) the syntactic and semantic comprehensibility of the instructions themselves; (2) the timing of the delivery of the instructions (whether delivered before, during, or after presentation of the evidence, or some combination of these); and (3) the medium of presentation of the instructions (oral, written, or videotaped). n115

Little attention has been paid to the exact nature of the discourse event during which instructions are given. It now seems clear that any reform in jury instructions must frankly acknowledge that the jury's role as finder of fact must compete both with requirements of legal procedure, particularly those implicating constitutional issues, and with the current judicial perception that the jury must be highly constrained and controlled. Our legal system pays lip service to the notion that the jury is the trier of fact and therefore functions as a kind of expert in its own domain. However, we do not treat jurors as experts. If we did, we would accord them much greater freedom in certain areas, we would permit their note-taking and question-asking, and we would provide them instructions that are not so arcane and convoluted as to be unreadable by most people. We would certainly not deliver those instructions orally in the monotone in which judges often read them.

But that is not to say that matters of syntax and semantics are unimportant. The exact nature of their importance can be seen by examining empirical research on comprehensibility and also by analyzing pattern instructions. Overwhelmingly, the textual problem is sentence structure.

[\*725] Examples of difficult grammatical constructions are nominalizations ("failure of recollection" rather than "people often forget"); vague or unusual prepositional phrases ("as to"); doublets, especially of legal terms ("devise and bequeath"); and passive constructions, particularly in subordinate clauses. n116 In addition, sentences in pattern instructions typically contain more than four clauses with three or four levels of embedding.

Other issues include presuppositions underlying jury instructions (*e.g.*, the existence of facts or truth, or the ability of jurors to establish facts) in opposition to the presuppositions underlying attorney strategies (*e.g.*, the inaccessibility of facts, the relativity of truth, etc.); the nature of the task (*e.g.*, how jurors conceptualize their task and how jurors respond to the test-like conditions under which they must work); and the highly abstract nature of the instructions.

One way to assess comprehensibility is to assess readability as it is measured by established scales such as the Flesch readability scale. n117 The Flesch scale measures readability by calculating such quantitative relationships as that between the average number of words in sentences and the average number of syllables per word. The Flesch scale, and others like it, assume that the shorter the words and the shorter the sentences in a given document, the easier a document is to read. According to the Flesch scale, highly readable language scores a sixty (zero is the most difficult; 100 is the least difficult), based on an average of around twenty words



per sentence and 1.55 syllables per word. n118 The Flesch formula also provides a method for calculating the grade level of written text. On average, adults in the United States read at the sixth to eighth grade level. n119 The average is lower in some areas, particularly in rural areas where the average highest grade level is lower than elsewhere. n120 For adults, a good target level is from sixth to eighth grade.

Another useful method of analysis measures syntactic complexity by assessing the clause-to-sentence ratio. On average, how many clauses does each sentence contain? An additional measure of syntactic complexity assesses the average depth of embedding of clauses.

The *Report* used a combination of these methodologies:

Every sentence consists of at least one independent or main clause. In traditional descriptions of English grammar, that is called a simple sentence:

a. Jane hit the ball.

Some sentences may contain two or more independent or main clauses, typically conjoined by a coordinating conjunction like "and." Such sentences are called compound sentences:

[\*726] b. Jane hit the ball, and John scored from third base.

In addition, some sentences also contain dependent or subordinate clauses. A sentence containing one main clause and one dependent clause is called a complex sentence:

c. After Jane hit the ball, John scored from third base.

Traditional English grammar also describes compound-complex sentences. A compound-complex sentence contains at least two main clauses and at least one dependent clause:

d. After Jane hit the ball, John scored from third base and the Cougars moved ahead.

In addition, clauses may be embedded in other clauses, thereby further increasing the complexity of sentences. A typical example involves the embedding of a clause as the subject of a main clause:

e. Jane's hitting the ball was responsible for the Cougars' win.

Though sentence e. is, in traditional terms, a simple sentence, it is considerably more complex than sentence a. above, and it requires more and different mental processing.

....

The simplest syntactic text consists only of simple sentences. For such a text, the clause: sentence ratio is 1:1. For more complex text, the ratio may rise to 3:1, 4:1, 5:1 or even more. The higher the number of clauses per sentence, the more complex the text. . . . But it is not only the clause: sentence ratio that provides information about the complexity of a text. The level of embedding is also important. A main clause may have one dependent clause, but that dependent clause in turn may have an dependent clause also. If we designate a main clause as an A, then its dependent clause is a B, while its dependent clause is a C, etc. n121

Consider, for example, a prior version of Tennessee's pattern instruction on reasonable doubt for criminal cases:

Reasonable doubt is that doubt engendered by an investigation of all the proof in the case and an inability, after such investigation, to let the mind rest easily as to the certainty of guilt. Reasonable doubt does not mean a captious, possible or imaginary doubt. Absolute certainty of guilt is not demanded by the law to convict of any criminal charge, but moral certainty is required, and this certainty is required as to every proposition of proof requisite to constitute the offense. n122

The paragraph consists of three sentences, but those three sentences contain a total of eleven clauses, embedded to a C level. Thus, the structural breakdown of the instruction, with main clauses denoted by A and dependent or embedded clauses denoted by letters other than A (and also indented), appears below:

[\*727] A 1. Reasonable doubt is that doubt [2] and an inability, after such investigation,  
 B 2. [that is] engendered by an investigation of all the proof in the case  
 B 3. to let  
 C 4. the mind rest easily as to the certainty of guilt.  
 A 5. Reasonable doubt does not mean a captious, possible or imaginary doubt.  
 A 6. Absolute certainty of guilt is not demanded by the law [7]  
 B 7. to convict of any criminal charge,  
 A 8. but moral certainty is required,  
 A 9. and this certainty is required as to every proposition of proof  
 B 10. [that is] requisite  
 C 11. to constitute the offense. n123

The syntactic complexity is greatly complicated by three factors: (1) arcane vocabulary items (in particular, the word "captious" in line 5); (2) negative concepts ("an inability" in line 1) and definitions ("reasonable doubt does not mean . . ." in line 5); and (3) the passive construction "demanded by the law" (line 6).

Available syntactic remedies include simplifying sentence structure; paraphrasing difficult concepts; adding examples and narratives to the pattern instructions; and answering jurors' questions (after first letting them know that their questions will be answered--*i.e.*, let jurors know that the communication process acknowledges their role as active participants). Proposed syntactic and other remedies are discussed below.

Two important topics have largely been ignored by the various reform commissions. One is the manner of presentation or delivery. I suggest below that manners of presentation other than oral reading of the instructions are highly desirable. The other neglected topic is what might be called the discourse imbalance between domain experts.

In the courtroom, the trial judge is the expert on law, while jurors are the experts on facts. The specific function of jurors in the trial process is to determine the facts when they are in dispute. Thus, judge and jurors represent expertise in two different domains, law and facts--both crucial to the trial process. But the representatives of those two domains are not treated with equal respect. The trial judge is accorded great respect, while the behavior of jurors is severely constrained in ways that suggest a much lower level of respect. The judge, for instance, enters and leaves the courtroom at will, speaks at will, and generally makes the rules. Jurors, on the other hand, do as they are told, may not speak in the courtroom most of the time, cannot ask questions of witnesses, often cannot take notes as they listen, and in many ways are confined almost as much as prisoners. In jurisdictions with mandatory sequestering of juries (Texas, for example), jurors must remain confined once

deliberations begin, usually in motels, but at one time and in [\*728] some jurisdictions, in courthouse rooms.

Such arrangements do not foster the notion that jurors are experts whose expertise is critical to our jury system. Further, the methods of message transmission used during court trials often leave much to be desired. Robyn Penman has suggested that the problems emanating from the complexity of written documents cannot be solved by sole reliance on "Plain English." n124 The term comes from the 1970s movement that originated with a committee on Public Doublespeak and was embodied in an executive order requiring "clear and simple English" for all government documents. n125 This is true because a Plain English approach presupposes that communication is a transmission process, one that involves the sending and receiving of messages: n126

In this model, communication is the process in which one person encodes a message from their thoughts . . . , sends [a] signal . . . to [the] receiver, who decodes the ideas from the message. While there is no doubt that many contemporary authors define communication in a far more sophisticated form than that described above, the key elements still remain. People are seen as senders and receivers of messages and communication is seen as a transmission process.

People are seen as separate from their activities . . . . The actions of the people involved in the process are seen as being separate, contiguous behaviors--a message is sent and then received. . . . The active doings of people in interaction are turned into products or effects as if there were real beginnings and ends. . . .

Time and space are taken as real, concrete coordinates such that things are seen as occurring before or after other things and as occurring in concrete spaces. n127

I will suggest below that representatives of the domains of law and fact should both be treated with equal respect, so as to emphasize the importance of the domain expertise of jurors. For example, research on the discourse processes as genetic counseling, which involves both a domain expert (the counselor, a medical expert) and a client expert (the parent-to-be), suggests that the subject-matter domain expert (the medical expert) can easily invade the province of the client expert unless full respect for the client's role is preserved in discourse practices. n128

### [\*729] *C. Improving The Language of Pattern Instructions*

Prior to the pioneering empirical research into characteristics of the language of jury instructions by Charrow and Charrow, n129 lawyers often assumed that the incomprehensibility of jury instructions was due primarily to legal terminology. However, researchers also recognized that certain linguistic constructions are intrinsically more difficult to comprehend than others. Charrow and Charrow tested three hypotheses:

(1) that standard jury instructions . . . are not well understood by the average juror; n130 (2) that certain linguistic constructions are largely responsible for this hypothesized incomprehensibility; and (3) that if the problematic linguistic constructions are appropriately altered, comprehension should dramatically improve, notwithstanding the "legal complexity" of any given instruction. n131

Subsequent research has supported Charrow and Charrow's conclusion that hypothesis (1) is true: n132 Pattern

instructions are not well understood by the average juror. n133 The complexity of pattern instructions is multifaceted. Instructions are quite complex syntactically, and they should be rewritten so that they are less complex and are comprehensible to nonlawyers with limited formal education. n134 But while it is true that revision of problematic linguistic constructions improves comprehensibility, that alone does not appear to be completely adequate. In addition, there is evidence to suggest that a higher level of comprehension can be achieved by "providing 'roadmaps' early in the instructions, . . . avoiding the use of arcane vocabulary items except when they are absolutely necessary [in which case they must be defined clearly], and clarifying the meanings of difficult abstract concepts by providing concrete [perhaps narrative] examples." n135

All these steps are necessary for rendering jury instructions more comprehensible, first because of the inherent complexity of pattern instructions and perhaps also because of the nature of the Anglo-American legal process, which operates by means of this reasoning pattern: (1) a case [\*730] is tried; (2) a proposition descriptive of the case is made into a rule of law; (3) and the proposition becomes a precedent to be applied to future similar situations. Future situations arise, some of which may eventually be sufficiently different from the original situation to prompt a rethinking of the original rule, and perhaps a revision of it. It is thus essential that jurists be able to discern similarities and differences among objects and situations. "The finding of similarity or difference is the key step in the legal process." n136 At least in theory, the resulting system can usefully be described as a moving classification system, one that enables rules to change over time even as precedent is honored.

However, it can be quite difficult to distinguish differences and similarities, especially where new commercial products and processes are involved. The classic study is that of Edward H. Levi, who in 1949 provided a case-based introduction to legal reasoning. n137 Each of a number of consumer products was the focus of a case in the development of contemporary products liability law. At issue in each case was the factual question: is this item defective or dangerous? Early in the development of products liability law, the fact that a consumer product could be put to a dangerous use was not necessarily evidence that the item itself should be classified as dangerous. And at one time, only the immediate purchaser of an item could recover for injury.

Contemporary products liability law often hinges on the doctrine of strict liability, a liability that does not depend upon any negligence on the part of the plaintiff or upon any intent to harm on the part of the defendant, but rather "on the breach of an absolute duty to make something safe." n138 The doctrine of strict liability that permits lawsuits and the award of damages over items such as coffee, obviously served hot, by immediate purchasers or almost anyone else, is a late development from early law, which did not necessarily find gunpowder dangerous. Even today, many U.S. jurisdictions hold that products such as tobacco are not inherently defective. In Tennessee, tobacco is not a defective product unless it contains a separate ingredient, defective in itself. n139

From the current perspective, most of the items discussed by Levi in 1949 would probably appear clearly defective or dangerous, but they were not obviously so in the nineteenth century. Included were such objects as a loaded gun, a defective gun, a defective (horse-drawn) coach or carriage, gunpowder, and a bottle of ginger beer containing the decomposed remnants of a snail. n140 Of course, it is only recently that we have come to expand our understanding of a defective or unreasonably dangerous product to include [\*731] aluminum used to manufacture aircraft engines that departed from an aluminum manufacturer's specifications due to the presence of foreign particles; n141 pesticides that cause injury because they have drifted from the areas where they were lawfully applied; n142 computer software; n143 hot coffee; n144 and the anti-depressant drug Prozac. n145

It is likely that strict liability is an area as confusing for lawyers as it is for jurors. Other concepts that produce much confusion on the part of lay jurors are anti-trust liability, copyright infringement, qualified immunity of police officers or government officials, and civil rights violations.

## 1. Roadmaps

During their time in the jury box and during deliberations, jurors resemble nothing so much as students taking a course--or several courses simultaneously--in a new and arcane subject. Often, as a recent and amusing video makes clear, jurors must absorb new information, learn new procedures, and digest and use new standards quickly and with no time for reading, reviewing, or consulting with others. n146 They may, for example, have to learn a great deal about constitutional law, criminal procedure, medical standards, and human psychology all within a few days. In addition, jurors must judge the credibility of witnesses, often expert witnesses, who contradict each other's testimony. Simply put, jurors need all the help they can get. One way to assist them in the instructions is to tell them exactly what they are going to hear before they hear all the details. Few professors begin a class without a syllabus or some outline of course content. A roadmap, a list, or a diagram telling jurors where they are headed and by what route they can expect to arrive there can be provided with an outline of jury instructions. n147 Thus, instead of simply plunging into individual components of instructions, one paragraph at a time, the court can give a preview. Consider, for example, Tennessee's current pattern instruction for comparative fault. It begins with [\*732] this paragraph: "In deciding this case you must determine the fault, if any, of each of the parties. If you find more than one of the parties at fault, you will then need to compare the fault of the parties. To do this, you will need to know the definition of fault." n148

A better roadmap might be an introductory paragraph informing the jurors of the areas in which they will need to be instructed:

To decide this case fairly under the law, you will need to know the meanings of some words. You will also need to understand some legal rules. In addition, you will need to understand some of my legal obligations.

After hearing this paragraph, jurors will know that they will be given some definitions, be told some legal rules, and be informed of the judge's obligations (which are different from the jurors' obligations) before they are given their specific instructions. Of course, the structure of the sentences in which jurors will be told these things must be comprehensible to them, or no roadmap will take them very far.

## 2. Syntactic and Semantic Complexity

As noted above, pattern instructions are modeled closely upon the language of appellate opinions. Appellate opinions are specifically directed to judges, *i.e.*, legal professionals trained in law and accustomed to using legal discourse on a daily basis. Further, these opinions are designed to be read by judges, not listened to by finders of fact. They typically contain lengthy sentences containing many clauses, a great deal of subordination, and arcane vocabulary, including legal terminology and mysterious doublets. In its suggested revision for the Tennessee Pattern Jury Instruction for reasonable doubt, n149 the TBA Report addresses the syntactic complexity. The reader will note the greater length involved; compact, dense prose is much harder to comprehend than longer, but simpler text:

The standard of proof in a criminal case is not the same as that in a civil case. If you have served as a juror in a civil case, you know that the plaintiff in a civil case must prove a charge by showing that it is more likely true than not true. A higher standard of proof is required in a criminal case.

In a criminal case, the law is that the defendant is presumed to be innocent until guilt is shown beyond a reasonable doubt. Further, each individual element of the offense must be proved beyond a reasonable doubt.

If you cannot find that the state has proved every element of the offense beyond a reasonable doubt, then you must find the defendant not guilty.

Proof beyond a reasonable doubt is a level of proof that leaves you as a juror firmly convinced of the defendant's guilt. In order to reach such a [\*733] level of proof, you must consider all the evidence carefully, being certain to consider all facts carefully and impartially.

If after you consider all the evidence in the case carefully, you are firmly convinced of the defendant's guilt, you should/must find the defendant guilty

If, however, you think there is a real possibility, based upon rational consideration and common sense, that the defendant is not guilty, then you should/must find the defendant not guilty.

Beyond a reasonable doubt does not mean absolute certainty; few things in this world are absolutely certain. Neither does it mean an imaginary doubt or a doubt that could be dreamed up if a few facts were different. It means a doubt that will not let your mind rest easy about the certainty of guilt. n150

It is clearly necessary to use the term "reasonable doubt" in the jury instructions. However, there does not appear to be any good reason to define that term in language that includes the terms "engendered," "captious," and "requisite." What's wrong with "born of," "trivial," and "required"?

### 3. Difficult Abstract Concepts

Many legal concepts are difficult to define. "Reasonable doubt" is one such concept. n151 Others are "present cash value," "defective and unreasonably dangerous," and "proximate cause." One way of explaining such concepts to lay jurors is to give examples or brief narratives. The following extract from the Tennessee pattern jury instruction on the meaning of "present cash value" illustrates the difficulties inherent in some pattern instructions:

I have used the expression "present cash value" in these instructions concerning damages for future losses that may be awarded to the plaintiff.

In determining the damages arising in the future, you must determine the present cash value of those damages. That is, you must adjust the award of those damages to allow for the reasonable earning power of money and the impact of inflation.

"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 the 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. n152

One possible remedy is paraphrasing:

[\*734] In other words, in order to make a reasonable adjustment for the present use, interest-free, of money representing a lump sum payment of anticipated future loss, the law requires that the jury discount, or reduce to its present worth, the amount of the anticipated future loss, by taking (1) the interest rate or return which the plaintiff could reasonably be expected to receive on an investment of the lump sum payment, together with (2) the period of time over which the future loss is reasonably certain to be sustained; and then reduce, or in effect deduct from, the total amount of anticipated future loss whatever the amount would be reasonably certain to earn or return if invested at such rate of interest over such future period of time; and include in the verdict an award for only the present worth--the reduced amount--of the total anticipated future loss.

Another correction involves the addition of a brief example:

Hopefully, this simple example will be of some benefit: 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 of money which, *when invested*, would equal \$ 1,000 in five years. How much that money should be now is for you to decide.

An even longer example might be useful.

The plaintiff is also seeking damages for the loss of wages and benefits and for medical expenses in the future. If you find that there is a reasonable likelihood that the plaintiff will have these losses, you are required to do something called "discounting to present value." Purely as an illustration, if you found from the evidence that there was a reasonable likelihood that the plaintiff would incur \$ 10,000 in medical expense in the year 2007, you would not award him \$ 10,000 today. Why? Because money, when prudently invested, draws interest. If you find that the plaintiff is going to need \$ 10,000 in seven years to pay medial bills arising from this accident, you will award him only that amount of money now which, when added to the interest it would accumulate in seven years, will amount to \$ 10,000 in 2007, the year he will have the expense. You need to do this with any future medical bills or lost wages and benefits, but not with damages for future pain and suffering, mental anguish, or loss of the enjoyment of life.

Some issues, such as proximate cause, may require the addition of both positive and negative examples:

Some of these legal concepts or principles can be difficult for laypersons to understand. I hope this example will illustrate for you a practical example of proximate cause: It is negligence for a driver to drive a car that has bald, or slick, tires. If that automobile with bald tires slams into the rear of a car because the driver could not stop due to a combination of slick tires and wet pavement, then the negligence of the driver in driving with bald tires would be a proximate cause of the accident.

[\*735] It is possible for a person to be negligent without that negligence being a proximate cause of the accident. If the driver of that car with bald tires is stopped for a red light and is struck in the rear by another car, obviously the bald tires had nothing to do with the accident. In other words, the driver's negligence in driving a car with bad tires was not a proximate cause of that accident.

To find a party to be "at fault," you must find that party was negligent *and* that the negligence was a proximate cause of the injury or damage for which a claim was made. You must then determine the percentage of fault of each party whom you have determined is at fault.

Finally, some issues may suggest a need for both paraphrasing and examples. In the following example, from *Lovin v. VME Americas, Inc.*, n153 modified instructions made use of both paraphrase and narrative examples to clarify the concepts of "defective and unreasonably dangerous":

In Tennessee, a plaintiff, in order to recover under any theory of product liability, must establish by a preponderance of the evidence that the product was defective and unreasonably dangerous at the time the product left the control of the manufacturer. This burden of proof must be carried by the plaintiff, whether his complaint is couched in terms of negligence or strict liability.

The plaintiffs assert that VME Americas failed to properly design, test and manufacture the ladder, which was used by Mr. Lovin, in the following ways: (1) the vertical spacing of the ladder rungs is inconsistent; (2) there is no skidproofing on the ladder rungs; (3) the width of the ladder rungs (3/8") is substandard and unreasonably dangerous; (4) the top rung of the ladder is not level with the platform which it serves; (5) the ladder is too close to the dozer, which falls below accepted engineering principles and standards; and (6) the handrails are defective in that the top handrail on the left side is angled at such a position as to be inconsistent with accepted engineering principles and standards. Plaintiffs assert that this failure to properly design, test and manufacture the ladder was the proximate cause of their injuries. The defendant denies all these allegations and insists that the plaintiffs are not entitled to a recovery under any theory.

First, plaintiffs assert that the defendant VME Americas, Inc., is liable under the theory of strict liability. The manufacturer of a product is liable to the user of that product for any personal injuries the product causes if:

- (1) the product left the manufacturer's control in a defective or unreasonably dangerous condition;
- (2) the seller is engaged in the business of selling such a product; and
- (3) the product is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.



This rule applies even if the seller has exercised all possible care in the preparation and sale of the product and even if the user himself did not buy the product from the seller. The plaintiffs have the burden of proving each [\*736] of the elements of strict liability by a preponderance of the evidence.

Under the law, Mr. Lovin was a user or consumer of the product when this incident occurred. Similarly, the parties do not dispute that defendant VME Americas was in the business of manufacturing ladders and dozers.

Defective condition means a condition of a product that renders it unsafe for normal or anticipated handling and consumption.

Unreasonably dangerous means that a product is dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics; or that the product, because of its dangerous condition, would not be put on the market by a reasonably prudent manufacturer or seller assuming that he knew of its dangerous condition.

For example, a rifle is inherently dangerous; after all, its purpose is to expel a metal projectile--a bullet--at a high velocity. If that bullet strikes a human being or animal, death or great harm will be the result. But the fact that the weapon is dangerous because it ejects a bullet does not make it *unreasonably* dangerous--after all, the ordinary consumer reasonably expects a rifle to do that.

Further, the fact that it is dangerous because it fires a bullet does not make it defective; after all, by so doing it only does what it is supposed to do.

But if a manufacturer develops a new magnum caliber and ammunition, i.e., *extraordinarily* powerful -- and the recoil or kick is so powerful that a shooter could not fire it without dislocating the user's shoulder, then that is something that the ordinary consumer would not expect, and it could be said that such a rifle is *unreasonably* dangerous.

Using our same rifle as an example, if the manufacturer failed to use appropriate strength steel to withstand the pressure generated by the exploding cartridge so that the barrel ruptures and causes injury to the user, then it could be said that the rifle contained a defect.

Obviously, do not equate a rifle with a ladder. I stress my example of the rifle is for purposes of giving you a concrete example of "unreasonably dangerous" and "defective." n154

In considering the use of paraphrasing and examples, the legal system must consider whether they should be uniform for all cases, as the pattern instructions are. If so, they could replace in whole or become part of the pattern instructions. One potential problem is that pattern examples might occasionally resemble case facts. Obviously, that should be avoided. For instance, the previous example given for "defective and unreasonably dangerous" could not be used in a case involving a firearm. This problem could be solved by having alternative texts available; trial judges could select those examples most appropriate for a given case. There is no legal reason why trial judges could not compose their own paraphrases and examples, but that procedure would surely increase the possibility of reversal on appeal and therefore be unattractive to the judiciary. However, paraphrasing and [\*737] examples could be limited to use only at the trial judge's discretion. Therefore, it might be that such devices could be used primarily in response to questions from jurors, avoiding the *Weeks*

scenario described above. n155 Time is also a problem; when would judges compose paraphrases and examples? Dockets are crowded, and trials come up every day. It can be very time-consuming to revise incomprehensible instructions. Consistency is also an issue. If judges wrote their own paraphrases, the law might not be evenly applied. The only realistic corrective may lie in expanded review for abuse of discretion.

#### 4. Timing and Delivery of the Instructions

It is traditional in the majority of jurisdictions to provide most jury instructions, particularly those involving substantive law, after all the evidence has been presented and just before the jury retires to deliberate. One of the problems with this arrangement is that jurors often form their opinions about the proper outcome of the case well before the court instructs them in the applicable law. Since the landmark study of the American jury by Harry Kalven, Jr. and Hans Zeisel in 1966, n156 legal scholars have known that the single most important factor in the determination of juror attitude is juror reaction to the opening statements delivered at the very beginning of the case, when lawyers outline their theories of the case and prepare the jurors for the evidence they will subsequently hear from witnesses. Thus, pretrial instruction in substantive law might improve jury performance. Indeed, studies have confirmed the value of pre-instruction in improving the comprehension of the jury. n157 The weight of the evidence is that while the impact of pre-instruction alone is questionable, the use of both pre- and post-testimony instruction improves both juror comprehension and juror satisfaction with the trial process. n158 Although the reasoning behind the presenting of jury instructions immediately before deliberation is based upon the principle of recency--a sound principle in many circumstances--when was the last time anyone learned the rules of a game *after* it was played?

Because the evidence shows that U.S. jury instructions are written to be read rather than to be heard, it would seem logical to provide them in written form to the ultimate triers of fact. n159 Although the results of empirical research on the role of written instructions in the improvement of comprehensibility are somewhat mixed, this may be the result of presenting [\*738] jurors with written instructions that are incomprehensible for other reasons. n160 If a person does not speak "a foreign language, it will not matter if they are given written or verbal instructions in that foreign tone." n161

Whatever the manner of delivery, instructions designed to be read should not be delivered orally, in a rapid monotone. So self-evident is this that it is curious, given the theoretical importance of having a properly instructed jury, that there is no research literature that addresses the manner in which instructions are delivered. The situation is analogous to the relative lack of research on the delivery of liturgical ritual during church services. There are, however, some common-sense recommendations arising from instructional and rhetorical traditions that may be useful to consider.

In cases, judicial instructions may be lengthy, complex, and couched in language that is only marginally comprehensible. Nothing could be worse, from a communication science perspective, than having these instructions read verbatim, in an official monotone, by a berobed judge to captive jurors. Unfortunately, that is the way the instructions are often communicated to the jury. A number of changes in the delivery process could help to make the communication more effective. Judges could provide summaries as well as roadmaps. n162 Courts could make use of multimedia formats, particularly charts, decision trees, or simple bullet summaries. Moreover, courts could be careful to maintain eye contact with jurors and in general pay full attention to the legitimacy, dignity, and humanity of the jurors and their role.

One critic of the Plain English movement has gone so far as to suggest that the real problem with complex text may be the model of communication implicit in institutional discourse. This is the "conduit metaphor," originally identified by Michael Reddy in 1979 n163 and described by Robyn Penman: "In this view of communication, language is seen as the transfer vehicle for thoughts and ideas. We communicate by putting our thoughts into words and sending them to a receiver who takes the thoughts out of the words." n164 In other words, exclusive focus on problems with vocabulary and syntax has prevented us from paying full attention to

the notion of textual comprehension as "discursive construction": n165

First, people and not the message *per se*, are seen as the process of meaning generation; they are actively involved in constructing their understanding in discourse. Second, the people are not seen as sending and receiving messages in some sort of reactive fashion; instead they are seen as [\*739] voluntarily intertwined so as to bring about their understandings. Third, the people are not sending messages to have effects on others, but are jointly involved in the ongoing creation of meaning. And, finally, the message is not a concrete entity, meaning does not exist outside the joint action and the context of that action. n166

## 5. Correctives

Jurors are crucial to the American trial process. If the jury process is to serve its intended purpose, jurors must be accorded the discourse rights necessary for their full participation as triers of fact. Necessary constraints on jurors' exposure to some information must not be allowed to restrict their understanding of their charge. To facilitate full juror comprehension, jury instructions must be written in language comprehensible to lay persons, and they must be delivered at times and in ways that enhance understanding. Below are some examples.

It is generally recognized that jury instructions could be changed to be much more comprehensible than they currently are. n167 The existence of pattern jury instructions, whereby judges and attorneys often use previously prepared text, means that it might be relatively easy and inexpensive to modify the instructions. Pattern instructions should either be rewritten to be comprehensible to non-lawyers with limited formal education or should be accompanied by guides and paraphrases adequate to allow jurors to follow jury instructions as currently worded. If pattern instructions are rewritten, they should be rewritten in accord with a plan to reduce sentence complexity and overall sentence length. As discussed above, this can be accomplished by reducing the number of clauses per sentence, by providing "roadmaps" to contents, and by providing specific and concrete paraphrases as examples of abstract concepts. Such tools for comprehension should be used even if instructions are not rewritten. Standard paraphrases might be prepared in the same way that pattern instructions are prepared and be available to judges via a loose-leaf service.

To see how pattern language might be revised, let us examine one additional extract from Tennessee's pattern jury instruction on comparative fault and compare it with a rewritten version that is syntactically simpler, though also longer, because some roadmaps have been added. Which would be more comprehensible to the nonlawyer?

In deciding this case you must determine the fault, if any, of each of the parties. If you find more than one of the parties at fault, you will then need to compare the fault of the parties. To do this, you will need to know the [\*740] definition of fault.

A party is at fault if you find that the party was negligent and that the negligence was a legal cause of the injury or damage for which a claim is made.

Fault has two parts: negligence and legal cause. Negligence is the failure to use reasonable care. It is either doing something that a reasonably careful person would not do, or the failure to do something that a reasonably careful person would do, under circumstances similar to those shown by the evidence. A person may assume that every other person will use reasonable care unless the

circumstances indicate the contrary to a reasonably careful person.

....

The second part of fault is legal cause. A legal cause of any injury is a cause which, in natural and continuous sequence, produces an injury, and without which the injury would not have occurred. A single injury can be caused by the negligent acts or omissions of one or more persons.

If you find that a party was negligent and that the negligence was a legal cause of the injury or damages for which a claim was made, you have found that party to be at fault. n168

A rewritten version of the same instruction follows:

To decide this case fairly under the law, you will need to know the meanings of some words. You will also need to understand some legal rules. In addition, you will need to understand some of my legal obligations.

Part of your job will be to decide who, if anyone, is at fault in this case. It may be that more than one party is at fault. You will need to decide that. If that is so, then you will need to determine which share of the fault is borne by each party. For instance, one party may be 25% responsible, while another is 75% responsible. Or parties may be equally responsible, each bearing 50% of the blame.

It is important to understand the legal meaning of fault. A party is at fault in a legal sense if she was negligent in her behavior. Also, that negligence must also be a direct cause of the injury or damage at issue. Two conditions must be satisfied for there to be fault--negligence and causality.

Negligence is the failure to use reasonable care. Negligence may result from two different patterns of conduct. A person is negligent if she does something that a reasonably careful person would not do. A party is also negligent if she fails to do something that a reasonably careful person would do under similar circumstances. Special circumstances may lead to special results, of course. The test is what a reasonably prudent person would do under the circumstances.

For a party to be at fault, her negligence must be directly related to the injury. Her negligence must cause the injury. A person is at fault if her negligent behavior leads directly to an injury. Sometimes, of course, an injury can be caused by the negligent acts or omissions of more than one [\*741] person.

If you find that someone was negligent and that the negligence caused the injury or damages at issue, then you have found that someone is at fault.

The rewriting of pattern instructions so as to be comprehensible to average jurors is a large task to suggest. The recommendation of the Tennessee Bar Association Jury Reform Commission is that a special commission be appointed, composed of lawyers, judges, lay jurors, and appropriate social science experts to work closely with both the Tennessee Supreme Court and the United States Court of Appeals for the Sixth Circuit. n169

The Jury Reform Commission recognized that any reform must acknowledge frankly that the jury's role as finder of fact has to compete both with the requirements of legal procedure, particularly those implicating constitutional issues, and also with the judicial perception that the jury must be highly constrained and controlled. n170 In the courtroom, the judge is the domain expert on law and procedure. Lip service is paid to the idea that the jury is the trier of fact and is therefore a domain expert in its own right. But jurors are not treated as experts. If they were, they would have greater freedom in certain areas, would be able to take notes and to ask questions, and would be provided instructions that are not so arcane and convoluted as to be incomprehensible to most people.

## VI. CONCLUSION: JURY EMPOWERMENT

In the American judicial system, jurors play a unique role as the final arbiters on factual matters in many trials. The role of lay jurors is thus central in preserving the legitimacy of the courts. As the triers of fact, jurors are effectively domain experts on matters of fact. There is often, however, a large discrepancy between the lip service paid to jurors as the expert triers of fact and the way in which jurors are actually treated.

For jurors to function effectively, they must be empowered as the domain experts that our system requires them to be. In order for them to be appropriately empowered, jurors must be treated in a manner that acknowledges the important role that they play in the judicial process. So important are all the factors discussed above that it now appears that the judicial system may actually have benefited from ignoring early Plain English concerns that dealt almost exclusively with syntactic or narrowly semantic problems in jury instructions. The results of empirical research on the role of written instructions in the improvement of comprehensibility are somewhat mixed. This outcome may be because all the factors discussed here play an important role in rendering instructions comprehensible. In many cases, merely rewriting complex instructions is likely to have minimal effect. [\*742] Timing, medium of delivery, and manner of delivery are also crucial.

If, in 1979 or sometime thereafter, judges had taken early research on the syntax and semantics of jury instructions seriously, they might well have made or authorized the changes in sentence structure and vocabulary choice that scholars advocated. However, if only syntactic and semantic changes had been made without attention being paid to other important factors, little would have changed--except that judges and lawyers might have concluded that the rewriting of jury instructions was unimportant. The rewriting of jury instructions for greater comprehensibility is crucial, but the mode of delivery of the rewritten instructions is also critical, as is the entire discourse event in which the jurors are charged.

Discourse analysts have understood for twenty years that a "message" model of human communication--an assumption that language provides watertight linguistics "vessels" in its words, phrases, clauses, and sentences that contain meaning while being delivered to auditors--is wholly inadequate to explain how language and communication actually function. It is time for our judicial system to use insights from discourse theory, as well as knowledge of the ways in which syntactic and semantic structure assist or impede communication, to improve the ways in which jurors are instructed to perform the task they are asked by society. As a result of advances in discourse theory, linguists are in an excellent position to assist judges and lawyers in their ongoing attempt to carry out the functions of our judiciary, as it is charged by the Constitution.

## FOOTNOTES:

n1 See B. Michael Dann & George Logan, III, *Jury Reform: The Arizona Experience*, 79 JUDICATURE 280 (1986); B. Michael Dann, "Learning Lessons" and "Speaking Rights": *Creating Educated and Democratic Juries*, 68 IND. L.J. 1229 (1993) [hereinafter Dann, *Learning Lessons*].

n2 See J. Clark Kelso, *Final Report of the Blue Ribbon Commission on Jury System Improvement*, 47

HASTINGS L.J. 1433 (1996) (discussing the California jury reform project).

n3 See, e.g., JEROME FRANK, *LAW AND THE MODERN MIND* 181 (1930); LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 137 (1973) (lamenting jury instructions as "stereotyped, antiseptic statements of abstract rules"); Robert M. Hunter, *Law in the Jury Room*, 2 OHIO ST. L.J. 1 (1935) (collecting anecdotal observations); see also ARTHUR D. AUSTIN, *COMPLEX LITIGATION CONFRONTS THE JURY SYSTEM: A CASE STUDY* 55-65 (1984) (interviewing two sets of jurors in a complex antitrust suit and finding that jurors had a great deal of difficulty with the concepts involved and the poor language of the instructions); JOHN GUINTEHER, *THE JURY IN AMERICA* 70-73 (1988) (surveying jury decision making); SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, *THE AMERICAN JURY ON TRIAL* 141-63 (1988) (criticizing the incomprehensibility of jury instructions); Edith Greene, *Judge's Instruction on Eyewitness Testimony: Evaluation and Revision*, 18 J. APPLIED SOC. PSYCHOL. 252, 259 (1988) (finding that standard instruction on eyewitness testimony did not increase juror understanding); Saul M. Kassin & Lawrence S. Wrightsman, *On the Requirements of Proof: The Timing of Judicial Instruction and Mock Juror Verdicts*, in *IN THE JURY BOX*, 143, 144-45 (Lawrence S. Wrightsman et al. eds., 1987) (summarizing criticisms of jury instructions); Robert L. Winslow, *The Instruction Ritual*, 13 HASTINGS L.J. 456 (1962) (recommending that pattern instructions define abstract legal concepts by describing within factual context).

n4 See, e.g., Robert F. Forston, *Judge's Instructions: A Quantitative Analysis of Jurors' Listening Comprehension*, TODAY'S SPEECH, Fall 1970, at 34. All studies consistently point to failure by jurors to understand jury instructions. For example, the 1990 Michigan Juror Comprehension Project tested actual jurors who had rendered verdicts in criminal trials only a few minutes before being interviewed by researchers. As jurors completed jury duty, they were asked to complete extensive questionnaires regarding their understanding of the pattern jury instructions used in the trial just completed. Geoffrey P. Kramer & Doreen M. Koenig, *Do Jurors Understand Criminal Jury Instructions? Analyzing the Results of the Michigan Juror Comprehension Project*, 23 U. MICH. J.L. REFORM 401, 409 (1990). The researchers found that many jurors failed to understand critical aspects of the law even after having heard the judge read the instructions, after having read the instructions themselves, and after having discussed the instructions in deliberation. *Id.* at 429-33. For example, when asked whether an assault must include actual physical injury to the victim, only 32.3% of those jurors who heard pattern instructions on assault--jurors who had, only minutes before, completed a trial in which the defendant had been charged with assault--answered correctly that an assault did not require a physical injury. *Id.* at 423.

n5 See REID HASTIE ET AL., *INSIDE THE JURY* (1983) (examining the dynamics of jury decision making); Phoebe C. Ellsworth, *Are Twelve Heads Better Than One?*, 52 LAW & CONTEMP. PROBS. 205, 218-23 (1989) (finding that, following deliberation, 49% of juror responses to researchers' legal questions were unclear or wrong, and finding that deliberation did not cure juror misunderstanding); Amiram Elwork et al., *Juridic Decisions in Ignorance of the Law or in Light of It?*, 1 LAW & HUM. BEHAV. 163, 175-76 (1977) (finding that mock jurors were much more likely to comprehend and remember revised instructions than pattern ones); Norman J. Finkel & Sharon F. Handel, *Jurors and Insanity: Do Test Instructions Instruct?*, 1 FORENSIC REP. 65, 75 (1988) (finding that jury instructions on insanity had no more effect on verdicts than giving no instructions at all); Forston, *supra* note 4, at 34 (finding that jurors were confused by legal concepts as well as by deliberation proceedings); Jane Goodman & Edith Greene, *The Use of Paraphrase Analysis in the Simplification of Jury Instructions*, 4 J. SOC. BEHAV. & PERSONALITY 237, 246-50 (1989) (finding that jurors failed to understand intent and burden of proof); Harold M. Hoffman & Joseph Brodley, *Jurors on Trial*, 17 MO. L. REV. 235, 250 (1952) (revealing from juror interviews that jurors misunderstand a variety of aspects of trial); Irene Glassman Prager, *Improving Juror Understanding For Intervening Causation Instructions*, 3 FORENSIC REP. 187, 187-88 (1989) (finding that jurors were far more likely to understand revised instruction on intervening causation than pattern version); William W. Schwarzer, *Communicating with Juries: Problems and Remedies*, 69 CAL. L. REV. 731, 738-39 (1981) (describing comprehensibility problems with pattern jury instructions); Laurence J. Severance & Elizabeth F. Loftus, *Improving the Ability of Jurors to*

*Comprehend and Apply Criminal Jury Instructions*, 17 L. & SOC'Y REV. 153, 183 (1982) (finding that mock jurors given pattern instructions on intent and reasonable doubt did not perform any better than jurors who received no instructions at all); Walter M. Steele, Jr. & Elizabeth G. Thornburg, *Jury Instructions: A Persistent Failure to Communicate*, 67 N.C. L. REV. 77, 88-89 (1988) (finding that jurors had a poor grasp of pattern instructions, but improved with revised versions); *see also* William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 IND. L.J. 1043, 1044 (1995) (finding that "many jurors misunderstand the judge's sentencing instructions in ways that favor the imposition of the death penalty"); Shari Seidman Diamond, *Instructing on Death: Psychologists, Juries, and Judges*, 48 AM. PSYCHOL. 423 (1993) (analyzing the effect of instructions on comprehension); Shari Seidman Diamond & Jonathan D. Casper, *Empirical Evidence and the Death Penalty*, 50 J. SOC. ISSUES 177 (1994) (discussing jury decision making based on social science evidence); Shari Seidman Diamond & Judith N. Levi, *Improving Decisions on Death By Revising and Testing Jury Instructions*, 79 JUDICATURE 224 (1996) (reviewing Zeisel study and proposing revisions); James Luginbuhl & Julie Howe, *Discretion in Capital Sentencing Instructions: Guided or Misguided?*, 70 IND. L.J. 1161 (1995) (finding 41% of tested jurors believed mitigating evidence required proof beyond reasonable doubt).

n6 *See, e.g.*, TENNESSEE BAR ASS'N JURY REFORM COMM'N, REPORT OF THE TENNESSEE BAR ASSOCIATION COMMISSION ON JURY REFORM (1999) (citing extensive literature) [hereinafter TBA REPORT]; Robert P. Charrow & Veda R. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 COLUM. L. REV. 1306 (1979); Joel D. Lieberman & Bruce D. Sales, *What Social Science Teaches Us About the Jury Instruction Process*, PSYCH., PUB. POL'Y & L. 589 (1997); Steele & Thornburg, *supra* note 5; J. Alexander Tanford, *The Law and Psychology of Jury Instructions*, 69 NEB. L. REV. 71 (1990); J. Alexander Tanford, *Law Reform by Courts, Legislatures, and Commissions Following Empirical Research on Jury Instructions*, 25 L. & SOC'Y REV. 155 (1991); Peter Meijes Tiersma, *Dictionaries and Death: Do Capital Jurors Understand Mitigation?*, UTAH L. REV. 1 (1995) [hereinafter Tiersma, *Dictionaries*]; Peter Meijes Tiersma, *Reforming the Language of Jury Instructions*, 22 HOFSTRA L. REV. 37 (1993) [hereinafter Tiersma, *Reforming the Language*].

n7 *See* Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538, 1561 (1998); Tiersma, *Dictionaries*, *supra* note 6.

n8 *See* Robert C. Power, *Reasonable Doubt and Other Doubts: The Problem of Jury Instructions*, 67 TENN. L. REV. 45 (2000); Peter M. Tiersma, *Jury Instructions in the New Millennium*, 36 COURT REV. 28 (1999) [hereinafter Tiersma, *Jury Instructions*]; Tiersma, *Reforming the Language*, *supra* note 6.

n9 Dann, *Learning Lessons*, *supra* note 1, at 1236-37.

n10 *See* Steele & Thornburg, *supra* note 5, at 80.

n11 *Id.*

n12 *Id.* at 83

n13 120 S. Ct. 727 (2000) (five-to-four decision).

n14 *Id.* at 732-33.

n15 *See* Stephen P. Garvey et al., *Correcting Deadly Confusion: Responding to Jury Inquiries in Capital Cases*, 85 CORNELL L. REV. 627, 628 (2000) ("The Supreme Court [in *Weeks*] concluded that the jury probably *did* understand the law.").

n16 *Weeks*, 120 S. Ct. at 733.

n17 No. 397-CV2728T (N.D. Tex. 1997).

n18 The lay opinions reported in this Article are drawn from interviews with individuals who report having recently served on juries. These individuals will be identified by geography but, at their request, not by name.

n19 Email letter from juror in the Northeast to author (June, 1998) (on file with author).

n20 Email letter from juror in the Midwest to author (July, 1999) (on file with author).

n21 Email letter from juror in New York City to author (May 28, 1998) (on file with author).

n22 Email letter from juror in Minnesota to author (May 28, 1998) (on file with author).

n23 *See, e.g.*, TBA REPORT, *supra* note 6; Charrow & Charrow, *supra* note 6; Lieberman & Sales, *supra* note 6; Steele & Thornburg, *supra* note 5; Tiersma, *Reforming the Language*, *supra* note 6.

n24 *See* Garvey et al., *supra* note 15, at 636.

n25 *Weeks v. Angelone*, 120 S. Ct 727, 734 (2000) (emphasis in original).

n26 U.S. CONST. amend. VI (emphasis added).

n27 U.S. CONST. amend. VII (emphasis added).

n28 HENRY KALVEN, JR., & HANS ZEISEL, *THE AMERICAN JURY* 3-4 (1966).

n29 *See, e.g.*, TBA REPORT, *supra* note 6.

n30 Dann, *Learning Lessons*, *supra* note 1, at 1230.

n31 156 U.S. 51, 92 (1895) (directing the trial judge "to act by the force of his reason and . . . of his knowledge of the law and all appropriate means, to adjudge all questions of law, and direct the jury thereon").

n32 Tiersma, *Jury Instructions*, *supra* note 8, at 28 (citing ROBERT G. NIELAND, *PATTERN JURY INSTRUCTIONS: A CRITICAL LOOK AT A MODERN MOVEMENT TO IMPROVE THE JURY SYSTEM* (1979)).

n33 *Id.* (citing William W. Schwarzer, *Communicating with Juries: Problems and Remedies*, 69 CAL. L. REV. 731, 737-740 (1981)).

n34 *See* DAVID MELLINKOFF, *THE LANGUAGE OF THE LAW* 434 (1963) ("These instructions are not designed for the quick understanding of listening laymen, but rather for more or less intelligible reading by appellate judges. . . . Almost all the reviewing judge need do is hold them up to the light, to see if the paragraph indentations and periods are in the right places." (footnotes omitted)).

n35 *See, e.g.*, Charrow & Charrow, *supra* note 6.

n36 *See* BLACK'S LAW DICTIONARY 861-62 (7th ed. 1999) (defining various types of jury instructions).



n37 See Steele & Thornburg, *supra* note 5, at 77.

n38 *Id.*

n39 Tiersma, *Reforming the Language*, *supra* note 6, at 39.

n40 *Id.* at 45.

n41 *Id.*

n42 See COMM. ON JURY STANDARDS, JUDICIAL ADMIN. DIV'N, A.B.A., STANDARDS RELATING TO JUROR USE AND MANAGEMENT (1993).

n43 See NAT'L CTR. FOR STATE COURTS, JURY TRIAL INNOVATIONS (G. Thomas Munsterman et al. eds., 1997).

n44 See Kelso, *supra* note 2.

n45 COUNCIL FOR COURT EXCELLENCE, DISTRICT OF COLUMBIA JURY PROJECT, JURIES FOR THE YEAR 2000 AND BEYOND (1998).

n46 See Colleen McMahon & David L. Kornblau, *Chief Judge Judith S. Kaye's Program of Jury Selection Reform in New York*, 10 ST. JOHN'S J. LEGAL COMMENT. 263 (1995) (discussing the New York Jury Project).

n47 See TBA REPORT, *supra* note 6.

n48 See Dann & Logan, *supra* note 1; Dann, *Learning Lessons*, *supra* note 1.

n49 See Dann & Logan, *supra* note 1, at 286.

n50 See, e.g., Valerie P. Hans et al., *The Arizona Jury Reform Permitting Civil Jury Trial Discussions*, 32 U. MICH. J.L. REFORM 349 (1999).

n51 TBA REPORT, *supra* note 6, at 60-66 (describing the specific recommendations for these entities and sets of rules).

n52 *Id.* at 4 (footnote omitted).

n53 *Id.* at 6-7.

n54 *Id.* PP9.1-9.5, at 37.

n55 *Id.*

n56 120 S. Ct. 727 (2000); see *supra* notes 13-16 and accompanying text.

n57 *Weeks*, 120 S. Ct. at 732-33.

n58 698 N.Y.S.2d 214 (N.Y. App. Div. 1999).

n59 *Id.*

n60 *Id.* at 215.

n61 *Id.* (Saxe, J., concurring).

n62 *Id.* (Saxe, J., concurring).

n63 *Id.* (Saxe, J., concurring).

n64 *Id.* at 216 (Saxe, J., concurring). The New York pattern jury instruction on reasonable doubt reads, "The doubt, to be a reasonable doubt, should be one which a reasonable person acting in a matter of this importance would be likely to entertain because of the evidence or because of the lack or insufficiency of the evidence in the case." 2 NEW YORK PATTERN JURY INSTRUCTIONS: CRIMINAL § 6:20 (2000).

n65 *Redd*, 698 N.Y.S.2d at 216 (Saxe, J., concurring).

n66 *Id.* (Saxe, J., concurring).

n67 120 S. Ct. 727, 732-33 (2000).

n68 *Id.* at 729.

n69 *Id.* at 730.

n70 *Id.*

n71 *Weeks v. Angelone*, 176 F.3d 249 (4th Cir. 1999).

n72 *Weeks*, 120 S. Ct. at 731.

n73 *Id.* at 733.

n74 No. 397-CV2728T (N.D. Tex. 1997).

n75 494 U.S. 370 (1990).

n76 *Id.* at 380-81. Chief Justice Rehnquist wrote:

We think the proper inquiry in such a case is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence. Although a defendant need not establish that the jury was more likely than not to have been impermissibly inhibited by the instruction, a capital sentencing proceeding is not inconsistent with the Eighth Amendment if there is only a possibility of such an inhibition. This "reasonable likelihood" standard, we think, better accommodates the concerns of finality and accuracy than does a standard which makes the inquiry dependent on how a single hypothetical "reasonable" juror could or might have interpreted the instruction. There is, of course, a strong policy in favor of accurate determination of the appropriate sentence in a capital case, but there is an equally strong policy against retrials years after the first trial where the claimed error amounts to no more than speculation. Jurors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might. Differences among them in

interpretation of instructions may be thrashed out in the deliberative process, with commonsense understanding of the instructions in the light of all that has taken place at the trial likely to prevail over technical hairsplitting.

*Id.* (footnotes omitted).

n77 *Id.*

n78 Affidavit of Bethany K. Dumas at 3-4, *State v. Jacobs*, No. F86-99780-HLJ (Crim. Ct. Dallas County, Tex. Oct. 1, 1996) (alteration in original) (on file with author).

n79 *Id.*

n80 Brief for Petitioner at 139, *Jacobs v. Johnson*, No. 397-CV2728T (N.D. Tex. 2000).

n81 *Id.*

n82 *Id.* at 139-40.

n83 *Id.* at 140.

n84 *Id.* at 140 (emphasis original).

n85 *Weeks v. Angelone*, 120 S. Ct. 727 (2000).

n86 *Id.* at 730.

n87 *Id.* at 728 (syllabus of the Reporter of Decisions).

n88 *Id.* at 730-31 n.1.

n89 *Id.* at 731.

n90 *Id.*

n91 *Id.*

n92 *Id.*

n93 *Id.* at 730-31 n.1.

n94 *See, e.g., Buchanan v. Angelone*, 522 U.S. 269 (1998) (considering the same instruction as the jury in *Weeks*).

n95 *Weeks*, 120 S. Ct. at 730.

n96 *Id.* at 731.

n97 *Id.* at 730.

n98 *Id.*

n99 Garvey et al., *supra* note 15, at 632-33 (citations omitted).

n100 *Id.* at 646.

n101 Social science research has been important in the judicial process in this country since 1954, when it played an instrumental role in the school desegregation decision in *Brown v. Board of Education*, 347 U.S. 483, 494 & n.11 (1954).

n102 *See* Charrow & Charrow, *supra* note 6.

n103 It was the day I read the Charrow article in 1981 that I decided to become familiar with legal discourse and the legal process by entering law school.

n104 *See* Lieberman & Sales, *supra* note 6.

n105 *Id.* at 639.

n106 Steele & Thornburg, *supra* note 5, at 108-09 (footnotes omitted).

n107 *Weeks v. Angelone*, 120 S. Ct. 727, 734 (2000) (citing *Boyde v. California*, 494 U.S. 370, 380 (1990)).

n108 *See supra* text accompanying note 77.

n109 Alan Reifman et al., *Real Jurors' Understanding of the Law in Real Cases*, 16 LAW & HUM. BEHAV. 539 (1992).

n110 *Id.* at 550.

n111 *Id.*

n112 *Id.*

n113 Joel D. Lieberman & Bruce D. Sales, *The Effectiveness of Jury Instructions*, in A HANDBOOK OF JURY RESEARCH 18-4 n.16 (Walter F. Abbott & John Batt eds., 1999).

n114 *Id.* at 18-5 to -6. The article also reports research on general problems of comprehension, then explores three major topics: "Explanation of Jurors' Failure to Follow Instructions," "Analytical Factors Affecting Comprehension," and "Solutions to Comprehension Problems."

n115 *See* sources cited *supra* note 6.

n116 TBA REPORT, *supra* note 6, § 9.4.

n117 RUDOLF FLESCH, THE ART OF READABLE WRITING (1974).

n118 *Id.*

n119 *See* CECILIA CONRATH DOAK ET AL., TEACHING PATIENTS WITH LOW LITERACY SKILLS (2d ed. 1996).

n120 *See id.*

n121 TBA REPORT, *supra* note 6, app. D, at 57.

n122 TENNESSEE PATTERN JURY INSTRUCTIONS: CRIMINAL § 2.03 (4th ed. 1995).

n123 *See* TBA REPORT, *supra* note 6, app. D, at 57-59.

n124 Robyn Penman, *Plain English: Wrong Solution to an Important Problem*, 19 AUSTRAL. J. COMM. 1 (1992).

n125 Brenda Danet, *Language in the Legal Process*, 14 L. & SOC'Y REV. 445, 451 (1980).

n126 *See* CLAUDE E. SHANNON & WARREN WEAVER, THE MATHEMATICAL THEORY OF COMMUNICATION 4-5 (1949).

n127 Robyn Penman, *Communication Reconstructed*, 18 J. THEORY OF SOC. BEHAV. 394, 395-96 (1988).

n128 Heidi E. Hamilton et al., *Genetic Counseling Principles in Practice: A Sociolinguistic Investigation*, Symposium at the Ann. Conf. of the Am. Ass'n of Applied Linguistics (Mar. 7, 1999).

n129 *See* Charrow & Charrow, *supra* note 6.

n130 By inference, the same is true of instructions that are grammatically and semantically similar to standard jury instructions.

n131 *Id.* at 164.

n132 *See* Steele & Thornburg, *supra* note 5, at 94.

n133 *Id.*

n134 *See, e.g.*, Donald R. Ploch et al., *Readability of the Law*, 33 JURIMETRICS 189 (1993). But much more than syntax needs attention. Research on "normalized" language suggests that restricting the occurrence of logical operators and using a consistent sequence of conditions and results improves comprehensibility. *Id.*

n135 TBA REPORT, *supra* note 6, § 9.4.

n136 EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 2 (1949).

n137 *See generally id.*

n138 BLACK'S LAW DICTIONARY 926 (7th ed. 1999).

n139 RESTATEMENT (SECOND) OF TORTS § 402A cmt. j (1965).

n140 LEVI, *supra* note 136, at 6-19.

n141 RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 5 cmt. b (1998).

n142 See generally Theodore A. Feitshans, *An Analysis of State Pesticide Drift Laws*, 9 SAN JOAQUIN AGRIC. L. REV. 37 (1999) (surveying state tort law governing pesticide drift).

n143 See generally Reed R. Kathrein, *Class Actions in Year 2000 Defective Software and Hardware Litigation*, 18 REV. LITIG. 487 (1999) (discussing liability for sale and manufacture of computer software and hardware made defective by the Y2K bug).

n144 *Liebeck v. McDonald's Restaurants, Inc.*, No. CV 93-02419, 1995 WL 360309, at \* 1 (N.M. Dist. Ct. Aug. 18, 1994); see *Big Jury Award for Coffee Burn*, N.Y. TIMES, Aug. 19, 1994, at D5.

n145 Michael Jonathan Grinfeld, *Protecting Prozac*, CAL. LAW, Dec. 1998, at 36, 37.

n146 Videotape: Order in the Classroom (National Jury Trial Innovations Project of the International Association of Defense Counsel Foundation 1998) (on file with the author).

n147 Bethany K. Dumas & Michael G. Johnson, U.S. Pattern Jury Instructions: The Problem of Inertia, Presentation Before the Fourth International Association of Forensic Linguists Meeting (June 28, 1999) (unpublished manuscript on file with the author).

n148 8 TENNESSEE PATTERN JURY INSTRUCTIONS: CIVIL § 3.50 (1997)

n149 See *supra* notes 77-78 and accompanying text.

n150 See TBA REPORT, *supra* note 6, app. D, at 57-59.

n151 See Power, *supra* note 8.

n152 See TBA REPORT, *supra* note 6, app. D, at 57-59.

n153 *Lovin v. VME Americas, Inc.*, No. 93-CV-157 (E.D. Tenn. filed April 29, 1993).

n154 Charge at 11-13, *Lovin* (No. 93-CV-157) (Dennis H. Inman, Mag. J.).

n155 See *supra* notes 13-16 and accompanying text.

n156 See KALVEN & ZEISEL, *supra* note 28.

n157 See, e.g., KASIN & WRIGHTSMAN, *supra* note 3; Lieberman & Sales, *supra* note 6, at 628, 630-31.

n158 See Dann, *Learning Lessons*, *supra* note 1, at 1256-59.

n159 *Id.* at 1259.

n160 See Lieberman & Sales, *supra* note 6, at 597.

n161 *Id.* at 628.

n162 See *supra* notes 100-102 and accompanying text.

n163 See Michael Reddy, *The Conduit Metaphor--A Case of Frame Conflict in Our Language About Language*, in METAPHOR AND THOUGHT 164-201 (Andrew Ortony ed., 2d ed. 1993).

n164 *See* Penman, *supra* note 124, at 10.

n165 *Id.* at 11.

n166 *Id.* at 11 (citation omitted).

n167 *See* Charrow & Charrow, *supra* note 6; Steele & Thornburg, *supra* note 5; *see also* JUDITH N. LEVI, A.B.A. TEACHING RESOURCE BULLETIN # 4, LANGUAGE AND LAW: A BIBLIOGRAPHIC GUIDE TO SOCIAL SCIENCE RESEARCH IN THE U.S.A 2-3 (1994).

n168 8 TENNESSEE PATTERN JURY INSTRUCTIONS: CIVIL § 3.50 (1997).

n169 *See* TBA REPORT, *supra* note 6, at 4.

n170 *Id.* at 3 n.9.