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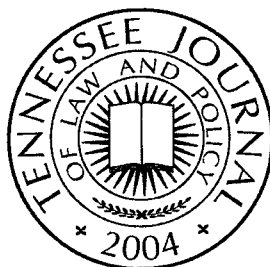
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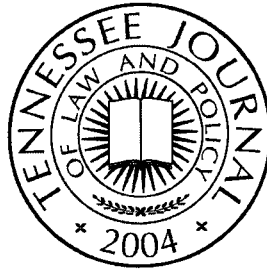
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*Peter Tiersma*

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*John W. Clark III*

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ESSAY

**ASKING JURORS TO DO THE IMPOSSIBLE**

*Peter Tiersma\**

**I. Introduction**

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

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

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

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

<sup>2</sup> *Id.*

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

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

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

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

## **II. Travel Back in Time**

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

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

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

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

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

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

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

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

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

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

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

<sup>7</sup> PETER TIERSMA, *LEGAL LANGUAGE*, 194-95 (1999).

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

### **III. Divine the Future**

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

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

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

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<sup>8</sup> Ill. Pattern Instructions, No. 1.06.

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

<sup>10</sup> See, e.g., Tenn. Pattern Jury Instructions, Civ., No. 14.54.

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

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

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

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

#### IV. Ignore the Obvious

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

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

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

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

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

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

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

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



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

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

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

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

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

<sup>15</sup> Calcrim, *supra* note 5, at No. 204.

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

<sup>17</sup> Calcrim, *supra* note 5, at No. 200.

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

## V. Forget You Ever Heard This

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

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

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

<sup>19</sup> Calcrim, *supra* note 5, at No. 104.

<sup>20</sup> *Id.* at 303, 345 (corpus delicti).

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

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

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

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

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

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

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

<sup>23</sup> Diamond & Vidmar, *supra* note 11, at 1864.

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

<sup>25</sup> See bench notes to Calcrim, *supra* note 5, at No. 305.

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

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

## **VI. Do Not Discuss This Case With Anyone**

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

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

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

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<sup>26</sup> Calcrim, *supra* note 5, at No. 101.

<sup>27</sup> *Id.*

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

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

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

<sup>29</sup> A.B.A., *supra* note 3, at 13(F).

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

potentially negative consequences, the researchers rendered a generally positive verdict.<sup>31</sup>

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

## VII. Base Your Decision Solely on the Evidence

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

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

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

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

<sup>33</sup> Calcrim, *supra* note 5, at No. 101; Prosecuting Attorneys Association of Michigan, Jury Instructions, [http://www.paamtraffic.safety.com/www/jury-instructions\\_2.htm](http://www.paamtraffic.safety.com/www/jury-instructions_2.htm) (last visited Mar. 29 2009).

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

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

### **VIII. Forget Everything You Ever Learned**

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

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

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

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

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

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

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<sup>35</sup> Ohio Jury Instructions, No. 405.01 (2006).

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

<sup>37</sup> *Id.* at 859.

<sup>38</sup> *Id.* at 861.



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

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

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

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<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 866.

<sup>43</sup> *Id.*

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

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

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

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

<sup>45</sup> *Id.* at 256.

<sup>46</sup> *Id.*

<sup>47</sup> See Calcrim, *supra* note 5, at No. 121.

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

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

## IX. Be a Lie Detector

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

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

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<sup>48</sup> See *id.*

<sup>49</sup> See Calcrim, *supra* note 5, at No. 105.

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

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

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

## **X. Follow My Instructions**

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

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

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<sup>52</sup> Calcrim, *supra* note 5, at No. 200.

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

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

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

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

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

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

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

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

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

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

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

## XI. Read My Mind

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

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

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

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

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

<sup>59</sup> See Calcrim, *supra* note 5, at No. 100.

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

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

Or they need to read the judge's mind.

## **XII. You Be the Judge**

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

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<sup>60</sup> *Id.* at No. 315.

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

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



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

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

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

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

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<sup>63</sup> Calcrim, *supra* note 5, at No. 860.

<sup>64</sup> *Id.* at No. 2670.

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

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

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

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

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

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

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<sup>67</sup> Calcrim, *supra* note 5, at No. 333.

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

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

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

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

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<sup>70</sup> 446 U.S. 420 (1980).

<sup>71</sup> *Id.*

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

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

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

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

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

### **XIII. You Be the Expert**

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

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<sup>74</sup> Solan, *supra* note 75, at 1311.

<sup>75</sup> See generally *id.*

### A. Lexicography

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

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

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

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

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

<sup>77</sup> Tiersma, *Dictionaries and Death*, *supra*, note 78, at 15-17.

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

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

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

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

<sup>79</sup> Proverbs 6:3 (New American Standard Version).

<sup>80</sup> Search conducted by author on Jan. 15, 2009.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

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

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

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

*captious* (in the reasonable doubt instruction<sup>85</sup>)  
(306,000/1)

*extenuate* (in death penalty instructions<sup>86</sup>)  
(220,000/4)

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

*preponderate* (used for civil burden of proof<sup>87</sup>)  
(294,000/0)

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

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

*petty* (31,200,000/240)

*reduce* (205,000,000/1720)

*entice* (5,500,000/23)

*likely* (278,000,000/1918)

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

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

<sup>86</sup> *Cal. Jury Instructions, Criminal, No. 8.85*.

<sup>87</sup> *Id.*, No. 2.50.2.

frequency guide reports 543 occurrences.<sup>88</sup>

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

## **B. Etymology (and Historical Lexicography)**

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

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

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<sup>88</sup> Search, *supra* note 82.

<sup>89</sup> Calcrim, *supra* note 5, at No. 1550.

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

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



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

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

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

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<sup>92</sup> Cal. Jury Instructions, Criminal, 15.01.

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

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

### C. Economics

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

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

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

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<sup>93</sup> Calcrim, *supra* note 5, at No. 2842-45.

<sup>94</sup> *Id.* at 2843.

Tennessee instruction, judges typically explain the concept in relatively abstract terms.<sup>95</sup>

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

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

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

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

#### **D. Other areas of expertise**

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

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<sup>95</sup> Tenn. Pattern Instructions, Civil, No. 14.54 (8th ed. 2008).

<sup>96</sup> *Id.*

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

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

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

#### **XIV. Helping Jurors Do the Impossible**

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

##### **A. Find Someone Else to Do It**

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

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<sup>98</sup> Vidmar & Hans, *supra* note 22, at 182.

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

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

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

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

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<sup>99</sup> *Id.* at 37.

<sup>100</sup> *Id.* at 68-69.

<sup>101</sup> *Id.* at 153-57.

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

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

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

## B. Find an Alternative Solution

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

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

<sup>103</sup> *Id.* at 188.

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

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

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

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

### **C. Explain Clearly What the Jurors are Expected to Do**

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

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

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

### **1. Speak plainly**

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

### **2. Speak concretely**

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

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

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



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

### 3. Be positive

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

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

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

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<sup>108</sup> Tiersma, *supra* note 7, at 66.

<sup>109</sup> *Id.* at 194-96.

<sup>110</sup> *Id.*

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

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

#### **4. Tell the jurors what to do**

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

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

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

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

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

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

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

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

### **5. Explain why you are asking jurors to do something**

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

## **6. Use illustrations and examples**

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

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

## **7. Answer the jury's questions**

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

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

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<sup>113</sup> See Ninth Circuit Criminal Jury Instructions, 1.05, comment.

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

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

Any questions?

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<sup>114</sup> ROBERT S. RAIT, *LIFE IN THE MEDIEVAL UNIVERSITY* 44-45 (1918).



ESSAY

**JURY REFORM: THE IMPOSSIBLE DREAM?**

*Nancy S. Marder*<sup>\*</sup>

**I. Introduction**

In his essay, *Asking Jurors To Do the Impossible*,<sup>1</sup> Peter Tiersma identifies several ways in which jurors have difficult, if not impossible, roles to play and suggests several steps that courts could take to aid jurors in performing these roles. He offers a number of recommendations, such as having judges instruct jurors in plain and specific language, allowing jurors to ask questions about the instructions, and explaining to jurors the reasons for certain rules.<sup>2</sup> His recommendations are sensible, and courts would do well to follow his advice. With the exception of his call for the creation of expert juries in technical cases,<sup>3</sup> I agree with his recommendations, though I think there are good reasons to go even further than Tiersma does with several of the reforms he proposes.

Although Tiersma's recommendations provide a useful starting-point for courts, courts should engage in those jury reforms that foster any of the following three basic principles: (1) courts should be honest with jurors; (2) courts should give jurors the tools that they need to be

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<sup>1</sup> Peter Tiersma, *Asking Jurors To Do the Impossible*, 5 TENN. J.L. & POL'Y 105 (2009).

<sup>2</sup> *Id.* at 142-45, 146.

<sup>3</sup> *Id.* at 139-40.

engaged in the trial and deliberations; and (3) courts should seek jurors that are broadly drawn from the community. Jurors from all walks of life will bring an array of perspectives and approaches to jury deliberations. In addition, only if the process of selecting jurors appears fair and above-board will the parties and members of the community accept the jury's verdict even when they disagree with it. If courts follow these three basic principles, then jurors would be better able to perform their job even though it is difficult, and at times, seemingly impossible. To the extent that Tiersma's recommendations are consistent with these principles, they should be followed. However, to the extent that his recommendations fall short of having courts carry out these basic principles, his recommendations need to go further. Only one of his recommendations—his call for the creation of expert juries—should be rejected. Although jurors would be better off with most of Tiersma's reforms than without them, it would be a shame for courts to miss an opportunity to undertake the kind of reforms that would truly aid jurors in the performance of their difficult role.

I begin by looking at Tiersma's jury reforms that are consistent with the above principles, but that should go even further. Reforms that are consistent with these principles will lead jurors to perform their job more effectively and will lead members of the community to feel more satisfied with juries and the verdicts they reach. Then, I consider the one jury reform—the creation of expert juries—that Tiersma suggests, but that should be rejected because it would limit who could serve as jurors and would undermine the effort to seek jurors drawn broadly from the community.



## II. Courts Should Be Honest with Jurors

Tiersma identifies several moments when courts do not level with jurors. These include when courts fail to instruct jurors on the jury's power to nullify,<sup>4</sup> when courts fail to inform jurors whether a case is a "three-strikes" case,<sup>5</sup> and when courts fail to acknowledge to jurors that they are being asked to perform a task that is particularly difficult, if not impossible.<sup>6</sup> In several of these instances, Tiersma recommends that courts should be honest with jurors. I agree with this approach. In one instance, however, when judges instruct jurors that they must follow the law and do not tell them that they have the power to nullify, Tiersma is undecided about the steps courts should take.<sup>7</sup> In this situation, I think courts should be honest with jurors and instruct them on the jury's power to nullify.<sup>8</sup> In three-strikes cases, Tiersma suggests juries may have a role to play.<sup>9</sup> I agree, and would go further and urge courts to be honest with jurors about three-strikes cases.<sup>10</sup>

### A. Instructing Juries on Nullification

One instance when courts are not honest with jurors is when they instruct jurors that they must follow the law, but do not instruct jurors on the jury's power to nullify.

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<sup>4</sup> *Id.* at 122, 130.

<sup>5</sup> *Id.* at 112.

<sup>6</sup> *See id.* at 108-22.

<sup>7</sup> *Id.* at 130.

<sup>8</sup> For a detailed discussion of nullification and why courts should instruct juries on their power to nullify, see Nancy S. Marder, *The Myth of the Nullifying Jury*, 93 NW. U.L. REV. 877 (1999).

<sup>9</sup> *See* Tiersma, *supra* note 1, at 112.

<sup>10</sup> *See* Nancy S. Marder, *Juries, Drug Laws & Sentencing*, 6 J. GENDER RACE & JUST. 337, 341-52, 372 (2002) (describing juries' responses to three-strikes cases in California and suggesting that courts need to inform jurors about three-strikes cases rather than leaving jurors to learn by happenstance).

Tiersma is ambivalent about nullification and does not take a stand on whether juries should be instructed on this power.<sup>11</sup> My recommendation is that courts should not tell jurors that they must follow the law, when in fact they have the power in their capacity as a jury not to follow the law.<sup>12</sup> Rather, courts should tell jurors that they have the power to nullify. Of course, courts can draft the instruction carefully so that jurors know that this power must be exercised only in rare circumstances.<sup>13</sup> This information needs to come from the court; otherwise, some jurors will have heard of nullification, but others will not and those who are unfamiliar with the concept will feel at a disadvantage and will be uncertain whether or not this power really belongs to the jury.<sup>14</sup>

Chief Judge Bazelon, writing in dissent in *United States v. Dougherty*,<sup>15</sup> urged courts to instruct jurors on their power to nullify. In his view, courts had to trust jurors: "Trust in the jury is, after all, one of the

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<sup>11</sup> See Tiersma, *supra* note 1, at 130.

<sup>12</sup> See Marder, *supra* note 8, at 957 ("[N]ot only are jurors not told of that power [of nullification], but they are told the exact opposite: They only have the power the judge has described.").

<sup>13</sup> *Id.* ("Admittedly, courts must proceed carefully so as not to foment nullification. Nullification should be reserved for compelling cases."). One model for an instruction on nullification could borrow from the language of John Adams, who would instruct juries, in part, as follows: "It is not only [a juror's] right, but his [or her] duty . . . to find the verdict according to his [or her] own best understanding, judgment and conscience . . ." Mark DeWolfe Howe, *Juries as Judges of Criminal Law*, 52 HARV. L. REV. 582, 605 (1939) (quoting 2 LIFE AND WORKS OF JOHN ADAMS 253-55 (C.F. Adams ed., 1856)).

<sup>14</sup> For an example of a case in which some members of the Fully Informed Jury Association ("FIJA") informed several jurors of the jury's power to nullify, resulting in a deadlocked jury, a mistrial, and a subsequent indictment for jury tampering and criminal trespass, see *Turney v. Alaska*, 936 P.2d 533 (Alaska 1997).

<sup>15</sup> 473 F.2d 1113 (D.C. Cir. 1972) (describing the case of the "D.C. Nine," who broke into the Dow Chemical Company offices and vandalized them in protest of Dow's manufacture of napalm).

cornerstones of our entire criminal jurisprudence, and if that trust is without foundation we must re-examine a great deal more than just the nullification doctrine.”<sup>16</sup> After all, jurors are entrusted with life or death decisions. If jurors are informed of the jury’s power to nullify, they would not only have knowledge but also guidance about when to use it.<sup>17</sup> His dissent did not persuade his fellow judges on his panel, who suggested that if jurors were told of this power they would use it excessively.<sup>18</sup> The majority, in an opinion written by Judge Leventhal, reasoned that it was better to let jurors discover this power on their own in the few cases that seemed to call out for nullification.<sup>19</sup>

One difficulty if the court does not instruct jurors that they have the power to nullify is that when jurors find out afterward, they will feel deceived by the court. The court should not be in the business of deceiving jurors. Jurors try to perform their job responsibly and ably. They also try to follow the court’s instructions. When they are told one thing and not told another, only to find out the truth later on, then they will feel that they have been misled by the court. It is important that jurors not feel this way and that they return to their community feeling satisfied with how they have been treated by the court and how they have carried out their tasks as jurors. If the jury functions

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<sup>16</sup> *Id.* at 1142.

<sup>17</sup> *Id.* at 1143 (“The instruction would speak in terms of acquittal, not conviction, and it would provide no comfort to a juror determined to convict a defendant in defiance of the law or the facts of the case.”).

<sup>18</sup> *Id.* at 1134 (“[T]he advocates of jury ‘nullification’ apparently assume that the articulation of the jury’s power will not extend its use or extent, or will not do so significantly or obnoxiously. Can this assumption fairly be made?”).

<sup>19</sup> *Id.* at 1136-37 (“[I]t is pragmatically useful to structure instructions in such ways that the jury must feel strongly about the values involved in the case, so strongly that it must itself identify the case as establishing a call of high conscience, and must independently initiate and undertake an act in contravention of the established instructions.”).

as a “free school,”<sup>20</sup> as Alexis de Tocqueville presciently observed, then it is important that jurors learn positive lessons from this experience.

One former judge, B. Michael Dann, who served as a superior court judge in Maricopa County, Arizona and who was a catalyst for jury reform in Arizona both in his own courtroom and in his role as head of the Arizona Supreme Court Committee on More Effective Use of Juries,<sup>21</sup> has written about the need to inform jurors of the jury’s power to nullify.<sup>22</sup> Courts routinely instruct jurors that they “must” convict if they find that all of the elements of a crime have been proven beyond a reasonable doubt.<sup>23</sup> Judge Dann argues that this mandatory instruction “invade[s] the province of the jury and violate[s] the constitutional guarantee of an ‘impartial jury.’”<sup>24</sup> Instead, he offers an instruction that judges could use that would inform jurors about the jury’s power to nullify while teaching jurors that this power should be exercised sparingly.<sup>25</sup> The language is straightforward and explains to jurors that the jury can act consistent with its conscience

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<sup>20</sup> 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 252 (Jacob Peter Mayer & Max Lerner eds., 1966) (13<sup>th</sup> ed. 1850).

<sup>21</sup> This committee summarized its recommendations in a report entitled *The Ariz. Supreme Court Comm. On More Effective Use of Juries, Jurors: The Power of 12* (1994), available at [www.supreme.state.az.us/jury/Jury/jury1gl.htm](http://www.supreme.state.az.us/jury/Jury/jury1gl.htm). Arizona adopted eighteen of the committee’s fifty-five recommendations. See William H. Carlile, *Arizona Jury Reforms Buck Legal Traditions*, CHRISTIAN SCI. MONITOR, Feb. 22, 1996, at 1.

<sup>22</sup> B. Michael Dann, “*Must Find the Defendant Guilty*” *Jury Instructions Violate the Sixth Amendment*, 91 JUDICATURE 12 (2007).

<sup>23</sup> *Id.* at 14 (“[A] substantial number of state and federal trial judges use the strongest term ‘must,’ or its equivalent, when instructing the jury on its duty to convict if all the jurors agree that the law’s definition of the crime has been met by proof beyond a reasonable doubt.”) (citation omitted).

<sup>24</sup> *Id.* at 12.

<sup>25</sup> See *id.* at 18-19 (providing instruction).

and can acquit a defendant whose guilt has been proven beyond a reasonable doubt, but that this power must be exercised with great care and only out of good motives.<sup>26</sup> He urges judges to adopt his version, or to construct their own, as long as the instruction tells jurors that the jury can return a verdict of not guilty, even if the defendant's guilt has been proven beyond a reasonable doubt, but that this should only be done in the exceptional case. Judge Dann, though now retired from the bench, is still in the forefront of jury reform; as of now, no federal circuit supports an instruction on jury nullification, nor do any state courts.<sup>27</sup>

### **B. Informing Juries about "Three-Strikes" Cases**

Although Judge Dann recommends instructing jurors on nullification, no judge has taken a public stance in favor of instructing jurors on three-strikes cases. Courts in California, where three-strikes cases are prevalent,<sup>28</sup> do not

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<sup>26</sup> *Id.* at 19 ("You should exercise your judgment and examine your conscience without passion or prejudice, but with honesty and understanding. You should exercise with great caution your power to find a defendant not guilty whose guilt has been proven beyond a reasonable doubt.").

<sup>27</sup> See Nancy S. Marder, *The Interplay of Race and False Claims of Jury Nullification*, 32 U. MICH. J.L. REFORM 285, 310 n.116 (1999) (providing a list of federal circuits that do not permit an instruction on nullification and noting that the two states, Indiana and Maryland, which permit judges to instruct jurors that they have the right to determine the law as well as the facts, have since limited this opportunity through case law).

<sup>28</sup> California is not the only state with a three-strikes law. See David Schultz, *No Joy in Mudville Tonight: The Impact of "Three Strike" Laws on State and Federal Corrections Policy, Resources, and Crime Control*, 9 CORNELL J.L. & PUB. POL'Y 557, 572 (2000) (noting that twenty-two states and the federal government have a three-strikes law). However, California, unlike other states, invokes its law frequently. See *id.* at 573 ("In the vast majority of the twenty-two states and the federal government that have adopted three-strikes, the law's effect on

tell a jury whether or not the case before it is a three-strikes case.<sup>29</sup> Instead, the task has fallen to lawyers to provide hints to the jury that the case before it is a three-strikes case<sup>30</sup> or the task has fallen to jurors to surmise that the case is a three-strikes case.<sup>31</sup> The task has also fallen to prosecutors to be circumspect about which cases they choose to bring as three-strikes cases, particularly in Northern California where juries are less likely to convict if they sense that a case is a three-strikes case and the “third strike” is not for a serious crime.<sup>32</sup> The problem is that juries should not have to “guess” whether a case is a three-strikes case because if they guess wrong they are likely to feel bad about their

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crime is arguably minimal since it is rarely used. The one exception is California where 4,468 offenders have been sentenced under the third strike provision and over 36,043 for a second strike offense.”).

<sup>29</sup> The three-strikes law in California requires that any person who is convicted of a serious felony and has two prior felony convictions defined as “violent” or “serious” is to receive a sentence of twenty-five years to life imprisonment. See CAL. PENAL CODE § 667 (West 1999).

<sup>30</sup> Some of the more creative efforts by defense attorneys include the defense attorney who carried a folder marked “three strikes” across the top, another who used baseball analogies throughout the trial, and yet another who asked the jury: “In 25 years from now will you have an abiding conviction that justice was served?” Harriet Chiang, *Some Jurors Revolt Over 3 Strikes/Penalty Prospects Sway Their Verdicts*, S.F. CHRON., Sept. 24, 1996, at A1.

<sup>31</sup> For example, in the case of a man convicted of robbing a security guard and trying to steal his car, a juror “became agitated and started to cry when she realized it was a ‘three-strikes’ case.” Tony Perry & Maura Dolan, *Two Counties at Opposite Poles of ‘3 Strikes’ Debate Crime: San Francisco is Restrictive in Applying Law, San Diego Takes Hard Line, Approaches Reflect Will of Electorate*, L.A. TIMES, June 24, 1996, at A1. As one judge remarked, sometimes juries just “smell” that a case is a three-strikes case. *Id.* (quoting Judge Alex Saldamando).

<sup>32</sup> See *id.* (“San Francisco Dist. Atty. Arlo Smith, aware that liberal San Francisco juries would not convict, frequently declined to prosecute nonviolent crimes as ‘three-strikes’ cases. His more liberal successor, Terence Hallinan . . . has been even more restrictive.”).

verdict afterward.<sup>33</sup> Although courts do not usually tell jurors anything about sentencing because sentencing is undertaken by the judge (and to some extent by the prosecutor in a sentencing guidelines case because the prosecutor can decide how to charge the case), the sentence can be so draconian in a three-strikes case that it becomes an instance when the commonsense judgment of a jury is sorely needed. However, if the court does not tell the jury that it is hearing a three-strikes case, then the jury cannot give its commonsense judgment about whether this is an appropriate case for a mandatory prison term of twenty-five years to life. As Tiersma points out, with violent crimes, the jury is likely to convict even if it is a three-strikes case.<sup>34</sup> However, with minor offenses,<sup>35</sup> such as the theft of “a slice of pizza,”<sup>36</sup> the jury can introduce commonsense into the process and not have the defendant be imprisoned for the rest of his life. With three-strikes cases, the court should not leave the jury to guess, but should inform the jury so that it can provide its “commonsense judgment.”<sup>37</sup> Courts have an opportunity to provide juries with

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<sup>33</sup> For example, one juror who had served on a jury that had convicted a woman for taking a five-dollar cut in a cocaine deal “felt deceived by the court” after learning that the defendant would go to prison for life under the three-strikes law. Rene Lynch & Anna Cekola, *‘3 Strikes’ Law Causes Juror Unease in O.C.*, L.A. TIMES, Feb. 20, 1995, available at 1995 WL 2017381.

<sup>34</sup> See Tiersma, *supra* note 1, at 112.

<sup>35</sup> See *id.*

<sup>36</sup> See Frank J. Murray, *Is a Pizza Worth 25 Years to Life?*, WASH. TIMES, Apr. 29, 1995, at A6 (“Opponents of California’s ‘three strikes and you’re out’ law . . . said it was excessive and absurd to invoke it against Jerry Dwayne Williams for taking a slice of pepperoni pizza from a group of children.”); Eric Slater, *Pizza Thief Gets 25 Years to Life*, L.A. TIMES, Mar. 3, 1995, at B3 (“Jerry Dwayne Williams was sentenced to prison for 25 years to life Thursday under the state’s ‘three strikes’ law for stealing a slice of pepperoni pizza.”).

<sup>37</sup> Taylor v. Louisiana, 419 U.S. 522, 530 (1975) (describing the jury as a safeguard against the exercise of arbitrary power by making “available the commonsense judgment of the community”).

information that would allow them to fulfill this function more effectively. The court's silence is a lost opportunity.

Jurors should be told when a case is a three-strikes case so that they know that if there is a conviction there will be a mandatory, lengthy prison sentence. Courts should be honest with juries about this and should not leave juries with the burden of having to guess and later on having regrets about their verdict. Jurors have to live with these regrets for the rest of their lives. Rendering judgment is difficult enough—for judge or jury.<sup>38</sup> Courts should not make judging more difficult than it already is for jurors.

### C. Acknowledging the Impossibility of Some Jury Tasks

Tiersma urges courts to be honest with jurors and to explain when the task they are being asked to perform is difficult, if not impossible. He suggests that jurors would be helped if the court acknowledged the impossibility of the task and simply asked jurors to do the best they can. Tiersma identifies several ways in which courts ask jurors to do the impossible. For example, judges tell jurors to determine the truth of what happened, even when jurors are not given all of the information they would like to have.<sup>39</sup> Similarly, when jurors are asked to award damages and to predict how an injury will affect a person's future job prospects, earning power, and life span, Tiersma suggests that courts should tell jurors that no one can predict the future, but that they should just do this job as best they can.<sup>40</sup> Additionally, when jurors are told in a criminal case

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<sup>38</sup> Robert Cover described the task of judging as "deal[ing in] pain and death." Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1609 (1986). Although Cover focused on judges, his description also applies to juries.

<sup>39</sup> See Tiersma, *supra* note 1, at 116-17, 130-38.

<sup>40</sup> See *id.* at 108-09.



about the presumption of innocence, Tiersma suggests that judges should provide further explanation because this concept is difficult for laypersons to understand. After all, have not the police and prosecutor done their jobs and arrested and charged the right person? Tiersma proposes that judges explain to jurors that this is a bedrock principle and a necessary one because prosecutors, police, and other law enforcement can and do make mistakes.<sup>41</sup> If judges follow these suggestions and are honest with jurors, then jurors are more likely to try to do what they have been instructed to do and will not be as overwhelmed by their task as they may now feel.

### **III. Courts Should Give Jurors the Tools To Be Engaged Jurors**

Tiersma identifies a number of reforms that courts could undertake that would assist jurors to perform their difficult roles. His recommendations are helpful insofar as they encourage jurors to be engaged, but if they went just a step further, they would enable jurors to have tools that would lead them to be engaged participants during the trial and the deliberations.

#### **A. Giving Jurors Written Copies of Instructions and Permitting Jurors To Ask Questions about the Instructions**

Tiersma points out that judges instruct jurors by reading their instructions aloud to jurors from a written text and that jurors would benefit from having a copy of the written text.<sup>42</sup> I quite agree, but would add that jurors should have *individual* copies of the written instructions that they can follow while the judge reads the instructions

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<sup>41</sup> See *id.* at 111.

<sup>42</sup> See *id.* at 122-24.

aloud.<sup>43</sup> Jurors should be able to make notes on their individual written copies of the instructions and should then be able to take their copies with them when they enter the jury room to deliberate. Each juror would then have his or her own annotated copy of the written instructions to consult during jury deliberations. One judge who gives jurors their own written copy of the instructions reported that deliberating juries no longer send notes to her with legal questions.<sup>44</sup> She described this practice, which she has adhered to for over a decade, as “wildly successful” and as “an inexpensive, effective way to virtually guarantee juror understanding of the law.”<sup>45</sup>

In some courtrooms, jurors listen to the judge’s instructions, but do not receive a written copy of the instructions.<sup>46</sup> It is difficult, if not impossible, to remember several hours of instructions, given in abstruse legal language, without being able to see the words or refer back to them later. These jurors face an uphill battle in their effort to understand the instructions. Without a written text, they might ignore the instructions altogether either because they do not remember them or because they did not understand them and have no way to clarify what they did not understand. If, during their deliberations, they send a note to the judge seeking further clarification, they are

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<sup>43</sup> See Nancy S. Marder, *Bringing Jury Instructions into the Twenty-First Century*, 81 NOTRE DAME L. REV. 449, 499-500 (2006) (describing how individual written copies of the jury instructions aid jurors’ comprehension of the instructions).

<sup>44</sup> Jacqueline Connor, *Jurors Need To Have Their Own Copies of Instructions*, L.A. DAILY J., Feb. 25, 2004, at 7.

<sup>45</sup> *Id.*

<sup>46</sup> For example, in New York, courts do not provide the jury with even a single, written copy of the jury instructions. See Terry Carter, *The Verdict on Juries*, A.B.A. J., Apr. 2005, at 41, 42 (reporting on New York’s pilot studies, including giving jurors copies of the written instructions, and noting that these practices have been tried on an experimental basis but have not yet been adopted as accepted practices).

likely to find that the judge will simply reread relevant portions of the instructions to them without actually answering their question,<sup>47</sup> or the judge could simply ignore their requests.<sup>48</sup>

In other courtrooms, such as those in Illinois, the entire jury is given one written copy of the instructions to share among all of the jurors during deliberations.<sup>49</sup> Although the Illinois jurors with their one copy are slightly better off than the jurors without any written copy at all, the Illinois jurors are limited because only one juror can see the written instructions at a time during the deliberations. Thus, whoever holds the instructions becomes more of an expert than the other jurors. The Illinois jurors, like the jurors who do not receive a written copy, were also at a disadvantage when the instructions were read aloud by the judge because they did not have a written text that they could follow as they listened to the instructions. People absorb information in different ways.<sup>50</sup> Some people learn

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<sup>47</sup> See, e.g., Connor, *supra* note 44, at 7 (“When jurors would send out questions asking about the meaning of a concept or term, the custom was always to reread the instruction, as if the jurors would understand a second recital with the renewed dulcet tones of the judicial officer.”); Mike Kataoka, *Eschewing Obfuscation: The Judicial Council Strives for Plain English with Its New Jury Instructions*, CAL. LAW., Dec. 2000, at 52, 53 (“[Judges] sit up there and read the instructions and watch people really trying hard to understand. And often the judges respond to questions simply by reading the same instructions louder.”) (quoting Justice Carol A. Corrigan, Chairwoman of the Judicial Council Task Force on Jury Instructions and Chairwoman of the Criminal Subcommittee in California)).

<sup>48</sup> See, e.g., SCOTT E. SUNDBY, A LIFE AND DEATH DECISION: A JURY WEIGHS THE DEATH PENALTY 167 (2005) (“Adding insult to injury from the jurors’ perspective, judges sometimes would appear to turn a cold shoulder when the jury asked them to clarify instructions or define terms such as ‘mitigating.’”).

<sup>49</sup> See ILL. SUP. CT. COMM. ON PATTERN JURY INSTRUCTIONS IN CIVIL CASES, ILLINOIS PATTERN JURY INSTRUCTIONS—CIVIL 7 (2005 ed.).

<sup>50</sup> See, e.g., Mark Hansen, *Learn How They Learn: Knowing Modes of Adult Education Helps Lawyers Create Successful Presentations*,

by listening, while others learn by reading. Some prefer to take notes, while others do not. If instructions are delivered in two different ways (lecture and written text) rather than just one (lecture), and if note taking is permitted,<sup>51</sup> the court is more likely to reach a greater number of jurors and to have them understand and remember the instructions.<sup>52</sup>

Tiersma also suggests that jurors should be permitted to ask the judge questions about the instructions.<sup>53</sup> I wholeheartedly agree, and have made this suggestion before.<sup>54</sup> As Tiersma notes, most teachers take it for granted that questions are an important part of the learning process. This is true in the classroom, and is likely to be true in the courtroom too. Most judges would probably shy away from this proposal because they worry that they might say something that would be the basis for reversal on appeal.<sup>55</sup> One empirical study's findings

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A.B.A. J., Aug. 2003, at 26, 26 ("People learn in different ways. . . . A good teacher will try to incorporate as many different learning preferences into his or her instruction as possible.").

<sup>51</sup> The trend is toward allowing jurors to take notes, *see* JURY TRIAL INNOVATIONS 141-43 (G. Thomas Munsterman et al. eds., 1997), but not all courts have adopted this practice. *See* G. Thomas Munsterman & Paula L. Hannaford-Agor, *Building on Bedrock: The Continued Evolution of Jury Reform*, JUDGES' J., Fall 2004, at 10, 15 ("Only a small handful of states continue to restrict juror note taking.").

<sup>52</sup> *See, e.g.*, JURY TRIAL INNOVATIONS, *supra* note 51, at 19 ("[M]aterial is better remembered when it is presented in several different forms than in a single form. Having the jurors both listen to and read the instructions should capitalize on this effect.").

<sup>53</sup> *See* Tiersma, *supra* note 1, at 146-47.

<sup>54</sup> Marder, *supra* note 43, at 501 ("After the judge reads the instructions to the jury, but before he or she sends the jury off to deliberate, the judge should allow jurors to ask questions about the instructions.").

<sup>55</sup> *See, e.g.*, James D. Wascher, *The Long March Toward Plain English Jury Instructions*, CBA REC., Feb.-Mar. 2005, at 50, 54 (describing the response of Cook County Circuit Court Judge Stuart A. Nudelman, a past president of the Illinois Judges Association, to a jury's question on the instructions: "[H]e declined to answer the jury's question both

suggest that jurors' comprehension of the instructions would improve if they were given the opportunity to ask any questions they have about the instructions.<sup>56</sup>

Judge Dann is likely to agree with this recommendation because he is a believer in judge-jury "dialogue."<sup>57</sup> Because of Judge Dann's jury reform efforts, Arizona state court judges now instruct juries that have reached an impasse that they can turn to the judge for further assistance.<sup>58</sup> Rather than delivering the typical "Allen charge,"<sup>59</sup> in which jurors are pressured to go back to the jury room and to try to reach a verdict, Arizona judges can meet with the jury and see what the basis of the impasse is and whether further argument by the lawyers or dialogue with the judge would help the jury to overcome its impasse.<sup>60</sup> The judge is permitted to play a more constructive role, as is the jury.

If jurors are able to ask the judge questions about the instructions, then they will not have to make up answers during their deliberations. In most courtrooms, jurors are not permitted to ask the judge any questions about the

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because he was not entirely sure how to answer and because any answer might well have been 'a guarantee of the appellate court saying that, as the trial judge, I went too far and that it's the jury's job to interpret instructions.'").

<sup>56</sup> See Alan Reifman et al., *Real Jurors' Understanding of the Law in Real Cases*, 16 LAW & HUM. BEHAV. 539, 551 (1992) ("A new finding of this study is that jurors who requested help from the judge performed substantially better than those subjects who did not. When the judge responded by providing supplemental information, either in the form of written instructions or by explaining the instructions in their own words, the jurors' understanding of the instructions reached fairly high levels (up to 67%).").

<sup>57</sup> B. Michael Dann & George Logan III, *Jury Reform: The Arizona Experience*, 79 JUDICATURE 280, 283 (1996).

<sup>58</sup> ARIZ. R. CIV. P. 39(h); ARIZ. R. CRIM. P. 22.4.

<sup>59</sup> *Allen v. United States*, 164 U.S. 492, 501 (1896) (holding that there was no error when the jury returned for further instructions and the trial court judge instructed the jurors to reexamine their views).

<sup>60</sup> See Dann & Logan, *supra* note 57, at 283.

instructions immediately after they have been instructed. If jurors have questions, then they can try to answer the questions during their deliberations. Sometimes they arrive at correct answers, other times they do not. Alternatively, once the jury is deliberating it can send a note to the judge, asking the judge the jury's question about the instructions. Typically, the judge will respond, not by answering the jury's question, but simply by gathering everyone in the courtroom and rereading the relevant portion of the instructions. The jurors become frustrated when the court's only response is to reread a portion of the instructions, which they did not understand the first time. After this happens a few times, the jury realizes that it is not going to obtain any answers from the judge so it stops turning to the judge for assistance. In one case, a college professor who served as the foreperson of a criminal jury in New York reported that his jury simply stopped turning to the judge when they discovered that the judge was unhelpful, as well as cantankerous.<sup>61</sup> One law professor who conducted interviews with jurors in several capital cases reported that jurors stopped asking the judge questions about parts of the instructions that they did not understand when the judge simply reread portions of the instructions to them.<sup>62</sup> Instead, they tried to provide their own explanations.<sup>63</sup>

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<sup>61</sup> See D. GRAHAM BURNETT, A TRIAL BY JURY 81 (2001).

<sup>62</sup> See SUNDBY, *supra* note 48, at 49-50 (describing jurors who felt intimidated by the process of having to return to the courtroom to hear the judge reread portions of the instructions anytime the jury submitted a question to the judge).

<sup>63</sup> *Id.* at 50 (“[W]e just tried to resolve any further disputes on our own.”) (quoting a juror).

## B. Permitting Jurors to Question Witnesses

Tiersma recommends that jurors be permitted to ask the judge questions about the instructions, but he does not suggest that jurors should be able to submit written questions to the witnesses. This practice is explicitly permitted in several states,<sup>64</sup> and explicitly prohibited in other states.<sup>65</sup> In most states and federal circuits, however, the decision is left to the discretion of the trial judge.<sup>66</sup> Allowing jurors to submit written questions to witnesses is a reform that would benefit jurors enormously. They would not have to remain confused or uncertain during the trial; instead, they could get answers to their questions.

In states where juror questions to witnesses are permitted, the jurors are typically given an opportunity at the close of a witness' testimony to submit a written question to the judge who then consults with the lawyers and decides whether the question should be asked of the witness. The questions are submitted anonymously and the judge, after consultation with the lawyers, decides whether

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<sup>64</sup> See Nicole L. Mott, *The Current Debate on Juror Questions: "To Ask or Not To Ask, That Is the Question,"* 78 CHI.- KENT L. REV. 1099, 1100 (2003) (noting that Arizona, Florida, and Indiana permit jurors to submit written questions to witnesses, and that Colorado intends to adopt the practice in civil and criminal cases).

<sup>65</sup> See *id.* (reporting that Mississippi prohibits juror questions to witnesses in all cases, whereas Texas, Georgia, and Minnesota bar the practice in criminal cases).

<sup>66</sup> See Eugene A. Lucci, *The Case for Allowing Jurors To Submit Written Questions*, 89 JUDICATURE 16 (2005) ("Every federal circuit that has addressed the issue of juror questioning of witnesses agrees that it is a practice that should be left entirely within the court's discretion."); Bruce R. Pfaff, John M. Stalmack & Nancy S. Marder, *Jurors in Illinois Should Have the Right To Submit Questions To Be Answered by Witnesses*, CBA REC. (forthcoming May 2009) (providing a survey of state court and federal circuit cases on juror questions to witnesses, with most cases leaving the decision to the discretion of the trial judge) (manuscript at 7-13, on file with authors).

they are appropriate questions. If they are, then the judge will ask them. If they are not, then the judge will explain to the jury that this is not a question that can be asked. Because the questions are submitted in written form at the end of a witness' testimony, they do not interrupt the flow of the trial.

This practice allows jurors to have their questions answered as they arise, and jurors appreciate this opportunity.<sup>67</sup> Otherwise, they are left confused throughout the trial and can only speculate as to answers during their deliberations. Moreover, in the states that permit this practice, judges, lawyers, and jurors have been satisfied with it. In states where juror questions have been permitted as part of a pilot program, the participants usually find that they like the practice even if they resisted it initially.<sup>68</sup> Jurors' questions tend to be few in number and

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<sup>67</sup> See Lucci, *supra* note 66, at 17 (polling jurors and finding that "jurors universally approve of and appreciate the ability to clear up confusion by asking questions, and, combined with the ability to take notes and having written jury instructions on the law, when jurors are allowed to ask questions they feel very satisfied that they reached the correct verdict").

<sup>68</sup> See, e.g., Mott, *supra* note 64, at 1104-05 (reporting on a pilot study in New Jersey state courts in which jurors and a majority of lawyers responded favorably to the practice of permitting jurors to submit written questions to witnesses, as did judges, including those who "were initially skeptical, but after experience with questions in their courtrooms, they were pleased with the results and expressed their desire to continue after the pilot period ceased"); Patrick S. Pemberton, *Out of the Mouths of Jurors: In Los Angeles They're Letting the Jurors Quiz Witnesses*, CAL. LAW., Nov. 2000, at 18 ("[T]he judges who participated in the pilot program [in L.A.] were generally pleased with the results. And so were a large majority of the participating jurors, according to a poll that was done."); Seventh Circuit American Jury Project Final Report 60-62 (Sept. 2008) (surveying participants in the Seventh Circuit's pilot program in which judges and jurors in particular reported that the practice of permitting juror questions to witnesses contributed to the fairness of the trial process and the jurors' understanding of the case).



reasonable.<sup>69</sup> Often, jurors seek clarification of a fact<sup>70</sup> or greater explanation about a practice.<sup>71</sup> One pilot program permitting juror questions to witnesses found that juror questions do not add significantly to the length of a trial.<sup>72</sup> One theory is that juror questions to witnesses might even reduce the time required for deliberations.<sup>73</sup> Another theory is that such questions might reduce the number of hung juries, though no study has tested this theory yet.

Permitting jurors to submit written questions to witnesses, just as permitting jurors to ask the judge questions about the instructions, are practices designed to give jurors the information they believe they need to decide

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<sup>69</sup> See Mott, *supra* note 64, at 1109 (“A study asking judges in Arizona to rate the reasonableness of juror questions found that judges’ ratings were extremely high.”); *id.* at 1112 (working from data collected for other purposes from initiatives in Arizona, D.C., and Pennsylvania, Mott found that “[o]f the 130 state-level cases, the average number of questions jurors submitted per case was 16”); Lucci, *supra* note 66, at 17 (“I am currently in my fifth year of allowing jurors to propose written questions, and have done so in well over 100 trials. Over that period . . . the vast majority (over 90 percent) of juror questions are good questions and many are excellent . . .”).

<sup>70</sup> See Mott, *supra* note 64 at 1117 (“Approximately one-fifth of the juror questions asked witnesses to clarify factual evidence such as exactly what events witnesses saw or more detailed facts about a person or place.”); Lucci, *supra* note 66, at 17 (observing that in his own experience with juror questions in over 100 trials, “most questions seek clarification of testimony regarding topics that have already been touched upon by the witness, including testimony not heard or which was vague or ambiguous”).

<sup>71</sup> See Mott, *supra* note 64, at 1115 (“Jurors inquired about typical practices within a profession, whether the expert believed an event was plausible, or what procedures an individual should have taken in a given situation.”).

<sup>72</sup> See *id.* at 1109 (describing a study of the pilot program in New Jersey that “found that the estimated median time added to trials allowing questions was only thirty minutes”).

<sup>73</sup> See Lucci, *supra* note 66, at 18 (“Questioning is likely to save time with improved understanding by the jurors, reduced questioning of other witnesses, and shorter jury deliberations.”).

the case. Jurors typically exercise restraint in asking questions,<sup>74</sup> but both practices would allow jurors to get answers to the questions that they have rather than remaining confused throughout the trial or after the instructions and then speculating during deliberations. Both of these reforms give jurors the opportunity to seek answers to their questions when they arise so that when they enter the jury room, they are prepared to deliberate.<sup>75</sup>

### C. Instructing Jurors on Deliberations

Courts typically do not give jurors any instructions on deliberations. Tiersma described judges as being “quite coy about how jurors should approach deliberations.”<sup>76</sup> Judges are reticent to provide instructions about deliberations because it is up to jurors to decide how to conduct their deliberations. Judges are reluctant to intrude into the province of the jury. However, some guidance would be useful, and of course, jurors can still decide how closely to follow the judge’s instructions. Tiersma notes that even the new California jury instructions do not give jurors any advice on how to proceed with their deliberations, other than some general admonitions.<sup>77</sup> Although Tiersma does not recommend that judges should provide such guidance, I think it would be useful.<sup>78</sup>

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<sup>74</sup> See Mott, *supra* note 64, at 1109, 1112 (noting the reasonableness and limited number of questions asked by jurors to witnesses); see also Connor, *supra* note 44, at 7 (noting that jurors who received individual written copies of the instructions did not send notes to the judge with legal questions during their deliberations).

<sup>75</sup> See Lucci, *supra* note 66, at 18 (“When a witness answers an individual juror’s questions, it helps to lay the proper foundation for effective deliberations by the jury as a group.”).

<sup>76</sup> Tiersma, *supra* note 1, at 125.

<sup>77</sup> See *id.*

<sup>78</sup> See Marder, *supra* note 43, at 503 (recommending that judges instruct juries on deliberations).

Instructions on deliberations can give jurors an idea of what is expected of them and how to proceed. The jurors still decide how to conduct their deliberations. When all the jurors have an overview of deliberations, then when they enter the jury room they can proceed without some jurors feeling at a loss. Instead, all of the jurors will feel prepared to participate in the deliberations.

One approach that judges can take to inform jurors about the deliberation process without interfering in how jurors actually decide to structure their deliberations is to give each juror a copy of the American Judicature Society's (AJS) pamphlet entitled *Behind Closed Doors: A Guide for Jury Deliberations*.<sup>79</sup> The AJS is a non-profit organization committed to an independent judiciary. The pamphlet gives jurors background information useful for deliberations, such as the role of the foreperson, different ways to conduct deliberations, the need to be respectful of each juror's views, and what to do when the jury has a question or cannot agree on a verdict.<sup>80</sup> Although the information is general, it is nevertheless helpful. Thus, the pamphlet can be viewed as a tool that aids jurors in performing their tasks during deliberations. Rather than being baffled or confused by what they are supposed to do in the jury room, jurors receive some general guidance from the court in the form of a pamphlet. Of course, jurors can choose to depart from the suggestions, but at least they enter the jury room with an overview of the process and some understanding of possible ways to proceed.<sup>81</sup> It is up

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<sup>79</sup> See generally AM. JUDICATURE SOC'Y, *BEHIND CLOSED DOORS: A GUIDE FOR JURY DELIBERATIONS* (1999) (providing general information about deliberations).

<sup>80</sup> See *id.* at 3-8.

<sup>81</sup> Without such guidance on deliberations, some juries struggle with how to proceed. See, e.g., Erin Emery, *The Jury That Couldn't: Scenes from a Mistrial in Teller County*, DENV. POST, July 3, 2002, at 1A (quoting a juror in a first-degree murder trial who said: "'It was really frustrating because we were not getting any help on how do you go

to the jurors to decide when they want to follow the suggestions and when they want to depart from them.

Another approach is that judges can instruct jurors on the deliberation process. Any instructions, like the AJS pamphlet, can be general so that jurors have basic background information. The instructions also can present jurors with an array of approaches as to how to organize their deliberations, and they can choose which one makes sense to them. Judge Kane, a Federal District Court Judge, decided to draft instructions that would inform jurors about deliberations after he read Graham Burnett's account of his jury duty in *A Trial By Jury*, in which Burnett expressed his frustration with the court for failing to provide any guidance as to deliberations.<sup>82</sup> Judge Kane then published his instructions in *The Judges' Journal*,<sup>83</sup> a journal whose audience consists largely of fellow judges. His instructions, like the AJS pamphlet, are informative without being intrusive. Other judges can adopt them or use them as a model for developing their own instructions. Indeed, he tells jurors: "I am not directing you how to proceed, but I offer the following suggestions that other juries have found helpful so that you can proceed in an orderly fashion . . . ."<sup>84</sup> Another advantage of Judge Kane's instruction is that he includes guidance on the dynamics of deliberation, including suggestions that jurors participate fully, listen to each other carefully, avoid interrupting each other, deliberate before taking a vote, express respect for each other, and proceed with patience.<sup>85</sup> Some states, such as Michigan, are beginning to provide such instructions,

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about this, how do you approach the situation. You're supposed to decide the outcome of a man's life—blind—and that's not acceptable.'").

<sup>82</sup> BURNETT, *supra* note 61, at 79-85.

<sup>83</sup> John L. Kane, *Giving Trials a Second Look*, JUDGES' J., Fall 2004, at 28, 30-31 (providing instruction).

<sup>84</sup> *Id.* at 30.

<sup>85</sup> *Id.* at 30-31.

though Michigan's instruction does not provide as much guidance as Judge Kane's instruction.<sup>86</sup> Judges can work from either Judge Kane's instruction or Michigan's instruction so that they do not have to reinvent the wheel.

The key point is that judges can provide jurors with information on deliberations so that they are fully informed and understand their tasks. The instruction or pamphlet serves as a tool that enables jurors to be active participants in their deliberations. The traditional reason for not giving such an instruction—wariness about intruding into the province of the jury—though respectful of the jury's independence, often leaves jurors mystified or confused. There is a middle ground, whereby judges can provide background information and set forth possible ways the jury might proceed, but the court also can instruct jurors that they decide how to organize their deliberations.

#### **D. Instructing Jurors on the Unreliability of Eyewitness Testimony**

Another area in which judges are reluctant to intrude is how jurors should assess the credibility of eyewitness testimony. Typically, courts do not offer any instructions on eyewitness reliability or allow expert witnesses to testify on the unreliability of eyewitness testimony because assessing the credibility of eyewitness testimony is supposed to be solely within the province of the jury. Judges also tend to believe that this assessment is based on commonsense. Thus, there is no need for expert testimony. The difficulty is that there have been myriad empirical studies showing that eyewitness recollections can

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<sup>86</sup> See M. CIV. J.I. 60.01 (Jury Deliberations), *available at* <http://www.courts.michigan.gov/mcji/jury-deliberations/printCh60.htm>.

be very unreliable.<sup>87</sup> Our commonsense tells us that we can believe what we see, and therefore, we can believe what eyewitnesses claim to have seen. However, empirical studies show that there are many factors that contribute to the unreliability of eyewitness testimony and unless jurors are made aware of these factors, they will tend to think that eyewitness testimony is more reliable than it really is.<sup>88</sup> The factors that can affect the reliability of eyewitness testimony include: how far the eyewitness was from the person being observed; the conditions, such as whether there was bad weather or poor lighting; how much time there was for observation; the health of the eyewitness; whether the eyewitness and the person being observed were of the same race because cross-racial identifications are harder to make; and how much stress the eyewitness was under because contrary to common belief, the more stress a person is under, the less reliable the identification is.<sup>89</sup>

In California, as Tiersma explains, judges now instruct jurors on the factors that can affect the reliability of eyewitness testimony.<sup>90</sup> California judges, by instructing in this way, provide more information on this subject than judges in most other jurisdictions. However, as Tiersma notes, California judges do not go far enough. They instruct jurors to consider whether the eyewitness and the person being observed are of different races, but they do not say why this is important. They do not explain to jurors that cross-racial identifications are more difficult to make

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<sup>87</sup> See, e.g., Robert Buckhout, *Eyewitness Testimony*, SCI. AM., Dec. 1974, at 23 (discussing studies).

<sup>88</sup> See, e.g., ELIZABETH LOFTUS & JAMES DOYLE, EYEWITNESS TESTIMONY 26 (1987) ("Another reason that jurors place so much faith on eyewitness testimony is that they are often unaware of how many different factors influence its accuracy.").

<sup>89</sup> See, e.g., Buckhout, *supra* note 87, at 23, 24-27 (identifying factors that make eyewitness identification unreliable).

<sup>90</sup> See Tiersma, *supra* note 1, at 126.

than identifications between people of the same race.<sup>91</sup> Tiersma rightly criticizes the instruction for this omission because it leaves jurors to “guess” or “to read the judge’s mind.”<sup>92</sup> His point is well taken; the instruction should provide this additional piece of information.

However, there is even more information, in addition to the challenges posed by cross-racial identifications, which would be useful for jurors to have. For example, researchers in this area have found that eyewitness testimony is more likely to be believed than any other form of evidence.<sup>93</sup> Even when other forms of evidence undermine the eyewitness identification, jurors will continue to believe the eyewitness testimony.<sup>94</sup> So, perhaps something stronger than even an instruction in which the judge describes the factors that contribute to the unreliability of eyewitness testimony is needed.

There is much disagreement as to how to counter the strongly held belief that we can believe what we see,

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<sup>91</sup> See, e.g., SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, *THE AMERICAN JURY ON TRIAL: PSYCHOLOGICAL PERSPECTIVES* 82 (1988) (identifying several factors that are not commonly known and that make eyewitness identification unreliable including the difficulty people have in identifying people of other races); Buckhout, *supra* note 87, at 26 (describing a study in which stereotypes limit what viewers see and recall).

<sup>92</sup> Tiersma, *supra* note 1, at 126.

<sup>93</sup> See, e.g., ELIZABETH F. LOFTUS, *EYEWITNESS TESTIMONY* 9 (1979) (“Jurors have been known to accept eyewitness testimony pointing to guilt even when it is *far* outweighed by evidence of innocence.”); LOFTUS & DOYLE, *supra* note 88, at 24 (describing studies of mock jurors that show that they tend to believe eyewitness testimony particularly when it was given with confidence); John C. Brigham & Robert K. Bothwell, *The Ability of Prospective Jurors To Estimate the Accuracy of Eyewitness Identifications*, 7 *LAW & HUM. BEHAV.* 19, 27 (1983) (noting that jurors find eyewitness evidence extremely persuasive).

<sup>94</sup> See KASSIN & WRIGHTSMAN, *supra* note 91, at 79-82 (providing examples of erroneous eyewitness identification that persuaded juries in spite of strong alibi defenses by the defendants).

and therefore, we can believe what an eyewitness says he or she has seen. An instruction is a good starting-point.<sup>95</sup> California is ahead of the curve in this respect, even with the shortcoming identified by Tiersma on cross-racial identifications. Other recommendations include allowing the testimony of experts who can explain more fully the factors that the judge mentioned in the instruction<sup>96</sup> or providing jurors with some of the findings gained from the empirical studies as a way of showing them that eyewitness testimony should be open to question. Suggestions that are more controversial include the exclusion of any evidence that is based only on eyewitness testimony.<sup>97</sup> Some courts, like those in California, instruct juries on the factors that can affect the reliability of eyewitness testimony. Other courts have allowed the testimony of experts.<sup>98</sup> There is a need for greater experimentation by courts so that a “best practice” emerges. The one point that is clear is that courts’ predilection to take no action and to avoid the problem is not a useful approach. It does not give juries the

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<sup>95</sup> See *id.* at 84 (noting that some courts, if requested by one of the parties, give a cautionary instruction in which they “inform the jury that identification evidence can be wrong and encourage them to scrutinize it carefully”).

<sup>96</sup> See *id.* (noting that a “more controversial, more prevalent, and potentially more effective” approach than a cautionary instruction is to allow parties to call experts “to testify about perception, memory, and eyewitness testimony”).

<sup>97</sup> Compare *id.* at 83-84 (“One [way to assist jurors with eyewitness testimony] is to exclude it altogether in cases where it stands alone, without corroboration. This alternative is plainly unacceptable. It would needlessly paralyze too many legitimate criminal prosecutions.”), with Michael J. Gorman, *Eyewitnesses Make Serious Mistakes*, NAT’L L.J., Sept. 30, 2002, at A21 (describing the misidentification of Bryant Gumbel’s son as a suspected purse-snatcher and recommending that eyewitness “identification alone should never lead to a criminal conviction”).

<sup>98</sup> See, e.g., KASSIN & WRIGHTSMAN, *supra* note 91, at 85 (describing Judges Bazelon and Weinstein as “particularly strong advocates of using eyewitness experts”).



information they need to perform their task in a responsible manner. The consequence of relying too heavily on eyewitness testimony can be quite serious; it can lead to an erroneous conviction.<sup>99</sup>

#### **IV. Courts Should Seek Jurors Drawn Broadly from the Community**

##### **A. Rejecting Expert Juries**

Tiersma observes that courts require jurors to be experts in several different areas and he suggests that juries of experts might be useful where expertise is needed. Tiersma proposes that an expert jury could be used to decide technical cases, such as tax fraud cases.<sup>100</sup> He proposes that in “highly technical areas” it would “make sense on occasion” to have a jury of experts.<sup>101</sup> For example, in a tax fraud case, he suggests that a jury of accountants “might not be a bad idea.”<sup>102</sup>

Tiersma is not the first to suggest a jury of experts in technical areas, but this idea has been rejected in the past and should continue to be rejected. Expert juries have a number of drawbacks compared to juries of ordinary citizens drawn broadly from the community. This recommendation, rather than broadening the base of citizens who could serve as jurors, would limit the base. It would lead to limited viewpoints being made available to the jury, limited opportunities for ordinary citizens to serve, and would cast doubt on the integrity of a process by which ordinary citizens were bypassed in favor of experts.

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<sup>99</sup> See, e.g., *DNA Clears Man in Rape, Judge Rules*, N.Y. TIMES, Nov. 1, 2006, at A21 (describing the case of Larry Fuller, who was convicted of rape based on the eyewitness identification of the victim; however, he was eventually exonerated based on DNA evidence).

<sup>100</sup> Tiersma, *supra* note 1, at 139.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

One drawback to a jury of experts, who serve in trial after trial, is that they are unable to bring a fresh look to a case that a jury drawn from ordinary citizens who serve in only one trial could bring. Justice White recognized this limitation when he described the protections that a jury affords a defendant in a criminal case. He suggested that a criminal defendant might prefer the commonsense judgment of a jury of ordinary citizens, even though they are unschooled in the law,<sup>103</sup> to the expertise of a judge because the judge might become hardened over time.<sup>104</sup> Expert jurors, who would be expected to serve in trial after trial, run this risk just as readily as do judges who hear criminal cases time after time.

Another drawback to the expert jury is that it is necessarily drawn from a limited pool of people who meet certain professional or technical requirements so that they qualify as experts. Thus, the expert jury would not be drawn from a broad swath of the population and would not have available to it the full range of perspectives, life experiences, and commonsense judgment that a jury of ordinary citizens could offer. A jury consisting of experts, many of whom might have gone to the same schools, received the same professional training, and share the same attitudes or views that are prevalent in that profession, might be bereft of any jurors who can offer an outsider's perspective or critique. In addition, a jury of experts raises questions about how representative that jury is of the population at large and whether the expert jury is being

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<sup>103</sup> See *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968) ("If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it.").

<sup>104</sup> See *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) ("The purpose of a jury is . . . to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps over-conditioned or biased response of a judge.").

used as a screen to justify the exclusion of other members of society from serving as jurors. Justice White observed that “[r]estricting jury service to only special groups . . . cannot be squared with the constitutional concept of jury trial. . . . Trial by jury presupposes a jury drawn from a pool broadly representative of the community . . . .”<sup>105</sup>

Another limitation is that it is difficult to decide which areas are technical and would require expert juries and which areas are general and could be heard by juries of ordinary citizens. The technical categories for which expert juries are needed are likely to grow until they overtake the general category for which ordinary juries are needed.

Finally, as Alexis de Tocqueville reminds us, the jury is above all “a political institution.”<sup>106</sup> One way in which it functions as a political institution is that it serves as a “free school” and teaches ordinary citizens about the importance of fulfilling their civic duty and serving as jurors.<sup>107</sup> Casting a vote and serving on a jury are the two ways in which citizens participate in their democracy. Jurors who lack the background to serve as expert jurors are denied an opportunity to participate in the judicial system and to acquire that education. Although they might eventually have the chance to serve on a jury, their chances are reduced with the creation of expert juries, particularly when expert juries burgeon as all cases begin to take on a technical sheen.

Tiersma’s fallback position is that there could be one or two experts on any jury that is asked to decide a technical issue.<sup>108</sup> He notes that lawyers tend to use their peremptory challenges to remove from the jury anyone who

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<sup>105</sup> *Id.* at 530.

<sup>106</sup> TOCQUEVILLE, *supra* note 20, at 250.

<sup>107</sup> *Id.* at 252.

<sup>108</sup> *See* Tiersma, *supra* note 1, at 139.

has relevant expertise.<sup>109</sup> He realizes that lawyers are likely to object to any proposal that an expert or two should be seated on the jury in a technical case. Although there is no guarantee of having an expert on one's jury, it seems that peremptory challenges should not be used simply to remove all prospective jurors who might have some expertise.<sup>110</sup> To the extent that a jury drawn broadly from the populace will have a range of views available to it, including jurors with expertise, eliminating peremptory challenges<sup>111</sup> or at least reducing the number of peremptory challenges would avoid or limit the skewing effect of lawyers who exercise their challenges to exclude prospective jurors with expertise. If lawyers had fewer peremptory challenges, then they would use their challenges with greater care and try to remove those prospective jurors whose impartiality they doubted but who did not meet the standard for a for cause challenge. Although Tiersma does not go this far in his recommendations, this seems to be a better approach than expert juries, which pose a threat to juries of ordinary citizens and do not have the advantages of juries drawn broadly from the community.

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<sup>109</sup> *See id.*

<sup>110</sup> According to one prospective juror's observation, "we potential jurors discovered that anyone who knew anything about costs or the medical profession had been screened out—an economist, an accountant, and two nurses." Robert J. Barro, *Pleading the Case for a Paid-Jury System*, BUS. WK., July 22, 2002, at 20.

<sup>111</sup> My view has long been that peremptory challenges should be eliminated rather than simply reduced in number. *See* Nancy S. Marder, *Beyond Gender: Peremptory Challenges and the Roles of the Jury*, 73 TEX. L. REV. 1041 (1995). For a recommendation made by Professor David Baldus that peremptory challenges should be eliminated or limited to three per lawyer, see Debra Cassens Weiss, *Law Prof Who Studied Peremptories Suggests Three-Strike Limit*, A.B.A. J., Mar. 5, 2009, [http://www.abajournal.com/news/law\\_prof\\_who\\_studied\\_peremptories\\_suggests\\_three-strike\\_limit](http://www.abajournal.com/news/law_prof_who_studied_peremptories_suggests_three-strike_limit).

Moreover, before taking the dramatic leap to expert juries, ordinary citizens should be given the basic tools necessary to perform their tasks, particularly when expertise is required. For example, when juries have to decide damage awards, they should be permitted to use calculators and Excel spreadsheets, which are basic tools that any expert would employ.<sup>112</sup> These tools are common in the workplace, and should be common in the jury room. These tools are not particularly expensive and would aid jurors in making the calculations that they need to make. Not too long ago, jurors were asked to make calculations about damages but were not even permitted to have paper and pencil in the jury room. Most courtrooms now allow such basic tools as paper and pencil.<sup>113</sup> Courts need to take the next step and provide calculators and Excel spreadsheets to jurors. Before Tiersma criticizes ordinary jurors for their lack of expertise, he should insist that courts provide them with the basic tools that would enable them to perform the tasks they have been asked to perform.

### **B. Reaching Out To Prospective Jurors**

Tiersma does not mention the myriad ways in which courts have reached out to prospective jurors and have tried to summon them from a broader swath of the population than ever before. Courts are moving in the right direction, though more remains to be done. For example, courts used to summon jurors from voter registration lists only,<sup>114</sup> but

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<sup>112</sup> For a detailed discussion of the high-tech and low-tech tools, including spread-sheets and calculators, that jurors should be given to help them perform their tasks, see Nancy S. Marder, *Juries and Technology: Equipping Jurors for the Twenty-First Century*, 66 BROOK. L. REV. 1257, 1286 (2001).

<sup>113</sup> See JURY TRIAL INNOVATIONS, *supra* note 51, at 141 (describing juror note-taking as “a widespread technique”).

<sup>114</sup> See, e.g., David Kairys, Joseph B. Kadane & John P. Lehoczky, *Jury Representativeness: A Mandate for Multiple Source Lists*, 65 CAL.

now many courts use multiple lists, such as tax rolls, drivers' licenses, unemployment lists, or utilities, in addition to voter registration lists.<sup>115</sup> The idea is to reach as many people as possible and not to rely on just one source. Many more people are qualified to serve as jurors than people who register to vote. In addition, courts have done a better job of updating the addresses that they use when mailing questionnaires and summonses. This is important given how often people move.

Several trial courts have been innovative in trying to increase minority representation among those who are summoned to serve; however, appellate courts have not viewed these efforts with favor. When a district court in Michigan "subtracted" potential jurors from the master wheel because they were not African Americans in order to create a more diverse venire,<sup>116</sup> the Sixth Circuit struck down the practice,<sup>117</sup> holding that it violated a federal statute that prohibited selection based on race<sup>118</sup> and that it also violated the Equal Protection Clause of the Fifth Amendment to the U.S. Constitution.<sup>119</sup> When a district

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L. REV. 776, 825-26 (1977) ("The most widely used primary list is the voter registration list . . ."); *id.* at 778 (noting that in 1977, "only two federal district courts and several state courts utilize[d] multiple lists") (footnotes omitted).

<sup>115</sup> See JURY TRIAL INNOVATIONS, *supra* note 51, at 36 ("As of August 1996, 12 states use only voter registration lists, six states use only lists of licensed drivers, two states use state-unique lists, and 25 use a combined voters and drivers list. Five states add some additional lists to the voters and drivers lists.").

<sup>116</sup> See Nancy J. King & G. Thomas Munsterman, *Stratified Juror Selection: Cross-Section by Design*, 79 JUDICATURE 273 (1996) (describing the use of stratified juror selection by the Eastern District of Michigan).

<sup>117</sup> *United States v. Ovalle*, 136 F.3d 1092 (6<sup>th</sup> Cir. 1998).

<sup>118</sup> See Jury Selection and Service Act, 28 U.S.C. § 1862 ("[N]o citizen shall be excluded from service as a grand or petit juror in the district courts of the United States . . . on account of race, color, religion, sex, national origin, or economic status.").

<sup>119</sup> U.S. CONST. amend. V.

court judge in Massachusetts tried to create a more diverse venire by ordering new jury summonses to be mailed to residents who lived in the same zip code as jury summonses returned to the court as “undeliverable,” the First Circuit granted the government’s petition for a writ of mandamus and directed the district court judge not to implement that part of her order calling for new jury summonses.<sup>120</sup> The First Circuit concluded that an individual judge could not enlarge the jury array; rather, it had to be done on a district-wide level.<sup>121</sup> Appellate courts must become more supportive of innovative efforts by district court judges; otherwise, venires are unlikely to reflect the larger communities from which they are drawn.

Meanwhile, academics have studied why people do not always respond to their jury questionnaire or summons. One study discovered that while some never received their questionnaire or summons, and others are deterred by practicalities, such as the absence of childcare, the unavailability of parking, or the meager compensation, the most important factor was whether people felt that they had some control over when they performed their jury duty.<sup>122</sup> As long as they felt that they had some control, especially in terms of timing, the potential jurors were more likely to respond to their questionnaire and their summons and feel enthusiastic about jury duty.<sup>123</sup> If courts focused on offering prospective jurors some control over when they performed their jury duty, such as an automatic extension when they are first called, then less time would be spent

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<sup>120</sup> United States v. Green, 426 F.3d 1 (1<sup>st</sup> Cir. 2005).

<sup>121</sup> See Judge Nancy Gertner, 12 Angry Men (*and Women*) in Federal Court, 82 CHI. KENT L. REV. 613, 623 (2007) (providing background to *Green*).

<sup>122</sup> See Susan Carol Losh et al., “Reluctant Jurors”: What Summons Responses Reveal about Jury Duty Attitudes, 83 JUDICATURE 304, 310 (2000).

<sup>123</sup> See *id.*

imposing fines<sup>124</sup> or having marshals search for additional prospective jurors.<sup>125</sup>

Courts' efforts to send jury questionnaires and summonses to as broad a swath of the population as possible have proceeded slowly, but at least they are moving in the right direction. The challenge of summoning a diverse venire depends upon the efforts of many participants, including innovative efforts by trial courts, support for these efforts by appellate courts, and greater understanding by researchers of why prospective jurors do not always respond to their summonses. The goal is to reach as diverse a group of citizens as possible for the venire, and then not to lose them during the exercise of peremptory challenges. Ideally, the petit jury that is actually seated is drawn broadly from the community, can offer a range of views and experiences, and can render a verdict that will be accepted by the community, even if the community disagrees with the verdict.

## V. Conclusion

Most of Tiersma's recommendations encourage courts to be honest with jurors and to give them the tools they need to perform their jobs ably. His recommendations could go further, as I have suggested above, but they are

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<sup>124</sup> See, e.g., Colin F. Campbell & Bob James, *Innovations in Jury Management from a Trial Court's Perspective*, JUDGES' J., Fall 2004, at 22, 25 (describing Arizona's enforcement efforts for those summoned for jury duty, including orders to show cause and up to \$500 penalties for those held in contempt); Greg Moran, *When Jury Duty Calls: Counties Wrestle with High Evasion Rates*, CAL. LAW., May 2001, at 22 (describing that in California failure to appear for jury duty is an act of contempt punishable by a fine up to \$1000 and five days in jail).

<sup>125</sup> Moran, *supra* note 124, at 22 (explaining that in Stanislaus County, California, a "failure to appear" postcard follows an ignored jury summons, and if that fails to elicit a response within ten days, then a uniformed marshal with an order to show cause can appear at the door).



consistent with the basic principles by which courts should approach jury reform. The only recommendation for which this is not the case is the creation of expert juries. This recommendation runs counter to the principle that juries should be drawn broadly from the community. This principle is important for several reasons. First, by drawing on ordinary citizens from all walks of life, a jury will potentially have available to it a wide range of viewpoints, perspectives, and life experiences. Second, a deliberation among jurors from diverse backgrounds will allow for questions, challenges, and the avoidance of what Irving Janis called “groupthink,” in which jurors simply go along with the prevailing point of view.<sup>126</sup> Third, such juries of ordinary citizens, working together and participating actively in a thorough deliberation, can reach a just verdict and one that the community is willing to accept. Surprisingly, such a jury is also more likely to reach an accurate verdict. James Surowiecki described this phenomenon in *The Wisdom of Crowds*.<sup>127</sup> He suggested that when a group engages in a deliberative process in which the participants have different viewpoints and skills and feel free to offer them, they will reach a more accurate result than a homogeneous group, even one with expertise,<sup>128</sup> or than one or two people, “no matter how smart they are.”<sup>129</sup> Thus, when jurors are treated with honesty by courts and given the information and tools to be active participants, they are more likely to render accurate verdicts. If Surowiecki is right, then we need to worry less about creating expert juries and more about creating conditions that will allow juries of ordinary citizens to achieve the wisdom of crowds.

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<sup>126</sup> IRVING L. JANIS, GROUPTHINK 262, 270-71 (2d ed. 1982).

<sup>127</sup> JAMES SUROWIECKI, THE WISDOM OF CROWDS (2005).

<sup>128</sup> *Id.* at 30-31.

<sup>129</sup> *Id.* at 31.



ESSAY

**REVERSE ENGINEERING OF JURY INSTRUCTIONS<sup>1</sup>**

*Bethany K. Dumas\**

Reverse engineering of jury instructions requires (1) creating a *decision structure* or *decision tree* for a case, based on a *theory of the case*, (2) identifying crucial points in the *decision structure* or *decision tree*, and (3) incorporating crucial points into the jury instructions. This paper suggests that reverse engineering of jury instructions can be used to instruct jurors about legal concepts and technical terms before they hear jury instructions or closing arguments. The goal is to improve the clarity of instructions to achieve litigation goals.

It is a truism in the legal community that successful advocacy in the courtroom requires a lawyer to proceed based on an appropriate *theory of the case*.<sup>2</sup> Through a theory of the case, the lawyer organizes and correlates facts to support the most effective legal argument for the client.<sup>3</sup> Further, evidence presented to jurors in a jury trial must fully support that theory of the case or explain why a competing theory is inadequate to explain the facts of the case. Thus “[t]he modern litigator’s arsenal should include . . . techniques . . . for selecting appropriate case theories, for testing those theories, and then for making the theories

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<sup>1</sup> This is a draft of Chapter 4 of a book manuscript in progress, *Writing and Using Effective Jury Instructions*. Earlier chapters are: 1. Jury Instructions: History and Rationale, 2. Lay Perceptions of Jury Service, and 3. Recent Criticism and Reform Efforts.

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<sup>2</sup> See JAMES W. MCELHANEY, EFFECTIVE LITIGATION: TRIALS, PROBLEMS AND MATERIALS 123 (1974).

<sup>3</sup> See *Id.*; BLACK’S LAW DICTIONARY 1517 (8th ed. 2004).

understood at both an intellectual level and a psychological level through the use of illustrative exhibits or computer technology.”<sup>4</sup>

In jury trials, the litigator’s arsenal must also include techniques for insuring that jurors are adequately instructed with respect to their decision-making responsibilities. In most jurisdictions, it is still assumed that adequate instruction includes instruction in law, though two states, Kentucky and perhaps Georgia, seem to be moving away from that assumption.<sup>5</sup>

Let me pause to explain what is being called the “Kentucky Approach” to jury instructions, as it has implications for the material below. Attorney Charles M. Cork, III, of Macon, Georgia, contrasts it with current practice thus:

Much of current practice conceives jury instruction as a miniature, accelerated education process in which the judge lectures on one or more fields of law and the jurors are expected to assimilate the lecture into a coherent and correct understanding of the law. This will be called the “Lecture Approach.” The goal of this process is that the jurors will understand all of the contours of legal doctrine reflecting on the legal dispute before them. The lawyers for each party will supply to the judge a series of proposed jury instructions comprised of excerpts from reported decisions or statutory text, selected in a partisan manner, emphasizing language that is most favorable to the client’s case, and often repeating

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<sup>4</sup> Anthony J. Bocchino & Samuel H. Solomon, *What Juries Want to Hear: Methods for Developing Persuasive Case Theory*, 67 TENN. L. REV. 543, 543 (2000).

<sup>5</sup> Charles M. Cork, III, *A Better Orientation for Jury Instructions*, 54 MERCER L. REV. 1, 2-3 (2002).

such language in different ways. The current rules for presenting instructions and obtaining review of the judge's decisions give no incentive to lawyers to submit balanced and simple, but complete, jury instructions. After receiving opposing, unbalanced sets of proposed instructions from the lawyers, the judge will then attempt to assemble the excerpts into a cohesive, neutral body of text that will educate the jury about all relevant aspects of the law applicable to any issue raised by the evidence and the contentions of the parties. Unfortunately, the instructions proposed by counsel will hamper, not assist, the judge's efforts to instruct the jury. Unless the judge can accomplish a creative synthesis of the proposed instructions, or ignores them, the jury will hear a number of excerpts that apparently conflict with each other. Further, the excerpts often contain misleading legal usage of common terms, legal jargon, and other confusing and misleading instructions. The result is that the jury instructions will fail to enable jurors to understand the contours of the applicable law simply because those contours cannot be learned by ordinary citizens through cramming; the law can only be learned by legal study that systematizes and harmonizes the body of relevant legal texts into a coherent whole. What is sensible to judges and lawyers, who have had years to learn the contours of the law, will remain opaque to jurors without similar training and experience.<sup>6</sup>

The process whereby judges attempt to assemble lawyers' suggestions into a cohesive document sometimes

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<sup>6</sup> *Id.* at 2 (internal citation omitted).

includes a *charge* or *charging conference*, a meeting during which the parties' attorneys present their suggestions for jury instructions.<sup>7</sup> The goal of the charge or charging conference is for decisions to be made so that shortly after the meeting the parties' attorneys receive copies of the jury instructions that will be use. The judge makes all final decisions. Now let us contrast current practice with what is being done in Kentucky and which Georgia appears to be moving towards; Cork continues thus:

Instead of treating jury instruction as a compulsory mini-law school, it is far superior to orient jury instruction practice so that it helps the jury do its job, which is to resolve questions of fact. The method . . . already practiced in Kentucky and toward which the Georgia Supreme Court may be moving, is to limit instructions to the core factual issues that control the ultimate verdict. This method will be called the "Kentucky Approach." The judge gives instructions in order to call for the jury to do something, rather than to contribute to the jurors' knowledge of somewhat random information about the law. Instructions are framed around the parties' respective burdens of proof and their contentions. Typically, a complete instruction on liability in a simple tort case would take the form of, "D had a duty to do x, y, and z; if you believe from the evidence that D failed to comply with any of these duties and that the failure to comply was a substantial factor in causing P's injuries, you should find for P; otherwise, you should find for D." Instructions in cases with legal issues of greater complexity will still be framed in terms of the factual issues that the jury must resolve in order to determine

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<sup>7</sup> BLACK'S LAW DICTIONARY 249 (8<sup>th</sup> ed. 2004).

whether a party with the burden of proof has sustained that burden. . . . The point of these instructions is to call upon the jury to perform its fact-finding function, rather than the essentially legal function of harmonizing disparate legal texts.<sup>8</sup>

More generally, perhaps, such an issue as *burden of proof* is crucial in all cases, and such issues as *contributory responsibility* are important in some cases. In any event, jurors must be persuaded by factual evidence, and that is most effectively accomplished in terms of a *theory of the case*—defined very comprehensively in Black’s Law Dictionary:

A comprehensive and orderly mental arrangement of principles and facts, conceived and constructed for the purpose of securing a judgment or decree of a court in favor of a litigant; the particular line of reasoning of either party to a suit, the purpose being to bring together certain facts of the case in a logical sequence and to correlate them in a way that produces in the decision-maker’s mind a definite result or conclusion favored by the advocate.<sup>9</sup>

The remainder of this article will identify briefly some contemporary commentary on the ways in which case theories are developed and implemented in *decision structures* or *decision trees* (hereafter “*decision structures*”), then address the issue of how litigators can insure that jury instructions are adequate to allow jurors to consider a given case theory fairly.

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<sup>8</sup> *Id.* at 2-3 (internal citations omitted).

<sup>9</sup> BLACK’S LAW DICTIONARY 1487 (8th ed. 2004).

The technique discussed in this paper is known as *reverse engineering of jury instructions*. The term was initially used by engineers to mean the disassembling of a product or device in order to understand the underlying concepts and perhaps produce something similar.<sup>10</sup> As used with respect to jury instructions, the term means deconstructing the desired verdict with respect to what decisions the jury will have to make in order to reach that desired verdict. In order to carry out reverse engineering of jury instructions, a litigator must complete three steps beyond establishing a theory of the case. The litigator must (1) create a decision structure for the case, (2) identify crucial points in that decision structure, and then (3) incorporate the crucial points of that decision structure into the jury instructions.<sup>11</sup> The technique at its best makes use of insights from discourse theory as well as knowledge of the ways in which syntactic and semantic structure operate to assist or impede communication.<sup>12</sup>

Recent case theory research has focused on case theory as being grounded in story or narrative.<sup>13</sup> This approach has moved away from case theory as legal doctrine and towards case theory as persuasive storytelling. Overall, however, it has been suggested that “[c]ase theory operates at three levels: legal, factual, and persuasive[:.]”

[1.] Legal theory defines the case in terms that describe why, as a matter of law, your client should prevail. . . . Because legal theory is

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<sup>10</sup> See generally ELDAD EILAM, *REVERSING: SECRETS OF REVERSE ENGINEERING* (Wiley 2005).

<sup>11</sup> See Bocchino, Anthony J, and Samuel H. Solomon. *What Juries Want to Hear: Methods for Developing Persuasive Case Theory*, 67 Tenn. L. Rev. 543 (2000).

<sup>12</sup> See *id.*

<sup>13</sup> See generally Binny Miller, *Teaching Case Theory*, 9 CLINICAL L. REV. 293, 295 (2002) (discussing techniques for treating the case theory development as building a story line).



primarily for judicial consumption, it is possible to have two or more—perhaps even wholly inconsistent—legal theories of the case at the same time. . . . All that must occur at trial is that the lawyers prove facts sufficient to sustain a favorable verdict on appeal.”

[2.] Factual theory defines what the facts of the case really are. . . . [I]n developing effective factual theory, it is vital to remember that not only are the facts themselves important, but so is the perception of facts that will drive factual theory. Often the reality of the facts and the common perception of them will be at odds, and it is for the lawyer to reconcile reality and the perception of reality for effective factual persuasion. . . .

[3.] Persuasive theory . . . explains why it is that the jury should feel right about its decision. Persuasive theory is grounded in common human experience and is usually presented in common sense terms that come from some authoritative source [for instance, the Bible or great literature]. . . . Persuasive theory will usually strike at the core psychological values that most jurors share and that motivate much of their decision-making. As such, an effective persuasive theory will resonate with themes of fairness, redressing a wrong, doing the right thing, and, in circumstances suggesting egregious behavior, the need for punishment.<sup>14</sup>

It is important to treat a factual theory as a working hypothesis, one that must be modified or discarded if necessary supporting facts do not emerge during discovery. Ideally, “the legal, factual, and persuasive theories of the

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<sup>14</sup> Bocchino & Solomon, *supra* note 5, at 544-46.

case will be unitary.”<sup>15</sup> Perhaps some specific case examples will be helpful. In *United States v. Hill*, defendants in Union County were accused of conspiring to import cocaine based upon four and one-half hours of audio-recorded conversation among defendants and undercover agents.<sup>16</sup> Most of the facts were not at issue, and the law was not in dispute. There was clearly a plan to import cocaine into the county via air, which is a criminal act. What was at issue was whose plan it was and whether a conspiracy had occurred. That is, at issue was the proper interpretation of agreed facts.<sup>17</sup>

The prosecution's theory was that the defendants had conspired to import cocaine in violation of criminal law.<sup>18</sup> The defense's theory was that defendants, one of whom was a county sheriff running for re-election (the other was a mayor of a town within the same county), were cooperating with initiating undercover agents in order to confiscate the airplane when it landed with the cocaine. Tennessee law permits local jurisdictions to keep such equipment if it is confiscated during a drug seizure. The defendants claimed that they needed the money that they would raise by selling the airplane for county expenses.<sup>19</sup> Conversational analysis of the tape-recorded conversation revealed a striking similarity of conversational patterns between defendants and agents with respect to topic initiation and topic elaboration.<sup>20</sup> Based on my analysis, I concluded that the linguistic evidence supported the defendants' theory at least as well as a criminal conspiracy theory.

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<sup>15</sup> *Id.* at 548.

<sup>16</sup> *United States v. Hill*, 738 F.2d 152 (6th Cir. 1984).

<sup>17</sup> Expert Report of Bethany K. Dumas, *United States v. Hill*, No. 83-5587/83-5588 (E.D. Tenn. argued May 20, 1985).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

This case was a re-trial of a case in which an original conviction had been overturned by the Sixth Circuit on the ground that the defendants' constitutional rights had been violated when the original judge refused to allow defense attorneys to question prospective jurors about some of their beliefs.<sup>21</sup> A plea bargain was reached in the second trial, but only after the jury was unable to agree on a verdict.<sup>22</sup> Jurors did not appear to be confused about the law and few facts were in dispute; however, jurors were unable to agree on an interpretation of the undisputed facts.<sup>23</sup>

In a number of capital cases, jurors have requested clarifying instructions on the meaning of the term *reasonable doubt*, used in the pattern instructions on murder in most jurisdictions.<sup>24</sup> As recently as 2000, in *Weeks v. Angelone*,<sup>25</sup> the Supreme Court held:

[I]t 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. 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. 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

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<sup>21</sup> Hill, 738 F.2d at 153.

<sup>22</sup> Expert Opinion of Bethany K. Dumas, *supra* note 17.

<sup>23</sup> *Id.*

<sup>24</sup> Bethany K. Dumas, *Reasonable Doubt about Reasonable Doubt: Assessing Jury Instruction Adequacy in a Capital Case*, in LANGUAGE IN THE LEGAL PROCESS 246-49 (Janet Cotterill ed., Palgrave Macmillan Press 2002).

<sup>25</sup> 528 U.S. 225 (2000).

sentencing alternatives. 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 original jury instructions. The U.S. Court of Appeals for the Fourth Circuit affirmed, and that decision was affirmed by the Supreme Court. The final opinion thus declares it to be the law of the land that "jurors are presumed to understand instructions."<sup>26</sup>

For our purposes, the opinion from *Weeks* is important because it makes clear that juries are sometimes uncertain about the law. Additionally, it underscores that jury understanding matters; it is sometimes a matter of life and death.

Now that we have established the role and importance of jury interpretation and jury comprehension, let us explore the additional steps we are looking at today. We will begin with a very brief look at how one transforms a theory of the case into a decision structure.

The concept of reverse engineering of litigation procedures was, to the best of my knowledge, first introduced by Anthony Bocchino, James Dobson, and Samuel Solomon in 2001. They introduced "reverse engineering the verdict" as:

[A] method for taking what has been learned in discovery and molding and shaping that information into a trial theory or strategy that will ultimately persuade the jury of the correctness of the position of our clients. . . . Some graphic designers work well with large display boards,

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<sup>26</sup> Bethany K. Dumas, *Jury Trials: Lay Jurors, Pattern Jury Instructions, and Comprehension Issues*, 67 TENN. L. REV. 701, 714 (2000) (internal citations omitted).

while others are better suited to using computer-generated slide shows. . . . In this way the social scientist can determine the effect certain arguments have on the flow of juror opinion. . . . Usually, regarding the use of graphic displays, less is better, and the graphic display professionals are more likely to come to a similar conclusion as they are part and parcel of the entire trial theory development, not just their own special piece of that preparation. . . . It is for the trial team to determine not only the form, but also the content of the graphic displays to be used to best explain and demonstrate the trial theory.<sup>27</sup>

The strategy of “reverse engineering the verdict” involves developing a detailed case theory and calling the attention of jurors to discrete issues in the case theory.<sup>28</sup> Bocchino et al. acknowledge that “[i]n many cases, there is little dispute as to what happened and who did what to whom, but a great deal of dispute as to why the parties did what they did. . . . At issue then, will be the motive of the people who caused the thing to occur.”<sup>29</sup> The authors then suggest that:

[a] decision tree, which shows the options for decisions and the choices made by the party in charge, leading to the ultimate conclusion in the case [can] be very helpful in advancing either the plaintiff's or defendant's case. If the jury can be made to understand the options available at each juncture in critical decision making, the choices

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<sup>27</sup> Anthony J. Bocchino et al., *What Juries Want to Hear II: Reverse Engineering the Verdict*, 67 TEMP. L. REV. 177, 177, 179, 182, 186, 189 (2001).

<sup>28</sup> *Id.*

<sup>29</sup> *See id.* at 187.

made, and the reasons why the choices were made, jurors will be a long way towards understanding whether the defendant's motives were legitimate or not.<sup>30</sup>

In their 2001 article, Bocchino, Dobson, and Solomon describe a detailed plan for using social scientists, graphic designers, and lawyers to improve litigation strategies.<sup>31</sup> The social scientists include those who conduct various kinds of surveys, jury consultants, focus groups, jury simulations, and witness evaluations. Missing from the list are linguists who might pay attention to ways in which the words of jury instructions might be introduced during trial process in order to habituate jurors to thinking in terms of key concepts that are crucial to legal theory as well as factual analysis.

For example, suppose that in a products liability case it is required that a product is shown to be “defective and unreasonably dangerous.” Pattern jury instructions do not generally give narrative examples of what constitutes a “defective and unreasonably dangerous” product (though some judges do). However, a line of questioning of witnesses could be developed and utilized that would provide examples during trial so that when jury instructions and closing arguments are given, jurors would already be familiar with the terminology.

In other words, I am proposing that reverse engineering of jury instructions be conducted as an exercise in the explicit teaching vocabulary and definitions during trial process. Reverse engineering of jury instructions would need to be done within the context of legal, factual, and persuasive theory, of course. There is no reason to believe that this strategy would not work and every reason to believe that it would. It has been demonstrated in the

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<sup>30</sup> *Id.*

<sup>31</sup> *See id.* at 178-80.

context of custodial interrogation that individuals being interrogated can be “taught” to use specialized terms (often with legal meanings that they do not understand). If one has an explicit agenda and a clear sense of what one is trying to teach, it should be relatively easy to teach terms and definitions in the context of trial questioning.

Earlier, I mentioned the charge conference, where the attorneys present their suggestions for jury instructions and judges attempt to assemble those suggestions into a cohesive document. At its best, a charge conference concludes with judges presenting printed copies of the jury instructions that will be used. Lawyers seeking reverse engineering of jury instruction will have clear ideas about what to present well before the charge conference is actually held. How much of the legal definition that is included will vary, depending upon the extent to which a jurisdiction favors the lecture approach of jury instructions or the Kentucky approach.

This article has proposed that techniques of reverse engineering can be used to advantage in composing jury instructions; partly by identifying how best to instruct jurors about legal concepts and technical terms well before they hear jury instructions or closing arguments. Future publications will illustrate how appropriate questioning during voir dire can serve to educate potential jurors about terms and definitions. They will also explain how such litigation techniques can make it easier for jurisdictions to adopt the Kentucky approach or something similar, dropping most legal definitions from jury instructions and leaving it to the trial lawyers to educate jurors about relevant concepts during trial. The overall goal of the approach is to improve the clarity of instructions to achieve litigation goals.





ESSAY

**IS IT POSSIBLE TO PREDICT JUROR BEHAVIOR?**

*John W. Clark III\**

**I. Introduction**

Each year in the United States there are over 150,000 jury trials. Theoretically, the jury serves as the conscience of the community. The jury's decision manifests what is acceptable and unacceptable behavior. With this substantial responsibility, jurors are assigned the responsibility of evaluating arguments made by attorneys, determine the truthfulness of witness's testimony, decipher physical evidence, and comprehend jury instructions given by the judge. Therefore, the American adversarial system allows attorneys a great deal of latitude in determining a juror's fitness to serve.

Attorneys often consider many variables important when considering whether to select or excuse a prospective juror. For example, some legal scholars would argue that bumper stickers (attitude), lawn care practices (conscientiousness) and clothing attire (socioeconomic status) are significant factors when selecting or excusing a juror. Others may suggest a person's type of employment (occupation) or view towards war (ideology) are acceptable indicators. Since attorneys utilize predictability measures, caution should be heeded. Research investigating individual differences involving personality, ideologies, attitudes, and demographics as predictors of jury decision making have been widely studied.<sup>1</sup> However, research

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<sup>1</sup> John W. Clark et al., *Big Five Personality Traits, Jury Selection and Case Outcomes in Real Criminal and Civil Cases*, 34 CRIM. JUST. & BEHAV. 641, 642 (2007).

examining these variables has produced incongruent findings.<sup>2</sup>

Legal scholars must understand that the selection of jurors is but one facet of trial advocacy. Often, attorneys place a great deal of importance in their selection of jurors. However, the individuals selected, as jurors ultimately comprise a group of twelve develop their own sense of justice. The manifestation of a jury's sense of justice is exhibited via a collective personality, ideology, or attitude. However, in some cases, the jury fails to unite and work toward their stated goal i.e. search for the truth. The latter has led one scholar to suggest: "why do jurors who hear the same evidence frequently disagree on the proper verdict? When and how do preexisting prejudices and attitudes influence jurors' decisions? How do jurors comprehend and apply instructions on the presumption of innocence and the standard of proof?"<sup>3</sup>

With the above sentiments, the purpose of this article is to examine social psychological variables that influence jurors beyond the jury selection phase. Importantly, it should be noted that attorneys have very little, if any, control of the extra-legal factors once a trial commences.

## **II. Extra-Legal Factors**

The majority of persons summoned for jury duty have no prior exposure to American jurisprudence. Thus, their interaction with judges, attorneys, and bailiffs is not contrived. While the goal of a jury is to determine fact from fiction and innocence from guilt, jurors are at best unpredictable. Given this fact, there are no perfect jurors. All cases, trials, and juries are unique. The selection of

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<sup>2</sup> *Id.* at 641.

<sup>3</sup> INSIDE THE JUROR: THE PSYCHOLOGY OF JUROR DECISION MAKING 3 (Reid Hastie ed., 1993).

jurors is often characterized by controlled chaos. Specifically, the control mechanism lies in the fact that attorneys are attempting to select or deselect jurors by some reason or fancy. Chaos is demonstrated by the unpredictability of twelve ordinary citizens. While the public often accuses attorneys of “stacking the jury,” this is somewhat of a myth often perpetuated in the media.<sup>4</sup>

Once the process of jury selection is complete and the trial begins, a new dynamic begins. This dynamic is manifested by the inability to control jurors in and out of court. As for out of court, when jurors leave the confines of the court they are free to watch the evening news, read the morning newspaper, surf the internet, or even speak to another juror by telephone or email. While a judge may instruct jurors otherwise, the enforcement is next to impossible unless you sequester all jurors, and even then, abuse is a very real possibility. In court, there are extra-legal factors that may influence an individual as well as the collective jury. Extra-legal factors can be thought of as factors beyond the evidence that influence a juror’s decision. What are some extra-legal factors that influence a juror or jury and ultimately undermine the system? Physical attractiveness, social categorization, judicial bias, personality, attitudes, ideologies, and stress appear to be among the strongest factors. It is important to note that these factors operate from the moment the defendant enters the courtroom. Thus, before opening statements, jurors are sizing up the parties involved.

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<sup>4</sup> NEIL J. KRESSEL & DORIT F. KRESSEL, STACK AND SWAY: THE NEW SCIENCE OF JURY CONSULTING 215-16 (2002).

## A. Physical Attractiveness

Social psychological research indicates that jurors are affected by a defendant's physical attractiveness.<sup>5</sup> According to Franzoi, the way a defendant is physically perceived has a direct bearing on one's degree of responsibility.<sup>6</sup> Moreover, according to Abwender & Hough, "fairly consistent literature suggest that physically unattractive defendants are generally at a disadvantage, with respect to both the likelihood of being found guilty and the severity of the recommended sentence."<sup>7</sup> At the same time, research suggests that people tend to assume that physically attractive people possess an array of socially desired personality traits. For example, attractive people are more intelligent, confident, strong, happy, assertive, honest, and outgoing than those who are less physically attractive.<sup>8</sup>

Ideally, in a criminal trial, the defendant's physical attractiveness should not matter. However, Abel & Watters, suggest attractiveness is a factor that influences the verdict in both simulated and real world trials.<sup>9</sup> Given the above suggestion, DeSantis & Kayson suggest attorneys are well aware of the importance of the bias toward

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<sup>5</sup> Donald M. Burke et al., *Effects of Victim's and Defendants Physical Attractiveness on the Perception of Responsibility in an Ambiguous Domestic Violence Case*, 5 J. FAMILY VIOLENCE, 199, 200 (1990).

<sup>6</sup> See generally STEPHEN L. FRANZOI, SOCIAL PSYCHOLOGY 4th ed. 1996).

<sup>7</sup> David A. Abwender & Kenyatta Hough, *Interactive Effects of Characteristics and Mock Juror in U.S. Participants' Judgment and Sentencing Recommendations*, 141 J. SOC. PSYCHOL. 603, 604 (2001).

<sup>8</sup> Bruce Keisling & Malcolm Gynther, *Male Perceptions of Female Attractiveness: The Effects of Targets' Personal Attributes and Subjects' Degree of Masculinity*, 49 J. CLINICAL PSYCHOL., 190, 190-95 (1993).

<sup>9</sup> Millicent H. Abel & Heather Watters, *Attributions of Guilt and Punishment as Functions of Physical Attractiveness and Smiling*, 145 J. SOC. PSYCHOL. 687, 688 (2005).

attractiveness and often steer their clients to do everything feasible to improve their appearance in the courtroom.<sup>10</sup> An excellent example of this involves the retrial of Andrea Yates. While the jury found her not guilty by reason of insanity for the drowning of her five children in 2001, the strength of evidence was undeniably strong. According to Parker and Kasindorf, Yates was an attractive defendant who seemed pleasant and personable, a person with whom the jurors could readily identify.<sup>11</sup> Another example is the jury in the first murder trial of Eric and Lyle Menendez. There, jurors were deadlocked, thus guilt could not be established. Interestingly, according to Parks & Sanna, some of the jurors when interviewed later revealed they could not believe the brothers killed their parents because the boys looked like nice young men.<sup>12</sup>

## B. Social Categorization

According to Breckler et al., people separate society into two groups: they view others as belonging either to their own group (the in-group) or to another group (the out-group).<sup>13</sup> Most often, these distinctions are based on religion, race, gender, age, ethnic background, occupation, and income.<sup>14</sup> An important component of the in-group/out-group perspective is the belief that a person considered to be in the in-group is perceived to display or

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<sup>10</sup> Andrea DeSantis & Wesley A. Kayson, *Defendants' Characteristics of Attractiveness, Race, and Sex Sentencing Decisions*, PSYCHOL. REP. 679, 679 (1997).

<sup>11</sup> Laura Parker & Martin Kasindorf, *Yates Retrial May Signal Opinion Shift*, USA TODAY, July 27, 2006, [http://www.usatoday.com/news/nation/2006-07-27-yates-verdict\\_x.htm](http://www.usatoday.com/news/nation/2006-07-27-yates-verdict_x.htm).

<sup>12</sup> CRAIG PARKS & LAWRENCE SANNA, GROUP PERFORMANCE AND INTERACTION, 157 (1999).

<sup>13</sup> STEVEN J. BRECKLER, JAMES M. OLSON & ELIZABETH C. WIGGINS, SOCIAL PSYCHOLOGY ALIVE (2006).

<sup>14</sup> *Id.* at 75.

possess positive characteristics, whereas a person considered to be in the out-group is thought to possess undesirable or negative characteristics.<sup>15</sup> According to Franzio, with respect to social categorization, research suggests that physical features are the most common way to classify people, particularly in the early stages of impression formation.<sup>16</sup> Interestingly, applying social categorization to jurors is effortless. To demonstrate, from the moment a defendant crosses the threshold of the courtroom doors, all eyes are fixated upon him or her. It is important to recognize that jurors identify the defendant as in-group or out-group and evaluate his or her physical attractiveness. In the end, a defendant who is perceived to possess positive characteristics, in-group standing, and physical attractiveness stands a greater chance of acquittal.<sup>17</sup> For example, from the onset of the O.J. Simpson murder trial there was a tremendous amount of media coverage. Simpson was a wealthy and physically attractive former football star at the college and professional level. Because Simpson was a national celebrity, most Americans had preconceived notions of his character. Interestingly, Toobin discovered that halfway through the trial, sixty percent of Caucasians believed Simpson was guilty, whereas, only twelve percent of African-Americans believed in Simpson's guilt.<sup>18</sup> These figures sustain the theory that an in-group/out-group dichotomy exists.

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<sup>15</sup> Alan J. Lambert, *Stereotypes and Social Judgment: The Consequences of Group Variability*, J. PERSONALITY & SOC.-PSYCHOL. 388, 388 (1995).

<sup>16</sup> FRANZIO, *supra* note 8.

<sup>17</sup> MARK CONSTANZO, PSYCHOLOGY APPLIED TO LAW, 138 (2004).

<sup>18</sup> Jeffrey Toobin, *Putting it in Black and White*, THE NEW YORKER, July 17, 1995.

### C. Judicial Bias

Judges maintain a significant amount of discretion in trial outcomes. While jurors render verdicts and judges serve as the impartial referee, judicial figures exercise serious influence in directing the verdict. Aesthetically, in courtrooms throughout the country, judges wear black robes and sit on escalated benches. Further, the courtroom itself forces an intimidating division between the judge and the citizens. Most often, the courtroom is aesthetically pleasing. To demonstrate in courtrooms throughout the country we find high ceilings, wood panels, marble columns, and visible symbols like the scales of justice; all of which reinforce the judicial branch's image as an institution worthy of respect. Despite members of the judiciary maintaining an air of authority and tradition, it may be impossible for judges to remain truly neutral. Judges, like the rest of us are human beings who make mistakes. Despite remaining neutral, judges hold attitudes, values, biases, and political interests that may affect their rulings. When judges attack a witness's credibility or improperly admit evidence, they negatively impact a defendant's verdict.

Throughout a trial, while judges ask juries to weigh the evidence and witnesses' testimony, the judge's biases enter the courtroom, whether intentional or not.<sup>19</sup> Judges are to suspend judgment until all the evidence, witnesses and closing arguments have been concluded. However, judges often draw their own conclusions based on preferences for the prosecution and, as a result, judges may display nonverbal cues which may influence jurors. Research indicates that a judge's appearance and behavior during a trial or while delivering jury instructions can

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<sup>19</sup> *Id.*

influence the jury.<sup>20</sup> Moreover, the Alabama Supreme Court in *Allen v. State*, suggested that courts have long recognized that nonverbal judicial behaviors (i.e. facial expressions and tone of voice) can influence jury verdicts.<sup>21</sup> Accordingly, when judges expect a guilty verdict, their non-verbal behavior is often perceived as cold, less competent, less wise and more anxious when delivering instructions to the jury.<sup>22</sup> In contrast, judges expecting a not guilty verdict are perceived as warmer, less hostile, and more open-minded.<sup>23</sup>

#### D. Personality

The personality of jurors has received minimal attention from academic researchers throughout the years.<sup>24</sup> A person's personality follows him or her throughout life, and is not to be left at the door when serving on a jury.

At present, only a handful of studies have examined the relationship between juror personality and jury decision making. The following studies will show just what was found with the limited research on juror personalities.

One study administered a personality test to 86 individuals from eight deliberating juries to measure the big five model of personality in Texas criminal and civil cases. It was discovered that jurors who reported high levels of conscientiousness were more likely to be influenced by

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<sup>20</sup> Marisa E. Collett & Margaret B. Kovera, *The Effects of British and American Trial Procedures on the Quality of Juror Decision Making*, 27 LAW & HUM. BEHAV. 403, 405-06, 418 (2003).

<sup>21</sup> 276 So.2d 583, 586 (Ala. 1973).

<sup>22</sup> Peter D. Blanck, *Calibrating the Scales of Justice: Studying Judges' Behavior in Bench Trials*, 68 IND. L.J. 1119, 1139 (1993).

<sup>23</sup> *Id.* at 1137.

<sup>24</sup> Dennis J. Devine et al., *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 PSYCHOL. PUB. POL'Y & L. 622, 674-75 (2001).



other jurors.<sup>25</sup> By contrast, jurors reporting high levels of openness were less likely to report being influenced.<sup>26</sup> Further, extraverted jurors were seen as being more influential than jurors who were introverted.<sup>27</sup> One criticism of this study was the failure to administer a personality test to all people summoned for jury duty to compare the personality tests of those jurors who were selected and those who were excused.

Another study discovered that a person's "character structure" (i.e., socialization, empathy, and autonomy) is related to the voting behavior and effectiveness of jurors.<sup>28</sup> According to this study, character structure relates because socialized individuals are often thought to be more inclined to follow societal rules and values.<sup>29</sup> With respect to empathy, these individuals are more inclined to entertain other people's viewpoint and consider either the defendant's or plaintiff's intentions when coming to their ultimate verdict.<sup>30</sup> Autonomous individuals are characterized as being independent and decisive; and, this study found that individuals who are highly autonomous were able to withstand group influence. A 1996 study examining the personality of jurors serving on felony cases found that guilty verdicts rendered by males are related to authoritarianism and socialization.<sup>31</sup> Two years later,

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<sup>25</sup> David K. Marcus et al., *Studying Perceptions of Juror Influence in Vivo: A Social Relations Analysis*, 24 LAW & HUM. BEHAV. 173, 173 (2000).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 184. Extraversion was the only big five-model trait associated with perceptions of being influential. *Id.*

<sup>28</sup> Carol J. Mills & Wayne E. Bohannon, *Character Structure and Jury Behavior: Conceptual and Applied Implications*, 38 J. PERSONALITY & SOC. PSYCHOL. 662, 662 (1980).

<sup>29</sup> *Id.* at 666.

<sup>30</sup> *Id.*

<sup>31</sup> Gary Moran & John C. Comfort, *Neither "Tentative" Nor "Fragmentary": Verdict Preference of Impaneled Felony Jurors as a*

another research study asked a mock jury to rate the dominance of jurors in the group during deliberations based upon on a videotaped recreation of a criminal trial.<sup>32</sup> The videotaped deliberations indicate that jurors who scored higher in the extraversion measure were more likely to be perceived as dominant by other jurors and more likely to be selected as a foreperson.<sup>33</sup>

To date, there is only one comprehensive study which examines the relationship between the big five model of personality and actual summoned jurors. This research conducted by Clark et al. is the first study which examines the personality of summoned jurors and the relationship to jury selection, excusal, and case outcomes from deliberating juries in real criminal and civil cases.<sup>34</sup> In total, there were 764 jurors who completed the personality and demographic measures. The researchers administered these measures before the jury selection process. A measure was also given after a verdict had been reached. Here, an attempt was made to ascertain jurors' case experiences. Court clerks were very useful in supplying information about the juries composition; verdict; and whether the jurors were struck for cause, excused by the defense, or excused by the prosecution.<sup>35</sup>

Results indicate personality and selection to a jury trial were not associated with a juror's personality traits.<sup>36</sup>

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*Function of Attitude Toward Capital Punishment*, 71 J. APPLIED PSYCHOL. 146, 146 (1986).

<sup>32</sup> K.J. Rotlenberg, M.G. Hewlett, & C.M. Siegwart. *Principled Moral Reasoning and Self Monitoring as Predictors of Jury Functioning*, 20 BASIC & APPLIED SOC. PSYCHOL. 173 (1998).

<sup>33</sup> *Id.*

<sup>34</sup> John W. Clark, Marcus Boccaccini, Beth Caillouet, & William F. Chaplin, *Five Factor Model Personality Traits, Jury Selection, and Case Outcomes in Criminal and Civil Cases*, 34 CRIM. JUST. & BEHAV. 641, 641 (2007).

<sup>35</sup> *Id.* at 647.

<sup>36</sup> *Id.* at 650-51.

However, there was an association between a juror's race and sex. Specifically, African-Americans were most likely to be excused from jury duty, and women were more likely to be selected to serve as a juror than a male. Another finding suggests the prosecutor was more likely to excuse younger and employed jurors than the defense.<sup>37</sup> Overall, there were 17 juries that deliberated to a verdict. Researchers found that juror extraversion was associated with case outcomes and processes.<sup>38</sup> Specifically, extraversion was associated with being selected as a jury foreperson.<sup>39</sup> Also noteworthy is the fact that foreperson extraversion was associated with lengthy jury deliberation times and the perceived foreperson influence in criminal cases.<sup>40</sup>

### E. Attitudes

Inside and outside the courtroom, all participants have independent judgments about some aspect of society. Jurors may have strong views about politicians, abortion, law enforcement, or capital punishment. It is an *a priori* assumption that jurors bring their attitudes and life experiences to the jury box. Obviously, in a courtroom where the jury decides guilty versus not guilty and freedom versus incarceration, attitudes of a jury are paramount. Even though *voir dire* may enable an attorney to identify potential jurors who are biased or subjective, impartial jurors still may end up serving in a trial. In the field of social psychology, it is without a doubt that attitudes influence social thought.<sup>41</sup> Accordingly, attitudes often surface in the form of schema. According to Wyer & Srull,

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<sup>37</sup> *Id.* at 651.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 655.

<sup>40</sup> *Id.* at 651, 654-55.

<sup>41</sup> *Id.* at 119.

schema are cognitive frameworks that help us to organize and analyze information about specific situations, concepts, or events.<sup>42</sup> In a criminal or civil trial, schema may play a crucial role as jurors go through a cognitive process in evaluating the guilt or innocence of an individual. Research conducted by Pennington and Hastie describes a story model for juror decision-making.<sup>43</sup> The authors hypothesize that jurors develop a narrative story of the trial and ultimately organize the trial information into an understandable context. This context enables them to render a decision.<sup>44</sup> Furthermore, the story model suggests that some jurors rely on their world knowledge and life experiences in deciding the guilt of an individual.<sup>45</sup> Most importantly, jurors go through this cognitive story construction from the opening statement to the actual deliberations. To illustrate the above schema or story model, imagine a jury of twelve individuals in which there are seven males and five females. Moreover, there are four jurors with advanced degrees, six with a high school education, and two with a GED. Now imagine four jurors who are Caucasian, five African-Americans, and three Hispanics. Importantly, all of these jurors bring their own biases and prejudices into the courtroom. Furthermore, each one develops his or her own personal schema in evaluating the evidence, the defendant, and events in question.

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<sup>42</sup> HANDBOOK OF SOCIAL COGNITION, 47 (Robert S. Wyer, Jr. & Thomas K. Srull eds., 1994).

<sup>43</sup> Nancy Pennington & Reid Hastie, *The Story Model for Jury Decision Making*, in *INSIDE THE JUROR: THE PSYCHOLOGY OF JUROR DECISION MAKING* (Reid Hastie ed. 1994).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

## F. Ideology

The ideological construct that has received the most attention in jury research is authoritarianism. According to Narby, Cutler, and Moran, the authoritarian is likely to hold or subscribe to conventional values, submit to strong leadership, act aggressively toward out-group members, and “believe in the rightness of power and control, whether personal or societal.”<sup>46</sup>

In essence, a reasonable person could conclude that authoritarianism is the value that a wrong should be punished through retribution.<sup>47</sup> As a result, jurors who are authoritarian are more likely to recommend lengthy sentences, to vote guilty, and to punish the defendant when he or she is of a lower social status than the juror or attitudinally dissimilar.<sup>48</sup> Research on authoritarian jurors has also shown that a juror’s ethnicity, sex, and type of crime committed serve as moderators of the relation between authoritarianism and outcomes.<sup>49</sup>

A second ideology is the belief in a just world. According to Boyll, this person views life as just and fair and ultimately individuals get what they deserve. To illustrate, research conducted by Gerbasi, Zuckerman, and Reiss discovered that mock jurors who demonstrated a

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<sup>46</sup> Douglas Narby, Brian Cutler, & Gary Moran, *A Meta-Analysis of the Association Between Authoritarianism and Jurors’ Perceptions of Defendant Culpability*, 78 J. OF APPLIED 34, 34 (1993).

<sup>47</sup> *Id.* at 35.

<sup>48</sup> Virginia R. Boehm, *Mr. Prejudice, Miss Sympathy and the Authoritarian Personality: An Application of Psychological Measuring Techniques to the Problem of Jury Bias*, 1968 WIS. L. REV. 734, 744 (1968).

<sup>49</sup> Linda A. Foley & Minor H. Chamberlin, *The Effect of Race and Personality on Mock Jurors’ Decisions*, 112 J. OF PSYCH. 47, 47 (1982).

strong just world belief are more likely to blame the victim for the crime being committed.<sup>50</sup>

### G. Stress

The reality is that most legal scholars forget jurors are placed under a tremendous strain that ultimately manifests as stress. The legal community must be cognizant that jurors may be experiencing extreme levels of stress before, during, and after the trial. Research conducted by the National Center for State Courts suggests that:

[j]urors confront numerous sources of stress at every stage of jury duty, even in routine trials. Beginning with the summons to jury service, they experience disruption of their daily routines, lengthy waits with little information and often in unpleasant surroundings, anxiety from the scrutiny of lawyers and the judge during voir dire, tension from sifting through conflicting versions of facts and unfamiliar legal concepts, conflicts during deliberations, and isolation following the verdict and their release from jury service.<sup>51</sup>

In addition, research conducted by Hafemeister and Ventis indicated that jurors maybe more likely to experience stress in trials that depict unusually violent crimes.<sup>52</sup> Importantly, these trials are characterized by visually graphic and horrific evidence that is often

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<sup>50</sup> Kathleen C. Gerbasi, Miron Zuckerman, & Harry T. Reiss, *Justice Needs a New Blindfold: A Review of Mock Jury Research*, 84 PSYCH. BULL. 323, 330 (1977).

<sup>51</sup> NATIONAL CENTER FOR STATE COURTS, THROUGH THE EYES OF THE JUROR: A MANUAL FOR ADDRESSING JUROR STRESS 1 (1998).

<sup>52</sup> Thomas L. Hafemeter & W. Larry Ventis, *Juror Stress: Sources and Implications*, 30 TRIAL 68 (1994).

accompanied by a recording of the crime scene.<sup>53</sup> It should be noted that jurors in these trials have subsequently gone on to reveal stress related symptoms for months afterward.<sup>54</sup> Some of these jurors have actually sought out professional assistance i.e. counseling which could continue for years. To demonstrate, one juror who served on a capital murder case suggested that she almost divorced over it.<sup>55</sup> This juror experienced depression, a feeling of a lack of control, and nightmares.<sup>56</sup> She ultimately stopped talking. In a second example, a juror who served on a case that was punishable by a life sentence stated:

After the trial, the first day I went back to work, somebody came up and said, 'Hi you doing?' I just cut loose crying and I cried for an hour solid, and my boss was in the office that day, just on a routine visit, and that poor man didn't know what to do! [He] kept saying, 'she's got to get some help!' He thought I was having a nervous breakdown, but I mean, it was just, it had to come out of somewhere, I guess. . . . I thought about it all the time, you know.<sup>57</sup>

A second source of stress is deliberations. According to research conducted by National Center for State Courts, the foremost stressor as reported by jurors in death penalty cases is deciding whether or not to impose the death penalty.<sup>58</sup> Another stressor as reported by these jurors is determining whether the accused is guilty of a capital

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<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> Michael E. Antonio, *I Didn't Know It'd be so Hard: Jurors Emotional Reactions to Serving on A Capital Trial*, 89 JUDICATURE 282, 286 (2006).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 71.

offense.<sup>59</sup> With respect to non-capital offenses, the number one source of stress is deciding on a verdict.<sup>60</sup> Given this, Bornstein et al. conducted a study that examined juror stress in 28 trials.<sup>61</sup> A total of one hundred and fifty-nine jurors participated in the study, which examined stress immediately after the trial and one month afterward.<sup>62</sup> The results indicate that the greatest amounts of stress resulted from the decision-making tasks itself.

Another source of stress is the *voir dire* process. Most importantly, the National Center for State Courts discovered that over three-quarters of jurors experienced stress during jury selection. This makes perfect sense if we recognize that the majority of jurors are unsure of the process and most often, they are thrown into an awkward situation.<sup>63</sup> Further, *voir dire* is often characterized by intrusion. Attorneys (whom are perfect strangers) ask very personal and private questions about the lives of jurors and this “shocks” and violates all rights of privacy.<sup>64</sup> It should also be noted that stress may arise from responding to surveys that may be administered by the court.<sup>65</sup> To demonstrate, jurors are asked to provide demographic information.<sup>66</sup> This often includes age, gender, race, education status, marital status, and possibly occupation.<sup>67</sup> A second type of survey and most often traumatic is the one that is case specific.<sup>68</sup> Examples here include attitudinal measures such as opinions toward sexual

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<sup>59</sup> NATIONAL CENTER FOR STATE COURTS, *supra* note 61.

<sup>60</sup> *Id.*

<sup>61</sup> B. Bornstein et al., *Juror Reactions to Jury Duty: Perceptions of the System and Potential Stressors*, 23 BEHAV. SCI. & L. 321 (2005).

<sup>62</sup> *Id.* at 326-27.

<sup>63</sup> *Id.* at 16.

<sup>64</sup> *Id.* at 17.

<sup>65</sup> *Id.* at 20

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 20-21.



offenders, abortion, capital punishment, politics, and religion.<sup>69</sup> Additional questions include victimization, any prior exposure of the case, prior arrest record, and any familiarity with the criminal justice system (i.e. a family member or friend that has or had been incarcerated or arrested.)<sup>70</sup>

Another source of stress is the disruption of the daily lives of jurors.<sup>71</sup> According to research examining juror stress, disruption of daily lives is a serious issue.<sup>72</sup> Serving as a juror means essentially surrendering one's daily schedule in exchange for public service. Interestingly, an argument could be made that the majority of people would consider jury duty as bothersome and at best, undesirable. It should be noted that attorneys should consider the specific circumstances of a prospective juror. Prospective jurors could be experiencing childcare issues, marital and financial problems, as well as health conditions. The last source of stress is the instruction to jurors that forbids them from speaking about the trial.<sup>73</sup> Accompanying this is the restriction from reading the newspaper or viewing the news on local or cable television. According to the National Center for State Courts, 60 jurors were asked, "What were the negatives of serving as a juror?"<sup>74</sup> One juror responded, "It was very difficult because you could not talk or share the internal debate in my mind."<sup>75</sup> There were doubts that could not be shared.

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<sup>69</sup> *Id.* at 21.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 25.

<sup>72</sup> Brian Bornstein, Monica Miller, Robert Nemeth & Gregory Page, *Juror Reactions to Jury Duty: Perceptions of the System and Potential Stressors*, 23 BEHAV. SCI. & L. 321, 321, 346 (2005).

<sup>73</sup> NATIONAL CENTER FOR STATE COURTS, EVALUATION OF THE JURY DEBRIEFING PROGRAM: KING COUNTY SUPERIOR COURT, at Appendix B-2 (2003).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

A second juror suggested: “Having to keep everything inside of you. If I had to go much longer, thought [I] would go nuts. [I] [w]alked out of [the] courtroom after seeing [a] picture of [the] victim and saw a girl on the bus that looked like [the] victim.”<sup>76</sup> Most intriguingly, research reveals that reaching out and seeking someone else is paramount for an individual’s well being.<sup>77</sup> This is why jurors are psychologically harmed by forced silence and isolation for the duration of a trial.

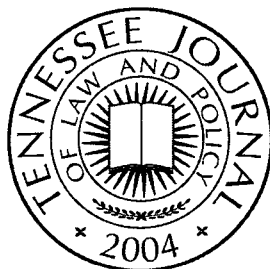
### III. Conclusion

Trial by jury is a cornerstone of American jurisprudence. The 21<sup>st</sup> century juror is asked to bear a heavy burden. We expect jurors to be impartial and conscientious. In courtrooms across this Country, we strive and desire for just verdicts and equity for all parties. Most importantly, these admirable goals may be undermined by extra-legal factors that cannot be dismissed. This article examined physical attractiveness, social categorization, judicial bias, personality, attitudes, ideologies, and stress. All of these factors collectively, or in part, may undermine the pursuit of justice. Ultimately, how do we predict the unpredictable?

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<sup>76</sup> *Id.*

<sup>77</sup> CHARLES MORRIS & ALBERT MAISTO, UNDERSTANDING PSYCHOLOGY (7<sup>th</sup> ed. 2006).



**TENNESSEE JOURNAL OF LAW AND POLICY AND  
CENTER FOR ADVOCACY AND DISPUTE  
RESOLUTION**

**SUMMERS-WYATT SYMPOSIUM  
“ASKING JURORS TO DO THE IMPOSSIBLE”**

**FRIDAY, MARCH 27, 2009**

**THE UNIVERSITY OF TENNESSEE COLLEGE OF  
LAW**

## WELCOME AND INTRODUCTION

PROFESSOR WHITE: My name is Penny White and I am the Director for the Center for Advocacy and Dispute Resolution and the faculty advisor for the Tennessee Journal of Law and Policy along with Dr. Otis Stephens.

I want to begin by telling a story. It's an automobile accident case. A simple car wreck. The lawyers are good. They're well experienced. They know how important it is to communicate with juries. The law is clear. The judge is learned. The judge is not only learned, but patient. Does this sound like a dream world so far?

The judge has carefully instructed the jury on the law. The jury has been in deliberations for about three hours when there is knock, knock, knock on the door. A question. These are the jury's questions: What are the three lawsuits? What damages have been done? Who is suing whom, for what? These really were questions written by Tennessee jurors in a lawsuit within the last several years.

It is my honor to welcome you to the first Summers-Wyatt symposium and to begin by expressing our gratitude to the members of the Summers-Wyatt law firm for the opportunity to come together. We are lawyers and judges. We are linguists and psychologists. We are students and citizens. We have come to confront the question: Are we asking jurors to do the impossible?

Because of the abiding faith in the American Justice System and a tireless devotion to the protection of individual rights that the members of the Summers-Wyatt law firm has, they have generously enabled the College of Law and the Center for Advocacy and Dispute Resolution to partner with the Tennessee Journal of Law and Policy and host this symposium. Join me in thanking them. Not only will this symposium have an effect hopefully on those of you in the audience today, but it will also have a lasting

effect because these proceedings, as well as the papers of the experts who speak with us today, will be published in a special edition of the Tennessee Journal of Law and Policy. Now, I would like to introduce to you the person who makes all of these efforts at the law school possible by his continuing support and his endless energy, Dean Blaze.

DEAN BLAZE: Well, welcome to the law school. On behalf of everybody here, we are really excited to have you. Now, we're talking about juries, but it's kind of intimidating when you look out at the audience and the jury that you're talking to is made up entirely of judges or primarily of judges. I'm used to talking to law students, I'm used to talking to lawyers. Your Honors, welcome and we're glad you're here and participating. This is an exceptional program that Penny and the Journal have put together. I want to add my thanks to the Summers-Wyatt law firm for everything you've done to make this possible, for your ongoing support for the law school. And to the students, I want to add my thanks for everything you've done, the staff of the Tennessee Journal of Law and Policy.

You know, we're excited to have this because this is a perfect place for this kind of program. This law school is—I'm going to sound like a Dean—but I firmly believe that it's the best place in the country for training people to be lawyers. Whether they want to be transactional lawyers, whether they want to be a general practitioner, whether they want to go to a law firm, whether a large firm, or whether they want to be advocates in the courtroom, this is the best place for it.

This is an incredibly important topic. It is a topic that is near and dear to my heart. In fact, Professor Dumas and I had a research project going for a while on the "heinous, atrocious, and cruel" instructions being used in Tennessee. We were going to explore the comprehensibility of that. We had a survey set up. Then,

thank God, the Sixth Circuit said: "You don't need to do that; 'heinous, atrocious, and cruel' makes no sense. We're not going to use it in Tennessee anymore." While I missed doing the research with you, Bethany, I'm glad that happened.

We're always talking about the importance of lawyers. Lawyers are essential, but the jury system is absolutely crucial to our system of justice. To use a very simple example, we hold up "To Kill a Mockingbird," Harper Lee's book, and Atticus Finch as the best of our legal system. Atticus was incredibly capable and committed to justice. He stepped forward and did what needed to be done in the small town to represent Tom Robinson. That's fabulous and we should embrace that image, but remember that Tom Robinson, despite having Atticus Finch, still ran. He still ran and was killed while escaping. Why did he run? Because the system failed him because the jury system failed him.

Now, we're here today not to talk about bias embedded in potential juries. We're not talking about "To Kill a Mockingbird," Tom Robinson running, or Scottsboro. We are talking about proper functioning of juries and properly instructed, properly informed, properly engaged juries can do a lot to overcome bias and can actually make a difference in the proper functioning of our system. In conclusion, I hope you enjoy our program, and I hope you learn and that your thoughts are provoked today. Thank you.

## INTRODUCTION TO SYMPOSIUM

PROFESSOR WHITE: Our symposium is divided into two distinct parts: acquisition and application. I tell you this because it's going to be a little different than your run-of-the-mill symposium. This morning we are in the acquisition phase. We will acquire knowledge.

Knowledge about language and how we can better communicate with juries for the purpose of helping them perform what the United States Supreme Court has called the most awesome responsibility. Beginning with our keynote speaker and a panel of distinguished individuals, we will acquire this knowledge from a diverse group of experts, diverse in their expertise, in their approaches, and in their viewpoints.

After our morning of acquiring knowledge, we will move on this afternoon to application. This afternoon, based on a case modeled after a Tennessee decision, we will ask lawyers and judges, aided by law students, to contemplate jury instruction issues while a mock jury of undergraduate students deliberates the same case in another room. At the end of the day, we will join in again to exchange what we have learned in the hopes that in some small way, we will make the task of jurors less impossible in the future.

At this point, I want to turn the program over to the Editor-in-Chief of the Tennessee Journal of Law and Policy and we'll get started. Ashley Musselman, who has worked on this program with me since about September. Thank you, Ashley.

MS. ASHLEY MUSSELMAN: Good morning. My name is Ashley Musselman. I'm the Editor-in-Chief of the Tennessee Journal of Law and Policy. I want to start off by saying, on behalf of the Tennessee Journal of Law and Policy that you all for coming. I want to also recognize some of the members of the board of the Journal. When I say your name, please stand and be recognized. Ashonti Davis, managing editor. Chris Hayden, and Ashley White, research editors. Jade Dodds and Sara White, articles' editors. Jonathan Buckner, publication editor. Jesyca Westbrook, candidacy-process editor. Thank you all for your hard work and dedication to the Journal. I would also

like to thank the Journal members that were part of the symposium committee. I would like to recognize a few of them as well. When I say your name, please stand and be recognized, Sally Goade, Sean McDermott, Monica Rice, Jesyca Westbrook, Ashley White and Crystal Young.

At this time, I'd like to introduce the keynote speaker at our event today, Peter Tiersma. Dr. Tiersma is a Professor of Law at Loyola University in Los Angeles, California. He is a nationally renowned speaker and expert in writing comprehensible jury instructions. He has written extensively on language and the law and on jury instructions. His recent publications include "Communicating with Juries," "How to Draft a More Understandable Jury Instruction," "Some Myths about Legal Language," and "Speaking of Crime: The Language of Criminal Justice." So, without further ado, please join me in welcoming Dr. Tiersma.

[Professor Tiersma's keynote speech was a summary of his article, *Asking Jurors To Do the Impossible*, located on pages 105 to 147 of this journal. Following his presentation, he was asked the following questions.]

## QUESTIONS AND ANSWERS

MS. MEREDITH RAMBO: You had mentioned what you called the gag rule. Basically about how it's been impossible to keep jurors from talking to each other during the entire process versus in deliberation, but then later you had mentioned something about being lie detectors and twelve heads being better than one. Don't you run into the fact that if jurors are conversing during the entire process, that one person's bias may influence how those other jurors hear the evidence and process it themselves? Might the



problem arise that this may lead one person to make the judgment?

PROFESSOR TIERSMA: Well, that, I suppose, is the concern. That's probably the reason you have those restrictions. The ABA came up with a rule recently, which allows jurors, as a group to discuss things during breaks, but everyone has to be there.

That's one fairly conservative way of implementing that idea. Yes, there is a problem if one juror is a loudmouthed juror who dominates a discussion. I think that's a concern. But you know, it's also a concern when they're all together in the jury room at the end.

I know that's an answer that judges and lawyers often have with respect to jury instructions being rather difficult to understand. They argue that some of the jurors are going to be relatively well educated. They can explain it to the others. Ultimately, they'll all understand what the instructions mean. Some research has suggested that in fact that isn't necessarily the truth. That what happens is that it's not the person who understands the instructions best who explains it to the others. It's the loudmouth. That person might understand them correctly or that person might not understand them correctly. He or she tends very forcefully to state his or her opinions. He or she might be wrong; he or she might be right. So, you've got that sort of person on just about any jury.

MR. ALEX RIEGER: Along with the gag order questions, say there was a jury that didn't involve that loudmouth person but still didn't have the gag rule. They deliberated and discussed amongst themselves before all the evidence is presented, wouldn't possibly letting them discuss early and letting them all be together, wouldn't we still be afraid that there would be some sort of band wagon approach, where twelve people essentially group think their way to an

early answer and stubbornly and steadfastly stand by that answer until all evidence is presented and basically just ignore the other evidence in favor of the decision they've already made?

PROFESSOR TIERSMA: The question is this: Is it possible for jurors to keep an open mind? If we tell them, "You can discuss it, but keep an open mind. You're going to hear other evidence. You might be surprised by what you hear."

We've got a psychologist here to tell us more about how people reach decisions. Typically, you tend to reach a tentative conclusion. That's going to happen regardless of whether they discuss it or not. They're going to reach tentative conclusions and they're going to modify that conclusion as additional evidence comes in.

I think that jurors are fair-minded enough that if you tell them, "Reserve judgment until the end. You can talk about it, listen to the witnesses, you can reach a tentative conclusion. You've got to listen to the other jurors and reserve your final judgment until the end." I think they should be capable of doing that. We actually have a certain amount of evidence on this from Arizona. Jury experts have been looking at actual deliberations. Shari Diamond has written about this very issue. She concluded that there are some dangers to this, but that overall the process seems to be working pretty well.

JUDGE ROBERT CHILDERS: Have there been any studies on group dynamics, particularly on group dynamics in the jury in a court setting that are allowed to talk to jurors. What about a group of jurors getting together and having lunch every day and that sort of thing and the group just sort of leads the jury in the direction that they want to go during the deliberations? Are you familiar with any studies on group dynamics?

PROFESSOR TIERSMA: Well, no, that's not an area that I'm really an expert on to be honest. I mean I'm a law professor and I used to be a linguist, so I'm really concentrating on language.

PROFESSOR WHITE: I want to ask the last one. As an evidence professor, I'm struck that you suggest that one solution to unringing the bell is to specify the evidence you're asking them to forget, which is what why we often teach law students that they may just not want to object because they will re-emphasize.

PROFESSOR TIERSMA: That's a strategic question for the lawyers.

PROFESSOR WHITE: If the judge restates it, "Don't take into consideration that the defendant assaulted his past three girlfriends," that improves the jurors' comprehensibility?

PROFESSOR TIERSMA: Well, does it improve juror comprehensibility? I think it commonly does. It also reinforces that message. So, this is very much a strategic decision. If you really want to have an effective limiting instruction, I think the judge would have to say, "Evidence has been introduced that the defendant attacked his previous girlfriends. You can consider that evidence on the question of whether the defendant testified truthfully when he denied doing so, but you should not consider it on the question of guilt."

Now, once you say it that way, you begin to realize how problematic limiting instructions are. But at least that would focus the jury on the issue. If it's a punitive damages case, you might say, "You've heard testimony of some incidents that happened outside of Tennessee. You can

consider that on the question of this but not that." Rather than simply talk about other state evidence generally, you identify exactly what you're talking about. That's my idea. Yes, they're extremely problematic. There's no doubt.

## INTRODUCTION

MS. ASHLEY MUSSELMAN: At this time, I would like to introduce our panel. Our panel is comprised of members of various disciplines, including law, psychology, criminal justice, and linguistics. The panel is here today to provide a response to this issue addressed from their perspective of their various disciplines. So please help me in welcoming our panelists.

Janet Ainsworth, a professor of law at Seattle University School of Law. John Clark, III, an associate in criminal justice at Troy University. Bethany Dumas, Professor of English here at the University of Tennessee at Knoxville, and David Ross, Professor of Psychology at the University of Tennessee at Chattanooga. We'll start with Professor Ainsworth.

## COMMENTS OF JANET AINSWORTH

PROFESSOR AINSWORTH: It's a real honor to be here today and to be able to comment and make a few observations on Professor Tiersma's interestingly titled "Asking Juries to Do the Impossible" presentation. I'm struck that you said this as though it's a bad thing. When I think of the impossible things I am reminded of the line from Alice in Wonderland. When Alice said, "Well, I can't do that. It's impossible." The Red Queen replied, "Well, I often believe six impossible things before breakfast."

So I guess the question that I want to ask today is: Are these things really impossible? Lawyers and judges can do things to make those impossible tasks that we give

to jurors perhaps a little bit more possible. I work with issues of language in law, but today I'm really wearing a somewhat different hat. I was a trial attorney before coming into the academy. I practiced criminal defense for about eight and a half years, and tried somewhere in the neighborhood of 100 to 150 cases—and they were virtually all jury trials. My thinking about this issue is much less as an academic and probably much more as a lawyer.

When Professor Tiersma talked about impossible thinking, he talked about a great many different things that we ask jurors to do. These tasks really fall into several different kinds of categories. What might be instructive for us is to think about the ways in which we can help jurors with some of these categories, whereas others we may not be able to do as much about. For example, Professor Tiersma reminds us that jurors are often asked to make decisions about issues instructed in technical language or archaic language, or with confusing, convoluted, poorly structured, and lengthy sentences. Those are all examples of one set of problems—namely, that jury instructions are often fairly opaque. They are not user-friendly.

A second problem is that jurors are often asked to make determinations about matters that we think of as more properly legal matters in which they have relatively little guidance about how to think about the legal issues. Third, we often ask jurors to make decisions in which they ought to make decisions sequentially in some order, but we fail to tell them that. In other words, we don't road map for them how the various issues they are deciding may fit together. Finally, we ask jurors to both assess the past and predict the future, or sometimes even to construct a hypothetical present and future as though something different had happened in the past. All of these tasks are in some sense impossible. I'm going to speak to each one of them briefly. I hope to make some suggestions about ways that lawyers

and judges can deal with some of these impossible tasks, building on the things that Professor Tiersma has said.

I'm not going to speak very much about the problem that is probably the easiest for us to do something about, which is drafting jury instructions that make sense in plain English. Getting rid of some of the archaic language. Breaking sentences down into simpler sentences, not embedding clause, upon clause, upon clause, nominalization upon nominalization, upon nominalization—all these can make train wrecks of jury instructions. Rather we should make them instructions that people can actually understand.

Simple as this sounds, there are a number of challenges to this. For one thing, all of us today are here because we were trained in the use of language in specialized ways, as judges, as lawyers, as legal professionals, and as social scientists. It's sometimes easy for us to forget how difficult it is for ordinary jurors, who don't have as much experience with parsing that kind of specialized literary language to understand what it is that we're saying. I suspect this is only going to get worse. I keep being reminded that my students now are millennials. They're not used to reading long things. They're not even used to reading e-mails anymore—that's for old people. They're not even using IM's anymore. I've been told those are for semi-old people. Now they're twittering. I've been told, although I don't twitter myself, that twitter limits what you can say to 140 characters. I believe that includes spaces. So any statement which is longer than 140 characters may be daunting to the jurors of the future. This is something we need to think about.

My advice to lawyers in preparing to craft instructions is to talk to the jurors in your cases when you're finished. I've often found that jury instructions that seemed clear and intelligible to me turned out to present land mines for jurors. They didn't to me because I had read

them so many times before and heard judges utter them so many times before that they seemed completely obvious to me. Only when I spoke to jurors after the trial did I understand how confusing they were, or did I understand that the jurors actually misapprehended the instructions. I learned a lot about jury instructions, and frankly, I learned a lot about lawyering generally every time I spoke to jurors after trial. My suggestion to those of you who are in the practicing bar is, if a judge allows you to speak with jurors after they conclude their jury service on your case, take full advantage of that. You'll always learn something interesting and important from them.

I pointed out that jurors are often asked to deal with what we might consider legal questions. Professor Tiersma gave you a couple of examples. One example that I felt the most vexing when I was in practice came out of a habitual criminal statute in Washington State. This statute was an early "three strikes and you're out" statute, which meant that if you had three convictions of certain types of felonies, you got a sentence of life in prison. The Supreme Court in our jurisdiction decided that, in order to get a conviction under the statute, all the elements needed to be proven beyond a reasonable doubt, including that the convictions all be constitutionally valid. Therefore, the question of the legality of any prior conviction had to be answered by the jury. The jurors were instructed that it was their job to determine whether prior convictions, often by guilty pleas, were constitutionally valid beyond a reasonable doubt.

So the jurors had to figure out whether a particular guilty plea was constitutionally valid. This is something that has sorely tried many judicial minds. The idea that jurors could do it was somewhat counter-intuitive, to say the least. Worse yet, they had to make their determination beyond a reasonable doubt. What it means to a jury to decide that something was constitutionally valid beyond a

reasonable doubt was even more problematic. We managed to fix that, of course, by scrapping the entire statute and coming up with a new “three strikes and you're out” law, which doesn't have that problem. The new statute has a variety of other problems but that's beyond the scope of this talk.

I think if there's a wonderful take away from the examples that Professor Tiersma was giving to us, it's that jurors are really not told very much about how to be jurors. They are not given an instruction manual. They're not given a good road map about how they should proceed. That's easy for us to forget because those of us who are lawyers and who are judges have seen so many jury trials that it seems blatantly obvious how jurors ought to begin their deliberations, how they ought to determine what the issues are and how to decide them. In reality, that isn't necessarily the case, and becomes particularly clear when you talk to jurors after trial.

A greater use of meta-instructions—instructions about instructions, instructions about how to proceed—are certainly useful. Indeed, in Washington they've begun to use some of those meta- instructions, telling jurors how to think about the decision making process. However, they didn't replace the old instructions and so we now have probably the worst of all possible worlds. For example, in our criminal instructions in Washington, we gave an instruction that begins, "A person commits the crime of X when. . ." blah, blah, blah, followed by a description of the elements of the crime. We refer to that as the “a person commits” instruction. Jurors were sometimes confused because they didn't understand how the elements related to each other and whether each of the elements were essential to conviction.

So the jury instruction committee got together and said, "Let's come up with a new instruction—kind of a meta-instruction. We will call that the "to convict”



instruction, reading, "To convict a person of the crime of X, you must first find X. You must then find Y. You must then find Z. If you have found all these elements beyond a reasonable doubt, it's your duty to return a verdict of guilty. If, however, you have a reasonable doubt as to any one of these elements, it will be your duty to return a verdict of not guilty." But, they weren't sure whether they should get rid of the "a person commits" instruction, so now jurors get both. This ends up being very confusing. A number of jurors have said, "Well, we couldn't figure out which of those instructions was the real one. So we (a) flipped a coin, (b) tried to apply both, (c) discarded both of them." Those are all options that jurors have picked. You can see that continuing to use both instructions turns out to be not very helpful.

Cases involving lesser-included offenses provide a classic example of an issue needing some kind of meta-instruction that tells jurors how to make decisions about lesser-included offenses. The suggestion is often made that special verdict forms—verdict forms that actually walk the jurors sequentially through the fact determinations they have to make—can be helpful to jurors. Why then do lawyers and judges find special verdict forms so difficult? Why are they so resistant to using them? I think one reason is a fear of inconsistent verdicts. If we actually could open up the black box of a jury verdict and get something other than "thumbs up, thumbs down," we're worried that we might in fact find that the jurors had made inconsistent factual findings. This would be a problem, making us face up to facts we might prefer not to know.

One interesting potential solution to that problem could come from technology, oddly enough. If you've bought anything online in recent years, you probably know that at some point they're going to show you a little box following the sales terms that says, "I accept." You put a little green dot in that box to get to the next screen. There's

no place on that screen where you can do anything other than to either click "I accept" or get out of the program and not buy the thing. If you take a technological approach to using a special verdict, you could set the form so that once the jurors made a particular determination; they would never then see the rest of the instructions that no longer were relevant. For example, in a lesser-included offense situation, you could actually have the jurors get a little box to check if they found the defendant guilty of the greater offense. If they check that box, they never see the follow-up screens asking them to consider lesser offenses. If they find the defendant not guilty of the greater offense, then up pops the next screen instructing them on the lesser offenses. This electronic jury verdict form would get rid of the distracting things jurors don't need to consider but instead give them forms describing the issues that they really need to decide in the case.

With respect to the impossibility of predicting the future and dealing with hypothetical futures like, for example, what would have happened if the disease had been appropriately diagnosed, let me say this. It is true that jurors are certainly not able to do that, but nobody else is either. I think that actually telling the jurors that explicitly is not a bad idea. Jurors get nervous about not being able to perform their job correctly. If you can tell them that some things are inherently not knowable by anyone, not just by them because they're not legally trained, but by any of us, legally trained or otherwise, they feel much more comfortable about making the kind of determinations that we ask them to do.

If juries are in fact asked to do the impossible, as Professor Tiersma suggests very colorfully that they are, it only seems fair to encourage lawyers and judges to do the merely challenging—that is, to assist them in performing their roles. If we do this through better instructions, we may help make the impossible for jurors into the merely

challenging, whether it is in fact before or after breakfast. Thank you.

### COMMENTS OF JOHN W. CLARK III

PROFESSOR CLARK: It's good to be here. I just kind of tell it like it is. That's always been my approach. I'm real straightforward and I conduct a lot of jury research. I am very passionate about this idea of twelve persons coming together and trying to deliberate and ultimately reach a verdict. Back in 2000, I was really thinking a lot about the criminal justice system, law enforcement, courts and corrections, and equity, due process. I remember in graduate school thinking about where I want to go with this. I love the legal system. I love engaging in dialogue with attorneys and judges. I mean I've really been fortunate. I owe my career to judges who gave me the opportunity to conduct jury research.

I've surveyed, examined, and discussed a lot of different studies, attitudes, ideologies, personalities, technology, mental retardation with jurors. I've actually examined, met with, and discussed over 4,000 since 2000. And predominantly this is all in Alabama and some in Texas. I've always been, as I say today, a straight shooter with this. I very much appreciate the professor's opening if you will. I've learned a lot. I've thought a lot about jury instructions. One of the words that I've heard today is control.

Well, I drove here because I wanted to be in control rather than fly. Because I'm not in control. So I can control so much. I mean I am very eclectic. You can tell already. I've heard this idea of functioning. Functioning. Well, I'm probably dysfunctional, as well as most of society. Our society, you could argue, is dysfunctional and then we try to make them functional in a jury system that is, some would argue, dysfunctional. We have a lot of

dysfunction going on. It seems that we're trying to make it functional. If this doesn't make sense, then it might later. If you drink a beer, it might then. I do my best work, you know, late at night. I've written my best articles late at night.

But with that said, tomorrow it may even make better sense. With that being said, this idea of truth and this idea of equity, and sometimes I get really caught up on it, is that really what it's about? I mean is that what we want? I think more times than not, we all get caught up in our prescribed rules and our processes in the roles that we follow. Sometimes we tend to forget control, function, truth, and equity. What are we really trying to do? I'm really in it for the pure essence of finding out something and going in to examine something.

I've had the real unique opportunity to speak to a lot of different persons before. Whether it's law school students, or undergraduate students, graduate students, attorneys, and judges. They'll all tell you, in the past, that I just come at it the way I come at it in my approach. I really do think that we need to recognize again, when it comes to jurors, that they do have their own lives. I've conducted a lot of research in this stuff. And I've met with a lot of jurors as I've indicated.

Jurors have their own lives. We summon them and we're lucky to get probably half of all that go out. There's already this idea of cross representation and how many jurors are we truly bringing in. Nonetheless, we take them from their lives where it's chaotic—there's work, kids, responsibilities, trying to keep a job, the economy that we live in. Nonetheless, they have a life. We ask them to come down to this foreign atmosphere, and foreign room. We place them in some really unusual situations.

Nonetheless, we put them in this environment and we expect so much from them. They're just out of their element. We have to understand that. They have their own

lives. We've got to understand and recognize we're taking them from their world and putting them somewhere that may be very different. I think sometimes we lose focus of that.

We also, secondly, must recognize that when it comes to jurors, they have their own personalities. So, I think this is really cool because we're thinking about jury instructions. We're really focused on meticulously and the semantics and the lexicon and putting these words in place and trying to make sure that the instructions and it's just right. We all need to do the best that we can.

With that being said, we can be perfect on instructions. Then think back to yourself when you were in school. How many people follow the instructions? You take a test and it gives you instructions. How many people don't follow instructions? So there's something to be said for that. Think about the personalities. Think about attitudes. Think about ideology. How is this and instructions related? Well, the case could be made that no matter how good a job we do it might not matter.

No matter how good we come across with instructions, and we want to maintain control as we've already indicated. We want jurors to function, as they need to function. But can we ever get away from recognizing what jurors bring in when we come inside the threshold of the courtroom door. Never forget or just accept the personality, attitudes, and ideology that's brought inside these courtrooms.

Ultimately, you could have the greatest instructions but we all must recognize that there's some things that we can't control. Because I'm extraverted and I score high on neuroticism. I score high on openness. I score high on conscientiousness. I score very low on agreeableness, which means I don't really get along with a lot of people.

That's called the five factor model personality. When you think about, again, recognizing control and

function and everything that works fine. The point is there's a human dynamic to this. There's a human element, and that's what I want everyone to recognize. Of course, judges, attorneys, and the law students especially. There's the individuality. There's this discussion of understanding that you select.

We're thinking about trial advocacy, thinking about twelve jurors and some alternates. Ultimately, there's this idea of it's better to have twelve than to have one. Understand that when jurors are deliberating, and this is important, the twelve become one. This is fascinating. As a trial attorney, you select individuals and excuse. Ultimately, twelve do make one. The key to this, to how much and how important the one becomes is with the passage of time. If it's a real slam shut case and the strength of evidence is very strong, the twelve may not necessarily come to be one. With the passage of more time, the twelve mold together. That's when you get into a collective personality. I think that's really important and that's not really mentioned a lot in the literature. You may go out and you look for individuals that you think are best suited for the case at hand, but ultimately, the twelve, with enough time, could easily become one.

With respect to note taking, I think maybe it's not necessarily a bad thing. I know there's the pros and the cons for that. But, maybe if we're in the courtroom and it's isolated and they're writing something, maybe something's pertinent enough. That does show a degree of conscientiousness, and maybe it could be germane later in the deliberations.

With respect to discussing this with other jurors: we must keep in mind, no matter what we do, jurors are going to discuss the case with other persons. That's the reality of this. We have to accept that. Whether they discuss it amongst themselves, but more importantly, without them being sequestered, going to their homes and

at night. It's so abnormal not to talk at times and discuss. Whether it's a family member, whether it's a friend, they will get it off their chest. It's a stressful situation. They are taken from their lives and responsibilities into a trial. Even more importantly, they are exposed to very visual, very graphic, very heinous evidence. They want to talk about it. They may also want to take notes.

Another thing we must recognize in this process is the debriefing. We should debrief and allow the recognition that jurors go through a lot in some instances. Having some sort of psychological debriefing program is important. Throughout this country, you really do not find that. There are a few other counties throughout the country, such as King County, which debrief.

I have plenty of examples to demonstrate psychological issues that jurors have encountered after the fact—during the trial and even afterwards. Ultimately, jurors like technology as well. So as the instructions and thinking about, are we asking jurors to do the impossible. I know how savvy individuals are. I know that the technology is important in the twenty-first century. Jurors are expecting certain things.

#### COMMENTS OF BETHANY DUMAS

PROFESSOR DUMAS: Let me introduce myself briefly for those of you whom I do not know yet. I am delighted to be here. I am always pleased and honored to be involved with this College of Law in any way at all. I have been since my first days here, although they were not always extremely easy and pleasant days. Just a very brief comment or two about where I come from with respect to all of this: I began life as an English major—well, not quite, but near the third grade I think. I was going to be a literature professor definitely I decided. I've been thinking about my life as I've been listening to others this morning

and thinking about how is it that I got led to be here this morning talking about what I'm going to be talking about this morning. Looking back, I've always been, in a sense, data driven. I'll give you one example of what I mean by that. I got part of the way through a Ph.D. in Literature and then I had to take some philology courses—Old English, history of the English language, Beowulf in the original language. You know, you read six lines of it once. I fell in love with that. I thought this is wonderful. This is what life is really about is each time you would pull those from the page from the year 450.

At a certain point, I also was tired of not ever, ever, ever having any money at all. I decided I would teach for a year or two in this and then finish my doctorate. So I taught literature courses for two years at a state college. I hated it. Then I got an opportunity to teach at another university for a year and I took it. Then I took a job over the telephone at Southern University in Baton Rouge in 1964. I went down to Baton Rouge to teach at the largest essentially all black state supported university in the country. It was one of the more educational things I've done in life I took the job because of the fact that I thought I would learn something. In 1964, there were no books and really no articles on what at that time we were calling Black English or African American English. Most of my students were from small southern towns in Southern Louisiana. Many of them, quite frankly, had never interacted much with a white person other than a store clerk or a postal clerk. So, we had some communication problems. I was very fortunate in that the department head at Southern, shortly after I got there, became Melvin Butler, who was African American and who was a linguist.

So when I got stuck, I would go to Melvin and say, "Tell me what's going on. Tell me what to do. Tell me what I need to know that I don't know already." I had already taken some linguistic courses in language variation



and dialect studies, but that year, I decided that I wanted to understand why the kind of variations that exist in the American English exist, and why was it that we couldn't talk to each other more easily. I actually changed into a linguistics concentration that year. It was that particular trip. That's what I mean by being data driven. This I was interested in. It was exciting. I wanted to understand it. So I did finish in linguistics and did research in language variations beginning with Ozark English and moving to Tennessee to continue my studies of Appalachian English.

I had been here four or five years. I was wondering, do I want to run around with a tape recorder doing this kind of study all my career or will I want to do something different at a certain point? Understand that I had never been remotely interested in the law, except to stay as far away from it as possible as a graduate student.

More or less by accident, I read that 1980, '81 article by Ferro and Ferro, the short version of the Columbia Law Review article on why jurors don't understand jury instructions. They had actually conducted a careful research in the Washington D.C. area, about that particular point. I read that. The short article fascinated me, and I went and read the long law review article. I guess it was the first law review article I ever read. I decided that judges, Your Honors, and lawyers needed to know something about language that linguists know. I decided that I wanted to help teach judges and lawyers. However, I couldn't think of any reason why any of them would listen to me.

So I decided that I needed to understand legal process. I thought I could do it in one year. I quietly got myself admitted to the College of Law, and for four years between 1981 and '85, I taught full-time except for the final year, and I also came over here to begin my real education. That's how I got where I am. Jury instructions have been a passion of mine for a long time, and some of the work that

I've done has actually resulted in some detailed examinations of the kinds of things that Peter has told us about and written about extensively.

One of the fortunate things that happened to me fairly early in the beginning of this research is that Judge Inman corresponded with me, and over a period of years he shared with me some of his solutions to some of the policies we're discussing. One is paraphrasing entire instructions. Another involves pre-narrative examples, which are not extremely popular with judges. I understand why. But, he shared a number of those kinds of things with me.

For instance, just to show you one short example, talking to a jury about the concept of present cash value. Most jurors are not accountants, and so that is kind-of a strange phrase. If we examine the pattern of instruction in Tennessee, I won't read that. We could go get the paraphrasing. It makes the language a little bit simpler. We could even add a brief example. Hopefully, the simple example will be of some benefit.

If you know that a person will need \$1,000.00 five years from now, you would normally not give him the \$1,000.00 now. Well, in today's market, actually, you probably would. Maybe you would give him \$2,000.00. But if you were required to give him money now, you would give him only the amount of money which, when invested, back when we could invest, would equal \$1,000.00 in five years. How much that money should be now is for you to decide. That would be kind of a narrative paraphrasing example that I learned the existence of from Judge Inman.

Another example, and I'm going to show you one more, would be something like proximate cause, which might include both positive and negative examples. There again, of course, from Judge Inman. 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 negligent for a driver to drive a car that has bad or slick tires. If that automobile with bad tires slammed 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 bad tires would be a proximate cause of the accident.

Of course, the other problem here is that “proximate” sounds to a layperson like “approximate,” a very different meaning. But, it is possible for the person to be negligent without that negligence being a proximate cause of the accident. If the driver of that car with bad tires is stopped for a red light and is struck in the rear by another car, obviously the bad 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. This is a straightforward example it seems to me.

I'd love to go through the history of having juries in the U.S., but I will not. I will move to trials just a little bit. Let me say, before I move into this, that my head is filled this morning with data, and it's a little bit different from what it had been filled with while I had been standing here in the past years. I have been focused a lot upon how undergraduate students at Duke University understand the nature of legal process and the nature of jury service. I've also been having two to three novels and views of films on “To Kill a Mockingbird,” “Runaway Jury,” and “The Runaway Jury” that are still in the book and other such things.

Also, I want to mention that last fall I had the interesting experience of challenging, pre-requiring students to write a novel involving a lawyer. I'm teaching a little undergraduate course—it's a special topic course. I looked at all the special topic courses, and I didn't like any of them, so, of course, I invented my own: Lawyers in

Literature. We started out with the thriller, "The Runaway Jury." We went into excerpts from novels, that kind of thing. Then the day after the drop deadline came, I went in and told the students what we were actually going to be doing in class. The preceding summer, as I had been planning the course, it occurred to me finally that 254 is a writing intensive course, and that I was probably expected to have all my students to write a research paper. I did not want to read some library research papers on any topic whatsoever. So I thought, okay, what do we write instead? I decided that we would corroboratively write a novel. This applied to all my students the day after the drop deadline. They looked at me like, woman from Mars, what are you talking about?

They didn't think we could do it or would do it. What I had done prior to that day is to have them do some writing exercises, both in and out of class, such that I knew they could write sentences and weave together coherent narratives. Those are the two things I thought they needed to do. My motive for having them write the novel is that I wanted to, in effect, put them in the driver's seat with respect to fiction. I wanted them to think hard about what does a fiction writer have to do? How do you think about plot, how do you develop characters, how do you identify a conflict, how do you write? How do you do all this stuff when you're the author? So that for the rest of their lives they might occasionally, in reading a novel, think about, well, I wonder if he thought about going here instead, or he thought about going there instead? That kind of thing.

Now, it was a large class for this kind of activity. There were thirty-one students in the class. And we didn't get to do what Ken Kesey did with his graduate students in Oregon back in the '80s. I learned, actually after my course started, that Ken Kesey had done this experiment once with graduate students. Well, they came to his house twice a week and all sat around a table and wrote a pretty bad

novel. You can buy it if you want to. It's out in print, and you can buy it.

We couldn't do that, I mean thirty-one students twice a week for an hour and fifteen minutes. We developed a plot outline. We identified our characters, our conflict, and our resolutions; then divided ourselves into groups to write the individual chapters. We finished a 100-page draft. It's a bad draft. But, my requirement was not that they write a good novel. It was that they write a novel—a draft of a novel.

Furthermore, four of them decided they would like to continue working on it. So they've been working all semester this spring with me. The idea was that they would take the 100-page draft, flush it out, and improve it. That lasted for about four weeks. They came in the fifth week and said, "We have an announcement to make." What's the announcement? "We have thrown away the 100 pages and we are starting over."

They're doing a pretty good job.

So, what's the point I'm trying to make? I wanted to examine the extent to which untrained, laypersons, undergraduate students, and these are not pre-law students, would depict legal process and depict jury service. Because I think one of the problems with jury instructions is that jurors are regarded as sort-of minor players even when they're doing a very major sort of function—that they, themselves, don't have a clear picture of what a jury service is.

I'd like to conclude by just suggesting that the improvement of languages, the addition of paraphrasing and narrative is extremely important. But I think that there's a kind-of discrepancy between lip service paid to jurors just prior to the fact and the way the jurors, in fact, are often actually treated. I have suggested that they have to be empowered into kind-of a lay expert they're being asked to be. That is, the lay expert on facts. I think that the

way they're treated in court would probably have to be changed just a little bit. I've even suggested at one point seriously that if in 1979 or sometime during the 1980s, or even in the 1990s judges could have taken early research on syntax and semantics of jury instructions totally seriously, they might well have made or authorized changes in sentence structure and vocabulary choice that many of us have been advocating. But if they had done only that, I think that would have been actually totally inadequate. It's far more important for us to do—and I've been suggesting this morning, to stand back and look at the whole picture of what we're asking jurors to do when they walk into that courtroom, what we're removing them from, what their perceptions are as they, in fact, attempt to follow the kinds of instructions that we are both charging them with and also always trying to improve. I welcome your comments and suggestions later. Thank you very much.

#### COMMENTS OF DAVID ROSS

PROFESSOR ROSS: My name is David Ross, and I've got kind-of a different perspective on the topic. Don't leave. I'm a Professor of Psychology at the University of Tennessee Chattanooga. For many years, I've been studying juries and eyewitness memory and doing a lot of work. When I was in graduate school, I thought I would get all this great science, and the legal system would just open its arms, understand it, and want to hear about it. Little did I know how incredibly naive I am. Part of that education came when I met the Honorable Neal Thomas in Chattanooga. We've been working together for many years on issues like trying to increase juror comprehension and things like that. It's been an incredible journey.

I wanted to share with you three points that I think might be different here as well, that we haven't talked about here. One of the first things I want to do is ask you a

question. What's the literacy rate in Tennessee? Does anybody know? Currently, the illiteracy rate, I should say, reading level below sixth grade in Tennessee, is forty-three percent. You know what it is nationally? Twenty-seven percent. So the very first question that we have to ask is to what extent are we going to match the language level of our jury instructions to the people who come in to hear them?

First of all, as we have established today, court is a very foreign place. It is intimidating. People don't know about it. In fact, how many people in this room know that we actually have a jury orientation videotape available to every court in Tennessee? Well, the person who made that videotape is sitting right here: Judge Thomas. His whole idea has been to help educate jurors from the moment they walk in the door to help them feel more comfortable. We've done a careful research on the impact of the jury orientation tape that makes jurors feel more comfortable, and it increases their comprehension of the process, which is a critically important thing. If we look at the literacy problem, it becomes even incredibly more important.

In fact, those of you, for example, the judges—and I'll pose this question to you as well—in your jurisdiction, do you know what percentage of jurors show up who have been summoned for jury duty? In Hamilton County, where we're from, it's thirty-two percent. Thirty-two percent. The number one reason that jurors don't show up for jury duty, from the research, is that—does anybody want to take a guess at it? Yes?

UNIDENTIFIED SPEAKER: The mail.

PROFESSOR ROSS: The mail? This is actually a good guess. A lot of them don't get it. But people who have actually gotten the summons, why they don't show up?

UNIDENTIFIED SPEAKER: They can't read it?

UNIDENTIFIED SPEAKER: They're not getting paid enough.

PROFESSOR ROSS: Well—pay is a problem, plus fear of being made a fool of. Fear of not being competent. Fear of humiliation. That ties right into the question of how are we going to make this entire process easier? Maybe we need to expand the jury orientation videotape to make them understand that they're going to hear things like jury instructions that are going to be complex.

We do—one of the things I've done over the years too is that I do a lot of trial consulting with attorneys. We'll look at a jury instruction, and I'll read it and I give it to them. Will you please tell me what this means? They don't know. They say, "Well, I'm not really quite sure." I say, "Well, I don't know. If you don't know, how is the jury going to know?" So the issue of literacy and comprehension starts from understanding who your jury panel is, how these people are going to be competent to understand. If you have a literacy rate of forty-three percent, if thirty-two percent of your community shows up for jury duty, we're looking at a substrata of our population that we've got to pay attention to before we even start looking at the question of jury instructions.

It's not just a jury instruction issue. It's a much broader issue than that. Making them feel comfortable. Making them understand the process. So that was the first point I wanted to talk about. We really didn't hit literacy. It's a really, really, really important problem, and it varies even within our state when sometimes we go to real rural communities and deal with jurors there. Literacy rates even within counties vary enormously.

I always tell the attorneys when we're practicing for a trial or we're working on something, that if your presentation doesn't pass the granny test, it's not a good one. By that, meaning—and not anything about



grandmothers—but I use that example, Granny didn't go to law school. It's got to be in a language that everybody can understand. So the jury instructions have to follow or pass the granny test. That's my first point.

My second point hasn't been, I don't think, addressed yet today. I think this is even more problematic. What happens when the content of the jury instructions is wrong? Let me give you these concrete examples of our own work. The single largest, the single biggest reason for wrongful conviction in the criminal justice system. Does anybody know what it is? Eyewitness testimony, eyewitness identification. Of the first forty DNA exoneration studies, ninety—or examples—ninety percent of those were due to errors in line-up identification accuracy. Five of those people were on death row waiting to be executed. One was two hours from execution and got a stay.

Well, if you look at the jury instructions that are given in most states regarding how to evaluate the accuracy of eyewitness identification, the content is wrong. The content is wrong. We have approximately today about 3,000 studies of eyewitness identification. The typical jury instruction to the jury is to rely on witness competence. Competence bears little to no accurate relationship to witness accuracy. The same thing with detail. It bears little to no relationship to witness accuracy. So, jurors are actually given an instruction that is just the opposite of what the science tells them.

So, you wonder how many of those cases—and if you look at the DNA exoneration studies that are continuing to go on, those preventatives are still hovering around seventy-five, eighty percent errors in line-up identification accuracy. How much of that error in the system is because jurors are given instructions to use to evaluate an eyewitness that are factually wrong? That points them in the wrong direction? Because something

like witness competence is an extraordinarily easy thing to manipulate. What we know from many, many studies from the '80s is that from the time the person experiences the event to when they actually testify, witness confidence or competence goes like this (indicating downward). By the time they get on the stand and they go, "Yeah, that's the guy," that competence measure means nothing. But the Court instructs the jury, that's what you use among other things. So that was my second point.

I will give you another example of a very important issue where the content of the jury instruction was wrong. Years ago, we were interested in the issue of child witnesses. Children were really starting to testify in court, and legal changes were making it easier for children to testify at very young ages. One of the issues that the courts were concerned about was how do we protect a very young child, a four or five-year-old child, from the trauma of testifying? Because when the child comes in and sits in the witness box, whom would that child typically look at? Who's in front of the child? Who? The defendant. Exactly.

The theory is that having the defendant there may produce such trauma to the child that it may impact his or her testimony or make the child unavailable to the court because the child can't speak. It's too fearful. So, courts started putting protective shields between children and defendants or using video monitoring systems, where they would leave the defendant and the jury in the courtroom, and they would have the child directly across in the judge's chambers.

Well, this raised the issue of what? What does this deny the defendant? Exactly. The Sixth Amendment right to confront his accuser. The Supreme Court of the United States heard a number of cases on this issue in a very short period of time. They came down with the conclusion, based on a jury instruction, that it was not unconstitutional

as long as the judge gave the instruction to the jury just prior to the child testifying that the jury is to ignore—as you talked about ignore the pink elephant in the room—ignore the screen that's being placed between the child and the defendant. You are not to infer anything about the guilt or innocence of the defendant as the function of the presence of that screen.

Their court opinion was without any data, that the instruction was sufficient to undo any presumed prejudice that would be introduced by that screen. Well, what does that do? First of all, it assumes that the screen would actually prejudice the outcome of the trial, number one. Number two, it assumes that the jury instruction would eliminate the prejudice. Well, at that time, there was no data on the topic, and we had a NSF Grant to look at that. To make a long story short, we spent an enormous amount of money and time to look at whether this is the case, that the presence of a screen actually increases conviction rates, which was the concern of the court. The reasons for the instruction.

We did a study. We did a very large-scale, elaborate study. Not only did we find that it had not had an impact, it had the opposite impact. That if you protect a child and you put a protective screen between the child and the defendant, conviction rates don't go up. They go down; and they go down significantly. Just the opposite of what the court concluded and argued. Moreover, what does that do to the utility of the instruction? The instruction says what? The instruction says, "Look. Don't let the screen imply that the defendant is guilty." But if you look at the data, it doesn't do that. It actually decreases conviction rates. Just the opposite of what the court concluded. So the content of the instruction was wrong. So if you were going to rewrite the instruction, what would it say? It would say the opposite, you know. Don't let the presence of the screen make you think the defendant is not guilty.

But actually, what it was doing, what it was really doing is they had it backwards. The presence of the screen was not impacting perceptions of the defendant. The presence of the screen was impacting the perceptions of the child. Because if you put a screen between a child and the defendant, the assumption about the child was what? Was what? Fragile, unreliable, had to protect it, and couldn't rely on the testimony of the child. If you were going to write an instruction that was actually accurate based on data, the instruction would have been something about don't allow the presence of the screen to influence your judgment about the credibility of the child's testimony.

Those are the kinds of issues that I thought so critically important. If we could correct all of the linguistic structures, to make it easier for people to understand the jury instructions and things like that. But the question is, what happens when the content of the instruction is wrong? What can we do as scientists to help supply the courts information to correct the instruction? That's when I started to work with Judge Thomas in asking, "Well, why can't we just change it?" Very naively. Little did I know how little, how difficult it is for the legal system to change and to make these changes because of concerns about reversibility and things like that. And I was incredibly naive, thinking as long as we had this data, everything would be fine. But it's really been an incredible experience to see the interaction between science and the legal system, and wondering, how do we get those two to mesh and actually get the wheels of the legal system to turn a little bit faster than they're turning, to make changes in accordance to what we're finding in scientific studies of jurors and issues facing the court system?

Thank you for allowing me the honor to be among you.

## QUESTIONS AND ANSWERS

MS. ASHLEY WHITE: At this time, we're going to open the floor up for questions for the panel.

MR. SID GILREATH: Your illustration about the deduction of present value in a tort. We have that instruction for deducing present value for pain and suffering. We have an instruction before that says, "There is no fixed rule in which to determine pain and suffering." So we have an inconsistent situation there, and I wish that the people who write the rules and procedures, the Supreme Court, were here today. Anyway, that shows the inconsistency that we have in our instructions as you talked about in California.

PROFESSOR DUMAS: Thank you for that comment. I don't know exactly how that committee works. But do such committees ever have an editor who is just an editor, who looks for things like that, rather than importing substantive information into them? It might be an idea.

JUDGE CREED MCGINLEY: The chairman of the committee is here. This gentleman.

PROFESSOR DUMAS: Then I'll sit down and listen. Can you comment?

JUDGE ROBERT CHILDERS: You want me to comment? Sure. On the Civil Pattern Jury Instructions, we completely re-wrote several instructions after *McIntyre v. Balentine* came out in 1992. As part of that, we broke up into subdivisions or working groups and assigned each working group a section of the instructions. We also created what we call the Clarity Subcommittee. The Clarity Subcommittee looked at every instruction to try to clarify,

without changing the substance, and to try to gender neutralize the instructions as much as possible. So we did that.

Unfortunately, without the benefit of the linguist, which I wish in hindsight we had one, however, we are now looking at the possibility of engaging the service of a linguist because when I came on the bench in 1984, some of the instructions were one-paragraph long sentences. I couldn't understand them. So, my goal since I've been a member of this committee and I've been chair, and I've been the chair since 1991. And so we continue to try to do what you folks are talking about today. And that is to make the instructions as understandable as we can. We put our third edition—we're now up to the eighth edition this year because we're putting it in a softbound volume each year like the criminal committee is doing.

We tried to reach an eighth grade education level. The computer tells us we reached a tenth grade level. You know, we took out words like "exercise" and put in "use." We eliminated "proximate." As I used to tell the jury when I got to proximate cause, I would literally spell the word out. I'm saying, "Proximate, P-r-o-x-i-m-a-t-e, not approximate, like we're used to using in our everyday language."

We've taken out other words to try to again use the plain English language and not this stilted language that the law has always used. So I hope that briefly explains the process we use. I also have lay judges trying to make jury instructions understandable for lay people.

PROFESSOR DUMAS: Thank you. Can I just say one thing? The thing I'm most grateful for is that the word "captious" disappeared from the reasonable doubt instruction. I once asked a room full of linguists to define the word captious for me. One person in the room offered a definition.

UNIDENTIFIED SPEAKER: Were they right?

PROFESSOR DUMAS: I don't know.

MS. ASHLEY WHITE: Yes?

MR. BRADLEY SMITH: My name is Bradley Smith. This question is actually for Professor Ross. In regard to your statement about there being instructions that were factually inaccurate, where we're actually asking the jury to do something instructionally wrong, how much do you think that ties into what Professor Tiersma stated about rape identification? Not only telling them that it made a difference, you're supposed to consider it, but actually telling them why you're supposed to consider it? Do you feel like by not only changing those instructions to be accurate, but by telling the jurors why they were inaccurate, do you think that would affect the outcome?

PROFESSOR ROSS: I think actually I would rewrite the entire instruction regarding eyewitness identification because when they talk about things like rape, that's actually a category of variable that it's difficult for psychologists to talk about. Because there's rape, stress, all kinds of things that the eyewitness experiences. The field of eyewitness identification has much clearer definitions and instructions for jurors on how the police collected the identification evidence. In fact, there are the Department of Justice Guidelines instructing exactly what you should have done.

The instructions should be not about the eyewitness. The instruction should be about the procedures that were used to collect the identification evidence, and whether they followed the guidelines that had been published by the

Department of Justice and have been sent to every law enforcement agency in the United States.

So, cross-race ID is a tough one because even if it's a cross race ID case, no one can tell you. No one. There's no psychologist in the country who can tell you whether or not a particular eyewitness is susceptible to making an error because of cross-race ID. We can only talk in generality. That's a misleading instruction. But what we can do is say, "Look. There's agreed upon in the science among judges, attorneys, the DOJ Guidelines about how the evidence should have been collected. That's what the instructions should be about. Not about what are called estimated variables, things like cross-race identification. They're looking at the wrong variables. So, I would rewrite the whole instruction on something we really have much better science on.

JUDGE BOB JONES: Judge Bob Jones, also a Professor of Law. When you studied the screen between the minor and the defendant, did you also study the impact upon the jurors on the purity of instructions? The purity of instruction by the judge about not letting the prejudice intercede about the guilt of the defendant?

PROFESSOR ROSS: Yes. Yes, we did. And we looked at a lot of the questions about that in terms of their reaction to it, the reactions to the judge giving the instruction, and things like that. But the thing that we found most disturbing about the reaction to the instruction is we asked them to recall it. Guess what percentage recalled it. Five percent recalled the instruction, which I couldn't believe. Five percent recalled the instruction.

That's another issue I think, in terms of jury instructions and memory, is where do they fall. That instruction fell in the middle of the trial. You know, for example, an instruction like what we were talking about in



regard to the eyewitness. Well, if you read it at the end, after the testimony has already been given, how can a juror go back, take that instruction and apply it to assessing the credibility of a witness that they may have heard a week ago? So, why not give the instruction just prior to the presentation of the witness. We were very disappointed by how many of the jurors couldn't even remember the instruction.

MS. MEREDITH PASAY: I have a question about the same study along those same lines. Because I was thinking I don't know a lot about the details of the study. If the instruction was, if you see the child on the screen, don't let it affect your judgment about the guilt of the defendant, and then it comes out that they find not guilty, and the conviction rate goes up. So it seems like the instruction makes it worse.

PROFESSOR ROSS: Well, we had a control group that was compared to a control group that didn't get any instructions. What we found with the instruction—so we have one condition where they see the entire trial—and what we did is we took actual cases that went before the Supreme Court by hiring attorneys to write a model case. We manipulated the presence or absence of the instruction. It had no impact at all on conviction rate gain; the reason being is I think only five percent remembered it. But then again, the question is, well, if you do more and try to give it more and more, the problem is it's still the wrong instructions. The instruction should be don't let it undermine your perceptions of the credibility of the child. It's really not about the defendant. So, to answer, it was a fascinating study. I can give it to you if you would like to read it.

MR. JOHN ROGERS: My name is John Rogers. I have a question for the entire panel. I would hope that each of you is more than aware of the fact that the institution that we're talking about here, the American jury trial is not on the verge of extinction, but certainly it's extremely ill. The reduction in the number of trials that take place all across this land, state or federal, has been fueled with a fire and the fire generated by those institutions in our society like the business roundtables, the insurance lobbyists to destroy, to take away that fundamental right of all citizens. I want to know, have any of you ever worked directly for the Chamber of Commerce, been employed, had studies funded, that you have been involved with, provided the capital to administer those studies, and if it bothers you? If it hasn't happened yet, would you do so, work for the very forces in our society that are trying to deny every citizen the right to a fair and impartial jury trial?

PROFESSOR AINSWORTH: I'd like to briefly comment. You are actually talking about the elephant in the room that nobody is talking about, which is that jury trials are a vanishing species in our system. Mark Galanter wrote a very influential article in 2004 called *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*. All of the studies that have come out since Professor Galanter's study have confirmed his empirical findings that civil and criminal trials are going away.

It's a very complex matter to figure out why this is happening. For example, in the criminal area, which I'm more familiar with, it is largely a function in federal court of sentencing, with mandatory minimum sentences that make it almost impossible to get your day in court without risking five, ten, and even higher mandatory minimum sentences unless you plea bargain. So it's a foolish defendant who tries.

On the state court level, it's also a function of factors like the dramatically increasing case loads among public defenders. I've been looking at situations where, although the ABA suggests that 150 to 180 cases per attorney per year is about the right caseload, there are jurisdictions now in which public defenders are assigned 700, 800, 900 cases per attorney per year. We're talking about felonies in many cases. Well, if you've got 900 cases per year, I'm going to guarantee you're not going to try very many of them.

On the civil side, there are a combination of factors to point to. Things like damage caps in tort reform have made it much more difficult to have get the kind of damage awards that would make a jury trial economically plausible. And so cases are simply settling on that basis rather than going to trial. But in many respects, it may be that if we came back here in twenty years to talk about jury instructions, the question will be, why? If so few cases are actually being tried to juries, is a jury instruction conference somewhat of a sideshow compared to the real issues that face us in terms of our civil and criminal justice system? I agree you've raised a really important issue. I hope and would like to believe that we can preserve the jury trial. Because I think it's crucial. Somebody talked about legitimacy. Today I think it's crucial to the functioning of a legitimate justice system that there be community input into its most important decisions.

PROFESSOR CLARK: Following up, very good question. Personally, I've never done any work for private types of organizations. I know there is a lot of money to be made. You know, you get into especially pharmaceutical companies and research studies that are done. Making references, legitimizing justice system, recognizing even in jury consultants there is a \$450 million a year industry on that. My research has always just been very pure, going

into it for recognizing and understanding something. Not necessarily going into it and whatever the outcome may be, but trying to understand that whether it's a positive or a negative, this is a finding. And it's a finding. Not going into it hoping to find something or steering it in a certain manner.

I very much appreciate that question because of the necessity to have an ordinary group of twelve persons—lay persons—come in and render these verdicts. I don't want to go to an expert of jurors. You've heard other countries making use of jurors who are considered just experts. I'm very much opposed to that. So I hope I have answered your question.

PROFESSOR TIERSMA: Can I say just one thing about that too? Although it is definitely true, trials and juries, jury trials especially, have gone down quite a bit over the last decade or two. Maybe to put it in perspective, on the positive side, there are other countries that are starting to adopt the jury system. For example, Japan and Korea have started to use something like a jury system or what they sometimes call lay assessors. So, even as—it's rather odd, isn't it—that while jury trials are decreasing in the United States, we've in a sense exported the idea to some other countries, which are now starting to adopt it. So, there is a positive note, I suppose, to that issue.

MR. ROGERS: One of the reasons I asked that question is particularly with your presentation, I would think that—well, while it was not intended for that purpose, I want you to know I'm not complaining or insinuating in any way that you would be for the annihilation of the jury system. But when you point to this long litany of areas within the jury instructions, which create this sort of imbecilic circus that must go on in the jury deliberation room because they're required to apply these impossible, nonsensical rules, I

think it does a disservice to the lawyers whose job it is to explain many of the jury instructions. You know, we have them before the jury is charged. We put them on board or voir dire, and we explain to the jury what we believe. You can't tell them what the law is, but we tell them what we think about how to apply those laws to the facts of this case.

All I want to say to all of you is that you need to keep in mind that this analysis you're doing may only be half the story. You have to take into account what the bar is doing in the courtroom to bring to light this sometimes archaic language. To deal with that archaic language in a way that makes sense, makes common sense, and why the American jury system still is the greatest form of resolving disputes in the history of mankind.

PROFESSOR TIERSMA: I think I probably should respond to that because I don't take your comments personally. But you know, it's interesting that in California, I've been involved for the last twelve years on the effort in California to make jury instructions more comprehensible. How did that start? It started out with the riots basically in Los Angeles. It was an indirect result of that and the O.J. Simpson case.

What we call the Rodney King case, which is the case of Rodney King being badly beaten by these police officers. The police officers were put to trial, and they were acquitted. Then O.J. Simpson was acquitted. In California, a lot of people began to think the jury system is broken. Right? And so there was a blue ribbon commission that was appointed by the State Supreme Court, which basically made a lot of recommendations as to how the jury system could be improved. They made many recommendations, but one of them was that jury instructions ought to be made more user-friendly.

Our Chief Justice Ronald George took that, and that's how this whole process began that I became involved in—very involved in, I hate to think of how many hours I spent on this whole process over the last twelve years. But it's quite a few. But at any rate, I've been involved in that as a result of this whole soul-searching that we went through about the jury system and whether it is broken.

So, when we're talking about making jury instructions more comprehensible, we're certainly not talking about getting rid of the jury. What we're talking about is making the process for jurors, involving them more, making them more educated about what they're doing, and making them more comfortable with the process. It seems to me that that, in the long run, is going to strengthen the jury system rather than undermine it. If jurors know what they're doing, and they're not being confronted with weird instructions and legalese that make them feel like they're strangers to the system and we don't really want them there because we don't make the effort to address them personally, we don't address them as "you." We always talk about "the jurors" and that sort of thing. That really puts them off, and that's what we want to avoid.

Ultimately, this is about making jurors know what they're doing, carry out their job better, and feel better about the process after they've been through it because they understood what was happening and they feel confident about the verdict that they've reached. This is all about strengthening the jury system. It's not about undermining it in any sense.

PROFESSOR DUMAS: And just for the record, John, no, I have never been engaged by one of these companies and nor do I plan to be.

PROFESSOR ROSS: Ditto for me. To reiterate the same spirit, I think all of us would share that same ideology that

this work is designed to help preserve and to improve, not to tear down and eliminate. So, the spirit is the opposite of that.

MS. DOROTHY STULBERG: I'm Dorothy Stulberg. I don't think it makes any difference what is happening if nobody's having jury trials. So, I think his comment is extremely important. None of us, as practicing lawyers, want to go to jury trial. The insurance companies want us to go to jury trials because the remedy is so low. There are so many factors that come in before juries. I am scared to death of what the Chamber of Commerce is doing. They are specifically opposed. The business world is specifically opposed to juries. They don't want the public to have some concept of what justice is. So I—it scares me because I agree—I think somebody said the value of twelve people sitting there commenting on what's right for our world. It bothers me, as a practicing attorney, that it looks like the legal system is so strong because of the publicity of the power structure. I think it's relevant to make it easier, but make it easier, and nobody is going to use juries. Anyway, that's my comment.

MS. ASHLEY WHITE: We have time for one more question.

UNIDENTIFIED LAW STUDENT: You said earlier that there is life outside of serving on a jury. That made me think about a jury trial that I got to witness this summer. After the jury selection process, the jurors that were excused seemed excited, even seemed like they had dodged a bullet because they didn't have to serve. That made me think about whether you had come across any research or thought of the possibility that either (a) jurors don't want to serve on juries, and/or (b) they don't really care about the

administration of justice and how does that affect the system?

PROFESSOR CLARK: That's a great question. That's amazing that you brought that up. I've got a study that's being written up right now that deals with juries over the period since 2000 and my involvement in conducting jury research. I'm amazed that on that Monday morning when the summoned jurors show up, and they go through the orientation, I've absolutely been amazed at the number of jurors that, for whatever it's worth, they'll get up and then they'll run to get in line and say, "This is why I need to go. This is why I've got to be excused." It's upsetting, and I cannot believe it.

You can just guarantee that half of the people—if there are 160, 80-something—are going to get up. What's interesting is, again, touching on this issue of the importance of dating back to 1215 of the Magna Carta of the conscience of the community. Twelve persons coming together and rendering a verdict, being that conscience of the community and trying to have the pulse of right and wrong as fellow citizens.

The number is startling of them trying to get out of jury service, again, for whether it's medical reasons or unjust or unsound issues. There is a lot of evidence that does indicate that jurors—what are they going to get out of this experience? What are they going to get out? In Alabama, for example, if you're paying jurors \$10.00 a day, I mean you know, and they're saying, "What am I going to get out of this?"

So many persons see this as a job to the extent, as a liability, as frustration and aggravation. That's why we're trying to improve the jury system, and along with this, making it user-friendly. Let's make the jury system user-friendly and keep trying. It's almost like you have to go back to Civics again. Listen, this is a privilege that you can



serve on a jury, and you must understand that. I think we need to do a better job of conveying that message. But it's amazing how jurors and persons come together. I learned this a long time ago from a judge that the juries and persons being summoned for duty, they're wheels, if you will, to the extent that when you're a defendant and you're on the fourth floor, and on the first floor there's 160 people down there, wow. That really, that gets it going, don't it?

So, the importance of having those jurors. But I am amazed, and studies indicate again the frustration, aggravation, low pay, what am I going to get out of this. I don't have time for this. Accompanied with what I said about their own lives and what they're going through, the dysfunction, if you will, and issues. It makes it very tough. Okay, it's tough, but that's the reality. And that's what I wanted to indicate to everyone: the reality of what we're dealing with. The reality of the world that we live in, in 2009 is not easy. But we must understand who we're dealing with and how we can improve it. And I think that's what we're doing today.

## INTRODUCTION

MS. JESYCA WESTBROOK: Good afternoon, ladies and gentlemen. My name is Jesyca Westbrook, and I'm the Candidacy Process Editor for the Tennessee Journal of Law and Policy. I'm also the logistics chair for this symposium. Before I introduce Judge Dann, I would first like to thank him again for graciously being here. We could not ask for a better outcome after Mr. Munsterman could not join us.

Today we also could not ask for a more experienced or distinguished afternoon keynote speaker. Judge Dann is a retired Phoenix, Arizona Superior Court Judge with over twenty years of experience on the bench, five of them spent as Chief Judge. After retiring in 2000, instead of playing golf as many others do, he then completed two visiting

fellowships at the National Center for State Courts and the National Institute of Justice.

His dedication to jury research, jury trial innovations, and reform has helped to shape the future of jury trials in the U.S. And he's a nationwide leader in the effort to transform the way courts view jurors. He has been called a pioneer trailblazer in the field and, as a result, has received the William Rehnquist Award for Judicial Excellence and the ABA Inaugural Jury Impact Award. So, on behalf of the Center for Advocacy and Dispute Resolution, The Tennessee Journal of Law and Policy, and the Summers-Wyatt Symposium, please join me in welcoming Judge B. Michael Dann.

#### COMMENTS OF MICHAEL DANN

JUDGE DANN: Thank you. And did you say retired or tired? Today it's both. Good afternoon. I'm really happy to be here. Sad that Tom Munsterman couldn't make it. Many of you know Tom. Tom is a good friend of thirty years and a walking encyclopedia on matters having to do with the American jury.

Maybe you don't know about Tom. He has no legal background, training, education, experience. He, by background and education, is a mechanical engineer, electrical, one of those. He was called to Federal Court for a jury trial in a drug transaction sale case or something and was so taken, moved, and unmoved by the experience that he wrote the judge after the trial and said, "Have you ever considered doing things a little differently with regard to the jury's needs?" The judge welcomed the letter and invited Tom to come in to chat. They had a nice visit, and Tom shared his wisdom with the judge. The judge suggested that Tom, since he had so much to offer, consider going into the business of juries and jury trials.

Tom took him seriously and founded his own firm, which was eventually a jury research and re-engineering, if you will, re-engineering the jury trial. His small firm was absorbed by the National Center for State Courts, where he has remained for twenty-some years. He's a wonderful guy, who has visited probably every state and a lot of foreign countries. I know he spent a lot of time in Russia recently, as they have made halting attempts to adopt some form of jury that fits the Russian culture and politics. And Japan, and Korea, and so forth. Maybe you've had the pleasure of hearing him before. He's a very urbane fellow. Speaking for myself, I'm undergoing urban renewal. Maybe some of you miss Tom already.

The pleasure, finally, after years of hearing about Peter Tiersma and reading his work, and knowing of its impact nationally on the movement to produce understandable jury instructions and to improve jury comprehension. It's the first time I've had the chance to press his flesh, as LBJ used to say, to hear him live and making a presentation. Peter, thank you for all your work.

I don't think it's any coincidence that his work followed soon after release of the monumental ABA study on jury comprehension in complex civil cases in 1988 or thereabout. It showed that juries indeed do manifest a lot of confusion in cases involving complex civil cases, involving complex issues, technical and so forth. Over fifty percent of the source of jury confusion in these cases is attributable and traceable to the judge's jury instructions. Over half of their errors and sources of confusion are the judge's own jury instructions. Something judges and/or lawyers, you may consider have full control over and have had forever.

Take our own Arizona jury instructions. Please take them. When I went there fresh out of school in the mid to late '60s, and this was before any reform or rewrites and the committee. I don't know about the rest of you, but I

think bench bar committees who are tasked to rewrite instructions to make them understandable, composed solely of lawyers and judges, are wholly incapable of reaching that goal, wholly incapable of doing that.

If unaided by experts in the field, non-lawyer experts in the field of linguistics, psychology, etc., and by former jurors and without road testing them, subject to being evaluated by appropriate experts and feedback to the committee as to how the road testing went. I think we lawyers and judges need to recognize that, you know, law schools sharpen the mind all right. But in my experience, they sharpened my mind by narrowing it. There was precious little when I went to school pre-war—I forget what war it was, but pre-war; there have been so many—precious little on appreciating what other disciplines have to tell us, to inform us, law students, lawyers, judges, etc.

There have been published articles by folks who study the judicial process and the legislative process, showing that judges and legislators pay little heed to the work of social scientists, psychologists, sociologists, and so forth, and so on in writing laws and procedures and then designing court processes. Pay little heed. That's a very recent article.

Well, let me share with you my favorite Arizona jury instruction. Our task was to take the Law French, Latin, and legalese—and translate it. Our goal was not to reach plain English, but to go from all of that to plain Latin. So this is what we came up with early on [indicating projected document]. For those of you are sight impaired, I apologize. “Ladies and gentlemen of the jury, you are instructed that the crime of theft requires not only proof of *actus reus*, but also *mens rea*, or in more understandable terms, *animus furandi*.”

“In considering the evidence, you may determine the facts under the doctrine of *res ipsa loquitur*. Remember, however, that *ignorantia non-excusat*, or as the

courts popularly put it, that's *necessitas non habet legem*. The defendant's defense is *assumpsit*. One or the other of these theories may not apply to the case *sub judice*. In that event, you should apply the rule of *inclusio unius est exclusio alterius*, so as to choose between *ex parte* and *ex hypothesi*." I like it.

Well, you get the idea. Are we asking too much? Of course. But we're not asking too much of ourselves. Jurors. Something we have to weigh. Peter's suggestion today and in this slide, and in one of his slides, an interesting suggestion. He asks, well, why don't we turn to the jury after we've read the instructions to them, and hopefully, they've read along from their copy that they have in front of them, each of the jurors. Someone said, "Well, our court can't afford a copy for each juror, so we'll give them one." Oh, really, who gets the one copy? Who gets to read from it while the judge is reading it? Studies show that comprehension goes up when they can read and hear at the same time.

A copy for everyone in this day and age of rapid, inexpensive duplications and so forth. A copy for every juror. Turn to the jury box and say, "Okay. Having just read the instructions to you, and you have your own copies in front of you, I'll take questions during your deliberations if you have any. You can write questions, in writing, then I'll meet with the attorneys, and we'll get back to you. Ask them right then and there in addition to an invitation, do any of you, at this early juncture, do any of you have any questions about what you just heard and read? I'll be happy to take them."

In Arizona when I voiced that suggestion to the judges, they said, "Oh, my God, no. I can't do that. (1) I would embarrass the jurors and put them under pressure, making them feel like they have to come up with questions, or—that's speculative—or (2) they might actually have a question, and that might embarrass me. Or I'd get in

trouble with the Appellate Court for answering, for not answering, or the way I answered, or what I said or didn't say." Fear of reversal. So that suggestion has gone nowhere in Arizona so far. But we will come back another day and make another run at it.

I've done it, and I've never been embarrassed. Of course, nothing would embarrass me. I think, in the five to ten times I've tried it, maybe one question has come up. They just don't feel comfortable. But they sure feel comfortable later during deliberations in asking questions. Some of those questions about the instructions are among the most difficult.

I'm supposed to talk about the modern jury. In the vernacular, in the words of the billboard sign, we've come a long way, baby, since the mid '60s. We have been somewhat successful, I think, all of us working together, of dragging the traditional form of jury trial and jury service, kicking and screaming first into the twentieth century. We're still working to drag them into the twenty-first century.

I think a lot of this work started in the mid '60s with the publication of Kalvin and Zeisel's landmark study, *The American Jury*. The first major effort to study real world juries and jurors—reality, facts, fact-based, empirical. It opened the door to a whole generation of researchers and social scientists. Some judges and lawyers joined the movement, all card-carrying members of the movement. The result was a lot of research, surveys, studies, writing articles, and so forth, and so on. There's a flood of information out there for us lawyers and judges to take advantage of, policy makers, legislators, etc. A whole subset of scientists and social scientists developed called jury experts.

In the meantime, during this period, beginning '50s, '60s, trials began, although maybe falling off in number attributable to a number of causes—I think no single

cause, but for the reasons, some of which you've heard mentioned here today. The number of trials has diminished. I think another reason not mentioned yet is a lack of trust in juries and lay people deciding these disputes. On the other hand, Trials grew more complex on the theory that any case worth litigating, civil or criminal, is worth at least one expert. And one expert is worth the other side producing a rebuttal expert. Well, since I'm calling one, let's make it three. Okay, three versus two or three. Suddenly American juries have been confronted in just what used to be a run-of-the-mill case or street crime with a handful of experts, many of whom don't agree on important points of evidence.

This makes it so that it's now more difficult to sort out who has the better evidence. The battle of experts and so forth; complex scientific evidence and terminology. So it's our job to help them the best we can. Public dissatisfaction with the American jury has started to increase or grow, given the result of certain high-profile civil and criminal trials in the '90s and 2000.

Then we had the ABA stuff that I mentioned. Since then, and because of all this coming about, over twenty-five states, including, I'm happy to say, Tennessee, have conducted their own, as have two or three federal circuits, the Ninth and the Seventh. Also, the D.C. Circuit, Washington D.C. Have conducted their own, thoroughgoing soup-to-nuts study of their jury system, and decided for themselves what they would like to change. And they've set about to do so.

Tennessee adopted, as I read, the Cullins summary of the 2003 amendments, Civil and Criminal Rules, adopted thirteen important innovations for changes. Tennessee Jury Practice. And because of this work, the model of the active juror emerged. I don't know who originated it, but an active juror replacing the older tradition model. A tradition of 200, 300 years. The passive

juror model. Now, we've heard those terms applied to judges. An active judge versus a passive judge. A magistrate trial versus a passive umpire. Just sits back and waits to be called upon.

But it applies to jurors too. What do they mean by active juror model? I'd like to think that it means to give the jurors the tools they need, some of the tools being participatory in nature. You create an action activity, giving active jurors the tools they need to help them better decide today's cases, civil and criminal, and to reach better verdicts or to have a greater comfort level with their own verdict. And hopefully a greater public acceptance and understanding of the verdict. All consistent with due process. In other words, without depriving anyone of a fair trial. And I think that none of the Tennessee changes—thirteen changes or innovations—rule changes, if properly managed and controlled by the court is going to deprive anyone of a fair trial.

Our goal should be a fair trial. Insuring a fair trial, not necessarily a perfect trial, without undue fear of reversal. I think we're calling upon appellate judges to cut us more slack, possibly the trial judges and lawyers. More slack to be innovative, to experiment a little bit with those instructions, to adapt them to the case at hand, to help make them more understandable. Judges, in my experience—too many judges, not all by any means—have a heightened fear of reversal. And I think exaggerated. I mean, what's the worst that can happen? If a case gets sent back and tried by someone else, of course it's embarrassing. You can be censured. You can be removed, flogged and so forth, impeached, but that's the worst thing that can happen to you.

All this culminated in the 2005 ABA, the lawyers' own professional association, telling us, "Yeah, these things are good for America, for the American jury, and for the future to help assure the future of a vibrant, functioning,



well-functioning jury." The ABA standards, or principles as they are called, Principles for Juries and Jury Trials. This little booklet. I heartily recommend that you get one. Each principle or standard black letter is followed by a good commentary citing the reasons for the thing and the legal support.

For example, Principle 13, Paragraph F, black letter, jurors in civil cases may be instructed—may, not must—may be instructed that they will be permitted to discuss the evidence among themselves in the jury room during recesses from trial when all are present, as long as they reserve judgment about the outcome of the case until deliberations commence. That's the language. And the commentary goes on for a page or so to explain why, and how, and what, and so forth.

I've done it in civil, criminal cases, including murder cases. A fellow on death row being retried for five murders. The jury reached an impasse. I'm sorry—I'm off-base. In Arizona, this procedure is mandatory. We must instruct civil juries accordingly in Arizona, in Indiana, and some other states, that they may discuss the case among themselves, etc., subject to these structured jury instructions—structured jury discussions they call them. I was thinking of another procedural change and innovation. We may get to that later; it is one that I've tried and with success in murder cases.

So, the ABA Jury Standard, this is the most recent word or collection of words on the subject. Of course, we've had two, or three, or four National Jury Summits since all this started. All right, where are we? I think the changes, and updates, innovations, reforms, call them what you will, fall into three or four—at least three general categories. The first category being that it all has to do with justice. Doing justice with this and justice with that.

Juries serve the cause justice. In the name of doing justice to jury service, I think we've increased the

representativeness and diversity of our jury, of the juries we're seeing, as a result of such reforms as coming up with new source lists. Not limiting ourselves to the voters or driver's license or both, but moving beyond those one or two lists to other kinds of source lists, broadening the pool of eligible people to call. Modern, updating our source list.

One day, one trial. Especially in urban areas; I know this may not be practical in rural, small, lightly populated counties or circuits. But one day, one trial in urban areas greatly increases the number of people called and makes for more rapid turnover, shorter terms of jury service. One day. If you're not selected that one day, you're done. Or one trial. If you're selected for a trial, you serve that trial, whether it's three days, or three weeks, or three months. So then you're done. Whatever the numbers. However long the numbers. Three years. Two years. Four years. That depends on the population, and so on and so forth.

Creature comforts such as, well, increases in pay, realistic payment for mileage, making arrangements for parking. I know we've got a long way to go on parking and pay in many states. You heard about what, in Alabama—some states are lower than \$10.00 a day. What is it here?

UNIDENTIFIED SPEAKER: Eleven.

JUDGE DANN: Yeah. It's not supposed to be a profit-making endeavor. I don't think we have to worry about \$40.00 a day or even minimum wage per day or per hour even being harmful to the process. Efforts to provide paid-for child care at the courthouse. I think, again, urban courts ought to consider that. So mothers of young children, caretakers of young children can have a greater chance to participate. And efforts to deal with juror stress. Recognition that there is considerable stress in serving on the jury. Not just a criminal—a horrific criminal case—but

a long civil case. Sometimes just the sheer length of a trial is oppressive and stressful. It's all new and different.

A juror told me, who sat on a Tucson murder case—we had five former jurors on our reform jury innovations committee, and that's probably the wisest decision we made in terms of membership. Yeah, we had a token law school professor too. Five former jurors were worth their weight in gold. They held our feet to the fire and said, "You can't justify, judges and attorneys, you can't justify giving centuries old practice. Maybe it's time to take a look at it. I mean we don't buy your justification that you've always done it that way. That's no justification. That's a cop-out."

But this Tucson juror told me—he was on the committee in Arizona—he said, "You know, we're not stupid. These jurors who come to the courthouse to serve, who are fortunate enough to be selected. We're not stupid, but we're ignorant. This is a strange, new world to most of us who are called. Most of us for the first time. And it's intimidating and stressful, and a lot of it we don't understand. So in that sense we're ignorant, but we're not stupid. The trouble with you judges and lawyers is that you treat us both—both at once—as both stupid and ignorant." As brilliant too, he might have added. Because we expect them to make all these grand decisions.

There are some other things that are being done regarding term of service, conditions of service, to be more palatable. But justice for service. Justice for comprehension or cognition. Cognitive justice, I like to call it. Procedural justice. Various procedural aids intended to increase comprehension and give today's jurors a better shot at a chance to understand today's cases. The law and the evidence. You know, you start with plain English, a rewrite of jury instructions.

Pre-instructing the jury before they start hearing the evidence, or even opening statements with as much

substantive law, in addition to the usual housekeeping stuff—that's important—but give them as much substantive law as you can about the case. The burdens of proof, the necessary definition of legal terms, the elements of the crime or what a plaintiff must prove in a medical malpractice case. Don't wait until the very end of a case to tell them.

It would be like asking me to watch, understand, and enjoy a game of cricket without telling me what in the devil is going on. What are they doing and why, and so forth. Give them a road map in advance to follow, and they're more likely to reach the destination that we want. Pre-instructions. Copies of the instructions for every juror. Allowing jurors to put questions in writing through the judge, with the attorneys and then the judge, the question should go forward. If it stands any objection, the attorneys can object out of their presence. Maybe you're doing that already here.

Structured jury discussions. Maybe a pilot project might be in order in civil cases to see how that works. Use of—in complex or lengthy trials—multi-purpose jury notebooks. Not for every case, but if it's important, it's hard work, and a lot of work for the judge's staff to determine to get it right. Not allowing each side to prepare and bring in their own notebooks. That kind of notebook would be more advocacy. And the judge loses control over the notebooks then. The judge should, in pre-trial meetings, make assignments. You prepare this and exchange it before we come back next time and reach an agreement on a glossary of terms, legal and technical terms in the case. You prepare your witness list, get it to him by e-mail, and so forth. Come back with the first witness list explaining, listing, the names of witnesses and their affiliation at the time of the events. Not necessarily now but so the jurors can deliberate. Juror notebooks.

Allowing entry of summaries, reading, and giving the final instructions before closing arguments, rather than waiting until after. There's always the housekeeping stuff to take care of after the closing arguments conclude. So, both before and after they hear from the judge. The judge should be the one making the instructions clear. That's the judge's principle responsibility. We shouldn't be relying on lawyers through advocacy, arguments and comments to the jury at trial to explain the instructions. That's the judge's job. Every time that happens, too often when the lawyers get into explaining and reading ("Ladies and gentlemen, you're about to hear this final instruction read," and this is what they get wrong. They're advocating, and they're arguing their case. And you don't want that kind of emphasis or slant put on it. The judge has responsibility for instructing the jury after hearing from the lawyers.

Debriefing, I agree with whoever said it. I've found that debriefing jurors as a group, having them in the judge's chambers or going into the jury room, onto their turf and having a casual visit, without robe and taking the jacket off and so forth, talking with the jurors about their experience. And listen, I've learned so much. Maybe most of what I needed to know about jury changes, innovations from former jurors. It's like the book: "I learned what I needed about life in kindergarten." I learned it from former jurors.

These people have almost always done their very best to get it right. You may not always agree with the result, but they work very hard. They take it very seriously, to a man and to a woman, to get it right, to do justice, given the tools they have and the evidence and so forth and so on. Very conscientious. They take a lot of pride in their work. And one of the questions is, "Judge, do you agree with our verdict?" Usually I skirt around that. There's no point in my telling them that. Your job isn't over yet. But talking to them in general terms about their experience, not asking them why they found a certain way or how they might have

reached a verdict, but how did the trial procedure strike you. And they'll give you some wonderful feedback.

Debriefing. Now attorneys, a lot of the judges will debrief but not permit the attorneys to talk to them. A lot of judges, especially in the federal side, in my experience, don't allow lawyers to talk with the jurors post-verdict. They just have a blanket rule. I think that's a mistake. It's possible for the judge to invite the jurors, those who wish of their own free will and volition to stay behind to chat with the attorneys, telling them; it's very valuable as a litigator, as a trial attorney, to get some feedback from jurors. These attorneys are not going to grill you on why or how. A lot of attorneys regret that they don't have that opportunity. I think we ought to consider giving it to them in a structured, careful way. And maybe have a bailiff, or a court staff person present to interrupt if there's any overreaching, or abuse, or browbeating by attorneys. But attorneys, you know, they're not going to want to offend the jurors.

Okay. That's cognitive justice. Substantive. I think the next way you can reform will be taking a look at the substantive power and reach, jurisdiction, of the American jury. It started a few years ago with a group of decisions: *Apprendi v. New Jersey*, *Ring v. Arizona*, and recent—let's see, the most recent decision I think is *Ice v. Oregon*—struck a cautionary note, telling us that juries are the ones who must decide certain categories of disputed facts necessary for the judge's decision. For the judge to do so becomes sentencing, death penalty qualifications, that kind of consideration. Jurors must decide those issues and may come to a verdict or make findings, and then the judge, based upon those findings, does the judge thing—imposes sentence, or makes a death/life decision.

But mind you, several states have gone to jury sentencing in death penalty cases, something I find troubling. The legislatures said, "Well, the Supreme

Court's ruled juries must decide these death penalty cases." That's not what the Supreme Court held in *Rain*. The Supreme Court said, "They must make certain findings of dispute. Resolve certain issues of disputed fact."

But the death penalty is supposed to be reserved for the worst of the worst; it's not intended for every homicide. And almost every murder has its grizzly, if not horrific, heinous, aspect. But the death penalty is supposed to be reserved for the most egregious, the worst of the worst. The worst of the bad. How on Earth can a one-shot jury determine which is the worst of the worst? They have no basis for comparison, where the judge over time sees and hears a lot of these cases and can better determine, or a panel of two or three judges working together, on a series of two or three minds. I think Colorado has gone to this. I'm not certain if it's Colorado. But two or three judges sit and make that ultimate decision, life or death. Because they're better able to see a variety of cases and better able to identify which is the worst of the worst. The jury, to them the case they hear is the worst of the worst because it probably is. I'll get off my soapbox.

But the jury's jurisdiction and power is expanding. And you may hear more about what some people refer to as the nullification debate. One argument is that the Sixth Amendment, the right to an impartial jury, along with the history of the English-American—the American jury creates some space, allows, and mandates some space for the jury at a particular point in the criminal case. We must allow room, as judges and lawyers, trial and appellate, must reserve some room for the jury to exercise some discretion. It's called mercy sometimes. It's called community conscience sometimes.

When, for them to convict, for example, when all of the elements have been proven beyond a reasonable doubt, you typically tell them, "You must convict. You shall convict." Two-thirds of the state and federal courts handle

it that way. As if we're attempting and we fear the nullification so much that to eliminate jury nullification, not just to find it, but to eliminate it altogether by telling the juror, the jury, they can't. They don't have that right. No, you cannot. You must find, according to these instructions, you must convict. Telling the jury to convict under any circumstances; is that consistent with the Sixth Amendment? The right of the jury to exercise some wiggle room perhaps to acquit when to convict, would do violence to a strongly held conscientious belief of theirs and the belief of the community. But to convict would be a terrible injustice.

Spousal-assisted suicide. You name the case. I don't care. Some drug cases. You know, mandatory three-strikes laws. Is the jury simply a computer, or is it intended to reflect the sentiment, which if it ignores, it causes great injustice and calls the law itself into question? The credibility of the law may be at stake in such cases. I think that debate remains to be resolved. But it might be the next debate.

It comes down in my book to being honest and respectful, honest with the jury and respectful of the jury. If you feel that way—what's the word—empathy. In other words, try to put our—step out of our judge and attorney advocate roles—and put ourselves in the place of the juror hearing these debated cases, and ask ourselves, well, what tools would we like? How would we like to have a case presented? What tools would we like to have? What would I like to have if I were sitting there charged with the responsibility of deciding this person's fate? That will answer a lot of questions for us. Not all, but, I mean, there are limitations.

Where are we going from here? What does the future hold? There will be suggestions for more—to speed up the trial process, make it less expensive for presentation of videotaped testimony rather than live. Virtual trials have



been suggested and speculated about by some. That is where the jurors don't—the actors, including the jurors—don't even come together in the same place. They are aware of who they are. We're all watching the same presentation on the computers and weigh in with questions and deliberations, a chat room for deliberations. I'm very leery about that. At some point, even I become a traditionalist and want to preserve the face-to-face deliberations, the exchange, viewing witnesses, etc. So, I'm not a big fan of the suggestion of virtual trials.

A word needs to be said I think about evaluating these procedures or doing a pilot study if you're leery. Have it evaluated by experts to get the feedback, rather than relying on suppositions and assumptions, and age-old understandings. In Arizona, the Arizona Supreme Court opened up a whole bunch of trials, criminal and civil, to study by some of the experts you've heard named: Hans, Diamond, Munsterman, and others. Fifty civil trials, jury trials in Tucson were—and deliberations with the parties' consent—lawyers', jurors', and so forth and so on—consent. The Supreme Court's consent, conditional. Videotaped and produced six or eight articles, some of which are listed in your materials, evaluating juror discussions, jury deliberations, etc., and answering many of our questions. Resolving some of our fears, and not resolving others, leaving them open. Empathy, trust, fear of reversal. Was it Erica Jong who wrote *Fear of Flying*? Did she pass away? Well, if she's still with us, I wish she would do a book for us that is *Fear of Reversal*.

Okay. Questions about anything I've said or haven't said; Arizona's experience, or experience in other states?

## QUESTIONS AND ANSWERS

MR. JEFFREY BELEW: I'm Jeffrey Belew. I've got a question not necessarily for you, but maybe for some of the

judges this time. We've implemented some of those things that he suggested with jurors. I was curious what Judge Thomas or some of the other judges would chime in on jury questions during the trial. What have you found to be, percentage-wise, good questions, questions that would just—obviously a lot of times they know it's insurance, which we don't let come in, in Tennessee. But what has been your experience with some of the questions that have been asked of the jurors during the trials?

JUDGE MCGINLEY: I'm Creed McGinley, and I'm a judge in a rural district. I try a whole lot of jury cases. And I was actually part of the pilot project that we've referred to. They pulled me screaming and kicking into this thing on some of the issues. I'm doing everything right now that is suggested here as far as jury notebooks, complete instructions. I charge them as much as I can on the front end. I'm allowing juror questions. It has not been any problem whatsoever. You relatively, you hardly ever have questions. And when you do, sometimes it actually suggests to the attorneys some deficiencies in their presentation. And if a jury trial was a search for the truth, then I think that's appropriate. But these things, everyone having a copy of the instructions. A lot of these things that I said couldn't be done, I'm doing every one of them now because I can tell the difference in these cases.

MR. BELEW: Is that before the trial or after the trial?

JUDGE MCGINLEY: The what?

UNIDENTIFIED SPEAKER: You said there were deficiencies identified by the questions jurors asked. Are they asking those questions after the presentation or before?

JUDGE MCGINLEY: Yes, that's when you charge them that after witnesses testify, but before they are excused. They're permitted to ask questions and so forth and so on. And sometimes it will bring up something that likely should be developed. And the attorneys, I think probably both sides appreciate it because it helps them.

JUDGE DANN: If I can join in on that. One way to look at it is that there's no such thing as a bad juror question, as even the bad or off-the-wall question—what we think was off-the-wall—is important to that juror. Otherwise, the juror would not have taken the time and trouble in reaching out for help with something.

JUDGE MCGINLEY: You do have to screen because . . .

JUDGE DANN: Oh, sure.

JUDGE MCGINLEY: They will ask questions that are not appropriate as far as the Rules of Evidence.

JUDGE DANN: My favorite question in a criminal case asked the testifying defendant, "Well, if you didn't do this crime, do you know who did?" You've heard of that. But these strange or bad questions we do have sometimes alert the judge and the lawyers that something may need to be better done about that misunderstanding to clear up something, add, clarify, and so forth. It does take additional time in the trial, and you have to vent it with the attorneys, give them a chance to object outside. But in my book, we can take the time—the trade-off is worth it. Juror satisfaction, juror comprehension is worth it—and the care we like to think we take with these matters, these serious matters. It's worth the trade-off, the extra time and effort.

DEAN BLAZE: Judge, following up on this. What about re-argument in response to some of the questions? If I remember correctly, there were a number of times in Arizona when this was done, I don't know if you did it or Judge Martone.

JUDGE DANN: Yeah, both of us did it. Judge Marton and I did it in different homicide cases. This procedure was also approved by the ABA. It's called in some courts re-opening for additional argument, instruction, or even evidence sometimes. That is, the juror reaches—you get the familiar note—I think we've reached an impasse. Now, where they noticed this word impasse is beyond me. But they know what word to use, the magic word impasse. So instead of calling them into the jury room and saying, "Are you really?" and then leading, the next conversation is, "Are you hopelessly deadlocked? You are, aren't you?" And lead them through—we do this dance, tradition dance, and a mistrial.

Well, the only thing worse than trying some of these cases once is trying them twice, needlessly so. At that first mention of a possible mistrial, Arizona law allows—it doesn't require—it depends on the circumstances, judge's discretion, to ask the deliberating jury, "I received your note. You think you've reached an impasse on one or all counts or whatever. If you would like to do so, but only if you want, please write down the issues that divide you that have led to an impasse, if the issue is having to do with the evidence, or the instructions, or a combination. And I will take your list up with the lawyers and we'll see what, if anything, we can do to assist you in moving along and avoiding deadlock." And the note comes out.

Sometimes they say, "We don't want to" or "We can't list anything. We can't even agree on what to list, what our differences are." Or they'll list three things or four things. Among those three or four, there are two or

three, or maybe just one that you're able to address. You do that through additional argument. Ask the attorneys to supplement their argument on this point. How does the law of conspiracy, for example, in a murder case, tie in this particular defendant? How does it relate to this defendant?

Well, the law on conspiracy is enough to choke even a knowledgeable Tennessee attorney and let alone lay jurors. It's complex, heavy-duty stuff. So you allow the attorneys, as we did, half an hour each. The jury went back in this murder case, and an hour and a half or so later they came out with verdicts acquitting on some counts and convicting on others. It helped them; they said post trial in a debriefing. Now, sometimes you can't. Your hands are tied. You can't call in additional witnesses or something in the record. You've got the burden of proof, the jeopardy considerations, and all that due process. Sometimes you can do something and save the trial, save the investment to the public and private money.

UNIDENTIFIED SPEAKER: Judge, I was just going to follow up on what Judge McGinley said about juror questions. The juror questions are a golden opportunity for the lawyers to get into the minds of the jurors about what they're thinking during the trial. And one other thing that I've added that's not specifically provided for in our Rule: eleven juror questions. To allow each side follow-up questions if a witness brings out new information that neither attorney has gotten out of their questions, then I allow each side one opportunity to ask follow-up questions of them.

SECOND UNIDENTIFIED SPEAKER: I go back to direct and cross or whatever. After I've determined the question is appropriate with the lawyers, asked the juror the questions, and they get the answers from the witness. And

then I'll say, "Anything further from this side? Anything further from that side?"

UNIDENTIFIED SPEAKER: I've had more than one lawyer say, "Judge, that's a great question. I wish I had thought of that."

JUDGE DANN: Thank you. If you still miss Tom Munsterman at this point, that's your problem.

