Reforming the Language of Jury Instructions

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REFORMING THE LANGUAGE OF JURY INSTRUCTIONS

Peter Meijes Tiersma*

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I. INTRODUCTION

During the past decade or two, experts on language have increasingly focused their attention on legal issues.\(^1\) For example, a number of studies have examined legal language, which includes not only the speech and writing of lawyers and other legal professionals,\(^2\) but in a broader sense encompasses any language, such as that of constitutions, statutes, opinions, contracts, wills, and so forth, that has some type of legal effect, whether or not drafted by someone with legal training.\(^3\) Elsewhere, the law is concerned with more everyday lan-


language, particularly when that language is used to defame someone or to commit a crime. Other researchers have investigated the role of language in the courtroom, such as how the speech style of a witness can influence assessments of her credibility. A related issue is the reliability of eyewitness testimony; although various factors can influence such reliability, linguistic considerations like the phrasing of a question have been shown to be quite important in determining a witness's response.

Yet in some ways the most significant linguistic research on the law has focused on the comprehensibility of jury instructions, for in a very real sense these studies call into question the legitimacy of the jury system itself. Fundamental to the Anglo-American process of trial by jury is the assumption that after the presentation of evidence and argument by counsel, the judge can instruct the jury on the applicable law, and the jury will then apply those instructions to the facts of the case and return a reasoned verdict.

Few lawyers and judges ever pause to contemplate just how woefully inadequate this “instruction” often is, especially in more complex cases. Imagine a tax class at a law school in which the

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7. As one law professor who served on a jury reported:

The judge stepped down from his tomb-like bench. Facing a huge lectern placed directly in front of the jury box, he proceeded to drone on for fifty-seven minutes giving us his “instructions.” Those instructions did not, in the ordinary or familiar use of that plain English word, instruct us in any way to do anything that could have been digestible to an adult without legal training. Internally contradictory in part and ponderously phrased, they were a jumble of comments, legal clichés, cautionary words, cabalistic definitions, and talmudical subtleties on the themes of reasonable doubt, diminished capacity, lesser included offense, specific intent, and other legal chestnuts.

Ivor Kraft, Happy New Year: You’re a Juror, 28 Crime & Delinqu. 582, 593 (1982).
entire course consists of a verbatim reading of the Internal Revenue Code. Students are not told that they have the right to ask questions, and the formal atmosphere of the class does not encourage them to do so. When one summons the courage to pose a question, the professor responds by rereading the entire lecture word for word, so as not to draw undue emphasis to any particular section of the Code. He refuses to give students a copy of the Code or to provide any examples or illustrations that might help them understand how the Code works in practice; he also forbids the students to do outside research. Then he hands out the final examination.

Surely no reputable law school would tolerate such “instruction.” But this scenario is remarkably similar to the reality faced by many juries. All too often instructions track the language of an applicable statute almost verbatim, so that a charge may differ little or not at all from simply reading the statute. When jurors fail to understand an instruction, judges are reluctant to explain it in ordinary language. Compounding the inadequacy of this “instruction” is that unlike law students, jurors are laypersons not selected for their educational attainments or their promise as legal scholars. At the same time, the decision of the jury may literally be a matter of life and death.

Part II of this Article surveys some of the data showing that jurors often do not comprehend pattern jury instructions, and explores some of the linguistic characteristics that make them difficult to understand. Part III continues by tracing to what extent the courts and jury commissions have responded to these empirical studies. It also reviews the California civil jury instructions criticized in an article by Robert and Veda Charrow one and a half decades ago and analyzes the progress that has been made since then. Finally, part IV of this Article makes some proposals for further reform, particularly emphasizing the need to inform jurors of their right to ask questions about instructions that they do not understand, and to receive an adequate response.


9. Any explanations of the instructions, or illustrations of how they work, are most likely to be provided by counsel during closing argument. But of course, jurors are routinely told that it is only the judge who can instruct them on the law, and they may therefore pay little heed to argument by the parties’ lawyers regarding the content of the law.
II. THE EVIDENCE

Like priests debating fine points of a Latin mass to be delivered to French-speaking peasants, lawyers devote tremendous energy to refining arcane statements of the law that mean little to the jury. Justice Frankfurter noted that all too often instructions to juries are "abracadabra." And as Judge Jerome Frank put it:

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

Are the instructions of the judge really like a foreign language? Surely this is at least a slight exaggeration. But after years of law school and daily exposure to terms like "estoppel" and "preponderance," it is doubtful that legal professionals can intuitively gauge the degree to which laypeople understand legal language. This is a quintessentially empirical issue that can only be resolved by appropriate research. Fortunately, scholars of various disciplines have increasingly turned their attention to precisely this question.

A. Empirical Studies of Jurors’ Comprehension of Instructions

Roger Traynor, the renowned California jurist, once wrote that "[i]n the absence of definitive studies to the contrary, we must assume that juries for the most part understand and faithfully follow instructions." Since Traynor made his assertion over two decades ago, the studies then lacking have been made, and they have over-

11. JEROME FRANK, LAW AND THE MODERN MIND 195 (Peter Smith 1970). Frank’s point was not that instructions should be made comprehensible, but rather that ordinary jurors cannot reasonably be expected to understand the law in such a short period of time. He claimed that the “realistic theory” was that the jury simply determines the law itself. Id. at 329-30.
12. But see Mrs. Ben T. Head, Confessions of a Juror, 44 F.R.D. 330, 336 (1968) (quoting a former juror’s statement to a Tenth Circuit conference) (“[T]he Judge instructed us in language none of us understood. It was involved and tedious and long, and so full of whereases and therewiths that he lost us halfway through. . . . [W]e proceeded to consider the case according to our rough sense of justice without much regard for the law.”).
whelmingly concluded that the assumption that juries adequately understand their instructions is simply no longer tenable. Once it is established that jurors do not fully understand instructions, the related assumption that jurors faithfully follow them also becomes subject to grave doubt. Even with the best of intentions, people cannot follow instructions that they do not comprehend.

Much research by linguists, psychologists and others has confirmed that jurors tend to have great difficulty understanding the instructions that are supposed to guide their decisionmaking. For example, studies conducted by the team of Amiram Elwork, Bruce Sales, and James Alfini have consistently shown that jurors have difficulty understanding standard jury instructions, and that those same jurors have much less difficulty understanding jury instructions that have been rewritten in light of psycholinguistic principles.\textsuperscript{14}

In one such study, a representative sample of the jury pool in Lancaster County, Nebraska, viewed a videotape of a mock automobile accident trial that was based on the facts of a real Michigan case.\textsuperscript{15} The subjects were divided into thirty-one juries: sixteen juries were given the original instructions, and fifteen juries were given instructions that had been rewritten for greater comprehensibility.\textsuperscript{16} The jury deliberations were videotaped and analyzed.\textsuperscript{17} Those juries that received the original instructions experienced more confusion, allowing one or two individuals to "proclaim expertise and dominate" the discussion.\textsuperscript{18} Juries with the original instructions were also more

\begin{itemize}
\item \textsuperscript{14} See, e.g., AMIRAM ELWORK ET AL., MAKING JURY INSTRUCTIONS UNDERSTANDABLE 12-17 (1982) (study groups were given actual jury instructions, then were asked a series of questions designed to test their understanding of those instructions—the groups answered less than half the questions correctly, and demonstrated a misunderstanding of many critical legal issues); Amiram Elwork et al., Juridic Decisions: In Ignorance of the Law or in Light of It?, 1 L. & HUM. BEHAV. 163 (1977) (two studies found that Michigan pattern negligence instructions were about as useful as no instruction at all—rewriting the instructions made them significantly more effective); see generally Amiram Elwork et al., The Problem with Jury Instructions, in THE IMPACT OF SOCIAL PSYCHOLOGY ON PROCEDURAL JUSTICE 214 (Martin F. Kaplan ed., 1986); Amiram Elwork et al., Toward Increasing the Comprehensibility of Jury Instructions, in IN THE JURY BOX: CONTROVERSIES IN THE COURTROOM (Lawrence S. Wrightsman et al. eds., 1987); Amiram Elwork et al., Toward Understandable Jury Instructions, 65 JUDICATURE 432 (1982); Bruce D. Sales et al., Improving Comprehension for Jury Instructions, in THE CRIMINAL JUSTICE SYSTEM 23 (Bruce D. Sales ed., 1977).
\item \textsuperscript{15} Amiram Elwork & Bruce D. Sales, Jury Instructions, in THE PSYCHOLOGY OF EVIDENCE AND TRIAL PROCEDURE 280, 285 (Saul M. Kassin & Lawrence S. Wrightsman eds., 1985).
\item \textsuperscript{16} Id. at 285.
\item \textsuperscript{17} Id.
\item \textsuperscript{18} Id. at 286.
\end{itemize}
likely to discuss legally irrelevant or inappropriate issues. For example, the groups receiving the less comprehensible original instructions frequently ignored the judge's admonition that they should not consider whether the defendant's insurance would pay a damage award. These juries were also less inclined to discuss a critical issue: whether the plaintiff was contributorily negligent. Even after deliberation, a significant number of jurors who received the original instructions failed to apply the contributory negligence rule, demonstrating that deliberation did not eliminate confusion.

Another team headed by David Strawn and Raymond Buchanan likewise found in several studies that Florida jurors commonly misunderstood instructions and that improved instructions were beneficial. In one article, the authors reported on an actual civil case. The jury instructions were relatively standard, and the trial resulted in a hung jury. On retrial, the instructions were modified to clarify legal definitions and outline the process that the jury should use to reach a decision. This second jury returned a verdict in ninety-five minutes, and its members reported that they were all much more satisfied with the experience.

Laurence Severance and Elizabeth Loftus have also demonstrated that comprehension levels for pattern instructions are low and that rewriting pattern instructions leads to greater understanding. In a

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19. Id.
20. Id.
21. Id. at 287.
22. Id. at 286-87. It should be noted that jury nullification of the contributory negligence rule may also have been a factor.
23. See David U. Strawn & Raymond W. Buchanan, Jury Confusion: A Threat to Justice, 59 JUDICATURE 478, 480-83 (1976) (explaining that Florida standard criminal jury instructions were misunderstood by a large proportion of a study group that received the instructions); see also Raymond W. Buchanan et al., Legal Communication: An Investigation of Juror Comprehension of Pattern Instructions, 26 COMM. Q. 31 (1978); K. Phillip Taylor et al., Avoiding the Legal Tower of Babel, JUDGES' J., Summer 1980, at 10.
25. Id. at 387.
26. Id. at 387-88.
27. Id. at 389.
28. See Laurence J. Severance & Elizabeth F. Loftus, Improving the Ability of Jurors to Comprehend and Apply Criminal Jury Instructions, 17 L. & SOC'Y REV. 153, 189-94 (1982) (discussing a study in which researchers found that comprehension errors by college student subjects were significantly lower overall with revised instructions than with pattern instructions, and that subjects who received revised instruction made fewer requests for clarification of the instructions).
study performed on former jurors and people waiting assignment as jurors in the State of Washington, subjects were shown a videotaped burglary trial. Some were given pattern instructions on reasonable doubt and related legal concepts; others were given instructions on the same subjects that were designed to be more understandable while communicating the same content. A multiple-choice questionnaire that measured comprehension showed that subjects who received the revised instructions made fewer errors than those with the pattern instructions. Many other studies have reached analogous conclusions.

B. What Makes Jury Instructions Difficult to Comprehend?

While most legal professionals would probably agree that jurors have trouble understanding jury instructions, they would probably not...
agree as to why this is so. One possibility is that the rules of the law, which must be conveyed to a group of ordinary citizens within a very limited period of time, are too complex for the ordinary citizen to understand. Yet if the law is too complex for laypersons to understand, the legitimacy of trial by jury itself is called into question. Our system of justice depends on carefully crafted rules of law that are applied to the facts of a particular case. The Supreme Court has observed that a "critical assumption" underlying the system of trial by jury is that "juries will follow the instructions given them by the trial judge."³³ "Were this not so," the Court added, "it would be pointless for a trial court to instruct a jury, and even more pointless for an appellate court to reverse a criminal conviction because the jury was improperly instructed."³⁴

Except perhaps in cases of jury nullification, our legal system requires faithful adherence to its rules of law. And even with nullification, the jury must logically first determine what the legally mandated outcome ought to be by applying the law to the facts.³⁵ Only then can it nullify that option and produce what it believes to be a more just verdict. A verdict based on misunderstanding or confusion, or simply ignoring the law, is not an example of nullification.³⁶ Hence, even jury nullification presupposes a system in which the jury ordinarily understands and follows the law. The rule of law means nothing if legal decisionmakers are ignorant of it or can freely ignore it.

Consequently, if the law is simply too complicated for lay juries to understand, we should abolish the jury entirely. In the alternative, we might argue that juries be used only in straightforward cases that will not require complicated jury instructions, or at least that in certain types of complex cases (like securities cases) we use jurors with specialized training in that area. Indeed, arguments of this sort have been seriously entertained.³⁷

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34. Id.
37. See, e.g., James S. Campbell & Nicholas Le Poidevin, Complex Cases and Jury Trials: A Reply to Professor Arnold, 128 U. PA. L. REV. 965 (1980) (arguing for elimination of
While the complexity of the law is surely a relevant factor, a more fundamental reason for the difficulty that jurors have in comprehending jury instructions is the linguistic nature of the instructions themselves. Anyone who has ever bought a product unassembled and tried to put it together realizes that the clarity of the instructions can make a world of difference. Poorly written instructions that use a large number of undefined technical terms with no illustrations are almost impossible to follow; the frustrated purchaser will either give up or call in an expert. On the other hand, even a very complicated job can often be performed by an amateur if the instructions are sufficiently “user-friendly.” Likewise, a jury that is given poorly drafted instructions will probably either give up on the instructions, or will seek expert advice by asking the judge for assistance or looking up technical terms in a dictionary or other reference work. On the other hand, if the instructions are more user-friendly, perhaps including illustrations and laying out the logical steps that the jury must follow to reach a verdict, the jury will be far less frustrated—and will be considerably more likely to actually apply the law to the facts.

C. The Charrow Study

Robert and Veda Charrow conducted one of the seminal studies on the comprehensibility of jury instructions, a study in which they

identified some of the linguistic characteristics that make jury instructions difficult to comprehend. In the first of two experiments, the Charrows tested thirty-five prospective jurors in Maryland. Fourteen pattern civil jury instructions used in California were recorded on audio tape and played twice to each juror. The jurors were then recorded on another audio tape as they paraphrased the instructions they had just heard. The subjects were divided into four different groups, each of which received the instructions in a different order. The Charrows scored the paraphrases by breaking each instruction into segments, then determining how many segments were properly paraphrased to reach what they called the "full performance" score. Subjects did poorly on full performance, obtaining a mean score of .386; that is, only about thirty-nine percent of the segments were properly paraphrased. The Charrows also created what they called the "approximation" measure, an alternative scoring scheme in which only the essential parts of each instruction were scored. Yet even using this more lenient measure of accuracy, the subjects did poorly, obtaining a mean score of .540; that is, only about fifty-four percent of all essential parts of the instructions were, on average, correctly paraphrased.

A more detailed analysis of the data revealed several noteworthy conclusions. Not surprisingly, the only demographic factor found to affect comprehension was the educational level of the subject: higher education leads to greater comprehension. Surprisingly, sentence length, which is often felt to reduce comprehensibility, had very little actual effect; the critical issue was not the length but the complexity of the sentences. A simple illustration of this point is that a short sentence like "ontogeny recapitulates phylogeny" is incomprehensible

39. Id. at 1312.
40. The Charrows studied California’s standard civil jury instructions as compiled in CALIFORNIA JURY INSTRUCTIONS—CIVIL—BOOK OF APPROVED JURY INSTRUCTIONS (5th ed. 1969) [hereinafter BAJI (5th ed.)]. Charrow & Charrow, supra note 38, at 1311.
42. Id. at 1313.
43. Id. at 1311-14.
44. Id. at 1340-41.
45. Id. at 1361.
46. Id. at 1315.
47. Id. at 1361.
48. Id. at 1320-21.
49. Id. at 1318-20.
to almost everyone on first encounter. Yet an extremely long sentence, created by the concatenation of short and simple phrases, can be understood by virtually any child. Imagine, for example, a fairy tale that begins: “Once upon a time there was a king, and he had a daughter, and her name was Esther, and she lived in a castle, and one day she saw a frog in the wishing well” and so forth ad nauseam.

What matters far more than sentence length, according to the Charrows, is a number of linguistic factors that decrease comprehension. Most of these factors, not surprisingly, are common in legal writing in general. Among these are the following:

1. Overuse of Nominalizations

Nominalizations are nouns that are derived from verbs. The easiest way to create a nominalization is to add the suffix “-ing” to a verb. Thus, “eating” is a nominalized form of “eat,” as in “the eating of crackers can be messy.” Creating nominalizations occurs in a variety of fashions: “demonstration” (from the verb “demonstrate”), “failure” (from “fail”), “estoppel” (from “estop”), and “waiver” (from “waive”) are some examples. The Charrows pointed out that nominalizations are often more difficult to process than their corresponding verb forms. Unfortunately, jury instructions tend to use a lot of nominalizations.\textsuperscript{50} Consider the phrase “failure of recollection is [common],”\textsuperscript{51} containing two nominalizations. It is much more direct to say that “people often forget.”

2. Use of “As To”

The Charrows also observed that jury instructions are replete with “as to” constructions. The following single sentence contains three instances: “As to any question to which an objection was sustained, you must not speculate as to what the answer might have been or as to the reason for the objection.”\textsuperscript{52} “As to” is problematic not only because it is literary and somewhat anachronistic, but also because its meaning is rather vague.\textsuperscript{53}

\textsuperscript{50} Id. at 1321-22, 1336.
\textsuperscript{51} Id. at 1345 (emphasis added) (quoting BAJI (5th ed.), supra note 40, No. 2.21).
\textsuperscript{52} Id. at 1344 (quoting BAJI (5th ed.), supra note 40, No. 1.02).
\textsuperscript{53} Id. at 1322.
3. Misplaced Phrases

Another common problem with instructions is that prepositional phrases are sometimes placed in unnatural locations. For example, California's civil instructions contained the clause “if in these instructions any rule . . . is repeated,” instead of the more comprehensible “if any rule in these instructions is repeated.” Because “if” is directly followed by the subject in many sentences, some of the Charrows’ test subjects incorrectly paraphrased the clause as “if these instructions are repeated.”

4. Deletion of Relative Pronouns and the Following Verb

Jury instructions often omit relative pronouns like “who,” “which,” or “that” and the following form of the verb “be,” a phenomenon sometimes called *whiz deletion.* For instance, California’s civil instructions spoke of “questions of fact submitted to you” instead of the more comprehensible “questions of fact that are submitted to you.” Of course, whiz deletion is common in ordinary speech and writing, but leaving out information may make sentences harder to process. Consider the phrase “the people evacuated yesterday,” which in isolation could mean either that they evacuated themselves or that they *were* evacuated. With the relative pronoun expressed, this initial ambiguity is eliminated: “the people who were evacuated” can have only the latter interpretation.

5. Technical or Legal Lexical Items

It is surely no surprise that lay jurors have great difficulty with legal terms such as “proximate cause” (which is not widely used outside the law) or “stipulate” (which has a specific legal meaning). While terms of art serve as a convenient shorthand for lawyers, they obviously befuddle those uninitiated into the legal fraternity. Support for this observation is provided by the many cases in which jurors engage in misconduct by looking up legalisms in dictionaries.

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54. Id. at 1322-23.
55. Id. at 1323 (quoting BAJI (5th ed.), *supra* note 40, No. 1.01).
56. Id.
57. The term “whiz deletion” refers to an omission of the phrase “which is.” Id.
58. Id. at 1323 (quoting BAJI (5th ed.), *supra* note 40, No. 1.00).
59. Id. at 1324.
60. Use of a dictionary by a jury technically constitutes misconduct, although many courts have found such use to have been nonprejudicial under the facts at issue. See United
6. Failure to Use Modal Verbs

Legal language is often characterized by the use of passive or impersonal phrasing, instead of more to-the-point constructions using modal verbs like "must" or "may." Thus, jury instructions often state that "it is necessary for you" or "it is your duty" or "you are required" instead of the more direct "you must."

7. Use of Double or Triple Negatives

In addition to words like "not" or "never," negatives include words that contain elements with a negative meaning, such as the prefix "mis-" in "misunderstand" or "un-" in "unreal." The use of more than one negative in a sentence often causes comprehension errors. For example, a person who hears the phrase "she did not misunderstand me" might process it as being semantically negative ("she did not understand," or "she did misunderstand"), whereas in fact the negatives cancel each other out ("she did understand"). Multiple negatives are endemic in jury instructions, as in the sentence

States v. Duncan, 598 F.2d 839 (4th Cir.) (jury's reference to a dictionary to look up "motive" and "intent" was misconduct, it was not prejudicial), cert. denied, 444 U.S. 871 (1979); Franks v. State, 811 S.W.2d 301 (Ark. 1991) (allowing jury to look up "premeditated" was error but not prejudicial, since dictionary definitions were clearer than instructions); Tate v. State, 401 S.E.2d 549 (Ga. App. 1991) (juror looking up "aggravate" and "assault" did not necessitate mistrial because he did not communicate the definition to others); State v. Amorin, 574 P.2d 895 (Haw. 1978) (while it was misconduct for a juror to consult a dictionary for the definition of "insanity," the misconduct was harmless because juror followed court's definition); State v. McNichols, 363 P.2d 467 (Kan. 1961) (although jury was guilty of misconduct in looking up "culpable," the appellant was not prejudiced by it); State v. Duncan, 593 P.2d 427 (Kan. Ct. App. 1979) (jury's misconduct in looking up definition of "assault" was not reversible error; defendant showed no prejudice resulting from it); State v. McLain, 177 S.E.2d 742 (N.C. Ct. App. 1970) (juror's looking up "uttering" in case of uttering forged check was not prejudicial where jury was instructed to disregard the definition); State v. Holt, 107 N.W.2d 732 (S.D. 1961) (jury's use of dictionary to look up "corporal," "assault," and "battery" was harmless when state made sufficient showing to overcome presumption of prejudice); Wilson v. State, 495 S.W.2d 927 (Tex. Crim. App. 1973) (jury's looking up definitions of "care," "custody," and "control" was not prejudicial); State v. Donald, 63 P.2d 246 (Utah 1936) (allowing jury to look up "utter" in prosecution for uttering forged check was not prejudicial to the defendant). In other cases, use of a dictionary by a jury was found to have been prejudicial under the facts of issue. See Marino v. Vasquez, 812 F.2d 499 (9th Cir. 1987) (juror's use of dictionary to define "malice" was prejudicial); Alvarez v. People, 653 P.2d 1127 (Colo. 1982) (jury's use of dictionary to look up "reasonable," "imaginary," and "vague" was prejudicial); State v. Williamson, 807 P.2d 593 (Haw. 1991) (juror's taking a dictionary into deliberation to look up "preponderance" and "entrapment" was prejudicial misconduct); State v. Holmes, 522 P.2d 900 (Or. App. 1974) (providing jury with dictionary was prejudicial).

61. Charrow & Charrow, supra note 38, at 1324-25.
62. Id. at 1325.
"innocent misrecollection is not uncommon," which contains no less than three negative elements in a five-word phrase.

8. Use of Passives in Subordinate Clauses
Authorities on legal writing have long been suspicious of the passive voice. Charrow and Charrow found, however, that the passive voice impedes comprehension primarily when used in subordinate clauses—in main clauses, the passive voice does not seem to cause any particular problems.

9. Poor Discourse Structure
"Discourse structure" is the overall organization of ideas into coherent and logical sentences and paragraphs. The Charrows observed that some jury instructions are poorly organized, containing ideas on several different topics and not clearly indicating the relationship between them.

10. Too Many Embeddings
A final problem with many jury instructions is the large number of embeddings. Complex sentences are often constructed by combining two or more simple sentences. For example, the simple sentences "I saw the woman at the beach" and "the woman was wearing a hat" and "the hat had a wide brim" can be combined into one sentence by embedding the second and third sentences into the first: "I saw the woman who was wearing a hat that had a wide brim on the beach." More embedding makes sentences harder to process, as in the following example, which contains not only embeddings, but also has passives in the subordinate clauses: "[y]ou must never speculate to be true any insinuation suggested by a question asked a witness." In a second experiment, the Charrows rewrote the instructions to eliminate many of the problematic features they had identified, mak-

63. Id. at 1325 (quoting BAJI (5th ed.), supra note 40, No. 2.21).
66. Id. at 1326.
67. Id. at 1327.
68. Id.
69. Id. at 1328 (quoting BAJI (5th ed.), supra note 40, No. 1.02); see ELWORK ET AL., supra note 14, at 145-88 (identifying many of the same factors that Charrow & Charrow, supra note 38, determined to cause comprehension problems).
ing mostly minor revisions to remain as true to the original as possible.\textsuperscript{70} Once again, they asked potential jurors to paraphrase the instructions.\textsuperscript{71} The revision led to substantially better performance, both on the performance measure and the approximation measure.\textsuperscript{72}

III. THE RESPONSE BY THE PROFESSION

In light of the many studies that have undermined the presumption that jurors adequately understand their charge, as well as research that pinpoints some of the specific linguistic reasons for the lack of comprehension, one might expect to find litigants challenging obscure instructions. In addition, one might expect courts or jury instruction commissions to advocate reforms. Unfortunately, progress remains limited. There are, however, hopeful signs for the future.

A. The Courts

1. The Legal Standard for Evaluating Jury Instructions

Despite some twenty years of research by social scientists, law professors, and even judges,\textsuperscript{73} courts have largely ignored the findings that jurors often do not understand the jury instructions that lawyers and judges labor so hard to craft correctly. The legal standard for jury instructions remains, primarily, that they must accurately state the law, or that they must not mislead the jury.\textsuperscript{74} Indeed, courts at
times still remark that failure of the jury to understand an instruction is legally irrelevant.  

Under this approach, the safest course of action for a judge is to read verbatim from the governing statute or judicial opinion, both of which by definition accurately state the law. Of course, such documents are not written for lay consumption, and the rules contained in them therefore need to be translated into terms that legally untrained jurors can understand. Unfortunately, the traditional standard for appraising instructions on appeal severely discourages efforts by judges to translate the legal language of statutes and opinions into lay terms.

On the other hand, the traditional standard may be changing. Several courts have commented—usually in dicta—that instructions ought to be understandable, and some have even referred to the research on this issue. For example, Judge (now Justice) Ginsburg, and correct statement of the law applicable to the case, the instructions are not erroneous.

75. See People v. Lee, 269 Cal. Rptr. 434, 438-39 (Ct. App. 1990) (refusing to overturn conviction on ground of instructional error, despite evidence that jurors did not understand instruction); John B. Gunn Law Corp. v. Maynard, 235 Cal. Rptr. 180, 183 (Ct. App. 1987) (stating that “it has never been held error in California to instruct in terms of [a pattern jury instruction] due to lack of intelligibility”); Biegler v. Kirby, 574 P.2d 1127, 1130 (Or. 1978) (stating that “[c]onfusion or misunderstanding of instructions is not misconduct justifying a mistrial”); Davis v. Pacific Diesel Power Co., 598 P.2d 1228, 1230-31 (Or. Ct. App. 1979) (retrial not granted even though post-trial hearing established that jury had not understood its instructions); Hoffman v. Deck Masters, Inc., 662 S.W.2d 438, 443 (Tex. Ct. App. 1983) (jury apparently miscalculated damages because it misunderstood its instructions; court held that while a unanimous clerical error in recording the verdict would have justified a new trial, a unanimous misconstruction of the language of the charge did not, despite affidavits from eight jurors that they misunderstood the charge); Kindle v. Armstrong Packing Co., 103 S.W.2d 471, 473 (Tex. Civ. App. 1937) (jury’s misunderstanding of meaning of “proximate cause” was not grounds for new trial).

76. As one commentator has noted, “judges are talking to appellate judges and not to the jury when giving the instruction.” Ronald M. Price, Comment, Study of the North Carolina Jury Charge: Present Practice and Future Proposals, 6 WAKE FOREST INTRAMURAL L. REV. 459, 466 (1970).

77. People v. Miller, 160 N.E.2d 74, 76-77 (N.Y. 1959) (holding that the court has a duty to give the jury comprehensible instructions); People v. Gonzalez, 56 N.E.2d 574, 576 (N.Y. 1944) (holding that court’s failure to answer jury questions during deliberation was error, stating that a jury has the right to ask questions and that a judge’s failure to answer or fail to provide an adequate answer to a proper question is reversible error); Commonwealth v. Smith, 70 A. 530, 535-36 (Pa. 1908) (holding that “when the trial judge has not succeeded in delivering instructions on the law in such a way that they will be understood by the jury, his charge is inadequate and open to objection by the defendant.”). For a substantial list of other cases requiring jury instructions to be concise and understandable, see Robert P. Charrow, Book Review, 30 UCLA L. REV. 1094, 1097 n.11 (1983).

78. See, e.g., Bennett v. State, 789 S.W.2d 436, 438-39 (Ark.) (in a murder prosecution, trial court’s failure to instruct jury on all applicable law at conclusion of case was reversible
To arm the jury with the information needed for the intelligent performance of its task, the judge might first endeavor to speak the language of the jurors, and avoid the jargon of the legal profession. Terms familiar to a lay audience, and shorter, less complex, more active sentences, increase the chance that the jurors will understand and recall the judge's instructions.80

Another recent case to address the problem is Mitchell v. Gonzales.81 In Mitchell, the California Supreme Court analyzed the 1986 version of the California Jury Instructions—Civil—Book of Approved Jury Instructions ("BAJI") No. 3.75, a pattern instruction on proximate cause.82 It referred to the Charrow study in concluding that the instruction produced substantial misunderstanding among laypersons.83 Critically, however, the court did not rely on the finding that the instruction's language created comprehension difficulties. Rather, it focused on the likelihood that jurors would be misled by the instruction. In other words, the court largely adhered to the traditional standard that an instruction must accurately (not necessarily comprehensibly) state the law. As a result, the court disapproved

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79. 817 F.2d 762 (D.C. Cir. 1987).
80. Id. at 808 (Ginsburg, J., concurring).
82. Id. at 873 nn.1-2 ("A proximate cause of [injury] [damage] [loss] [or] [harm] is a cause which, in natural and continuous sequence, produces the [injury] [damage] [loss] [or] [harm] and without which the [injury] [damage] [loss] [or] [harm] would not have occurred.").
83. Id. at 877.
BAJI No. 3.75 and held that the lower court should have given BAJI No. 3.76, an alternative instruction on proximate cause. At the same time, the court noted that the Charrow study had found some comprehension difficulties with BAJI No. 3.76 as well, so it recommended that the Committee on Standard Jury Instructions consider whether the instruction could be improved by adopting the suggestions of the Charrow study or by otherwise modifying it.

2. Difficulties in Challenging Incomprehensible Instructions in Court

Although some judges are at least moderately receptive to studies regarding jury instructions, virtually no court has overturned a verdict because the charge, though legally adequate, was difficult for a jury to understand. Clearly, the obstacles to raising comprehensibility issues in the context of particular cases are formidable. Especially in criminal cases, judges have considerable discretion in choosing the precise language to instruct the jury. Perhaps even more critically, the issue of instructional error must generally be raised at the trial level. The party challenging the verdict must have objected to the

84. Id. at 873 n.3 ("A legal cause of [injury] [damage] [loss] [or] [harm] is a cause which is a substantial factor in bringing about the [injury] [damage] [loss] [or] [harm].").

85. Id. at 879 n.9.


87. See United States v. Kabat, 797 F.2d 580, 588 (8th Cir. 1986) ("[A trial] court has wide discretion on choice of language [of jury instructions]."); Gómez v. State, 494 So. 2d 184, 186 (Ala. Crim. App. 1986) ("A trial court has broad discretion in formulating its jury instructions, provided they are an accurate reflection of the law and facts of the case."). One limit on this discretion is that judges are often under some pressure to use pattern instructions.

88. See Henderson v. Kibbe, 431 U.S. 145, 154 (1977) (holding that instructional error must normally be raised in the trial court); United States v. Glickman, 604 F.2d 625, 631-32 (9th Cir. 1979) (holding that appellants who did not object to a supplementary jury instruction at trial "[could not challenge the instruction] on appeal unless the instruction constituted plain error"); cert. denied, 444 U.S. 1080 (1980); McCall v. State, 540 P.2d 95, 95 (Nev. 1975) (per curiam) ("The failure to object or to request special instruction to the jury precludes appellate consideration."); People v. Gonzalez, 430 N.Y.S.2d 655, 655 (App. Div. 1980) (upholding lower court’s rejection of jury’s request to explain jury instruction “in layman’s terms” where defendant had failed to object), aff’d, 439 N.E.2d 351 (N.Y. 1982); Davis v. State, 792 P.2d 76, 83 (Okla. Crim. App. 1990) ("Appellant’s failure to object or...
incomprehensible charge when it was given, and perhaps have offered an understandable alternative that preserved the meaning of the original charge.  

Procedural difficulties aside, proving that the jury instructions in a particular case were incomprehensible will likewise be challenging. If a trial court refuses to give requested comprehensible instructions, a litigant may have to convince the appellate court not only that her proffered instructions were legally adequate, but that those actually given were not readily comprehensible to the jury. It will normally not be economically feasible to conduct a study of the actual jury instructions, so the appellate court must be willing to accept expert testimony—based on more general research—that the instructions at issue were inadequate.

Where courts decline to accept such expert opinions, the party challenging the instructions will have to prove that the jury charge in that specific case was not correctly understood. Aside from the logistical obstacles to locating and surveying the actual jury, such efforts will likely run afoul of the rule that jurors normally cannot impeach their own verdict after they have been discharged. While

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89. See, e.g., Block v. United States Fidelity & Guar. Co., 290 S.W.2d 429, 439 (Mo. 1926) (en banc) (“If respondent believed that the meaning of the phrase ["within the apparent scope of said employee's duty"] was not clear and was likely to be misunderstood by the jury, it should have requested an instruction defining the phrase.”); Bulkley v. Thompson, 211 S.W.2d 83, 90 (Mo. Ct. App. 1948) (if “defendant was fearful that the jury might misunderstand [an] instruction, it was his duty to offer an instruction limiting the effect of the one given”).

90. See, e.g., Mitchell v. Gonzales, 819 P.2d 872, 879 (Cal. 1991) (finding instruction given at trial “grammatically confusing and conceptually misleading,” while praising instruction requested below by appellant as “intelligible and easily applied”).

91. See, e.g., Mitchell, 819 P.2d at 876-79.

92. See Murphy v. Lake County, 234 P.2d 712, 715 (Cal. Dist. Ct. App. 1951) (“The rule is well established in this state that affidavits or other oral evidence of either concurring or dissenting jurors which tend to contradict, impeach or defeat their verdict, are inadmissible.”); Watson v. Navistar Int'l Transp. Corp., 827 P.2d 656, 665 (Idaho 1992) (explaining that juror affidavits cannot normally be used to impeach verdict); Wingate v. Lester E. Cox Medical Ctr., 853 S.W.2d 912, 916 (Mo. 1993) (stating that affidavit or testimony of a juror is inadmissible in evidence for the purpose of impeaching the verdict of a jury).

However, the judge may have somewhat more leeway to inquire into the verdict before the jury is discharged. See, e.g., Stevens Markets, Inc. v. Markantonatos, 177 So. 2d 51, 52 (Fla. Dist. Ct. App. 1965) (holding that if "it is apparent that the jury misunderstood the court's instructions and rendered a defective verdict, [it] may be reindicted and returned to
the prohibition against impeachment has been eased in cases where jurors are alleged to have engaged in misconduct,\textsuperscript{93} the prohibition remains impervious to attempts to use juror affidavits to reveal their mental processes or deliberations.\textsuperscript{94} This rule therefore bars a court from considering the most probative kind of evidence that the jury was confused by, or did not understand, its instructions.\textsuperscript{95} Even when

\textsuperscript{93} See, e.g., Martinez v. Bullock, 535 P.2d 1200, 1204 (Alaska 1975) (stating that a juror cannot impeach verdict by his testimony or affidavit, absent a showing of fraud, bribery, forcible coercion or any other obstruction of justice); Ertsgaard v. Beard, 800 P.2d 759, 764 (Or. 1990) (explaining that a jury can impeach its verdict only in cases of misconduct that amounts to fraud, bribery, forcible coercion or any other obstruction of justice that would subject the offender to a criminal prosecution).

\textsuperscript{94} See State v. Leonard, 725 P.2d 493, 497 (Ariz. Ct. App. 1986) ("A defendant cannot impeach the jury verdict by delving into the jury's mental processes or personal experiences."); Rome v. Gaffrey, 654 P.2d 333, 334 (Colo. Ct. App. 1982) (holding that juror confusion about effect of verdict concerned their mental processes and thus did not justify a new trial); Chalmers v. City of Chicago, 431 N.E.2d 361, 363 (Ill. 1982) ("It is well established in this State, and almost universally recognized, that a jury may not impeach its verdict by affidavit or testimony which shows the motive, method or process by which the verdict was reached."); Hoffman v. Deck Masters, Inc., 662 S.W.2d 438, 443 (Tex. Ct. App. 1983) ("The verdict of the jury cannot be impeached by inquiring into the mental processes by which the jurors reached their verdict."); see also FED. R. EVID. 606(b), which provides, in part:

[A] juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith.

\textsuperscript{95} See Farmers Coop. Elevator Ass'n v. Strand, 382 F.2d 224, 230 (8th Cir. 1967) (explaining that a jury verdict may not be impeached by juror's affidavit that the jury misunderstood the instructions as to occurrences in the jury room which inhere in the verdict), cert. denied, 389 U.S. 1014 (1967); Walker v. United States, 298 F.2d 217, 226 (9th Cir. 1962) (holding that the trial court properly denied defendant a new trial based on a juror affidavit alleging misconception by jurors of the court's instructions on entrapment); People v. Battin, 143 Cal. Rptr. 731, 750 (Ct. App. 1978) (holding that juror's affidavit that she misunderstood instructions was inadmissible to impeach verdict when instructions were proper), cert. denied, 439 U.S. 862 (1978); Davis v. Lira, 817 P.2d 539, 544 (Colo. Ct. App. 1991) (holding that jurors who misunderstand jury instructions and apparently reach quotient verdict cannot impeach their verdicts); Andrews v. Idaho Forest Indus., 786 P.2d 586, 588-89 (Idaho Ct. App. 1990) (holding that the trial court correctly refused to consider affidavits from two jurors claiming that they misunderstood jury instructions); Applebe v. Lenschow, 494 N.E.2d 529, 535 (Ill. App. Ct. 1986) (holding that affidavits of jurors that they were confused by instructions were not admissible in motion for new trial); Commonwealth v. Fidler, 371 N.E.2d 1381, 1386 (Mass. App. Ct. 1978) (explaining that a jury verdict may not be impeached on showing that jury "misunderstood the judge's instructions, or erroneously recalled the evidence, or discussed in their private deliberations matters which the judge struck from the evidence and ordered them not to consider"); rev'd in part, 385 N.E.2d 513 (Mass. 1979); Johnson v. Ramsey County, 424 N.W.2d 800, 806 (Minn. Ct. App. 1988) (stating that
a misunderstanding of the law leads jurors to vote otherwise than they intended, or to enter the wrong verdict, most jurisdictions will not allow the verdict to be impeached, unless perhaps the jury misunderstanding or incorrectness of the verdict is apparent from the verdict itself.

Because of the impeachment rule, it may be impossible to ascertain whether an actual jury in a particular case understood its instruc-

96. See Santilli v. Pueblo, 521 P.2d 170, 171 (Colo. 1974) (en banc) (jurors may not impeach verdict where they allege that they misunderstood an instruction, even if they allege that their verdict would be different if they had understood it correctly: "[T]o allow such inquiry could subject jurors to harassment and coercion after the verdict and create uncertainty on the finality of verdicts"); Pletcher v. Von Poppenheim, 365 P.2d 261, 264 (Colo. 1961) (holding that testimony that jurors doubled damage award because they believed attorney received 50% fee was inadmissible to impeach verdict); Davis v. Lira, 817 P.2d 539, 543-44 (Colo. Ct. App. 1991) (holding that when one verdict form awarded compensatory damages of $87,300 and a second verdict form awarded exemplary damages of $87,300, and jurors later indicated they wished to make only one award of $87,000, the jurors could not impeach their verdict); Taylor v. R.D. Morgan & Assoc., 563 N.E.2d 1186, 1192 (Ill. App. Ct. 1990) (holding that juror affidavits, stating that jury misunderstood its instructions and believed it had to find defendant liable on all three alleged acts of negligence in order to find for the plaintiff, were not admissible); D.C. Thompson & Co. v. Hauge, 695 P.2d 574, 575-77 (Or. Ct. App. 1985) (holding that affidavits from discharged jurors stating that the verdict was not what they intended, apparently because the jury had overlooked the word "fail" in its instruction, did not justify a new trial), aff'd, 717 P.2d 1169 (Or. 1986).

Some jurisdictions do allow juror affidavits to be used to change a clerical error in the verdict. See, e.g., Cyr v. Michaud, 454 A.2d 1376, 1381-84 (Me. 1983) (discussing split of authority on whether affidavits of jurors are admissible to correct a mistake in the recording of the verdict, and holding that in this case such affidavits are inadmissible for that purpose).

97. See, e.g., In Re Acquisition of Property by Eminent Domain, 690 P.2d 1375, 1380 (Kan. 1984) ("Where under all the facts and circumstances it is disclosed that the jury was confused in making findings and in awarding damages . . . the verdict should be set aside on motion for a new trial."); Dicker v. Smith, 523 P.2d 371, 375 (Kan. 1974) (holding that, since it was apparent from the verdict that jury either misinterpreted or disregarded instructions, new trial was proper); Timmerman v. Schroeder, 454 P.2d 522, 525 (Kan. 1969) ("A jury verdict which manifests a disregard for the plain instructions of the court on the issue of damages, which arbitrarily ignores proven elements of damage and which indicates passion, prejudice or a compromise on the issues of liability and damages should be set aside on motion for new trial."); Parlman v. Kennelly, 520 So. 2d 445, 446-47 (La. Ct. App. 1988) (holding that an obviously inconsistent verdict should be set aside); Thormahlen v. Foos, 163 N.W.2d 350, 353-54 (S.D. 1968) (stating that, where verdict indicates that jury misconstrued instruction on mitigation of damages under comparative contributory negligence statute, plaintiff is entitled to new trial).
tions, at least for purposes of attacking the verdict. Consequently, it may be necessary to conduct a study on prospective or mock jurors who match the demographic profile of the actual jury or the demographic profile of the jury pool in that area.

However, even a carefully conducted study demonstrating that the actual jurors in a particular case had great difficulty understanding a particular jury instruction may not be sufficient to challenge the verdict rendered. The United States Court of Appeals for the Seventh Circuit rejected the results of a study showing that many prospective jurors did not understand the actual instructions in a particular death penalty case.\footnote{Gacy v. Welborn, 994 F.2d 305, 308-10 (7th Cir.), \textit{cert. denied}, 114 S.Ct. 269 (1993).} Specifically, the Seventh Circuit held that the researchers had failed to prove that alternative instructions conveying the same information would have led to greater comprehension.\footnote{\textit{Id.} at 311.}

In summary, parties should not wait until they lose a case to consider whether the jury will understand its instructions. Particularly in complex cases, they should submit comprehensible instructions if they hope to obtain a reasoned verdict, and should object to jury instructions that do not further this goal. Courts should not only tolerate such efforts, but should encourage them. However, in light of the obstacles discussed above, it does seem that challenging jury instruction comprehensibility in the context of a particular case will remain an arduous route to reform.

\section*{B. Jury Instruction Commissions}

Perhaps a more logical path to increasing juror comprehension of jury instructions is through the commissions whose task it is to formulate those instructions.\footnote{See Steele & Thornburg, \textit{supra} note 32, at 109 (stating that the best hope for improvement of jury instruction comprehensibility is the pattern instruction movement).} Unfortunately, although the commissions have made great strides in standardizing instructions, they have historically been less concerned about translating legal principles into language that ordinary jurors can understand.\footnote{\textit{Id.} at 6.} At one time, jury instructions were normally drafted on a case-by-case basis, leading to commonly used instructions being redrafted time and again.\footnote{\textit{Robert G. Nieland, Pattern Jury Instructions: A Critical Look at a Modern Movement to Improve the Jury System} 5-7 (1979).} California was at the forefront of the movement to eliminate this duplica-
tion of effort by compiling a list of approved jury instructions.\(^{103}\) By 1978 pattern instructions were being used in thirty-eight jurisdictions.\(^{104}\) These pattern instructions have not only resulted in time savings, but may also have led to fewer instructions being struck down by courts of appeal.\(^{105}\)

Unfortunately, the movement has been less successful in writing instructions that jurors can understand. Some judges and lawyers have even expressed reservations about this goal: The California Committee on Jury Instructions—Civil (the "California Committee"), stated in 1956 that "the one thing an instruction must do above all else is to correctly state the law. This is true regardless of who is capable of understanding it."\(^{106}\) While this comment has been labeled "notorious,"\(^{107}\) the California Committee in actuality was merely reporting the legal standard mandated by the courts at that time and ever since. Numerous cases have stressed in a general sense that an instruction must accurately state the law, but virtually none has disapproved a specific instruction solely because jurors could not understand it.\(^{108}\)

Still, Robert Nieland's study of pattern jury instructions reports that an early Illinois project established the goal of drafting instructions that were not only unslanted and accurate, but also conversational and understandable.\(^{109}\) For that matter, the California Committee, in its first edition in 1938, solicited assistance from users by requesting that "if you can write [an instruction] that will be clearer to the lay mind . . . we ask you to give to our committee and to the bar the benefit of your erudition."\(^{110}\) Furthermore, the California Com-

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103. \(\text{id.; see also Schwarzer, supra note 73, at 732-40 (discussing the historical role of jury and the reform movement advocating pattern instructions).}\)

104. \(\text{NIELAND, supra note 101, at 10.}\)

105. \(\text{See id. at 18; Sales et al., supra note 14, at 23, 27 (stating that there is considerable support for the propositions that pattern jury instructions save time for judges, counsel and jury, and that they reduce reversals for erroneous instructions). But see Robert G. Nieland, Assessing the Impact of Pattern Jury Instructions, 62 JUDICATURE 185, 188-94 (1978) (discussing a study of Illinois Supreme Court opinions, in which it appeared that the adoption of pattern instructions had little effect in reducing the total number of appeals, or the number of times instructional error was the basis of an appeal, or the number of reversals and retrials granted).}\)

106. \(\text{CALIFORNIA JURY INSTRUCTIONS—CIVIL—BOOK OF APPROVED JURY INSTRUCTIONS 44 (4th rev. ed. 1956) [hereinafter BAl (4th ed.)]}\)

107. \(\text{Jamison Wilcox, The Craft of Drafting Plain-Language Jury Instructions: A Study of a Sample Pattern Instruction on Obscenity, 59 TEMPLE L.Q. 1159, 1160 n.2 (1986); see also Sales et al., supra note 14, at 28 (calling this a "disturbingly comical statement"); Severance et al., supra note 29, at 201.}\)

108. \(\text{See supra notes 73-75 and accompanying text.}\)

109. \(\text{NIELAND, supra note 101, at 10.}\)

110. \(\text{BAI (4th ed.), supra note 106, at 43 (quoting CALIFORNIA JURY INSTRUC-}\)
mittee now aspires to draft instructions that are "understandable to the average juror," though it cautions that an instruction that has received appellate approval should not be lightly changed. Other jurisdictions require that instructions be simple, understandable, conversational, free of legal jargon, and/or written in plain language comprehensible to jurors. The Ninth Circuit, expressing an interest in "improv[ing] the quality of communication with juries," recommends using short sentences and avoiding negatives. It further disapproves of reading statutes to the jury, because they are not drafted with jury comprehension in mind. Finally, it advises against using a particular instruction merely because its language has been approved by an appellate court; such approval does not guarantee that the instruction is necessarily comprehensible.

Of course, espousing the goal of drafting understandable instructions does not guarantee its accomplishment. According to Nieland, meaningful attempts at reform have been made in Pennsylvania, Florida and Arizona, while more limited efforts have been made in Montana, Michigan, Maryland and Virginia. New York and Oklahoma were planning such efforts when Nieland completed his monograph in 1979. Since then, additional progress has been made in Washington, Iowa, and perhaps other states. Several federal courts, en-

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111. CALIFORNIA JURY INSTRUCTIONS—CIVIL—BOOK OF APPROVED JURY INSTRUCTIONS at vi (7th ed. 1986) [hereinafter BAI (7th ed.)].
112. See, e.g., IDAHO R. CIV. P. 51(a)(2).
113. See, e.g., D. HAW. CT. R. 235.11(g).
114. See, e.g., MICH. CT. R. 2.516(D)(4).
115. See, e.g., E.D. CAL. CT. R. 163(C).
118. Id.
119. Id.
120. NIELAND, supra note 101, at 24-25.
121. Id. at 24.
122. Recently, the Washington Pattern Jury Instruction Committee prepared simplified alternative instructions, apparently as an experiment. See WASHINGTON PATTERN JURY INSTRUCTIONS—CRIMINAL WPIC 1.01 comment at 6 (2d ed. 1994); id. WPIC 1.02 comment at 11; id. WPIC 1.04 comment at 14. The Iowa Jury Instructions Committee has rewritten the Iowa Uniform Jury Instructions to eliminate confusing legal terminology and to make the instructions understandable to a lay person. See John H. Neiman, Letters: Iowa Jury Instructions, 74 JUDICATURE 336 (1991).

It has been reported that Montana and Oregon have attempted to draft more comprehensible instructions, using communications specialists. See Bernard S. Meyer & Maurice Rosenberg, Questions Juries Ask: Untapped Springs of Insight, 55 JUDICATURE 105, 106.
couraged by the Federal Judicial Center, have also made advances in this area.

This overview of endeavors to simplify the language of jury instructions mirrors results obtained in an extensive study of a related area by J. Alexander Tanford. Focusing on recommendations to give juries instructions at the beginning as well as the end of trial, as well as to provide written copies, Tanford found that courts have actually moved in a direction opposite of that suggested by the research. On the other hand, commissions were more prone to adopt the recommended reforms. Thus, if change occurs, it will probably originate in the relevant commissions. We now revisit the activities of one such commission: that of California.

C. California’s Civil Jury Instructions: A Brief Analysis

As noted above, California’s civil jury instructions were the subject of intense scrutiny in the Charrow study, published in a law review with broad circulation. Furthermore, the California civil

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See, e.g., MANUAL, supra note 117 (the sentiments expressed in the Introduction, as well as a reading of the model instructions, suggest that substantial progress has been made in increasing comprehensibility).

See FEDERAL JUDICIAL CENTER, PATTERN CRIMINAL JURY INSTRUCTIONS (1987). In the introduction to the 1982 Report, reprinted in the 1987 edition, Judge Marshall points out the difficulties of communicating with a lay jury and the fact that pattern instructions do not accomplish this very well. Id. at xiii. He observes that “[i]t is all too easy for the lawyers and judges who engage in the drafting process to forget how much of their vocabulary and language style was acquired in law school. The principal barrier to effective communication is probably not the inherent complexity of the subject matter, but our inability to put ourselves in the position of those not legally trained.” Id. The report also contains an appendix, written by Allan Lind and Anthony Partridge and entitled Suggestions for Improving Juror Understanding of Instructions, that makes suggestions based on the work of the Charrows and the Elwork, Sales, and Alfini team. Id. app. at 161. Overall, the instructions in this volume appear to have gone a long way towards meeting the Center’s goal of greater comprehensibility.


Id. at 157.

Id.

See Charrow & Charrow, supra note 38.
jury instruction committee now adheres to the goal of formulating understandable instructions, and the California Supreme Court has recently encouraged such efforts. It is therefore illuminating to compare the present jury instructions with those that the Charrow team studied, to determine whether and how they have been made more comprehensible.

The following comparison is limited to those instructions that appear to have undergone primarily linguistic changes since the Charrows studied them, rather than those instructions that were modified to reflect legal developments. In each case, I will first present the instruction as critiqued by the Charrow study, and then show its current wording.

1. BAIJ No. 1.00: Respective Duties of Judge and Jury

Text at time of Charrow study:

Ladies and Gentlemen of the Jury:

It is my duty to instruct you in the law that applies to this case and you must follow the law as I state it to you.

As jurors it is your exclusive duty to decide all questions of fact submitted to you and for that purpose to determine the effect and value of the evidence.

You must not be influenced by sympathy, prejudice or passion.

The Charrows made several suggestions for improving the comprehensibility of this instruction, most of them fairly minor. They noted that the first sentence lacked focus and suggested rewriting it as two sentences. The Charrows also found that their test subjects were confused by the statement in the second paragraph that it is the jurors' "exclusive" duty to decide questions of fact, since the phrase is ambiguous: it might mean that this is the jury's only duty, or that only the jury is to make factual determinations.

130. BAIJ (5th ed.), supra note 40, No. 1.00; see Charrow & Charrow, supra note 38, at 1341.
131. Charrow & Charrow, supra note 38, at 1342.
132. Id.
133. Id.
Text presently:

Ladies and Gentlemen of the Jury:

It is now my duty to instruct you in the law that applies to this case. It is your duty to follow the law.

As jurors it is your duty to determine the effect and value of the evidence and to decide all questions of fact.

You must not be influenced by sympathy, prejudice or passion.\(^{134}\)

Although the California Committee has not adopted the Charrow recommendations wholesale, nor apparently even referred to them publicly, the modifications to BAJI No. 1.00 suggest that the California Committee is aware of the study and has taken it into account. Observe that the first paragraph now consists of two sentences, and that the word “exclusive” has been purged from the second paragraph. In addition, the rephrasing of the second paragraph on the Committee’s own initiative clarifies the jury’s duties.

Yet although the Committee appears to have responded to the Charrow study, the linguistic changes to this instruction are decidedly modest. Recall that the Charrows recommended using modals like “you must” instead of impersonal constructions like “it is your duty.”\(^{135}\) Ironically, where the earlier version of the instruction stated that “you must follow the law,” the present instruction has regressed, and now incorporates the impersonal instruction: “[i]t is your duty to follow the law.” While this change creates an attractive parallelism and relates back to the theme of the respective duties of judge and jury, the Committee may have compromised understanding in the process. On balance, the present incarnation of BAJI No. 1.00 is a definite step forward, but comprehension could still be improved. Consider the following possible alternative, which is more straightforward and, as far as I can tell, preserves the meaning of the original:

Ladies and Gentlemen of the Jury:

I am now going to tell you the law in this case. You must follow these rules to reach your verdict.

It is your job to decide the facts. You should consider all the evidence and then decide what really happened.

Do not let sympathy, prejudice or passion influence your decision.

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134. BAJI (7th ed.), supra note 111, No. 1.00.
135. See supra part II.C.6.
2. BAIJ No. 1.01: Instructions to Be Considered as a Whole

*Text at time of Charrow study:*

If in these instructions any rule, direction or idea is repeated or stated in varying ways, no emphasis thereon is intended by me and none must be inferred by you. For that reason you are not to single out any certain sentence or any individual point or instruction and ignore the others, but you are to consider all the instructions as a whole and are to regard each in the light of all the others.

The order in which the instructions are given has no significance as to their relative importance.136

The Charrows identified several problematic attributes of BAIJ No. 1.01 that have been eliminated in later revisions.137 One is the oddly situated phrase “in these instructions” in the first sentence, which was discussed above as an example of a misplaced phrase.138 While poetic, it created the incorrect impression that the instructions themselves might be repeated, rather than the ideas or rules of law. The latter part of the first sentence, “no emphasis thereon is intended by me and none must be inferred by you,” was also problematic for the test subjects.139 The Charrows pointed out that the phrase not only contained the archaic “thereon,” but also consisted of two negative phrases in the passive voice.140

*Text presently:*

Even if any matter is repeated or stated in different ways in these instructions, I do not intend any emphasis on it. You must not single out any individual rule or instruction and ignore the others. Instead, you must consider all the instructions as a whole and must regard each in the light of the others.

The order in which the instructions are given has no significance as to their relative importance.141

Many of the specific linguistic difficulties identified by the Charrows have been rectified in the present version. In addition, the Committee has replaced the bookish construction “you are to consider” with “you must consider.”

136. BAIJ (5th ed.), supra note 40, No. 1.01.
137. Charrow & Charrow, supra note 38, at 1343.
138. See supra part II.C.3.
139. Charrow & Charrow, supra note 38, at 1343.
140. Id.
141. BAIJ (7th ed.), supra note 111, No. 1.01.
Nonetheless, other problematic elements of BAJI No. 1.01 persist. In particular, the Charrows doubted that jurors understand the phrase “as a whole,” and typified the instruction that they must consider each instruction “in the light of all the others” as “hackneyed and probably no longer understood.”\(^\text{142}\) My personal perception is that these phrases are far from the worst prose found in jury instructions, and the Committee apparently agrees.

While this instruction has clearly benefitted from rewriting, it still creates a somewhat stilted overall impression. Although courts are reluctant to tinker with instructions that have withstood the test of time, the mere fact that an appellate court may have approved a jury charge as being legally accurate half a century ago is no guarantee that jurors today will understand it.

Language is constantly changing. Ordinary language in one generation may become formal and contrived a few generations later. For example, constructions adding as prefixes “where-” or “here-” or “there-” to prepositions, as in “whereunder” (meaning “under what”) and “herewith” (“with this”), were ordinary English at one time, and are generally still comprehensible to Shakespeare scholars and, perhaps, lawyers. Most people today, however, have real difficulties understanding such formations. I sometimes ask people what Juliet meant when on her balcony she pined: “O, Romeo, Romeo! wherefore art thou Romeo?”\(^\text{143}\) Respondents almost invariably think that Juliet cannot spot her lover in the garden below, and that she is asking, “Where, oh where, are you, Romeo?” In fact, “wherefore” is the interrogative form of “therefore” and means “why” or “for what reason.”\(^\text{144}\) The common misinterpretation obscures the whole point of the scene. Juliet is asking Romeo why his name is Romeo Montague, marking him as a member of the Montague clan with which her family is feuding, and thus preventing them from being together.\(^\text{145}\) Only in this context can we properly understand the subsequent statements: “What’s in a name? that which we call a rose by any other name would smell as sweet.”\(^\text{146}\)

\(^{142}\) Charrow & Charrow, supra note 38, at 1343.
\(^{143}\) WILLIAM SHAKESPEARE, ROMEO AND JULIET act 2, sc. 2, line 33 (Funk & Wagnalls 1968) (1597).
\(^{145}\) Betken translates Juliet’s entire question into modern English as “Oh, Romeo! Romeo! Why must you be Romeo?” Id. at 134.
\(^{146}\) SHAKESPEARE, supra note 143, at line 43.
Obviously, language changes, and jury instructions need to keep pace. Not only has language changed, but it appears that in the last decade or two, passive knowledge of literary and/or archaic language has declined dramatically. At the beginning of this century, many Americans regularly heard the anachronistic language of the King James version of the Bible, and the literature taught in schools concentrated on “great works” or “classics,” which generally meant English authors long dead. Presently, most religious services utilize Bibles and liturgy in today’s English, and schools seem to spend far less time teaching Shakespeare. Because people have little exposure to earlier stages of the language, they lack even a passive knowledge of Elizabethan English.

Nonetheless, the legal profession continues to use words and constructions that were ordinary English several hundred years ago but have since become extinct. Commissions could be more daring in their revision of jury instructions, without sacrificing legal accuracy. For example, in the last sentence of BAJI No. 1.01,147 the judge seems to be telling the jury, “Just because I give one instruction before another one does not mean that it is more important. The order of the instructions does not make any difference.” If this is what the judge means, why not just say so?

3. BAJI No. 1.02: Statements of Counsel; Evidence Stricken Out; Insinuations of Questions

Text at time of Charrow study:

You must not consider as evidence any statement of counsel made during the trial; however, if counsel for the parties have stipulated to any fact, or any fact has been admitted by counsel, you will regard that fact as being conclusively proved as to the party or parties making the stipulation or admission.

As to any question to which an objection was sustained, you must not speculate as to what the answer might have been or as to the reason for the objection.

You must not consider for any purpose any offer of evidence that was rejected, or any evidence that was stricken out by the court; such matter is to be treated as though you had never known of it.

147. The last sentence of BAJI No. 1.01 states: “The order in which the instructions are given has no significance as to their relative importance.” BAJI (7th ed.), supra note 111, No. 1.01.
You must never speculate to be true any insinuation suggested by a question asked a witness. A question is not evidence and may be considered only as it supplies meaning to the answer.148

The Charrows emphasized that BAJI No. 1.02 contained nine passives, most of them in subordinate clauses.149 They further noted that the instruction was poorly organized.150 Finally, the instruction contained (1) deleted relative pronouns (e.g., "insinuation [which is] suggested by a question"); (2) several nominalizations (e.g., "stipulation"); (3) misplaced phrases (e.g., "speculate to be true any insinuation"); and (4) "as to" phrases and odd embeddings (e.g., "you will regard that fact as being conclusively proved as to the party or parties making the stipulation or admission").151 Many of these difficulties were addressed by the present version.

Text presently:

Statements of counsel are not evidence; however, if counsel have stipulated to a fact, or one has been admitted by counsel, you must treat that fact as having been conclusively proved. You may not speculate as to the answers to questions to which objections were sustained or as to the reasons for the objections. You may not consider any evidence that was stricken; that must be treated as though you had never known of it.

A suggestion in a question is not evidence unless it is adopted by the answer. Standing alone, a question is not evidence. You may consider it only to the extent it is adopted by the answer.152

The first paragraph has been greatly improved by simply advising the jury that "statements of counsel are not evidence," in place of the ponderous phrase "you must not consider as evidence any statement of counsel made during trial." In addition, the "as to" phrase found objectionable by the Charrows in the phrase "as to the party or parties" has been stricken. On the other hand, the instruction does not explain the meaning of a "stipulation," which is a rare word outside the legal sphere. Further, in ordinary usage it generally refers to requiring something by agreement (e.g., "our contract stipulates that"), whereas the term here refers to a declaration or agreement that some-

148. BAJI (5th ed.), supra note 40, No. 1.02.
149. Charrow & Charrow, supra note 38, at 1345.
150. Id.
151. Id.
152. BAJI (7th ed.), supra note 111, No. 1.02.
The second paragraph has also been revised, but to my mind less successfully. Observe that the introductory phrase, "[a]s to any question to which an objection was sustained," has been deleted. While this phrase did contain the somewhat archaic "as to" and a passive verb, it helped organize the instruction by providing a smooth transition from the topic of statements of counsel to that of objectionable questions.

One of the Charrows' more notorious examples of poor syntax was the first sentence in the fourth paragraph: "You must never speculate to be true any insinuation suggested by a question asked a witness." The present text reveals that the Committee has vastly improved this statement of the law.

As in the previous examples, BAJI No. 1.02 is a definite improvement over the version used at the time of the Charrow study. Yet the Committee has again proceeded quite cautiously. While it has eliminated many specific barriers to comprehension identified by the Charrows, it has been far more reluctant to affirmatively reorganize the discourse structure of the instruction. For example, the final three paragraphs of BAJI No. 1.02 could be restated as follows without any real loss of meaning:

Statements of counsel are not evidence. Sometimes, however, counsel may stipulate to a fact. This means they agree the fact is true. Or counsel may admit that a fact is true. In either case, you must treat that fact as having been conclusively proved.

Sometimes I sustain an objection to a question. You should not guess what the answer might have been, or why I sustained the objection.

Also, I sometimes order evidence to be stricken from the record. You should treat that evidence as though it does not exist.

Finally, a question by counsel is not evidence. You should concentrate on what the witness says and ignore any suggestion or insinuation in a question. A question is relevant only if it helps you understand the witness's answer.

In paraphrasing this instruction, I have explained what a stipulation is in the first paragraph. In the remaining paragraphs I have tried to improve the discourse structure by using transitions to indicate that each paragraph relates to a separate topic. Further, I have added language that aims to introduce each new topic, once again, to improve overall organization.
4. BAJI No. 2.21: Discrepancies in Testimony

Text at time of Charrow study:

Discrepancies in a witness’s testimony or between his testimony and that of others[, if there were any,] do not necessarily mean that the witness should be discredited. Failure of recollection is a common experience, and innocent misrecollection is not uncommon. It is a fact, also, that two persons witnessing an incident or a transaction often will see or hear it differently. Whether a discrepancy pertains to a fact of importance or only to a trivial detail should be considered in weighing its significance.153

Among other features, such as the use of nominalizations and passives, the Charrows faulted BAJI No. 2.21 for containing no less than three negatives within one phrase: “innocent misrecollection is not uncommon.”154 While there have been some minor linguistic alterations, few of these issues have been addressed in the present version.

Text presently:

Discrepancies in a witness’s testimony or between his testimony and that of others[, if there were any,] do not necessarily mean that the witness should be discredited. Failure of recollection is common. Innocent misrecollection is not uncommon. Two persons witnessing an incident or a transaction often will see or hear it differently. Whether a discrepancy pertains to an important matter or only to something trivial should be considered by you.155

A positive change, made by the Committee on its own initiative, relates to the original sentence “Failure of recollection is a common experience, and innocent misrecollection is not uncommon.” While the sentence has an attractive parallelism, it is clearly not easy for the average juror to process. The only real change to this sentence, however, has been to split it in two by replacing “and” with a period. As the Charrows emphasize, however, shorter sentences are not necessarily easier to understand, conventional wisdom notwithstanding.156 The two sentences “I went home. Then I went to bed.” are no easier to process than the single sentence “I went home and then I went to

153. BAJI (5th ed.), supra note 40, No. 2.21.
154. Charrow & Charrow, supra note 38, at 1325.
155. BAJI (7th ed.), supra note 111, No. 2.21.
156. Charrow & Charrow, supra note 38, at 1319-20.
bed.” Interestingly, the Committee itself has recognized this point, writing in the introduction of a previous edition that “[i]t is a seriously erroneous idea that clarity of expression is assured by the use of short sentences.”157 Obviously, what matters is the complexity of sentences, and here the Committee has done nothing to change that.

Another concern is vocabulary. Legal terminology is problematic, but so are nontechnical words that are rarely encountered. The problem may well be compounded by the fact that many prospective jurors may speak English as a second language, particularly in California.158 Will the average juror fully understand words like “misrecollection” and “discredit”?159

5. BAJI No. 3.11: Determining the Question of Negligence

Text at time of Charrow study:

One test that is helpful in determining whether or not a person was negligent is to ask and answer whether or not, if a person of ordinary prudence had been in the same situation and possessed of the same knowledge, he would have foreseen or anticipated that someone might have been injured by or as a result of his action or inaction. If such a result from certain conduct would be foreseeable by a person of ordinary prudence with like knowledge and in like situation, and if the conduct reasonably could be avoided, then not to avoid it would be negligence.160

The Charrows observed that BAJI No. 3.11 consisted of two long and complex sentences.161 The first sentence, for example, contained a conditional within a conditional within an embedding. Additionally, the instruction contains archaic and technical terms like “pos-

158. Almost half of all residents of Los Angeles County over the age of five speak a language other than English at home. BUREAU OF THE CENSUS, U.S. DEP’T OF COMMERCE, 1990 CENSUS OF POPULATION & HOUSING, SUMMARY TAPE FILE 3A 28 (Los Angeles County; Language Spoken at Home). The 1990 census revealed that over 4,400,000 residents speak only English, while over 2,500,000 speak Spanish or Spanish creole, and over 1,100,000 speak an assortment of other languages. Id. at 31. It seems probable that undocumented immigrants were undercounted and that the number of non-English-speaking people is therefore greater than the census indicates.
159. “Misrecollection” does not even occur in my dictionary. See THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (3d ed. 1992). Nor can I recollect ever hearing it outside of this context. Further, to be “discredited” ordinarily means to lose face or be disgraced, not to be disbelieved.
160. BAJI (5th ed.), supra note 40, No. 3.11.
161. Charrow & Charrow, supra note 38, at 1349.
possessed of knowledge” and “person of ordinary prudence.” In terms of discourse structure, the first sentence lists one question that must be asked. The second sentence begins to explain what happens if the answer to the first question is yes, but then unexpectedly interjects another issue: whether the conduct could have been avoided. With these problems in mind, compare the present version of BAJI No. 3.11.

Text presently:

One test that is helpful in determining whether or not a person was negligent is to ask and answer the question whether or not, if a person of ordinary prudence had been in the same situation and possessed of the same knowledge, he would have foreseen or anticipated that someone might have been injured by or as a result of his action or inaction. If the answer to that question is “yes”, and if the action or inaction reasonably could have been avoided, then not to avoid it would be negligence.162

Obviously, little has changed. This instruction received a low comprehension score in its original version163 and would probably fare only marginally better in its current incarnation. One clear improvement is the first part of the second sentence (“If the answer to that question is ‘yes’”), which is far more straightforward than the original version.

BAJI No. 3.11 does illustrate that it can be quite a challenge to rewrite jury instructions without sacrificing meaning. On the other hand, a legally adequate but obscure instruction is not particularly useful, either. The following version of BAJI No. 3.11 is my attempt to reconcile the goals of clarity and legal adequacy:

One way to decide if someone was negligent it to ask yourself how an ordinary reasonable person would have acted if he [or she] had been in the defendant’s shoes. Would an ordinary reasonable person have foreseen or anticipated that someone might be injured because of what the defendant did or did not do? If the answer is no, the defendant was not negligent.

If the answer to this question is yes, ask yourself a second question: could the defendant reasonably have avoided the accident [injury] [result]? If the answer to this question is also yes, the defendant was negligent.

162. BAl (7th ed.), supra note 111, No. 3.11.
To summarize, it is apparent that although California was a pioneer in the movement to standardize jury instructions, its record in the subsequent movement—to make those instructions more comprehensible—is mixed. The California Committee has made definite progress toward its goal of making jury instructions understandable to the average juror. At the same time, there is still plenty of room for improvement.

IV. SOME SUGGESTIONS FOR REFORM

The most obvious way to ensure that jurors understand the law that guides their task is to continue efforts to write instructions that an average juror can understand. A report from the Brookings Institution and the American Bar Association on the civil jury system recently reemphasized the need for such reform. To encourage bench and bar to write comprehensible instructions without undue fear of reversal, the Brookings report urges appellate courts to be tolerant of innovations. California's Supreme Court has indicated its approval of attempts to draft understandable jury instructions by referring to the Charrow study. Therefore, the Committee on Standard Jury Instructions in California should redouble its efforts in this direction, as should the committees of other states.

At the beginning of this Article, I observed that it would be an educational travesty to "instruct" students on tax law by reading the Internal Revenue Code to them, without providing them an opportunity to ask questions. A chance to ask questions not only allows students to clarify the lesson, but also gives the instructor valuable feedback on whether she has made herself clear. As the Colorado Supreme Court has noted, a jury question about the meaning of its charge may indicate a fundamental misunderstanding, thus rebutting the presumption that the jury understood its instructions.

The formal nature of a trial seems to cause many judges to lose

164. THE BROOKINGS INSTITUTION, CHARTING A FUTURE FOR THE CIVIL JURY SYSTEM: REPORT FROM AN AMERICAN BAR ASSOCIATION/BROOKINGS SYMPOSIUM 24 (1992) (recommending that "[j]udges . . . tailor jury instructions to the specific case being tried and spell them out in clear, plain English, free of legal jargon to the extent possible").

165. Id.


167. Leonardo v. People, 728 P.2d 1252, 1255 (Colo. 1986); see also City of Seattle v. Gellein, 768 P.2d 470, 471-72 (Wash. 1989) (holding that, where jurors in criminal case asked question indicating they misunderstood critical instruction, "[t]he only reasonable conclusion is that the instructions confused and misled the jury").
sight of the fact that they, too, are educators when it comes to charging the jury. Like any good teacher, a judge should explain to jurors that they have the right to ask questions regarding the instructions. Unfortunately, the indications are that all too many jurors are unaware that they can do so. The many cases in which jurors consult dictionaries to determine the meaning of a legal term,

168. See David U. Strawn, The Judge’s Role as an Educator, 8 U. BRIDGEPORT L. REV. 371, 371-72 (1987) (stating that the rendering of judicial decisions entails the performance of many different jobs, one of which is to educate the jury).

169. As one court noted at the beginning of this century:

The practice of giving additional instructions to the jury upon their request is so well settled in this state that we know of no prior instance in which the request has been refused. So far as we are advised it is the universal practice in the state. It is immaterial that the court has already charged the jury upon the law of the case generally, or has given instructions which would answer the request of the jury. The very fact that the jury, after having been in consultation, have failed to comprehend the instructions given in the charge and request further instructions, is of itself sufficient to show the necessity of additional instructions.

Commonwealth v. Smith, 70 A. 850, 851 (Pa. 1908); see also Bollenbach v. United States, 326 U.S. 607, 612-13 (1946) (holding that a judge must make reasonable efforts to answer a jury’s questions); Cape Cod Food Prods. v. National Cranberry Ass’n, 119 F. Supp. 900, 917 (D. Mass. 1954) (judge informed jurors that they have the right to ask questions during deliberations); Davis v. Lira, 817 P.2d 539, 545 (Colo. Ct. App. 1991) (stating that a judge has a duty to respond to questions during deliberation in order to assist the jury in understanding and correctly applying the law), rev’d on other grounds, 832 P.2d 240 (Colo. 1992); People v. Gonzalez, 56 N.E.2d 574, 576 (N.Y. 1944) (court’s failure to answer jury questions during deliberation was error; a jury has the right to ask questions and a judge’s failure to answer or inadequate answer to a proper question is reversible error). But see Waterford v. Halloway, 491 N.E.2d 1199, 1207 (Ill. App. Ct. 1986) (holding that court’s refusal to answer jury question was not error: “The decision to answer a jury question is one resting in the sound discretion of the trial court, and will not be disturbed unless that discretion was abused”).

170. See, e.g., Chalmers v. City of Chicago, 431 N.E.2d 361, 363 (Ill. 1982) (holding that the jury could not impeach its verdict by affidavits declaring that “we were confused by the form of verdicts furnished to us and . . . were uncertain if we could request communication with the presiding judge to obtain clarification of the instructions” and that as a consequence they filled out the verdict form incorrectly); see also Lorelei Sontag, Deciding Death: A Legal and Empirical Analysis of Penalty Phase Jury Instructions and Capital Decision-Making 193 (1990) (unpublished Ph.D. dissertation, University of California (Santa Cruz)) (“It is difficult for jurors to ask the judge for help . . . . When juries do ask for further instruction, they too often receive pseudo-help in the form of repetition of the original instructions, or legal definitions as obscure as the original language.”); Ellsworth, supra note 32, at 224 (citing study which revealed that few juries actually asked for further information, but that the judges had not told them they could ask); Symposium, Making Jury Instructions Comprehensible, 8 U. BRIDGEPORT L. REV. 341, 343 (1987) (statement of Judge D. Lawrence Beard) (“I never [ask jurors whether they have any questions about the instructions] . . . but I would not hesitate to answer an appropriate question if I thought the answer would help the jury in its deliberation.”).

171. See supra note 60 and cases cited therein.
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technically a type of misconduct, provide fascinating evidence that jurors do not know that they can ask questions, or believe that asking questions will be ineffectual.\textsuperscript{172} If the jurors knew that they could ask the judge for an authoritative and comprehensible definition, there would be no reason for them to engage in misconduct by consulting such outside sources.

Ideally, the judge would simply ask the jurors, after reading the instructions to them, whether they have any questions.\textsuperscript{173} Realistically, however, some judges may be concerned that encouraging questions at this stage in the proceedings will lead to an overabundance of queries and comments, many of which could easily be dealt with by the jurors themselves during deliberations—one juror may understand or recall what another does not.

Perhaps a more practical alternative is for the judge to give jurors a final instruction that if they have uncertainties about the instructions that persist during deliberation, they (or perhaps the foreperson) can give a written note with their query to the bailiff, or whatever other method the judge prefers.\textsuperscript{174} For example, one of the

\textsuperscript{172} In one such case, the jury asked the judge to clarify the term “negligence.” Rather than doing so, the judge sent them home for the evening. During deliberations the next day, one of the jurors pulled out a piece of paper with a dictionary definition of the term. At a later hearing, it turned out that four other jurors had also—apparently independent of the others—consulted dictionaries. Nichols v. Seaboard Coastlines Ry. Co., 341 So. 2d 671, 672-73 (Ala. 1976).

\textsuperscript{173} See Making Jury Instructions Comprehensible, supra note 170, at 342 (statement of Judge Nicholas Cioffi) (“[Judges should] ask whether or not [the jurors] have questions while you are charging them, right then and there on the spot: ‘Do you have any questions?,’ ‘Do you understand this?’”); Strawn, supra note 168, at 381 (suggesting that judges should ask the jurors questions to test their understanding of the instructions); Symposium, Improving Communications in the Courtroom, 68 IND. L.J. 1033, 1064 (statement of Judge B. Michael Dann) (“At the end of the reading and giving of the instructions, judges should consider asking the jurors before they retire if they have any questions concerning what they just heard and read.”).

\textsuperscript{174} The pattern criminal jury instructions of the Federal Judicial Center include an instruction, intended to be given before the first break at trial, stating that “If you need to speak to me about anything, simply give a note to the marshal to give to me,” FEDERAL JUDICIAL CENTER, PATTERN CRIMINAL JURY INSTRUCTIONS No. 5 (1987). California’s Penal Code, in section 1138, requires that “[a]fter the jury have retired for deliberation, . . . if they desire to be informed on any point of law arising in the case, . . . the information required must be given.” However, it is unclear how often the jury is informed of this right. CAL. PENAL CODE § 1138 (West 1985). In a published opinion consisting solely of a charge to the jury, the judge informed jurors that they could pose questions to him during deliberations, although he hoped that it would not prove necessary. Cape Cod Food Prods. v. National Cranberry Ass’n, 119 F. Supp. 900, 917 (D. Mass. 1954). Harry Kalven and Hans Zeisel, in their respected study of the American jury, note that the jury is not normally encouraged to come back with questions, and suggest that it “[might be] good policy for the judge, when
final instructions might be something like the following:

If you have a question about these instructions during your deliberations, please reread your instructions, discuss the matter, and try to answer the question yourselves. If you cannot agree on what the instructions require you to do, your foreperson should put the question in writing and give it to the bailiff.

Unfortunately, the present system all too often continues to reward obscurity, even after the jury has indicated that it does not understand its “instruction” and requests clarification. Usually, the safest course for the judge is to simply repeat the instructions word for word.\(^{175}\) If she tries to explain the instructions in ordinary language, an appellate court might reverse on the ground that she misstated the law.\(^{176}\) The judge can be relatively confident, however, that regurgitating the approved or pattern instructions is generally not reversible,\(^{177}\) even though these were the very instructions that originally confused the jury and induced them to request clarification in the first place.

We need to discard this perverse incentive system. As Judge Charles Wyzanski has written, “the object of a charge to a jury is not
to satisfy an appellate court that you have repeated the right rigmarole of words, but to try to make jurors who are laymen understand what you are talking about. To achieve this end, judges should be required to respond to jury questions in ordinary language, explaining legal concepts as best they can, and perhaps providing appropriate examples. In reviewing a case in which a lower court judge simply reread the original instructions in response to a request for clarification, one court observed: "[W]hen the jury indicates to the judge that it does not understand an element of the offense charged or some other matter of law central to the guilt or innocence of the accused, the judge has an obligation to clarify that matter for the jury in a concrete and unambiguous manner." At least in criminal cases, responding to jury questions is arguably required by due process. In both criminal and civil cases, the notion that cases should be decided by the rule of law underpins our entire jurisprudence. Without effective instruction on the mandates of the law—which must allow for questions—we have no assurance that the jury system will further that goal.

It would also be useful for jury instruction committees to keep track of the questions that juries ask about their instructions. In—

178. Cape Cod Food Prods., 119 F. Supp. at 907. Judge Wyzanski's comment was part of his plain language charge to the jury, which constitutes the entire published opinion.

179. Judge William Schwarzer of the Northern District of California recommends that courts provide juries with concrete examples of how to apply instructions in actual factual situations, integrating the law with the facts presented at trial. Schwarzer, supra note 73, at 744-47.

180. Leonardo, 728 P.2d at 1256.

181. See, e.g., Bollenbach v. United States, 326 U.S. 607, 612-13 (1946) ("When a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy.").

Section 15-4.3(a) of the American Bar Association Standards for Criminal Justice provides:

If the jury, after retiring for deliberation, desires to be informed on any point of law, they shall be conducted to the courtroom. The court shall give appropriate additional instructions in response to the jury's request unless:

(i) the jury may be adequately informed by directing their attention to some portion of the original instructions;

(ii) the request concerns matters not in evidence or questions which do not pertain to the law of the case; or

(iii) the request would call upon the judge to express an opinion upon factual matters that the jury should determine.

ABA STANDARDS FOR CRIMINAL JUSTICE § 15-4.3(a) (2d ed. 1986).

182. At one time, the New York Judicial Conference, the Committee on Pattern Jury Instructions (Civil) of the Association of Supreme Court Justices, and the Columbia University School of Law monitored the questions jurors asked during deliberations to pinpoint difficulties they encountered in carrying out their task. Meyer & Rosenberg, supra note 122, at
stead of dealing with recurring requests on an ad hoc basis, the standard instructions should be modified when persistent questions indicate that they are not effectively communicating the law. Appellate courts seem increasingly sympathetic to efforts to properly educate jurors. Perhaps if judges find that they are repeatedly explaining certain obscure instructions, they will more actively support efforts to make these instructions more comprehensible in the first place.

If we continue to entrust lay juries with some of the most momentous decisions made in our society, and if we expect them to follow the law in reaching those decisions, we have no choice but to provide jurors with instructions they can understand.

106. Among other things, the questions revealed that the jurors often did not recall specific aspects of the law on which they were instructed. Id. at 106-07; see also Severance & Loftus, supra note 28, at 162-73 (evaluating written questions presented by jury to the judge, as reported by nineteen superior court judges in King County, Washington).