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INTRODUCTION

THE role of the lay juror is an integral part of the American trial system. It is so essential that a jury trial is constitutionally mandated in the Sixth and Seventh Amendments.[2] According to the U.S. Supreme Court, the framers of the Constitution sought to protect individuals' rights against government oppression by guaranteeing a trial by an impartial jury.[3] The use of lay jurors as fact finders at trial is rooted in the concept of fairness.[4] While the jurors are not expected to be legal experts, they are expected to apply the law to the facts in rendering their judgments.[5] The applicable law is communicated to the jury through the instructions, usually read to the jury by the judge at the end of closing arguments. This is typically the jury's only exposure to the law, and judges and attorneys go to great lengths to ensure that the instructions fairly and completely state that law.[6] Yet, jurors' incomprehension of the law is a well-documented crisis in the judicial system.[7] Jury instructions suffer from "a perfect storm of legal jargon, outdated language, and antiquated procedures."[8] Because many jurors cannot understand the law that they are expected to apply to the facts of the case, the constitutional right to a fair trial is at stake.[9]

Juror incomprehension of the law in jury instructions is a widespread

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2 U.S. CONST. amend. VI; U.S. CONST. amend. VII.

3 Duncan v. Louisiana, 391 U.S. 145, 155 (1968).

4 Bethany K. Dumas, *Communicating with Juries: Jury Trials: Lay Jurors, Pattern Jury Instructions, and Comprehension Issues*, 67 TENN. L. REV. 701, 707 (2000).

5 *Id.*

6 Sparf v. United States, 156 U.S. 51, 92 (1895) (instructing the trial judge to "adjudge all questions of law, and direct the jury thereon").

7 *See, e.g.*, Robert M. Hunter, *Law in the Jury Room*, 2 OHIO ST. L.J. 1, 8–14 (1935); ARTHUR D. AUSTIN, COMPLEX LITIGATION CONFRONTS THE JURY SYSTEM: A CASE STUDY 55–56 (1984); SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, THE AMERICAN JURY ON TRIAL 141–63 (1988); Dennis J. Devine et al., *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 PSYCHOL. PUB. POL'Y & L. 622 (2001).

8 Molly Armour, *Dazed and Confused: The Need for a Legislative Solution to the Constitutional Problem of Juror Incomprehension*, 17 TEMP. POL. & CIV. RTS. L. REV. 641, 642 (2007).

9 *Id.* at 641–42.

problem in American courts. This Note will explore the reasons why jury reform has been slow to take effect despite scientific and academic support and argue that reforming the language and presentation of instructions will aid jurors in understanding the law. Part I of the Note will explore the important role the jury plays in American judicial system. Part II will examine the four primary reasons why jury instructions have been resistant to change. Part III will discuss the debate regarding whether reforming jury instructions for greater clarity will sacrifice other functions of pattern jury instructions and argue that reformation is possible without disrupting these other functions. Lastly, Part IV will advocate a holistic approach to reforming jury instruction, including simplifying the language of the instructions and modifying the instructional process.

I. THE JURY'S ROLE IN THE AMERICAN JUDICIAL SYSTEM

The Constitution assures the right of a criminal defendant to "a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed."[10] In civil cases, the defendant has a right to a trial by jury "where the value in controversy shall exceed twenty dollars."[11] The Supreme Court has gone to great lengths to define precisely how this guarantee of a jury trial is to be provided. They have outlined processes for jury selection,[12] the number of jurors required,[13] and which defendants are entitled to a jury.[14] The purpose of the jury in ensuring fairness in a trial is a time-honored and respected tradition in the American judicial system:

> The Anglo-American jury is a remarkable political institution. . . . It recruits a group of twelve laymen, chosen at random from the widest population; it convenes them for the purpose of the particular trial; it entrusts them with great official powers of decision; it permits them to carry on deliberations in secret and to report out their final judgments without giving reasons for it; and, after their momentary service to the state has been completed, it orders them to disband and return to private life. The jury thus

10 U.S. CONST. amend. VI.

11 U.S. CONST. amend. VII.

12 Batson v. Kentucky, 467 U.S. 79, 89 (1986) (holding that the Equal Protection Clause prohibits a prosecutor from challenging jurors based on their race); Taylor v. Louisiana, 419 U.S. 522, 533 (1975) (holding that "women cannot be systematically excluded from jury panels from which petit jurors are drawn").

13 Ballew v. Georgia, 435 U.S. 223, 245 (1978) (holding that a five-member jury deprives a criminal defendant of the "right to trial by jury guaranteed by the Sixth and Fourteenth Amendments").

14 Blanton v. City of N. Las Vegas, 489 U.S. 538, 545 (1989) (holding that the Sixth Amendment does not guarantee a person charged with DUI to a trial by jury under Nevada law).

> represents a deep commitment to the use of laymen in the administration of justice .... It opposes the cadre of professional, experienced judges with this transient, ever–changing, ever–inexperienced group of amateurs.[15]

A fair trial requires that the "jury is apprised of the law, including constitutional standards and presumptions, and that a jury properly applies the law to the facts."[16] Thus, jurors' inability to comprehend their instructions on the law undermines the constitutional guarantee of a fair trial by jury.

The potential danger of juries' misapplication of the law to facts is most poignantly seen in death penalty cases, where the very life of the defendant depends on a jury's understanding of the law. In *Weeks v. Angelone*,[17] the U.S. Supreme Court ruled in a five–to–four decision that a trial judge need only to re–read the controlling language of the instructions when presented with jurors' questions regarding crucial death penalty sentencing instructions.[18] In the majority opinion, Chief Justice Rehnquist assumed that jurors are capable of understanding their instructions simply by hearing the judge read them.[19] In fact, trial judges often answer juror questions by reiterating the applicable portion of the instructions; however, there is no evidence that this reiteration assists jurors to better comprehend the law.[20] On the contrary, some case studies and legal professionals suggest that this response actually treats juror incomprehension as if the jury had not heard the instructions rather than not having understood them.[21]

Some appellate courts have suggested that merely allowing jurors to ask questions regarding instructions is an error.[22] In *People v. Redd*,[23] the defendant argued that the trial judge erred in merely reiterating the jury instructions after jurors asked for an explanation in simpler language.[24] Although the court ruled that the issue was not properly preserved, it noted that it would have rejected the appeal on the merits because re–reading the initial instructions provided "adequate guidance."[25] In his concurring opinion, Judge Saxe argued that "consistency within the criminal justice system is a more important goal than clarification of language for the benefit

15 HENRY KALVEN, JR., & HANS ZEISEL, THE AMERICAN JURY 3–4 (1966).

16 Armour, *supra* note 8, at 644.

17 Weeks v. Angelone, 528 U.S. 225 (2000).

18 *Id.* at 234.

19 *Id.*

20 Dumas, *supra* note 4, at 704.

21 *Id.*; *see also* Stephen P. Garvey et al., *Correcting Deadly Confusion: Responding to Jury Inquiries in Capital Cases*, 85 CORNELL L. REV. 627, 627 (2000).

22 Dumas, *supra* note 4, at 712.

23 People v. Redd, 698 N.Y.S.2d 214 (N.Y. App. Div. 1999).

24 *Id.* at 215.

25 *Id.*

of the jury."[26] *Weeks* and *Redd* illustrate the need for reforming courts' attitudes regarding jury instructions. In order to provide the constitutionally guaranteed jury trial, the courts must place greater emphasis on jurors' comprehension of the law.

II. Why Jury Instructions Have Been Resistent to Change

There are four primary reasons that legal professionals resist reforming jury instructions despite the large amount of research showing that jurors rarely comprehend their instructions.[27]

A. Drafters are Legal Professionals with Goals Other Than Juror Comprehension

First and foremost, the attorneys and judges who draft jury instructions often have goals in drafting other than aiding jurors' comprehension of the law.[28] While attorneys and judges recognize that the instructions must communicate the law to the jury, their primary focus in drafting is to provide correct and neutral statements of the law that will survive appellate review.[29] They want the instructions to correctly reflect the law, thus they often employ the language directly from statutes, which is written for legal professionals and not lay citizens.[30] Drafters focus on the needs of other legal professionals when creating jury instructions:

> As the drafters work on the jury instructions, they have fellow judges and lawyers in mind. The drafters struggle to create jury instructions that accurately convey the law as it has been expressed in statutes or interpreted in case law. They strive to use "neutral" language that does not favor plaintiffs or defendants. They are concerned with the nuances of words and phrases and whether an instruction they have written accurately tracks the requirements of a statute or the elements of a judicial test. They are comfortable with the legal language because they have been trained in it. . . . The drafters are hard–pressed to put themselves in the position of those who hear these words for the first time and who have not had the benefit of such training.[31]

As appellate court reviews of these instructions usually focus on whether the instruction language is an accurate representation of the law,[32] it is

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26 Dumas, *supra* note 4, at 713.

27 Nancy S. Marder, *Bringing Jury Instructions into the Twenty–First Century*, 81 Notre Dame L. Rev. 449, 458–75 (2006).

28 *Id.* at 458–63.

29 *Id.*

30 *Id.* at 459.

31 *Id.* at 460.

32 *Id.* at 461.

understandable that the drafters take such care in crafting the language of the instructions. Unfortunately, while the drafters write instructions with the primary goal of passing appellate review and the secondary goal of juror comprehension, no great strides towards reform can be made.[33]

B. Jury Instructions Serve Goals Other Than Communicating the Law to the Jury

A second reason that jury instruction reform has been slow is that the legalese and complex sentences of jury instructions serve purposes other than communicating the law to the jury.[34] Some legal scholars argue that one of the purposes of the instructions is to "inspire respect for the judge, the proceedings, and the power of the law."[35] Even if the jurors do not understand their instructions, the difficult and arcane language arguably causes them to respect the judge's authority and appreciate the importance of their role in the trial process.[36] Other scholars and legal professionals counter that lay jurors recognize the importance of their role and respect the judge's authority with or without these instructions, because they are not familiar with a courtroom and the trial proceedings. As a circuit judge argued, "We have to reject any unspoken fear that using 'plain' or more common language will somehow make us appear less knowledgeable, and/or diminish the integrity of the proceedings."[37] Regardless of whether these ulterior goals are being achieved to lay forth the authority of the court, jury instructions continue to be drafted with these motives in mind.

C. Judicial Skepticism Regarding Jurors' Incomprehension

Jury instruction reform has also been slow because many judges are skeptical that a comprehension problem exists at all. There is a general presumption in the courts that jurors understand their instructions.[38] The U.S. Supreme Court has said that "[a] crucial assumption underlying [the] system is that juries will follow the instructions given them by the trial judge."[39] This presumption is hard to overcome, particularly because of judges' skepticism regarding the truth in empirical studies.[40]

Many courts have been reluctant to recognize the findings of empirical

33 *Id.* at 460.

34 *Id.* at 464.

35 *Id.*

36 *Id.* at 465.

37 Scott Donaldson, *Is It Time for the "Plain English" Jury Charge?*, 66 ALA. LAW. 60, 63 (2005).

38 Richardson v. Marsh, 481 U.S. 200, 211 (1987).

39 Parker v. Randolph, 442 U.S. 62, 73 (1979).

40 *See* Marder, *supra* note 27, at 490.

studies, not only in regard to juror comprehension issues, but also in other areas of the law. For example, many studies have tested the reliability of eyewitness testimony.[41] Yet, courts have consistently refused to instruct juries on the potential for unreliable eyewitness testimony.[42] Their refusal stems from a general mistrust of empirical studies and a reluctance to deny the general public's assumption that we can trust in the truth of what we and others see.[43]

This same problem has occurred in regard to research suggesting that jurors do not understand the law presented to them in their instructions. A notable case in Illinois arose when James Free, a man convicted of murder and sentenced to death, challenged his sentence on the grounds that the jury did not understand the sentencing instructions.[44] Free challenged the Illinois death penalty scheme on multiple grounds, but three are relevant to the current discussion. Free claimed that the statute and jury instructions had a presumption in favor of the death penalty, that the instructions failed to properly guide the jury, creating a risk that the death penalty would be arbitrarily imposed, and that the sentencing scheme failed to set out a specific standard of proof.[45]

Free supported his contentions with the work of the noted jury researcher, Hans Zeisel. Zeisel conducted a study with mock jurors and individuals that were called for jury service in Cook County, Illinois, but not selected.[46] He presented them with instructions based on the Illinois pattern instructions for the death penalty, although not identical to those used in Free's case.[47] Zeisel's study found that the jurors did not understand a number of the instructions, most notably the mitigating instruction.[48] The Illinois instructions included a number of examples of mitigating factors that the jury should consider, though the list was not comprehensive. Zeisel found that the jurors in his study believed the mitigating factors they could consider in sentencing must be similar to the examples listed in the instructions.[49] On the recommendation from the magistrate concerning this "overwhelming empirical evidence,"[50] the district judge held that it was reasonable that Free's jury did not comprehend the instructions, and

41 *See, e.g.*, Robert Buckhout, *Eyewitness Testimony*, SCI. AM., Dec. 1974, at 23.

42 Marder, *supra* note 27, at 468.

43 *Id.* at 468–69.

44 Free v. Peters, 12 F.3d 700, 702 (7th Cir. 1993).

45 United States *ex rel.* Free v. Peters, 778 F. Supp. 431, 434 (N.D. Ill. 1991) (referring the matter to a magistrate for evidentiary hearings).

46 *Peters*, 12 F.3d at 705.

47 *Id.*

48 *Id.*

49 United States *ex rel* Free v. Peters, 806 F. Supp. 705, 708 (N.D. Ill. 1992).

50 *Id.* at 726.

he issued a writ of habeas corpus.[51]

The Court of Appeals for the Seventh Circuit rejected Zeisel's empirical research because it found flaws in the methodology of the study.[52] Although the court "acknowledge[d]—at least, implicitly—that empirical evidence might be able to rebut the presumption that jurors understand their instructions[,] . . . it imposed almost impossibly high standards on such proof."[53] The court required that Zeisel's study use revised instructions to prove that the language of the given instructions was the problem, rather than some other factor.[54] Furthermore, the court said that juror comprehension is improved simply by being in the courtroom to see the evidence and hear the arguments, rather than be presented with a written record as they were in Zeisel's study.[55] A problem arises, however, because evidence of actual juror confusion in real cases is barred by the rule preventing jurors from impeaching their verdict. As one appellate court has observed:

> One enduring element of the jury system, no less vital today than two centuries ago, is insulation from questions about how juries actually decide. Jurors who volunteered that they did not understand their instructions would not be permitted to address the court, and a defendant could not upset a verdict against him even if all of the jurors signed affidavits describing chaotic and uninformed deliberations.[56]

The court of appeals in *Free* has set a nearly impossible barrier for empirical studies to meet in order to overcome the presumption that jurors understand jury instructions, at least in the Seventh Circuit. It seems that the study must use actual jurors rather than mock jurors, but the testimony of actual jurors regarding their confusion over the law in the instructions is inadmissible to impeach their verdict.[57]

In dissent, Judge Cudahy criticized the majority for being too quick to dismiss the findings of a respected researcher and the findings of both the magistrate judge and district court. He accused the majority of "simply ignor[ing] their conclusions as the product of slap–dash research and scatter–brained analysis" rather than seriously considering the empirical evidence.[58]

While the Seventh Circuit took a very harsh and critical view of

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51 *Id.* at 732.

52 *Id.* at 706.

53 Peter Tiersma, *The Rocky Road to Legal Reform: Improving the Language of Jury Instructions*, 66 BROOK. L. REV. 1081, 1091 (2001).

54 Free v. Peters, 12 F.3d 700, 705–06 (7th Cir. 1993).

55 *Id.*

56 Gacy v. Welborn, 994 F.2d 305, 313 (7th Cir. 1993) (citations omitted).

57 Tiersma, *supra* note 53, at 1092.

58 *Peters*, 12 F.3d at 709 (Cudahy, J., dissenting).

empirical studies regarding juror comprehension of instructions, some courts have looked more favorably on such evidence. In *Mitchell v. Gonzales*, the California Supreme Court assigned error in the state's pattern jury instruction on proximate cause because it found that it could lead to confusion for the jurors.[59] In making this finding, the court relied on empirical studies conducted by Robert and Veda Charrow.[60] Unfortunately, instances of courts finding error in confusing jury instructions are the "exceptions that prove the rule."[61]

Jury instruction reform is not only slowed by judges' skepticism regarding juror incomprehension and their reluctance to acknowledge the empirical evidence supporting it, but also because of the suspicion that juries listen to the instructions at all. Some judges, particularly those that are skeptical of the jury system in general, argue that jurors do not listen to instructions and will not apply them to the facts no matter how easy they are to understand.[62] Other judges think that jury instructions do not make a great deal of difference and that the jury can reach the correct verdict, even without instructions.[63]

D. Respect for Tradition

Lastly, jury instructions have been generally resistant to change because of a respect for tradition. This emphasis on traditional jury instructions stems from the idea of instructions as precedent:

> The instructions have been passed down from judge to judge.... [T]reatise writers collected judges' instructions so that they could be disseminated beyond an individual judge's courtroom.... States have their own pattern instructions and it is in the interest of state judges to follow the pattern instructions, and thus, to minimize the chance of reversal on appeal based on jury instructions.[64]

Additionally, some studies suggest that judges and attorneys regard instructions as sacred texts that are so familiar that they no longer think about the meaning of the words, much less whether or not they are clear to

59 Mitchell v. Gonzalez, 819 P.2d. 872, 878–79 (Cal. 1991) (affirmed order by court of appeals reversing trial judgment).

60 *Id.* at 877 (citing Robert P. Charrow & Veda R. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 COLUM. L. REV. 1306, 1353 (1979)).

61 Michael J. Saks, *Improving Communications in the Courtroom: Judicial Nullification*, 68 IND. L.J. 1281, 1288 (1993).

62 Marder, *supra* note 27, at 472 (discussing the arguments of Judge Jerome Frank).

63 *Id.* at 473.

64 *Id.* at 473–74 (citations omitted).

individuals without legal training.[65]

Because of these various long-held beliefs and assumptions, jury instructions and general reform to the jury process have been resistant to changes. Despite this reality, some states have embraced reform, most notably in California and Arizona.[66] Still, there are some scholars who recognize that jurors do not understand the law communicated in the instructions or how to apply it to the facts of a case, yet argue that this level of juror incomprehension is actually preferable to reform.

III. Jury Instructions Should Be Reformed for Greater Clarity

While many scholars and legal professionals have proposed reforms to the language of jury instructions and the need for greater juror comprehension since the 1970s, some individuals have argued that reforming instructions to give greater clarity will "unwittingly damage important functions and delicate balances, and make certain institutional goals more difficult to achieve."[67] Yet, many states have successfully initiated reforms in the language of jury instructions and the process of instructing the jury that provide greater juror comprehension and thereby improve the fairness of trials.[68]

A. Reforming Jury Instructions Will Not Undermine Other Institutional Functions

Historically, the idea of jury nullification was valued as a way to protect citizens from unjust outcomes under the law. In colonial America, "jurors had a duty to find a verdict according to their own conscience, though in opposition to the direction of the court . . . ."[69] When the law led to unjust verdicts, jurors could simply nullify the law by refusing to follow it and following their own conscience instead.

Since the Revolutionary War, the idea of jury nullification has become less popular and is no longer viewed favorably. However, juries still have the power to nullify the law if they so choose.[70] Some scholars argue that, although judges typically dislike jury nullification and support the jury applying the correct law to the facts in reaching their decision, judges have been the most resistant to making changes to ensure that juries properly

65 *Id.* at 474–75.

66 *See infra* Part III(B)(1)–(2).

67 Saks, *supra* note 61, at 1295.

68 Marder, *supra* note 27, at 475–81.

69 United States v. Dougherty, 473 F.2d 1113, 1132 (D.C. Cir. 1972).

70 Saks, *supra* note 61, at 1285.

apply the law.[71] Professor Michael Saks of the University of Iowa suggests that:

> Courts have not only ignored the new data but actually have moved the law in the direction *opposite* to the suggestions of the social scientists. Legislatures generally have done nothing or moved only slightly toward the suggested reforms. Commissions have made the most substantial changes, engaging in extensive reform of jury instruction procedures along the lines suggested by the research.[72]

Saks explains this trend in terms of "judicial nullification," arguing that there exist institutional functions that are managed through jury instructions.[73]

1. *Judicial Nullification Provides Increased Judicial Control.*— First, Saks suggests that judicial nullification provides judges increased control over case outcomes. "Where the judge believes that the desired outcome of the case would be impeded by the law, the judge can nullify the law and allow the jury to use its equities to reach the result the judge desires."[74] Moreover, if the instructions are incomprehensible to the jury, the judge is better able to communicate his or her own views of the case through his or her non–verbal behavior.[75]

Many scholars support this behavior, arguing that judges will know when following the "letter of the law would lead to results contrary to the law's true intent."[76] Nevertheless, allowing judges to nullify the law when they see fit could have negative consequences. Following the law ensures that everyone is treated even–handedly, whereas judicial nullification allows a judge to treat individuals differently depending on the judge's adjudication of the case. Furthermore, the law provides needed guidelines for people's behavior. If the application of the law is too unpredictable, individuals will not know what is expected of them.

2. *Judicial Nullification Reinforces the Adversarial System.*— Saks also argues that judicial nullification reinforces the adversarial system. He hypothesizes that while judges may give ineffective instructions, attorneys are actually instructing jurors on the law through their arguments and their closing statements.[77] Saks believes this is a better system, because it would

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71 *Id.* at 1289.

72 *Id.* (quoting J. Alexander Tanford, *Law Reform by Courts, Legislatures, and Commissions Following Empirical Research on Jury Instructions*, 25 LAW & SOC'Y REV. 155, 157 (1991)).

73 *Id.*

74 *Id.* at 1290.

75 *Id.*

76 *Id.*

77 *Id.* at 1291–92.

allow parties more control over the trial's presentation[78] and would provide instructions with greater clarity and adversarial purpose.[79]

He also thinks it will increase efficiency by dividing the duties of instructing the jury.[80] Yet, Saks again ignores the importance of having clearly defined and predictable laws. Attorneys would no doubt be able to stretch and skew the law to best fit their needs, maybe to the point of making it unrecognizable from its original form. Furthermore, dealing with the number of objections that would undoubtedly arise from the opposing party's instructions on the law would be time consuming and influence how juries perceive the law and the legal process.

3. *Wariness of Reforming Traditional Models.*— Lastly, Saks argues that "historical inertia" is a reason for difficult and often incomprehensible jury instructions.[81] He argues that instructions full of legalese and difficult language were developed in English law as a method to temper unduly harsh or unfair outcomes that would result from juries following the letter of the law.[82] He suggests avoiding unjust laws or the unjust application of laws by allowing the jury to follow its own intuitions and conscience.[83] Again, this suggestion ignores the need for clearly defined laws as guidance. It also disregards the regrettable truth that the judgments of the majority may not always be correct, and thus, nullification would allow the majority to oppress the minority.

Although it is true that the process of instructing the jury and the instructions themselves serve other functions in the trial process than merely conveying the law to jurors, the need to preserve these functions is an insufficient reason to avoid jury instruction reforms. Courts and lawyers have generally been resistant to reforms regarding instructions out of fear that those reforms will upset well-established practices and balances of power within the courtroom.[84] Yet, there is no proof that reforms will upset these other functions or that other procedures in the trial cannot serve the same purposes. Furthermore, these concerns fail to take into account the great benefit of instructing a jury so that they can understand and properly apply the law. In fact, many states have begun to reform their instructional process with great success.

78 *Id.* at 1292.

79 *Id.* at 1291.

80 *Id* at 1292.

81 *See id.*

82 *Id.*

83 *Id.*

84 Janessa E. Shtabsky, *A More Active Jury: Has Arizona Set the Standard for Reform with Its New Jury Rules?*, 28 ARIZ. ST. L.J. 1009, 1011 (1996).

B. Successful State Reforms

While changes to the jury process and jury instructions have been generally slow, a few states have made much-needed and drastic changes.

1. *California's Blue Ribbon Commission.*— California undertook one of the most extensive efforts at rewriting its pattern jury instructions to eliminate legalese and incorporate "language that [would] be understandable to jurors."[85] After O.J. Simpson was acquitted of murder in his criminal trial, "the Judicial Council of California established a Blue Ribbon Commission on Jury System Improvement to review its [current] system" and suggest improvements.[86] The Commission recommended the implementation of a task force to redraft pattern jury instructions to promote juror comprehension.[87] Although the ultimate task force consisted mainly of judges and attorneys, two lay members also assisted in the drafting of new civil and criminal jury instructions.[88]

Rewriting was extensive and made use of plain language principles.[89] Typical problems that arise in jury instructions include legal vocabulary, nominalizations,[90] use of negatives,[91] complex sentences,[92] "use of the passive voice,"[93] compound sentences,[94] and use of "unique determiners . . . like 'such' and 'said' [when] 'the' or 'this' would suffice."[95] The reforms greatly simplified the language of the instructions and incorporated references to everyday life to better communicate with the jurors. For example, an original instruction stated that "[f]ailure of recollection is common [and] [i]nnocent misrecollection is not uncommon."[96] The revised instruction provides that "[p]eople often forget things or make mistakes in what they remember."[97] California's original instruction regarding circumstantial evidence read as follows: "Circumstantial evidence is evidence that, if

85 J. Clark Kelso, *Final Report of the Blue Ribbon Commission on Jury System Improvement*, 47 HASTINGS L.J. 1433, 1444 (1996).

86 Marder, *supra* note 27, at 475–76.

87 *See id.* at 476.

88 *Id.*

89 *See id.* at 477.

90 Dylan Lager Murray, *Plain English or Plain Confusing?*, 62 MO. L. REV. 345, 355 (1997).

91 *Id.* at 356.

92 *Id.* at 358.

93 *Id.* at 361.

94 *Id.* at 362.

95 *Id.* at 357–58.

96 JOHN M. DINSE ET AL., CALIFORNIA JURY INSTRUCTIONS—CIVIL BOOK OF APPROVED JURY INSTRUCTIONS § 2:21 (9th ed. 2003).

97 JUDICIAL COUNCIL OF CAL., JUDICIAL COUNCIL OF CALIFORNIA CIVIL JURY INSTRUCTIONS § 107 (2003).

found to be true, proves a fact from which an inference of the existence of another fact may be drawn. A factual inference is a deduction that may logically and reasonably be drawn from one or more facts established by the evidence."[98] By using examples from jurors' every day experiences, the revised instruction better illustrates the meaning of circumstantial evidence. The new instruction states:

> Some evidence proves a fact directly, such as testimony of a witness who saw a jet plane flying across the sky. Some evidence proves a fact indirectly, such as testimony of a witness who saw only the white trail that jet planes often leave. This indirect evidence is sometimes referred to as "circumstantial evidence." In either instance, the witness's testimony is evidence that a jet plane flew across the sky.[99]

These new instructions are much simpler and will no doubt be easier for jurors to understand. Some critics have argued that the new instructions are "dumbed–down,"[100] but the reforms have generally been met with support and enthusiasm.

2. *Arizona Reforms.*— Arizona also undertook major changes to its entire jury system in the early 1990s.[101] Not only did Arizona draft new pattern jury instructions, taking into account the principles of plain language, but it also made changes to the timing and delivery of instructions to the jury.[102] These changes put Arizona in the "vanguard of jury reform," even a decade later.[103] Some of the Arizona reforms include:

> [A]llowing jurors to submit written questions for witnesses during the trial, allowing jurors to engage in preverdict deliberations in civil trials, and allowing researchers to film some of the actual jury deliberations to study how the new reforms were working. . . . There were changes to the timing and presentation of [jury] instructions . . . as well as a commitment to plain language instructions and to gearing the instructions to a sixth–grade reading level. . . . [F]or a jury that had reached an impasse, the judge was to eschew the traditional Allen charge, and instead, to instruct the jury that the judge was available to engage in dialogue with the jury if the jury thought that it would help to resolve the impasse."[104]

98 DINSE ET AL., *supra* note 96, at § 2:00.

99 JUDICIAL COUNCIL OF CAL., *supra* note 97, at § 202.

100 Marder, *supra* note 27, at 477.

101 *Id.* at 478.

102 Armour, *supra* note 8, at 657.

103 Marder, *supra* note 27, at 478.

104 *Id.* at 478–79.

These reforms are far-reaching, encompassing not only changes to the language of the instructions, but also transforming the entire process of instructing and engaging the jury so as to optimize juror comprehension.[105]

One of the most important of the Arizona reforms is the move away from the traditional Allen charge to creating a "dialogue" between the judge and jury.[106] Traditionally, when jurors reached an impasse the judge would give them an Allen charge by "reminding [the jurors] of the nature of their duty and the time and expense of a trial, and urging them to try again to reach a verdict."[107] Under the new Arizona reforms, the judge and jury work together to decide if "there is additional information that either the judge or counsel are permitted to provide that would assist the jury in its decisionmaking."[108] This approach allows for a more active role on the part of jurors and allows judges to provide the information and direction needed for jurors to fulfill their duties.

3. *Other States' Reforms.*— Many states have undertaken various reforms of their jury systems, though most are not as extensive as those made in California and Arizona. According to the National Center for State Courts and the American Judicature Society, Hawaii, Iowa, Michigan, Oregon, Pennsylvania, Wisconsin, Delaware, Minnesota, Missouri, and North Dakota have sought to simplify their jury instructions, at least to some extent, by employing plain language principles.[109]

For example, Delaware sends drafts of instructions to an expert who then edits them to comply with plain language.[110] The Seventh Circuit, while being careful not to allow its reformed instructions to go so far in the pursuit of simplicity as California, has attempted to redraft its instructions to be "shorter, more direct and to the point."[111] The District of Columbia did a year-long study assessing the federal and state jury systems, and while the project did not make recommendations on redrafting of instructions, it did recommend giving jurors written copies of the instructions, using case-specific and interim instructions, and providing the substantive instructions before closing arguments rather than after the arguments.[112]

These state reforms also have led to changes in areas other than jury instructions, including allowing jurors to take notes, submit questions to

105 *Id.* at 478.

106 *See* B. Michael Dann & George Logan III, *Jury Reform: The Arizona Experience*, 79 JUDICATURE 280, 283 (1996).

107 United States v. Anderton, 679 F.2d 1199, 1203 (5th Cir. 1982).

108 Marder, *supra* note 27, at 480.

109 *Id.* at 481.

110 *Id.*

111 *Id.*

112 Armour, *supra* note 8, at 658.

witnesses, and participate in pre–deliberation discussions.[113] The most common instruction–related reforms include "(1) providing a written copy of instructions for jurors, (2) issuing substantive instructions before opening statements, (3) issuing substantive instructions before the onset of closing arguments, and (4) crafting instructions with simpler language."[114] All the various reforms across the nation show "common sense assessments of how human beings assimilate and analyze information."[115]

IV. A Holistic Approach to Jury Reforms is Needed

While the need to eradicate legalese and employ plain language in jury instructions receives the most attention from scholars and legal professionals, this technique must be coupled with other changes in the entire jury process to ensure juror comprehension. Reforms must focus not only on redrafting the language, but also on changing the processes by which the jury receives its instructions and participates in the proceedings. The successes of this more drastic approach in California and Arizona show the importance of recognizing that jurors do not comprehend the law used in jury instructions.

There are many factors that intersect in jurors' decision–making processes. First, there is the language and terms used in the instructions and how well lay jurors are able to understand and articulate their meaning in deliberations. This can be further complicated by the "prevalence of certain [legal] terms in popular culture," where jurors may be exposed to definitions of certain terms or phrases in a manner that does not comport with the actual legal meaning.[116] Second, there is the trial structure itself,[117] which involves the timing of the instructions related to the arguments and the offering of evidence. Third, there is the manner in which the instructions are given. Generally, the instructions are read in one long lecture by the judge with no opportunity for the jury to ask for clarification, take notes, or follow along with their own copy of the instructions.[118] Finally, there are also many problems that arise from the "dynamics of group decision–making" that are exacerbated by the lack of guidance provided by the judge.[119]

All of these various factors come together and influence the jury's decision–making process. Thus, no reform of the jury instructions can

113 *Id.* at 658–59.

114 *Id.*

115 Neil P. Cohen & Daniel R. Cohen, *Jury Reform in Tennessee*, 34 U. Mem. L. Rev. 1, 35 (2003).

116 Armour, *supra* note 8, at 656.

117 *Id.*

118 *See* Marder, *supra* note 27, at 491.

119 *Id.* at 656; *see also* Roger M. Young, *Using Social Science to Assess the Need for Jury Reform in South Carolina*, 52 S.C. L. Rev. 135, 150 (2000).

completely address the issue of juror incomprehension without accounting for all these factors. This holistic approach to jury reform will maximize the ability of jurors to understand the law presented them and apply it to the facts of the case, thus ensuring that every defendant's constitutional right to a trial by jury is fulfilled.

A. Redrafting Jury Instructions in Plain Language

The first reform that any jurisdiction must undertake is the redrafting of pattern jury instructions. As discussed, it is unlikely that these changes will come from the judiciary for various reasons, including fear of reversal on appeal, skepticism regarding the problem and the potential to fix it, and concern that jury instructions serve purposes other than communicating the law to the jury.[120] Consequently, committees are best suited to draft new plain language instructions.

First and foremost, the drafters must recognize that the instructions should be "jury-centric."[121] The primary goal of the instructions should be to properly instruct the jury on the law and how it is to be applied in a manner that is correct, concise, and readily understandable to the lay person. Although avoiding reversal on appeal will always be a concern, courts should primarily focus their efforts on providing a fair trial to the parties. To this end, committees should not only include judges and attorneys, but also a number of non-legal members who can offer insights into the instructions that legal professionals miss given their training.[122] Committees should also strive to have the input of lay persons through empirical testing, incorporating the work of social scientists over the past thirty years. This will provide another avenue to receive lay persons' input and help the committees to further understand how jurors comprehend instructions and apply them to the facts.

Specific changes can simplify the language of jury instructions and improve juror comprehension. The principles of plain language, for example, suggest avoiding negatives, third-person voice, and passive voice, and suggest incorporating contractions and "examples to illustrate how the law applies."[123] President Clinton mandated that these principles be incorporated into government writing in an effort to make the government "more responsive, accessible, and understandable in its communications with the public."[124] These same principles can and should be incorporated

120 Marder, *supra* note 27, at 458–75.

121 *Id.* at 482.

122 Tiersma, *supra* note 53, at 1100 (discussing the composition of the Judicial Council of California's Task Force on Jury Instructions).

123 Joseph Kimble, *How to Mangle Court Rules and Jury Instructions*, 8 SCRIBES J. LEGAL WRITING 39, 53–54 (2001–2002).

124 Memorandum on Plain Language in Governmental Writing, 34 WEEKLY COMP. PRES.

into jury instructions to facilitate jurors' understanding of the law and aid them in providing a fair application of the law to the facts.

B. Timing of Jury Instructions

Following many of the reforms already instituted in various jurisdictions, changes also must to be made to the manner in which the jurors receive instructions. Typically, jurors do not receive an instruction on the law to be applied until after the closing arguments.[125] The instructions provide a context with which to view the evidence. The problem with this method is that the jury has already heard all the evidence and likely begun forming conclusions before knowing the applicable law.[126] Thus, by providing the substantive instructions at the beginning of the trial, the court can improve juror comprehension and establish a context for jurors to understand the evidence presented during trial. Rather than reiterate the instructions after the closings, judges should refresh the jurors' memories by providing instructions before the closings, again reminding the jurors of the context with which to judge the evidence.

In addition to providing substantive instructions at the beginning of the trial and before closings, judges should instruct the jury as needed throughout the trial. This may include instructions regarding particular evidence matters that arise, admonitions, or limiting instructions.[127] While repeatedly stopping the trial to instruct or explain issues to the jury will lengthen the trial, the benefits of jurors' comprehension of the trial process, the evidence, and the law far outweighs this concern.

C. Other Reforms

In addition to reforming the language and timing of instructions, other changes can easily be made to engage jurors in the trial process and increase their comprehension.

Providing jurors with a written copy of the instructions, both while the instructions are being read by the judge and in the deliberation room, can aid their understanding by allowing them to actively follow along rather than passively listen to dense, unfamiliar material. The judge's reading of the instructions has been compared to a professor giving a lecture.[128] In order to maintain the jury's attention to the material, courts should provide written copies so that the jurors can follow along. Allowing jurors to take notes on the instructions will also keep their attention and help them note

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Doc. 1010 (June 1, 1998).

125 Marder, *supra* note 27, at 491.

126 *See id.*

127 Neil P. Cohen, *The Timing of Jury Instructions*, 67 TENN. L. REV. 681, 692–93 (2000).

128 Marder, *supra* note 27, at 452.

questions they have or instructions they find particularly important. It will further assist jurors to have copies of the instructions in their deliberations so they can be reminded of the language and any terms that they do not fully comprehend.

Following Arizona's lead in eliminating the Allen charge is another important step in engaging the jury and assisting it in reaching a decision. Permitting judges to dialogue with jurors and provide additional information necessary for jurors to reach a decision, courts will not only improve jurors' comprehension and decision making process but will also prevent hung juries. Additionally, judges must be able to respond to jurors' questions by doing more than rereading the pertinent part of the instructions. Judges must be allowed to respond to jurors' questions in a meaningful way that will clarify the instruction so the law can be administered properly.

Juror engagement can also be furthered by allowing them to anonymously submit their questions to witnesses. Not only will this increase juror comprehension by encouraging them to pay attention and participate in the proceedings, but it also will benefit attorneys to know the issues on which the jury is focusing. Jurors should also be encouraged to take notes throughout the trial as a way to stay engaged and ensure they will remember important points. Some courts also have jurors participate in pre–verdict deliberations. All of these reforms, when made together, address the various factors that contribute to juror incomprehension and aid in the decision–making process to ensure that defendants receive their constitutionally–guaranteed right to a jury trial.

CONCLUSION

The Constitution guarantees the right of a trial by jury,[129] but the crisis of jurors' incomprehension of the law threatens this guarantee, because jurors consistently fail to apply the law correctly, which thereby leads to unfair trials. Though research conducted over the past thirty years documents jurors' difficulty in understanding jury instructions and suggests possible solutions, courts have been reluctant to introduce reforms. There are four primary reasons for this reluctance: the drafters of jury instructions are legal professionals, there are often goals other than juror comprehension, judicial skepticism of the reliability of empirical data, and a hesitance to break with tradition. Some scholars have argued that reforming jury instructions will undermine other functions that the instructions serve in addition to conveying the law to the jury. These concerns are unpersuasive, however, because they fail to fully account for the benefits of the proposed reforms and the ability of other aspects of the trial process to fulfill these functions.

129 *See, e.g.*, U.S. CONST. amend. VI; U.S. CONST. amend. VII.

In order to ensure that jurors comprehend the law and properly apply it, reforms must be holistic, focusing on both the language and process of the instructions. First and foremost, instructions must be rewritten in plain language that is easy for jurors to understand. Also, giving substantive instructions at the beginning of the trial and before closings will give the jurors a context with which to view the evidence. Other reforms, such as giving each juror a copy of the instructions, allowing judges to respond to juror questions, and allowing jurors to ask questions of witnesses will further help juror comprehension and engage jurors in the trial. A holistic reform encompassing these various reforms is the best way to ensure that jurors comprehend the law and defendants truly receive a fair trial.