

## THE ROCKY ROAD TO LEGAL REFORM: IMPROVING THE LANGUAGE OF JURY INSTRUCTIONS\*

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### INTRODUCTION

One of the fundamental principles of our justice system is that the judge decides what the law is and the jury applies that law to the facts. We all realize that this distinction is sometimes a fiction, or in any event, an exaggeration. We know—or at least strongly suspect—that jurors sometimes ignore the law. Likewise, judges can strongly influence determinations of fact, most notably by excluding certain evidence. All of this presupposes that we can neatly compartmentalize law and facts in the first place.

Nonetheless, most of us would agree that in a system governed by the rule of law, juries should follow the law that is enacted by the legislature and construed by the courts, rather than pursuing their own notions of how a case ought to be decided or making up the rules as they proceed. Obviously, jurors can only follow the law if someone explains it to them in a comprehensible fashion. That brings us to the issue of jury instructions.

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This Article does not discuss the possibility of nullification, which suggests a principled deviation from the law. In any event, for a jury to nullify a rule of law, it must first understand the law. Only then can it determine that its application in a particular case would be unjust. Hence, even nullification presupposes comprehension. A jury that acts in ignorance of the law has not engaged in nullification.

This Article begins with a brief outline of the history of jury instructions, including recent research on the language of such instructions and the movement to improve their comprehensibility. It then surveys the rather mixed reaction of the courts towards this problem and offers some reasons why judges are often unreceptive to research on the issue. Next, the Article describes how the problem is being addressed by the committees that draft standardized or pattern jury instructions, drawing mainly on my experience as a member of such a committee in California, but discussing issues that are likely to arise in any jurisdiction. Ultimately, the language of jury instructions, and thus the quality of the decisions made by juries, will gradually improve, but the process will be neither easy nor quick.

## I. THE HISTORY OF JURY INSTRUCTIONS

Originally, there was a rule in England that judges were not supposed to instruct jurors at all; they could only answer questions.<sup>1</sup> Even then, the answers to jury questions were not always very helpful. In the 1314 case of *Abbot of Tewkesbury v. Calewe*, a jury was asked to decide whether certain land was “free alms” or “lay fee.”<sup>2</sup> They pointed out to the judge, “We are not men of law,” implicitly requesting his assistance.<sup>3</sup> The judge replied, “Say what you feel.”<sup>4</sup> This is the problem, of course. If a judge does not explain to the jury what it is supposed to do, the jury will do what it feels is best. This is

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<sup>1</sup> William W. Schwarzer, *Communicating With Juries: Problems and Remedies*, 69 CAL. L. REV. 731, 732-37 (1981).

<sup>2</sup> J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 95 (3d ed. 1990) (citing *Abbot of Tewkesbury v. Calewe*, (1314) 39 SS 158, 161).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 95 n.40.

precisely the sort of arbitrary decision making that the rule of law seeks to prevent.

Eventually, judges in England did begin to instruct jurors on the law. But even today, English jury instructions (part of the judge's "summation") remain oral and relatively informal. The judge summarizes the facts and possible inferences to be drawn from them and then tells jurors in his own words what the relevant law is.

As in England, American judges originally did not instruct jurors on the law. Jurors were expected to use their common sense. Common sense may have worked well enough when the country was largely rural. But as the country industrialized, legal disputes became more complex and the need for consistently applied rules of law became more pressing. Eventually, jurors lost the right to decide questions of law. Additionally, toward the end of the nineteenth century, many states took away the power of the judge to charge juries on the facts. Thus arose the modern division of labor in which the judge decides the law and the jury is entrusted with the facts. Inevitably, jurisdictions began to require the judge to instruct the jury on the relevant law.

The legal profession soon came to realize that instructing the jury could involve a lot of work and duplication of effort. With every trial, judges and attorneys would spend time drafting the instructions. Another problem was that instructions were often inconsistent from judge to judge. And judges were often reversed for instructional error.

In 1935, Judge William J. Palmer of the Superior Court of Los Angeles, California addressed some of these issues in an article recommending that a committee be formed to compile approved instructions for civil cases.<sup>5</sup> The presiding judge of the court was impressed by the idea and appointed a committee of lawyers and judges to accomplish this goal. The committee published a book of instructions a few years later. The descendant of this book of instructions is still used in California, where it is known as the *Book of Approved Jury Instructions* ("BAJI"). A similar book of criminal instructions, *Califor-*

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<sup>5</sup> ROBERT G. NIELAND, PATTERN JURY INSTRUCTIONS: A CRITICAL LOOK AT A MODERN MOVEMENT TO IMPROVE THE JURY SYSTEM 6 (1979).

*nia Jury Instructions: Criminal* (“CALJIC”) soon followed.<sup>6</sup> The venture was a tremendous success and has since been imitated by many other states.<sup>7</sup>

Tellingly, the name of the original collection of civil jury instructions in California, and especially the reference to “approved” jury instructions, lays bare both the strengths and weaknesses of the approach that was generally taken by the committee of judges and lawyers in California and in many other American jurisdictions. The philosophy of much of the original pattern jury instruction movement was to search for language to which a court or legislature had given its stamp of approval. This approved language was found, for the most part, in judicial opinions and in statutes. The approach had a very powerful advantage. Copying verbatim the language of statutes—and, to a somewhat lesser extent, judicial opinions—was a virtually foolproof method of insulating the instructions from legal attack on appeal. After the Constitution, legislation is supreme in our legal system. Who could fault a judge for reading to the jurors from a statute when the statute, by definition, is an accurate statement of the law?

Yet there were and are some significant downsides to copying approved language. Many of the cases and statutes that contain the rules of law were drafted quite a while ago. The words in one version of the reasonable doubt instruction, still used today, were taken verbatim from a Massachusetts case decided in 1850.<sup>8</sup> Moreover, cases and statutes are written primarily for an audience of lawyers and, thus, have never been intended to be read and understood by the lay public. Consequently, using approved language and publishing the results did save time and probably resulted in fewer reversals for instructional error. But it did not increase jurors’ understanding of the law. In fact, it may have had the *opposite* effect.

Research confirms that jury instructions are hard for the average juror to understand. The seminal study by Robert and Veda Charrow analyzed some of California’s BAJI (civil) instructions. The Charrows found that their research subjects

<sup>6</sup> The most recent edition is CAL. SUPERIOR COURT (L.A. COUNTY), COMM. ON STANDARD JURY INSTRUCTIONS, CALIFORNIA JURY INSTRUCTIONS: CRIMINAL (6th ed. 1996) [hereinafter CALJIC].

<sup>7</sup> See generally NIELAND, *supra* note 5.

<sup>8</sup> Commonwealth v. Webster, 59 Mass. 295, 320 (1850).

understood roughly one-half of the instructions. They then rewrote the instructions in a way that maintained the meaning but avoided some of the linguistic problems in the originals, producing better—albeit not perfect—comprehension scores.<sup>9</sup> A substantial number of studies of instructions in other jurisdictions have produced similar results.<sup>10</sup> The message is that it is possible to reform the language of jury instructions and thereby achieve greater comprehension. Jurors may never fully understand the law, but we *can* do better.

Assuming that communication with juries can and should be improved, how do we achieve that goal? The most common formal mechanisms for changing the law are legislation and judicial decisions. Although there are statutes requiring that jurors be instructed on certain matters, and sometimes even in specified language, for the most part legislatures have not particularly concerned themselves with the language of jury instructions. They have little expertise in the area, and appear content to leave the matter to the legal profession. This means that reform is most likely to occur through the courts, or—as discussed below—through the work of the committees of lawyers and judges who draft the instructions.

## II. THE REACTION OF THE COURTS

For the most part, the courts have not been especially effective as a mechanism for reforming the language of jury instructions. One reason is that litigants seldom seem to raise the issue when the instructions are being selected. Perhaps understandably, lawyers are much more interested in the question of which instructions are given, and in possibly slant-

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<sup>9</sup> Robert Charrow & Veda Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 COLUM. L. REV. 1306 (1979).

<sup>10</sup> See, e.g., AMIRAM ELWORK ET AL., MAKING JURY INSTRUCTIONS UNDERSTANDABLE (1982); Phoebe C. Ellsworth, *Are Twelve Heads Better Than One?*, 52 LAW & CONTEMP. PROBS. 205 (1989); Geoffrey P. Kramer & Dorean M. Koenig, *Do Jurors Understand Criminal Jury Instructions? Analyzing the Results of the Michigan Juror Comprehension Project*, 23 U. MICH. J.L. REFORM 401 (1990); Bradley Saxton, *How Well Do Jurors Understand Jury Instructions? A Field Test Using Real Juries and Real Trials in Wyoming*, 33 LAND & WATER L. REV. 59 (1998); Laurence J. Severance & Elizabeth F. Loftus, *Improving the Ability of Jurors to Comprehend and Apply Criminal Jury Instructions*, 17 LAW & SOC'Y REV. 153 (1982); David U. Strawn & Raymond W. Buchanan, *Jury Confusion: A Threat to Justice*, 59 JUDICATURE 478 (1976).

ing those instructions in their favor, than they are in how the instructions are expressed. Initially, this may seem logical enough, but on reflection it is somewhat surprising. One would think that in a fair number of trials one side would have an interest in jurors following the law, while the other side might prefer to ignore or minimize the legal rules. The former would presumably fight for clear instructions, while the latter would prefer the existing obscurity. As far as I know, however, lawyers seldom use this strategy, at least as far as jury instructions are concerned. As a result, lawyers tend not to object to the language of jury instructions until perhaps raising it on appeal, after they have lost the case. At this point, of course, appellate judges are likely to reply that it is too late; they should have objected at trial.

Even when lawyers are aware of the comprehensibility issue, many states with pattern or standardized instructions either require or strongly recommend that they be used when available.<sup>11</sup> Add to this the suspicion of judges that the instructions offered by the parties are almost always slanted in some way and it should be evident that it will be difficult, perhaps impossible, for individual parties to propose modifying the language of existing pattern instructions.

Judges also tend to be unhelpful when during deliberations the jurors ask a question about the meaning of an instruction. In several jurisdictions it has been held inadequate to respond to jury questions or confusion by simply referring back to the instructions that were already given.<sup>12</sup> Nonetheless, it is all too common for judges to simply reread the original instructions, or to refer jurors back to them. Unfortunately, this inadequate practice is frequently upheld on appeal.<sup>13</sup> Con-

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<sup>11</sup> Illinois is one example. See Shari Seidman Diamond, *Instructing on Death: Psychologists, Juries and Judges*, 49 AM. PSYCHOL. 425 (1993).

<sup>12</sup> *Bollenbach v. United States*, 326 U.S. 607, 612-13 (1946); *McDowell v. Calderon*, 130 F.3d 833, 838-39 (9th Cir. 1997) (en banc); *United States v. Bolden*, 514 F.2d 1301, 1308-09 (D.C. Cir. 1975); *United States v. Petersen*, 513 F.2d 1133, 1136 (9th Cir. 1975); *Powell v. United States*, 347 F.2d 156, 157-58 (9th Cir. 1965); *Seattle v. Gellein*, 768 P.2d 470, 471-72 (Wash. 1989); *Leonardo v. People*, 728 P.2d 1252, 1254-55 (Colo. 1986); *Commonwealth v. Smith*, 70 A. 850, 850-51 (Pa. 1908).

<sup>13</sup> See, e.g., *Weeks v. Angelone*, 528 U.S. 225, 234 (2000); *Waterford v. Halloway*, 491 N.E.2d 1199, 1207 (Ill. App. Ct. 1986); *People v. Gonzalez*, 77 A.D.2d 654, 654, 430 N.Y.S.2d 655, 655 (2d Dep't 1980) (holding it is not error to reread the original instructions after the jury came back and asked for additional instructions "in layman's terms"); *Biegler v. Kirby*, 574 P.2d 1127, 1129 (Or. 1978).

sider the recent New York case of *People v. Redd*,<sup>14</sup> in which jurors wrote a note to the judge seeking in vain a “laymen’s” explanation of the concept of reasonable doubt. Although the appellate court ducked the issue on procedural grounds, it suggested that the trial court correctly relied on its original instruction. In fact, it advised lower courts to adhere to the language of New York’s pattern instruction.<sup>15</sup>

Consider what would happen if a law school instructor answered student questions by simply rereading her notes verbatim. She would quickly be looking for a different line of work. Yet this is exactly what many judges do. Unfortunately, there is a rational reason for judges to react so cautiously: the fear of reversal. It is a rare judge who has been reversed for responding to questions by repeating an instruction word for word. Judges who bravely try to explain a concept in their own words, on the other hand, risk having the verdict overturned. This is especially true with important—and conceptually very difficult—standards like reasonable doubt.<sup>16</sup>

Sometimes there is evidence after trial that a particular jury was actually confused by an instruction. One might think that when this happens, courts would realize that their instructional efforts were inadequate. Yet evidence of actual confusion has had very little impact because of the rule that juries are not allowed to impeach their own verdicts.<sup>17</sup> This procedural barrier means that even when interviews with jurors show that they did not understand, for example, the difference between aggravation and mitigation in a death penalty

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<sup>14</sup> 266 A.D.2d 12, 698 N.Y.S.2d 214 (1st Dep’t 1999).

<sup>15</sup> *Id.* at 215.

<sup>16</sup> See, e.g., *People v. Ruge*, 35 Cal. Rptr. 2d 830 (Cal. Ct. App. 1994) (reversing trial court for trying to explain reasonable doubt in laymen’s terms); *People v. Garcia*, 126 Cal. Rptr. 275 (Cal. Ct. App. 1976) (“Well intentioned efforts to ‘clarify’ and ‘explain’ [reasonable doubt] criteria have had the result of creating confusion and uncertainty, and have repeatedly been struck down by the courts of review.”).

<sup>17</sup> See *Wingate v. Lester E. Cox Med. Center*, 853 S.W.2d 912, 915 (Mo. 1993) (stating that an affidavit or testimony of a juror is inadmissible in evidence for the purpose of impeaching the verdict of a jury); *Watson v. Navistar Int’l Transp. Corp.*, 827 P.2d 656, 662 (Idaho 1992) (stating that juror affidavits cannot normally be used to impeach verdict); *Murphy v. County of Lake*, 234 P.2d 712, 715 (Cal. 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.”).

case,<sup>18</sup> there is no way to present such evidence to a court.

The rule against a jury impeaching its verdict is reinforced on appeal by a presumption that jurors understood their instructions.<sup>19</sup> In practice, this presumption is nearly impossible to rebut. As noted, interviews with jurors after the verdict are generally inadmissible for this purpose. Moreover, although the questions that juries ask would seem to indicate uncertainty on that point, appellate courts seem to assume that rereading the instruction will solve the problem. Hence, jury questions on the meaning of an instruction, even though they are strong evidence of confusion, and are often unanswered, also will not rebut the presumption.

Finally, it would be unrealistic to ignore political considerations. Because jury instructions are standardized, judges are very reluctant to declare that a particular instruction was poorly drafted, especially in criminal cases, because there might be dozens or hundreds of prisoners in the jurisdiction who were convicted on the same instruction. Judges understandably fear opening the floodgates to massive amounts of litigation. If the case involves the death penalty, the stakes are even higher, and the political pressure to let sleeping dogs lie is even more intense.

These various barriers to reform are illustrated by some interesting cases decided during the past decade. One of these cases is *United States ex rel. Free v. Peters*.<sup>20</sup> James Free was convicted of murder, sentenced to death, and had his sen-

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<sup>18</sup> See Ursula Bentele, *How Jurors Decide on Death: Guilt is Overwhelming; Aggravation Requires Death; and Mitigation is No Excuse*, 66 BROOK. L. REV. 1011 (2001); see also LORELEI SONTAG, *DECIDING DEATH, A LEGAL AND EMPIRICAL ANALYSIS OF PENALTY PHASE JURY INSTRUCTIONS AND CAPITAL DECISION-MAKING* (1990) [dissertation: Univ. Microfilms].

<sup>19</sup> See, e.g., *Richardson v. Marsh*, 481 U.S. 200, 211 (1987) ("A jury is presumed to follow its instructions."); *Parker v. Randolph*, 442 U.S. 62, 73 (1979) (plurality opinion) ("A critical assumption underlying [the] system [of trial by jury] is that juries will follow the instructions given them by the trial judge."); *Jackson v. Denno*, 378 U.S. 368, 382 n.10 (1964); *Opper v. United States*, 348 U.S. 84, 95 (1954); see also ROGER J. TRAYNOR, *THE RIDDLE OF HARMLESS ERROR* 73-74 (1970) ("In the absence of definitive studies to the contrary, we must assume that juries for the most part understand and faithfully follow instructions.")

<sup>20</sup> 806 F. Supp. 705 (N.D. Ill. 1992).

tence upheld by the Illinois state courts.<sup>21</sup> Free later petitioned the federal courts for a writ of habeas corpus, claiming that even if the statutory scheme under which he was condemned was constitutional (as previous decisions had held), the jury had not properly understood that scheme as expressed in its death penalty instructions.<sup>22</sup> In other words, Free was claiming that the rule of law had something to say about the procedure under which the jury had decided his fate but that the instructions had failed to effectively communicate the rules to the jurors.

Free supported his contention with research by the late Professor Hans Zeisel, who had conducted a survey of how Illinois' pattern instructions on the death penalty were understood by people called to jury service in Cook County, Illinois. After receiving a report from a magistrate, who had held extensive hearings on the Zeisel study,<sup>23</sup> District Court Judge Marvin Aspen determined that Zeisel's results were scientifically valid.<sup>24</sup>

Although the Zeisel study investigated juror comprehension of several points of law, its most dramatic finding regarded what are called *nonstatutory mitigating factors*. A capital jury has the right to consider any type of mitigating evidence in reaching its decision.<sup>25</sup> The Illinois instructions presented jurors with a list of some illustrations of mitigating factors. Not surprisingly, large numbers of jurors believed that for them to consider mitigation offered by the defendant, it should be similar to the items on the list. In fact, however, jurors are free to consider anything at all to be a mitigating factor, whether or not it was on the list or similar to a listed item. The

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<sup>21</sup> *People v. Free*, 447 N.E.2d 218 (Ill. 1983); *People v. Free*, 492 N.E.2d 1269 (Ill. 1986); *People v. Free*, 522 N.E.2d 1184 (Ill. 1988).

<sup>22</sup> Free challenged the Illinois death penalty scheme on several grounds, three of them relevant here: (1) that the statute and jury instructions imposed a presumption in favor of death; (2) that the statute failed to narrowly channel and guide the jury's discretion, creating the risk that the death penalty would be arbitrarily or capriciously imposed; and (3) that the Illinois sentencing scheme failed to assign a specific standard of proof. *United States ex rel. Free v. Peters*, 778 F. Supp. 431, 434-36 (N.D. Ill. 1991) (referring the matter to a magistrate for evidentiary hearings).

<sup>23</sup> See *United States ex rel. Free v. McGinnis*, 818 F. Supp. 1098, 1104 (N.D. Ill. 1992).

<sup>24</sup> *Peters*, 806 F. Supp. at 713-19.

<sup>25</sup> *Lockett v. Ohio*, 438 U.S. 586, 604 (1978).

court, referring to this “overwhelming empirical evidence,”<sup>26</sup> held that it was reasonably likely that Free’s jury misapprehended this important point.<sup>27</sup> Based on this and similar evidence, Judge Aspen issued a writ of habeas corpus, although he stayed the order pending appeal.<sup>28</sup>

The ink had barely dried on Judge Aspen’s order when another inmate on Illinois’ death row, the notorious serial killer John Wayne Gacy, tried to ride on Free’s coattails. He likewise petitioned the federal courts for habeas relief, noting that his jury had been instructed in essentially the same language as had Free’s. The district court rejected his petition.<sup>29</sup> Because of some procedural maneuvering in the *Free* case, Gacy’s appeal reached the Seventh Circuit first.<sup>30</sup> In an opinion written by Judge Easterbrook, the panel gave little credit to Professor Zeisel’s study, arguing that the problem might not have been poor drafting, but the inherent complexity of the concepts contained in the instructions. Perhaps jurors are “simply unable to grasp thoughts unfamiliar to them.”<sup>31</sup> The panel also appealed to tradition: “[A]s long as the United States has been a nation, judges have been using legalese in instructing juries.”<sup>32</sup>

In this context it is highly ironic that the federal courts have probably had the most success in improving communication with juries.<sup>33</sup> The Federal Judicial Center has published a report in which Judge Marshall noted—in contrast to the Seventh Circuit—that “[t]he 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.”<sup>34</sup>

The *Gacy* panel also invoked the presumption that ju-

<sup>26</sup> *Peters*, 806 F. Supp. at 726.

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

<sup>28</sup> *Id.* at 732. For further details on the *Free v. Peters* case, see Peter M. Tiersma, *Dictionaries and Death: Do Capital Jurors Understand Mitigation?*, 1995 UTAH L. REV. 1.

<sup>29</sup> *United States ex rel. Gacy v. Welborn*, 1992 WL 211018 (N.D. Ill. Aug. 26, 1992).

<sup>30</sup> *Gacy v. Welborn*, 994 F.2d 305 (7th Cir. 1993).

<sup>31</sup> *Id.* at 311.

<sup>32</sup> *Id.*

<sup>33</sup> See, e.g., MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE NINTH CIRCUIT (1992).

<sup>34</sup> FEDERAL JUDICIAL CENTER, PATTERN CRIMINAL JURY INSTRUCTIONS (1988).

rors understand their instructions:

Instead of inquiring what juries actually understood, and how they really reasoned, courts invoke a “presumption” that jurors understand and follow their instructions. . . . [T]his is not a bursting bubble, applicable only in the absence of better evidence. It is a rule of law—a description of the premises underlying the jury system, rather than a proposition about jurors’ abilities and states of mind.<sup>35</sup>

Particularly striking is the court’s suggestion that this presumption cannot be overcome by *any* empirical evidence.

When *Free*’s appeal finally came before a different panel of Seventh Circuit judges, the outcome was virtually preordained.<sup>36</sup> The opinion, authored by Judge Richard Posner, did acknowledge—at least, implicitly—that empirical evidence might be able to rebut the presumption that jurors understand their instructions.<sup>37</sup> But it imposed almost impossibly high standards on such proof.<sup>38</sup> First, Posner rejected the results of the Zeisel study because it did not test a control group with revised instructions.<sup>39</sup> As a result, *Free* did not prove that it was the language of his instructions, rather than some other factor, that caused the test subjects’ low comprehension scores.<sup>40</sup> Significantly, a subsequent study by Shari Seidman Diamond and Judith N. Levi has demonstrated that revised instructions do indeed lead to higher comprehension than the original *Free* instructions.<sup>41</sup>

Judge Posner’s second criticism in *Free* was that the subjects in the study answered written questions based on a supposedly hypothetical case presented by means of a written record.<sup>42</sup> In a real case, their comprehension would have benefited from hearing the evidence and arguments of counsel.<sup>43</sup> But remember that actual evidence of confusion, based on real cases, is barred by the rule that prevents jurors from impeach-

<sup>35</sup> *Gacy*, 994 F.2d at 313 (citations omitted).

<sup>36</sup> *Free v. Peters*, 12 F.3d 700 (7th Cir. 1993), *cert denied*, 513 U.S. 967 (1994).

<sup>37</sup> *Id.* at 706.

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

<sup>39</sup> *Id.* at 705.

<sup>40</sup> *Id.* at 706.

<sup>41</sup> Shari Seidman Diamond & Judith N. Levi, *Improving Decisions on Death by Revising and Testing Jury Instructions*, 79 JUDICATURE 224 (1996).

<sup>42</sup> *Free*, 12 F.3d at 705.

<sup>43</sup> *Id.* at 705-06.

ing their own verdicts. As the appellate court observed in *Gacy* :

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.<sup>44</sup>

Taken together, the *Free* and *Gacy* cases raise an almost insurmountable barrier to challenging the comprehensibility of jury instructions in cases of this sort, at least in the Seventh Circuit. Survey research showing that mock jurors did not understand an instruction is invalid because the test subjects were not real jurors. But evidence of actual confusion by real jurors is inadmissible. Even if we managed to surmount these barriers, the presumption that jurors understand their instructions could always be pulled out of the hat.

Although *Free* and *Gacy* never made it to the United States Supreme Court, another set of related cases did. In *Buchanan v. Angelone*,<sup>45</sup> the defendant was convicted of murder and sentenced to death for killing his father, stepmother, and two brothers. There was evidence that he was mentally disturbed, largely because of the death of his mother; this is important, of course, because it constitutes mitigation.<sup>46</sup>

During the penalty phase of his trial, the jury was given Virginia's pattern capital sentencing instruction:

You have convicted the Defendant of an offense which may be punishable by death. You must decide whether the defendant should be sentenced to death or to life imprisonment.

Before the penalty can be fixed at death, the Commonwealth must prove beyond a reasonable doubt that his conduct in committing the murders of [his family] was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the above four victims, or to any one of them.

If you find from the evidence that the Commonwealth has

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<sup>44</sup> *Gacy*, 994 F.2d at 313 (citations omitted).

<sup>45</sup> 522 U.S. 269 (1998).

<sup>46</sup> *Id.* at 271.

proved beyond a reasonable doubt the requirements of the preceding paragraph, then you may fix the punishment of the Defendant at death, or if you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment of the Defendant at life imprisonment.

If the Commonwealth has failed to prove beyond a reasonable doubt the requirements of the second paragraph in this instruction, then you shall fix the punishment of the Defendant at life imprisonment.<sup>47</sup>

Buchanan's counsel did not object to this instruction at trial.<sup>48</sup>

After being sentenced to death, Buchanan's appeals to the Virginia courts were rejected and he applied for a federal writ of habeas corpus.<sup>49</sup> When his case reached the United States Supreme Court, he argued that the instruction had violated his constitutional right to have the jury properly instructed on the role of mitigating evidence.<sup>50</sup> Observe that the instruction nowhere mentions the role of mitigation.<sup>51</sup> Moreover, it suggests to jurors that as long as they find that one or more of the aggravating factors (that the murder was vile, etc.) was proven beyond a reasonable doubt, the jury should fix the penalty at death.<sup>52</sup> Of course, the instruction continues that the jury should vote for life imprisonment if it decides that the death penalty is "not justified."<sup>53</sup> But how was the jury to decide whether the death penalty was "justified"? They might well think that death was justified if the government proved one of the aggravators beyond a reasonable doubt, and that it was not justified if the government failed to do so.

Nonetheless, in a majority opinion by Chief Justice Rehnquist, the Supreme Court rejected the notion that the instruction discouraged the jury from considering all mitigating evidence:

The instruction informed the jurors that if they found the aggravating factor proved beyond a reasonable doubt then they "may fix" the

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<sup>47</sup> *Id.* at 272 n.1.

<sup>48</sup> *Id.* at 273.

<sup>49</sup> *Id.* at 274.

<sup>50</sup> *Buchanan*, 522 U.S. at 275.

<sup>51</sup> *Id.* at 272 n.1.

<sup>52</sup> *Id.*

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

penalty at death, but directed that if they believed that all the evidence justified a lesser sentence then they “shall” impose a life sentence. The jury was thus allowed to impose a life sentence even if it found the aggravating factor proved . . . .<sup>54</sup>

The Court thus reasoned that the jury would have paid close attention to the difference between “may” and “shall.” It is worth emphasizing that these jurors were not lawyers. In any event, even lawyers often disagree on the meaning of “may” and “shall.”<sup>55</sup>

The Court also relied on the fact that during the penalty phase there were two days of testimony about Buchanan’s background and mental problems. “It is not likely that the jury would disregard this extensive testimony in making its decision, particularly given the instruction to consider ‘all the evidence.’”<sup>56</sup> Yet jurors are routinely told to ignore relevant evidence, and repeatedly instructed to avoid feelings of bias or sympathy and to base their decisions solely on evidence that has been properly admitted. They might well have believed that the evidence of Buchanan’s background and mental state was legally irrelevant, or that it was relevant only in deciding whether the proposed aggravating circumstances were true. Mere mention of the defendant’s background or character would not inform jurors that after concluding that one or more of the aggravating factors was true, they should then consider the evidence in mitigation. Only after completing both steps could they have properly decided whether to impose the death penalty or life imprisonment.

The majority also noted that both defense counsel and the prosecutor discussed the mitigating evidence and its relevance to sentencing.<sup>57</sup> Yet jurors are almost always warned that argument of counsel is not evidence and that only the judge can instruct them on the law.<sup>58</sup> They might well have

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<sup>54</sup> *Id.* at 277.

<sup>55</sup> See BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 939 (2d ed. 1995) (“[C]ourts in virtually every English-speaking jurisdiction have held . . . that *shall* means *may* in some contexts, and vice-versa.”).

<sup>56</sup> *Buchanan*, 522 U.S. at 278-79.

<sup>57</sup> *Id.* at 278.

<sup>58</sup> See, e.g., NINTH CIRCUIT MANUAL OF MODEL JURY INSTRUCTIONS, CRIMINAL

ignored argument on this point if they believed that it conflicted with the judge's charge.

Three justices—Breyer, Stevens, and Ginsburg—dissented. They agreed that a lawyer trained in death penalty law would understand the instruction to require the jury to engage in a second step that considers mitigation, as suggested by the majority. But to the average juror:

[The instruction] seems to say that, if the jury finds the State has proved aggravating circumstances that make the defendant eligible for the death penalty, the jury may “fix the punishment . . . at death,” but if the jury finds that the State has not proved aggravating circumstances that make the defendant eligible for the death penalty, then the jury must “fix the punishment . . . at life imprisonment.” To say this without more—and there was no more—is to tell the jury that evidence of mitigating circumstances (concerning, say, the defendant's childhood and his troubled relationships with the victims) is not relevant to their sentencing decision.<sup>59</sup>

Because the instruction did not properly apprise jurors of the role of mitigation, the dissenters concluded that Buchanan's death sentence violated the Eighth Amendment.<sup>60</sup>

Much of the problem derives from the fact that we can never be sure how jurors understood an instruction. Remember that jurors cannot impeach their own verdict. Lawyers cannot quiz jurors about their understanding of the law and use the responses to overturn the verdict. That rule makes sense for a system concerned with avoiding endless litigation. But it means that in the average case there is no way of determining whether the jury understood and followed the law.

*Buchanan* was not the average case, however. It was followed by another case presenting almost exactly the same issue, from the same state, and concerning the same jury instructions. In *Weeks v. Angelone*,<sup>61</sup> the defendant, Lonnie Weeks, shot a policeman who had stopped the car in which he was riding. He was tried in Virginia and convicted of capital

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1.03 (1995); CALJIC, *supra* note 6, at 0.50.

<sup>59</sup> *Buchanan*, 522 U.S. at 281-82.

<sup>60</sup> *Id.* at 285-86.

<sup>61</sup> 120 S. Ct. 727 (2000).

murder.<sup>62</sup> During the penalty phase of the trial, the jury received essentially the same instruction as in the *Buchanan* case, and like the jury in *Buchanan*, it returned a verdict of death.<sup>63</sup> There was one critical difference, however. During its deliberations, the jury sent the judge this question:

If we believe that Lonnie Weeks, Jr. is guilty of at least 1 of the alternatives, then is it our duty as a jury to issue the death penalty? Or must we decide (even though he is guilty of one of the alternatives) whether or not to issue the death penalty, or one of the life sentences? What is the Rule? Please clarify?<sup>64</sup>

It could not be more obvious that at least some of the jurors interpreted the Virginia instruction in exactly the way that the dissent in *Buchanan* suggested they might: as requiring them to return a death verdict if they decided that at least one of the aggravating circumstances (the “alternatives” to which the note referred) was true. To be more blunt, the question shows that the *Buchanan* majority was wrong. The Virginia instruction does not adequately instruct jurors on the role that mitigation plays in their decision. Unfortunately, despite this appeal for clarification, the judge refused to explain the law.<sup>65</sup> Rather, he sent the jury a message referring them back to the original instruction.<sup>66</sup>

The *Weeks* case is thus a further illustration of why we cannot expect trial judges to solve the problem of incomprehensible jury instructions. When the instructions are first drafted or selected, judges either cannot or prefer not to deviate from the language of the standardized or pattern instructions available in their jurisdiction. If the jury during deliberations asks a question that requests clarification or reveals that they do not properly understand a point of law, most judges fear that they will be penalized by a reversal if they try to explain a concept in ordinary English.<sup>67</sup>

As indicated by the Supreme Court’s opinion in *Weeks*, we also cannot expect appellate judges to solve the

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<sup>62</sup> *Id.* at 729-31.

<sup>63</sup> *Id.* at 730-31.

<sup>64</sup> *Id.* at 730 (citations omitted).

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

<sup>66</sup> *Weeks*, 120 S. Ct. at 730.

<sup>67</sup> *See* sources cited *supra* note 16.

problem. It seems likely that the dissenters in *Buchanan* successfully argued for a grant of certiorari in *Weeks* because they believed that they now had the evidence they needed to prove that the jury did not properly understand the Virginia death penalty instructions. Not only did the jury come back with a question seeking clarification on the exact point raised in *Buchanan*, but there was evidence that they were very conflicted by their decision.<sup>68</sup> Specifically, the court reporter noted in the transcript that as the jurors were polled, “a majority of the jury members [were] in tears.”<sup>69</sup> No doubt, condemning someone to death is a wrenching decision, but it is even more agonizing if jurors believe that there are reasons to spare the defendant’s life, but that they are legally prevented from considering them.<sup>70</sup>

The majority in *Weeks* downplayed this evidence of confusion and instead fell back on its earlier decision in the *Buchanan* case. It invoked the weary but still useful proposition of law that “[a] jury is presumed to follow its instructions.”<sup>71</sup> Moreover, “a jury is presumed to understand a judge’s answer to its question.”<sup>72</sup> As long as courts trot out such presumptions whenever there is genuine doubt that a jury understood the law, instructions are unlikely to improve in any meaningful way.

Responding to Justice Stevens’ comment in dissent that it is virtually certain that the jury misunderstood the instruction, the majority pointed out that its interpretation of the instruction was supported not only by the trial judge, but also by seven justices of the Supreme Court of Virginia, a federal district judge, and three judges of the Court of Appeals for the

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<sup>68</sup> *Weeks*, 120 S. Ct. at 740.

<sup>69</sup> *Id.* (citations omitted).

<sup>70</sup> Although it probably came too late for consideration by the Supreme Court, research has confirmed that approximately forty percent of mock jurors confronted with the instruction used in the *Weeks* case believed that if an aggravating factor is proven, the instruction requires them to impose the death penalty. Stephen P. Garvey et al., *Correcting Deadly Confusion: Responding to Jury Inquiries in Capital Cases*, 85 CORNELL L. REV. 627, 635-36 (2000).

<sup>71</sup> *Weeks*, 120 S. Ct. at 733.

<sup>72</sup> *Id.*

Fourth Circuit.<sup>73</sup> This points to another reason why reform of the language of jury instructions has so far not been advanced to any great degree by the appellate process. Judges as well as lawyers tend to be poor evaluators of whether and how the ordinary lay public understands legalese. Because such language is so familiar to them, all too many members of the legal profession do not fully grasp how difficult it can be for people with no legal training.

As a further justification for its holding, the Supreme Court mentioned that Weeks' counsel did not make much of this matter at trial or on appeal, but treated it largely as an "afterthought."<sup>74</sup> Here we see an illustration of another barrier to reform: the fact that trial lawyers have until now seldom considered the need for more comprehensible instructions. As a result, they often fail to properly preserve the issue at the trial court level, or fail to raise it in any significant way on appeal.

Finally, it is hard to avoid the conclusion that death penalty politics has a subtle hand in many of these decisions. The major cases on the comprehensibility of jury instructions—*Free*, *Gacy*, *Buchanan*, and *Weeks*—all involved defendants who were sentenced to death. This is, perhaps, not surprising in light of what is at stake. Unfortunately, the importance of the issue and its high visibility serve only to hinder reform. Invalidating a death sentence attracts the attention of the press and is seldom welcomed by the public. If an instruction was widely used, such a holding has the potential to throw open the doors of death row in a much more dramatic fashion. Most judges are understandably very reluctant to engage in such a politically unpopular measure.

Given these obstacles, widespread reform of the language of jury instructions will probably not come through court decisions, at least not in the near future. As mentioned previously, legislators have also shown little inclination to address this issue. The most likely remaining possibility for reform is through the committees or commissions that draft the instructions.

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<sup>73</sup> *Id.* at 734 n.5.

<sup>74</sup> *Id.* at 734.

### III. JURY INSTRUCTION COMMITTEES

Most jurisdictions that routinely use pattern or standardized jury instructions have committees of judges and lawyers who issue them. We have already noted that California has two such committees, one for civil instructions (the “BAJI committee”) and the other for criminal (the “CALJIC committee”). The California committees are unusual in that they have no official statewide status. Members are appointed by the presiding judge of the Los Angeles Superior Court. The instructions issued by the BAJI and CALJIC committees have become highly regarded for legal accuracy and are routinely used throughout the state.

At the same time, we have seen that jurors do not understand California’s jury instructions all that well. There is, of course, always some tension between legal accuracy and comprehension. Yet the CALJIC and BAJI committees have consistently favored legal accuracy over comprehension. Consequently, despite occasional hints from the appellate courts,<sup>75</sup> little progress was made in increasing jurors’ understanding of the law, at least in California.

That situation began to change in the aftermath of the celebrated murder case against O.J. Simpson. A Los Angeles jury acquitted Simpson despite a belief by many people that he should have been found guilty of the murder of his former wife, Nicole Brown. The perception that the criminal justice system, and particularly the jury, was not working all that well motivated the Judicial Council of California to establish a blue ribbon commission to review the jury system. This commission made its report in 1996. One of its recommendations related to jury instructions:

The Judicial Council should appoint a Task Force on Jury Instructions to be charged with the responsibility of drafting jury instructions that accurately state the law using language that will be understandable to jurors. Proposed instructions should be submitted to the Judicial Council and the California Supreme Court for approval. The membership of the Task Force on Jury Instructions should be

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<sup>75</sup> See, e.g., *Mitchell v. Gonzales*, 819 P.2d 872 (Cal. 1991); *Maupin v. Widling*, 237 Cal. Rptr. 521 (Cal. Ct. App. 1987) (noting that fortunately the Charrow & Charrow study (*supra* note 9) did not apply to appellate opinions).

diverse, including judges, lawyers, representatives from the Committee on Standard Jury Instructions of the Superior Court of Los Angeles, linguists, communications experts, and other non-lawyers. The Task Force should be charged with completing its work no later than 18 months after its formation.<sup>76</sup>

Pursuant to this recommendation, the Judicial Council did indeed set up a task force.<sup>77</sup> Its members are mainly judges and lawyers, although it also includes two members of the public. The task force was split into two subcommittees, civil and criminal. I have been a member of the criminal subcommittee since its inception.

The original plan was that the task force would revise the existing BAJI and CALJIC instructions. Each subcommittee of the task force included two or three members of the BAJI and CALJIC committees. It soon became evident, however, that the BAJI and CALJIC committees had no intention of simply fading out of existence. The committees had a lot of pride in what they had accomplished in the past and were apparently convinced that the mission of the task force—to create more comprehensible instructions that accurately convey the law—was doomed to failure. Of greater practical importance was that the BAJI and CALJIC instructions are copyrighted. It is also worth noting that the Los Angeles Superior Court receives royalties from their publication.<sup>78</sup>

For much of the first half of 1997, there were discussions between the Judicial Council and the Los Angeles Superior Court about how to proceed. Efforts to reach a compromise failed. Consequently, the BAJI and CALJIC committees continue their work as usual. The Judicial Council task force has also begun to draft new and more comprehensible jury instructions, although it has had to start from scratch because of the copyright issue. It is quite possible that not too far in the future, California judges and lawyers will have two sets of jury instructions available to them. Unless the legislature steps in, or the courts exhibit a strong preference for one set of instruc-

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<sup>76</sup> JUDICIAL COUNCIL OF CALIFORNIA ET AL., REPORT OF THE BLUE RIBBON COMMISSION ON JURY SYSTEM IMPROVEMENT, (Recommendation 5.8, 1996), reprinted in J. Clark Kelso, *Final Report of the Blue Ribbon Commission on Jury System Improvement*, 47 HASTINGS L.J. 1433 (1996).

<sup>77</sup> Judicial Council of California, Task Force on Jury Instructions.

<sup>78</sup> Caitlin Liu, *Say What, Your Honor?*, L.A. TIMES, Sept. 7, 2000, at A1.

tions over the other, we may have to let the marketplace decide which will prevail.

In mid 2000 the criminal task force released new jury instructions for public comment. The remainder of this Article will compare some of the old and new instructions. It will also discuss some of the issues that have arisen in the process and how we have dealt with them. My hope is that reading about our experience will prove useful to similar groups in other jurisdictions. Obviously, my comments derive from my own somewhat biased observations and in no way reflect the opinions of other members of the task force. Finally, readers should recall that all discussion of proposed instructions is simply to illustrate points being made in this Article. The instructions could still undergo major modifications on the basis of public comment or for other reasons, and there is at this time no guarantee that some or all of them will be accepted by the Judicial Council for use in the courts.

#### IV. TECHNICAL VOCABULARY

One of the most obvious problems with jury instructions, or any other legal language that is meant to be understood by the general public, is *technical vocabulary*. Some legal terms are completely unknown in ordinary language, like *quash* or *expunge* or *res gestae*. Others, which I have elsewhere called *legal homonyms*,<sup>79</sup> are ordinary words but have a specific legal meaning. Examples include *brief*, *burglary*, *mayhem*, *complaint*, *notice*, *aggravation*, and many others. Legal homonyms are potentially dangerous because a layperson may think that he knows what they mean, whereas the terms may

mean something quite different in the law. The average person, for instance, uses *briefs* to refer to a type of men's undergarment, not legal documents.

The first difficulty is categorizing words as ordinary language or technical terminology. Unfortunately, judges sometimes assume that words are part of ordinary speech

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<sup>79</sup> PETER TIERSMA, LEGAL LANGUAGE 111 (1999).

when in fact they are technical terms with a legal meaning unknown to the lay public. Thus, although most jurisdictions provide jurors with some kind of definition of the term *reasonable doubt*, at least two federal circuits have held that this is an ordinary phrase that need not be defined.<sup>80</sup> Likewise, some courts have held that the terms *aggravation* and *mitigation*, which are critical to death penalty decisions, are ordinary words and that the jury need not be instructed on their meanings.<sup>81</sup> The reality is that jurors have a great deal of difficulty with both of these concepts, making it essential to provide an understandable definition.<sup>82</sup>

Once it is decided that a term is not part of ordinary language, it becomes necessary to choose between two alternatives. One approach is to avoid the word entirely. This is what our committee decided to do with *preponderance of the evidence*. Instead of instructing the jurors that they need to decide some issue by a preponderance of the evidence, we propose informing them to decide whether it is *more likely than not*.<sup>83</sup>

Elsewhere, we use a more ordinary equivalent for a technical term, but nonetheless refer to it because we believe that jurors will be familiar with it and may have misconceptions about the term if it is not mentioned. The best example is *circumstantial evidence*. Our instruction on this topic distinguishes between *direct* and *indirect* evidence, but we still found it advisable to mention that indirect evidence is the same as circumstantial evidence.<sup>84</sup> The reason, of course, is the popular notion that circumstantial evidence is somehow inferior to

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<sup>80</sup> See, e.g., *United States v. Reives*, 15 F.3d 42 (4th Cir. 1994) (disfavoring attempts to define "reasonable doubt" in the Fourth Circuit); *United States v. Blackburn*, 992 F.2d 666, 668 (7th Cir. 1993) ("We have reiterated time and again our admonition that district courts should not attempt to define reasonable doubt.").

<sup>81</sup> *Cape v. State*, 272 S.E.2d 487, 493 (Ga. 1980) ("[m]itigation' is a word of common meaning and usage") (citation omitted); accord *Smith v. State*, 290 S.E.2d 43, 45 (Ga. 1982); see also *People v. Lang*, 782 P.2d 627, 657 (Cal. 1989) ("aggravate" and "mitigate" are ordinary words that do not have to be defined for the jury); *Pruett v. State*, 697 S.W.2d 872, 876 (Ark. 1985) ("The language used by the legislature in naming the elements of mitigation cannot be said to be vague and beyond the common understanding and experience of the ordinary juror.") (citation omitted).

<sup>82</sup> See Tiersma, *supra* note 28.

<sup>83</sup> JUDICIAL COUNCIL OF CALIFORNIA, TASK FORCE ON JURY INSTRUCTIONS, CRIMINAL JURY INSTRUCTIONS 615 (circulated for public comment, May 2000) (on file with author) [hereinafter TASK FORCE INSTRUCTIONS].

<sup>84</sup> *Id.* at 300.

other evidence or even suspect.

The other approach is to use a technical term, usually because there is no ordinary word that is close enough in meaning. If so, the word or phrase must be defined. Thus, we use the term *false token* in an instruction regarding a type of theft, defining it as “a document or object that is not authentic, but appears to be, and is used to deceive.”<sup>85</sup>

An example of how these two approaches interact is *malice aforethought*. California’s existing instructions use this term and then define it as involving either *express malice* or *implied malice*:

“Malice” may be either express or implied.

[Malice is express when there is manifested an intention unlawfully to kill a human being.]

[Malice is implied when:

1. The killing resulted from an intentional act,
2. The natural consequences of the act are dangerous to human life, and
3. The act was deliberately performed with knowledge of the danger to, and with conscious disregard for, human life.]<sup>86</sup>

Although the difference between express and implied malice may occasionally be relevant from a legal standpoint, one wonders whether it is essential to burden the jury with this terminological nicety.

Our task force also decided to use the term *malice aforethought* in our proposed new instruction entitled “Murder with Malice Aforethought.”<sup>87</sup> Nonetheless, we avoided using the terms *implied malice* and *express malice*; rather, these concepts are described without using the words themselves:

The defendant is charged [in Count \_\_\_] with (first degree/second degree) murder. You may find the defendant guilty of murder only if the prosecutor has proven beyond a reasonable doubt that:

1. The defendant caused the death of another person [or fetus]. [AND]
2. (He/She) caused the death by an act committed with malice aforethought [AND]
3. The killing was committed without excuse or justifica-

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<sup>85</sup> *Id.* at 1308.

<sup>86</sup> CALJIC, *supra* note 6, at 8.11 (further definitions omitted).

<sup>87</sup> TASK FORCE INSTRUCTIONS, *supra* note 83, at 720.

tion.]

The defendant acted with malice aforethought if either:

- A. (He/She) intended to kill [that is, acted with express malice]. OR
- B. (He/She) intentionally did an act that (he/she) knew was highly dangerous to human life and acted with conscious disregard of that danger [that is, acted with implied malice].<sup>88</sup>

One possible reason for using an archaic-sounding legal term like *malice aforethought* is that jurors may expect to hear it in a murder case and may wonder about it if they do not, as in the case of *circumstantial evidence*. In addition, a technical term expresses in a word or phrase what would otherwise require a sentence or two to explain. Lawyers may appreciate being able to use this shorthand during oral argument.

Using a term like *malice aforethought* has the additional advantage of creating an elegant and relatively simple list of elements of the crime:

1. the defendant killed someone;
2. he acted with malice aforethought; and
3. he had no justification or excuse.

Unfortunately, that superficial elegance can be misleading. Jurors cannot mentally process the second element because it contains a term they do not properly understand. Deciding whether the defendant acted with malice aforethought requires understanding the two-part legal meaning of that term. Only after all of the elements have been read do they finally get a definition of that phrase, allowing them to understand what the second element means. Although it is undoubtedly less elegant, I believe that when possible, definitions should be incorporated into the elements, as in my revised version of the murder instruction (elements only) below:

1. The defendant caused the death of another person [or fetus]. AND
  - 2A. (He/She) intended to kill
- OR

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<sup>88</sup> *Id.* The definitions of malice and causation are omitted. Notice that we did leave judges the option of adding a clause that identifies express and implied malice, if they believe it relevant.

- 2B. (He/She) intentionally did an act that (he/she) knew was highly dangerous to human life and acted with conscious disregard of that danger.

This approach allows jurors to go through the list of elements with sufficient information to decide whether each has been met before proceeding to the next element. It reduces the need to page through the instructions looking for definitions. Anyone who has tried to read something in archaic English or a foreign language realizes how frustrating this can be. Of course, if it is necessary to use a technical term repeatedly, a separate definition is the only feasible option. The point is simply that when a word is used once and needs to be defined, it is generally preferable to define it immediately, rather than at some later point.

A further advantage of this approach is that we might be able to avoid mentioning the technical term altogether. Especially in the case of *malice aforethought* this strikes me as preferable because the sum of the individual words does not equal the whole, conceivably causing a great deal of confusion. *Malice* suggests ill will, and *aforethought* strongly implies deliberating or engaging in some other mental activity beforehand. To the lay jury member, it would therefore suggest that the defendant bore ill will towards the victim before killing him. Obviously, this is quite different from the legal meaning.

A final problem with definitions of legal terms is that all too often they are themselves written in inscrutable legalese or in formal or archaic language. Among the worst offenders are definitions of *aggravation* and *mitigation*, both of which are critical in death penalty jurisprudence.<sup>89</sup> California's existing definition of mitigation, for instance, is the following: "A mitigating circumstance is any fact, condition or event which does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty."<sup>90</sup> Yet if people do not know what *mitigate* means, how likely are they to be familiar with *extenuate*? One of the basic principles of lexicography is that the language of the definition should be

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<sup>89</sup> See TIERSMA, *supra* note 79.

<sup>90</sup> CALJIC, *supra* note 6, at 8.88.

more understandable than the word being defined and that in any event a word should never be defined by means of an equally unusual word. California's definition of *mitigation* clearly violates that principle.

Negative definitions are also potentially problematic. Notice that this definition begins by declaring what mitigation does *not* include: facts, conditions, or events that constitute an excuse or justification for the crime. It is true, of course, that mitigation is different from an excuse or justification; this is probably the point that the original drafters were trying to make. But to tell jurors during the penalty phase that mitigation does not include excuses or justifications is absolutely and totally wrong. Clearly, the jury would be entitled to consider anything that the defendant offered as an excuse or justification. It is mind-boggling that such a misleading statement could continually be read to penalty phase jurors.

I am cautiously optimistic that our task force will be able to clarify the meaning of mitigation. Many of our definitions are distinctly more comprehensible than those contained in existing instructions. Yet even in our proposed plainer language alternatives, the definitions are not always as plain as they could be. For example, the proposed instructions use the term *aiding and abetting*. A defendant is said to have aided and abetted the perpetrator of a crime if she *aided, facilitated, promoted, encouraged, or instigated* the commission of the crime.<sup>91</sup> This turns out to be virtually identical to the existing definition in CALJIC 3.01. The reason, not surprisingly, is that both definitions come from the same judicial opinion.<sup>92</sup> In my view, a definition of aiding and abetting as *encouraging or helping* the perpetrator to commit the crime seems to cover all of the bases. Yet it can be very difficult to convince the judges on the committee—even a committee, like ours, that is devoted to crafting more understandable instructions—that they should not track the language of a statute or judicial opinion, as we

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<sup>91</sup> TASK FORCE INSTRUCTIONS, *supra* note 83, at 501.

<sup>92</sup> *People v. Beeman*, 674 P.2d 1318, 1326 (1984) (“We suggest that an appropriate instruction should inform the jury that a person aids and abets the commission of a crime when he or she, acting with (1) knowledge of the unlawful purpose of the perpetrator, and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense, (3) by act or advice aids, promotes, encourages or instigates, the commission of the crime.”).

will see in greater detail below.

## V. FORMAL, UNUSUAL, AND DIFFICULT VOCABULARY

Another fundamental principle of plain English is that you should use ordinary words in their ordinary meaning. Existing jury instructions routinely violate this principle.

One reason that judges prefer formal or educated language is that we tend to evaluate people by how they speak. This may be most evident with accents. Using regional pronunciations of words, rather than what has come to be considered standard American pronunciation, tends to mark or even stigmatize the speaker as being less educated and of lower socioeconomic status. Linguist William Labov conducted a famous experiment in New York City, in which he investigated the “dropping” of the *r* in phrases like *fourth floor*.<sup>93</sup> He found that the phenomenon of not pronouncing an orthographic *r* before a consonant (*fourth, girl*) or at the end of a word (*floor, bar*) was much more common among lower class speakers.<sup>94</sup> In other words, the degree to which people pronounce the *r* can operate as a marker of class in New York.

Higher status people usually pronounce the *r* that is represented in our spelling system, while lower class people tend not to pronounce an *r* when it occurs in these positions.<sup>95</sup>

Using standard English grammar, instead of regional or dialectal forms, serves the same function. Consider the use of *ain't*, which is common in nonstandard English but highly stigmatized in more formal varieties. This principle also applies to vocabulary. People who express themselves through what we might call more “elevated” vocabulary are perceived as being more educated and of higher social status.

Instructing the jury is one of the few occasions in which the judge says more than a few words during the typical

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<sup>93</sup> William Labov, *The Social Stratification of (r) in New York City Department Stores*, in *SOCIOLINGUISTIC PATTERNS* 44 (1972).

<sup>94</sup> *Id.* at 63-64.

<sup>95</sup> *Id.* at 43

Anglo-American trial. Because of the seriousness of the occasion, judges almost always speak standard English. Many, in my experience, prefer to speak not just standard English, but relatively formally. They would rather *enumerate* than *list* several factors for a jury to consider. Events tend to *commence* or *initiate* instead of merely *beginning*.

It is quite understandable that judges would like to appear educated and intelligent. Most of us share that sentiment. The problem is that if we adopt too formal or educated a speech style, it becomes harder for the average juror to follow. For example, California's jury instructions warns jurors that *innocent misrecollection is not uncommon*.<sup>96</sup> It is a wonderfully compact phrase, but I seriously doubt that the average person will comprehend its meaning, especially as a very small part of a much longer set of instructions. At the same time, I do not advocate explaining the law in slang or street language. Most people in this country have at least a high school education and would resent having a judge "talk down" to them. It should normally be possible to write instructions in a style that is sufficiently dignified without sacrificing too much comprehension.

Closely related to formal and educated language is a general preference to speak impersonally. Many judges resist referring to what they *want* or *would like* or *need*. They prefer to say *I remind you* in place of *I would like to remind you*. Although such impersonal language may not be a serious impediment to understanding, it is worth mentioning that it does affect the atmosphere in the courtroom. Phrasing requests or commands in terms of what I *would like* and similar constructions is generally perceived as being more polite than blunt commands. Polite language conveys respect and suggests to jurors that they and the judge are engaged in a cooperative venture. Impersonal language, on the other hand, creates distance. Logically, jurors will be more satisfied with their experience if we emphasize that they are an important part of our justice system, rather than merely being people who are commanded to appear and follow the judge's instructions. To this end, an occasional politeness marker like *please*, *I would like to remind you*, or *thank you* is not out of place.

The problem of an overly formal, antiquated, or ele-

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<sup>96</sup> CALJIC, *supra* note 6, at 2.21.1.

vated style is more difficult to solve when the language derives from a statute or an important court decision. As mentioned above, the definition of *aiding and abetting* came from a judicial decision. Even more problematic is statutory language. Many judges are extremely hesitant to deviate from important statutory language. Thus, the California Penal Code states that an *accessory* to a crime is someone who *harbors, conceals, or aids* a principal in a felony.<sup>97</sup> Our task force considered an instruction defining an accessory as someone who *helps or hides* the perpetrator of a crime. *Hide* seems indistinguishable from *conceal*, and *help* for all practical purposes means exactly the same thing as *aid*. What *harbor* adds in this context is not clear. Nonetheless, the task force decided to repeat the statutory phrase verbatim.<sup>98</sup>

It should be emphasized that virtually no one advocates reading entire statutes to jurors. The problem revolves around what we might call the “critical terms” of the statute—the words that constitute the essence of an offense and whose meaning is therefore most likely to be the subject of an appeal. Leaving aside the problem of *harbor*, the words *conceal* and *aid* are not that terribly unusual, of course. What is at stake here is the principle that if a common word means the same thing as a statutory term, and if no one can articulate a relevant difference in meaning between them, we ought to use the more ordinary term. This becomes especially important when dealing with more uncommon statutory words, like *uttering forged instruments*.

What makes the issue so difficult is that tracking significant statutory language is almost certainly the safest course. Given the supremacy of legislation in our system, it takes a courageous appellate judge to invalidate an instruction that follows statutory language, even if the jury had little idea what it meant.

This dilemma will surface repeatedly in any effort to draft more understandable jury instructions. On the California task force we have gone both ways on the question, sometimes sticking with statutory language and on other occasions adopting more comprehensible phraseology.

<sup>97</sup> CAL. PEN. CODE § 32 (1935).

<sup>98</sup> TASK FORCE INSTRUCTIONS, *supra* note 83, at 520.

This question is not apt to be resolved without decisive action by the appellate courts. If our task force's instructions are adopted and some are then struck down because an appellate court insists on tracking critical statutory terms, we will soon be incorporating even more language verbatim from the Penal Code. Personally, I am optimistic that the California Supreme Court will view our efforts more sympathetically. Chief Justice George has been a strong supporter of more comprehensible jury instructions.<sup>99</sup> As long as the appellate courts realize that legal accuracy and subtle distinctions are meaningless if jurors do not understand them, we should soon see more common terminology substituting for obscure legislative language and plainly written definitions instead of legalese defined by more legalese.

#### VI. SYNTACTIC FEATURES

One of the traditional problems with jury instructions has been the use of long, convoluted sentences. Moreover, they have often been poorly organized, avoiding transitions and placing exceptions before general statements of law. In these areas, I am pleased to say, our task force has had considerable success. We have generally tried to use shorter sentences that express one idea at a time in a logical sequence. In light of the subject matter, the sentences have also avoided too much syntactic complexity. And although there is nothing wrong with an occasional passive construction, we have generally attempted to use the active voice whenever possible.

Perhaps the best illustration is *reasonable doubt*. That concept, as well as the closely related *presumption of innocence*, is presently defined as follows:

A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in a case of reasonable doubt whether [his/her] guilt is satisfactorily shown, [he/she] is entitled to a verdict of not guilty. This presumption places upon the People the burden of proving [him/her] guilty beyond a reasonable doubt.

Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs is open to

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<sup>99</sup> Jean Guccione, *Judicial Council Decides to Press Ahead on Jury Instructions*, DAILY RECORDER (Sacramento), Sept. 10, 1997, at 4.

some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the mind of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge.<sup>100</sup>

Note the impersonal reference to *the jurors* and the odd phrase *abiding conviction*. More importantly, the definition in the second paragraph begins with a description of what reasonable doubt is *not*, rather than describing what it *is*. Even the main definition of reasonable doubt in the second sentence is in the negative (“that they *cannot* say”). Nowhere does the instruction affirmatively tell jurors how much proof is needed. As Lawrence M. Solan has pointed out, defining this concept negatively, rather than affirmatively, creates a real danger of shifting the burden of proof to the defendant in certain types of cases.<sup>101</sup>

Not surprisingly, the strange wording of this instruction is straight from a statute—California Penal Code § 1096. As mentioned earlier, the California legislature adopted this language from a Massachusetts case dating from 1850.<sup>102</sup> The CALJIC committee was apparently so concerned with tracking the exact statutory language that it even adopted the unorthodox semicolon in the first sentence of the second paragraph (by today’s standards, of course, there might be a comma, or no punctuation at all).

Unfortunately, redrafting this instruction was complicated by the fact that the legislature not only defined reasonable doubt in the code, but it provided that a trial court “may read” this code section to the jury and need not give any further instruction on the subject.<sup>103</sup> While this provision does not necessarily require verbatim copying of the legislative language, it does suggest caution.

The proposed instruction drafted by our task force addresses this problem by preserving the “critical” language,

<sup>100</sup> CALJIC, *supra* note 6, at 2.90.

<sup>101</sup> Lawrence M. Solan, *Refocusing the Burden of Proof in Criminal Cases: Some Doubt About Reasonable Doubt*, 78 TEX. L. REV. 105 (1999) (arguing that traditional definitions of reasonable doubt impermissibly lower the government’s burden in cases where the evidence of guilt is weak).

<sup>102</sup> *Commonwealth v. Webster*, 59 Mass. 295, 320 (1850); *see also* TIERSMA, *supra* note 78, at 194-96.

<sup>103</sup> CAL. PENAL CODE § 1096a (1995).

while shuffling the words around to improve organization and syntax:

1. I will now explain the presumption of innocence, the prosecutor's burden of proof, and the charges against the defendant. The defendant in this case is charged with \_\_\_\_\_ [insert charge[s]] and has pleaded not guilty. The fact that a criminal charge has been filed against the defendant is not evidence that the charge is true. You must not be biased against the defendant just because (he/she) has been arrested and charged with a crime.

2. A defendant in a criminal case is presumed to be innocent. This presumption requires that the prosecutor prove each element of the crime[s] [and special allegation[s]] beyond a reasonable doubt. Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt.

3. In deciding whether the prosecution has proven its case beyond a reasonable doubt, you must impartially compare and consider all the evidence. Unless the evidence proves the defendant guilty beyond a reasonable doubt, (he/she) is entitled to an acquittal and you must find (him/her) not guilty.

Especially in paragraph two, notice that the critical terminology contained in the instruction has been maintained, while overall organization and grammar have been greatly improved.

Another syntactic feature that makes language harder to understand is the common tendency of legal writers to use *nominalizations* in place of the verbs or adjectives from which they are derived.<sup>104</sup> For instance, *destruction* and *consideration* are the nominalized forms of the verbs *destroy* and *consider*. Likewise, *ability* is the noun form of the adjective *able*, and is related semantically to the verb *can*. Jury instructions tend to use a great deal of such nominalized forms, rather than the more basic verbs and adjectives. Instead of asking whether you *can see* a particular thing, legal writers habitually prefer expressions like *are you able to see* or *what is your ability to see* the object in question.

This syntactic feature is an issue with an instruction on the *credibility* of witnesses. The existing CALJIC instruc-

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<sup>104</sup> TIERSMA, *supra* note 79 at 77-79.

tion advises jurors that they should consider a list of various *factors*, which tends to include many nominalizations:

In determining the believability of a witness you may consider anything that has a tendency to prove or disprove the truthfulness of the testimony of the witness, including but not limited to any of the following:

The extent of the opportunity or ability of the witness to see or hear or otherwise become aware of any matter about which the witness testified;

The ability of the witness to remember or to communicate any matter about which the witness testified;

The character and quality of that testimony;

The demeanor and manner of the witness while testifying;

The existence or nonexistence of a bias, interest, or other motive . . . .<sup>105</sup>

Nouns and other nominal forms in the above include *extent, opportunity, ability, character, quality, demeanor, manner, existence, and nonexistence*. Compare the proposed new instruction on the same subject:

In evaluating a witness's testimony, consider the following questions:

- a) How well could the witness see or hear [or otherwise sense] the things about which the witness testified?
- b) How well was the witness able to remember and describe what happened?
- c) What was the witness's behavior while testifying?
- d) Did the witness understand the questions and answer them directly?
- e) Did the witness have a reason to lie, such as a bias or prejudice, a personal relationship with someone involved in the case, or a personal stake in how the case is decided?<sup>106</sup>

Even here, the lawyerly tendency to use nominalized forms proved irresistible with question (c), which would have been more straightforward if it simply asked: *How did the witness behave while testifying?* Overall, however, the proposed instruction is—at least from a linguistic point of view—much

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<sup>105</sup> CALJIC, *supra* note 6, at 2.20.

<sup>106</sup> TASK FORCE INSTRUCTIONS, *supra* note 83, at 60.

better than that presently in use.

## VII. FEAR OF SLANTING

This is an appropriate place to mention another factor that may impede comprehensibility: fear of slanting. Those who draft instructions are understandably quite concerned that they not favor one side or the other. This is clearly essential, but sometimes fear of slanting can, in my view, become excessive and undermine efforts to make the language as helpful and understandable as possible. For example, some members of our task force initially favored asking jurors about the *ability of the witness to see the things about which the witness testified* because asking *how well* the witness could see might subtly suggest that the witness could see well. Space prevents us from considering in detail why this is not so; it should suffice for present purposes to point out that asking how old a young child is does not suggest that the child is old. It could be asked about a newborn baby, in fact.

Jury instructions are most effective when they not only provide jurors with relevant information, but also tell them what to do with it. Note that even the new, improved version of the credibility instruction quoted above informs jurors that they should consider how well a witness could see the events in question, for instance, but does not tell them that a witness who had a better view of what transpired is more credible than one who did not. This point may seem self-evident, but it is not always so. The instruction on credibility also tells jurors to consider the witness' behavior while testifying, but gives no clues as to what type of behavior might be relevant, or what that behavior means in terms of believability. Similarly, an instruction on eyewitness identification informs jurors to consider whether the defendant and the witness are the same or different racially, but fails to point the way to the conclusion: research has shown that people are less accurate in identifying people of different races.<sup>107</sup> Nonetheless, our task force has consistently refused—because of fear of slanting—to inform jurors how the factors presented to them should be ap-

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<sup>107</sup> ELIZABETH F. LOFTUS, EYEWITNESS TESTIMONY 189-90 (1979).

plied, beyond the vague suggestion that jurors should “consider” them.

The issue of slanting or argumentativeness has also arisen in deciding how to refer to the parties in a criminal case. What, for example, do you call the prosecutor? One possibility is simply the *district attorney*, but this term is not always applicable because on rare occasion the prosecutor in California may be an assistant attorney general. Prosecutors like to refer to themselves as *the People* (with a capital *P*), but this is not particularly plain and might suggest that the defendant is opposed by all the people of the State of California, including his mother. More accurate, perhaps, is the *government*, a term used by some federal courts. This word, however, has associations that some prosecutors would rather avoid.

Our task force decided on *prosecutor* as the most neutral term. During the public comment period, however, the People (i.e., the prosecutors) made it clear that they were not thrilled by that decision, perhaps because of the phonetic similarity to *persecutors*. Apparently, no decision will satisfy everyone.

What about the *defendant*? One option is to leave a blank line so that the judge can fill in his or her name. That was the choice made by the subcommittee drafting civil instructions.<sup>108</sup> This alternative did not prove too popular on the criminal task force, however, perhaps because judges did not relish having to fill in blanks again and again.<sup>109</sup> Another option is to refer to *the defendant*. This avoids the problem of repeatedly having to fill in blanks, but some people felt that the term *defendant* subtly suggests that the person on trial might actually be guilty. Other rejected proposals were *the actor* or *the individual*. The final possibility comes straight out of the code—a *person*. The term *person* can theoretically refer to anyone, which is why it works well in the Penal Code, which is applicable to anyone and everyone. It does not work well in a jury

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<sup>108</sup> JUDICIAL COUNCIL OF CALIFORNIA, TASK FORCE ON JURY INSTRUCTIONS, CIVIL JURY INSTRUCTIONS p. iii (circulated for public comment, May 2000), available at <http://www.courtinfo.ca.gov/invitationstocomment/aproposals.htm>. (last visited Oct. 9, 2001).

<sup>109</sup> Although this problem could easily be solved by using computer-generated instructions, apparently many judges are not very computer literate, so this option was also rejected.

instruction, however, because the question at trial is not whether *any person* committed some crime, but whether *the defendant* did it. If that is what the jury must decide, why not tell them so directly?

The other problem with *person* is that, as noted, it can refer to anyone. This can be problematic because there are usually at least two people involved in a crime: the defendant and the victim. Tracking statutory language, the word *person* would refer to both persons involved, the distinction being that the defendant is typically *a* or *the* person, whereas the victim is mostly referred to as *another* person. Thus, an instruction might require the jury to decide whether *a* person (defendant) injured *another* person (victim), that *the* person (defendant) intended to harm *the other* person (victim), and that *the other* person (victim) suffered great bodily injury.

This sublime distinction might work for crimes involving only two people but soon runs into trouble when a third or fourth person enters the scene. Suppose that the defendant is accused of committing rape by threatening to injure the victim's daughter. In such an event, the jury would have to be instructed to decide whether *a* person (defendant) had sexual intercourse with *another* person (victim) and that *the other* person (victim) only consented because *the* person (defendant) threatened *still another* person, or perhaps *a third* person (daughter). Task force members eventually realized, though not without much debate, that *person* would not work. We thus refer to the defendant as *the defendant*. On the other hand, calling someone a *victim* is still considered problematic; the victim is generally called *another person*.

## VIII. TEMPLATES

How to name the parties was part of a larger issue: what *template* should we use in presenting the elements of the various crimes? This was an important question because there are a large number of crimes to be described, and the template therefore has an impact on dozens of instructions. The existing CALJIC instructions begin by quoting the Penal Code section verbatim. What follows is an illustration of how the instruction then continues, based on the crime of arson of an inhabited

structure. For ease of presentation, it has been simplified by leaving out definitions and alternative possibilities:

In order to prove this crime, each of the following elements must be proved:

1. A person set fire to a structure; and
2. The fire was set willfully and maliciously; and
3. The fire caused an inhabited structure to burn.<sup>110</sup>

A major problem with this template is that it is quite abstract and does not directly tell the jury what it must decide. By using a passive verb in the introductory clause (“the following elements must be proved”), it fails to identify who must prove the elements (i.e., the prosecutor, or the People). Moreover, as discussed above, the first element refers to *a person*. The reference is actually to the defendant, so why not just say so? The jury does not decide whether “a person” set a fire, but whether the defendant did it! Moreover, element two contains an unnecessary passive construction (*was set*)—why not just say that the defendant must have willfully (or perhaps better: intentionally) and maliciously started the fire? That is the issue, is it not?

The template for the proposed new instructions is substantially more direct, and thus clearer (again, only one alternative is presented and definitions are omitted):

The defendant is charged [in Count \_\_] with arson that burned an inhabited structure.

You may find the defendant guilty of this crime only if the prosecutor has proven beyond a reasonable doubt that:

1. The defendant burned a structure.
- 2B. (He/She) acted willfully and maliciously with the intent to burn a structure. AND
3. The fire burned an inhabited structure.<sup>111</sup>

This instruction clearly states who must prove the case, as well as reminding the jury of the burden of proof. It directly tells the jury what to decide: Did the defendant burn a

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<sup>110</sup> CALJIC, *supra* note 6, at 14.80.

<sup>111</sup> TASK FORCE INSTRUCTIONS, *supra* note 83, at 1055.

structure, did she act willfully and maliciously, and was the structure inhabited?

#### CONCLUSION

The goal of this Article has been to show that it is possible to reform the language of jury instructions, although we should not underestimate the hurdles that must be overcome. Change is most likely to be instituted by the committees that are responsible for drafting the instructions, rather than by judicial opinions in specific cases. As our experience in California has demonstrated, there are some real challenges even for committees philosophically united behind the idea of increasing comprehension, and the process may be more difficult and time-consuming than one might originally think. But it can be done. The instructions that we have released for public comment are significantly more understandable than those presently being used not only in California, but in most other jurisdictions.

While appellate courts will probably not be leading the charge, for all the reasons outlined in this Article, they do have a crucial supporting role. Any change of this magnitude

will invariably lead to legal challenges. One hopes that judges will recognize the importance of comprehension when evaluating those challenges.

For hundreds of years, juries have been an essential part of the Anglo-American criminal justice system. Trial by jury offers many benefits, not the least of which is inspiring public confidence in the fairness of the system. At the same time, having cases decided by people without legal training potentially undermines the rule of law. If we are serious about keeping trial by jury, and if we believe in the values of the rule of law, it is essential that we convey the law to jurors in a way that they can understand.