The classic image is of the jury “being doused with a kettleful of law during the charge that would make a third-year law student blanch.” (Judge Jerome Frank quoting Judge Bok in Skidmore v. Baltimore & O.R.R., 167 F.2d 54, 64 (2d Cir. 1948).

I. An Introduction to the Problem of Jury Instructions

The standard story about jury instructions is that the judge’s recitation of the law at the end of the trial constitutes little more than window dressing. Either the jurors simply ignore the instructions or they are hopelessly confused by the legal guidance the instructions purport to give. After all, if bright college graduates must struggle mightily to learn how to think like lawyers, and may then spend a lifetime of practice as attorneys arguing with equally educated adversaries about how the law should be applied, why should we expect to be able to instruct laypersons successfully on complex legal principles in an abbreviated presentation at the end of a trial? Yet jury trials proceed on the implicit assumption that such instruction takes place, and appellate courts regularly engage in a careful parsing of the specific language used in the instructions that the jury has been given, implicitly assuming, or at least behaving as if they assume, that a legally correct instruction was necessary and sufficient to produce an acceptable verdict.

Research conducted on jury comprehension of instructions presents a very different picture, providing empirical evidence that the jury instructions in fact provide little effective guidance on the relevant law. Since the early 1980’s, a body of scholarly work has accumulated that documents the failures of jury instructions, demonstrating that laypersons provided with jury
instructions perform poorly on comprehension tests, both in laboratory experiments\(^2\) and on post-trial questionnaires administered to real jurors following their jury service,\(^3\) and in a few cases, revealing inaccurate use of relevant legal concepts during simulated deliberations.\(^4\)

Yet this image of jurors befuddled by the law they are asked to apply does not fully harmonize with some other sources of evidence. First, when jurors are asked, the majority of them report that they did not find the legal instructions difficult to understand\(^5\) (although some report they are less convinced that other members of their jury similarly grasped the relevant law).\(^6\) Of course, these positive juror reports may well be wrong, reflecting an over-optimistic self-evaluation. A more telling indicator is that nearly all studies that have compared jury verdicts with the verdicts that judges would reach in the same trial find substantial agreement between the two decisionmakers.\(^7\) This agreement could arise not because jurors understand the


\(^4\) See e.g., Phoebe Ellsworth, Are Two Heads Better than One? 52 LAW & CONT. PROBS. 205 (1989).

\(^5\) See e.g., Seventh Circuit American Jury Project Final Report (Sept., 2008).


\(^7\) Harry Kalven, Jr. & Hans Zeisel, THE AMERICAN JURY, 58-68 (1966) (78% agreement in 3576 criminal trials, 78% agreement in approximately 4000 civil trials). See also, Larry Heuer & Steven Penrod, Trial Complexity: A Field Investigation of its Meaning and Effects, 18 LAW AND HUM. BEHAV. 29, 48 (1994) (74% agreement in 77 criminal trials, 63% agreement in 67 civil trials); Shari Seidman Diamond, Neil Vidmar, Mary Rose, Leslie Ellis & Beth Murphy, Jury Discussions During Civil Trials: Studying an Arizona Innovation, 45 U. of Arizona Law Rev. 1 (2003) (77% agreement in 46 civil trials, 74%
legal instructions, but because they share values consistent with the content of those instructions, but it suggests that problems in communicating legal principles does not tend to pose a significant threat to the quality of most jury decision making. It is also possible, as Michael Saks suggests, that judges may produce jury agreement by influencing juries to agree with them for non-legal reasons.\textsuperscript{8} Without a close look at how juries use (or don’t use) legal instructions during their deliberations, it is hard to evaluate the extent to which poorly written jury threaten the quality of jury decision making.

Nonetheless, there is no doubt that jury instructions are hardly the model of clear communication – and for good reason. Pattern jury instructions are typically written by committees of judges and attorneys who represent the opposing parties (i.e., prosecutors and defense attorneys in criminal cases, plaintiff and defense attorneys in civil cases). The legal expertise of these groups appropriately prepares these professionals to produce pattern instructions that can save the time of lawyers and judges during trial, and reduce the likelihood of an appeal or reversal due to an erroneous instruction. Yet legal accuracy and vetting by multiple legal constituencies does not guarantee that the instructions will be comprehensible to laypersons. Committees writing pattern jury instructions have traditionally turned to the wording of statutes and to the case law to decide on the wording of instructions, but have given little attention to communicating meanings to non-lawyers. The results include instructions like those given to an Illinois jury deciding on whether or not to impose the death penalty, “If you do not unanimously find from your consideration of all the evidence that there are no mitigating

factors sufficient to preclude imposition of a death sentence, then you should sign the verdict form requiring the court to impose a sentence other than death.” Although that example includes relatively few unfamiliar words, the sentence construction – with its four negatives – probably could only have been produced by a committee.

Recent reform efforts, such as providing preliminary instructions and supplying jurors with written copies of the instructions, are designed to assist the jury in understanding and applying the law, but it is worth asking whether these aids are likely to be helpful if the instructions themselves are incomprehensible. As the legal community has acknowledged, current jury instructions frequently fail to achieve clarity. Indeed, Principle 14A of the 2005 American Bar Association Principles for Juries and Jury Trials addresses this issue explicitly by providing: “All instructions to the jury should be in plain and understandable language.” The commentary recognizes that “jury instructions remain syntactically convoluted, overly formal and abstract, and full of legalese” and that communication with the jury often suffers as a result. Nonetheless, despite the fact that sporadic efforts to improve the comprehensibility of instructions show that substantial improvements can be made, only one jurisdiction has taken on the task of substantially re-writing its pattern jury instructions in Plain English.

What is the consequence for jury decision making? Some new research suggests that the problem of miscommunication may be overstated. That is not to say that jury instructions

---

9 Although some informal testing that linguist Judith Levi did with college students suggested that the word “preclude” is not unambiguous: many of the students thought it meant the opposite of “conclude.”


12 California included linguist Peter Tiersma on the pattern jury instructions committee. Peter Tiersma, The Rocky Road to Legal Reform: Improving the Language of Jury Instructions, 66 BROOKLYN L. REV. 1081 (2001)
always provide clear guidance. Frequently, they do not. Moreover, jurors sometimes do not
follow the legal instructions for reasons other than a failure to understand them. As a whole,
however, communication and jury compliance with the law may be far better than common
wisdom or the experiments that target particular instructions would suggest. If this view is
correct, and the problem of impaired communication is limited, the focus should be on those
pockets of dysfunctional communication rather than wringing our hands about an
insurmountable problem. By exaggerating the problem, we may have actually discouraged
realistic efforts to make modest changes that are quite feasible. Faced with a perceived
quagmire of improving communication, courts have tended to take an ostrich-like approach.
Thus, it is no wonder that courts continue to respond to questions from the jury on the
instructions with either a simply re-reading of unclear language or by directing the jury that it
should look again at the instructions to determine the relevant law. Such a passive response is
appropriate if the court is convinced that clear communication is not possible. Moreover, “doing
no harm” is the most effective way to reduce the likelihood of being reversed for misstating the
law.

We begin in Part I by briefly describing the Arizona Jury Project which enabled us to
examine how fifty jury in civil trials dealt with jury instructions, for the first time providing us
with empirical evidence on what jurors actually do in discussing instructions during
deliberations. In Part II we examine jurors talk about legal instructions and how accurately those
discussions reflect the law in the jury instructions the jurors have received. While we find
important pockets of misunderstanding, this evidence suggests that the abysmal performance of
jurors on the comprehension tests typically used to evaluate juror understanding of instructions is
vastly overstated. In Part III we identify four principal sources of juror confusion that arise from
jury instructions and identify how some can be cured rather easily, while others reveal deeper problems that the movement championing Plain English instructions cannot solve. Finally, in Part IV we analyze the inconsistencies between our picture of how juries respond to legal instructions and conventional wisdom.

II. The Arizona Jury Project

A. The Background of the Project

The Arizona Jury Project, in which we observed actual jury deliberations, presented a unique occasion to observe how juries handle jury instructions. The opportunity to study these jury deliberations arose because an innovative group of judges and attorneys in Arizona, encouraged by the Arizona Supreme Court, took a close look at their jury system. As a result, Arizona decided to make some changes aimed at facilitating jury performance, including a controversial innovation instructing jurors that they were permitted to discuss the case among themselves during breaks in the trial. To evaluate the effect of allowing discussions, the Arizona Supreme Court issued an order permitting a team of researchers to conduct a randomized experiment in which some jurors in some cases were instructed that they could discuss the case and others were given the traditional admonition not to

---

discuss the case.\textsuperscript{14} The court order also permitted us to videotape the jury discussions and deliberations.\textsuperscript{15}

B. Selection of Jurors and Cases

The jurors, attorneys, and parties were promised that the tapes would be viewed only by the researchers and only for research purposes. Jurors were told about the videotaping project when they arrived at court for their jury service. If they preferred not to participate, they were assigned to cases not involved in the project. The juror participation rate was over 95 percent.\textsuperscript{16} Attorneys and litigants were less willing to take part in the study. Some attorneys were generally willing to participate when they had a case before one of the participating judges; others consistently refused. The result was a 22 percent yield among otherwise eligible trials.

C. Data Collection and the Final Sample

In addition to videotaping the discussions and deliberations, we also videotaped the trials themselves and collected the exhibits, juror questions submitted during trial, jury instructions, and verdict forms. In addition, the jurors, attorneys, and judge completed questionnaires at the end of the trial. The fifty cases

\textsuperscript{14}See Juror Discussions During Civil Trials, supra note 13.

\textsuperscript{15}See id. at 17, for a detailed report on the permissions and security measures the project required, and the results of the evaluation. As part of their obligations of confidentiality under the Supreme Court Order as well as additional assurances to parties and jurors undertaken by the principal investigators, the Authors of this Article have changed certain details to disguise individual cases. The changes do not, however, affect the substantive nature of the findings that are reported.

\textsuperscript{16}Although we cannot be certain that the cameras had no effect on their behavior during deliberations, the behavior during deliberations at times included comments that the jurors presumably would not have wanted the judges or attorneys to hear.
in the study reflected the usual mix of cases dealt with by state courts: 26 motor vehicle cases (52 percent), four medical malpractice cases (8 percent), seventeen other tort cases (34 percent), and three contract cases (6 percent).\textsuperscript{17} The 47 tort cases in the sample varied from the common rear-end collision with a claim of soft tissue injury to cases involving severe and permanent injury or death. Awards ranged from $1,000 to $2.8 million, with a median award of $25,500.

D. The Data

1. \textit{The Trials}: We transcribed the opening and closing arguments in each case from the trial videotape. We also created a very detailed “roadmap” of the trial from the videotaped trial.

2. \textit{The Instructions}: We obtained the complete set of instructions the court delivered to the jury in each trial. Each juror received a copy of the instructions for use during deliberations, consistent with the practice in Arizona. The instructions averaged 17 pages, and varied in length between 8 and 33 pages. Each trial included a set of boilerplate instructions (e.g., what the attorneys say is not evidence, do not concern yourselves with my rulings on the admission of evidence, do not speculate, etc.) and a set of case-specific instructions (e.g., what the plaintiff must prove, the life expectancy of the plaintiff, compensation only for aggravation of pre-existing condition). There were 7 or 8 pages of boilerplate instructions for each trial. The eighth page provided an instruction on evaluating expert testimony and was given whenever the trial included at least one expert witness. In addition to the instructions, each jury was provided with the verdict forms, which provided supplementary information on the legal requirements of the

\textsuperscript{17}This distribution is similar to the breakdown for civil jury trials for the Pima Country Superior Court for the year 2001: 62 percent motor vehicle tort cases, 8 percent medical malpractice cases, 23 percent other tort cases and 6 percent contract cases (figures provided by Nicole M. Waters of the National Center for State Courts).
task (e.g., in a comparative fault case, the potential for allocating 100% of liability across two parties).

3. Data from the Deliberations: We created verbatim transcripts of all deliberations, producing 5,276 pages of deliberations transcripts for the fifty trials. The deliberations consisted of 78,858 comments by the jurors, each of which was coded on a variety of dimensions, including whether the comment involved a reference to the instructions.

III. Juror Talk about Instructions

Defining Talk about Instructions: Deciding when jurors were talking about the instructions required us to develop a coding scheme to categorize the juror comments. We coded each time a juror made a comment that referred to a concept in the instructions, with one important exception. In determining damages, the jurors tended to refer persistently to the category of damages on the list they received in the instructions as they were deciding how much to award in damages for that expense. If we had considered each mention as an instruction reference, we would have coded the entire damages discussion as talk about the instructions. Instead, we coded only the first instance in which a juror said, for example, we have to decide how much to give him for lost wages; we did not code the references to lost wages in the conversation that followed as the jurors reached that determination.

In talking about the instructions, jurors sometimes directly referred to the fact that the judge had instructed them on an issue (e.g., The judge told us not to speculate). More often, however, the reference was indirect, either because the juror simply incorporated the judge’s directive (e.g., “We’re not supposed to speculate.”) or because the juror adopted the language or concept of the instruction (e.g., in a slip-and-fall case, “But did [defendant X] actually know about the dangerous condition?”). Before coding a case, we closely examined the instructions
for that case to identify terms of art the jurors might use if they were drawing from the instructions, but would be unlikely to use in the absence of the instructions. The number of specialized words and phrases in the instructions that triggered an instruction code varied from case to case. This was a conservative approach to identifying instruction talk, since we did not code a comment as instruction-based if it might have been produced in the absence of instructions (e.g., when a juror said, “I don’t think it was his fault,” we did not code this statement as an instruction comment because a juror who watched the trial, but never heard the judge’s instructions might easily have made this comment, using the term fault, in discussing the case.

Jurors could refer to the judicial instructions either literally, as described above, or conceptually. Literal references explicitly used the language of the instructions (e.g., We shouldn’t compensate for her pre-existing condition); conceptual references conveyed the same idea without using the literal language of the instruction (e.g., We know that her leg hurt before the accident – we have to figure out how much of the expenses were due to the accident). We identified each literal and each conceptual reference.

We also identified whether the juror’s comment referred to a general (boilerplate) or specific (case-specific) instruction, and whether the juror correctly or incorrectly interpreted the meaning of the instruction that the juror was referring to.

How much do jurors talk about the jury instructions? Across the fifty cases, the average percentage of comments referring to the instructions was 15 percent per case. Using a somewhat different approach in a jury simulation involving a criminal case, Reid Hastie and his colleagues coded any discussion of determining whether or not to believe a witness, whether or not the juror mentioned the instruction on how to judge witness credibility, as an instruction reference. On the ground that individuals naturally would try to figure out who was telling the truth when confronted with the competing accounts in a trial, we took a more conservative approach.

---

18 Insert range of terms across cases.
19 Reid Hastie, Steven Penrod, & Nancy Pennington, Inside the Jury (1983). Hastie and his colleagues coded any discussion of determining whether or not to believe a witness, whether or not the juror mentioned the instruction on how to judge witness credibility, as an instruction reference. On the ground that individuals naturally would try to figure out who was telling the truth when confronted with the competing accounts in a trial, we took a more conservative approach.
colleagues obtained a higher rate of instruction discussion, reporting that nearly a quarter of the juror comments related to the instructions. Both of these results indicate that juries focus significant attention on judicial instructions; both provide convincing evidence that jurors, whether in criminal or civil cases, do not simply ignore the instructions they receive.

The active use of the instructions on the Arizona juries also emerged in a direct way during their jury deliberations. On 47 of the 50 juries (94%) at least one juror read an instruction aloud to the group, and on nearly half of the juries (48%) at least half of the jurors read an instruction aloud. Thus, at least in a jurisdiction where the jurors receive copies of the instructions, the availability of the document as a reference makes it possible for jurors to consult it – and they do. Note that although the trend appears to favor giving jurors a copy of the jury instructions, only a minority of courts currently supply each juror with his or her own copy.

What instruction topics are discussed by the jurors? Not surprisingly, the focus of the jurors is on case-specific instructions, rather than on the general instructions. Nonetheless, 28 percent of the juror comments did draw on the general instructions. For example, regarding the admonition not to speculate:

Juror #1: Well, he missed those hours [of work], but how, that is not to say he didn’t get paid when he was gone. If you or I get in a car accident…
Juror #8: [interrupts] But we can’t consider that, that’s speculation.
Juror #2: Because we don’t know that.
Juror #3: Yeah, even though we would like to.

On more than half of the juries (52%), a juror warned another juror not to speculate, and in a majority of those cases, the juror made a specific reference to the judge’s admonition.

20 Id. at X.
21 State of the States survey: State courts: 68.5%; federal courts: 79.4%
22 Id at X: State courts: 32.6%; federal court: 39.0%
What predicts how much jurors talk about the law reflected in the jury instructions? We might expect that length of the trial or, more specifically, the length of the jury instructions, would signal to jurors that they should spend more time focusing on the jury instructions. It appears, however, that the jurors are more sophisticated than that. In each case, we asked the judges to rate how easy or difficult it was to understand the jury instructions on a 1 to 7 scale (1 = very difficult, to 7 = very easy). The judicial rating of the complexity of the instructions was a significant predictor ($r=-.36$, $p=.011$)\(^{23}\) of the percentage of time jurors devoted to the judicial instructions during their deliberations, a better predictor than both the length of the trial ($r=.21$, $p=.15$) and the number of pages of instructions ($r=.21$, $p=.14$).

In addition, the jurors spent more time discussing the instructions when the case turned on unfamiliar as opposed to what they considered familiar issues. Over half of the trials (26) in the sample, as is typical of state court civil litigation, resulted from automobile tort cases. The remainder reflected a mixture of other tort cases (e.g., slip and fall cases, malpractice, products liability) and several contract cases. Juror familiarity with auto accidents may explain why auto accident cases stimulated a significantly lower percentage of instruction comments than did the remaining cases (12.2% versus 17.7%, $t=2.62$, $p=.012$).

Many jurors come to deliberations with a history of experience with automobiles and automobile accidents, and they often referred to that experience as they tried to evaluate the evidence. In one case, for example, as the jurors were discussing driving behavior on a highway, one juror noted: “[i]f you are in an exit lane you have to be careful, you know, you know you’re going to go down the ramp. It’s not like you were getting off from main line. (Right) You know, so uh, even if the car in front of them slammed on the brake, you have to react quick.” In another case, an issue was whether a driver going slowly had any responsibility for an accident

\(^{23}\) N=49 cases due to one missing value for a judge rating of instruction complexity.
that occurred when the driver’s car was hit from behind. A juror commented, “[W]hen you hit somebody in the rear you’re not paying attention, number one. You got to pay attention. You have to.”

*How often are juror references to the instructions incorrect?* Across the fifth cases, the juries averaged 12% incorrect comments, with 86% correct and 2% unclear. Many of the misunderstandings were minor (e.g., whether they all had to sign the verdict form), but others were more substantial and even if they did not influence the verdict, signal a set of problems that warrant attention.

### III Four Sources of Miscommunication

**A. Fixable: An unclear message about handling proof and the absence of proof.**

Three standard instructions that jurors receive are:

1) You must determine the facts only from the evidence produced in Court.

2) You should not speculate or guess about any fact.

3) (on the testimony of a witness) You should consider what testimony to accept, and what to reject.

Following standard procedure, courts delivered these three admonitions at different points in the presentation of the jury instructions. One of the trial provided evidence on an important issue from one party, and no evidence on that point from the opposing party. The jury had the following exchange (the plaintiff claimed that the reconditioned item he purchased from the defendant was defective):

> Juror #3: I don’t think we’re supposed to speculate about [whether it was fixed] because if they didn’t give any evidence to the contrary, then we’re supposed to assume the evidence that, which we got, shows that it was fixed. Because, you know, there was no evidence – there’s evidence that it was fixed, there’s no evidence that it wasn’t fixed. I mean, it didn’t work afterward, but you could, you know, you know you could fix it
and have it break.
Juror #2: Yeah.

This example points to the need to revisit the piecemeal construction of jury instructions. The
pieces are generally written as individual units, but the jury must put them together. Here, it
would be possible to write a clear statement to prevent the confusion.

B. **Fixable: if the law itself can be clarified**

Two instructions the jurors receive are:

1) You must determine the facts only from the evidence produced in Court.

2) Consider all of the evidence in the light of reason, common sense, and experience.

The juxtaposition of these two admonitions can lead to several types of uncertainty. Some jurors
were unsure as to whether or not their personal experiences as drivers or accident victims could
be discussed during deliberations. Clearly, that experience could not be characterized as
evidence, and it certainly was not produced in Court, although it occasionally came up during
voir dire. At the same time, many jurors recognized that their prior experiences were helping
them to understand the evidence and admonition 2) appears to invite them to do just that.

Although the jurors generally handled this situation reasonably (i.e., cutting off a juror who tried
to argue at length that his accident history should inform the group), some further instruction on
the limits of such discussion might offer some helpful guidance.

A more complicated situation arises if the juror has relevant occupational expertise. As
one juror with medical expertise observed:

Juror #7: That’s another thing, one of the things I was listening really carefully…
they didn’t say….they said two things that kind of confused me. They
said you can’t use any evidence that wasn’t introduced.
Juror #6: Right
Juror #7: Now I can sit here and think a lot about the reasons she would have a lot
of the symptomatology she does… that they never said, ‘what about this?
What about this [counts on fingers] you know. Now, can we consider those things?

Jurisdictions differ in their evaluation of what would be permissible in this latter case. The remaining two sets of circumstances leave jurors to struggle, and there is no easy solution.

C. Hard to fix: Mixed message about the meaning of compensation.

Jurors are instructed “If you find defendant liable to plaintiff, you must then decide the full amount of money that will reasonably and fairly compensate plaintiff for each of the following elements of damages proved by the evidence to have resulted from the fault of the defendant [following by list of relevant categories].”

The list is exhaustive and the jurors typically go carefully down the list to address each category. Nonetheless, jurors are often uncomfortable that this approach is sufficient to achieve compensation. In trying to reasonably and fairly compensate the plaintiff, the jurors recognize that other factors will influence what the plaintiff receives: insurance, attorneys’ fees, occasionally taxes. Currently, the legal system deals with this issue by simply ignoring it because insurance, attorneys’ fees, and taxes are all legally irrelevant. We suggest that these topics come up so frequently during deliberations (a third of the instruction errors jurors made in the Arizona study involved insurance or attorneys’ fees), that a more direct approach is warranted.

D. Impossible to fix: Evidentiary rules requiring mental gymnastics

The final source of miscommunication is arguably not miscommunication at all. Moreover, it is not a new problem uncovered in the Arizona Project, but rather a general category of admonitions that demand more than human decision makers (judges as well as jurors) can do. We blindfold jurors to some information that we know will restructure their

---

24 Diamond, Rose, & Murphy (manuscript on juror experts)
25 Diamond & Vidmar, supra note X.
perceptions and as a result will be likely to affect their judgments in legally unacceptable ways (e.g., we don’t permit testimony on subsequent remedial measures). Yet we continue to preserve the fiction that jurors (and judges) can make limited use of prejudicial information like criminal record. The burden of creating an instruction that will effectively lead to the legally proper application of a limiting instruction is well beyond the reach of the Plain English movement.

Part IV to be written