

Note

LAYPEOPLE AS LEARNERS: APPLYING EDUCATIONAL PRINCIPLES TO IMPROVE JUROR COMPREHENSION OF INSTRUCTIONS

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ABSTRACT—The U.S. Constitution enshrines the jury in a sacred space within the American judicial system. Yet there are troubling signs that, notwithstanding their best efforts, jurors struggle to fulfill their duties. In particular, substantial empirical research indicates that jurors struggle to understand and, consequently, to apply the instructions given to them by the judge just prior to deliberations. Various mechanisms have been proposed—and in some cases adopted—to improve jurors’ comprehension of instructions and the quality of the deliberations that follow. Among these are rewriting jury instructions in “plain English,” permitting jurors to take notes and ask questions of witnesses, providing jurors with interim and preliminary instructions, providing written copies of jury instructions, and adopting a bifurcated trial structure. And, indeed, many of these proposals are backed by empirical research suggesting that they improve juror decision-making. Yet none have proven to be a panacea, and much room remains for improvement. This Note builds on previous legal scholarship analogizing jurors to learners and proposes a novel set of procedural reforms based on educational research—particularly the theory of Direct Instruction—that would further improve juror comprehension and decision-making.

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INTRODUCTION 1186

I. JUROR COMPREHENSION AND APPLICATION OF INSTRUCTIONS 1188

A. *Jurors’ Limited Instruction Comprehension* 1189

B. *Contributing Factors* 1190

C. *Consequences of Jurors’ Struggles to Comprehend* 1192

II. EXISTING APPROACHES TO IMPROVING JUROR INSTRUCTION COMPREHENSION ... 1198

A. *“Plain English” Revisions of Pattern Jury Instructions* 1199

B. *Other Researched Approaches* 1201

III. APPLYING EDUCATIONAL PRINCIPLES TO JURY INSTRUCTIONS AND DELIBERATIONS 1211

A. *Jurors as Learners* 1212

B. *Lessons from Educational Theory: Direct Instruction* 1212

C. *Recommended Procedures* 1215

CONCLUSION 1223

INTRODUCTION

Imagine the following: there is an ongoing civil trial—say, a state law class action brought by individuals who allege injuries resulting from the defendants’ misrepresentations regarding the safety of vaping products. The stakes are immense for both parties. The defendants have “bet the company” and will be driven out of business if they lose. Likewise, many plaintiffs are gravely injured and face medical bankruptcy absent a favorable verdict. The trial is exceedingly complex, involving more than one hundred hours of testimony. When the time finally arrives for deliberations, the judge spends several hours instructing the jurors on all elements of the plaintiff’s fraud claims. Yet the judge’s byzantine instructions leave the jurors deeply—though silently—confused. Too sheepish to ask for clarification, they soon retreat into deliberations. Within an hour, the jurors return their verdict. The defendants have prevailed, and the injured plaintiffs face financial ruin.

The plaintiffs’ attorneys interview several jurors post-verdict, soon discovering that the jurors applied a contributory negligence concept in reaching their verdict. In other words, notwithstanding their misgivings about the defendants’ behavior, the jurors decided that the plaintiffs “accepted the risk” in using vaping products. Naturally, this reasoning reflects the jurors’ common sense. Yet it also reflects their confusion. For, you see, this jurisdiction rejects contributory negligence defenses. Thus, the

jurors have, albeit inadvertently, thrown out the judge’s carefully crafted instructions in favor of gut instinct. Does this scenario seem far-fetched? Sadly, it is far more likely than one might imagine.

The U.S. Constitution enshrines the jury in a sacred space within the American judicial system.¹ Jurors are asked to fairly apply legal principles to reach verdicts that determine the rights, responsibilities, and freedoms of the parties in front of the court. All indications suggest that jurors strive in good faith to carry out this solemn duty.² Yet, notwithstanding their best efforts, there are also signs that jurors at times struggle with this task. Judges’ instructions are often difficult to understand and so abstract as to bear little relationship to the dispute in front of the court.³ And empirical research suggests that jurors’ difficulties in understanding instructions can lead to incorrect verdicts, even in matters as serious as capital sentencing.⁴

Scholars have suggested and courts have attempted numerous reforms, including providing preliminary instructions; providing written instructions; using special verdicts and interrogatories; rewriting instructions into easier-to-understand “plain English”; bifurcating complex trials into smaller, more focused proceedings; and permitting jurors to ask questions and take notes during the trial.⁵ And research suggests that these reforms do help jurors comprehend the law they are asked to apply.⁶ But none of these reforms has proven to be a panacea, and there remains considerable room for improvement.

This Note argues that jurors—laypeople—are best understood as novice legal learners who bear substantial similarity to students in other environments. Accordingly, this Note suggests a novel set of procedural reforms that, although anchored in existing trial mechanisms, also

¹ See U.S. CONST. amends. VI, VII. Although the Supreme Court has applied the Sixth Amendment’s criminal-jury requirement to the states through its “selective incorporation” doctrine, it has not yet done so with the Seventh Amendment right to a jury in civil cases. See generally F. Andrew Hessick & Elizabeth Fisher, *Structural Rights and Incorporation*, 71 ALA. L. REV. 163 (2019) (discussing the selective-incorporation doctrine and the extent to which it has been used to apply various provisions of the Bill of Rights to the states).

² See Walter W. Steele, Jr. & Elizabeth G. Thornburg, *Jury Instructions: A Persistent Failure to Communicate*, 67 N.C. L. REV. 77, 98 (1988) (“[A] typical jury makes a good faith effort to use its instructions for the purpose intended, that is, to reach a verdict according to the law.”).

³ Jay E. Grenig, *The Civil Jury in America: Improving the Jury’s Understanding of a Case*, 24 AM. J. TRIAL ADVOC. 93, 99 (2000) (quoting William W. Schwarzer, *Communicating with Juries: Problems and Remedies*, 69 CALIF. L. REV. 731, 732 (1981)).

⁴ See *infra* Sections I.A.1–I.A.3.

⁵ See *infra* Part II.

⁶ See *infra* Part II.

incorporate educational principles in order to improve juror comprehension of legal principles.

Educational or “learning theories” are bodies of scholarly work that “describe views regarding how one acquires knowledge and creates connections among the items of information encountered in the world.”⁷ There are nearly as many educational theories as there are stars in the sky,⁸ and although these theories rarely provide “exact pedagogical strategies or instructional methods,”⁹ they nevertheless communicate key principles that have significant instructional implications.¹⁰ This Note argues that the principles of one particular educational theory—that of “direct” or “systematic” instruction—are especially helpful for jurors faced with the daunting task of applying unfamiliar legal doctrines to reach a fair verdict. It then extrapolates from Direct Instruction principles to propose modifications to the jury-instruction and deliberation processes that would empower jurors to more easily carry out this vital task.

Part I overviews the existing research on juror comprehension and establishes the grave consequences of jurors’ failures to comprehend instructions. Part II reviews existing reforms aimed at improving juror comprehension and assesses their strengths and limitations. Part III proposes novel reforms to jury-trial procedures that are rooted in the principles of Direct Instruction and which seek to further improve juror comprehension. It then addresses likely points of opposition and discusses various testing mechanisms by which the validity of the proposal might be established. This Note briefly concludes by illustrating the application of this proposal in a hypothetical products liability case.

I. JUROR COMPREHENSION AND APPLICATION OF INSTRUCTIONS

This Part overviews the existing literature regarding juror comprehension, which establishes that jurors often fail to comprehend judicial instructions. Next, it discusses potential contributing factors to juror confusion. It then overviews literature suggesting that juror confusion leads to incorrect and, in some cases, potentially catastrophic results. It establishes that juror confusion is pervasive in both civil and criminal contexts,

⁷ Kelley Buchheister, *Learning Theories*, in 3 THE SAGE ENCYCLOPEDIA OF EDUCATIONAL RESEARCH, MEASUREMENT, AND EVALUATION 961 (Bruce B. Frey ed., 2018).

⁸ A bit of hyperbole, of course, but there are dozens (or more) of educational theories that have garnered significant attention. For a representative sample, see Paul Stevens-Fulbrook, *15 Learning Theories in Education (A Complete Summary)*, TEACHEROFSCI.COM (Apr. 18, 2019), <https://teacherofsci.com/learning-theories-in-education/> [https://perma.cc/H27A-8PAQ].

⁹ Buchheister, *supra* note 7, at 961.

¹⁰ *Id.*

including in applying burdens of proof and, more tragically, in capital sentencing cases. Finally, this Part discusses more recent research by Professor Shari Diamond and her coauthors that, although affirming the general conclusion that jurors struggle to comprehend judicial instructions, indicates that juror comprehension may be somewhat better than previously thought.

A. Jurors' Limited Instruction Comprehension

Over the past several decades, researchers have examined the extent to which jurors comprehend—or fail to comprehend—their instructions.¹¹ In one study, researchers tested juror comprehension by asking jurors to paraphrase essential terms from a set of pattern instructions.¹² The overall accuracy rate was 54%.¹³ Another study found comprehension rates ranging from 51% to 65%, depending upon the complexity of the case.¹⁴ A 2000 study by Professors Mona Lynch and Craig Haney found an average accuracy rate of 42% when using mock jurors in a hypothetical capital sentencing case.¹⁵ Other studies have found comprehension rates ranging from around 30% on the low end to around 70% in the highest estimates.¹⁶ One study on the insanity defense found comprehension levels as low as 15%.¹⁷

¹¹ Shari Seidman Diamond, Beth Murphy & Mary R. Rose, *The “Kettleful of Law” in Real Jury Deliberations: Successes, Failures, and Next Steps*, 106 NW. U. L. REV. 1537, 1542 (2012).

¹² Robert P. Charrow & Veda R. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 COLUM. L. REV. 1306, 1313 (1979). This study parsed legal instructions into discrete units of meaning (e.g., “you must follow the law”), which the researchers dubbed “variables,” and assessed juror ability to paraphrase the essential variables of the instruction. Paraphrasing of each variable was deemed “correct,” “correct by inference,” “wrong,” or “omitted.” *Id.* at 1314.

¹³ *Id.* at 1316.

¹⁴ Amiram Elwork, James J. Alfini & Bruce D. Sales, *Toward Understandable Jury Instructions*, 65 JUDICATURE 432, 436 (1982).

¹⁵ Mona Lynch & Craig Haney, *Capital Jury Deliberation: Effects on Death Sentencing, Comprehension, and Discrimination*, 33 LAW & HUM. BEHAV. 481, 486 (2009) [hereinafter Lynch & Haney, *Capital Jury Deliberation*].

¹⁶ See, e.g., Laurence J. Severance & Elizabeth F. Loftus, *Improving the Ability of Jurors to Comprehend and Apply Criminal Jury Instructions*, 17 LAW & SOC'Y REV. 153, 179–180 (1982) (finding correct response rates of up to 70.4% on multiple-choice questions testing comprehension of concepts such as reasonable doubt); Richard L. Wiener, Christine C. Pritchard & Minda Weston, *Comprehensibility of Approved Jury Instructions in Capital Murder Cases*, 80 J. APPLIED PSYCH. 455, 460 (1995) (finding 29% comprehension of the reasonable-doubt instruction using a multiple-choice comprehension inventory in a simulated capital sentencing case where study participants received model instructions revised according to psycholinguistic principles).

¹⁷ James R.P. Ogloff, *A Comparison of Insanity Defense Standards on Juror Decision Making*, 15 LAW & HUM. BEHAV. 509, 519 (1991) (finding 14.9% of participants correctly recalled a specific

Although the law generally assumes complete or near-complete juror comprehension of instructions,¹⁸ this assumption conflicts with the empirical research described above. Instead, this research suggests that jurors develop, at best, an incomplete understanding of the law after receiving instructions from the judge. Reported levels of postinstruction comprehension are often quite low—no better than chance—and studies yield mixed results regarding whether jury instructions improve understanding of the law at all.¹⁹ Although some studies demonstrate modest postinstruction improvement in jurors' understanding of the law, others have found that instructed jurors possess no greater understanding of the law than noninstructed controls.²⁰ In particular, one study of Michigan jurors found that instructions improved jurors' understanding of procedural rules, but not definitions of crimes.²¹

B. Contributing Factors

There are various reasons why jurors might fail to comprehend instructions. Some scholars suggest jurors struggle to comprehend instructions because the instructions include legal jargon which carries either no meaning for laypersons or which carries lay meaning different from its legal meaning.²² Indeed, one judge studied jurors' comprehension of Georgia's "proximate cause" instructions and found that, although more than half the jurors realized the concept was significant, just over 20% correctly understood the instruction.²³ As the judge concluded, "A trial judge who

element of the insanity defense under the M'Naghten standard); see also Dan Simon, *More Problems with Criminal Trials: The Limited Effectiveness of Legal Mechanisms*, 75 LAW & CONTEMP. PROBS. 167, 174 n.37 (2012) (citing Ogloff and other studies regarding jury-instruction comprehension levels).

¹⁸ Simon, *supra* note 17, at 174–75. This is presumably because the fairness of any particular verdict is predicated on the jury having correctly applied—and, necessarily, having understood—the pertinent law. See *Francis v. Franklin*, 471 U.S. 307, 324–25 n.9 (1985) (“[W]e must assume that juries for the most part understand and faithfully follow instructions.” (quoting R. TRAYNOR, *THE RIDDLE OF HARMLESS ERROR* 73–74 (1970))). For a detailed analysis of this assumption, see generally Judith L. Ritter, *Your Lips Are Moving . . . but the Words Aren't Clear: Dissecting the Presumption that Jurors Understand Instructions*, 69 MO. L. REV. 163, 164 (2004).

¹⁹ Simon, *supra* note 17, at 175.

²⁰ *Id.*

²¹ Alan Reifman, Spencer M. Gusick & Phoebe C. Ellsworth, *Real Jurors' Understanding of the Law in Real Cases*, 16 LAW & HUM. BEHAV. 539, 547 (1992).

²² See e.g., Charles M. Cork, III, *A Better Orientation for Jury Instructions*, 54 MERCER L. REV. 1, 9 (2002) (“Empirical researchers have consistently reported a problem with the use of legal jargon—terms of legal art that carry no intuitive meaning to lay jurors or a lay meaning different from the legally correct meaning.”).

²³ Charles B. Mikell, *Jury Instructions and Proximate Cause: An Uncertain Trumpet in Georgia*, 27 GA. ST. BAR J. 60, 62–63 (1990).

reads a jury this instruction might just as well read a poem in Mandarin Chinese. It probably makes no difference in the outcome of [the] case”²⁴

Another possible culprit is over-generality in jury instructions. There are several possible reasons why overly general instructions might cause problems with juror comprehension. First, language drafted for universal applicability is invariably harder for jurors to understand because it remains at a confusing level of abstraction.²⁵ Second, generalized instructions map poorly onto the facts of specific cases. Thus, jurors struggle to apply unfamiliar legal *content* which lacks any clear connection to the factual *contexts* they face in the courtroom.²⁶ Third, the intentionally broad scope of generalized instructions likely causes jurors to consider less relevant or irrelevant information in their deliberations²⁷—for instance, affirmative defenses inapplicable to the case at hand.

The length and complex structure of jury instructions also pose difficulties for jurors.²⁸ Some courts have recognized that the total length of jury instructions tends to adversely impact jurors’ comprehension.²⁹ Moreover, the charge provided to the jury is often assembled from a collection of shorter instructions.³⁰ The piecemeal assembling of instructions tends to confuse jurors, and remedying that confusion might prove difficult or impossible unless jurors take the time to ask clarifying questions.³¹ Likewise, certain instructions, when assembled together, can become contextually unclear, even if they are otherwise accurate statements of the law.³²

Juror comprehension can also be limited by factors outside the instructions themselves. For instance, factors such as jurors’ educational level,³³ their preexisting notions of how the legal system functions,³⁴ and the

²⁴ *Id.* at 64 (footnote omitted).

²⁵ Cork, *supra* note 22, at 11.

²⁶ *Id.* at 11–12.

²⁷ *Id.*

²⁸ *Id.* at 12.

²⁹ *Id.* at 13 (noting that jury instructions in Georgia tend to be excessively long).

³⁰ *Id.* at 14.

³¹ *Id.*

³² *Id.* at 15; *see also* Gunn v. Dep’t of Transp., 476 S.E.2d 46, 47–49 (Ga. Ct. App. 1996) (reversing a jury verdict where the juxtaposition of two otherwise valid instructions created internal inconsistencies in the jury instructions).

³³ *See* Joel D. Lieberman & Bruce D. Sales, *What Social Science Teaches Us About the Jury Instruction Process*, 3 PSYCH. PUB. POL’Y & L. 589, 617 (1997).

³⁴ *Id.* at 618–19.

inherent complexity of a case³⁵ could all contribute to difficulties with comprehension. Furthermore, various procedural limitations might keep jurors from reaching optimum levels of comprehension, such as prohibitions against jurors asking questions of witnesses or discussing the evidence prior to the beginning of deliberations.³⁶

C. *Consequences of Jurors' Struggles to Comprehend*

In most cases, jurors make a good-faith effort to use the instructions provided.³⁷ However, they are hobbled by their struggles to comprehend the instructions,³⁸ which leave them uncertain as to how to apply the law to the facts.³⁹ This in turn may encourage jurors to decide the case on a gut sense of who they think should win without regard for the facts and the law.⁴⁰ Significant empirical research on both criminal and civil jury instructions supports the conclusion that jurors incorrectly apply the law as a result of their difficulty comprehending instructions, at times with serious consequences.

1. *Civil Cases*

Jurors struggle to piece together the instructions in complex civil cases, particularly those including multiple claims.⁴¹ In one study, Professor Diamond and her coauthors reviewed recordings of multiple jury deliberations from real cases.⁴² In one personal injury case, the authors found that jurors struggled to apply instructions when the case involved multiple tort claims, including a contingent claim of negligent supervision.⁴³ There, finding the defendant employer liable for negligent supervision would necessarily have required finding one of the defendant employees liable for one of the other tort claims.⁴⁴ This requirement wasn't stated explicitly in the instructions, and the jurors only cleared up their confusion about the contingent claim after discussing the topic at length and submitting a

³⁵ Jerry J. Fang, Note, *12 Confused Men: Using Flowchart Verdict Sheets to Mitigate Inconsistent Civil Verdicts*, 64 DUKE L.J. 287, 306 (2014) (citing Lieberman & Sales, *supra* note 33, at 616–17).

³⁶ William W. Schwarzer, *Reforming Jury Trials*, 1990 U. CHI. LEGAL F. 119, 120.

³⁷ Steele & Thornburg, *supra* note 2, at 98.

³⁸ *See id.*

³⁹ Cork, *supra* note 22, at 6.

⁴⁰ *Id.* at 6–7.

⁴¹ Diamond et al., *supra* note 11, at 1565–66.

⁴² *See id.* at 1546–47. The recorded, authentic deliberations were part of the larger Arizona Jury Project. *Id.*

⁴³ *Id.* at 1566.

⁴⁴ *Id.*

question to the judge.⁴⁵ Absent this clarification, the jury might well have tried to find the employer liable for negligent supervision even without finding that one of its employees had committed the predicate tort.

In other instances, a few confused jurors attempted to entirely omit negligence as a requirement to award damages in tort cases.⁴⁶ That is to say, the jurors, believing in each case that the plaintiff had suffered damages, wished to find the defendant liable even absent the requisite finding of negligence.⁴⁷ Ultimately, these cases were resolved correctly when other jurors pointed out that the instructions required negligence as a predicate to liability. But it is still unsettling that at least some members of the jury were initially willing to bypass an essential element of the plaintiff's claim. Even worse, Professor Diamond's study revealed that other more serious errors remained uncorrected.

Among the more serious errors identified was the tendency to conflate issues of liability and damages in comparative fault cases.⁴⁸ Jurors were instructed to determine first the defendant's liability, then total damages, then what percentage of fault was attributable to the plaintiff.⁴⁹ Instead, jurors sometimes factored in the degree of comparative fault when calculating damages. In other words, some juries determined up front how much money they wished to award to the plaintiff and then adjusted damages upward to ensure that the plaintiff would receive that amount regardless of comparative fault.⁵⁰ Ultimately, Professor Diamond and her coauthors concluded that jurors frequently misapplied the law in comparative fault cases, that most of their errors were not corrected, and that in many cases these uncorrected errors affected the amount of damages awarded.⁵¹ Thus, whether resulting from problems with comprehension or reluctance to apply the law as written, current jury instructions in comparative fault cases fail to fully separate jurors' consideration of liability and damages.⁵²

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at 1567–68.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 1569.

⁵² *Id.* It is worth noting that, notwithstanding the authors' overall conclusions, approximately 79% of juror comments during deliberations accurately reflected the judge's instructions, and only 9% represented uncorrected errors. *Id.* at 1594. But this only suggests that, even when jurors can accurately state or apply the judges' instructions, their lack of comprehension still causes them to misapply the law in complex civil cases.

2. *Burden-of-Proof Instructions*

One particularly dangerous opportunity for juror error lies in applying the burden of proof in criminal cases. A 1976 mock juror study by Judge David Strawn and Professor Raymond Buchanan concluded that only 50% of instructed study participants comprehended the reasonable doubt standard applicable in criminal cases.⁵³ Another study in 1990 compared the comprehension of “reasonable doubt” for individuals who had served as jurors to that of individuals who had been called but were not selected for jury service.⁵⁴ Of the instructed individuals—that is, those who had *actually served as jurors*—only approximately 25% correctly determined that reasonable doubt is a higher threshold than “any doubt, no matter how slight.”⁵⁵ Worse, instructions on reasonable doubt even appeared to *increase* confusion on one area—more instructed than noninstructed jurors believed that reasonable doubt could only be based on the evidence, not on inferences drawn from the evidence.⁵⁶ These findings raise serious due process concerns.⁵⁷ After all, “[i]f jurors fail to understand the law, there is no way to be certain that the reasonable doubt standard has been satisfied.”⁵⁸

Empirical research further suggests that jurors’ struggles to apply the correct burden of proof might go beyond the realm of reasonable doubt. A 1985 study tested juror application of various burdens of proof, including preponderance of the evidence, clear and convincing evidence, and beyond a reasonable doubt.⁵⁹ The researchers provided study participants with legal definitions of the various burdens of proof—derived from pattern jury instructions—as well as quantified definitions (51%, 71%, and 91% for preponderance of the evidence, clear and convincing evidence, and beyond a reasonable doubt, respectively).⁶⁰

⁵³ David U. Strawn & Raymond W. Buchanan, *Jury Confusion: A Threat to Justice*, 59 JUDICATURE 478, 481 (1976).

⁵⁴ 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, 409–10 (1990).

⁵⁵ *Id.* at 414.

⁵⁶ *Id.*

⁵⁷ *See, e.g.*, *Miles v. United States*, 103 U.S. 304, 312 (1880) (“The evidence upon which a jury is justified in returning a verdict of guilty must be sufficient to produce a conviction of guilt, to the exclusion of all reasonable doubt.”).

⁵⁸ John P. Cronan, *Is Any of This Making Sense? Reflecting on Guilty Pleas to Aid Criminal Juror Comprehension*, 39 AM. CRIM. L. REV. 1187, 1215 (2002).

⁵⁹ Dorothy K. Kagehiro & W. Clark Stanton, *Legal vs. Quantified Definitions of Standards of Proof*, 9 LAW & HUM. BEHAV. 159, 162–63 (1985).

⁶⁰ *Id.* at 163.

Study participants provided with quantified definitions of the burden of proof returned fewer verdicts for the plaintiff as the burden of proof increased, showing that the quantified definitions produced the intended legal effect.⁶¹ In contrast, the unquantified burden-of-proof definitions taken from pattern jury instructions produced no significant effect on the rate of verdicts returned in favor of the plaintiff.⁶² In fact, study participants receiving the pattern-instruction definition of reasonable doubt actually returned more verdicts in favor of the plaintiff (43%) than those receiving the preponderance of the evidence definition (31%).⁶³ Moreover, even when quantified definitions of the burden of proof were provided, there was only an insignificant difference in the number of verdicts returned for the plaintiff between the clear and convincing and preponderance standards.⁶⁴ Given the constitutional mandate that criminal defendants be convicted only when jurors are convinced of the defendant's guilt beyond a reasonable doubt,⁶⁵ jurors' apparent inability to comprehend and delineate between various standards of proof is quite troubling.

3. *Capital Sentencing*

Even more disturbing than the possibility that criminal defendants might be convicted using a standard less than that of beyond a reasonable doubt is the possibility that jurors might misapply instructions in capital sentencing cases. In *Furman v. Georgia*, the Supreme Court, in a per curiam opinion, concluded that existing state death-sentencing schemes violated the Eighth Amendment because they allowed jurors "untrammeled discretion"⁶⁶ that could lead to the "arbitrary and discriminatory" imposition of the death

⁶¹ *Id.* at 164–65. Participants returned pro-plaintiff verdicts at rates of 66% for the preponderance of the evidence standard, 52% for the clear and convincing evidence standard, and 31% for the reasonable doubt standard. *Id.*

⁶² *Id.* at 164. Participants returned pro-plaintiff verdicts at rates of 31% for the preponderance of the evidence standard, 38% for the clear and convincing evidence standard, and 43% for the reasonable doubt standard. *Id.* However, a 1996 mock juror study by Professors Irwin Horowitz and Laird Kirkpatrick found that unquantified reasonable doubt definitions that included "firmly convinced" language tended to produce verdicts more in accord with the evidence. See Irwin A. Horowitz & Laird C. Kirkpatrick, *A Concept in Search of a Definition: The Effects of Reasonable Doubt Instructions on Certainty of Guilt Standards and Jury Verdicts*, 20 LAW & HUM. BEHAV. 655, 667 (1996) ("It appears that only the 'firmly convinced' instructions provided jurors with the guidance or stimulus to reach appropriate verdicts in both the weak and strong case.").

⁶³ Kagehiro & Stanton, *supra* note 59, at 164.

⁶⁴ *Id.*

⁶⁵ *Miles v. United States*, 103 U.S. 304, 312 (1880) ("The evidence upon which a jury is justified in returning a verdict of guilty must be sufficient to produce a conviction of guilt, to the exclusion of all reasonable doubt.").

⁶⁶ 408 U.S. 238, 249 (1972) (Douglas, J., concurring).

penalty.⁶⁷ For a period of time, this holding led to a blanket prohibition on the imposition and carrying out of death sentences in the United States.⁶⁸ Many states responded by revising their capital sentencing instructions in an attempt to reduce the “unbridled discretion” of the jury.⁶⁹ When these revised instructions were later challenged, the Court concluded in *Gregg v. Georgia* that capital sentencing is not inherently unconstitutional, and that jury discretion is permissible so long as it is properly guided.⁷⁰ Jurors must now adhere to this principle of “guided discretion” in all capital cases.⁷¹ Yet, there are troubling signs that jurors struggle to comprehend their instructions in this most precarious area of law.

A series of studies by Professors Haney and Lynch tested jury-eligible Californians’ comprehension of the state’s capital sentencing instructions.⁷² Despite hearing the instructions repeatedly, the study participants struggled to define the terms “aggravation” and “mitigation,” and only 8% could provide legally correct definitions of both.⁷³ Worse still, two of the mitigating factors were misinterpreted as aggravating factors by 23% and 25% of the study participants, respectively,⁷⁴ and only half understood that a death verdict should not be issued when mitigating factors outweighed aggravating factors in a given case.⁷⁵ Additionally, 41% incorrectly believed that when aggravating factors outweighed mitigating ones the death penalty was mandatory.⁷⁶

Admittedly, these studies involved jury-eligible adults and undergraduate students, not actual jurors.⁷⁷ However, researchers at the Capital Jury Project obtained similar findings by interviewing more than

⁶⁷ *Id.* at 243.

⁶⁸ *Id.* at 239–40. This prohibition ended with the Court’s decision in *Gregg v. Georgia*, 428 U.S. 153, 169 (1976).

⁶⁹ Lynch & Haney, *Capital Jury Deliberation*, *supra* note 15, at 481.

⁷⁰ 428 U.S. at 206–07.

⁷¹ Simon, *supra* note 17, at 181.

⁷² Craig Haney & Mona Lynch, *Comprehending Life and Death Matters: A Preliminary Study of California’s Capital Penalty Instructions*, 18 LAW & HUM. BEHAV. 411, 418 (1994) [hereinafter Haney & Lynch, *Comprehending Life and Death*].

⁷³ *Id.* at 421.

⁷⁴ *Id.* at 424.

⁷⁵ Craig Haney & Mona Lynch, *Clarifying Life and Death Matters: An Analysis of Instructional Comprehension and Penalty Phase Closing Arguments*, 21 LAW & HUM. BEHAV. 575, 581–82 (1997) [hereinafter Haney & Lynch, *Clarifying Life and Death*].

⁷⁶ *Id.* at 582.

⁷⁷ See Lynch & Haney, *Capital Jury Deliberation*, *supra* note 15, at 483 (jury-eligible adults); Haney & Lynch, *Clarifying Life & Death*, *supra* note 75, at 577 (same); Haney & Lynch, *Comprehending Life & Death*, *supra* note 72, at 418 (undergraduates).

1,200 jurors who had served on capital cases. Nearly half of the interviewed jurors mistakenly believed that the death sentence was mandatory under certain circumstances.⁷⁸ Other jurors felt that the law contemplated additional aggravating factors which, although plausible, were not included in the instructions.⁷⁹

Moreover, additional studies reveal significant racial disparities in the application of the death sentence in capital cases and suggest that these patterns might be tied to juror comprehension. For example, a study by Professor David Baldus examined verdicts in 2,484 homicide cases decided in Georgia between 1973 and 1979 and found that although white defendants were sentenced to death only 8% of the time for killing white victims, Black defendants convicted of killing white victims were sentenced to death 21% of the time.⁸⁰ Similar disparities have been observed in other jurisdictions, including Philadelphia, Maryland, and New Jersey.⁸¹ In 2000, Professors Lynch and Haney conducted a study of jury-eligible adults and tied such racial disparities to juror comprehension, finding that the study participants who struggled most to comprehend death penalty instructions also sentenced Black defendants to death at higher rates than white defendants.⁸² These findings suggest that considerable doubt remains as to whether even revised capital sentencing instructions have remedied the constitutional issues presented in *Furman*. Moreover, these findings suggest a grave human toll as a result of juror miscomprehension. Any wrongful capital sentence is irreversible once carried out, and one especially horrifying study by Professor Samuel Gross and his coauthors found that as many as 4.1% of capital sentences might result from false convictions.⁸³

4. Cause for Hope

Despite the research described above, the news is not all bad. Although uncorrected juror errors appeared to influence some of the verdicts in

⁷⁸ Simon, *supra* note 17, at 183.

⁷⁹ See Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 CORNELL L. REV. 1, 3–6 (1993).

⁸⁰ DAVID C. BALDUS, GEORGE WOODWORTH & CHARLES A. PULASKI, JR., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS 45, 315, 328 (1990).

⁸¹ See Simon, *supra* note 17, at 184–85 n.103.

⁸² Mona Lynch & Craig Haney, *Discrimination and Instructional Comprehension: Guided Discretion, Racial Bias, and the Death Penalty*, 24 LAW & HUM. BEHAV. 337, 354–55 (2000). The authors drew no firm conclusions on what drove this pattern but found it “theoretically consistent with much social psychological writing about the mechanics of ‘aversive’ or ‘subtle’ racism.” *Id.* at 353.

⁸³ Samuel R. Gross, Barbara O’Brien, Chen Hu & Edward H. Kennedy, *Rate of False Conviction of Criminal Defendants Who Are Sentenced to Death*, 111 PROC. NAT’L ACAD. SCIS. 7230, 7234 (2014).

Professor Diamond's Arizona Jury Project study,⁸⁴ the majority of jurors' comments about the instructions were correct.⁸⁵ This reflected a significantly higher level of juror comprehension than many previous studies observed, and Professor Diamond has suggested that this higher level of comprehension might come as a result of jurors having the opportunity to correct each other's errors during deliberations.⁸⁶ Moreover, the comprehension measures used in studies assessing juror comprehension have varied significantly. Some studies have used paraphrase tests, which challenge jurors to restate legal instructions in their own words.⁸⁷ Logically, paraphrase tests are generally more challenging than simpler measures such as multiple-choice questionnaires. Thus, it might well be that the lower comprehension scores reflected in earlier studies are in part a product of the comprehension measures used. As a result, it is possible that Professor Diamond's review of real jury deliberations more accurately reflects levels of juror comprehension in response to instructions, notwithstanding its variance from some of the earlier studies. In any event, it is clear that there is still room for significant improvements in juror comprehension.

II. EXISTING APPROACHES TO IMPROVING JUROR INSTRUCTION COMPREHENSION

Various reforms have been proposed to improve comprehension of jury instructions. This Part begins by reviewing perhaps the most well-researched jury-instruction reform—the redrafting of pattern jury instructions into “plain English.”⁸⁸ It discusses the nature of plain English revisions, the extent to which research indicates that revised instructions improve juror comprehension, and the potential limitations and drawbacks of pattern-instruction revisions. It then provides an overview of other comprehension-oriented reforms that various jurisdictions have tested, including permitting juror note-taking; providing jurors with written copies of judicial instructions; utilizing special verdicts and special interrogatories; providing jurors with substantive preliminary and interim instructions; and bifurcating trials into separate phases based on distinct legal issues. It concludes that,

⁸⁴ See Diamond et al., *supra* note 11, at 1595–96.

⁸⁵ Specifically, 79% of the jurors' comments accurately reflected the judges' instructions, while only 9% reflected uncorrected errors. *Id.* at 1594.

⁸⁶ *Id.* at 1595.

⁸⁷ See, e.g., Steele & Thornburg, *supra* note 2, at 90.

⁸⁸ This term is heavily used in the literature on jury instructions and refers to rewriting jury instructions to be more reader-friendly. See *infra* Section II.A for a more detailed description of plain English revisions.

although these mechanisms can improve juror comprehension, further innovations are needed to surpass the limitations of these reforms.

A. “Plain English” Revisions of Pattern Jury Instructions

Perhaps the most well-tested jury reform aimed at improving juror comprehension is rewriting pattern jury instructions for greater clarity and readability.⁸⁹ Several studies convincingly suggest that revising jury instructions into plain English promotes greater comprehension. For example, Professors Robert Charrow and Veda Charrow undertook a study in which they rewrote pattern jury instructions to reduce confusing terms and awkward linguistic constructions.⁹⁰ Study participants achieved significantly higher levels of comprehension using these rewritten instructions, with some instructions providing as much as 93% improvement in comprehension.⁹¹

In a second study, Professor Diamond and Professor Judith Levi experimented with rewriting the Illinois Pattern Jury Instructions.⁹² They reduced common linguistic difficulties and clarified especially difficult legal concepts.⁹³ Some study subjects received the pattern instructions while others received the revised instructions, and both groups were tested for comprehension.⁹⁴ The subjects receiving revised instructions performed better on a nineteen-question test of comprehension, with these subjects responding with more correct and fewer incorrect responses compared to those receiving the pattern jury instructions.⁹⁵

A third study experimented with rewriting pattern instructions for hypothetical criminal trials involving charges of murder and burglary.⁹⁶ The authors rewrote the instructions by eliminating uncommon words, redrafting instructions in the active voice, and replacing abstract words with more

⁸⁹ Cronan, *supra* note 58, at 1235–36.

⁹⁰ Charrow & Charrow, *supra* note 12, at 1311.

⁹¹ *See id.* at 1352.

⁹² Shari Seidman Diamond & Judith N. Levi, *Improving Decisions on Death by Revising and Testing Jury Instructions*, 79 JUDICATURE 224, 226–28 (1996).

⁹³ *Id.* at 227. For example, the original pattern instructions included the following language regarding aggravating factors: “Aggravating factors are reasons why the defendant should be sentenced to death.” The authors revised this to read: “In a criminal case such as this one, an ‘aggravating factor’ is any fact or condition or circumstance that, in your judgment, makes a sentence of death more appropriate for this defendant than a sentence of imprisonment.” *Id.* at 228.

⁹⁴ *Id.* at 226.

⁹⁵ *Id.* at 230. The total percentage of correct responses rose by an average of 15%, and the total percentage of incorrect responses decreased by an average of 15%. *Id.*

⁹⁶ AMIRAM ELWORK, BRUCE D. SALES & JAMES J. ALFINI, MAKING JURY INSTRUCTIONS UNDERSTANDABLE 43–44 (1982).

concrete ones.⁹⁷ Study subjects reviewed a video of a trial and then received either the pattern instructions or the rewritten ones.⁹⁸ For subjects viewing the videotape of a murder trial, the second rewrite of the instructions yielded an 80% comprehension rate, up from 51% with the pattern instructions.⁹⁹ Similarly, subjects who viewed the videotape of a burglary trial achieved an 80% comprehension rate, up from 65% using the pattern instructions.¹⁰⁰

Additional studies support the conclusion that rewriting pattern jury instructions can yield significant improvements in juror comprehension.¹⁰¹ Furthermore, even authors who lack special training in linguistics have been able to significantly improve juror comprehension by rewriting jury instructions.¹⁰² Thus, rewriting pattern instructions shows considerable promise as a method to improve juror comprehension. Some states, most notably California, have even taken on formal efforts to revise their jury instructions for clarity.¹⁰³

However, rewriting pattern instructions is likely not a cure-all for cases of juror confusion. Although the existing studies reveal significant improvements in comprehension when using revised jury instructions, hurdles remain. For example, subjects in Professors Diamond and Levi's study achieved higher levels of comprehension with the revised instructions, but they still answered 30% of the comprehension questions incorrectly.¹⁰⁴ Likewise, a study showing dramatic increases in comprehension when using revised jury instructions still found that when subjected to a paraphrasing test jurors incorrectly paraphrased the instructions the majority of the time.¹⁰⁵ Furthermore, revising jury instructions carries some risks.¹⁰⁶ Long, complex jury instructions stem, in part, from trial court judges' efforts to avoid

⁹⁷ *Id.* at 168–80.

⁹⁸ *Id.* at 43–44.

⁹⁹ *Id.* at 45.

¹⁰⁰ *Id.* at 46.

¹⁰¹ *See, e.g.,* Severance & Loftus, *supra* note 16, at 190 (finding that jurors display only a 20.3% rate of comprehension errors when provided with revised instructions, compared to nearly 30% without revised instructions); Steele & Thornburg, *supra* note 2, at 90–91 (finding a 91% gain in comprehension with revised instructions).

¹⁰² Cronan, *supra* note 58, at 1238.

¹⁰³ *See id.* at 1239; John Coleman, Russ K.E. Espinoza & Jennifer V. Coons, *An Empirical Comparison of the Old and Revised Jury Instructions of California: Do Jurors Comprehend Legal Ease Better or Does Bias Still Exist?*, OPEN ACCESS LIBR. J., Feb. 17, 2017, at 3–5 (describing efforts by Missouri, Illinois, Michigan, and California to rewrite their standard jury instructions).

¹⁰⁴ Diamond & Levi, *supra* note 92, at 230.

¹⁰⁵ Cronan, *supra* note 58, at 1238–39.

¹⁰⁶ *Id.* at 1240.

reversal on appeal.¹⁰⁷ Jury instructions often closely mirror the language of statutes and appellate opinions, and revising their language runs the risk of creating legal inaccuracies.¹⁰⁸ Additionally, some research suggests that jurors tend to rely on existing mental schemas¹⁰⁹ to assess the features of a crime or claim, and such preconceived notions might not be easily overcome by mere revision of pattern instructions.¹¹⁰

B. Other Researched Approaches

1. Juror Note-Taking

Another relatively well-researched jury reform is allowing juror note-taking during trials. As far back as 1960, the Judicial Conference Committee on the Operation of the Jury System recommended that

trial jurors should, in the discretion of the trial judge, be permitted to take notes for use in their deliberations regarding the evidence presented to them and to take these notes with them when they retire for their deliberations. When permitted to be taken, [notes] should be treated as confidential between the juror making them and . . . fellow jurors.¹¹¹

Although the Supreme Court has never definitively ruled on the propriety of juror note-taking, most appellate courts at both the state and federal levels leave juror note-taking within the discretion of the trial court judge.¹¹²

The available empirical research suggests note-taking has either neutral or modest beneficial effects on juror comprehension. Studies from 1997¹¹³

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ The term “schema,” as used in educational research, refers to “knowledge structures” which “organize knowledge about specific stimulus domains and guide both the processing of new information and the retrieval of stored information.” Norbert M. Seel, *Schema(s)*, in *ENCYCLOPEDIA OF THE SCIENCES OF LEARNING* 2933 (Norbert M. Seel ed., 2012). Think of a schema as one’s internal framework for organizing past experiences and internalizing new experiences in discrete areas of life. For example, one likely has a schema for the workplace—expectations about interpersonal relationships, about the physical work environment, about the roles of different employees, etc.—which serves as a framework that allows one to more easily understand and internalize new work-related experiences.

¹¹⁰ Peter W. English & Bruce D. Sales, *A Ceiling or Consistency Effect for the Comprehension of Jury Instructions*, 3 *PSYCH. PUB. POL’Y & L.* 381, 383–84 (1997). Professor Diamond dubs this tendency to rely on preexisting schemas the “consistency ceiling.” Shari Seidman Diamond, *Instructing on Death: Psychologists, Juries, and Judges*, 48 *AM. PSYCH.* 423, 433 (1993).

¹¹¹ Douglas G. Smith, *Structural and Functional Aspects of the Jury: Comparative Analysis and Proposals for Reform*, 48 *ALA. L. REV.* 441, 567–68 (1997) (quoting Jud. Conf. Comm. on the Operation of the Jury Sys., *The Jury System in the Federal Courts*, 26 *F.R.D.* 409, 424 (1960)).

¹¹² *Id.* at 568.

¹¹³ Steven D. Penrod & Larry Heuer, *Tweaking Commonsense: Assessing Aids to Jury Decision Making*, 3 *PSYCH. PUB. POL’Y & L.* 259, 271 (1997).

and 1994¹¹⁴ suggest that juror note-taking creates modest improvement in juror recall of evidence. Furthermore, other studies indicate that juror note-taking is well-received by jurors, judges, and attorneys,¹¹⁵ and that note-taking might slightly increase juror satisfaction with the trial experience.¹¹⁶

However, there are several common criticisms raised about the prospect of juror note-taking. First, some critics believe that note-taking will tend to distract jurors from the trial.¹¹⁷ Second, they believe that notetakers will tend to have an outsized influence in jury deliberations.¹¹⁸ Third, they believe that jurors will struggle to keep up with the pace of the trial while taking notes, thus causing them to rely on incomplete, inaccurate notes that poorly reflect the trial record.¹¹⁹ Fourth, they believe that jurors might take more notes early in the trial, causing them to favor the party that presents first—the prosecution in criminal trials and the plaintiff in civil trials.¹²⁰ Finally, they suggest that juror note-taking might consume too much trial time.¹²¹ However, these concerns are not confirmed by the existing research.

2. *Providing Jurors with Written Instructions*

Another commonly suggested reform to improve juror comprehension is providing jurors with a written copy of the final instructions. This practice is widely accepted—it is permitted by all federal circuits and the Supreme Court and is permitted or required by at least twenty-nine states.¹²² Although empirical research on this reform is limited, one study in the Second Circuit examined the effects of providing jurors with written instructions.¹²³ In this study, four federal judges provided jurors in twelve analyzed trials with written instructions and evaluated the results.¹²⁴ Of the twelve trials, the judges evaluated the written instructions as “very helpful” in six cases and at

¹¹⁴ David L. Rosenhan, Sara L. Eisner & Robert J. Robinson, *Notetaking Can Aid Juror Recall*, 18 *LAW & HUM. BEHAV.* 53, 58–60 (1994).

¹¹⁵ Penrod & Heuer, *supra* note 113, at 266–67.

¹¹⁶ *Id.* at 267.

¹¹⁷ *Id.* (surveying cases throughout the 1900s and summarizing courts’ criticisms of juror note-taking).

¹¹⁸ *Id.* at 267.

¹¹⁹ *Id.* at 268–69.

¹²⁰ *Id.* at 269–70.

¹²¹ *Id.* at 270.

¹²² TED A. DONNER & RICHARD K. GABRIEL, *JURY SELECTION STRATEGY & SCIENCE* § 39:10 (3d ed. Supp. 2019).

¹²³ Leonard B. Sand & Steven Alan Reiss, *A Report on Seven Experiments Conducted by District Court Judges in the Second Circuit*, 60 *N.Y.U. L. REV.* 423, 455–56 (1985).

¹²⁴ *Id.* at 454–55.

least “somewhat helpful” in the remaining six cases.¹²⁵ The procedure also appeared to increase jurors’ comfort with the instructions; after receiving written instructions, jurors no longer asked the judges to reread portions of the charge.¹²⁶ However, some attorneys surveyed for the study felt that this was a negative—they believed that jurors might be relying too much on the written instructions without seeking necessary clarification from the judge.¹²⁷ Still, courts could address this concern by explicitly informing jurors that they are free to ask questions about the instructions, notwithstanding their possession of a written copy of the instructions.¹²⁸ Also, many study participants felt that the benefits of written instructions increased with the trial’s complexity.¹²⁹ In reviewing this study and two others, then-Judge Michael Dann of the Superior Court of Arizona identified four clear advantages associated with the providing jurors with written instructions: (1) jurors were less confused by the charge; (2) jurors felt that written instructions aided deliberations; (3) jurors were left with fewer questions about the instructions; and (4) jurors felt more confident in their verdict.¹³⁰ Thus, this reform appears to carry several clear advantages and few disadvantages. Unfortunately, there is limited research examining specifically the extent to which written instructions improve juror comprehension.

3. *Special Verdicts and Special Interrogatories*

Special verdicts and general verdicts with special interrogatories are two additional mechanisms which might improve juror comprehension of instructions. Both mechanisms are explicitly authorized by Rule 49 of the Federal Rules of Civil Procedure.¹³¹ When a special verdict is used, the court submits various questions of fact for the jury to resolve.¹³² The jury resolves each factual matter presented to it without issuing a general verdict.¹³³ The judge then applies the law to the jury’s factual findings in order to reach a verdict.¹³⁴ To the extent that a jury’s factual findings are internally

¹²⁵ *Id.*

¹²⁶ *Id.* at 455–56.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ B. Michael Dann, “*Learning Lessons*” and “*Speaking Rights*”: *Creating Educated and Democratic Juries*, 68 *IND. L.J.* 1229, 1259 (1993).

¹³¹ *FED. R. CIV. P.* 49.

¹³² Mark S. Brodin, *Accuracy, Efficiency, and Accountability in the Litigation Process—The Case for the Fact Verdict*, 59 *U. CIN. L. REV.* 15, 50 (1990).

¹³³ *Id.*

¹³⁴ *Id.*

inconsistent with a general verdict, the trial court judge has the duty to reconcile them, if possible.¹³⁵ If the jury's factual findings do not enable the court to reach a general verdict, the judge has discretion to submit additional questions to the jury, to make independent factual findings on unresolved issues, or to order a new trial if any factual inconsistencies cannot be remedied.¹³⁶ Special verdicts have seen increasing use in recent years,¹³⁷ and several states encourage or even mandate the use of special verdicts in certain instances.¹³⁸

Special interrogatories represent a compromise position between the general verdict and the special verdict.¹³⁹ The jury issues a general verdict but is also asked to answer accompanying factual questions not unlike those used for a special verdict.¹⁴⁰ When the answers to the special interrogatories are consistent with the jury's general verdict, the court is obligated to enter judgment on the verdict.¹⁴¹ When the answers to the special interrogatories are internally consistent, but inconsistent with the verdict, then the court may enter judgment consistent with the interrogatories and opposed to the verdict, return the verdict and interrogatories to the jury for further consideration, or order a new trial.¹⁴² Finally, when the answers to the interrogatories are both internally inconsistent and inconsistent with the verdict, the court must submit the verdict and interrogatories to the jury for further consideration or order a new trial.¹⁴³

Special verdicts and special interrogatories present both potential benefits and drawbacks. Opponents argue that these mechanisms might increase the frequency of hung juries¹⁴⁴ and might involve so many questions as to make the jury's deliberations unmanageable.¹⁴⁵ More significantly, many commentators, including the late Justices William Douglas and Hugo Black, have suggested that special verdicts and interrogatories impair the

¹³⁵ Fang, *supra* note 35, at 296–97.

¹³⁶ *Id.*; FED. R. CIV. P. 49(b)(3)–(4).

¹³⁷ Brodin, *supra* note 132, at 21.

¹³⁸ David A. Lombardero, *Do Special Verdicts Improve the Structure of Jury Decision-Making?*, 36 JURIMETRICS J. 275, 276–77 (1996). California, Iowa, Idaho, Michigan, and Texas are among the states that sometimes require the use of special verdicts. *See id.* at 277 n.7 (identifying special-verdict requirements in various states).

¹³⁹ Elizabeth C. Wiggins & Steven J. Breckler, *Special Verdicts as Guides to Jury Decision Making*, 14 LAW & PSYCH. REV. 1, 5 (1990).

¹⁴⁰ *Id.* at 2.

¹⁴¹ FED. R. CIV. P. 49(b)(2).

¹⁴² Wiggins & Breckler, *supra* note 139, at 5.

¹⁴³ *Id.*

¹⁴⁴ Brodin, *supra* note 132, at 61.

¹⁴⁵ *Id.* at 79.

right to trial by jury by denying the jury the unfettered right to produce a general verdict.¹⁴⁶ Proponents argue that these mechanisms improve deliberations by focusing the jurors' attention on discrete, manageable issues,¹⁴⁷ assisting the jurors in sifting through large amounts of information,¹⁴⁸ and encouraging the jurors to remain objective in reaching decisions.¹⁴⁹ Likewise, proponents argue that special verdicts and interrogatories assist the appellate court by disclosing additional information about the decision-making process in the lower court,¹⁵⁰ which tends to limit the number of relitigated issues following a successful appeal.¹⁵¹

Some authorities suggest that special verdicts and interrogatories favor defendants.¹⁵² This is because, assuming the evidence equally favors both parties, the probability of prevailing on three discrete elements of a claim is lower than the probability of prevailing on the claim as a whole.¹⁵³ In other words, if the jury only considers whether the plaintiff has satisfied the entire claim, as in a general verdict, then the plaintiff should prevail 50% of the time.¹⁵⁴ If the jury instead assesses whether the plaintiff has proved each of three consecutive elements, the odds drop to 12.5% ($0.5 \times 0.5 \times 0.5$).¹⁵⁵ On the other hand, in certain circumstances, the special verdict might skew in favor of the plaintiff, such as when alternative legal theories for the same claim would allow the plaintiff "two bites at the apple."¹⁵⁶

Professors Elizabeth Wiggins and Steven Breckler conducted an empirical analysis of the effects of special verdicts on verdict outcomes and juror comprehension of instructions.¹⁵⁷ The study subjects were ninety-six students at a large state university who viewed a videotaped mock trial.¹⁵⁸

¹⁴⁶ REPORT OF THE AMENDMENTS TO THE RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS, H.R. DOC. NO. 88-48, at 20 (1963); *see also* Brodin, *supra* note 132, at 40 (discussing the opposition statement of Justices Black and Douglas).

¹⁴⁷ Brodin, *supra* note 132, at 58.

¹⁴⁸ *Id.* at 65.

¹⁴⁹ Wiggins & Breckler, *supra* note 139, at 2.

¹⁵⁰ Brodin, *supra* note 132, at 68.

¹⁵¹ Wiggins & Breckler, *supra* note 139, at 3–4.

¹⁵² *Id.* at 7.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 8.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 9. For example, consider a plaintiff bringing two claims involving the same factual transaction that are based on different legal theories, such as a contract suit where a buyer sues for breach of contract and breach of warranty. A special verdict form that emphasizes both breach of contract *and* breach of warranty may be biased against the defendant. *Id.*

¹⁵⁷ *Id.* at 10–14.

¹⁵⁸ *Id.* at 10–11.

After viewing the mock trial, the study subjects were asked to issue two verdicts using some combination of general and special verdict forms.¹⁵⁹ Ultimately, the researchers concluded that the verdict form did not affect the trial outcome, although study subjects allocated compensatory and punitive damages differently depending on which form was used.¹⁶⁰ After issuing their verdicts, the subjects' comprehension was assessed in two ways. First, they were given a list of legal issues presented by the trial (e.g., "whether the defendant made a defamatory statement") and asked to assign the burden of proof for that issue to the correct party.¹⁶¹ Second, the subjects were given a set of factual findings from a mock jury's special verdict and were asked to determine whether those factual findings warranted a verdict for the plaintiff or for the defendant.¹⁶² The researchers found that special verdicts improved comprehension to a limited extent.¹⁶³ Specifically, the study subjects who issued special verdicts were more successful in assigning the correct burden of proof on the first comprehension measure than those who issued general verdicts.¹⁶⁴ However, they were no more successful in selecting the correct verdict in response to the mock jury's factual findings.¹⁶⁵ Furthermore, the performance levels in both the special-verdict and general-verdict conditions were low overall.¹⁶⁶

4. *Preliminary/Interim Instructions*

Rule 51 of the Federal Rules of Civil Procedure gives trial judges the discretion to provide preliminary instructions for any trial.¹⁶⁷ Proponents suggest that preliminary instructions might improve juror recall of evidence and instructions;¹⁶⁸ help jurors overcome bias towards the parties;¹⁶⁹ reduce juror confusion;¹⁷⁰ encourage jurors to withhold judgment until the end of trial;¹⁷¹ and increase jurors' abilities to connect evidence to relevant legal issues.¹⁷² In contrast, critics suggest that preliminary instructions could be

¹⁵⁹ *Id.* at 11–12.

¹⁶⁰ *Id.* at 30.

¹⁶¹ *Id.* at 17.

¹⁶² *Id.*

¹⁶³ *Id.* at 31.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ FED. R. CIV. P. 51.

¹⁶⁸ Lieberman & Sales, *supra* note 33, at 629; Sand & Reiss, *supra* note 123, at 438.

¹⁶⁹ Lieberman & Sales, *supra* note 33, at 629; Sand & Reiss, *supra* note 123, at 438.

¹⁷⁰ Lieberman & Sales, *supra* note 33, at 629.

¹⁷¹ *Id.*

¹⁷² Sand & Reiss, *supra* note 123, at 438.

redundant; slow down the progress of trials; push jurors to adopt a hypothesis-confirming mindset with biasing effects against the defendant; and encourage jurors to determine a preliminary verdict before all evidence has been introduced.¹⁷³

Available research provides a mixed picture of preliminary instructions. Studies are inconclusive as to whether preliminary instructions improve juror recall of evidence or instructions.¹⁷⁴ A 1985 Second Circuit study assessed judge and attorney reactions to preliminary instructions in ten civil and four criminal trials.¹⁷⁵ The three participating judges were encouraged to give preliminary instructions that would provide “maximum guidance” to the jurors.¹⁷⁶ Following the trial, the participating judges and counsel on both sides completed questionnaires on their reactions to the preliminary instructions.¹⁷⁷ The majority of participants reported satisfaction with the use of preliminary instructions, with some reporting improved juror attentiveness, and none reporting any delay in the trial as a result of the preliminary instructions.¹⁷⁸

One 1993 study found significant differences in evidence recall and accuracy of compensation awards, but not in overall verdict accuracy, between mock jurors who received preliminary instructions and those who did not.¹⁷⁹ After listening to a two-hour audiotape of a mock toxic tort trial involving multiple plaintiffs,¹⁸⁰ study participants were assessed on several measures. First, participants were asked to retell the events of the case; their comments were recorded and then categorized as probative, nonprobative, or evaluative.¹⁸¹ Second, participants were given a list of factual assertions, some of which came from the trial and some of which were plausible “lures,” and were asked to identify which items were actually part of the trial.¹⁸² Finally, participants were asked to reach a liability decision and to determine

¹⁷³ Lieberman & Sales, *supra* note 33, at 629.

¹⁷⁴ Lynne ForsterLee, Irwin A. Horowitz & Martin J. Bourgeois, *Juror Competence in Civil Trials: Effects of Preinstruction and Evidence Technicality*, 78 J. APPLIED PSYCH. 14, 14–15 (1993).

¹⁷⁵ Sand & Reiss, *supra* note 123, at 437.

¹⁷⁶ *Id.* at 437–38.

¹⁷⁷ *Id.* at 439–40.

¹⁷⁸ *Id.* at 439–41.

¹⁷⁹ ForsterLee et al., *supra* note 174, at 18–19.

¹⁸⁰ *Id.* at 16.

¹⁸¹ *Id.* at 17.

¹⁸² *Id.* Probative statements were defined as those directly drawn from the evidence, nonprobative statements as those that were not related to the case or evidence, and evaluative statements as those which reflected an opinion on—but not a specific event recalled from—the evidence. *Id.*

compensation for the plaintiff if the participant found the defendant liable.¹⁸³ Verdicts did not differ significantly between preinstructed and non-preinstructed participants, but this was likely because the evidence for the mock trial skewed heavily in favor of the plaintiffs.¹⁸⁴ On other measures, the researchers found significant differences between participants who received preliminary instructions and those who did not. The preinstructed participants made more probative and fewer nonprobative or evaluative statements on the recall test.¹⁸⁵ Likewise, they correctly identified a greater number of facts from the trial on the recognition measure and avoided more of the lures.¹⁸⁶ Finally, the preinstructed participants tailored compensatory awards more appropriately to the level of injury incurred by different plaintiffs in the mock trial.¹⁸⁷

A 1985 study found that preliminary instructions assisted jurors in correctly applying the law but did not facilitate greater recall of the evidence. The study examined judge, attorney, and juror reactions to the use of preliminary instructions in Wisconsin trials.¹⁸⁸ Twenty-nine judges participated, and they were asked to give preliminary instructions on issues such as the burden of proof, evaluating the credibility of witnesses, and various procedural matters.¹⁸⁹ Additionally, the judges were encouraged to provide any additional substantive instructions that they felt would be helpful for the jurors.¹⁹⁰ Following the trial, judges, attorneys, and jurors were asked to mail in a questionnaire reflecting on their experiences with the preliminary instructions.¹⁹¹ The juror questionnaire also included a number of questions testing recall and comprehension of the judges' instructions.¹⁹² The researchers concluded that, although jurors felt that the preliminary instructions were helpful to their understanding and application of the law, the preliminary instructions did not improve recall of the evidence or the instructions.¹⁹³ However, the judges' questionnaires expressed greater agreement with the verdicts issued by juries who received preliminary

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 19.

¹⁸⁵ *Id.* at 19–20.

¹⁸⁶ *Id.* at 19.

¹⁸⁷ *Id.*

¹⁸⁸ Larry Heuer & Steven D. Penrod, *Instructing Jurors: A Field Experiment with Written and Preliminary Instructions*, 13 *LAW & HUM. BEHAV.* 409, 416–17 (1989).

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 417.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.* at 424–25.

instructions, which, combined with the jurors' subjective assessments, suggests that preliminary instructions did in fact aid jurors in applying the law correctly.¹⁹⁴

5. *Bifurcation*

Rule 42(b) of the Federal Rules of Civil Procedure permits courts to conduct separate trial phases for different issues and claims, a process known as bifurcation.¹⁹⁵ Courts can implement bifurcation at any time “[f]or convenience, to avoid prejudice, or to expedite and economize” the trial, so long as the federal right to a jury trial is preserved.¹⁹⁶ Proponents suggest that bifurcation benefits litigants by ensuring the logical, sequential presentation of the evidence, thereby allowing jurors to more easily concentrate on relevant information and improving the quality of deliberations.¹⁹⁷ Proponents also suggest that bifurcation may shorten overall trial time by, for example, obviating the need to conduct a trial for damages in the absence of a finding of liability.¹⁹⁸ Finally, they argue that bifurcation, by dividing a trial into more manageable pieces, should promote jurors' comprehension of the evidence and legal issues.¹⁹⁹

Several empirical studies shed light on the effects of bifurcation on jury decision-making. A 1963 study reviewed verdicts in 186 personal injury cases in the Northern District of Illinois, some of which were bifurcated.²⁰⁰ The researchers found that the bifurcated proceedings skewed heavily in favor of the defendants—defendants prevailed in 34% of the unitary or “regular” trials but in 56% of bifurcated trials.²⁰¹ Moreover, the researchers noticed notable time savings with bifurcated trials. Whereas 78% of unitary proceedings completed the full trial stage, only 15% of bifurcated proceedings did.²⁰² Furthermore, the average trial length dropped from 4.2

¹⁹⁴ *Id.* at 425–26. It bears mentioning, however, that the self-reporting nature of the questionnaires somewhat weakens the strength of these conclusions.

¹⁹⁵ FED. R. CIV. P. 42(b).

¹⁹⁶ *Id.*

¹⁹⁷ Joe S. Cecil, Valerie P. Hans & Elizabeth C. Wiggins, *Citizen Comprehension of Difficult Issues: Lessons from Civil Jury Trials*, 40 AM. U. L. REV. 727, 767–68 (1991).

¹⁹⁸ *Id.* at 768.

¹⁹⁹ Stephan Landsman, Shari Diamond, Linda Dimitropoulos & Michael J. Saks, *Proposed Reforms and Their Effects: Be Careful What You Wish for: The Paradoxical Effects of Bifurcating Claims for Punitive Damages*, 1998 WIS. L. REV. 297, 333–34.

²⁰⁰ Hans Zeisel & Thomas Callahan, *Split Trials and Time Saving: A Statistical Analysis*, 76 HARV. L. REV. 1606, 1610 (1963).

²⁰¹ *Id.*

²⁰² *Id.* at 1610–11.

days in unitary proceedings to 3.1 days in bifurcated proceedings.²⁰³ However, the researchers tempered their findings by noting that the participating judges had selected which trials to bifurcate, thus leaving open the possibility that the bifurcated trials were somehow substantively different from the unitary ones.²⁰⁴

Another study published in 1990 tested mock jurors with a simulated toxic tort case.²⁰⁵ Much like the 1985 Wisconsin preliminary instructions study, this study found that the defendant prevailed significantly more often in bifurcated, rather than unitary, trials.²⁰⁶ Specifically, the plaintiff prevailed in 87.5% of unitary trials but in only 25% of bifurcated trials.²⁰⁷ However, when the plaintiff prevailed in a bifurcated trial, the compensatory damages awards were significantly larger than in a unitary trial.²⁰⁸

A third study published by Professor Stephan Landsman in 1998 reaffirmed many of the earlier findings. This study tested mock juror verdicts using a videotaped, simulated asbestos lawsuit.²⁰⁹ The video simulation was bifurcated into proceedings on compensatory damages and liability and then separate proceedings on punitive damages and liability.²¹⁰ Half of the study's participants viewed the video in a unitary fashion and the remaining half began with compensatory damages and then considered punitive damages only if they found liability for compensatory damages.²¹¹ As with the two earlier studies, the researchers found that the defendant prevailed more frequently in the bifurcated proceeding—in this case, the jury found the defendant liable only 42.8% of the time in bifurcated proceedings versus 55.2% of the time in unitary proceedings.²¹² On the other hand, they also

²⁰³ *Id.*

²⁰⁴ *Id.* at 1611–12.

²⁰⁵ Irwin A. Horowitz & Kenneth S. Bordens, *An Experimental Investigation of Procedural Issues in Complex Tort Trials*, 14 *LAW & HUM. BEHAV.* 269, 270 (1990).

²⁰⁶ *Id.* at 282.

²⁰⁷ *Id.* The authors suggested this trend might stem from the inability of jurors in the bifurcated condition to use evidence from the simpler issue of damages to dispel their uncertainty about the more ambiguous issue of general causation. They hypothesized that because jurors in the unitary condition possessed the ability to “buttress” their decision on general causation by considering plaintiff-sympathetic evidence relevant to the issue of damages, they were more sympathetic to the plaintiffs’ cause overall than the jurors in the bifurcated condition. *See id.*

²⁰⁸ *Id.* at 283.

²⁰⁹ Landsman et al., *supra* note 199, at 309–10.

²¹⁰ *Id.* at 308–09.

²¹¹ *Id.* at 311–12.

²¹² *Id.* at 316. The authors of this study suggested that this pattern of results might arise because the bifurcated trial structure prevented jurors’ “misuse of information” pertaining solely to damages to justify a finding of liability. *Id.* at 335.

found less variance in compensatory damage awards when using a bifurcated proceeding, regardless of the strength of the evidence on that issue.²¹³ One noteworthy result: the study found no evidence that bifurcation significantly improved juror comprehension.²¹⁴

III. APPLYING EDUCATIONAL PRINCIPLES TO JURY INSTRUCTIONS AND DELIBERATIONS

As Part I of this Note shows, jurors continue to struggle with comprehending and applying legal instructions during the course of a trial, and these struggles can result in significant consequences. Likewise, as discussed in Part II, although existing trial mechanisms such as juror note-taking and preliminary instruction do assist jurors in comprehending instructions, there remains significant room for improvement.

It is perhaps unsurprising that jurors would struggle to apply legal instructions during the course of a trial. Jurors, as laypersons, are given tremendous responsibility upon entering the courtroom—they are asked to quickly internalize abstract legal principles and accurately apply them to make powerful decisions about the lives of others.²¹⁵ As Professor Diamond notes, jurors are asked to do in mere days what law students struggle to do over the course of years.²¹⁶ In the process, they are “doused with a kettleful of law . . . that would make a third-year law student blanch.”²¹⁷

This Part suggests that to assist jurors in correctly applying the law, it would be wise to view jurors as learners and to tailor courtroom procedures to reflect this perspective. First, it addresses the basis for viewing jurors as similar to students in traditional classroom environments. Next, it explores the contours of one prominent educational theory, known as “direct” or “systematic” instruction. It briefly reviews the history of Direct Instruction and argues for the particular usefulness of this theory in the context of jury instructions. It then overviews the key principles of Direct Instruction. Next, it translates these principles into the legal context to suggest novel instructional and deliberation procedures that are both educationally sound and compatible with existing trial mechanisms. This Note concludes by addressing potential challenges to the proposed procedures and by

²¹³ *Id.* at 334.

²¹⁴ *Id.* at 333–34.

²¹⁵ Danielle R. Cover, *Of Courtrooms & Classrooms*, 27 B.U. PUB. INT. L.J. 291, 302 (2018).

²¹⁶ Diamond et al., *supra* note 11, at 1538.

²¹⁷ *Skidmore v. Balt. & Ohio R.R.*, 167 F.2d 54, 64 (2d Cir. 1948) (quoting CURTIS BOK, I TOO, NICODEMUS 261–62 (1946)).

suggesting testing mechanisms to establish the viability of the proposal prior to implementation in live courtroom proceedings.

A. *Jurors as Learners*

This Note is not the first piece of scholarship to describe jurors as learners. One scholar explains that while jurors naturally resemble the general population, they also bear strong resemblances to students in traditional lecture-based classrooms.²¹⁸ They are asked to internalize new concepts that are carefully packaged by the judge and attorneys—the courtroom’s “teachers.”²¹⁹ Although jurors should be viewed as adult learners, they are, owing to their lack of familiarity with legal proceedings, unusually dependent upon the court and counsel.²²⁰ And while jurors are motivated to understand the trial and reach a correct verdict, the parties’ trial presentations often fail to assist jurors in meeting this responsibility.²²¹

Moreover, other scholars argue that lawyers should view themselves as “educator-advocates” who have a duty to present information to jurors in a comprehensible manner.²²² An attorney operating under this premise would more carefully mirror the behavior of teachers insofar as attorneys “plan and evaluate the way they present information” like effective teachers in order to craft the most convincing story for their audiences.²²³ Indeed, at least one scholar has explicitly called for incorporating principles of educational psychology into courtroom procedures.²²⁴ This seems a sensible approach, given that every “trial is an exercise in education.”²²⁵

B. *Lessons from Educational Theory: Direct Instruction*

If we accept as true that jurors are essentially novice legal learners, what insights about their learning experiences might we draw from the realm of

²¹⁸ Cover, *supra* note 215, at 292 (“Broadly conceived, the juror experience looks very much like a classroom learning experience.”). This article makes an excellent case for understanding jurors as adult learners but focuses on using this insight to refine attorneys’ trial techniques, rather than arguing for modified trial procedures.

²¹⁹ *Id.*

²²⁰ *See id.* at 306.

²²¹ *See id.* at 302 (suggesting that trial presentations frequently fail to assist jurors in fulfilling their responsibilities).

²²² *See* Gail A. Jaquish & James Ware, *Adopting an Educator Habit of Mind: Modifying What It Means to “Think Like a Lawyer,”* 45 STAN. L. REV. 1713, 1716 (1993).

²²³ Cover, *supra* note 215, at 299.

²²⁴ *See* Jaquish & Ware, *supra* note 222, at 1728 (suggesting that law school curricula should include instruction on educational psychology so that advocates will be better prepared to communicate concepts to jurors in a comprehensible manner).

²²⁵ Schwarzer, *supra* note 3, at 135.

educational theory? One especially relevant theory is that of “systematic” or “direct” instruction. Direct Instruction was developed in the 1960s by Siegfried Engelmann²²⁶ as a way of teaching foundational skills in math and reading.²²⁷ Engelmann had noticed that disadvantaged students struggled to acquire reading skills because of a relative deficit in preexisting language skills when compared to their more affluent peers.²²⁸ Direct Instruction was designed to remedy this deficit by helping these at-risk students efficiently master basic skills so they could tackle more complex areas of study on a “level playing field” with their peers.²²⁹

Direct Instruction techniques were initially developed through correlational studies in which researchers identified educators who produced unusually large gains in student achievement and then analyzed those educators’ classroom procedures to detect common instructional strategies.²³⁰ The researchers then compiled these strategies into a manual for teaching, which was used as the foundation for experimental studies that tested whether intentional implementation of the strategies would improve students’ academic performance.²³¹ Though the experimental studies were primarily conducted in math and reading classrooms, they revealed that, on balance, students taught using Direct Instruction obtained significantly higher posttest scores than students taught in the control setting.²³²

Key tenets of Direct Instruction include checking frequently for understanding, presenting material in small steps, and allowing students the opportunity to actively and successfully participate in the learning process.²³³ In terms of instructional design, Direct Instruction counsels that educators should break material into small steps to prevent unnecessary confusion, structure learning by providing an overview or outline of new material, and

²²⁶ Siegfried Engelmann, Wesley C. Becker, Douglas Carnine & Russell Gersten, *The Direct Instruction Follow Through Model: Designs and Outcomes*, 11 EDUC. & TREATMENT CHIL. 303, 303 (1988). Perhaps ironically, Professor Siegfried Engelmann started out not in education, but in advertising. *Beginnings*, NAT’L INST. FOR DIRECT INSTRUCTION, <https://www.nifdi.org/research/history-of-direct-research/beginnings.html> [<https://perma.cc/QLS5-FQE6>]. Professor Engelmann had experience using marketing techniques to ensure that consumers retained information and thought to apply those same techniques in educating his two sons. *Id.* He then drew on his experiences with his children to develop the theory of Direct Instruction in conjunction with education researcher Carl Bereiter. *Id.*

²²⁷ Barak Rosenshine, *Systematic Instruction*, in 1 21ST CENTURY EDUCATION: A REFERENCE HANDBOOK 235, 235 (Thomas L. Good ed., 2008).

²²⁸ *Beginnings*, *supra* note 226.

²²⁹ *Id.*

²³⁰ Rosenshine, *supra* note 227, at 235–36.

²³¹ *Id.* at 236.

²³² *Id.*

²³³ *Id.*

give ample opportunities to learners to practice applying new concepts, along with many opportunities for feedback.²³⁴

Several theoretical considerations underpin this approach. First, learners have limited working memory, and, when exposed to new information, can experience “cognitive overload” that inhibits the processing of new material.²³⁵ Furthermore, absent opportunities to “elaborate on, review, and rehearse,” new material is unlikely to transition from working memory to long-term memory, where it can be actively used.²³⁶ Second, learners cannot process underlying patterns adequately to solve complex problems without developing “well-connected and elaborate knowledge structures” in long-term memory.²³⁷ Lastly, understanding is enhanced when learners are given the chance to “explain, elaborate, or defend” their positions.²³⁸

When viewed through the lenses of origins, purpose, and theoretical underpinnings, Direct Instruction principles appear uniquely suited to assist jurors in carrying out their duties. Jurors are, in every sense, the disadvantaged students in the courtroom: they come in with little or no formal experience with the legal system and almost certainly no concept of such fuzzy terms as “reasonableness” and “comparative negligence.” And they are asked to apply a “kettleful of law”²³⁹ without the benefit—enjoyed by the judge and attorneys, this classroom’s “more affluent peers”²⁴⁰—of years of legal experience. Of all the parties in a courtroom, jurors enter with the hardest job and yet the fewest basic skills with which to undertake it. So, Direct Instruction, which was designed to help even the most disadvantaged students efficiently achieve success, seems tailor-made to help jurors out of the quandary they face.

True, Direct Instruction techniques have not been researched with respect to legal education. But countless studies over the last fifty years have established that Direct Instruction techniques promote student learning in wide-ranging subjects such as math, reading, the sciences, foreign languages, and other complex cognitive skills.²⁴¹ And at least one authority suggests that

²³⁴ *Id.* at 239.

²³⁵ *Id.* at 236–37.

²³⁶ *Id.* at 237.

²³⁷ *Id.* at 238.

²³⁸ *Id.* at 237 (quoting A.L. Brown & J.C. Campione, *Psychological Theory and the Study of Learning Disabilities*, 14 AM. PSYCH. 1059, 1066 (1986)).

²³⁹ Diamond et al., *supra* note 11, at 1538.

²⁴⁰ See *Beginnings*, *supra* note 226.

²⁴¹ For a detailed meta-analysis of more than fifty years of studies supporting the effectiveness of Direct Instruction techniques, see generally Jean Stockard, Timothy W. Wood, Cristy Coughlin & Caitlin

Direct Instruction should be useful in any “well-structured”²⁴² content area. “Well-structured” is undefined, but when viewing the subjects covered, the common threads are apparent. Math, language, reading, the sciences—each of these disciplines contains a well-developed body of knowledge founded, in large part, upon predictable, structured systems and rules. What could be more structured than the legal profession? The entire common law system is predicated on the idea that similar cases should produce similar results,²⁴³ and the very existence of projects like the Restatements of Law, which seek to articulate the underlying principles of common law,²⁴⁴ speak to the “well-structured” nature of the legal system. Thus, Direct Instruction techniques should prove just as helpful in the courtroom as they have in the classroom. Accordingly, taking as true that jurors can be viewed as novice legal learners, and that Direct Instruction significantly promotes learning in “well-structured” subjects, such as law, how might Direct Instruction principles inform courtroom procedures? The next Section addresses that question.

C. Recommended Procedures

In view of jurors’ status as novice legal learners, and with the Direct Instruction principles discussed above kept firmly in mind, this Note recommends the following procedures to assist juror comprehension and deliberations. First, jurors should receive preliminary instructions in every trial. The preliminary instructions should cover both procedural and substantive matters, including instructions on each and every element of the plaintiff’s presumptive claims against the defendant.²⁴⁵ As discussed in Part II, preliminary instructions should help improve juror comprehension by giving jurors a mental schema through which to analyze the evidence presented. This reform is also entirely consistent with the Direct Instruction

Rasplica Khoury, *The Effectiveness of Direct Instruction Curricula: A Meta-Analysis of a Half Century of Research*, 88 REV. EDUC. RSCH. 479 (2018).

²⁴² Rosenshine, *supra* note 227, at 235. Professor Barak Rosenshine suggests that Direct Instruction is effective for teaching “mathematical procedures and computations, reading decoding, science facts and concepts, social studies facts and concepts, map skills, grammatical concepts and rules, and foreign language vocabulary and grammar,” as well as “complex cognitive skills such as writing essays, reading comprehension, and problem solving in mathematics.” *Id.*

²⁴³ *The American Legal System*, LUMEN, <https://courses.lumenlearning.com/boundless-politicalscience/chapter/the-american-legal-system/> [<https://perma.cc/L9UU-H4HF>] (“The general principle in common law legal systems is that similar cases should be decided so as to give similar and predictable outcomes, and the principle of precedent is the mechanism by which this goal is attained.”).

²⁴⁴ See *infra* note 250 for an example of one of the general common law rules embodied in the *Restatement Second of Torts*.

²⁴⁵ See *supra* Section II.A.4 for a discussion of preliminary instructions.

principle that learners should be provided with an overview or outline when engaging with unfamiliar material for the first time.²⁴⁶

Second, the trial should be conducted in short segments, not unlike the bifurcation of issues already commonly used. However, unlike bifurcation, the introduction of evidence in this scenario should be limited not to a single, large-scale issue, such as liability in a personal injury case, but rather to a single element of a claim, such as the intent requirement of battery. Much like the bifurcation procedures described in Part II,²⁴⁷ this method would allow jurors to benefit from concentrating on discrete, manageable components of a legal claim to a greater degree than is allowed by more conventional bifurcation procedures. Direct Instruction principles suggest that by breaking jury deliberations into smaller steps, jurors might be relieved of some of the cognitive overload they might otherwise experience when engaging with unfamiliar legal concepts. To further accommodate limitations on human working memory, interim instructions should also be provided at the beginning of each trial segment, in both written and oral form, regarding the relevant element of the claim (e.g., intent in a battery claim).²⁴⁸ This should assist jurors in moving the relevant legal concepts out of working memory and into long-term memory, where they might more easily be applied to reach a correct verdict in the case at hand.

Third, after all of the evidence on a particular element is introduced, jurors should be permitted to deliberate solely on that element. Moreover, in keeping with the Direct Instruction principle that learners should have ample opportunities for feedback, jurors should be permitted to ask clarifying questions of the court at any time during deliberations.²⁴⁹ The judge should have considerable latitude to provide clarification in response to these questions. In particular, this Note recommends that judges, where needed, provide examples of factual scenarios that would or would not satisfy a particular element of a claim. Of course, caution is needed to avoid biasing the jurors in their efforts to independently reach a correct verdict. Any clarifying factual examples should be provided only with the consent of both parties and should remain at a relatively high level of abstraction that avoids close resemblance to the facts of the case. As a model for these examples,

²⁴⁶ See *supra* note 232 and accompanying text.

²⁴⁷ See *supra* Section II.A.5 for a discussion of bifurcation procedures.

²⁴⁸ Interim instructions are permissible and have been endorsed by some scholars for use in particularly complex trials. See, e.g., Grenig, *supra* note 3, at 94; Nancy S. Marder, *Bringing Jury Instructions into the Twenty-First Century*, 81 NOTRE DAME L. REV. 449, 499 (2006).

²⁴⁹ For a thorough discussion of procedures surrounding juror questions to the court, see Nancy S. Marder, *Answering Jurors' Questions: Next Steps in Illinois*, 41 LOY. U. CHI. L.J. 727 (2010).

one might consider the examples following each provision of the various Restatements of Law.²⁵⁰ These “illustrations” demonstrate how the legal principles embodied in the Restatements can be applied to various factual contexts and do so in fairly generic, fact-light contexts. Similarly, judge-provided examples could be a useful scaffold²⁵¹ to assist jurors during deliberations.

If, while deliberating on any particular element of the claim, the jury should happen to find that the plaintiff has failed to meet the burden of persuasion on that element—typically a preponderance of the evidence—then the jury should return an early verdict for the defendant and conclude the trial. Otherwise, the trial should continue on in these shorter segments, with jurors receiving only the instructions necessary to deliberate on a single element of a claim at the end of each segment. This would improve juror comprehension because it will give jurors the opportunity to deliberate on narrower, more easily understandable issues from which they can, per Professor Barak Rosenshine, “explain, elaborate, or defend”²⁵² their positions to their fellow jurors. Combined with the freely available clarification from the court, this deliberation structure would bring jurors closer to the “guided practice”²⁵³ that Direct Instruction principles suggest would assist jurors in learning to apply the law.

²⁵⁰ By way of example, § 13 of the *Restatement (Second) of Torts* defines battery as follows:

An actor is subject to liability to another for battery if

- (a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and
- (b) a harmful contact with the person of the other directly or indirectly results.

RESTATEMENT (SECOND) OF TORTS § 13 (AM. L. INST. 1965). Section 14 of the same Restatement further provides: “To make the actor liable for a battery, the harmful bodily contact must be caused by an act done by the person whose liability is in question.” *Id.* § 14. The comments then illustrate this concept: “A pushes B against C, knocking C down and breaking his leg. A, and not B, is subject to liability to C.” *Id.* § 14 cmt. b, illus. 1.

²⁵¹ Scaffolding, in the educational context, refers to a “process that enables a . . . novice to solve a problem, carry out a task or achieve a goal which would be beyond [the novice’s] unassisted efforts.” Janet Mannheimer Zydney, *Scaffolding*, in *ENCYCLOPEDIA OF THE SCIENCES OF LEARNING* 2913 (Norbert M. Seel ed., 2012) (quoting David Wood, Jerome S. Bruner & Gail Ross, *The Role of Tutoring in Problem Solving*, 17 *J. CHILD PSYCH. & PSYCHIATRY* 89, 90 (1976)). The concept is derived from Lev Vygotsky’s theory of the zone of proximal development, which posits that a learner develops most rapidly when undertaking tasks that cannot be completed alone, but which are achievable with support and guidance from others. *Id.* at 2914 (referencing Lev S. Vygotsky, *Interaction Between Learning and Development*, in *READINGS ON THE DEVELOPMENT OF CHILDREN* 34 (Mary Gauvain & Michael Cole eds., 4th ed. 2005)). The “scaffolding” moniker for this concept was first coined by David Wood in 1976. *Id.*

²⁵² Rosenshine, *supra* note 227, at 237 (quoting Brown & Campione, *supra* note 238, at 1066).

²⁵³ *Id.*

Of course, should a trial continue through its full course without an early verdict for the defendant, jurors should simply receive one final, complete set of jury instructions following the introduction of all evidence. At this point, jurors would simply deliberate and return a general verdict in the traditional fashion.

1. *Compatibility with Existing Trial Mechanisms*

Although these procedures are novel, they comport with existing trial mechanisms. Preliminary instructions are, as stated above, permitted by Rule 51 of the Federal Rules of Civil Procedure.²⁵⁴ Thus, the introduction of preliminary and interim instructions throughout the trial should not be especially controversial. Likewise, as explained in Part II, written instructions are permitted in all United States jurisdictions and seem to provide some modest benefits for juror comprehension.²⁵⁵ Furthermore, although bifurcation is typically applied to separate larger issues, such as causation and damages, Rule 42(b) is agnostic as to the level of issue that is separated out for consideration.²⁵⁶ The Rule explicitly allows for the segmenting of issues into separate *trials*, so it should be no technical obstacle to segmenting the admission of evidence by element during the course of a single trial. The element-by-element deliberation also bears substantial similarity to the special-verdict and special-interrogatory procedures described in Part II.²⁵⁷ And, again, the submission of questions from jurors to the court is permissible in many jurisdictions and has been enthusiastically endorsed by some scholars.²⁵⁸

2. *Alignment with Educational Theory*

These procedures are not only theoretically viable, but also align with research and relevant educational principles. Research with college students suggests that an average learner's attention span is measured in minutes, not hours.²⁵⁹ Thus, it is reasonable to think that juror attention spans are equally

²⁵⁴ FED. R. CIV. P. 51(b)(3).

²⁵⁵ See *supra* notes 122–135 and accompanying text for a discussion of written instructions.

²⁵⁶ FED. R. CIV. P. 42(b).

²⁵⁷ See *supra* notes 136–171 and accompanying text.

²⁵⁸ See, e.g., Marder, *supra* note 249, at 502 (encouraging courts to allow jurors to submit questions prior to deliberations and suggesting the jurors who are allowed to do so “achieve[] a better understanding of jury instructions than those who [do] not”).

²⁵⁹ See Paul Marcus, *Judges Talking to Jurors in Criminal Cases: Why U.S. Judges Do It So Differently from Just About Everyone Else*, 30 ARIZ. J. INT'L & COMPAR. L. 1, 34–35 (2013) (discussing research on student attention spans).

limited.²⁶⁰ By dividing instructions into segments, this proposal would provide jurors with the shorter, more manageable chunks of information that they are accustomed to engaging with in day-to-day life.²⁶¹ Furthermore, providing jurors with more manageable amounts of information would help alleviate the burdens on long-term memory that are associated with the average trial.²⁶²

As explained above, this proposal also matches well with Direct Instruction principles, which suggest that in “well-structured”²⁶³ areas of study teachers can improve student comprehension by providing scaffolds to reduce the difficulty of an unfamiliar task.²⁶⁴ This theory suggests that because individuals have limited working memory, they will tackle new challenges most effectively if they are asked to engage with only a few pieces of information at a time.²⁶⁵ Accordingly, teachers should break information into small steps to reduce confusion, provide an overview or outline of the topic from the outset of new learning, and provide learners with ample opportunities to practice with new skills.²⁶⁶ This proposal satisfies all of these steps. Preliminary instructions provide an outline for the relevant legal claims. Then, segmenting instructions and deliberations into smaller chunks accommodates limits on jurors’ working memory, and short, frequent periods of deliberation with the opportunity to ask questions provide jurors with a sort of “guided practice” as they strive to correctly learn and apply the law. Thus, this proposal would greatly assist jurors in comprehending and accurately applying unfamiliar legal principles during the course of a trial.

3. *Potential Challenges*

There are several clear arguments against this proposal. The first and most significant is that organizing jury instructions and deliberations in this manner might raise constitutional concerns. Professor Ronald Eades, among others, suggests that special verdicts and similar piece-by-piece deliberations infringe upon the ability of juries to “do justice” by eliminating the right to

²⁶⁰ *Id.* at 35; *see also* Jaquish & Ware, *supra* note 222, at 1726 (stating that jurors feel their attention is “overburdened” during trials with in-court translations).

²⁶¹ *See generally* G. Marc Whitehead, *Jury Trial Innovations: Making the Courtroom a Better Place to Teach and Learn*, 89 ALI-ABA 203, 206 (2000) (arguing that jurors are accustomed to and would benefit from shorter bursts of information in the courtroom).

²⁶² *See* Jaquish & Ware, *supra* note 222, at 1727 (arguing that “advocate educators” must be prepared to assist jurors with long-term information retention during a trial).

²⁶³ Rosenshine, *supra* note 227, at 235.

²⁶⁴ *Id.*

²⁶⁵ *See id.*

²⁶⁶ *Id.* at 1.

nullify.²⁶⁷ And it is at least arguable that, in a criminal context, jurors should be able to nullify—an ability that might be impaired by the step-by-step deliberations suggested by this proposal.²⁶⁸ But the constitutional argument is exactly that—just one argument in a still-unsettled debate.²⁶⁹ Vigorous disagreement continues as to whether jury nullification should ever be allowed,²⁷⁰ and the Supreme Court itself has described jury nullification as a power of the jury, but one not rightfully wielded.²⁷¹ But even if one concludes that jury nullification must be left intact for criminal trials, this proposal can be limited solely to civil trials, a context in which courts uniformly reject any right for the jury to issue a verdict contrary to the evidence.²⁷² Indeed, the judge in a civil trial can overrule a jury verdict that is clearly not in accord with the evidence.²⁷³ Accordingly, there should be no significant harm from this proposal, which merely asks that jurors consider the evidence in a logical, stepwise fashion.

Second, some may argue that this proposal would skew trial outcomes in one direction or another. To some extent, this concern is borne out in the research discussed in Part II, which indicates that bifurcated trials can result

²⁶⁷ Ronald W. Eades, *The Problem of Jury Instructions in Civil Cases*, 27 CUMB. L. REV. 1017, 1024–25 (1997) (“The greatest benefit of the special interrogatory may be one of its faults. By eliminating the jury’s ability to render a general verdict, the interrogatory prevents the jury from ‘doing justice.’”). Many who adopt this position describe the jury as the “conscience of the community” and argue that the jury must be empowered to nullify in order to mitigate the sometimes-harsh effects of mechanically applying criminal laws. See, e.g., Alan Schefflin & Jon Van Dyke, *Jury Nullification: The Contours of a Controversy*, 43 LAW & CONTEMP. PROBS. 51, 111, 115 (1980) (“The jury, with its power of nullification, is a deliberate attempt to increase citizen participation in government, ameliorate the rigors of laws that may be too harsh when applied in certain cases, prevent governmental tyranny, bring the law and the community in closer harmony, and allow the people to make the final decision on moral blameworthiness in criminal cases.”).

²⁶⁸ See, e.g., *United States v. Spock*, 416 F.2d 165, 182 (1st Cir. 1969) (“There is no easier way to reach, and perhaps to force, a verdict of guilty than to approach it step by step. A juror, wishing to acquit, may be formally catechized. By a progression of questions each of which seems to require an answer unfavorable to the defendant, a reluctant juror may be led to vote for a conviction which, in the large, he would have resisted.”).

²⁶⁹ For an especially thorough treatment of why jury nullification should not be permitted, see Steven M. Warshawsky, Note, *Opposing Jury Nullification: Law, Policy, and Prosecutorial Strategy*, 85 GEO. L.J. 191 (1996).

²⁷⁰ It is beyond the scope of this Note to address the wide-ranging arguments surrounding the topic of jury nullification. For an excellent bibliography identifying the major scholarly writings on both sides of the jury nullification debate, the curious reader can consult Teresa L. Conaway, Carol L. Mutz & Joann M. Ross, *Jury Nullification: A Selective, Annotated Bibliography*, 39 VAL. U. L. REV. 393 (2004).

²⁷¹ “[I]t is [the jury’s] duty to be governed by the instructions of the court as to all legal questions They have the power to do otherwise, but the exercise of such power cannot be regarded as rightful” *Sparf v. United States*, 156 U.S. 51, 83 (1895) (quoting *Duffy v. People*, 26 N.Y. 588, 592 (1863)).

²⁷² Eades, *supra* note 267, at 1030.

²⁷³ This refers to judgment as a matter of law. FED. R. CIV. P. 50.

in greater numbers of pro-defendant verdicts.²⁷⁴ But there are two responses to this. First, it is possible that the verdicts reached in bifurcated trials are in fact fairer insofar as jurors cannot as easily “fuse” evidence from different phases of the trial, such as evidence on liability and damages.²⁷⁵ As Professor Diamond’s study with the Arizona Jury Project suggests, jurors are at times inclined to bypass essential elements of a claim, such as negligence, in their haste to recompense a clearly injured plaintiff.²⁷⁶ Second, the existing research also shows that plaintiffs who manage to prevail in a bifurcated trial generally receive larger verdicts.²⁷⁷ True, this might suggest that jurors in bifurcated trials hold back on finding liability except in the most egregious of cases. But a different, equally plausible framing is that juries in bifurcated trials are empowered to more rationally consider the case without allowing their sympathy for the plaintiff’s injuries to cloud their view of whether the defendant caused those injuries. Absent more definitive research on this phenomenon, it may well be that bifurcated trials merely produce different, rather than less fair, verdicts.

Finally, one might imagine that this Note’s proposed procedures would slow down the course of a trial. However, the existing research on bifurcation suggests the opposite—bifurcated trials typically take less time, not more.²⁷⁸ Although trials that run their full course could take longer using the proposed procedures, many others could be concluded earlier if the jury quickly finds that a single dispositive element²⁷⁹ of the claim fails for the plaintiff.

Admittedly, some evidence pertinent to multiple elements of a claim might need to be introduced to jurors repeatedly. For instance, in our hypothetical products liability case,²⁸⁰ jurors might be introduced to

²⁷⁴ See *supra* notes 200–214 and accompanying text.

²⁷⁵ See, e.g., Brian H. Bornstein, *From Compassion to Compensation: The Effect of Injury Severity on Mock Jurors’ Liability Judgements*, 28 J. APPLIED SOC. PSYCH. 1477, 1485 (1998) (finding that greater plaintiff injuries led to more frequent findings of liability when testing mock jurors). In other words, it appears that when faced with a severely injured plaintiff, jurors are more inclined to find *someone* (read: the defendant) liable, even absent strong evidence of causation.

²⁷⁶ See *supra* notes 42–52 and accompanying text.

²⁷⁷ See *supra* note 208 and accompanying text.

²⁷⁸ See Zeisel & Callahan, *supra* note 200, at 1624 (finding that trial bifurcation saves an average of 20% of the time that the trial would take using nonbifurcated proceedings).

²⁷⁹ To be clear, this Note does not propose holding separate *trials* as to each element of a claim. Rather, it proposes that jurors be allowed to recess intermittently during the course of a single trial to deliberate on specific elements of a claim. Bifurcation traditionally results in separate trials, albeit often with the same jury. For instance, in a mass tort case, the first trial might address liability, and the second, if needed, might address damages. This Note’s proposal speaks to subtrial units of analysis; jurors might, for example, be allowed time to deliberate solely on the issue of proximate cause while sitting for a trial on the larger issue of liability.

²⁸⁰ See *supra* Introduction.

incriminating emails from the defendant twice—once to establish that the defendant knew how dangerous their vaping products were, and again to establish that the defendant misrepresented that danger to the consuming public. At first blush, this might seem a magnificent waste of time. But the news wouldn't be all bad. This is because repetition facilitates evidence recall via “overlearning.”²⁸¹ Thus, any repetition caused by the proposed procedures would aid jurors during deliberations by facilitating easier recall of the most sensitive evidence—namely, the evidence bearing on multiple elements of a claim. And, of course, budget-conscious litigants will continue pushing their attorneys to operate efficiently. Accordingly, structuring deliberations around discrete elements of a claim might encourage the parties' attorneys to more concisely tie their presentations directly to the elements of the claim or even to stipulate to the existence of any undisputed elements of the claim.

Admittedly, there is some risk that allowing jurors to return an early verdict would incentivize them to find against the plaintiff early in the trial in order to avoid further jury duty. Trial simulations with mock jurors might better establish whether this concern has any basis in reality. As noted above, existing research suggests that jurors try hard to fulfill their duties,²⁸² so this concern may only be theoretical.

4. *Establishing Viability*

This proposal fuses aspects of existing trial mechanisms with principles drawn from the Direct Instruction educational theory in an effort to create trial procedures which will further assist jurors in comprehending and applying legal instructions. However, before this proposal can be attempted, it would be wise to attempt trial simulations using mock jurors to assess the procedure's impact on juror comprehension.

A key consideration in structuring such a study is selecting appropriate comprehension measures. Earlier studies have sometimes used paraphrasing tests, which are obviously more challenging on average than the basic recall involved in a multiple-choice assessment. Thus, paraphrasing tests could result in underestimating juror comprehension. On the other hand, it is conceivable that multiple choice or recall assessments might overestimate juror comprehension because the cognitive effort needed for these tasks might be less than is required to accurately apply the legal principles reflected in the jury instructions. It might be best to emulate Professor

²⁸¹ Jaquish & Ware, *supra* note 222, at 1727 (“Over-learning is essentially the result of repetition during the learning process . . . [R]epetition of key evidence in a case . . . facilitates jury recall of the evidence when the problem-solving situation arrives during jury deliberations.”).

²⁸² See *supra* note 37 and accompanying text.

Diamond's approach with the Arizona Jury Project by recording mock juror deliberations and assessing how well the participants' commentary reflects the instructions provided. If preliminary studies suggest increased juror comprehension, it would then be prudent to undertake more extensive trial simulations in order to assess the effect of this procedure on trial length. At that point, it might be feasible to attempt this proposal with live juries.

CONCLUSION

Let's revisit our hypothetical products liability case from the beginning of this Note.²⁸³ There, the defendants—the ones producing dangerous vaping products—escaped liability because the jury erroneously applied a contributory negligence defense that was simply inapplicable in that jurisdiction. Let's call this version of reality "World 1." What would have happened in an alternate reality where the trial had been restructured to accommodate the Direct Instruction principles described above? We can call this reality "World 2."

First, the jurors might be a little less perplexed right out of the gate. At the start of the trial, they receive an overview from the judge of the relevant legal principles—in this case, the requirements for a strict product liability claim based on the defendant's intentional misrepresentation of the dangers inherent in its vaping products. From the beginning, the jurors know that the plaintiffs' claims require proof (1) that the defendant's vaping products were unreasonably dangerous; (2) that the defendant misrepresented that danger; (3) that the plaintiffs relied on those misrepresentations; and, of course, (4) that they were injured as a result. Undoubtedly, the jurors are already benefitting from developing an initial understanding of the relevant legal framework, perhaps with the aid of a set of written preliminary instructions for their reference. They might even take a few notes on the judge's explanation of particular points of law.

As World 2's version of the case continues, the judge's decision to segment the trial into shorter pieces makes things a little easier for the jury. After reviewing, for instance, the requirement that the vaping products must have been unreasonably dangerous, the jurors know to focus their attention solely on this narrow factual issue. They can concentrate closely on both parties' presentations to see whether this requirement has actually been proven by a preponderance of the evidence. And before engaging with an overwhelming amount of new evidence, the jurors have the chance to recess together to discuss this element of the claim. They can share their views on

²⁸³ See *supra* Introduction.

the relative strength of each side's presentation, and they have the opportunity to reconcile any differing views of the evidence.

In later segments of the trial, the jurors start to notice some repetition. For instance, they see that, in repeatedly focusing on some of the defendant's unsavory internal emails, the plaintiffs are establishing both the dangerousness of the vaping products as well as the defendant's decision to downplay that danger. The jurors zero in on this information, and it comes up repeatedly during their separate discussions of both the "unreasonable dangerousness" and "misrepresentation" elements of the claim.

At one point, well into the trial, the jurors begin deliberating on the reliance element of the plaintiffs' claims. At first, they struggle—several jurors are confused as to how a seemingly individual question of reliance is going to be proven on a class-wide basis. Unable to settle the issue alone, the jurors submit a question to the judge, who, having first shared the question with both parties' counsel, clarifies that this jurisdiction permits an inference of reliance without requiring proof on a plaintiff-by-plaintiff basis.

Eventually, all of the presentations are complete, and the jurors are prepared to deliberate. They receive final instructions from the judge, largely nodding along as they recognize the now-familiar legal principles involved. The jurors retreat to the deliberation room as the litigants nervously wait.

The final deliberations aren't easy. The jurors come into the room with different backgrounds and experiences, and not all of them have the same view of the evidence. But what they share is a common understanding of the legal rules they are being asked to apply; there is no contention over those. In that sense, their legal education for this trial has been a success.

One thing that never occurs to them? Contributory negligence. All of the defendant's affirmative defenses had been presented earlier, during a separate segment of the trial. The jurors know that the plaintiffs' individual decisions to use vaping products, even while aware of some possible dangers, simply have no bearing on this lawsuit. In fact, when they discussed defenses the first time, they decided to submit a question to the judge on this very issue. In short order, they received clarification that contributory negligence does not apply in this jurisdiction.

The case remains a nail-biter to the end. Still, having thoughtfully deliberated on the case, the jurors eventually return a verdict: the defendant is liable. The class of injured plaintiffs will be made whole.

World 2's ending is certainly different from World 1's and is of course a much happier ending for the plaintiffs. But it is also a better ending for the legal system generally. In this world, the defendants didn't escape liability solely by grace of a sensible but legally incorrect misunderstanding on the part of the jurors. And the jurors themselves had a more satisfying

experience. They had more support to understand their charge, and they had the resources they needed to engage in productive deliberations. Each juror felt more secure in their verdict than in World 1, and many were grateful for the opportunity to serve.

Perhaps World 2 seems a shade utopian. But isn't it better than the status quo? Adopting even some of the proposed procedures could take us closer to World 2, even if imperfectly so. And we have every reason to want to do so. True, there are promising signs that jurors might comprehend instructions to a greater degree than previously thought. But existing empirical research still suggests that juror comprehension is lacking. And a juror's struggle to comprehend can result in severe consequences, particularly in capital sentencing cases. Existing reforms have somewhat mitigated this risk, but they are not a cure-all, and there remains substantial room for improvement. By incorporating educational principles into the courtroom, some of this dangerous gap in juror comprehension can be filled.

