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Articles

THE "KETTLEFUL OF LAW" IN REAL JURY DELIBERATIONS: SUCCESSES, FAILURES, AND NEXT STEPS[†]

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ABSTRACT—According to standard lore, when jurors are doused with "a kettleful of law" at the end of a trial, they either ignore it or are hopelessly confused. We present new evidence from a unique data set: not mock jury experiments or post-trial self-reports, but rather the deliberations of fifty real civil juries. Our intensive analysis of these deliberations presents a picture that contradicts received wisdom about juries and the law. We show that juries in typical civil cases pay substantial attention to the instructions and that although they struggle, the juries develop a reasonable grasp of most of the law they are asked to apply. When instructions fail, they do so primarily in ways that are generally ignored in the debate about juries and the law. That is, the jury deliberations reveal that when communication breaks down, the breakdown stems from more fundamental sources than simply opaque legal language. We identify a few modest pockets of juror resistance to the law and suggest why jury commonsense may in some instances be preferable to announced legal standards. We conclude that it will take more than a "plain English" movement to achieve genuine harmony between laypersons and jury instructions on the law.

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I. JURIES AND THE LAW

The standard story told about juries and the law is that the legal instructions jurors receive at the end of the trial are little more than window dressing—either the jurors simply ignore the instructions or they are hopelessly confused by the legal guidance the instructions purport to give.[1] After all, if law students struggle mightily to learn how to think like lawyers and attorneys spend a lifetime in practice arguing about how the law should be interpreted, how can anyone expect to convey complex legal principles to a lay audience with an abbreviated presentation at the end of a trial? The classic image is of the jury "being doused with a kettleful of law during the charge that would make a third-year law student blanch."[2] Yet jury trials proceed on the implicit assumption that jurors learn the relevant law from

[1] *E.g.*, JEFFREY ABRAMSON, WE, THE JURY 91 (1994); Michael J. Saks, *Judicial Nullification*, 68 IND. L.J. 1281, 1295 (1993).

[2] Skidmore v. Balt. & Ohio R.R., 167 F.2d 54, 64 (2d Cir. 1948) (quoting CURTIS BOK, I TOO, NICODEMUS 261–62 (1946)) (internal quotation mark omitted).

jury instructions.[3] Appellate courts follow suit, regularly engaging in a careful parsing of the specific language used in the instructions the jury has been given, assuming, or at least behaving as if they assume, that a legally correct instruction was necessary and sufficient to guide the jury in producing an acceptable verdict.[4] This account of court behavior suggests a serious commitment to having jurors apply the law.

An alternative view of jury instructions is that the legal system is ambivalent or even opposed to interfering with juries as they apply their laypersons' sense of justice.[5] Indeed, as we describe in detail below, some of the methods and procedures used in drafting and delivering jury instructions suggest at least a softness in the commitment to instructing juries on the relevant law.

Mock jury studies and post-trial surveys have long suggested substantial failures in the instruction process, but they have spurred little action.[6] Until now, however, we have had no direct evidence on what real juries actually do with the law during their deliberations. The new empirical research we present here fills this gap and provides a very different image of juries grappling with the law than the one elicited by mock jury studies and post-trial surveys. For the first time, the current research provides a detailed analysis of how jurors discuss the law as they reach their verdicts. The picture that emerges from the deliberations of fifty real civil juries reveals that jury instructions both succeed and fail in unexpected ways. The results suggest that legal jargon is not the primary culprit that threatens juror comprehension and application of the relevant law. Drawing on this new evidence, we identify the previously unacknowledged sources that pose obstacles to the jury's understanding and application of the law and suggest approaches to respond to them.

We begin Part II with a brief history of the development of jury instructions and a review of the empirical work assessing comprehension of instructions by the modern American jury. In Part III, we describe the Arizona Jury Project, which enabled us to examine how fifty deliberating juries in civil trials actually dealt with jury instructions, providing direct and unique empirical evidence on juror talk about the law during deliberations. In Part IV, we examine the extent and nature of deliberation

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[3] *See, e.g.*, Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 243 (1993) ("[A] reasonable jury is presumed to know and understand the law . . . ."); Parker v. Randolph, 442 U.S. 62, 73 (1979) (plurality opinion) ("A crucial assumption underlying th[e] system [of trial by jury] is that juries will follow the instructions given them by the trial judge."); Gacy v. Welborn, 994 F.2d 305, 313 (7th Cir. 1993) ("[C]ourts invoke a 'presumption' that jurors understand and follow their instructions.").

[4] *See, e.g.*, California v. Brown, 479 U.S. 538, 542 (1987) ("We think a reasonable juror would . . . understand the instruction not to rely on 'mere sympathy' as a directive to ignore only the sort of sympathy that would be totally divorced from the evidence adduced during the penalty phase.").

[5] Saks, *supra* note 1, at 1289–94.

[6] Phoebe C. Ellsworth & Alan Reifman, *Juror Comprehension and Public Policy: Perceived Problems and Proposed Solutions*, 6 PSYCHOL. PUB. POL'Y & L. 788, 788 (2000).

talk about jury instructions and assess how accurately that discussion reflects the legal principles that the jury should apply. While we find important pockets of misunderstanding, this evidence suggests that deliberating juries do not exhibit the abysmal failure in understanding the law that standard comprehension tests show, and that when jurors fail to apply the law they are given, the slippage is not attributable primarily to legal jargon. In Part V, we consider how the identified sources of juror confusion can be addressed by adopting a more holistic (as opposed to piecemeal) approach to instructing jurors, and by using a more transparent and collaborative method of communicating with the jurors about the law. We also identify some deeper problems that clear and comprehensible instructions probably cannot solve. Finally, in Part VI, we conclude by comparing the inconsistencies between our picture of how juries respond to legal instructions and the conventional wisdom as to how juries respond. We also offer a more radical approach to instructing juries that would disclose and remedy the lion's share of most miscommunication with the jury about the law.

II. THE DEVELOPMENT OF JURY INSTRUCTIONS

The earliest juries at common law were regarded as equal to the judge in their ability to interpret the law.[7] The rationale was that juries not only had personal knowledge of the facts but also shared the values of society and knew the rules of ordinary transactions on which the common law was built.[8] Judges in at least some of the American colonies recognized the right of the criminal jury to decide matters of law.[9] Moreover, judges in early American courts were often untrained in the law, so they were ill-suited to offer legal instruction.[10] In a study of seventeenth-century civil cases in Connecticut, historian Bruce Mann found "no indication that judges

[7] Harvey S. Perlman, *Pattern Jury Instructions: The Application of Social Science Research*, 65 NEB. L. REV. 520, 527 (1986); *see* Arie M. Rubenstein, *Verdicts of Consciousness: Nullification and the Modern Jury Trial*, 106 COLUM. L. REV. 959, 959–60 (2006) ("In the eighteenth century, it was commonly accepted that a defendant had the right to a jury which both found facts and determined whether the law should apply. However, by the end of the nineteenth century the jury was reduced to only a factfinding role . . . ."); *see also* Mark DeWolfe Howe, *Juries as Judges of Criminal Law*, 52 HARV. L. REV. 582 (1939) (describing the jury's acknowledged right to determine both fact and law in criminal cases in early America and the gradual erosion of that authority).

[8] This early view is reflected in the writing of John Adams: "'The general Rules of Law and common Regulations of Society, under which ordinary Transactions arrange[d] themselves, . . . [were] well enough known to ordinary jurors' . . . ." WILLIAM E. NELSON, AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760–1830, at 26 (1994) (quoting 1 LEGAL PAPERS OF JOHN ADAMS 230 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965)).

[9] Stanton D. Krauss, *An Inquiry into the Right of Criminal Juries to Determine the Law in Colonial America*, 89 J. CRIM. L. & CRIMINOLOGY 111, 121–22 (1998).

[10] JOHN H. LANGBEIN ET AL., HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS 479 (2009).

instructed juries on the law to apply."[11] With the development of the common law and the increased professionalization of the judiciary, legal instructions from the judge came to play an increasing role as an instrument of jury control.[12] By the end of the nineteenth century, as part of the increasing efforts at jury control, state legislatures and courts began to require the trial judge to instruct the jury and empowered the judge to grant a new trial when the jury's verdict was held to be inconsistent with the law.[13] In 1895, the U.S. Supreme Court held in *Sparf & Hansen v. United States*[14] that jurors did not have the right to decide questions of law, even in criminal cases. This decision solidified the importance of jury instructions, for if jurors did not have the right to decide legal issues, the trial judge had to give the jury instructions so that the jurors could apply the appropriate law to the facts they found.

Appellate courts began to review jury instructions, reversing jury decisions and ordering new trials when judges failed to state the applicable law accurately.[15] Both to increase the likelihood that their instructions would be accurate and to decrease their chance of being reversed, judges formed committees, usually with representatives from the practicing bar, to draft pattern jury instructions that could be endorsed for use in all applicable cases.[16] Most jurisdictions now have some form of pattern jury instructions,[17] and in some states, judges are required to give the pattern jury instruction whenever applicable instructions are available.[18]

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[11] BRUCE H. MANN, NEIGHBORS AND STRANGERS: LAW AND COMMUNITY IN EARLY CONNECTICUT 74 (1987). *But see* William E. Nelson, *The Eighteenth-Century Background of John Marshall's Constitutional Jurisprudence*, 76 MICH. L. REV. 893, 911–12 (1978) (describing the practice in Pennsylvania and other states in which judges, albeit sometimes confusingly, charged juries with the law to be applied).

[12] John H. Langbein, *Chancellor Kent and the History of Legal Literature*, 93 COLUM. L. REV. 547, 566–67 & n.99 (1993).

[13] Renée B. Lettow, *New Trial for Verdict Against Law: Judge-Jury Relations in Early Nineteenth-Century America*, 71 NOTRE DAME L. REV. 505, 521–26 (1996).

[14] 156 U.S. 51, 102 (1895).

[15] *Cf.* Bihn v. United States, 328 U.S. 633, 638 (1946) (finding grounds for reversal when the jury may have been influenced by an incorrect charge); Eller v. Koehler, 67 N.E. 89, 90 (Ohio 1903) (holding that incorrect instructions as to the amount of interference plaintiff must show to prove nuisance constituted reversible error).

[16] The first set of pattern jury instructions was developed by a committee of California judges and lawyers and was published in 1938. *See* ROBERT G. NIELAND, PATTERN JURY INSTRUCTIONS: A CRITICAL LOOK AT A MODERN MOVEMENT TO IMPROVE THE JURY SYSTEM 7 (1979).

[17] *Id.* at 12. Westlaw has thirty-one states in its directory of pattern jury instructions. *See Westlaw Database Directory*, WESTLAW, http://directory.westlaw.com/default.asp?GUID=WDIR00000000000000000000099223547&RS=W&VR=2.0 (last visited March 21, 2012) (listing thirty-one states); *see also* Jan Bissett & Margi Heinen, *Reference from Coast to Coast: Jury Instructions Update*, LLRX.COM (July 27, 2007), http://www.llrx.com/columns/reference53.htm (listing six additional states with pattern jury instructions available on the web); *Federal Jury Instructions Resource Page*, FED. EVIDENCE REV., http://federalevidence.com/evidence-resources/federal-jury-instructions (last visited March 21, 2012)

As the legal system came to depend on pattern jury instructions to provide a reference point for trial judges and attorneys, researchers raised questions about the effectiveness of these instructions in providing adequate guidance. Since the early 1980s, scholars have accumulated evidence documenting the failures of jury instructions, demonstrating that laypersons provided with such instructions perform poorly on comprehension tests, both in laboratory experiments[19] and on post-trial questionnaires administered to real jurors following their jury service,[20] and in a few cases, revealing inaccurate comprehension of relevant legal concepts despite jurors' participation in simulated deliberations.[21]

(providing hyperlinks to the pattern jury instructions for all federal circuits except the Second and Fourth Circuits).

[18] *E.g.*, ILL. SUPREME COURT COMM. ON JURY INSTRUCTIONS IN CIVIL CASES, ILLINOIS PATTERN JURY INSTRUCTIONS: CIVIL, intro. at 1 (2011) (quoting Illinois Supreme Court Rule 239, which provides: "(a) *Use of IPI Instructions; Requirements of Other Instructions*. Whenever Illinois Pattern Jury Instructions (IPI) contains an instruction applicable in a civil case, giving due consideration to the facts and the prevailing law, and the court determines that the jury should be instructed on the subject, the IPI instruction shall be used, unless the court determines that it does not accurately state the law.").

[19] *See, e.g.*, Robert P. Charrow & Veda R. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 COLUM. L. REV. 1306, 1316 (1979) (finding that jurors paraphrasing essential terms in instructions had an accuracy rate of 54%); Amiram Elwork et al., *Toward Understandable Jury Instructions*, 65 JUDICATURE 432, 436 (1982) (finding that accuracy was 51% for a more complex case and 65% for a less complex case); Mona Lynch & Craig Haney, *Discrimination and Instructional Comprehension: Guided Discretion, Racial Bias, and the Death Penalty*, 24 LAW & HUM. BEHAV. 337, 347 (2000) (finding that accuracy was 47% for mock jurors in a capital case); Laurence J. Severance & Elizabeth F. Loftus, *Improving the Ability of Jurors to Comprehend and Apply Criminal Jury Instructions*, 17 LAW & SOC'Y REV. 153, 179–80 (1982) (finding that overall accuracy ranged from approximately 30% to 36% across experimental conditions); Walter W. Steele, Jr. & Elizabeth G. Thornburg, *Jury Instructions: A Persistent Failure to Communicate*, 67 N.C. L. REV. 77, 78 (1988) ("[J]urors understood less than half the content of the tested instructions . . . ."); Richard L. Wiener et al., *Comprehensibility of Approved Jury Instructions in Capital Murder Cases*, 80 J. APPLIED PSYCHOL. 455, 462 (1995) (finding that the upper bound of mock jurors' accuracy for key concepts in capital case instructions was rarely above 70%); *see also* Joel D. Lieberman & Bruce D. Sales, *What Social Science Teaches Us About the Jury Instruction Process*, 3 PSYCHOL. PUB. POL'Y & L. 589 (1997) (reviewing empirical studies of the effectiveness of instructions).

[20] *See, e.g.*, Alan Reifman et al., *Real Jurors' Understanding of the Law in Real Cases*, 16 LAW & HUM. BEHAV. 539, 548 (1992) (finding that jurors responding to a post-trial survey rarely showed higher rates of accuracy on legal issues on which they had been instructed than jurors who had not been instructed on those issues); Bradley Saxton, *How Well Do Jurors Understand Jury Instructions? A Field Test Using Real Juries and Real Trials in Wyoming*, 33 LAND & WATER L. REV. 59, 88 (1998) (finding that former civil jurors responding to a post-trial questionnaire on instruction comprehension had accuracy rates of 58%).

[21] *See, e.g.*, Mona Lynch & Craig Haney, *Capital Jury Deliberation: Effects on Death Sentencing, Comprehension, and Discrimination*, 33 LAW & HUM. BEHAV. 481, 486–87 (2009) (finding that mock jurors had scores of less than 50% correct on a post-deliberation test of instruction comprehension); Richard L. Wiener et al., *Guided Jury Discretion in Capital Murder Cases: The Role of Declarative and Procedural Knowledge*, 10 PSYCHOL. PUB. POL'Y & L. 516, 555 (2004) (showing essentially no effect for deliberation in improving juror comprehension scores on tests of instructions); *see also* Phoebe C.

Yet this image of jurors befuddled by the law they are asked to apply is not in complete harmony with some other sources of evidence. First, when asked, the majority of jurors questioned in post-trial surveys report that they did not find their legal instructions difficult to understand[22] (although some report they are less convinced that other members of their jury similarly grasped the relevant law[23]). Of course, these positive juror reports may well be wrong, reflecting an overoptimistic self-evaluation. A potentially more significant indicator is that nearly all studies that have compared jury verdicts with the verdicts that judges report they would have reached in the same trial find substantial agreement between the two decisionmakers.[24] This agreement certainly could arise not because jurors understand the legal instructions, but because they share values consistent with the content of those instructions. Whatever the source of the agreement, it does provide an indication that problems in communicating legal principles may not pose a significant threat to the quality of most jury decisionmaking. It is also possible, as Professor Michael Saks suggests, that judges may produce jury agreement by influencing juries to agree with them through nonverbal cues that are likely to be most influential when the evidence and law are not clear.[25] Without a close look at how juries use (or fail to use) legal instructions during their deliberations, it is hard to evaluate the extent to which jury misunderstandings about the law play a role in the decisionmaking process or in final verdicts.

Nonetheless, there is no doubt that jury instructions are hardly the model of clear communication. Pattern jury instructions are typically

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Ellsworth, *Are Twelve Heads Better than One?*, 52 LAW & CONTEMP. PROBS. 205, 219 (1989) (finding that 51% of references to instructions during deliberation were correct statements).

[22] *See, e.g.*, SEVENTH CIRCUIT BAR ASS'N AM. JURY PROJECT COMM'N, FINAL REPORT 50 (2008), *available at* http://www.7thcircuitbar.org/associations/1507/files/7th%20Circuit%20American%20Jury%20Project%20Final%20Report.pdf; Dennis J. Devine et al., *Deliberation Quality: A Preliminary Examination in Criminal Juries*, 4 J. EMPIRICAL LEGAL STUD. 273, 285 (2007) (reporting that 84% of jurors responded that the law to be applied was clear and understandable after instructions).

[23] Shari Seidman Diamond, *What Jurors Think: Expectations and Reactions of Citizens Who Serve as Jurors*, *in* VERDICT: ASSESSING THE CIVIL JURY SYSTEM 282, 282–305 (Robert E. Litan ed., 1993).

[24] HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 58–68 (1966) (78% agreement in 3576 criminal trials and 78% agreement in approximately 4000 civil trials, with hung juries treated as half agreement, half disagreement); *see also* Shari Seidman Diamond, *Truth, Justice, and the Jury*, 26 HARV. J.L. & PUB. POL'Y 143, 150 n.28 (2003) (finding 77% agreement in forty-six civil trials and 74% agreement in forty trials in which liability was contested (citing Shari Seidman Diamond et al., *Juror Discussions During Civil Trials: Studying an Arizona Innovation*, 45 ARIZ. L. REV. 1 (2003))); Theodore Eisenberg et al., *Judge-Jury Agreement in Criminal Cases: A Partial Replication of Kalven and Zeisel's* The American Jury, 2 J. EMPIRICAL LEGAL STUD. 171, 181 (2005) (finding 75% agreement in 290 criminal trials); Larry Heuer & Steven Penrod, *Trial Complexity: A Field Investigation of Its Meaning and Its Effects*, 18 LAW & HUM. BEHAV. 29, 48 (1994) (finding 74% agreement in seventy-seven criminal trials and 63% agreement in sixty-seven civil trials). For a review, see Jennifer K. Robbennolt, *Evaluating Juries by Comparison to Judges: A Benchmark for Judging?*, 32 FLA. ST. U. L. REV. 469 (2005).

[25] Saks, *supra* note 1, at 1290.

written by committees of judges and attorneys who represent opposing parties (i.e., prosecutors and defense attorneys in criminal cases and plaintiff and defense attorneys in civil cases). The legal expertise of these groups appropriately prepares them to produce pattern instructions that can save the time of lawyers and judges during trial. It also reduces the likelihood of an appeal or reversal due to an erroneous instruction. Yet legal accuracy and vetting by multiple legal constituencies do not guarantee that the instructions will be comprehensible to laypersons. Even achieving legal accuracy can be a challenge when the law itself is ambiguous. Committees writing pattern jury instructions have traditionally turned to the wording of statutes and to case law to decide on the wording of instructions, but have given little or no attention to communicating meanings to nonlawyers. The results include instructions like those once given to Illinois juries deciding on whether or not to impose the death penalty: "If you do not unanimously find from your consideration of all the evidence that there are no mitigating factors sufficient to preclude imposition of a death sentence, then you should sign the verdict requiring the court to impose a sentence other than death."[26] Although that example includes relatively few words that would be unfamiliar to laypersons,[27] the sentence construction—with its four negatives—fails to provide a clear description of the weighing standard that laypersons should apply and displays the tortured construction that can result when a committee is the author of a communication.[28]

Recent reform efforts, such as providing preliminary instructions and supplying jurors with written copies of the instructions, are designed to assist the jury in understanding and applying the law.[29] Although it might fairly be argued that these reforms are obvious improvements that are long

[26] Gacy v. Welborn, 994 F.2d 305, 314 (7th Cir. 1993) (quoting 1987 Illinois Pattern Jury Instructions).

[27] Nonetheless, some informal testing that linguist Judith Levi did with college students suggested that the word "preclude" is not unambiguous: many of the students thought it meant the opposite of "conclude." Judith N. Levi, *Evaluating Jury Comprehension of Illinois Capital-Sentencing Instructions*, 68 AM. SPEECH 20, 28–29 (1993).

[28] This convoluted language was later revised to read: "If after weighing the factors in aggravation and mitigation one or more jurors determine that death is not the appropriate sentence, then you should sign the verdict requiring the court to impose a sentence [(other than death) (of natural life imprisonment)]." 1 ILL. SUPREME COURT COMM. ON PATTERN JURY INSTRUCTIONS IN CRIMINAL CASES, ILLINOIS PATTERN JURY INSTRUCTIONS—CRIMINAL § 7C.06A (4th ed. 2000 & Supp. 2011) (to be used in all cases for offenses committed on or after November 13, 2003). It is unclear the extent to which the revised language produced clarity, but the instruction is now moot in light of the 2011 decision to abolish the death penalty in Illinois.

[29] *See* B. Michael Dann & George Logan III, *Jury Reform: The Arizona Experience*, 79 JUDICATURE 280, 281–82 (1996); 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, 437–42 (1985); William W. Schwarzer, *Reforming Jury Trials*, 1990 U. CHI. LEGAL F. 119, 129–31; *see also* AM. BAR ASS'N, PRINCIPLES FOR JURIES AND JURY TRIALS princ. 6.C.1, at 29 (2005) (endorsing preliminary instructions, and 14.B, advocating written copies of instructions for each juror).

overdue, the ability of these aids to offer significant assistance may be limited unless the instructions themselves are comprehensible.[30] As the legal community has acknowledged, current jury instructions frequently fail to achieve clarity. Indeed, Principle 14.A of the 2005 American Bar Association's *Principles for Juries and Jury Trials* addresses this issue explicitly by providing: "All instructions to the jury should be in plain and understandable language."[31] The commentary recognizes that "jury instructions remain syntactically convoluted, overly formal and abstract, and full of legalese" and suggests that communication with the jury often suffers as a result.[32] Nonetheless, despite the fact that sporadic efforts to improve the comprehensibility of instructions show that substantial improvements can be made,[33] only one jurisdiction has taken on the task of substantially rewriting its pattern jury instructions in "plain English."[34]

The research we present here on real jury deliberations suggests that the problem of miscommunication may be both overstated and mischaracterized. That is not to say that jury instructions always provide clear guidance. Frequently, they do not. In addition, jurors sometimes resist following legal instructions that they understand. As a whole, however, communication and jury compliance with the law may be far better than common wisdom or experimental studies suggest. Moreover, the problems that do arise often emerge from weaknesses not previously identified: structural problems and omissions. In some instances, addressing them would require the legal system to confront questions about the legitimacy of juror considerations that are inconsistent with legal doctrine and legal doctrines that are themselves opaque or reflect ambivalent preferences for how jurors should behave. This new information presents a significant set of previously unconsidered challenges. Remedies require more dramatic

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[30] Even these reforms have not been uniformly embraced. For example, the National Center for State Courts (NCSC) *State-of-the-States Survey* found that in nearly one out of three jury trials that took place in the previous year in state courts, the jury did not receive a written copy of the instructions (and in one of every five federal jury trials, no copy was provided). GREGORY E. MIZE ET AL., THE STATE-OF-THE-STATES SURVEY OF JURY IMPROVEMENT EFFORTS: A COMPENDIUM REPORT 32 tbl.24 (2007).

[31] AM. BAR ASS'N, *supra* note 29, at princ. 14.A, at 107.

[32] *Id.* at princ. 14.A cmt. subdiv. A, at 108.

[33] *See, e.g.*, AMIRAM ELWORK ET AL., MAKING JURY INSTRUCTIONS UNDERSTANDABLE 45–49 (1982); Shari Seidman Diamond & Judith N. Levi, *Improving Decisions on Death by Revising and Testing Jury Instructions*, 79 JUDICATURE 224, 232 (1996); James Luginbuhl, *Comprehension of Judges' Instructions in the Penalty Phase of a Capital Trial: Focus on Mitigating Circumstances*, 16 LAW & HUM. BEHAV. 203, 210–17 (1992) (finding that revising North Carolina's pattern jury instructions could substantially improve jury comprehension).

[34] California included linguist Peter Tiersma on the pattern jury instructions committee. For Tiersma's review of the committee's approach, the problems it sought to address, and its solutions, see Peter Tiersma, *The Rocky Road to Legal Reform: Improving the Language of Jury Instructions*, 66 BROOK. L. REV. 1081 (2001).

changes than simply reducing the use of legal jargon and tinkering with awkward sentence construction.[35]

Courts focusing on simple linguistic translation as the big obstacle to juror comprehension have tended to resist making changes to the magic language of statutes and tradition.[36] Thus, courts typically respond to questions from the jury about instructions either by simply rereading the original language or by telling the jury to look again at the instructions to determine the relevant law.[37] Such passive responses can only be justified if the court is convinced that clear communication is not possible. Moreover, "doing no harm" is the most effective way for a trial court to reduce the likelihood of being reversed for misstating the law.[38]

As our close study of fifty deliberations reveals, the failure to actively address the variety of sources leading to miscomprehension of instructions has consequences: juries may reach decisions that are inconsistent with the law they are ostensibly being asked to apply. While most verdicts appeared to be unaffected by problems with the instructions or resistance to a relevant legal principle, the juries in several instances awarded damages that were to some degree influenced by instruction errors. Thus, although our results show far more appropriate application of relevant law than laboratory jury research would have predicted, they also reveal pockets of unnecessary miscommunication.

To obtain a better picture of the interaction between juries and the law that is grounded in what jurors actually do, we now turn to the evidence from the deliberations of real juries.

III. THE ARIZONA JURY PROJECT

A. The Background of the Project

The Arizona Jury Project, in which we observed actual jury deliberations,[39] presented a unique occasion to observe how juries handle jury instructions. The opportunity to study these jury deliberations arose because an innovative group of judges and attorneys in Arizona, appointed

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[35] We do not underestimate the challenge of writing legally accurate jury instructions that avoid legal jargon and convoluted sentences. One of us (S.D.), in serving on the Seventh Circuit Criminal Pattern Jury Instructions Committee, has been impressed by the difficulty in achieving both the accuracy and clarity of each instruction, despite strenuous efforts to accomplish those goals.

[36] Tiersma, *supra* note 34, at 1084.

[37] Ellsworth, *supra* note 21, at 223–24; 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, 403 n.14 (1990); Peter M. Tiersma, *Jury Instructions in the New Millennium*, CT. REV., Summer 1999, at 28, 31.

[38] *See* Darryl K. Brown, *Regulating Decision Effects of Legally Sufficient Jury Instructions*, 73 S. CAL. L. REV. 1105, 1115 (2000).

[39] *See* Shari Seidman Diamond et al., *Juror Discussions During Civil Trials: Studying an Arizona Innovation*, 45 ARIZ. L. REV. 1, 16–22 (2003).

by the Arizona Supreme Court, examined their judicial system and proposed changes to their rules in an attempt to optimize jury performance.[40] One such rule was a controversial innovation permitting jurors to discuss the case among themselves during breaks in the trial.[41] To evaluate the effect of allowing these discussions, the Arizona Supreme Court issued an order permitting us to conduct an experiment in which jurors in randomly assigned cases were instructed that they could discuss the case and those in the control cases were given the traditional admonition not to discuss the case.[42] The court order also permitted us to videotape the jury discussions and deliberations.[43]

B. Selection of Jurors and Cases

The jurors, attorneys, and parties were promised that the tapes would be viewed only by the researchers and only for research purposes. Jurors were told about the videotaping project when they arrived at court for their jury service. If they preferred not to participate, they were assigned to cases not involved in the project. The juror participation rate was more than 95%.[44] Attorneys and litigants were less willing to take part in the study. Some attorneys were generally willing to participate when they had a case before one of the participating judges; others consistently refused. A case could be included only if all attorneys and litigants agreed. The result was a 22% yield among otherwise eligible trials.

The fifty cases in the study reflected the usual mix of cases dealt with by state courts: twenty-six motor vehicle cases (52%), four medical malpractice cases (8%), seventeen other tort cases (34%), and three contract cases (6%).[45] The forty-seven tort cases in the sample varied from the common rear-end collision with a claim of soft-tissue injury to cases

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[40] ARIZ. SUPREME COURT COMM. ON MORE EFFECTIVE USE OF JURIES, JURORS: THE POWER OF 12, at 2–3 (1994).

[41] Diamond et al., *supra* note 39, at 4, 11–14.

[42] *Id.* at 17. In preparing this Article, we tested and found no impact of the opportunity to discuss the evidence during breaks during the trial on talk about the law.

[43] *Id.* For a detailed report on the permissions and security measures that the project required and the results of the evaluation, see *id.* As part of their obligations of confidentiality under the Supreme Court order, as well as additional assurances to parties and jurors undertaken by the principal investigators, the authors of this Article have changed certain details to disguise individual cases. The changes do not, however, affect the substantive nature of the findings that are reported.

[44] *Id.* Although we cannot be certain that the cameras had no effect on their behavior during deliberations, the behavior during deliberations at times included comments that the jurors presumably would not have wanted the judges or attorneys to hear.

[45] Our case distribution is similar to the breakdown for civil jury trials for the Pima County, Arizona Superior Court for the year 2001: 62% motor vehicle tort cases, 8% medical malpractice cases, 23% other tort cases, and 6% contract cases. E-mail from Nicole L. Waters, Nat'l Ctr. for State Courts, to authors (Aug. 2, 2004) (on file with authors).

involving severe and permanent injury or death. Awards ranged from $1000 to $2.8 million, with a median award of $25,500.

C. Data Collection

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

D. The Data

1. The Trials.—We transcribed the opening and closing arguments in each case from the trial videotape. We also created a detailed roadmap of the trial from the videotaped trial. The roadmap described the order in which testimony occurred, reconstructing in substantial detail what each witness said and indicating whether the testimony emerged on direct examination, cross-examination, or redirect. In addition, the roadmap included any objections from counsel and the outcome of those objections. The roadmap also included the questions that jurors submitted to the judge during the trial and the responses that witnesses gave to the juror questions that the witnesses were permitted to answer.[46]

2. The Instructions.—We obtained the complete set of instructions that the court delivered to the jury in each trial. Each juror received a copy of the final instructions for use during deliberations, consistent with the practice in Arizona.[47] The instructions averaged seventeen pages and varied in length between thirteen and thirty-three pages. The instructions always began with the same seven pages of boilerplate instructions (e.g., "What the attorneys said is not evidence," "Do not concern yourselves with the reasons for my rulings on the admission of evidence," "You should not speculate or guess about any fact.").[48] An eighth page provided an instruction on evaluating expert testimony and was included in forty-seven of the fifty cases—all of the cases in which an expert testified.[49] These boilerplate instructions were followed by a set of case-specific instructions that varied across trials, depending on the nature of the claims and the evidence (e.g., what the plaintiff must prove, the life expectancy of individuals the same age as the plaintiff, the particular categories of

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[46] Diamond et al., *supra* note 39, at 19.

[47] *See* Dann & Logan, *supra* note 29, at 282.

[48] Copies of the instructions are on file with the authors.

[49] At the beginning of the trial, the judge delivered a set of boilerplate instructions that were also included in the final instructions. The preliminary instructions also included: procedural instructions on note-taking; submitting questions for witnesses during trial; not doing outside research or speaking with parties, lawyers, or witnesses; and, for cases in which the jurors were permitted to discuss the case during breaks, instructions on how and when such discussions could occur.

damages to consider if the defendant is found liable, the directive to compensate only for aggravation of a preexisting condition). In addition to the instructions, each jury was provided with verdict forms, which provided supplementary information on the legal requirements of the task (e.g., in a comparative fault case, space on the verdict form for allocating 100% of liability across two parties).

Jurors also received instructions on the law from the judge during the course of the trial, including during deliberations. These instructions occurred in response to one of two events. The first arose when the judge responded to a question from the jurors about the law (e.g., "Since the defendant has admitted negligence in causing the collisions does that mean we must find in favor of the plaintiff?") or, more often, when a juror question asked for information about a topic the jurors were not permitted to consider (e.g., a question about insurance or whether one of the parties received a citation after the accident). The second occasion for an instruction given during the course of the trial arose if one of the attorneys raised an objection and the judge sustained it. We analyzed all juror talk during deliberations about instructions received either during the trial, including during deliberations, or in preliminary or final instructions.

3. Data from the Deliberations.—We created verbatim transcripts of all deliberations, producing 5276 pages of deliberations transcripts for the fifty trials. The deliberations consisted of 78,864 comments by the jurors, each of which was coded on a variety of dimensions, including whether the comment involved a reference to the instructions. A comment was defined as a statement or partial statement that continued until the speaker stopped talking or until another speaker's statement or partial statement began. If another speaker interrupted, but the original speaker continued talking, the continuation was treated as part of the initial comment. For example, here Juror #2 is in mid-sentence when Juror #4 interrupts to agree before Juror #2 completes his comment:

JUROR #2:	Negligence and cause of death . . . [are] also in the fact of what you don't do—
JUROR #4:	I, I agree.
JUROR #2:	—to prevent it.

In this instance, Juror #2 was credited with one comment and Juror #4 was credited with one comment.

4. Post-Trial Questionnaires.—At the end of the trial, each juror and judge completed a questionnaire about the trial. One of the questions asked them to rate how easy or difficult it was to understand the jury instructions on a seven-point scale (1 = very difficult to 7 = very easy).

IV. ANALYSIS OF JURY TALK ABOUT THE LAW DURING DELIBERATIONS

A. Defining Talk About the Instructions

We coded each comment a juror made that referred to one of the concepts covered by the jury instructions (e.g., the applicable standard of care, the burden of proof, categories of potential damages). Before coding a case, we closely examined the instructions for that case to identify terms and phrases that the jurors might use if they were drawing from the instructions, but would be unlikely to use in the absence of the instructions. The specialized words and phrases in the instructions that presumptively triggered an instruction code varied from case to case. For example, a slip-and-fall case included the instruction: "One of the tests used in determining whether a condition is unreasonably dangerous is whether it is open and obvious." When jurors used the phrases "unreasonably dangerous" or "open and obvious" during deliberations, this triggered the presumption that the comment was stimulated by the instructions. Thus, when Juror #1 said, "I don't feel like it's *unreasonably dangerous* . . . ," we coded the comment as an instruction reference.

In talking about the instructions, jurors sometimes directly referred to the fact that the judge had instructed them on an issue (e.g., "The judge told us not to speculate."). More often, however, the reference was indirect, either because the juror simply incorporated the judge's directive (e.g., "We're not supposed to speculate.") or because the juror adopted the language or concept of the instruction (e.g., in a slip-and-fall case, "But did he actually know about the dangerous condition?"). We counted jurors' references to the judicial instructions that were either literal or conceptual. Literal references explicitly used the language of the instructions (e.g., "We shouldn't compensate for her preexisting condition."), while conceptual references conveyed the same idea without using the literal language of the instruction (e.g., "We know that her leg hurt before the accident—we have to figure out how much of the expenses were due to the accident.").

We did not code a comment as instruction-based if a juror might have used the word or phrase or discussed a topic in the absence of an instruction. For example, when a juror said, "I don't think it was his fault," we did not code this statement as an instruction comment because a juror who watched the trial but never heard the judge's instructions might easily have made this comment, even using the term "fault" in discussing the case. In contrast, if the juror said, "To find him at fault, we have to decide that his negligence caused the plaintiff's injury," the comment was treated as an instruction reference because we could infer that the juror was drawing on the instructions to produce this comment. This approach was conservative in counting instruction references because we did not count some law-related comments that might very well have been stimulated by the instructions.

We also counted talk about instructions conservatively when the jurors discussed damages. Each set of jury instructions included a list of damage categories tailored to the particular case that jurors were to consider if they found the defendant at fault (e.g., lost wages, medical expenses). As a result, every mention of a damage category could be treated as a reference to the instructions as jurors offered their preferred awards in the case (e.g., "Me? I agree with what's been said—about $1500 for lost wages."). If we had considered every remark that mentioned a damage category as an instruction reference, we would have coded much of the damages discussion as talk about the instructions, which would have produced a highly misleading result. To avoid overcounting, we coded only the first instance in which any juror mentioned a damage category, for example, "We have to decide how much to give him for lost wages." We did not code references to lost wages in the conversation that followed on that topic (i.e., as jurors decided how much to award for lost wages). If the jurors changed the topic (e.g., from lost wages to medical expenses) and a juror later reintroduced the earlier topic of lost wages, we coded the reintroduction as an instruction reference. Thus, we treated the first instances as reflecting the influence of the instruction—as pointing the jurors toward a topic that they were instructed to discuss. We considered any subsequent mention of the damage category within the same line of conversation as less clearly linked to the instructions and therefore did not code them as instruction references. We did, however, code as instruction references all comments that referred to the meaning of the category (e.g., "What do they mean by the nature, extent, and duration of the injury?"), including explicit errors about the category (e.g., if a juror said that the jury was obligated to award the full amount of medical expenses covered in the submitted bills, rather than what they determined was a reasonable amount, we coded this as an instruction error). This coding system produced a reliable set of coding decisions.[50]

Because of our decisions to avoid treating ambiguous references to legal-concepts language as referring to the instructions and to code only the first reference to a damage category as referring to the instructions, our assessment of the amount of talk about instructions may somewhat undercount juror references to instructions. Because we *did* count every

[50] To assess the reliability of this coding, two coders independently coded each comment in five deliberations to determine whether or not it was an instruction reference. Coding was done using the index described by Charles P. Smith for analysis of qualitative text by dividing twice the number of agreements on a category by the sum of the frequency that each coder used the category. *See* Charles P. Smith, *Content Analysis and Narrative Analysis*, *in* HANDBOOK OF RESEARCH METHODS IN SOCIAL AND PERSONALITY PSYCHOLOGY 313, 313–27 (Harry T. Reis & Charles M. Judd eds., 2000). The reliability ranged from 0.84 to 0.96, averaging 0.89 across the five cases. In general, reliability indicators at this level are viewed as having "almost perfect" reliability. *See* J. Richard Landis & Gary G. Koch, *The Measurement of Observer Agreement for Categorical Data*, 33 BIOMETRICS 159, 165 (1977) (characterizing the strength of different agreement values).

error whenever it occurred,[51] the rate of errors as a proportion of this conservative measure of talk about instructions provides a generous assessment of the error rate. Despite this approach, the results show that the accuracy of juror talk about the instructions was unexpectedly high in light of the previous evidence on juror comprehension of instructions.[52]

B. An Overview of Talk About the Law

1. How Much Do Jurors Talk About the Law?.—Across the fifty cases, the jurors made 13,519 comments about the law, constituting 17.1% of all comments made during deliberations.[53] The jurors thus focused significant attention on the legal guidance they received from the instructions, providing convincing evidence that jurors do not simply ignore jury instructions.[54]

Another indicator of the attention jurors paid to the instructions is how quickly instructions entered deliberations as a topic for consideration. We excluded foreperson selection, which typically occurs at the very beginning of deliberations in response to the final instructions that jurors receive,[55] as well as any preliminary procedural comments based on the instructions (e.g., "We don't all have to agree to reach a verdict."). Even with these exclusions, the first exchange on the substance of the applicable law (i.e., at least two jurors exchanging substantive legal comments) occurred early in the deliberations on most juries: on thirty-eight of the fifty juries (76%) it occurred during the first ten minutes. A majority (twenty-six) of the juries exchanged comments about the substantive instructions during the first five minutes of deliberations, and another twelve had some exchange during the first ten minutes.

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[51] See *infra* note 64 for an explanation.

[52] *See infra* Part IV.B.4.

[53] The range was between 3.5% and 38.2% per case. Because the deliberations varied in length, the average percent per case differed slightly from the percent of total comments across cases (16.5% per case versus 17.1% across all cases).

[54] *See also* REID HASTIE ET AL., INSIDE THE JURY 85 (1983) (describing a jury simulation involving a criminal case in which nearly a quarter of the juror comments related to the instructions). Our lower rate may reflect differences between criminal and civil cases or between real and simulated juries, but it may also be due to our more conservative approach to attributing juror comments to the influence of instructions. In contrast, Hastie and his colleagues coded any discussion of determining whether or not to believe a witness as an instruction reference whether or not the juror mentioned the instruction on how to judge witness credibility. *See* Coding Instructions for Reid Hastie Study (on file with authors). On the ground that individuals naturally, even in the absence of instructions, would attempt to figure out who was telling the truth when confronted with competing accounts in a trial, we took the more conservative approach of coding those comments as instruction references only when they referred to the instruction or the specific criteria it included.

[55] CIVIL JURY INSTRUCTIONS COMM., STATE BAR OF ARIZ., REVISED ARIZONA JURY INSTRUCTIONS (CIVIL) Standard 15, at 30 (3d ed. 1997) [hereinafter RAJI (CIVIL) 3d] ("The case is now submitted to you for decision. When you go to the jury room you will choose a foreman. He or she will preside over your deliberations.").

This active use of the instructions by the juries also included reading portions of the instructions aloud during deliberations. On forty-six of the fifty juries (92%), at least one juror read an instruction aloud to the group, and in nearly half of the trials (46%), at least half of the jurors each read at least one instruction aloud. Thus, at least in a jurisdiction like Arizona, where each juror receives a copy of the instructions, the availability of the document as a reference makes it possible for jurors to consult it—and they do. Note that although the national trend appears to favor giving juries at least one copy of the jury instructions,[56] only a minority of courts currently supply all jurors with their own copies.[57]

Finally, we recognized that jurors might discuss instructions with some frequency but focus on only a few of them, ignoring the bulk of the topics that the instructions cover. To assess juror coverage of the instructions, we analyzed how many of the legally relevant case-specific topics covered in the instructions were referred to by jurors during deliberations. For example, in a case involving a simple auto accident in which liability is contested and the plaintiff is claiming permanent injury, case-specific topics covered by the instructions would include: (1) the claim; (2) the requirement to show negligence, causation, and damages; (3) the burden of proof; (4) the damages that can be considered; and (5) the average life expectancy for a person the plaintiff's age. If the defendant was alleging that the plaintiff had a preexisting injury, the instructions would also include an instruction telling the jury that if it awarded damages, those damages should assess the degree to which any preexisting condition had been made worse by the defendant's fault.[58] Similarly, if the accident involved allegations of comparative fault, the jury would also be instructed on the allocation of percentage of fault.[59]

We identified 381 case-specific (i.e., non-boilerplate) instruction topics across the fifty cases, an average of 7.6 per case, and analyzed whether each instruction topic was mentioned at least once during deliberations. In the course of a jury's deliberations, some instructions became irrelevant. For

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[56] MIZE ET AL., *supra* note 30, at 31–32 & tbl.24 (state courts: 68.5%; federal courts: 79.4%).

[57] *Id.* (state courts: 32.6%; federal court: 39.0%).

[58] Jurors received the following instruction in sixteen cases, and in one additional case, the second paragraph was given:

> Plaintiff is not entitled to compensation for any physical or emotional condition that pre-existed the fault of defendant. However, if plaintiff had any pre-existing physical or emotional condition that was aggravated or made worse by defendant's fault, you must decide the full amount of money that will reasonably and fairly compensate plaintiff for that aggravation or worsening.
>
> You must decide the full amount of money that will reasonably and fairly compensate plaintiff for all damages caused by the fault of defendant, even if plaintiff was more susceptible to injury than a normally healthy person would have been, and even if a normally healthy person would not have suffered similar injury.

RAJI (CIVIL) 3d, *supra* note 55, Personal Injury Damages 2, at 113.

[59] *See id.* at 40. Jurors were instructed on comparative fault in fourteen cases.

example, if a jury decided that the defendant was not negligent and therefore not at fault, the instructions on damages became irrelevant. If a jury decided that the defendant was at fault but the plaintiff had no permanent injury, the instruction on life expectancy became irrelevant.[60] Of the 381 case-specific instruction topics, 22 were legally irrelevant in light of the particular jury's decisions on other issues. The juries specifically talked about 269 of the 359 remaining topics, or 74.9% of the relevant case-specific instruction topics, during their deliberations. The analysis of coverage thus indicates that the jurors were generally attentive to the instructions. In a few instances, however, the jurors did fail to turn to the instructions for guidance and that failure may have contributed to juror confusion on the relevant law.

2. Predicting the Amount of Talk.—We might expect that longer trials or, more specifically, lengthier jury instructions, would require jurors to spend more time focusing on the jury instructions. It appears, however, that jurors allocate their deliberation time to instructions based on less obvious criteria. In each case, we asked the judge to rate how easy or difficult it was to understand the jury instructions in the case on a one to seven scale (1 = very difficult to 7 = very easy). The judicial rating of the difficulty of the instructions was a significant predictor of the percentage of time jurors devoted to the judicial instructions during their deliberations ($r = -0.31$, $p < 0.03$).[61] Neither the length of the trial ($r = 0.12$, $p > 0.40$) nor the number of pages of instructions ($r = 0.13$, $p > 0.30$) was a significant predictor of the time jurors spent on instructions. In a multivariate analysis that included all three potential predictors, judicial rating of instruction difficulty remained the only significant predictor ($R^2 = 0.10$, $p < 0.03$).[62]

3. The Instructions that Juries Talk About.—As noted above, all juries received three kinds of instructions. First, every jury received the boilerplate preliminary and final instructions describing general rules applicable to all cases. Second, each jury also received case-specific instructions that varied across cases and included final instructions as well as judicial rulings on objections during trial and judicial responses to jury questions submitted on a legal issue during trial or deliberations. The third

[60] In twenty-one of the cases, the jurors received an instruction on life expectancy. The jurors mentioned the instruction in ten of the cases. They did not mention the life expectancy instruction in six cases in which they found in favor of the defense on liability or in another four cases in which they rejected the plaintiff's claim of continuing injury. Thus, in only one of the twenty-one cases did they fail to discuss this instruction when it was legally relevant.

[61] N = forty-nine cases for all of these correlations due to one missing value for a judge's rating of instruction complexity.

[62] R^2 is the squared multiple correlation, which represents the proportion of the variation in the response variable (here, the time jurors spent on instructions) that is explained by the model that includes all three predictor variables. In contrast, each r is simply the correlation between one predictor variable and the response variable.

type of instruction, instructions about the verdict forms, was delivered just before the jury began its deliberations when the judge read the verdict forms to the jury. The instructions about the verdict forms were a hybrid of boilerplate (e.g., directions to select a foreperson) and case-specific information (e.g., information on the verdict forms that depended on the claims in the case). To track where in the instructions the jurors focused their attention, we identified whether each juror's comment referred to a general (boilerplate) instruction, a specific (case-specific) instruction, or a verdict form (hybrid) instruction.

Not surprisingly, the primary focus of the jurors was on case-specific instructions, which accounted for 72.2% of all instruction references. Comments about the verdict form instructions, which occurred primarily at the end of deliberations, accounted for 10.3% of the instruction references. Nonetheless, jurors did not ignore the boilerplate instructions: these instructions accounted for 17.5% of the juror comments relating to instructions. For example, regarding the admonition not to speculate:

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

On more than half of the juries (62%), at least one juror warned another juror not to speculate, and in a majority of those cases, the juror made a specific reference to the judge's admonition.

Similarly, the boilerplate instructions told the jurors to "[c]onsider all of the evidence in the light of reason, common sense, and experience," and jurors noted that guidance. In almost a third (30%) of the cases, jurors referred to the instruction telling them to use their common sense.[63] As we indicate below, all three types of instructions (boilerplate, case-specific, and hybrid) were sources of some confusion for the jurors.

4. Accuracy of Talk About Instructions.—We coded the accuracy of each comment a juror made about a legal instruction.[64] As Table 1 indicates,

[63] The attorneys tended to reinforce the advice that the jurors should use their common sense: one or both attorneys urged it in their closing argument in more than two-thirds (68%) of the cases.

[64] Inaccurate comments included any comment that erroneously interpreted or misapplied an instruction or advanced an inaccurate legal proposition. We also coded as errors questions about the law that included or implicitly suggested an incorrect answer (e.g., "Do we need to find the defendant liable if she admitted she was negligent?"). The rationale was that the question indicated juror confusion about the law. If a comment included both correct and incorrect content, it was coded as incorrect (e.g., "We should not speculate. Therefore, I think it's going to be difficult to prove him guilty beyond a reasonable doubt."). Full coding instructions are on file with the authors. The first author and law student assistants categorized comments about instructions as accurate or inaccurate and discussed all questions that arose. In addition, two experienced evidence professors reviewed a set of comments that had been coded as

most of the instruction comments (79.2%) were accurate across the fifty cases.

TABLE 1: JUROR TALK ABOUT INSTRUCTIONS DURING DELIBERATIONS

Nature of Instruction Comment	Percent	N
Accurate	79.16%	(10,702)
Comprehension Error	16.04%	(2169)
Resistance Error	3.24%	(438)
Accuracy Ambiguous	1.55%	(210)
Total Instruction Comments	99.99%	(13,519)

Table 1 also reveals that a total of 19.3% of the comments about instructions were incorrect (an average rate of 20.3% per case), and in a small percentage of instances (1.6%) the accuracy of the juror's comment was ambiguous. Thus, the overall accuracy of discussion about the law was high. Nonetheless, jurors made 2607 legally inaccurate comments across the 50 cases, an average of 52 errors per case. The errors were not evenly distributed across the cases: half of the cases had 30 or fewer inaccurate comments, but 6 deliberations had more than 100 errors. The errors ranged from 0.0% to 67.8% of the instruction talk in these deliberations, with a median of 18.2%.

The strongest predictor of the *number* of instruction errors was the length of the jury instructions ($r = 0.48$, $p < 0.001$). Together with the jurors' mean rating of instruction difficulty ($r = -0.41$, $p < 0.01$), this accounted for 31% of the variation in number of errors across cases ($R^2 = 0.31$, $p < 0.001$).[65] Of course, deliberations tended to last longer as the trial length increased ($r = 0.64$, $p < 0.001$) and as jury instructions lengthened ($r = 0.34$, $p < 0.02$), so it is not surprising that the number of comments about instructions, including incorrect ones, climbed as deliberations lengthened ($r = 0.82$, $p < 0.001$). To test what predicted accuracy of instruction talk, while controlling for the length of deliberations, we examined possible predictors of the *percent* of instruction comments that were inaccurate. There was no significant relationship between trial length, instruction length, or judge or jury ratings of instruction difficulty, and the percent of comments about instructions that

accurate or inaccurate. Both of them labeled one comment as an error that we had coded as accurate. The juror had said: "Fault is negligence if it is *the* cause [rather than *a*] cause of the plaintiff's injury." Although the juror then concluded that the defendant had not failed to use reasonable care so that the mistake had no effect on the juror's position on liability, the coding decision was incorrect.

[65] The length of the trial and the judge's rating of the difficulty of the instructions were also significantly correlated with the number of errors ($r = 0.31$, $p < 0.01$ for length of the trial and $r = -0.43$, $p < 0.01$, for judge's rating), but did not account for further variance beyond that accounted for by the length of instructions and juror rating of complexity.

were incorrect (correlations ranged from 0.02 to -0.22). Thus, longer jury instructions are simply associated with longer deliberations and more talk about instructions, both accurate and inaccurate.

Many of the errors jurors made in discussing the instructions were minor (e.g., making a statement that all jurors had to sign the verdict form, although the instructions said that only the presiding juror would sign if the jury was unanimous). Other errors had serious implications capable of affecting case outcomes (e.g., "Is that [the defendant's] problem, or is that [the agent's] problem?" in a case in which the instructions specified that the named agent was an agent of the defendant for purposes of the claims involved in the case).

Miscomprehension was the primary source of the instruction errors (83.2%). The remaining errors (16.8%) reflected resistance rather than juror confusion, occurring when a juror understood but rejected the appropriate legal standard.[66] In the analysis that follows, we treat the comprehension and resistance errors separately. Although the resistance errors were substantially less frequent than comprehension errors, with 8.8 resistance errors per case as opposed to 43.4 comprehension errors per case, the resistance errors reveal areas of modest conflict between jurors and the law. Arising from active rejection of legal rules rather than from confusion about what those rules are, resistance errors call for a different response.

C. Comprehension Errors

1. Overview of Comprehension Errors.—The comprehension errors revealed during deliberations took three forms.[67] The first type, language errors, arose when a juror misunderstood the meaning of a word or phrase, either because the word or phrase was an unfamiliar legal term (e.g., tortious inference) or because the juror failed to apply the plain language of the instruction (e.g., the juror failed to notice an "or" or an "and"). The other two types of errors resulted from structural weaknesses in the instructions (e.g., the juror identified what appeared to be, but were not, inconsistencies between components of the instructions, or made

[66] To check the reliability of whether an error was a resistance error rather than a comprehension error, two coders examined all instruction errors in the same six cases and the conversation that preceded and followed each instruction error, coding each error comment as: (1) a comprehension error or (2) a resistance error, based on: (a) expressing explicit defiance in the comment itself, (b) continuing to offer inaccurate comments after at least two corrections from other jurors without disputing the accuracy of their corrections, or (c) persisting in the error after the judge responded to a question with a clear correction. Using the index described by Smith, *supra* note 50, reliability ranged from 0.89 to 1.0, averaging 0.95 across the six cases. Resistance comments are discussed *infra* Part IV.D.

[67] These three types of errors reflected a total of eleven sources of error, discussed *infra* Part IV.C.2–IV.C.4. To assess the reliability of this coding, two coders independently coded the comments in eight deliberations to determine the source of each error. Using Cohen's Kappa statistic of inter-rater agreement for categorical items, *see* Jacob Cohen, *A Coefficient of Agreement for Nominal Scales*, 20 EDUC. & PSYCHOL. MEASUREMENT 37 (1960), the inter-rater reliability was 0.95.

connections where none existed) or from omission errors, which occurred when the instructions did not explicitly cover a topic or issue (e.g., the instructions listed the legally relevant elements that would fairly compensate the plaintiff, but did not explicitly rule out attorney's fees as a legally relevant element for compensation). Table 2 shows the distribution of all three types of errors, the number of cases in which each type of error occurred, how frequently each type of error was corrected, and the distribution of the errors that remained uncorrected. Corrections occurred when the other jurors or the judge responded to the error with the correct meaning or application of the law.[68]

TABLE 2: SOURCES OF COMPREHENSION ERRORS

Sources of Comprehension Errors	Total Comprehension Errors	Total Cases with Errors	Percent Corrected	Uncorrected Comprehension Errors
Language	601 (27.7%)	46	49.1%	306 (26.4%)
Structural	334 (15.4%)	16	44.6%	185 (16.1%)
Omission	1234 (56.9%)	44	46.0%	666 (57.6%)
Total	2169 (100.0%)	48	46.7%	1157 (100.0%)

As Table 2 indicates, comprehension errors occurred in nearly all of the cases (forty-eight out of fifty), but Table 2 also raises questions about the assumption that miscomprehension errors arise primarily because jurors cannot translate the unfamiliar language of the jury instructions. Fewer than three in ten (27.7%) of the inaccurate comments about instructions reflected language errors, an average of twelve comments per case. Moreover, almost half of all comprehension errors (46.7%) were explicitly corrected by another juror (32.3%), by the judge responding to a juror question (9.2%), or by both another juror and the judge (5.2%). The language errors occurred much less frequently than the omission errors. In the end, language errors accounted for only one in four uncorrected comprehension errors (26.4%). Omission errors, in contrast, were the most common type of error, accounting for more than half of both initial errors (56.9%) and uncorrected errors (57.6%). With this overview of the general categories of errors, we now turn to an analysis of the errors within each category.[69]

[68] A few judicial responses failed to answer the jurors' question, so the error was not treated as corrected in these instances.

[69] Reliability of type of error was computed based on the eleven possible categories of error: two types of language errors, two types of structural errors, and seven types of omission errors. Because of the large number of coding categories, we conducted the reliability analysis based on eight cases. The kappa was 0.94.

2. Language Errors.—The opaque language of jury instructions is the primary culprit typically blamed for juror errors.[70] We identified two types of language errors: (1) plain meaning errors and (2) technical meaning errors. Plain meaning errors occurred when a juror misread or ignored nontechnical language in the instructions that had the same meaning it would have in a nonlegal context (e.g., read or interpreted an "and" as an "or"). Technical language errors occurred when a juror misunderstood or misapplied a term that is only used in a legal context (e.g., plaintiff) or has a specialized legal meaning that is different from its meaning in a nonlegal context (e.g., competent). Table 3 shows the two types of language errors that occurred during these deliberations:

TABLE 3: LANGUAGE ERRORS

Type of Error	Total Errors	Cases with Errors	Percent Corrected	Uncorrected Errors
Plain Meaning	268 (44.6%)	42	75.4%	66 (21.6%)
Technical Meaning[71]	333 (55.4%)	31	27.9%	240 (78.4%)
Total	601 (100.0%)	46	49.1%	306 (100.0%)

a. Plain meaning.—Nearly half of the language errors (44.6%) occurred because a juror misread or ignored the plain language of an instruction. These errors occurred even though each juror had a copy of the jury instructions. The availability of the written instructions did, however, assist the jurors in correcting errors. Three-quarters (75.4%) of these "plain meaning" errors were explicitly corrected, often by a juror using the written instruction as evidence of the accurate meaning of the instruction. For example, in a products liability case, a juror said, "[I]t was not dangerous but it was defective. Now the question is: do we award any money for [it] being defective?" The instruction specified that liability could only be found if the product were both defective and unreasonably dangerous, and of course it was also necessary to show that the defect had caused the injury. Although the juror's error was not immediately corrected, later on in the deliberations when the juror repeated it, another juror (referring to the written instruction) said, "I think the 'and' is important there," and offered an example of how food could be burned, and therefore be defective, but

[70] *See*, *e.g.*, Lawrence M. Solan, *Refocusing the Burden of Proof in Criminal Cases: Some Doubt About Reasonable Doubt*, 78 TEX. L. REV. 105, 119–32 (1999) (collecting articles on comprehension tests before offering a rationale for changing the definition of reasonable doubt provided to jurors based on linguistics and cognitive psychology).

[71] One hundred eighty-nine of the 333 technical meaning errors came from a single case in which the jurors submitted a question to the judge and the judge directed the jurors back to the page that had prompted the question, leaving the jurors to struggle further. Of these errors, 176 concerned a single phrase in the instructions that was the subject of the question, and none of these errors were corrected. For discussion of this case, see *infra* text accompanying note 73. If these 176 comments are removed, the percent of technical meaning errors that were corrected would rise from 27.9% to 59.2%.

not dangerous. The others jurors agreed with the correct interpretation. They ultimately found for the defense.

In another example, a juror in a slip-and-fall case failed to recognize that the instruction described multiple alternative ways that could lead to a finding that the defendant had notice of a dangerous condition—missing the "or" in the instruction. The juror said: "If they didn't do something to create a dangerous condition, they're not responsible." Although the relevant instruction indicated that creating a dangerous condition was one way that a defendant might obtain notice of the condition, this juror failed to note the two other ways set out in the instruction that could also provide an attribution of the requisite notice: if the defendant had actual knowledge or if the condition had existed for long enough that the defendant should have known about it. Although no one corrected the error in this case, the jurors concluded that the defendant had created the dangerous condition, so the error did not influence the course of the jury's deliberations or the outcome of the case.

Even words that were understandable sometimes caused difficulty when the concept was counterintuitive for some jurors. A case involving a claim about a product purchased from a corporation by a consumer included an instruction for the jury on agency law. The instruction explained that a corporation can act only through its employees, agents, directors, or officers, and that the defendant corporation admitted that another company was its agent for purposes of the claims in the case. Several of the jurors were willing to accept the agency relationship only after a juror pointed out the specific instruction.

b. Technical meaning.—Technical legal language was the second source of language errors for the jurors. When the jury encountered a term they recognized as undefined and unfamiliar, they sent the judge a question about it (e.g., tortious). The more common source of confusion from technical language arose when a legal term of art consisted of words that were familiar to jurors in other contexts. For example, the jurors who were told, "An owner is competent to testify as to the value of his vehicle, whether they are qualified as an expert or not," did not understand that the instruction merely permitted the owner to state what he thought the car was worth.[72] Instead, they interpreted the instruction as a way of saying that the owner should be assumed to know the value of the vehicle:

[72] It was arguably odd to provide an instruction to the jury on this issue at all because the decision to permit the owner to testify about the value of the vehicle was an admissibility question reached by the judge.

JUROR #7: Isn't it saying here that [*inaudible*] the owner—whether being an expert or not—can determine the worth of the vehicle?
JUROR #1: Yeah, the owner can determine . . . .

The culprit was the use of the phrase "competent to testify," a phrase with a specialized meaning in a legal context. Similarly, the mental state required for liability is a crucial element in law. Jurors in tort cases are generally instructed on negligence, but their deliberations sometimes suggest that they are evaluating the defendant on a mental state more appropriate to an intentional tort or a criminal act. For example, a juror argued on behalf of a defendant: "[The defendant's action] wasn't intentional." In another case, a juror confused knowledge and negligence:

JUROR #1: But if he didn't know the law, how is he negligent? If he didn't have any idea . . . .

And in a third case, a juror expressed discomfort with holding a teenager fully responsible for an injury he caused:

JUROR #9: I know he hurt him, but [the defendant] was a kid. It was an accident. He didn't purposely set out to be negligent. He was just being a kid; he was stupid.

And on occasion, jurors simply got tangled up in the language. For example, jurors were evaluating the standard for judging the fault of a defendant when a fire broke out after the defendant repaired the plaintiff's furnace. The misstatements of Jurors #3 and #6 focusing on intentionality were corrected by Juror #1:

JUROR #3: It was because of the work [by the defendant] that was done that it happened, but there was no intentional negligence.
JUROR #6: Right, exactly. It was an accident.
JUROR #3: It was not done intentionally.
JUROR #1: But [the instruction] does not say intentional, does it?
JUROR #6: No.
JUROR #3: No, it doesn't.
JUROR #6: It just says, "Negligence is the failure to use reasonable care."

On another occasion, jurors misunderstood the meaning of a technical category that was expressed in general terms. The jurors carefully read the instruction on damages, focusing on the phrase "services rendered." They concluded that it directed the jury to include an award for attorney's fees.[73] This outlier case accounted for more than half of the total technical

[73] This interpretation was not irrational; the damages section in the instructions (as in other standard pattern instructions) included the following elements of damages: "Reasonable expenses of necessary medical care, treatment, and services rendered." The reference to services rendered is intended to refer only to medical services, but the phrasing is hardly unambiguous.

language errors in the entire set of fifty cases.[74] As the jurors in this case struggled to determine how much they should add for attorney's fees, they submitted a question to the judge, who responded by advising them to look at the damages page in the instructions. They had already focused their attention on that page, so the judge's response provided no assistance in correcting their misunderstanding, and they interpreted the answer as requiring them to estimate the attorney's fees. The result is that they explicitly added one-third to the damage award that the group had already assessed.

In thirty cases (60%), a juror referred to the burden or standard of proof during deliberations. Most of the 175 references were correct (81%). For example:

JUROR #8: I read that [the standard of proof] as being [a] very, very low standard, 50%, greater than 50%, so it's just more probably true than not.
JUROR #5: It's not like beyond a reasonable doubt.
JUROR #8: We're not up there on the high. It's just—
JUROR #6: That's correct.
JUROR #4: I agree with that.
JUROR #6: But the burden is on the plaintiff.
JUROR #3: On the plaintiff, not on the defendant.
JUROR #8: That's right. He has to prove, more probably true than not true, which is just about 50%, so it's something to keep in mind.

Nonetheless, thirty-three (19%) of the references were incorrect. These errors occurred in fifteen cases and were typically made by a single juror who applied the reasonable doubt standard from criminal law when the relevant standard was a preponderance of the evidence. For example, a juror in a medical malpractice case voiced "reasonable doubt" about what caused the plaintiff's injury, although in the end he supported finding the defendant liable. In a second case, involving an automobile accident, a juror voiced "reasonable doubt" about whether the accident caused the injury:

JUROR #8: But we have a reasonable doubt as to whether or not the [injuries] are from the accident.

A juror in a third case used "reasonable doubt" to evaluate the plaintiff's credibility: "I think we have a reasonable doubt [as] to his credibility." On a few occasions, a juror mentioning reasonable doubt was technically incorrect in the use of the phrase, but may have been using the phrase for emphasis, rather than as a standard of proof. For example, in a case involving a plaintiff whose vehicle hit the back of another car and who claimed that the automobile accident occurred because the driver in front had been going too slowly for conditions:

[74] *See supra* note 71.

JUROR #7: Okay, beyond a reasonable doubt I would say . . . [the driver] should have had enough time to stop the vehicle at least down to thirty.

The jury instructions in these cases never mentioned the phrase "beyond a reasonable doubt," but the phrase is so much a part of the common vernacular that it understandably creeps into the language that jurors use. The attorneys in thirty-four of the cases discussed the standard of proof in their closing arguments.[75] In fifteen of these thirty-four cases, one of the attorneys attempted to clarify the standard of proof in these civil cases by contrasting it with the beyond a reasonable doubt standard of proof in a criminal case.[76] Juror errors discussing the standard of proof occurred in two of the fifteen cases in which an attorney offered the contrast, and in eight of the nineteen cases in which attorneys mentioned the standard of proof but did not explicitly offer the contrast with beyond a reasonable doubt. Although a larger sample would be needed to test the stability of this difference (the difference between two cases out of fifteen (13%) versus eight cases out of nineteen (42%) is not statistically significant[77]), contrasting examples tend to aid comprehension in educational settings, so it would not be surprising if an explicit contrast helped jurors to understand the meaning of the standard of proof. Indeed, some courts do include this contrast in their instructions rather than depending on attorney argument to supply it, which is a more dependable way to ensure that the correct message is conveyed.[78]

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[75] Note that the jury instructions in all cases mentioned who had the burden of proof for each claim and specified what the standard of proof was (e.g., in negligence cases, that "the claim is more probably true than not"). In fifteen cases, the standard of proof was not mentioned in closing arguments, and in a sixteenth, we were unable to obtain a transcript of the closing arguments.

[76] In one of the fifteen cases, the contrast offered was between "clear and convincing" proof and the standard of "more probably true than not true."

[77] Even if the two sets of cases differ in their rates of error, with only a total of thirty-four cases, the comparison does not have sufficient statistical power to confidently reject the possibility that a difference, even one as large as the one obtained here (13% vs. 42%), could be due to chance. For further information on power and statistical significance, see JACOB COHEN, STATISTICAL POWER ANALYSIS FOR THE BEHAVIORAL SCIENCES (2d ed. 1988).

[78] *See*, *e.g.*, FED. JUDICIAL CTR., PATTERN CRIMINAL JURY INSTRUCTIONS 28 (1987) ("Some of you may have served as jurors in civil cases, where you were told that it is only necessary to prove that a fact is more likely true than not true. In criminal cases, the government's proof must be more powerful than that. It must be beyond a reasonable doubt."); JUDICIAL COUNCIL OF CALIFORNIA CIVIL JURY INSTRUCTIONS, CACI No. 200, (2012), *available at* http://www.courts.ca.gov/partners/documents/caci_2012_edtion.pdf ("In criminal trials, the prosecution must prove that the defendant is guilty beyond a reasonable doubt. But in civil trials, such as this one, the party who is required to prove something need prove only that it is more likely to be true than not true."); *see also* Elisabeth Stoffelmayr & Shari Seidman Diamond, *The Conflict Between Precision and Flexibility in Explaining "Beyond a Reasonable Doubt,"* 6 PSYCHOL. PUB. POL'Y & L. 769, 777–78 (2000) (concluding that criminal-case jury instructions that explicitly contrast the relative burdens of proof in criminal versus civil cases are more effective in focusing jurors on the evidence, rather than subjective moral beliefs or personal experiences).

A third of the thirty-three errors that jurors made in discussing the burden or standard of proof were corrected by other jurors, leaving twenty-two uncorrected comprehension errors about burden or standard of proof. In addition, jurors on two cases persisted in misusing the standard after several jurors corrected them, suggesting that their comments may have reflected resistance rather than errors based on miscomprehension.

A final group of sixteen technical language errors occurred because jury instructions often use general descriptors for the parties and other relevant individuals or businesses involved in the lawsuit, such as "employer." When the referent is clear because there is only one plaintiff and one defendant, that approach causes no difficulty. However, when the defendants vary for different claims (e.g., when some claims apply to a defendant employee as an individual and other claims apply to the employer through the actions of the employee), jurors may occasionally struggle to identify the appropriate defendant for each claim. Similarly, in comparative fault cases, the defendant rather than the plaintiff has the burden of proof to show that the plaintiff was at fault. Jurors in those cases, while correctly identifying the defendant as the party with the burden of proof, simply called that party the plaintiff for that claim. For example, in a case of comparative fault:

> JUROR #3: [W]hat I'm having a problem [with is] that . . . the defendants were the cause, but [the plaintiff] is also one of the defendants . . . .

The technical language errors tended to confuse individual jurors on occasion, but in only one trial was there clear evidence that language miscomprehension affected the damages awarded by the jury. In that case, described earlier,[79] the jury explicitly agreed to add attorney's fees for "service rendered." A majority of the jurors participated in the conversation about the proper amount to add, and no juror questioned the legitimacy of including attorney's fees as an appropriate component of services rendered. On other juries, evidence of language miscomprehension was reflected only in the comments of a few jurors, and, although the error may have influenced an individual juror's thinking, it did not explicitly emerge as a basis for the jury's verdict.

3. Structural Errors.—Jury instructions cover a range of issues. Some of these issues are related to one another, as when a claim of negligent supervision is contingent on another underlying claim. Others are unrelated. Jury instructions, however, do not explicitly signal when instructions are related and how these relationships function. As a result, jurors sometimes assume connections that are unwarranted and miss connections that are present. The failure to disclose the structure of

[79] *See supra* note 73 and accompanying text.

relationships among the instructions is promoted by the piecemeal way in which jury instructions are produced. Each side submits a set of proposed instructions, each on a separate page.[80] Instructions are then typically assembled by piecing together a set of separate instructions that cover different topics (e.g., the concept that corporations and individuals are entitled to the same fair and impartial consideration, the elements required for a claim of intentional infliction of emotional distress, the potential categories of damages), with a separate instruction on each page. This piecemeal approach enables the court, with the assistance of the parties, to create a packet of instructions by inserting acceptable individual instructions proposed by one of the parties, modifying, substituting, or adding instructions where necessary. To apply the law, however, jurors must be able to interpret the instructions in light of one another, so that if related instructions in the final packet do not appear on the same page or on adjacent pages, jurors may not see the connection or relevant differences between them. The patchwork construction of instructions provides no guidance in identifying connections, that is, in distinguishing between related and unrelated instructions.

The primary elements in civil cases concern claims, liability requirements, and damage instructions. We identified two types of structural errors: (1) mistakes from combining unrelated claims, liability standards, or damage instructions, or inappropriately distinguishing between related claims, liability standards, and damage instructions; and (2) other combination errors. As Table 4 indicates, structural errors occurred in nearly a third of the cases (sixteen of fifty) as jurors attempted to combine related instructions and avoid combining unrelated ones.

TABLE 4: STRUCTURAL ERRORS

Type of Error	Total Errors	Cases with Errors	Percent Corrected	Uncorrected Errors
Fitting Together Claims/Liability/Damages	160 (47.9%)	10	26.9%	117 (63.2%)
Other Combination Errors	174 (52.1%)	9	60.9%	68 (36.8%)
Total	334 (100.0%)	16	44.6%	185 (100.0%)

a. Fitting together claims/liability/damages.—The first type of structural error, accounting for almost half of the errors in this category, involves fitting together the basic components of civil cases: claims, liability, and damages. Juries in civil cases are often faced with multiple

[80] *See, e.g.*, D. OR. LOCAL R. CIV. P. 51-1(d), *available at* http://www.ord.uscourts.gov/en/local-rules-of-civil-procedure-2012/lr-51-instructions-to-the-jury ("Format Requirements: (1) Each instruction must begin on a separate page. . . . (3) Each instruction must embrace only one subject . . . ."). The trials in the Arizona Jury Project used the Oregon format as well.

claims and, when liability is contested, must be instructed on both liability and damages. While half the cases in the Arizona Jury Project involved a single claim against one defendant, the remaining half contained more complex allegations: multiple claims, claims and counterclaims, comparative fault, or an alleged nonparty at fault. All of the errors involving fitting together claims or liability and damages occurred in ten of the twenty-five cases with more complex claim structures. Because this source of confusion in jury instructions has not been identified in any prior research, we give several examples of the challenges jurors faced by having to link different parts of the instructions together. Thus, for example, confusion in one case arose among multiple claims that included a contingent claim of negligent supervision. Unless the jury found the employee liable for one of the multiple underlying tort claims, they could not find the defendant employer liable for negligent supervision. No single sentence in the instructions expressed precisely this point, which would have likely assisted the jurors in linking the underlying claims against the employee to those concerning the employer. It took an extended discussion by the jury[81] and a question to the judge before this relationship among the claims was clarified.

A second case involved claims of breach of contract and violation of the duty of good faith and fair dealing, which lead to different damage categories, the benefit of the bargain for the breach of contract claim and consequential damages (e.g., emotional distress, inconvenience, anxiety) for the claimed violation of the duty of good faith and fair dealing. The jurors believed that they had awarded all that was appropriate on the breach of contract claim and then struggled with the verdict forms, which included information about the other claim. The placement of the damages elements on separate pages of the jury instructions made it difficult for the jurors to match them with the appropriate claims. Sheepishly, they asked the judge for help and only at that point were able to come up with a solution.

The instructions in tort cases tell the jury that fault requires a showing of negligence, causation, and damages.[82] Most jurors in the study understood that damages cannot be awarded unless negligence is shown, but in five cases, a juror missed the connection between the need to show negligence as well as causation and damages in order to find fault, expressing the desire to make an award without finding the defendant negligent. In all five cases, that preference immediately drew a response from fellow jurors who cited the instructions as authority for negligence as a necessary predicate to liability.

The more common errors involving fit concerned the fit between claims and damages as jurors negotiated the relationship between liability

[81] The discussion spanned eighty-three minutes of deliberations.

[82] *See* RAJI (CIVIL) 3d, *supra* note 55, Fault 1–3, at 33–35.

and damages. When a case involves claims of comparative fault and the jury determines that the defendant was at least partially at fault, the legal standard calls for the jury to identify the full damages suffered by the plaintiff and the percentage of fault attributable to the plaintiff.[83] The court then will reduce the total damages by the percentage attributable to the plaintiff, and the plaintiff will receive the resulting damage award.[84] The jurors in the fourteen cases involving comparative fault were instructed to determine first whether the defendant was at fault to any degree, then to determine total damages, and finally to decide the comparative fault percentage allocation.[85] This order, which required the jurors to move from liability (is there any?) to damages and back to liability (comparative fault allocation), appears to conflict with the natural inclination of the jurors, who violated the instruction in five of the nine comparative fault cases in which they found the defendant at least partially at fault. In these five cases, they determined the percentage allocation of fault before turning to the consideration of damages.

In the comparative fault cases, the more serious error in following the instruction occurred in the computation of the damages. Late in the instructions, jurors are told that if they find the defendant liable, they must decide the full amount of money that will reasonably and fairly compensate the plaintiff for a set of case-specific elements of damages.[86] In four cases, the jurors decided what they thought the plaintiff should receive and raised the damage amount to preserve the amount that would remain after the

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[83] *See id.* Fault 8, at 40.

[84] Arizona is a pure comparative fault jurisdiction in which damages are reduced in proportion to the percentage of fault attributed to the plaintiff. ARIZ. REV. STAT. ANN. § 12-2505(A) (2003).

[85] The following instruction was given in each of the fourteen cases involving an allegation of comparative fault between the plaintiff and defendant:

> If you find that defendant was not at fault, then your verdict must be for defendant.
>
> If you find that defendant was at fault, then defendant is liable to plaintiff and your verdict must be for plaintiff. You should then determine the full amount of plaintiff's damages and enter that amount on the verdict form. You should then consider defendant's claim that plaintiff was at fault . . . .

RAJI (CIVIL) 3d, *supra* note 55, Fault 8, at 40.

[86] The instruction stated:

> If you find [any] defendant liable to plaintiff, you must then decide the full amount of money that will reasonably and fairly compensate plaintiff or each of the following elements of damages proved by the evidence to have resulted from the fault of [any] [defendant] [party] [person]:
>
> (1) The nature, extent, and duration of the injury.
>
> (2) The pain, discomfort, suffering, disability, disfigurement, and anxiety already experienced, and reasonably probable to be experienced in the future as a result of the injury.
>
> (3) Reasonable expenses of necessary medical care, treatment, and services rendered, and reasonably probable to be incurred in the future.
>
> (4) Lost earnings to date, and any decrease in earning power or capacity in the future.
>
> (5) Loss of love, care, affection, companionship, and other pleasure of the [marital] [family] relationship.

Id. Personal Injury Damages 1, at 112 (footnote omitted).

percentage of plaintiff liability was subtracted from the total damage amount. Thus, they fused the liability and damage decisions in order to arrive at what they viewed as fair compensation. There was no indication that these jurors realized they were not following the instructions. Thus, the juries typically would carefully assess the legitimacy of each amount claimed (e.g., how much really would have been earned, whether the plaintiff needed all of the treatment, how much the likely future medical costs would actually be), frequently substantially reducing the requested amounts to arrive at what they viewed as more reasonable estimates of expenses. Nonetheless, many of the jurors explicitly expressed concern about whether the plaintiff would receive enough to cover the costs incurred by the plaintiff and considered how to produce an award that would reflect both their assessment of comparative fault and a way to arrive at the compensation level they thought was appropriate for the injured party. For example:

> JUROR #3: I was taking the total and then multiplying it by 1.2 and then we throw whatever makes it to that total in medical and then we know when they take the 80% with a 20% reduction it will be back to the full value without any more pain and suffering.[87]

The jury accepted this calculation in arriving at its award. In a second case, in which the jurors saw the plaintiff and defendant as more equally at fault, the jurors also agreed that they would have to raise the total damages to "gross it up" to enable the plaintiff to "pay her bills and pay for Tylenol and go to the chiropractor again." A third jury, having determined that the plaintiff was 25% at fault, raised the award to cover "the percentage she will lose due to fault." A fourth jury, having decided to allocate 20% of the fault to the plaintiff, agreed to raise the award according to the formula suggested by one of the jurors: "So, he's gonna [sic] get four-fifths of *X*. If we want *X* to be the right amount to get there, you need to have five-fourths of it which is one and one-fourth which is 1.25."

Each of the other five juries making awards in comparative fault cases had at least one comment either indicating an error in considering damages before allocating percentage of fault or a juror who wanted to adjust the damage level to affect the ultimate award. But unlike the juries described in the preceding paragraph, none of these five juries explicitly adjusted their award with an eye toward what the plaintiff would receive in light of the comparative fault percentages. However, several jurors on these cases argued for higher damage levels, recognizing that the amounts they were discussing would be reduced by the percent of fault. Juror #4 takes this

[87] The math calculation is in error here. If the jurors decided that the plaintiff should end up with $10,000 and awarded $10,000 × 1.2, the award of $12,000 would be reduced by 20% and would end up being $9,600. The appropriate multiplier to achieve the jury's goal would be to multiply by 1.25.

position in the following example, arguing in favor of a higher total damage amount:

> JUROR #6: Well, I might give him $[X][88] the first year, 'cause [sic] he did suffer a lot.
>
> JUROR #4: I would leave it at $[2X] 'cause [sic] he still is going to lose half of that and he's just going to get $[X] of it.

Thus, the demands on the jury to assess liability and damages as separate decisions are difficult for the jurors to understand and follow in comparative fault cases, at least as jury instructions are currently constructed. Before comparative fault emerged as the dominant legal regime for torts, some legal scholars advocated the use of bifurcated trials that separated consideration of liability and damages.[89] The behavior of the jurors in these comparative fault cases adds additional evidence questioning the jury's ability to separate liability and damages. We have considered these fusions of liability and damage assessments to reflect comprehension problems. Alternatively, the jurors in these cases may be revealing a preferred theory of damages that the law does not currently recognize: injured plaintiffs should be entitled to recover some of the costs associated with injuries that were caused by the defendant's negligence (e.g., medical expenses, but not pain and suffering), even if the plaintiff contributed to the injuries. Either way, the deliberations of these juries suggest that instructions under the current legal rules have not fully achieved the goal of separating consideration of liability and damages in comparative fault cases. Errors occurred frequently in the comparative fault cases, most of the errors remained uncorrected, and the amount of damages awarded was affected in at least four of the nine comparative fault cases that involved damages.

b. Other combination errors.—Faced with pages of instructions, the jurors occasionally compared other unrelated instructions and incorrectly found connections between them where none existed. Examination of these errors offers clues about the types of instructions that are likely to produce such errors. For example, when a corporation or a business is a party, jurors generally receive an instruction admonishing them to give the corporation or business the same consideration they would

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[88] In this and other quotes from deliberations, some damage amounts or irrelevant factual details were changed to protect the identity of the case, consistent with our obligation to preserve confidentiality. In some instances, the symbols X and Y were substituted for specific dollar amounts or names used in juror comments.

[89] *See* Julius H. Miner, *Court Congestion: A New Approach*, 45 A.B.A. J. 1265, 1268 (1959); Warren F. Schwartz, *Severance—A Means of Minimizing the Role of Burden and Expense in Determining the Outcome of Litigation*, 20 VAND. L. REV. 1197, 1198, 1214 (1967). For a contrary view, see Jack B. Weinstein, *Routine Bifurcation of Jury Negligence Trials: An Example of the Questionable Use of Rule Making Power*, 14 VAND. L. REV. 831, 852–53 (1961). For an empirical assessment, see Hans Zeisel & Thomas Callahan, *Split Trials and Time Saving: A Statistical Analysis*, 76 HARV. L. REV. 1606 (1963).

give an individual.[90] Fifteen of our fifty cases involved a corporate or other business party, and in eleven of them, the jury received this instruction. In two of the cases involving a corporate defendant, a juror specifically mentioned the instruction, referring correctly to the requirement that a corporation or business be treated fairly. In others, although jurors did not reference the instruction, they talked about the importance of treating the corporation fairly. Yet any party in a case, including a corporation, may have special duties that other parties do not have. For example, in a case involving a manufacturer's warranty, a juror used the admonition regarding equal treatment of corporations to defend the corporation's alleged unwillingness to honor the warranty:

> JUROR #3: It says here on page nine that a corporation is entitled to the same thing as an individual. If you went out and bought the refrigerator from, you know, your buddy, John, and eleven months later the motor went bad, do you, do you really think that you should be able to go back to your buddy, John, and say, "You know what? I'm not happy with this refrigerator anymore. You have to give me my money back, you know, because your motor, my motor went out." I mean it's a used refrigerator, so . . . .

As the manufacturer of the product, the defendant in this case did have a different obligation than John would have had, yet Juror #3 read the general corporation instruction into the language describing the obligations of the seller and was convinced that the instruction reduced the corporation's responsibility to the purchaser.

In another case in which a juror inaccurately combined unrelated instructions, the jurors had to determine whether the behavior of the defendant was "extreme and outrageous." They were provided with this definition: "Extreme and outrageous conduct is conduct that an average member of the community would regard as atrocious and beyond all possible bounds of decency." As part of the damage instructions, the jurors also received the so-called "eggshell plaintiff" instruction:

> You must decide the full amount of money that will reasonably and fairly compensate plaintiff for all damages caused by the fault of defendant, even if plaintiff was more susceptible to injury than a normally healthy person would have been, and even if a normally healthy person would not have suffered similar injury.

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[90] For example:

> A corporation is a party in this lawsuit. Corporations and individuals are entitled to the same fair and impartial consideration and to justice reached by the same legal standards.
>
> When I use the word "person" in these instructions, or when I use any personal pronoun referring to a party, those instructions also apply to _____.

RAJI (CIVIL) 3d, *supra* note 55, Standard 11, at 26.

Several jurors were confused when they tried to put the two instructions together:

> JUROR #9: They define for us the "extreme and outrageous," but then I think it gets back to the 14b instructions [the eggshell plaintiff instruction] which is also saying that you have to look at that and say a normal person may not have been affected by that, but this is not a normal, healthy person.
>
> JUROR #4: Right.
>
> * * *
>
> JUROR #6: 14b [the eggshell plaintiff instruction] may help decide whether [defendant's] actions were extreme or outrageous.

The distinction between the instructions is that one is designed to help the jury determine liability by assessing whether the defendant intentionally or recklessly caused emotional distress (i.e., plaintiff's actions must be extreme and outrageous as an objective standard), and the other should be used by the jury in determining how much a plaintiff should receive for damages (i.e., the eggshell plaintiff, who is more severely injured than the average person, is entitled to recover more than the average person). The instructions, however, provide the jury with little guidance in recognizing this distinction. Moreover, by placing the definition of "extreme and outrageous" on a separate page, rather than offering it as part of the instructions on what the plaintiff had to prove to find the defendant liable, it was easier for a juror to conclude that another part of the instructions supplied the relevant definition.[91] Perhaps surprisingly, most of the jurors in this case ultimately focused on the appropriate standard for liability, determining that even if the plaintiff was more susceptible to injury, the behavior of the defendant did not meet the definition of "extreme and outrageous."

Cases involving multiple parties can pose a problem for the jurors who must grapple with determining which instructions apply to each party. For example, in a comparative fault case involving an automobile accident, the jury had to decide whether the defendant was at fault for any of the injuries. If so, the jury had to allocate fault between the two drivers. The jury had no difficulty understanding the allocation of fault between the two drivers. The problem arose because a second plaintiff was a passenger of the injured driver and the jury found the defendant only partially at fault. As a result,

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[91] The claim instruction read:

> Plaintiff claims that defendant intentionally or recklessly caused [him] [her] emotional distress.
>
> To establish this claim, plaintiff must prove:
>
> (1) Defendant's action or inaction was extreme and outrageous;
>
> (2) Defendant either intended to cause emotional distress or recklessly disregarded the near certainty that such distress would result from [his] [her] [its] conduct; and
>
> (3) Plaintiff sustained severe emotional distress as a result of a defendant's conduct.

Id. Employment Law 16, at 211.

the jury had to complete separate verdict forms for the driver and the passenger in the plaintiff's car. The jury was confused about whether the same comparative fault percentages should apply to the plaintiff driver and his passenger, or whether the plaintiff driver and passenger might have different percentages of fault vis-à-vis the defendant. The jury ultimately submitted a question to the judge who clarified that a single percentage was to be applied to the two plaintiffs.

In another case, the jurors struggled to determine how to fit the percentage of fault allocation with the total damages when the injury was due in part to a preexisting problem. That is, the jurors were unclear as to whether they should adjust the damage amount for the preexisting injury or adjust the percentage of fault to account for the preexisting injury. The instructions tell the jurors to decide total damages caused by the defendant's negligence and to allocate fault, but the instructions do not specifically address the relationship to any preexisting injury. In this case, it took a question to the judge to get an explicit explanation.

Other structural errors occurred when individual jurors attempted to combine unrelated instructions. In one case, a juror assumed that a claim and counterclaim—both of which involved allegations of intentional interference—should somehow be related (after the jury reached a verdict for the defendant on the initial claim, a juror asked, "But shouldn't both of them [the claim and the counterclaim] sort of correlate?"). The juror was not corrected and the jury ultimately found in favor of the defendant on the counterclaim. In another case, a juror concluded that liability should not be found because he was not convinced the defendant had malice, applying the "evil mind" state-of-mind instruction for punitive damages[92] to the underlying claim, which required only a showing of negligence.

Structural problems can also arise when the meaning of one instruction depends on incorporating the meaning of another instruction. For example, standard instructions tell jurors: "You will decide what the facts are from

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[92] This instruction stated:

> If you find defendant liable to plaintiff, you may consider assessing additional damages to punish defendant or to deter defendant and others from similar misconduct in the future. Such damages are called "punitive" or "exemplary" damages.
>
> To recover such damages, plaintiff has the burden of proving by clear and convincing evidence, either direct or circumstantial, that defendant acted with an evil mind.
>
> This required state of mind may be shown by any of the following:
>
> (1) Intent to cause injury; or
>
> (2) Wrongful conduct motivated by spite or ill will; or
>
> (3) [Defendant acted to serve his own interests, having reason to know and consciously disregarding a substantial risk that his conduct might significantly injure the rights of others.]
>
> [Defendant consciously pursued a course of conduct knowing that it created a substantial risk of significant harm to others.]

Id. Personal Injury Damages 4, at 115 (footnote omitted).

the evidence presented here in court."[93] Instructions may also—as in Arizona—warn jurors not to speculate ("You must not speculate or guess about any fact.").[94] A third instruction attempts to guide the jury's judgment on the credibility of witnesses ("In deciding the facts of this case, you should consider what testimony to accept, and what to reject.").[95] Following standard procedure, courts deliver these three admonitions at different points in the presentation of the jury instructions, and this separation makes it more likely that the jurors will consider one of the admonitions without connecting it to the related instructions. For example, in one of the Arizona trials, one party provided evidence on an important issue, while the opposing party offered no evidence on that same issue. The jury had the following exchange (the plaintiff claimed that the reconditioned item he purchased from the defendant was defective):

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

Thus, the jurors felt compelled by the jury instructions to accept the evidence presented by one side. They focused on the admonitions that they should confine themselves to the evidence and that they should not speculate, but failed to recognize that the third related instruction, which charged them with deciding whether or not to accept testimony that was presented, could have properly led them to reject the presented evidence as unconvincing. A similar misunderstanding apparently arose in the Pennzoil–Texaco multibillion-dollar contract trial. James Shannon, a member of the jury, recounted that in deciding on damages, the jury had carefully followed Judge Casseb's instructions to not consider anything not represented by the evidence.[96] According to Shannon, the jury accepted Pennzoil's $7.53 billion damage estimate because Texaco, arguing solely against liability, had presented no evidence on damages.[97]

Jurors occasionally raised questions about the introduction of personal experience into deliberations on similar grounds. Since they were instructed to decide only on the basis of the evidence presented at trial, it was

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[93] *Id.* Preliminary 2, at 4; *id.* Standard 2, at 17.

[94] *Id.* Preliminary 1, at 3; *id.* Standard 1, at 16 ("You should not speculate or guess about any fact.").

[95] *Id.* Preliminary 4, at 6; *id.* Standard 6, at 21.

[96] *See* JAMES SHANNON, TEXACO AND THE $10 BILLION JURY 476–77 (1988).

[97] *Id.*

therefore unclear whether their experiences outside of court could be considered relevant. Yet jury instructions directly acknowledge that a chief source of the jury's value is the ability of its members to draw on their life experiences, the jury's so-called "common sense." Thus, in Arizona, the jury is instructed: "Consider all of the evidence in light of reason, common sense, and experience."[98] But the jury is also warned: "You will decide what the facts are from the evidence presented here in court."[99] The juxtaposition of these two admonitions can lead to uncertainty. Some jurors who conscientiously focused on the admonition to decide only on the evidence were unsure whether or not their personal experiences as drivers or accident victims could be discussed during deliberations. Clearly, that experience could not be characterized as evidence, and it certainly was not produced in court.[100] At the same time, many jurors recognized that their prior experiences could help them understand the evidence, and the instruction to consider the evidence in light of their experiences appears to invite them to do just that. Although the jurors generally handled this situation reasonably (i.e., drawing on personal experience, but cutting off a juror who tried to argue at length that his accident history should inform the group), some further instruction on the use of personal experience in deliberations may avoid the occasional conflict on this issue. Because jurors were explicitly told in the instructions that they should consider the evidence in light of experience, we did not consider their frequent use of personal experience to be in error.

Finally, jurors are sometimes asked to consider the fault of a nonparty. If the jury decides that the nonparty is partially responsible for causing the damages and the party defendant is partially responsible, the jury can find for the plaintiff and apportion fault between the defendant and the nonparty. The defendant will then pay the portion of damages consistent with his percentage of fault. If, however, the jury determines that the defendant is not at fault, the jury cannot "award" damages to the plaintiff against the nonparty. In one case, a jury faced with this situation struggled to understand the relationship among the various verdict forms. Some of the jurors did not immediately see why they could not complete the verdict form in favor of the defendant, as well as the verdict form holding the nonparty liable and awarding damages to the plaintiff. When the judge confirmed that it was not possible, they found for the defendant.

In sum, these structural problems obstructed juror comprehension of the instructions. When jurors are not supplied with the connective tissue between, for example, multiple separate claims and the list of potential damages relevant to each claim, they are left to puzzle over how to match

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[98] RAJI (CIVIL) 3d, *supra* note 55, Preliminary 4, at 6; *id.* Standard 6, at 21.

[99] *Id.* Preliminary 2, at 4; *id.* Standard 2, at 17.

[100] The only mention of jurors' prior experiences during formal court proceedings occurred during voir dire.

the claims with the appropriate damages. When two instructions use similar language but relate to different concepts (e.g., how to treat a corporate defendant in general as opposed to the special obligations a corporation may have), failure to explicitly address the difference leaves room for misunderstanding. Many of these structural problems that caused conflict and confusion could have been avoided by showing the jurors how the pieces of the instructions related to one another. Instead, the jurors frequently spent substantial time struggling with connections that they should not have made and trying to reconcile what appeared to be inconsistencies that were in fact interlocking pieces that actually fit together.

4. Omission Errors.—The third category of error is the omission error. Omission errors arise because jurors bring expectations and preconceptions to the jury box. They actively search for ways to make sense of events about which they are told, consciously or unconsciously filling in blanks and resolving ambiguities to produce a plausible account and arrive at what they understand to be a just verdict consistent with the evidence and instructions.[101] Yet, despite this well-documented profile of the active juror, jury instructions do not recognize—or at least do not address—the possibility that jurors may find it necessary to fill in apparent gaps with their own understanding of what is legally relevant. Instead, instructions typically communicate with jurors on a "need-to-know" basis.[102] The traditional approach is to avoid bringing up an issue that the jury should not be thinking about, in order to avoid the possibility that the instructions would introduce an irrelevant topic that would otherwise not enter a juror's mind or be discussed during deliberations.[103] This minimalist approach is akin to the approach taken by the Federal Rules of Evidence in excluding potentially prejudicial information that may inappropriately influence the jury, such as subsequent remedial measures.[104] Blindfolding through exclusion may be a reasonable strategy when the blindfold is opaque, that

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[101] *See, e.g.*, W. LANCE BENNETT & MARTHA S. FELDMAN, RECONSTRUCTING REALITY IN THE COURTROOM (1981); Shari Seidman Diamond & Jonathan D. Casper, *Blindfolding the Jury to Verdict Consequences: Damages, Experts, and the Civil Jury*, 26 LAW & SOC'Y REV. 513, 557–58 (1992); Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 CARDOZO L. REV. 519, 519 (1991).

[102] *See, e.g.*, SUPREME COURT ADVISORY COMM. ON MODEL UTAH JURY INSTRUCTIONS—CIVIL, GUIDELINES FOR DRAFTING PLAIN-LANGUAGE JURY INSTRUCTIONS ¶ 16 ("Don't instruct the jury about things they don't need to know, such as evidentiary rules."), *available at* http://www.utcourts.gov/committees/muji/guideline summary.pdf. This report was included in the materials used to draft the *Model Utah Jury Instructions, Second Edition*, UTAH ST. CTS., http://www.utcourts.gov/resources/muji/index.asp?page=civ&view=all_civ (last visited Sept. 7, 2012).

[103] *See* Leon Green, *Blindfolding the Jury*, 33 TEX. L. REV. 157, 157 (1954).

[104] *E.g.*, FED. R. EVID. 407; *see also* Shari Seidman Diamond et al., *Blindfolding the Jury*, 52 LAW & CONTEMP. PROBS. 247, 249–50, 261–64 (1989) (discussing the justifications for and effects of "blindfolding" the jury as to certain information).

is, when the jurors are unlikely to make assumptions about the potentially prejudicial information.[105] When personal experience and knowledge offer a peek under the blindfold, however, the silent, exclusionary approach is unlikely to be effective. The classic instance of such a topic is whether the parties had insurance, a legally irrelevant issue in determining damages that, as we show below, jurors in tort cases often spontaneously consider as they discuss compensation.[106]

Other topics may be omitted from the jury instructions not through intentional omission, but because the instructions do not adequately anticipate all of the decisions that the jurors may face. For example, juries in Arizona are told that they may reach a verdict if six of the eight jurors agree and sign the verdict form.[107] This leaves out a few details: What should the jury do if six members agree that the defendant is liable? Who deliberates on damages? Must the same six jurors agree on the damage amount, or is the juror bound by the liability determination of the six? The instructions are silent.

Table 5 shows the basic types of omission errors and reveals that forty-four of the fifty cases produced juror comments that reflected topics avoided—or at least not explicitly addressed—by the jury instructions. The omission errors occurred as the jurors dealt with four major issues: (1) the role of jurors who preferred a no-liability decision during deliberations on damages; (2) the appropriate way to assess damages, including legally acceptable sources and costs, appropriate goals, and the degree of the jury's discretion in arriving at an award; (3) the boundaries of relevant evidence; and (4) procedural decisions the jury had to implement in reaching a verdict. In each instance, the failure of the instructions to cover the topic meant that during their deliberations, some jurors expressed an inaccurate view of the relevant legal standard.

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[105] *See* Diamond et al., *supra* note 104, at 261–64; *see also* Shari Seidman Diamond & Neil Vidmar, *Jury Room Ruminations on Forbidden Topics*, 87 VA. L. REV. 1857, 1905 (2001) ("When the forbidden topic is unlikely to be raised spontaneously by the jury, it is an appropriate subject for blindfolding.").

[106] *See* FED. R. EVID. 411 advisory committee's note ("[K]nowledge of the presence or absence of liability insurance would induce juries to decide cases on improper grounds."); Michael v. Cole, 595 P.2d 995, 997–98 (Ariz. 1979) (en banc); 1 MCCORMICK ON EVIDENCE § 201 (Kenneth S. Broun ed., 6th ed. 2006). See also 4 RESTATEMENT (SECOND) OF TORTS § 920A(2) (1979), which describes the collateral source rule, which provides that "[p]ayments made to or benefits conferred on the injured party from other sources are not credited against the tortfeasor's liability, although they cover all or a part of the harm for which the tortfeasor is liable." The rule has been described as an "established exception to the general rule that damages in negligence actions must be compensatory." 25 C.J.S. *Damages* § 172 (2002). For examples of juror comments on insurance, see *infra* Part IV.C.4.b.

[107] *See, e.g.*, RAJI (CIVIL) 3d, *supra* note 55, Standard 15, at 30.

TABLE 5: OMISSION ERRORS

Type of Error	Total Errors	Cases with Errors	Percent Corrected	Uncorrected Errors
No-Liability Jurors in Damage Deliberations	12 (1.0%)	2	16.7%	10 (1.5%)
Damages Issues	1170 (94.8%)	43	46.1%	631 (94.7%)
Source	*578 (46.8%)*	*31*	*37.9%*	*359 (53.9%)*
Costs	*505 (40.9%)*	*34*	*52.3%*	*241 (36.2%)*
Goals	*44 (3.6%)*	*12*	*38.6%*	*27 (4.1%)*
Discretion	*43 (3.5%)*	*12*	*90.7%*	*4 (0.6%)*
Relevance	41 (3.3%)	14	46.3%	22 (3.3%)
Procedure	11 (0.9%)	7	72.7%	3 (0.5%)
Total	1234 (100.0%)	44	46.0%	666 (100.0%)

By far, the largest category involved damages, which accounted for 94.8% of the omission errors. The primary sources of these damages errors were comments about insurance and attorney's fees.

a. No-liability jurors in damage deliberations.—In Arizona, as in most other states, jurors in civil cases are not required to be unanimous in order to reach a verdict.[108] As a result, a juror may be outvoted by a majority prepared to find the defendant liable. The law in Arizona is clear: every juror who votes on liability should participate in the determination of other issues, including damages.[109] Thus, jurors in two of the Arizona cases made errors when they expressed doubt as to whether a juror who had voted against liability should participate in deliberations on damages. In the first case, the issue was resolved with a question to the judge after the presiding juror asked if the no-liability juror could go home while the rest of the jury discussed damages.[110] In the second case, the other jurors decided to permit the juror to continue deliberating, although one juror was skeptical about that decision. During the damages discussion, the exchange between these

[108] *See* ARIZ. R. CIV. P. 49(a). Only eighteen states require unanimity in civil trials. Shari Seidman Diamond et al., *Revisiting the Unanimity Requirement: The Behavior of the Non-Unanimous Civil Jury*, 100 NW. U. L. REV. 201, 203 (2006).

[109] Perkins v. Komarnyckyj, 834 P.2d 1260, 1263 (Ariz. 1992) (en banc) ("[J]urors who find themselves in a minority on one issue may not withdraw or be excluded from consideration of the other issues in the case."); *accord* Gorski v. J. C. Penney Co., 442 P.2d 851, 853–54 (Ariz. 1968); Hall v. Delvat, 389 P.2d 692, 696 (Ariz. 1964). Arizona is not unusual in this position. *See, e.g.*, Schabe v. Hampton Bays Union Free Sch. Dist., 480 N.Y.S.2d 328, 335 (App. Div. 1984); Ralston v. Stump, 62 N.E.2d 293, 294–95 (Ohio Ct. App. 1944); Tex. Gen. Indem. Co. v. Watson, 656 S.W.2d 612, 615 (Tex. App. 1983).

[110] In fact, the bailiff, and not the judge, accurately (albeit inappropriately) answered the question.

two jurors became quite heated as the juror who had opposed liability argued for a lower award and the previously skeptical juror attributed that position to the juror's earlier opposition to any award. In the end, the vote of the juror who had opposed liability was not needed for the group to reach a verdict and she did not sign the verdict form.

This issue of participation in damage discussions could only have arisen in the six cases in which one or two jurors opposed a finding of liability when the jury moved on to consider damages. Decisions on liability and damages are legally independent so that once the jury has determined that a defendant's negligence caused some damage to the plaintiff, the total amount of damages the plaintiff suffered should be unaffected by the percentage of the defendant's fault. Nonetheless, these cases suggest some spillover from one decision to the other.[111] We have just described the two cases in which some members of the jury questioned the continuing participation of the no-liability jurors. In the remaining four cases, no juror raised a question about including all jurors in the determination of damages. In all of these four cases, however, the jurors who opposed liability argued for lower awards than at least some other members who favored liability. In two of the cases, the jurors opposing liability did not sign the verdict form. In the remaining two cases, a unanimous verdict was reached with the no-liability jurors appearing to succeed in limiting the award. It is unclear whether the deliberations were affected by the lack of clarity about the appropriate role of no-liability jurors in damage discussions, but ambiguity on this point is an unnecessary product of the failure to instruct jurors on the legal standard that mandates participation of all jurors at every stage of deliberations.

b. Damages.—The jury instructions in any civil case provide jurors with a list of damage categories that the jury may consider if it decides to make an award.[112] Notably absent from the list is any mention of how those damages will be paid, which is a practical concern for the parties, but legally irrelevant to the jury's charge of assessing reasonable damages

[111] This spillover between liability and damages is sometimes referred to as fusion. *See* EDIE GREENE & BRIAN H. BORNSTEIN, *Characterizing Jury Damage Awards*, *in* DETERMINING DAMAGES: THE PSYCHOLOGY OF JURY AWARDS 29, 41 (2003). Spillover from damages to liability judgments, attributed to the hindsight bias, occurs when jurors use damage information to judge the likely negligence of the defendant's actions. *See, e.g.*, Kim A. Kamin & Jeffrey J. Rachlinski, *Ex Post ≠ Ex Ante: Determining Liability in Hindsight*, 19 LAW & HUM. BEHAV. 89 (1995). The opposite path for fusion, when liability judgments influence damage estimates, is less well-established. While some studies have found that jurors consider defendant responsibility in calculating compensatory damages, *see, e.g.*, James K. Hammitt et al., *Tort Standards and Jury Decisions*, 14 J. LEGAL STUD. 751, 756–58 (1985), others have not, *see, e.g.*, Corinne Cather et al., *Plaintiff Injury and Defendant Reprehensibility: Implications for Compensatory and Punitive Damage Awards*, 20 LAW & HUM. BEHAV. 189 (1996).

[112] *See* RAJI (CIVIL) 3d, *supra* note 55, Personal Injury Damages 1, at 112. See *supra* note 86 for the full text of the instruction.

without regard to who will pay.[113] Similarly absent from the list are the plaintiff's costs of pursuing the lawsuit—including attorney's fees, court costs, and expert fees—which are also legally irrelevant, but nonetheless have implications for the ability of the damage award to fully compensate the plaintiff.[114] The jury, or at least some of its members, is likely to consider one or more of these topics in evaluating what fair compensation will be. Currently, they do so without guidance from the court, unless the jurors decide to ask the judge a question about insurance or about potential costs, such as attorney's fees or taxation of the award, a question the judge does not always answer.[115] But even if they do not ask such questions, jurors come to the court with experiences that have primed them to think about these topics.

(1) Source: insurance.—Jurors typically understand from their own experience that many motorists and others are insured. As a result, although jury instructions have traditionally avoided any mention of insurance, jurors make assumptions about the likely insurance status of the parties and draw conclusions about the likely behavior of the insurance companies. These assumptions and conclusions vary depending on the juror's experience and knowledge of insurance. Consider the following examples from three different cases:

CASE 1:

JUROR #8: Well, insurance normally takes the tab on the car.

[*And from the same jury*]:

JUROR #1: Insurance companies give you ten physical therapy treatments at the most. Ten, twelve at the very most. And that's what? Maybe a month of treatment?

[113] Evidence that a person carries liability insurance is generally excluded unless it is offered to "prov[e] a witness's bias or prejudice or prov[e] agency, ownership, or control." FED. R. EVID. 411.

[114] *See* Thomas D. Rowe, Jr., *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 DUKE L.J. 651, 651.

[115] Of the fifty-two questions that juries submitted to the judge during deliberations, eight concerned insurance, three were about attorney's fees, and six were about other costs. In response to fifteen of these seventeen questions, the judge explicitly instructed the jury not to consider the issue. An additional twenty-five questions on these topics were submitted during trial, twenty-three of them about insurance. In response to ten of these questions, the judge explicitly instructed the jury not to consider the issue and the judge gave no response at all to the remaining questions.

CASE 2:

JUROR #2: Um, we know it's not going to come out of the defendant's pocket or there wouldn't have been any, there wouldn't have been a trial.
JUROR #6: [*nodding*] And he doesn't have insurance, yeah.
JUROR #2: There wouldn't have been a trial.
JUROR #3: Well, he might be liable for something over a certain amount.

CASE 3:

JUROR #5: Was he on insurance, or was that out of pocket?
JUROR #2: We don't know.
JUROR #8: Don't know.
JUROR #4: I was wondering, too.
JUROR #2: I guess he was out of school and he was working part time jobs, so he might not've been covered by anything.
JUROR #7: Of course, he was young enough to be covered by his mom and dad still—
JUROR #8: Depending on what kind of insurance they had.
JUROR #7: —up until twenty-one years.
JUROR #2: And, he was living at home.

In Case 1, the jurors made claims about how insurance companies handle accident expenses, and their claims were not contradicted. In Cases 2 and 3, there was less agreement expressed by the jurors in the analysis of insurance. In Case 2, Juror #2 claimed that the insurance company would pay, but Juror #5 suggested that the defendant might have to pay something as well. In Case 3, the jurors made very different assumptions about the likelihood that the plaintiff had insurance. In thirty-one of the fifty cases, the jurors erred by talking about the parties' insurance, frequently expressing the desire to avoid double-compensating a plaintiff who had already been reimbursed through insurance. Note that unlike jurors who made insurance comments that reflected resistance and a refusal to set aside a topic the jurors were aware they should not consider, the jurors making the insurance comments included in Table 5 gave no indication that they knew the subject of insurance was legally irrelevant. This ignorance is understandable. Unless a jury submitted a question to the judge concerning whether insurance was to be considered—which occurred in eleven of the cases[116]—the jury received no instruction that discussing insurance during deliberation was inappropriate.[117]

[116] In two additional cases the jury asked about insurance but did not receive a responsive answer.

[117] Mention of insurance was a legally inaccurate reference unless: (1) a juror mentioned an insurance company to identify where someone worked, (2) a juror drew on information presented at trial about the reason for a plaintiff's behavior in obtaining medical help or in the selection of a particular doctor, or (3) a juror described personal experience with an accident and incidentally mentioned insurance (e.g., after describing the accident in detail, the juror said, "And my insurance picked it up, so

(2) Costs: attorney's fees and other costs.—Jurors are not only concerned with evaluating the source of the damage award. They also know that litigants typically have expenses associated with the litigation that may effectively modify the amount of an award. They are usually aware that attorney's fees in standard tort cases are contingency fees that will come out of the plaintiff's award. Discussion of attorney's fees occurred in thirty-four of the deliberations:

CASE 1:

JUROR #6: All right. Here's what you can do. You can come up with an amount . . . say the [medical] bills. Let's get the bills paid, okay—

JUROR #3: [*interrupting*] Well, but we're just . . . we're just doing in three categories [of damages] right now [*pointing to the board*]. If we all come up with other, we'll work on that—

JUROR #8: [*at the same time as Juror #3*] We're just [*pointing to the board*] . . . just doing three right now.

JUROR #6: And add like 20% or whatever for attorney's fees.

JUROR #8: Okay, but we can do that . . . .

CASE 2:

JUROR #5: Doesn't some of that $[X] [go] for fees . . . for attorneys?

JUROR #6: What about the attorney's fees . . . .

JUROR #2: The attorney's—

JUROR #4: They'll come out of here.

JUROR #5: He was acting like he [the plaintiff's attorney] wasn't going to get paid.

JUROR #6: No, no, no, no, wait. Attorney's fees come off the top of that $[X].

JUROR #4: And that will be . . . the minimum will be 35%.

In Case 1, Juror #6 floated the idea of increasing the award to account for attorney's fees, which the jury did not explicitly follow. In Case 2, at least three jurors engaged in a discussion of how much of the award will go for attorney's fees, although they did not explicitly adjust their award to cover the fees. The only jury that explicitly added to its award to pay for attorney's fees was the jury described earlier that reasonably interpreted the "services rendered" mentioned in the jury instructions on damages to include attorney's fees.[118] More commonly, jurors did not see any language in the instructions that told them how to deal with attorney's fees, and the topic peppered their discussions about damages, reflecting their understanding of the fees as a significant cost that would effectively reduce

I didn't go to court."). These references occurred in eighty-six comments. In a further 195 comments, a juror correctly and explicitly rejected insurance as relevant, usually in the context of correcting one of the 578 comprehension and 259 resistance errors about insurance by another juror.

[118] *See supra* note 73 and accompanying text.

the plaintiff's award. The majority (75%) of the 505 comments in the category of cost errors concerned costs associated with attorney's fees. In the remaining 126 comments (25%), jurors in 12 cases raised concerns about other irrelevant costs in addition to attorney's fees that the plaintiff incurred before and during the trial, such as costs for experts and time lost from work while attending the trial. For example:

CASE 1:

JUROR #1: Because court costs are probably pretty expensive.
JUROR #2: Well, because of Dr. X and the consult with Dr. Y.
JUROR #1: That's probably two grand.

CASE 2:

JUROR #1: They [the plaintiffs] would have been making money while they were in the trial. They got, they lost [several] weeks.

In Case 2, the jurors explicitly added a modest amount to their award (amounting to 1% of it) to cover the time the plaintiffs spent in court.

Jurors in eight cases expressed concern about whether the award would be taxed. In one case the jurors explicitly reduced the amount they awarded the plaintiff for lost wages, reasoning that if he had earned the lost wages instead of recovering them at trial, he would have had to pay taxes on those earnings:

JUROR #8: What about taking taxes out of the wages? He wouldn't have gotten that money anyway.
JUROR #7: Oh, should we make it net?
JUROR #5: Yes, let's make it net.
JUROR #8: Well, you know, because all typically that he lost was what he would have had to pay taxes on.
JUROR #4: Right, right, absolutely.

Like the jurors' concerns about insurance, these cost errors reflect the jurors' attention to items not mentioned in the instructions, but which jurors see as part of their task as they try to appropriately compensate the plaintiff.

(3) Goals.—Jurors are instructed to fairly compensate the plaintiff for the injury negligently caused by the defendant,[119] but they are not told that compensation is the *only* goal they should consider. They are not told that both deterrence and punishment are inappropriate goals to pursue. Without specific guidance limiting the only appropriate goal to compensation in the ordinary negligence cases (in which punitive damages are not at issue), jurors felt free to enlarge the range of goals they considered. In twelve cases (24% of all cases), at least one juror expressed an interest in "sending a message" or arriving at an award that would be "a

[119] *See* RAJI (CIVIL) 3d, *supra* note 55, Personal Injury Damages 1, at 112.

wakeup call." Both plaintiffs and defendants were the subject of these comments:

CASE 1:

JUROR #6: [W]e should also send a message that people can't go around suing just because—
JUROR #3: Exactly.
JUROR #6: —you get a little bumper.

CASE 2:

JUROR #4: This is just to give a signal to the [defendant] that you have to be reasonably, uh, accountable—
JUROR #3: Mm-hmm.
JUROR #4: —you know, to your public . . . people coming and going.

The remarks generally came from one or two jurors for a total of forty-four comments across the twelve cases. Other jurors explicitly corrected some of them (seventeen comments), as Juror #4 does below in a medical malpractice case:

CASE 3:

JUROR #8: On the other hand, you can look at this case as a way of sending a message to Dr. X—
JUROR #2: Mm-hmm.
JUROR #8: —and the medical profession—
JUROR #2: Exactly.
JUROR #8: —that they need to—
JUROR #4: Those are punitive damages.
JUROR #8: —they need to watch—
JUROR #4: And we're not giving punitive damages.
JUROR #8: —what they are doing.

Although Jurors #2 and #8 may not have been deterred from their goal by Juror #4's correction, they offered no further remarks on the topic during the deliberation. Yet this count may underestimate the tendency for jurors to see punishment as legitimate in a civil case in which it is not a legally relevant consideration. There is some evidence that the reprehensibility of a defendant's behavior may increase awards.[120] Thus, in the absence of an explicit instruction that punishment is an inappropriate goal, jurors may be more inclined to respond to irrelevancies, such as the defendant's level of reprehensibility.

(4) Discretion.—Deciding on damages is often described as the most difficult task for jurors because so little guidance is provided

[120] *See* GREENE & BORNSTEIN, *supra* note 111, at 136–37.

aside from the instruction to award reasonable compensation.[121] Faced with plaintiff's medical bills, jurors must determine what portion of these expenses was "reasonable."[122] Even with claims for lost wages, the jury must decide how much of the claimed amount the plaintiff actually would have earned if she had not been injured by the defendant. That assessment may require the jury to consider how many hours the plaintiff would have worked and even the amount she would have earned during the missing period (e.g., how much would she have earned as a commission-based worker?). The challenge is even greater when the jury must estimate future expenses—both medical expenses and any decreases in earning power or capacity in the future. In addition to physical injuries, jurors may be asked to consider damages for "pain, discomfort, suffering, disability, disfigurement, and anxiety already experienced, and reasonably probable to be experienced in the future as a result of the injury."[123] The plaintiff typically provides evidence and specific dollar amounts requested for medical expenses and lost earnings, past and future, often based on bills for expenses accrued and expert medical and economic testimony. Without any direct guidance from the court beyond the general instruction that what the attorneys say is not evidence, jurors sometimes are unsure how to treat the evidentiary guideposts[124] the parties and their witnesses offer, and to know when they have discretion to either ignore or adjust them:

CASE 1:

JUROR #3: So the question is can we reduce the amount to Dr. X, or does it have to be all or nothing? Right?

JUROR #8: It has to be all or nothing.

These types of misunderstandings occurred in twelve cases. On a few occasions, the jurors assumed there was a suggested range or guideline for damages, and they turned to the judge for help, learning (from the judge's response) that it was up to them to determine the award. Nearly all of the forty-three misunderstandings involving jury discretion (90.7%) were corrected.

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[121] *See* RAJI (CIVIL) 3d, *supra* note 55, Personal Injury Damages 1, at 112 ("If you find [any] defendant liable to plaintiff, you must then decide the full amount of money that will reasonably and fairly compensate plaintiff for each of the following elements of damages proved by the evidence to have resulted from the fault of [any] [defendant] [party] [person] . . . ."); *see also* Edith Greene & Brian Bornstein, *Precious Little Guidance: Jury Instruction on Damage Awards*, 6 PSYCHOL. PUB. POL'Y & L. 743, 746 (2000) (noting that jurors are instructed to compensate plaintiffs based on a number of components such as pain and suffering, but are not provided with definitions of the terms or instructions on balancing them).

[122] RAJI (CIVIL) 3d, *supra* note 55, Personal Injury Damages 1(3), at 112.

[123] *Id.* Personal Injury Damages 1(2), at 112.

[124] For a discussion of juror use of attorney recommendations as anchors, see Shari Seidman Diamond et al., *Damage Anchors on Real Juries*, 8 J. EMPIRICAL LEGAL STUD. 148 (2011).

c. Relevant evidence.—Courts instruct jurors to base their decisions on the evidence presented at trial and not to speak with trial participants if they encounter them outside of court during the trial. Jurors receive no explicit instruction about how they should handle any behavior they may observe or hear in the courtroom apart from the evidence presented from the witness stand or by the attorneys, or about what they may see and hear inadvertently outside the courtroom. In view of current legal controversy over whether a trier of fact should be permitted to consider the observed behavior of a party who is present in the courtroom while not testifying,[125] we treated juror comments about "off-stage" behavior[126] as errors only when the comments referred to nontestifying observers in the courtroom or to the behavior of trial participants outside the courtroom, both of which were clearly legally irrelevant. Across three cases, jurors made fourteen comments during deliberations about the behavior of nontestifying observers in the courtroom (e.g., "Did you see the man who was in the audience, sitting in the back who was with [the plaintiffs] at lunch yesterday?"), and about chance opportunities to view the behavior of the plaintiff outside the courtroom during the trial (e.g., "You know, he [the plaintiff] walked off the elevator just fine."). The majority of the comments occurred in a case in which two jurors on separate occasions discussed behaviors they saw outside the courtroom—in the bathroom and on the street—where the plaintiff allegedly started limping when he recognized the juror. As information obtained outside of the trial, the jurors should not have mentioned those inadvertent observations during deliberations. As we have suggested elsewhere,[127] jurors used these "off-stage" observations to support their positions, but there is little evidence these observations affected verdicts in the cases in which they occurred.

Irrelevant evidence presented at trial in these civil cases, even if it drew an objection sustained by the judge, was rarely substantially prejudicial to one of the parties. As a result, few irrelevant items presented during the trial attracted the attention of the jurors. In several instances, however, a juror cited a legally irrelevant piece of information presented at trial (e.g., the plaintiff "served our country" or has a family) as a basis for consideration on issues other than credibility. Some of these suggestions were rejected as irrelevant by other jurors, while others drew no reaction.

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[125] *See, e.g.*, United States v. Schuler, 813 F.2d 978, 982 (9th Cir. 1987) (finding that a witness's nontestifying demeanor is not a form of evidence and its use in closing argument is improper). *But cf.* Morgan v. Dep't of Fin. & Prof'l Regulation, 871 N.E.2d 178, 191 (Ill. App. Ct. 2007) (noting that an ALJ did not err in taking note of the testifying defendant's demeanor while sitting in the courtroom). *See also* Mary R. Rose & Shari Seidman Diamond, *Offstage Behavior: Real Jurors' Scrutiny of Non-Testimonial Conduct*, 58 DEPAUL L. REV. 311 (2009) (discussing, in the context of proposals for fact finders to view testimony on video instead of in person, fact finder use of "offstage" litigant behavior).

[126] *See* Mary R. Rose et al., *Goffman on the Jury: Real Jurors' Attention to the "Offstage" of Trials*, 34 LAW & HUM. BEHAV. 310, 313 (2010).

[127] *Id.* at 313, 318–19.

d. Procedural errors.—Jurors receive some instruction on the procedures that they are expected to follow during the trial (e.g., not to speak with the attorneys, how to contact the bailiff for assistance, or not to discuss the case with friends or relatives)[128] and how to handle their deliberations (e.g., choosing a foreperson to preside over deliberations),[129] but the deliberations revealed several omissions in these instructions. In one case, a juror worried that he was not supposed to take notes during closing arguments. Some jurors in a second case were concerned that if the jury decided two of the three claims and hung on the third, that the case would have to be completely retried. In a third case, a juror wondered if the jury was required to deliberate for a certain length of time. Most (72.7%) of these errors were explicitly corrected, and the remainder were ignored. They reveal that some standard procedures are unfamiliar to the laypersons who serve as jurors, a fact which unnecessarily causes the jurors concern and potentially distorts their behavior.

In sum, comprehension errors take a variety of forms. This intensive analysis of when they occur and how juries do (and do not) address them provides the groundwork for understanding the opportunities for improved communication. In addition to these comprehension errors, however, we also identified areas that may signal resistance rather than miscomprehension. In the next section we discuss these "resistance" errors expressed by jurors who appeared to misstate or misapply the relevant law, not because they failed to understand an instruction, but because they refused to follow it.

D. Resistance Errors

Resistance errors, in contrast to comprehension errors, occur when a juror makes a legally inaccurate statement and there is explicit or contextual evidence that the juror is aware that the statement is wrong. For a juror's error to qualify as a resistance error, the juror had to announce that he was not following the law, or there had to be strong evidence that the particular juror who made the error had received a clear instruction from the judge or his fellow jurors on the accurate version of the law, yet the juror continued to make the same error. That is, the 438 resistance errors, which constituted one in six instruction errors, occurred when a juror did not follow the appropriate legal standard and there was evidence that the juror was deviating intentionally from the law. In contrast, if a juror, although wrong, continued to maintain that he or she was correct, those inaccurate comments were treated as comprehension errors rather than resistance errors. For example, a juror did not want to attribute fault to the defendant from the actions of the defendant's agent even after the other jurors pointed out that

[128] RAJI (CIVIL) 3d, *supra* note 55, Preliminary 7, at 9.

[129] *Id.* Standard 15, at 30.

the agency instruction indicated that the defendant had admitted the agency relationship for purpose of the claims. The juror responded: "I'm not sure if page ten [in the instructions] really means that [agent] is [defendant] in all respects [involving the agent's actions at issue in the case]." We did not characterize this comment as resistance, although it is possible that the juror was being disingenuous and strategic, because the juror expressed the view that her position was correct, even suggesting that the jury send a question to the judge to get clarification.[130] As indicated below, to constitute a resistance error a juror had to explicitly or implicitly reject an instruction, and not claim that the correction of the juror's error was itself wrong.[131]

A small number of the resistance errors were explicit and direct: the juror announced that he or she was disregarding the law and discussing a legally irrelevant topic or advancing an incorrect position on the law. Thus, a juror was explicitly defiant when the juror said, "I know we're not supposed to speculate but . . . ." Other jurors showed similar awareness that they were considering "forbidden topics." For example:

CASE 1:

JUROR #6: I probably shouldn't say this at all, but here's the part that bothered me: this is why we all carry insurance. And we obviously, one of his doctors said . . . she submits $[X] per hour to his insurance carrier. Well, obviously we all know that he probably didn't pay, not for much of this, anyway.

CASE 2:

JUROR #3: Now I know we're not supposed to consider this, but you do realize the attorney's taking a lot of this.

In each of these instances of open defiance, the juror was directly acknowledging the legal rule but continuing to maintain a course directly at odds with it. These comments were made by twenty-four jurors who came from twenty different cases, and there were only thirty-one explicitly defiant comments overall.

A more common form of resistance occurred when jurors persisted in making inaccurate comments about a legal issue after the judge clearly answered a direct question about the point at issue or after several other members of the jury explicitly pointed to a judicial instruction that contradicted the juror's erroneous claim about the law. The bulk of the resistance comments, 308 (70%) of them, fell in this category. For example, after the judge explicitly responded to a juror question about insurance by telling the jurors to disregard the issue of insurance, a juror raised the

[130] In this example, the juror was ultimately persuaded that the instruction justified an agency-based liability, but this comment occurred during the deliberations before the juror reached that point.

[131] For the reliability analysis of this coding, see *supra* note 66.

question of the plaintiff's insurance again and the following conversation ensued:

JUROR #8:	If she [the plaintiff] had [] insurance, the chiropractor wouldn't be covered because she had a preexisting condition if that's what she's suing for. But I don't know, I don't know how many people have insurance. I mean, I can't . . . .
JUROR #2:	Well her primary physician indicates that she must belong to an HMO or, at the time have belonged to a group insurance.
JUROR #7:	At [plaintiff's place of employment] they have good insurance.

Each of these three jurors showed resistance by disregarding the judge's explicit admonition. In other cases, the jurors pointed to a specific judicial instruction (e.g., to ignore the plaintiff's previous settlement for a worker's compensation claim or with one of the original defendants in the case) and a juror continued to focus inaccurately on the topic.

The third category of resistance error involved persistent nonacceptance of corrections from multiple jurors. Jurors made these ninety-nine (23%) legally inaccurate comments after at least two other jurors had corrected an inaccurate statement on this topic, thus implicitly resisting the correctly expressed position after being confronted unambiguously with it. For example:

JUROR #2:	Whatever comes out of this thing, her lawyer is going to probably get anywhere from 25%–35%.
JUROR #3:	They get 33%.
JUROR #2:	Okay, her lawyer is going to get a third of whatever we tell them. So, if in your mind . . . .
JUROR #4:	But see, now, the other thing is, if her lawyer is going to get this, that shouldn't be a factor into this. It's her pain and suffering. She can deal with this.
JUROR #3:	You're not supposed to think about what the lawyer gets.
JUROR #2:	But still, you have to keep that in the back of your mind.

Here, Juror #2 persists with the issue of attorney's fees after Juror #4 and Juror #3 admonish the juror that it is inappropriate to consider the topic. These comments provided the weakest evidence of resistance. After all, the other jurors, unlike the judge issuing a direct and clear admonition, could be wrong.

It may be that a few of what we called resistance errors in fact reflected such a serious misunderstanding of the instruction that the juror making—and persisting in making—the error simply did not understand or notice the correction. We suspect, however, that there were few of these instances. When a juror did not explicitly announce that she was resisting, we only coded the error as a resistance error if it occurred following a very clear sign from the judge or other jurors that that the juror was making an error.

The vast majority of the 438 resistance comments concerned insurance (58.2%) or attorney's fees (26.9%).[132] In these comments, the jurors, contrary to legal doctrine,[133] expressed the view that both insurance and fees are appropriate considerations despite the legal irrelevancy of both in determining damages. In articulating that view, the jurors thus expressed a modest disagreement with governing law, while accepting the overarching legal principle that a compensatory award should attempt to place plaintiffs as nearly as possible to their pre-accident or dispute positions.

Apart from insurance and attorney's fees, only a few other topics revealed jurors' willingness to nullify the law, but they generally related similarly to the question of the sources or expenses that would affect full compensation. In a few remaining cases, individual jurors wanted to enlarge the category of relevant information in other ways. For example, in one case a juror insisted that it would be appropriate to find out whether one of the parties received a citation in the accident to determine who was at fault. In another case, the juror explicitly resisted the judge's clear communication that a fact the jury found relevant was not relevant at all: "They [the judge] said it was irrelevant, but to me it was relevant as far as what kind of person he is: Do his children talk to him . . . ?"

Two important points emerge from this analysis of the resistance errors. First, they are relatively infrequent compared to the much larger set of comprehension errors. Second, resistance errors tend to focus on insurance and attorney's fees, where the law rules out consideration of these factors that jurors nonetheless find relevant to producing an appropriate compensatory award.

E. Sustained Objections

Jurors receive the bulk of their instructions on the law at the end of the trial, but they are warned in preliminary instructions that the judge will also make legal rulings during the course of the trial. The jurors are told in advance that when an objection is raised by one of the parties and the judge either sustains that objection or explicitly tells the jurors that a question or answer should be stricken from the record, the jurors should disregard that question, exhibit, or testimony.[134] To evaluate how the jurors responded to

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[132] An additional 0.9% concerned both.

[133] *See* sources cited *supra* note 106.

[134] The preliminary instruction from Arizona stated:

> If an objection to a question is sustained, you must disregard the question and you must not guess what the answer to the question might have been. If an exhibit is offered into evidence and an objection to it is sustained, you must not consider that exhibit as evidence. If testimony is ordered stricken from the record, you must not consider that testimony for any purpose.
>
> Do not concern yourselves with the reasons for my rulings on the admission of evidence. Do not regard those rulings as any indication from me of the credibility or weight you should give to any evidence that has been admitted.

RAJI (CIVIL) 3d, *supra* note 55, Preliminary 3, at 5.

these sustained objections as a form of jury instruction, we sampled thirteen cases[135] and examined each of the sustained objections in situations: (1) that might have involved disclosure of information to the jury that the judge's instruction would have demanded that the jury not consider,[136] (2) that garnered from the judge a specific admonition to strike, or (3) in which no reason was given by the attorney or judge. These criteria produced 234 objections, which constituted two-thirds of the sustained objections in these cases.[137] We examined each of the objections and the information revealed in the objectionable question or answer to determine whether any new information was revealed that under the governing law, the jury should not consider. We also checked to see whether the same information was revealed in unobjectionable questioning in another part of the trial. We then scrutinized the deliberation transcript to see whether the jurors discussed the objectionable material, and, if so, what they said.

The majority of the sustained objections (79%) did not reveal any new or distinctive information. In these cases, either the objection prevented the witness from, for example, giving hearsay evidence, or the attorney was able to rephrase the question to avoid making it objectionable. The witness who answered the rephrased question, perhaps cued by the leading question, then provided the desired answer in an unobjectionable form. Objections to lack of foundation were typically addressed by providing a foundation, so that the question was then permitted. In other cases, another source provided the same information that the sustained objection had barred.

In thirty-five of the instances, the sustained objection did reveal new information, but the jurors did not discuss the objectionable material. In the remaining fourteen instances, the jurors did talk about the topic that was the subject of the sustained objection. In two of these fourteen instances, the new information apparently had no influence, as when an attorney in a leading question on redirect suggested a legitimate reason for the failure of the witness to produce some financial records, drawing an immediate sustained objection. The jury unanimously rejected the credibility of the suggestion and, in fact, the credibility of the witness on all financial matters. Thus, only 12 of the 234 instances in this sample of sustained objections generated unique information that might have influenced the

[135] We selected these thirteen cases to proportionally represent the range of case types (five motor vehicle, one medical malpractice, six other tort, one contract) and frequency of objections from the cases in our sample, and also because we had trial transcripts for eleven of these cases. We identified the objections and rulings on the objections in the remaining two trials from the videotapes of those trials, rather than the transcripts. We then examined the deliberations in all thirteen cases.

[136] For example: argumentative, assumes facts not in evidence, counsel is testifying, lack of foundation, hearsay, lack of personal knowledge, leading, misstates evidence, irrelevant, speculation, prejudicial.

[137] Thus, we did not include sustained objections such as "asked and answered" because they were not based on objectionable information that had been or threatened to be revealed to the jury.

jury. In two of these remaining twelve instances, both from the same case, we were able to trace juror talk during deliberations directly to the material brought out that led to the sustained objection. In the discussions involving these two objections, the jurors explicitly referred to the fact that the sustained objection had occurred. Their conversation involved two objections made during the testimony of the same witness, as the questioning attorney attempted to introduce hearsay evidence that others at the scene had made the same identification that the testifying witness had made. When Juror #2 brought up the corroborating "witness" support during deliberations, two other jurors immediately responded:

> JUROR #1: How come [the absent witnesses] didn't come and testify?
> JUROR #3: Wasn't that deemed hearsay and stricken from the record though? Wasn't it deemed that we couldn't use that because it was all hearsay?

Juror #2, who originally raised the issue, tried to defend his position: "In other words, we're going to call [the absent witness] a liar?" Juror #6 joined the conversation, responding: "No, we're not calling [the absent witness] a liar. We, we don't have any testimony from [the absent witnesses]. How can you call them a liar? They haven't testified. We have hearsay. Somebody said." Although Juror #2 persisted in wanting to give weight to the absent nonwitness, the majority of the jurors explicitly rejected that view.

The jurors did not explicitly talk about any other objection, and in no instance other than the one discussed above could their talk be traced directly to the forbidden material. In most of the other instances, sources other than the objectionable material may have produced the discussion (e.g., an objection was sustained because the attorney suggested a motivation and the jurors discussed that motivation, but the facts of the case would have suggested that motivation even if the attorney had not asked the question). There is no doubt that the deliberations only partially reveal what affects jury verdicts, and the material that emerged from the remaining twelve objectionable questions or answers may well have influenced the juries' decisions. Nonetheless, this analysis provides no evidence that jurors regularly misused information revealed in spite of a sustained objection.

What explains this minimal evidence of influential forbidden intrusions associated with sustained objections? The answer may stem from system controls on the attorneys, which are sometimes underappreciated. The classic version of influential intrusion that draws a sustained objection but is likely nonetheless to influence the juror appears in criminal trials when the prosecutor's question produces evidence of the defendant's criminal record (and the defendant has not taken the stand). The analogue in the civil case occurs when an attorney mentions or extracts information on insurance. What prevents attorneys from eliciting such potentially influential testimony beyond the fact that it may draw an objection that will

be sustained? One reason is that it may draw a damaging response from the judge. For example, it may influence discretionary rulings[138] or lead to more direct action. In one of our cases, the judge responded when a plaintiff's attorney asked a question involving insurance by instructing the jury that the defendant did not in fact have insurance.[139] Further, in an extreme case, failing to abide by evidentiary rules can result in a mistrial, as it did in the initial trial of baseball legend Roger Clemens, in which the prosecution left a videotape running during a sidebar, but while the jury was present, that showed hearsay congressional testimony supporting the credibility of a key prosecution witness.[140] It may also present fertile grounds for an appeal based on the claim that the inadmissible evidence tainted the jury.[141]

Attorneys are generally urged to keep objections to a minimum, even when an objection would be legally warranted, out of concern that the objection itself will draw attention to the objectionable question or testimony.[142] This advice not to take the chance of emphasizing objectionable questions or testimony has some empirical support[143] and may reduce the frequency of objections, even when they are legally warranted. As we have seen, when objections did occur in these trials, the rulings on them were typically brief and gave little time for the jury to focus on the unanswered question or the partially interrupted response until the moment had passed. Moreover, the questions and responses that produced most sustained objections revealed little potentially prejudicial information to these juries.

The result of this confluence of forces is that, unlike the Hollywood version of a trial in which an attorney asks a question that dramatically

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[138] Our thanks to Professor Robert Burns for this observation. Interview with Robert Burns, Professor of Law, Nw. Univ. Sch. of Law (Mar. 10, 2012).

[139] In another trial not included in the thirteen sampled for the detailed analysis discussed in this section, a similar event occurred, and the defense attorney requested a mistrial. The judge responded by immediately giving an instruction in which he reminded the jurors that the plaintiff had mentioned that the defendants may have had insurance and instructed them to ignore that testimony. The jurors in this case did talk about insurance, the majority of their references contradicting the judge's instruction. The primary contested issue in the case was how much damage, if any, was caused by the accident. The jurors were skeptical about the extent of the injury, and it is unclear whether the jury discussion of insurance affected the modest award.

[140] Richard A. Serrano, *Clemens Trial Gets Quick Hook: Jury Is Allowed to View Statements on a Witness' Credibility, Leading to a Mistrial*, L.A. TIMES, July 15, 2011, at C1.

[141] *See* Edward J. Imwinkelried, *Poetic Justice in Punishing the Evidentiary Misdeed of Knowingly Proffering Inadmissible Evidence*, 7 INT'L COMMENT. ON EVIDENCE 1, 1–2 (2009), *available at* http://www.degruyter.com/view/j/ice.2009.7.1/ice.2009.7.1.1089/ice.2009.7.1.1089.xml?format=INT.

[142] *Cf.* THOMAS A. MAUET, FUNDAMENTALS OF TRIAL TECHNIQUES 336 (3d ed. 1992) ("Unless you are reasonably sure that the answer to a question will hurt your case, it is usually better not to object.").

[143] *See* Nancy Steblay et al., *The Impact on Juror Verdicts of Judicial Instruction to Disregard Inadmissible Evidence: A Meta-Analysis*, 30 LAW & HUM. BEHAV. 469, 486–87 (2006) ("[The] [o]verruling of an objection is likely to *accentuate* the importance of that evidence and its impact.").

reveals damning inadmissible evidence and opposing counsel immediately and loudly objects, these ordinary civil trials rarely extracted potentially influential prejudicial evidence highlighted by objections. Moreover, our close study of the deliberations in the wake of sustained objections showed no evidence suggesting that jurors resisted the judicial admonitions that were offered in this context. In the end, instructions on the law delivered by the judge through sustained objections did not appear to influence jury deliberations.

F. Consequences of Comprehension and Resistance Errors

All comprehension and resistance errors conflict with the legal system's obligation to adequately instruct juries and the jury's legal duty to follow the law. Although jurors made remarkably few errors in talking about the law during these deliberations, we identified seven cases in which a general misunderstanding on the part of the jury explicitly affected the jury's damage award and no case in which resistance explicitly influenced a verdict on either liability or damages. The first damage award influenced by jury error was the result of a language error, two awards were influenced by omission errors, and four awards were affected by the same structural error. In the first case, the misunderstanding arose from a palpable failure to communicate: not only did the jurors not understand that the phrase in the instructions "services rendered" referred only to medical services (and not to attorney services), but in addition, the legal system failed to provide them with reasonable assistance; in response to their question, they received no clarification from the judge, who simply redirected them to the page listing damage categories that they had already been trying to follow. In two other cases, jurors made modest adjustments in their awards based on legally irrelevant criteria that were not mentioned in the jury instructions. In one case, the jury raised an award to account for the time the plaintiffs spent in court, and in the other, the jury reduced an award for lost wages to account for the taxes the plaintiff would have had to pay had he worked to earn the money. In all three of these cases, an explicit instruction ruling out attorney's fees, taxes, and time in court as considerations in determining damages would have corrected any misunderstanding as to what the law prescribes. Of course, a clearer instruction may not have deterred the jurors from adjusting their awards to consider these factors, but in the absence of such an instruction, it is a mistake to attribute lack of compliance to misbehavior by the jury.[144]

[144] In 10 other cases, some jurors understood that attorney's fees were an illegitimate factor to consider but nonetheless persisted in discussing how the attorney's fees would affect what the plaintiff recovered. In 3 of those cases, a majority of the jurors participated in the conversation, producing a total of 102 resistance errors. In all 3 cases, they bemoaned the fact that an undeserving plaintiff's attorney might recover more than he deserved. A total of 20 resistance comments occurred across the remaining 7 cases. In none of these 10 cases was it clear that the attorney's fees influenced the damage award.

The structural errors that arose in four other cases shaped the damages the jury awarded when the jurors adjusted their awards in comparative fault cases to ensure that the plaintiff would recover reasonable medical costs. These juries gave no indication that they saw this approach as inconsistent with the legal instruction to allocate the percentage of total damages between the two parties on the basis of percentage of fault. No juror on any of these juries objected to the way the jury arrived at the percentage of fault or the assessment of damages. Here, further work is needed to determine how, and perhaps whether, to address these structural errors. It is significant that in one of the four cases, the decision to give full medical expenses despite allocating partial fault to the plaintiff was in part a compromise between a few jurors, who wanted to make an award for pain and suffering, and the majority, who objected to any award for pain and suffering.

The history of comparative damages is instructive on the conflicts about the appropriate relationship between decisions on liability and damages. Before comparative fault emerged as the dominant legal regime for torts, some legal scholars advocated the use of bifurcated trials that would separate considerations of liability and damages.[145] The comparative fault cases add an additional context in which questions about the ability to separate liability and damage considerations emerge.[146] When juries fail to keep liability and damage assessments separate, it may reflect comprehension problems. Alternatively, or in addition, the jurors in these cases may be revealing a preferred theory of damages that the law as currently constructed does not recognize: that injured plaintiffs should be entitled to recover some of the costs associated with injuries received that were caused by the negligence of a defendant (e.g., medical expenses, but not pain and suffering), even if the plaintiff contributed to the injuries as well. In any event, the deliberations of these juries suggest that instructions under the current legal rules have only inconsistently led jurors to separate considerations of liability and damages in comparative fault cases.

V. ADDRESSING LEGAL ERRORS

Most of the juror talk about legal issues that we observed during these deliberations showed the jurors grappling successfully with their jury instructions—79% of comments stating or applying the law accurately reflected the instructions and less than 9% of the comments about instructions were errors that remained uncorrected. This close examination of error in deliberations suggests that jury instructions are largely, although not always, successful in helping jurors understand what they need to know about the law they are being asked to apply. The results show far better performance than what is typically reported in surveys and in the

[145] *See supra* note 89.

[146] *See supra* note 89 and accompanying text.

experimental literature.[147] What explains this inconsistency? One possibility is that jurors faced with applying instructions during deliberations are able to assist one another in ways not captured on post-deliberation questions or in studies of individual respondents. Another possibility is that the availability of written copies of the instructions for each individual juror bolsters comprehension. As we saw, the Arizona jurors frequently consulted their written instructions to directly check their understanding of the legal standards they were being asked to apply.[148] In some prior research showing no effects of deliberation on post-deliberation comprehension measures, the jurors did not receive even one copy of the instructions.[149]

Finally, we might ask whether the jurors in Tucson were unusually competent. As other researchers have shown, comprehension of complex evidence increases with juror education.[150] In fact, the educational distribution of the Tucson jurors in the Arizona Jury Project was remarkably similar to the distribution of jurors in a study conducted in a large urban state court in Cook County, Illinois, and in a second study conducted in a federal court in Connecticut[151]:

TABLE 6: EDUCATIONAL DISTRIBUTION OF JURORS

	AJP Jurors	**Cook County Jurors**	**Connecticut Jurors**	
	(venire) (n=353)	(venire) (n=1022)	(venire) (n=1801)	(jurors) (n=426)
Less than 4 years of high school	4.5%	6%	3.9%	3.8%
High school graduate	22.7%	24%	20.7%	23.5%
Some college	40.2%	28%	28.4%	26.8%
College degree or greater	32.6%	41%	47.0%	46.0%

In light of this evidence that the Arizona jurors are not atypically highly educated and that the report card from these real jury deliberations shows far better marks than the prior empirical work would have predicted, we might be tempted to dismiss the concerns frequently raised about opaque jury instructions[152] and ignorant jurors.[153] Nonetheless, the jurors we studied

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147 *See supra* notes 19–21.

148 *See supra* notes 56–57 and accompanying text.

149 *See, e.g.*, Ellsworth, *supra* note 21.

150 *See* Valerie P. Hans et al., *Science in the Jury Box: Jurors' Comprehension of Mitochondrial DNA Evidence*, 35 LAW & HUM. BEHAV. 60, 67 (2011).

151 *See* Diamond & Casper, *supra* note 101, at 529 n.15; Hillel Y. Levin & John W. Emerson, *Is There a Bias Against Education in the Jury Selection Process?*, 38 CONN. L. REV. 325, 336–38 (2006).

152 *E.g.*, Ellsworth & Reifman, *supra* note 6, at 540.

153 *E.g.*, FRANKLIN STRIER, RECONSTRUCTING JUSTICE: AN AGENDA FOR TRIAL REFORM 140 (1994).

did not always succeed in understanding and correctly applying their instructions on the law, and we found evidence that the errors affected damage awards in several cases. Moreover, because we could only listen to the jurors talk and could not hear their unexpressed errors in thinking, our ability to learn about their misunderstandings may be incomplete. In addition, it was clear that the jurors often had to struggle to arrive at an accurate understanding of the law they were supposed to apply. Both their struggles and the public perception of a disconnection between jury decisionmaking and the law threaten the legitimacy of the jury as a trustworthy pillar of the justice system. Finally, although the trials we studied here are typical standard fare in state civil litigation, the instructions the jurors in these cases received were not nearly as complex as the instructions jurors face in some trials. For example, in a recent case in Illinois, former governor Rod Blagojevich was charged with twenty-four counts involving alleged attempted bribery, attempted extortion, and wire fraud, among other charges.[154] At the end of the trial, the jury received more than one hundred pages of instructions, and the jurors reported that they spent the first several days of deliberations attempting to understand the instructions, including the relationship between the various charges.[155] Although this trial was more complicated than the trials in the Arizona Project and indeed involved an unusually complicated set of charges, the Arizona jurors who faced cases involving multiple claims were also challenged by the need to understand whether there was a relationship between them.

Our sense is that the Arizona jurors in the ordinary set of civil trials we studied provide a window into the problems that jurors face more generally, revealing previously undiagnosed sources of error. Although the deliberations display generally effective performance by the jurors, the deliberations also reveal struggles and errors reflecting strains that need to be addressed. We begin the next section by embracing fully the goal of optimizing compliance with the current legal standards that jury instructions attempt to convey. Thus, we focus on potential remedies for miscommunication. At the end, however, we step back and consider the jury as a source rather than as a recipient of law, describing some ways that legal rules might change to reflect jury preferences not recognized in current legal doctrine.

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[154] Monica Davey & Susan Saulny, *For Blagojevich, a Guilty Verdict on 1 of 24 Counts*, N.Y. TIMES, Aug. 18, 2010, at A1.

[155] Monica Davey & Susan Saulny, *Jurors Fault Complexity of the Blagojevich Trial*, N.Y. TIMES, Aug. 19, 2010, at A1 ("It was like, 'Here's a manual, go fly the space shuttle,' Steve Wlodek, one of the jurors, said . . . ."). After the first jury hung on all but one of the twenty-four counts, Blagojevich was retried on seventeen of the charges and the second jury reached a unanimous verdict on fifteen of them. Monica Davey & Emma G. Fitzsimmons, *Ex-Governor Found Guilty of Corruption: In Second Trial, Jurors Convict Blagojevich*, N.Y. TIMES, June 28, 2011, at A1.

A. An Overview of Potential Remedies

If we instructed jurors using plain English whenever possible and defined unfamiliar legal terms when use of those terms was unavoidable, the instruction process could eliminate many of the missteps associated with technical jargon and could remove up to one in four of the errors made by jurors in the Arizona Project. These linguistic problems are well-documented and can be corrected, if not effortlessly, then at least with a modicum of effort. Some efforts have recently been made in this direction.[156] Indeed, Arizona's pattern jury instructions have been revised to encourage courts to replace the descriptions "plaintiff" and "defendant" with the names of the parties in order to avoid juror confusion.[157] The errors that opaque instruction language causes do not stem from any inherent inability of the jury, from inconsistencies in the law, or from active resistance to legal directives, but merely from curable communication failures. But these wording traps are not the only, or even the most fundamental, reason why jurors may struggle unsuccessfully as they attempt conscientiously to apply the law. The Arizona jury deliberations revealed two more challenging sources of a serious disconnect with the law—as written—that a plain English focus will not solve. The following two other sources account for three out of four instruction errors: first, structural errors arising from the piecemeal construction of jury instructions, and second, omission errors arising from an unwillingness to confront the realities about what jurors know and expect. Together with the evidence of a few pockets of active resistance to the law, these other sources of error reveal why more is required than a plain English movement in jury instructions if the goal is both to provide clear guidance and to generate compliance. They also reveal the law's inconsistencies and ambivalences, suggesting the possibility that jurors—and not legal doctrine—may occasionally have the better of the argument when the two are at odds.

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[156] *See* Peter M. Tiersma, *Communicating with Juries: How to Draft More Understandable Instructions*, 10 SCRIBES J. LEGAL WRITING 1 (2006) (proposing basic rules for effective communication with jurors). The author, Peter Tiersma, is a linguist who recently helped rewrite the California Pattern Jury Instructions. *Id.* at 2. For examples of empirical studies demonstrating that plain English revisions to jury instructions can improve comprehension, see Diamond & Levi, *supra* note 33; V. Gordon Rose & James R.P. Ogloff, *Evaluating the Comprehensibility of Jury Instructions: A Method and an Example*, 25 LAW & HUM. BEHAV. 409, 419–20 (2001) (finding comparable results using a different experimental design); and see also Nancy S. Marder, *Bringing Jury Instructions into the Twenty-First Century*, 81 NOTRE DAME L. REV. 449, 486–87 (2006) (advocating having former jurors serve on pattern jury instruction committees).

[157] This change might have eliminated the sixteen technical language errors that jurors made in three of our cases due to confusion about the identity of parties mentioned in the instructions. *See* discussion *supra* Part IV.C.2.b.

B. Addressing Structural Errors

Jury instructions are written in parts.[158] When the court delivers the set of approved instructions, each part has been vetted for legal accuracy by the judge and the parties, but the set as a whole typically has been put together like a patchwork quilt with pieces from the defense, pieces from the plaintiff, and pieces from the judge. The jury receives the result and then tries to fit the pieces together. Although each instruction may be intelligible on its own, the jury is given little or no advice on how the pieces should work together. How could we ensure that jurors understand how the instructions fit together? The only way would be for the authors of jury instructions to analyze and evaluate sources of potential conflict between pieces, attend to the order in which they are to be presented, and offer the jury explicit guidance on the relationship or non-relationship between the two parts of the instructions. Many of these changes would not require drastic action. They might, for example, involve embedding a definition within the instruction, rather than presenting the definition by itself on a separate page. Other changes would require more; for example, instructions might be included that explicitly point out differences between instructions that might appear to be related. This more holistic approach to writing instructions, whether by a pattern jury instructions committee or by the attorneys and trial judge in the case being tried, means that the instructions are not ready when all of the relevant pieces are selected, but only after the sum of the parts is considered as a whole.

An additional byproduct of this holistic approach is that it would in some cases reveal inconsistencies in the law that are worthy of attention, identifying instances when instructions are not clear because the legal doctrine itself is ambiguous. For example, how far is a juror permitted to go in drawing on personal experience, as jurors regularly do? What if the juror has relevant occupational expertise? As one juror with medical expertise observed:

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[158] *See supra* note 80.

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

We did not consider this musing to be an error. Jurisdictions differ in their evaluation of what would be permissible in this case.[159] Even judges and experienced attorneys in the same jurisdiction have varying views on the appropriate use of such juror expertise. We have presented vignettes to judges and experienced attorneys, describing, for example, a juror with a medical background who convinced her fellow jurors in a tort suit that the medical expert who testified for the plaintiff was incorrect.[160] The expert claimed that the plaintiff's injury made him more susceptible to the viral infection he contracted six months after the accident.[161] We asked judges and practicing attorneys whether the juror had behaved appropriately or inappropriately. Even judges from the same jurisdiction were divided on the propriety of the juror's behavior. The issue here is thus not merely a matter of clarifying what the law demands, but rather of determining what that demand is.

C. Addressing Omission Errors

Omission errors should come as no surprise once we correct the misleading picture of jurors as blank slates and acknowledge that they do, as they must, fill in gaps to make sense of what they see and hear in the courtroom.[162] All comprehension is inherently a constructive process, and we regularly rely on our prior experiences to enable us to understand and interpret what is left unspecified. Often, we arrive at an accurate understanding that is generally shared. For example, we understand the sentence, "The policeman held up his hand and stopped the car."[163] We

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[159] *See* Shari Seidman Diamond et al., Embedded Experts on Real Juries (Feb. 8, 2012) (unpublished manuscript) (on file with the authors).

[160] *Id.*

[161] *Id.*

[162] Cognitive psychologists refer to cognitive structures of organized prior knowledge, abstracted from experience with specific instances, as cognitive schemas. They can be acquired directly or indirectly, and they guide both the processing of new information and the retrieval of stored information. *See, e.g.*, SUSAN T. FISKE & SHELLEY E. TAYLOR, SOCIAL COGNITION (2d ed. 1991).

[163] This classic example comes from Nancy Pennington & Reid Hastie, *The Story Model for Juror Decision Making*, *in* INSIDE THE JUROR: THE PSYCHOLOGY OF JUROR DECISION MAKING 192, 195 (Reid Hastie ed., 1993).

easily infer from our prior knowledge about police and traffic that the officer signaled the driver to come to a stop and did not put his hand on the car to forcefully prevent it from moving. Other inferences are more difficult, vary across individuals, and may fill gaps with unintended or inaccurate content. Our findings demonstrate that litigation expenses and insurance are in this category.

Jurors in personal injury cases in Arizona are instructed:

> If you find [any] defendant liable to plaintiff, you must then decide the full amount of money that will reasonably and fairly compensate plaintiff for each of the following elements of damages proved by the evidence to have resulted from the fault of [any] [defendant] [party] [person]:
>
> (1) The nature, extent, and duration of the injury.
> (2) The pain, discomfort, suffering, disability, disfigurement, and anxiety already experienced, and reasonably probable to be experienced in the future as a result of the injury.
> (3) Reasonable expenses of the necessary medical care, treatment, and services rendered, and reasonably probable to be incurred in the future.
> (4) Lost earnings to date, and any decrease in earning power or capacity in the future.
> (5) Loss of love, care, affection, companionship, and other pleasures of the [marital][family] relationship.[164]

In all of the thirty-two Arizona cases in which the jurors found in favor of the plaintiff, the jurors referred to this list as they deliberated on damages. They generally addressed each category, although they were sometimes unclear what the category "nature, extent, and duration of the injury" covered, and they primarily focused on damage elements two through five (e.g., medical expenses, lost earnings). In addition, however, jurors often expressed the view that this approach would be incomplete in determining the appropriate compensation. In trying to reasonably and fairly compensate the plaintiff, the jurors recognized that other factors would influence what the plaintiff received, including insurance, attorney's fees, and occasionally taxes.[165] Currently, the legal system generally deals

[164] RAJI (CIVIL) 3d, *supra* note 55, Personal Injury Damages 1, at 112. The instruction calls for a modification of this list to avoid elements that are inapplicable (e.g., future expenses if none are claimed) or cumulative, and notes that some unlisted elements may be applicable and that therefore customization may be required. *Id.* No additional elements were added to any of the personal injury instructions for cases in the Arizona Project. A sixth element—"Loss of enjoyment of life, that is, the participation in life's activities to the quality and extent normally enjoyed before the injury."—was added to the list since the Arizona Project data were collected. STATE BAR OF ARIZ., REVISED ARIZONA JURY INSTRUCTIONS (CIVIL) 108 (4th ed. 2005) [hereinafter RAJI (CIVIL) 4TH]. No jury in the Arizona Project received this additional instruction.

[165] Jurors, in effectively enlarging the legally relevant criteria supporting a damages award, reflect a distinction that attorneys make in discussing settlement values: both the jurors and the attorneys are concerned with "new money"—that is, with what the plaintiff will actually receive. Tom Baker, *Blood*

with these unlisted factors simply by ignoring them because they are all legally irrelevant. If the legal system really intends to have jurors ignore these factors,[166] it seems clear that failing to speak to the jurors about them is a failing strategy. Although it is difficult to trace juror comments on these topics directly to case outcomes in all instances, juries in at least three cases adjusted their awards to reflect items not on the list of relevant damage categories. In other cases, individual jurors said they were increasing their award to cover attorney's fees or decreasing their award on the assumption that the plaintiff had already recovered some or all expenses from insurance. The topics of insurance and attorney's fees come up so frequently during deliberations that a more direct approach is required.[167] We cannot escape, so we should not ignore, the fact that modern jurors are aware of the realities of litigation costs and sources of reimbursement.[168] By leaving these topics unaddressed, we effectively invite the unwarranted disparity in decisions that can arise as some juries adjust their awards to reflect these elements and others do not. Even if we are hesitant to address each potential litigant cost or source of reimbursement separately, on the grounds that most juries do not consider some of them (e.g., taxes or witness costs), a meta-instruction could warn jurors that if any item does *not* appear on the list they receive from the judge, the jurors should not include it in any award they make.

D. Addressing Resistance Errors

Juries are sometimes criticized for refusing to follow the law they are given, yet we saw little evidence of explicit resistance.[169] It may be that when jurors intentionally nullify the law, they do so primarily in criminal cases, or that they express their resistance silently. A juror, for example, might not believe that a defendant was negligent but may decide that the defendant should pay the plaintiff's damages for some other reason. Aware that the law requires negligence, such a juror might not overtly acknowledge that he was ignoring the negligence requirement. The deliberations did reveal a few complaints about the strictures of the law by an occasional juror who voiced some dissatisfaction with having to follow

Money, New Money, and the Moral Economy of Tort Law in Action, 35 LAW & SOC'Y REV. 275, 301–02 (2001).

[166] Fifty years ago, Harry Kalven, Jr. suggested that the legal system might actually be ambivalent about jury considerations of attorney's fees: "Since we cannot decide what we want to do about fees as damages, we are happy to let the whole troublesome issue go to the jury." Harry Kalven, Jr., *The Dignity of the Civil Jury*, 50 VA. L. REV. 1055, 1070 (1964).

[167] Diamond & Vidmar, *supra* note 105, at 1907 ("Ignoring [jurors'] attention to the [forbidden] issue[s] is tantamount to behaving like an ostrich.").

[168] *See* discussion *supra* Parts IV.C.4.b(1)–(2).

[169] *See supra* Part IV.D.

it. For example, several jurors expressed discomfort with the vicarious liability arising from agency law. Here, Juror #3 explains:

> I don't think that's right, but it's the law. It's just like the sexual harassment thing. If your supervisor sexually harasses you, you can sue the company even though it was the guy, and it wasn't the company, that was groping you, you know, it was the guy. But the company's still liable and it's the law, and it probably isn't good, right, or fair but we have to follow what the law says.

Insurance played a key role as a source of both resistance and comprehension errors, presenting the dilemma of how to address the insurance issue if comprehension is not the primary source of noncompliance for at least some jurors. The current legal practice of silence on the subject, or willingness to address it only when jurors explicitly ask a question about it, simply promotes inconsistency and undermines fairness. We have previously suggested that one remedy might be to explicitly instruct jurors in tort cases, when they are highly likely to assume that insurance is present, that insurance is legally irrelevant.[170] We also advocated honestly telling them that there is no way they can accurately determine whether any party in the case has insurance coverage or, if one or both parties have it, how much insurance they have.[171] Research is needed to determine whether this kind of acknowledged blindfolding can operate as a reasoned admonition,[172] that is, as a "collaborative instruction."[173] A collaborative instruction treats jurors as partners in the enforcement of legal rules by including a reason-based explanation as to why a statute or other legal standard addressed a particular issue the way it did. This reasoned admonition goes beyond a simple admonition that merely demands that the jury accept a legal standard without further justification because it is the law.[174] The notion is that if jurors are persuaded to accept the explanation,

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[170] *See* Diamond & Vidmar, *supra* note 105, at 1909–10.

[171] *Id.*

[172] *See, e.g.*, Diamond & Casper, *supra* note 101, at 524. "The traditional remedy for the introduction of inadmissible evidence is to admonish the jury to ignore it." Diamond & Vidmar, *supra* note 105, at 1907.

[173] *See* Diamond & Vidmar, *supra* note 105, at 1911.

Arizona and several other states have recently introduced an instruction on the irrelevance of insurance, but none has given an explanation for the admonition to disregard beyond the bald assertion that insurance is not relevant; for example, "In reaching your verdict, you should not consider [or discuss] whether a party was or was not covered by insurance. Insurance or the lack of insurance has no bearing on whether or not a party was at fault, or the damages, if any, a party has suffered." RAJI (CIVIL) 4TH, *supra* note 164, Standard 9, at 30 (citing Diamond & Vidmar, *supra* note 105, as a source, but modifying the instruction proposed in that article). Moreover, use of the instruction is generally discretionary: "Arizona Superior Court judges have differing views as to whether to use the insurance instruction just situationally or routinely." *Id.* use note. Other states with instructions containing similar admonitions include California, JUDICIAL COUNCIL OF CALIFORNIA CIVIL JURY INSTRUCTIONS, CACI No. 105, at 15 (2012), Indiana, IND. JUDGES ASS'N, INDIANA MODEL CIVIL JURY INSTRUCTIONS No. 533 (2011), and Virginia, 1 VIRGINIA MODEL JURY INSTRUCTIONS—CIVIL No. 9.015, at I-191 (1998).

[174] *See* Diamond & Vidmar, *supra* note 105, at 1909.

they will be more inclined—and better able—to set aside an issue that they initially find pertinent. We do not presume that such explanation-based instructions can control the use of evidence that appears not only useful, but central to answering key questions about witness credibility (e.g., criminal record),[175] but for more peripheral issues, particularly those like insurance coverage that are likely to be the subject of general interest from jurors and are susceptible to widely varying assumptions, a direct explanation-based instruction may offer the most effective approach.

Even more challenging is the resistance that emerges from juror awareness that the plaintiff will have to pay attorney's fees. The evidence presented here of the ubiquitous nature of this concern, and the reasonableness of jurors' sense that full compensation should cover the plaintiff's costs in litigation, breathes new life into the arguments against the general application of the American rule that requires parties to bear their own litigation costs.[176] Although there has been much debate about the relative merits of the American rule versus the English rule (which has the loser pay the winning party's litigation costs, including attorney's fees),[177] the potential impact on unwarranted disparity in jury awards has received little attention.

E. Human Limits on Applying Legal Rules

The errors we observed in these deliberations arose primarily because the instructions failed to tell the jurors what they needed to know. We expected to see, but did not find evidence of, another source of error that experimental studies have documented: the tendency of the law to on occasion ask jurors (and judges) to perform impossible mental gymnastics

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[175] There is ample evidence that people may be unable to suppress thoughts even when they are highly motivated to do so and that unconscious or uncontrollable mental processing can influence judgments. *See, e.g.*, Daniel M. Wegner, *Ironic Processes of Mental Control*, 101 PSYCHOL. REV. 34, 34 (1994); Timothy D. Wilson & Nancy Brekke, *Mental Contamination and Mental Correction: Unwanted Influences on Judgments and Evaluations*, 116 PSYCHOL. BULL. 117, 117 (1994). Thus, both laypersons and judges may be influenced by inadmissible evidence they recognize as irrelevant and are motivated to disregard. *See, e.g.*, Saul M. Kassin & Samuel R. Sommers, *Inadmissible Testimony, Instructions to Disregard, and the Jury: Substantive Versus Procedural Considerations*, 23 PERSONALITY & SOC. PSYCHOL. BULL. 1046, 1047–49 (1997) (laypersons); Andrew J. Wistrich et al., *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251, 1288–1324 (2005).

[176] For discussions of the current rule and the controversy surrounding it, see Howard Greenberger, *The Cost of Justice: An American Problem, An English Solution*, 9 VILL. L. REV. 400 (1964), and John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 AM. U. L. REV. 1567 (1993).

[177] *E.g.*, John J. Donohue III, Commentary, *Opting for the British Rule, or if Posner and Shavell Can't Remember the Coase Theorem, Who Will?*, 104 HARV. L. REV. 1093 (1991); Keith N. Hylton, *Fee Shifting and Predictability of Law*, 71 CHI.-KENT L. REV. 427 (1995).

that do not comport with human abilities.[178] For example, there is convincing evidence that jurors cannot limit their use of a defendant's criminal record, as the law requires, to judging credibility and not to influencing judgments of propensity.[179] Yet courts regularly give a limiting instruction to do just that. Similarly, the Supreme Court in *State Farm Mutual Automobile Insurance Co. v. Campbell* held that juries, when setting the amount of punitive damages, should be told that they can consider out-of-state conduct by the defendant to judge the defendant's reprehensibility, but not to set the amount of damages based on harm done to such nonparties.[180] The rationale may be understandable, but using the evidence of injury to others appropriately probably demands superhuman capabilities that judges as well as jurors lack.[181]

We have little doubt that limiting instructions impose demands that are likely to be difficult for jurors—and possibly judges[182]—to apply as the law directs. In those circumstances in which the legal rule asks for the application of a limiting instruction, solutions that will ensure that the legally mandated rule will be applied are also limited. As we and others have suggested elsewhere, admonitions, limiting or not, may be insufficient to eliminate the influence of evidence that a decisionmaker sees as highly relevant to arriving at an accurate verdict.[183] Limiting instructions further tax the juror's ability to follow the court's direction by asking the juror to engage in the cognitively complex task of using information for some purposes but not for others (e.g., using a criminal record as an indicator of credibility but not propensity).[184] In the case of evidence that falls into this

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[178] *See* Dennis J. Devine et al., *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 PSYCHOL. PUB. POL'Y & L. 622, 666 (2001) ("In general, limiting instructions have proven to be ineffective and have even been associated with a paradoxical increase in the targeted behavior.").

[179] *See, e.g.*, Roselle L. Wissler & Michael J. Saks, *On the Inefficacy of Limiting Instructions: When Jurors Use Prior Conviction Evidence to Decide on Guilt*, 9 LAW & HUM. BEHAV. 37, 43 (1985); *see also* Theodore Eisenberg & Valerie P. Hans, *Taking a Stand on Taking the Stand: The Effect of a Prior Criminal Record on the Decision to Testify and on Trial Outcomes*, 94 CORNELL L. REV. 1353 (2009) (finding a statistically significant impact of a prior criminal record on the likelihood of conviction, especially in cases with weak overall evidence).

[180] 538 U.S. 408, 422 (2003).

[181] Justice Ginsburg discussed the difficulty in making this distinction in her dissent in *Philip Morris USA v. Williams*, 549 U.S. 346, 362 (2007) (Ginsburg, J., dissenting).

[182] We know of no study that has tested judicial reactions to limiting instructions, but there is evidence that judges do in fact show the human tendency to use information they are aware they should disregard. *See, e.g.*, Wistrich et al., *supra* note 175, at 1323–24.

[183] *See* Diamond & Vidmar, *supra* note 105, at 1914; Samuel R. Gross, *Make-Believe: The Rules Excluding Evidence of Character and Liability Insurance*, 49 HASTINGS L.J. 843, 859–60 (1998); Kassin & Sommers, *supra* note 175, at 1047–49.

[184] Joel D. Lieberman & Jamie Arndt, *Understanding the Limits of Limiting Instructions: Social Psychological Explanations for the Failures of Instructions to Disregard Pretrial Publicity and Other Inadmissible Evidence*, 6 PSYCHOL. PUB. POL'Y & L. 677, 685 (2000) (pretrial publicity); *see also* Devine et al., *supra* note 178, at 666.

single-use category, the only realistic way to prevent the decisionmaker from using the information for impermissible purposes would be to bar the evidence entirely.

It is worth noting that limiting instructions may be relatively rare in the typical civil case. We saw such limiting instructions in only two of our cases, both of which involved plaintiffs with criminal records. In designing a remedy for misuse of limiting instructions, it would first be valuable to know when and how often they are used.

VI. CONCLUSIONS, CHALLENGES, AND RADICAL REFORM

The conventional wisdom on jury comprehension of legal instructions is only partially correct: juries do struggle with jury instructions, and they sometimes misapply legal rules in reaching their verdicts.[185] With some important exceptions, however, the deliberations of the Arizona jurors as they discussed legal issues were remarkably consistent with the instructions they received. Moreover, the evidence presented here shows that deliberations do assist in resolving individual misunderstandings. The jurors in Arizona, armed with individual copies of the jury instructions, were able to correct nearly half of the errors made during their deliberations. Nonetheless, a substantial portion of the struggle jurors go through in attempting to apply unnecessarily convoluted and ambiguously worded instructions is preventable. The push to improve the clarity of jury instructions is well-justified. But it is not enough if we are serious about having jurors apply the law.

Other procedures, typically within the judge's discretion but not widely used and used in just a few of the Arizona cases, may also improve comprehension. For example, the judge may give substantive legal instructions at the beginning of the trial that can assist jurors by giving them a preview of the legal issues they will be asked to deal with.[186] Similarly, by giving final legal instructions before closing arguments, the judge can provide the complete legal framework so that the attorneys can then refer to the legal instructions that the jurors have already heard from the judge, and the jurors can then place those arguments in the appropriate legal context. Yet, as we have seen, the more challenging obstacles to optimal jury

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[185] We note, however, that application of the law by judges in state civil bench trials, at least in the eyes of appellate courts, shows an imperfect record: a 27.5% reversal rate (the reversal rate for jury trials is 33.7%). Theodore Eisenberg & Michael Heise, *Plaintiphobia in State Courts? An Empirical Study of State Court Trials on Appeal*, 38 J. LEGAL STUD. 121, 130 (2009).

[186] *E.g.*, Amiram Elwork et al., *Juridic Decisions: In Ignorance of the Law or in Light of It?*, 1 LAW & HUM. BEHAV. 163, 172 (1977); Saxton, *supra* note 20, at 112; Vicki L. Smith, *Impact of Pretrial Instruction on Jurors' Information Processing and Decision Making*, 76 J. APPLIED PSYCHOL. 220 (1991); *see* AM. BAR ASS'N, *supra* note 29, at princ. 6.C.1, at 29 ("The court should give preliminary instructions directly following empanelment of the jury that explain . . . the basic relevant legal principles, including the elements of the charges and claims and definitions of unfamiliar legal terms.").

performance in dealing with the law arise in those areas of "misunderstanding" that stem not merely from heavy legalese or poor sentence structure, but from deeper structural issues and failures to confront inconsistencies and ambiguities in the law. The Arizona deliberations, although generally showing sensible decisionmaking by citizens motivated to "get it right," reveal tensions arising from some fundamental gaps between what we tell jurors to do and what we want them to do, coupled with limitations on what we can reasonably expect from any human decisionmaker, whether judge or jury. Even a wholesale conversion to plain English instructions would not eliminate these tensions. The honest assessment is that we can do better than to supply juries with a "kettleful of law."[187] We can add structures that guide them in using an unfamiliar recipe, rather than simply tossing a set of ingredients in a pot. We can conduct empirical tests to gauge whether the ingredients and seasonings are blending well.[188] We can directly tell jurors to avoid ingredients that will spoil the stew. Those improvements will take more work, but they can be made.

If we are really serious about educating trial jurors about the law they are to apply, we could take an even more radical step: recognizing that instruction is more effective when it is not one-sided. Modern courts are increasingly permitting jurors to submit questions for witnesses during trial. The questions are vetted by the judge with advice from the attorneys before the witness is permitted to answer them. The evidence is that the opportunity to submit questions offers useful assistance to jurors.[189] When it comes to jury instructions on the law, however, the only point at which a jury can submit a question is after their deliberations begin. As in other states,[190] in all of the Arizona Jury Project cases, the bailiff informed the jury at the beginning of deliberations that if they had a question, they should write it down, have the foreperson sign it, and ring for the bailiff, who would then deliver the question to the judge. That means that the jurors must confer and submit any question they may have on the law to the bailiff or marshal. The judge then must contact the attorneys, who are not likely to have remained in the courtroom, to discuss the answer the jury will

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[187] *See* BOK, *supra* note 2 and accompanying text.

[188] *See, e.g.*, Diamond & Levi, *supra* note 33.

[189] *See* SEC v. Koenig, 557 F.3d 736, 741–43 (7th Cir. 2009); Shari Seidman Diamond et al., *Juror Questions During Trial*: *A Window into Juror Thinking*, 59 VAND. L. REV. 1927, 1942–44 (2006) (providing an empirical evaluation of the practice).

[190] *See, e.g.*, MICH. SUPREME COURT COMM. ON MODEL CIVIL JURY INSTRUCTIONS, 1 MICHIGAN MODEL CIVIL JURY INSTRUCTIONS No. 60.01, at 60-5 to -6 (2002 & Supp. 2011) [hereinafter MICH. MODEL CIVIL INSTRUCTIONS], *available at* courts.mi.gov/mcji/MCJI.htm; *Bailiff Orientation—Interaction with Jurors*, WASH. COURTS, http://www.courts.wa.gov/training/global_printversion/Bailiff_PrintVersion.htm#manjurdurdel (last visited Sept. 4, 2012) (including instructions for bailiffs on how to manage jurors during deliberation).

receive.[191] The jurors learn quickly that they cannot receive an immediate response to a question they submit during deliberations.[192] This may discourage questions, and it hardly facilitates understanding. An alternative would be to read the instructions in the courtroom, providing each juror with a copy as the instructions are read, and immediately to take any questions a juror has at that point. As with questions for witnesses, such questions should be submitted in writing, and as with questions submitted during deliberations, the judge should consult with the attorneys before responding. Of course, some questions may emerge only as deliberations unfold, but others may be clear from the start. Judges might prefer to avoid taking the chance they may give a legally inaccurate answer that will become an argument on appeal, as can happen with a legally inaccurate response to a question submitted during deliberations, but the benefit is that misunderstandings can be corrected that would otherwise follow the jury into the deliberation room.

A final option for responding to some of the inconsistencies we have observed between legal standards and juror preferences is even more radical: we can use what we have learned from the jury's discomfort (and modest resistance) in applying aspects of the law to reconsider what the law should be. The historical record on the jury's potential role here is instructive. Early juries deciding felony cases reportedly often refused to convict because so many felonies (i.e., approximately 230 capital felonies in the early nineteenth century, up from about 50 a century earlier) were punishable by death, a sentence that seemed unduly harsh in many of these cases.[193] The unwillingness of jurors to convict offenders guilty of these less serious offenses that were punishable only by death reportedly led to elimination of the death penalty for those offenses.[194]

In the twentieth century, the jury played a role in modifying legal doctrine in civil cases. The traditional law of contributory negligence barred plaintiffs from any recovery if the plaintiff bore any responsibility for his injury. Jurors allegedly refused to apply this rule strictly, awarding damages even when the plaintiff was partially at fault and leading the way to the modern comparative negligence approach that recognizes divided responsibility.[195] Perhaps it is time to listen to the jury again in assessing the

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[191] *See, e.g.*, MICH. MODEL CIVIL INSTRUCTIONS, *supra* note 190.

[192] See VICTOR VILLASEÑOR, JURY: THE PEOPLE VS. JUAN CORONA (1997), for an extreme instance of the discouragement jurors felt in waiting to have a question answered. The jurors in the Arizona Jury Project waited up to forty-nine minutes for a response (the mean was nineteen minutes; the median was twenty minutes).

[193] *See* KALVEN & ZEISEL, *supra* note 24, at 310–11.

[194] *Id.*

[195] Stephen C. Yeazell, *The New Jury and the Ancient Jury Conflict*, 1990 U. CHI. LEGAL F. 87, 113–14.

role that insurance and litigation costs should play in compensating injured plaintiffs.