

Jury Instructions in the New Millennium

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The experience of being a juror can sometimes be rather frustrating. Admittedly, it's not as bad as it used to be. In merry old England, jurors were commonly confined "without meat, drink, fire or candle" while they deliberated. If they did not promptly agree, they were supposed to be carried around the judicial circuit in a cart (following the justices, apparently) until they reached a verdict.¹

Some of today's jurors must still deal with physical hardships, such as finding a parking space near the courthouse, child care, or loss of wages. Yet it seems to me that even more importantly, jurors are likely to emerge frustrated by the process. Some of these frustrations are endemic to the system, and may have very good justifications. Jurors will never be dealt a full deck of cards, for instance; the legal system will probably always "hide" some evidence from them. And despite the obvious relevance of hearing a criminal defendant's story in his own words, many juries will never hear a peep out of him. What can also be difficult for the jurors is that they are quite distinctly told not to apply their own notions of right and wrong; rather, they are solemnly sworn to follow the law as the judge instructs them.

The requirement that the jury must follow the law, and not its own conception of justice, is fundamental to our legal system. Most of the work of the appellate courts of our country consists of refining and elaborating on rules of law. Doing so enhances the consistency and predictability — and thus, the fairness — of our system. Judges seem to agree that jurors do their utmost to apply the law that they are given to the facts and reach the correct decision. Yet to apply the law correctly, jurors must understand what the judge reads to them. Unfortunately, all too often the law is presented to jurors in language that is full of legalese, overly formal and abstract, and syntactically convoluted.

In many ways, the problem of jury instructions is part of the much larger issue of legal language. People have complained for centuries about difficulties in understanding the speech and writing of lawyers and judges. The situation was probably worst when the legal system in England made widespread use of French and Latin, an indirect legacy of the Norman Conquest in 1066. The Statute of Pleading was enacted in 1362, condemning French as "much unknown in the said Realm" and noting that parties in a lawsuit "have no Knowledge nor Understanding of

that which is said for them or against them by their Serjeants and other Pleaders." In order that "every Man of the said Realm may the better govern himself without offending of the Law," the statute required that all pleas be "pleaded, shewed, defended, answered, debated, and judged in the English Tongue."² Lawyers seem to have largely ignored it. Later, when the Puritans took control of Parliament, they enacted their own law in 1650 requiring lawyers to use English. This statute was repealed with the restoration of the monarchy in 1660, and for a few decades some lawyers still used Law French on occasion. It was not until 1731 that its use was permanently outlawed.³

After centuries of using foreign languages, the law now was — and still is — entirely in English, the language of the people. Unfortunately, the English that lawyers use remains quite obscure to ordinary citizens. There would probably be nothing wrong with lawyers talking to each other in legalese; after all, most occupations and professions have their own jargon. Communications with the public, on the other hand, should be in language that the public can understand. Unfortunately, one of the great ironies about the legal profession is that some of the most convoluted legalese is used not by lawyers to other lawyers or judges (who would almost certainly not tolerate it), but rather in consumer documents, when the legal profession is trying to communicate with — or on behalf of — members of the public. Wills, consumer credit agreements, leases, and deeds are all of great importance to ordinary citizens, but traditionally tend to be the most obscure of all legal writing.

Jury instructions could be considered a variety of consumer legal document. Early in this century, lawyers and judges had to draft instructions for each case (although they would generally have had some forms available as models). Writing individualized instructions must have been a time-consuming process. California was a pioneer in crafting standard (or pattern) instructions. Before long, many states had followed suit.⁴

Pattern instructions have some real advantages. Perhaps most importantly, they save judges and lawyers time by eliminating the need to write instructions separately for each case. In addition, they should theoretically reduce the number of appeals for faulty instructions. Whether they have actually done so is uncertain, however.⁵

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Footnotes

1. J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 89 (3d

ed. 1990).

2. See generally PETER M. TIERSMA, LEGAL LANGUAGE 28 (1999). For the text of the statute, see 1 Statutes of the Realm, 36 Edward III, stat. i, ch. 15.

3. Tiersma, *supra* note 2, at 35-6.

4. ROBERT G. NIELAND, PATTERN JURY INSTRUCTIONS: A CRITICAL LOOK AT A MODERN MOVEMENT TO IMPROVE THE JURY SYSTEM 6 (1979).

5. William W. Schwarzer, *Communicating With Juries: Problems and Remedies*, 69 CALIF. L. REV. 731, 737-40 (1981).

Pattern instructions also have drawbacks. Because they are written by lawyers and judges, they tend to be in the same legalese that lawyers use to draft wills, leases, and other such documents. What aggravates the difficulties is that many of the drafting committees believe that the best way to prevent reversal is to copy — verbatim, if at all possible — the exact language of the statute or judicial opinion in which the legal rule originally appeared. The name of California’s civil instructions, *Book of Approved Jury Instructions*, clearly shows this philosophy. Yet every good speaker or writer realizes that probably the most important factor in effective communication is knowing your audience. If judges wish to be understood, they must use language that their audience is likely to understand. All too often in the past, judges and pattern instruction committees have been writing for the appellate courts. Those judges understand legalese quite well, of course. The problem is that the appellate courts are not the ones who have to apply the instructions! If we want jurors to follow the law, we have to explain it to them in language that they can comprehend.

The fact that instructions are written language is also somewhat problematic. Most of us write in a style that is more formal, compact, and syntactically complex than how we speak. Normally this is not a great problem, because the reader has time to mull it over in her mind, or to read something a second time, or to pause and consult a dictionary. Hearers of oral language, on the contrary, must comprehend it immediately, because more words are on their way even as the mind is trying to cope with what it just heard. Good teachers are intuitively aware of this problem and try to monitor whether a class comprehends a point. If students look puzzled, or ask questions that reveal a lack of understanding, the teacher will try to explain it again in other language or to give some examples. Written language, even if read aloud, makes it hard to monitor comprehension in this way. Judges typically read the instructions straight through from beginning to end, and would probably be a bit startled if a juror raised her hand midstream to ask a question.

So far my comments have been quite general. Let me therefore discuss some examples from California, my home state. Mostly I will draw my illustrations from *California Jury Instructions, Criminal*, also known as CALJIC.⁶ The CALJIC instructions are highly regarded for their generally accurate statements of the law. In terms of comprehensibility, they have been less successful, as we will see below. I hasten to add that I did not pick out the CALJIC instructions for special criticism. They happen to be readily accessible and familiar to me as a member of the California bar. More importantly, they illustrate the problems that exist in the jury instructions of almost all the states.⁷

I should add that it is much easier to criticize existing instructions than to write new ones which are not only in ordinary English, but legally accurate as well. I will sometimes offer suggestions for actual instructions below. In practice, of course, any new instruction should be reviewed by judges and lawyers to ensure that it correctly states the law. And it should be reviewed

by at least one person familiar with plain language principles. If possible, it should be tested on a cross-section of ordinary citizens. Reconciling the goals of clarity and accuracy will not always be easy, but it is the essence of the process.

Innocent Misrecollection

The following is one of the instructions on evaluating evidence given in California criminal cases:

Discrepancies in a witness’s testimony or between a witness’s testimony and other witnesses, if there were any, do not necessarily mean that [any] [a] witness should be discredited. Failure of recollection is common. Innocent misrecollection is not uncommon. Two persons witnessing an incident or a transaction often will see or hear it differently. Whether a discrepancy pertains to an important matter or only to something trivial should be considered by you.⁸

Note the extremely formal language and the relatively uncommon words, including *discrepancies*, *recollection*, and *misrecollection*. Moreover, *discredit* is not only fairly formal, but appears in an unusual sense: as “not believe,” rather than in its more common meaning of “lose face.” Overly formal or literary language is a pervasive problem with current jury instructions.

Another common problem is instructions that are too abstract and impersonal. This may be a result of standardization, which necessarily leads to a higher level of abstraction so that a single pattern can fit multiple fact situations. A factor that makes instructions like the above so abstract is overuse of **passive** constructions (*be discredited*; *be considered*), which allows for the actor — the person who does the discrediting or considering — to be omitted. As the United States Supreme Court once noted, “When Congress writes a statute in the passive voice, it often fails to indicate who must take a required action. This silence can make the meaning of a statute somewhat difficult to ascertain.”⁹ In this case, a phrase like *discrepancies. . . do not necessarily mean a witness should be discredited* does not indicate who should do the “discrediting.” Why not just tell the jurors: *If there were inconsistencies in a witness’s testimony, or between the witness’s testimony and that of other witnesses, you can still decide to believe the witness?*

The original instruction also has several **nominalizations**, including *failure*, *recollection*, and *misrecollection*. Nominalizations are nouns that derive from verbs (in this case, *fail*, *recollect*, and *misrecollect*). Like passives, they often create abstract constructions that minimize the role of the actor, or obscure it entirely. There is nothing wrong with appropriate use of nominalizations, but jury instructions use them far too often, with a resultant loss of precision and comprehension. Instead of informing jurors that *failure of recollection is a common experience*, the judge could just say that *people often forget things*, with absolutely no loss in meaning.

As for *innocent misrecollection is not uncommon*, this five-word sentence has no less than **three** negative elements (*mis-*, *not*, and

6. CALIFORNIA JURY INSTRUCTIONS, CRIMINAL (6th ed. 1996).

7. In the interest of full disclosure, I should mention that I am a member of a Judicial Council task force dedicated to drafting

more understandable criminal instructions in California.

8. CALJIC 2.21.1.

9. United States v. Wilson, 503 U.S. 329, 334–35 (1992).

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un-). Research indicates that the more negatives there are in a sentence, the harder it is to process.¹⁰ Why not just say: *people sometimes honestly believe they remember something, but turn out to be wrong?*

At this point I have to admit that on one level, I like those two sentences about recollection. They display a nice parallelism and are almost poetic:

Failure of recollection is common.

Innocent misrecollection is not uncommon.

These sentences make their points with a certain elegance and compact phrasing that the plain language equivalents cannot match — at least, in this case.

Still, the fact remains that this highly abstract and formal style is a poor means of communicating with an ordinary jury. Especially during closing argument, good lawyers try to connect with the jurors and address them in terms they will understand. Lawyers would not be very successful with a jury if they spoke the formal, stilted language found in the typical instructions.

Why is it that in contrast to earlier phases of the trial, the profession refuses to speak clearly to jurors during the instruction ritual? Admittedly, the legal concepts contained in the instructions may be rather complicated. But even complex topics can be explained in simpler terms. The law is no more complicated than many topics that expert witnesses manage to explain in ordinary language.

One explanation for this dramatic shift to extremely formal language must be that judges are now speaking. Presumably, most judges **want** to maintain a certain distance from the jurors, as opposed to the lawyers, who do their best to bond with them. The distancing effect of elevated language is reinforced by the judge's location, physically above the fray. The formal and archaic language, along with the elevation of the judge, endow the instructions with a sense of authority. And the judge's physical isolation from the rest of the courtroom reinforces the notion that the law, as embodied in the judge, is "detached" and therefore objective. Furthermore, judges are no different from anyone else; they may prefer to speak formally because elevated language is commonly associated with intelligence and competence. Practically speaking, therefore, a certain level of formality may be inevitable. In fact, sometimes ritualistic and formal language can be helpful. It clearly **is** important for participants and onlookers to believe that the judge is competent, as well as somewhat distant and detached. To have the bailiff open proceedings by shouting *be quiet — the judge is coming* would create entirely the wrong atmosphere for an event as serious as a court session.

The problem is that many people poorly understand formal language — which is more closely tied to writing than to

speech. Judges should not forget their audience, and the fact that ultimately, what counts most is clear, concise, and comprehensible communication. Ultimately, we must find a tone for jury instructions that conveys an adequate sense of dignity and seriousness without the highly formal language that now characterizes them.

Defining Reasonable Doubt

Other instructions are meant to educate the jurors on the substance of the law that they must apply. In a criminal case, the most critical requirement may be that the prosecution must prove the defendant guilty *beyond a reasonable doubt*. Here is how California judges define this essential concept for the jurors:

Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge.¹¹

As with many instructions, this is hardly a model of clear communication. It is quite abstract, never addressing the jurors as *you*, but rather speaking of *the jurors* and *they*. It is, moreover, largely phrased in the negative. Furthermore, the pivotal term *abiding conviction* is likely to be somewhat obscure to the average juror. *Abide* is a literary word that is seldom heard in ordinary speech. And *conviction*, in the sense of "belief," is also fairly formal. When *conviction* is heard in the courtroom, it almost always means that someone is going to prison, not that someone firmly believes something.

In part, the obscurity of this and the other instructions results from the fact that they are composed as written legal text. As we saw previously, written language tends to be lexically more dense and syntactically more complex than speech. Furthermore, when something is written down, it tends to resist change. Especially if it has been approved by a judge or legislature, it becomes authoritative text that the legal profession is even more reluctant to modernize. Because they are so distant from oral language, therefore, jury instructions are hard to follow. Furthermore, as Bernard Jackson has observed, there is an inherent difficulty in communicating by speech what was conceived in a written form of discourse.¹² It is bad enough to ask ordinary people to decipher dense written legal language. It is even worse to read it to them and then refuse — as some courts do — to provide them with the written copy.

California's reasonable doubt instruction illustrates these problems. It tracks the language of Penal Code section 1096. The statutory language, in turn, was adopted virtually verbatim from an 1850 Massachusetts case, *Commonwealth v. Webster*.¹³ As Justice Stanley Mosk of the California Supreme Court has observed, the language of *Webster* was "already obsolete" when California adopted it in 1927, and is "hopelessly superannu-

10. See DANIEL B. FELKER ET AL., GUIDELINES FOR DOCUMENT DESIGNERS 69-70 (1981).

11. CALJIC 2.90 (1996).

12. Bernard S. Jackson, *Some Semiotic Features of a Judicial Summing Up in an English Criminal Trial: R. v. Biezanez*, 7 INT'L J. SEMIOTICS L. 201, 202 (1994).

13. 59 Mass. 295, 320 (1850).

ated” today.¹⁴ Yet it continues to be approved by California courts, and the United States Supreme Court somewhat grudgingly upheld it in *Victor v. Nebraska*.¹⁵

Nonetheless, jurors can be confused about the meaning of this instruction, as evidenced by *People v. Ruge*, a recent case from California.¹⁶ The jury in *Ruge* had been instructed in the language of Penal Code section 1096, using the traditional phraseology. Not surprisingly, reciting this language to the jurors did not especially enlighten them. Before long, they trooped back into the courtroom to inquire: “[W]e would like to know what constitutes reasonable doubt. . . . We read the instructions over and over. We want you to tell us.”¹⁷

The judge cautioned that “greater minds than mine have tried to better the instruction, and about all they get is reversed or they mess it up or somebody up in the Court of Appeal or the Supreme Court says, ‘No, that’s not quite it. You blew it.’” She then bravely tried to translate the concept into ordinary English that the jurors might actually be able to fathom. But her intuitions were right: she blew it, at least according to the court of appeal: “It was error for the court to attempt to embellish the concept of reasonable doubt.”¹⁸

With appellate decisions like this one, it is no surprise that many judges are extremely reluctant to explain any aspect of the instructions. When asked about the meaning of an instruction by the jury, many judges just reread it verbatim.¹⁹ Others refuse to answer.²⁰ In fact, in a survey of fifteen judges in California with respect to jury requests for assistance, one judge replied that he tried to respond to questions in plain English, a few provided a written copy or tape recording of the original instructions, and some would not explain or reiterate them at all. The majority simply reread the original instructions.²¹ As one judge said when he referred a confused jury back to the original instructions, he wished he could be of more help. The foreper-

son responded, “We also wish you could be more help.”²²

Rereading instructions would not be so bad if they were more understandable in the first place. Consider this Ninth Circuit definition, which provides in part: “Proof beyond a reasonable doubt is proof that leaves you firmly convinced that the defendant is guilty.”²³ Applying this standard will never be easy in practice, but at least the phrase *firmly convinced* has been found to be “accessible and understandable” to jurors.²⁴

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The Elements of Mayhem

The issue of overly abstract style arises again in the definitions of the various crimes. A relatively typical list of the elements of a crime is that for mayhem, found in CALJIC 9.30. The instruction begins by noting that the defendant is accused of having committed mayhem. Next comes the statutory definition of the crime. It continues by stating:

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

1. One person unlawfully and by means of physical force deprived a human being of a member of [his] [her] body . . . and
2. The person who committed the act causing the bodily harm, did so maliciously, that is, with an unlawful intent to vex, annoy, or injure another person. . . .²⁵

As is so often the case, the instruction does not directly tell jurors what to do. Are the jurors supposed to prove this crime?

14. *People v. Brigham*, 25 Cal. 3d 283, 295 (1979) (Mosk, J., concurring).

15. 511 U.S. 1 (1994).

16. 35 Cal. Rptr. 2d 830 (Ct. App. 1994).

17. *Id.* at 834.

18. *Id.* at 836.

19. Geoffrey P. Kramer and Dorean M. Koenig, *Do Jurors Understand Criminal Jury Instructions? Analyzing the Results of the Michigan Juror Comprehension Project*, 23 J. L. REFORM 401, 403 n.14 (1990).

20. Laurence J. Severance and Elizabeth F. Loftus, *Improving the Ability of Jurors to Comprehend and Apply Criminal Jury Instructions*, 17 LAW & SOC'Y REV. 153, 162-73 (1982).

21. Phoebe C. Ellsworth, *Are Twelve Heads Better Than One?*, 52 LAW & CONTEMP. PROBS. 205, 223-24 (Autumn 1989).

22. *People v. Klee Green Matthews*, 30 Cal. Rptr. 2d 330, 336 (Ct. App. 1994).

23. MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE NINTH CIRCUIT 3.03 (1995).

24. Irwin A. Horowitz & Laird C. Kirkpatrick, *A Concept in Search of a Definition: The Effects of Reasonable Doubt Instructions on Certainty of Guilt Standards and Jury Verdicts*, 20 L. & HUM. BEHAVIOR 655, 667 (1996).

25. CALJIC 9.30. The full instruction follows:
MAYHEM—DEFINED—NECESSARY ELEMENTS (PEN.

CODE, § 203)

[Defendant is accused [in Count[s] _____] of having committed the crime of mayhem, a violation of section 203 of the Penal Code.]

Every person who unlawfully and maliciously deprives a human being of a member of [his] [her] body, or disables, permanently disfigures, or renders it useless, or who cuts or disables the tongue, or puts out an eye, or slits the nose, ear, or lip, is guilty of the crime of mayhem in violation of Penal Code section 203.

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

1. One person unlawfully and by means of physical force [deprived a human being of a member of [his] [her] body or, disabled, permanently disfigured, or rendered it useless;] [or] [_____ of a human being;] and

2. The person who committed the act causing the bodily harm, did so maliciously, that is, with an unlawful intent to vex, annoy, or injure another person.

[It is not a defense that a disfigurement has been or may be medically alleviated.]

The instruction is also troublesome because it contributes to the problem of information overload.

You would almost think so. Actually, of course, the jurors are supposed to decide whether the defendant is guilty of mayhem, and the prosecution must prove each element beyond a reasonable doubt. No doubt I am beginning to sound like the proverbial broken record, but I can only repeat my earlier advice: if this is what you

mean, say so!

The two elements of mayhem which follow this introductory phrase are equally abstract, once again being very unclear about who must have done what to whom. Essentially, the instruction states that *one person* must have deprived a *human being* of a “member” of his or her body. In addition, *the person who committed the act causing the bodily harm* must have done so with an intent to vex or annoy or injure *another person*. So, how many people must have been involved in this gruesome scenario? We can probably assume that *one person* is the defendant. *The person who committed the act* must also refer to the defendant. A *human being* must be the victim. So far, so good. On the other hand, *another person* almost seems to be a third party, making you wonder whether the doctrine of transferred intent is supposed to apply. It seems unlikely. Yet once again, it is more needless mental exercise for the poor jurors.

Much clearer is the following Ninth Circuit instruction, which begins by identifying the charge as assault and then continues:

In order for the defendant to be found guilty of [the charge], the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant intentionally [struck] [wounded] _____; and

Second, as a result, _____ suffered serious bodily injury.²⁶

By mentioning the need to find that the *defendant* did so-and-so, and that he or she did it to the complainant or victim (whose name is inserted in the blank), this instruction tells the jury exactly what it has to decide. My only quibble is that the first phrase contains a passive verb. An improvement would be: *For you to find the defendant guilty of [the charge], the government must prove...*

Malice Aforethought

One of the other major sources of juror confusion and frustration is the use of technical legal terminology. There is no doubt that technical vocabulary is extremely useful to the profession, allowing one lawyer to communicate a complex concept to a colleague via a single word or short phrase. The drawback is that people outside the profession, including jurors, do

not understand most of these terms. (How many judges or lawyers understand linguistic terminology like *allophonic variation*, *ergativity*, or *commissive illocutionary force*?)

A common example of a legal term in jury instructions is *malice aforethought*, one of the elements of murder. The odd word order is a leftover from Law French, in which adjectives usually followed the nouns they modified. Other remnants of this process include *attorney general*, *condition precedent*, *fee simple*, *letters patent*, and *notary public*. Not only is the word order strange, but *malice* is used in an unusual sense. The American Heritage Dictionary defines it as: “A desire to harm others or to see others suffer; extreme ill will or spite.”²⁷ In contrast, CALJIC 8.11 informs jurors that “malice aforethought does not necessarily require any ill will or hatred of the person killed.” No wonder that a Santa Barbara jury recently deadlocked in a homicide case, unsure about the meaning of this term and how to apply it to the facts before them.²⁸

One solution to the problem of technical terms is to leave them in the instruction, but with a definition. CALJIC 8.11 does indeed define *malice aforethought*, but not, in my mind, satisfactorily. For example, the defining instruction begins by stating that malice can be express or implied. “Malice is express when there is manifested an intention unlawfully to kill a human being.” Note the passive verb: *is manifested*. Who exactly must have manifested an intention? Like so many instructions dealing with elements of crimes, this one is an abstract principle of law that forces jurors to make inferences. Read literally, all that the jurors have to find is that someone in the world intended to unlawfully kill some human being. This is absurd, of course, and virtually all jurors are smart enough to figure it out. But jurors have enough on their minds. They have to absorb a lot of law in a short time. Why not make it as straightforward as possible? If the **defendant** must have had an intent to kill the victim, we should just say so. If it suffices for an accomplice to have had this intention, the judge can insert either “defendant” and “accomplice” into the appropriate place. As it is, this level of abstraction is unhelpful and — in the worst case — dangerous.

The instruction is also troublesome because it contributes to the problem of information overload. Jurors have to juggle many new concepts in order to reach a verdict. The last thing the instructions should do is throw unnecessary vocabulary and distinctions at them. I am no expert on criminal law, so I should proceed cautiously. But I wonder whether it’s really necessary to use the term *malice aforethought* and divide it into two categories, *express* and *implied*, as CALJIC 8.11 does. I do not doubt the usefulness of the terminology for the criminal bar, but perhaps we can avoid much of the problem by eliminating these words from the instructions. Perhaps all that jurors really need to know is the nature of the intent that the defendant must have had, not the name that the law invented centuries ago to label that intent.

26. MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE NINTH CIRCUIT 8.02F (1995).

27. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE

(3d ed. 1992).

28. Chuck Schultz, *Jury Deadlocks in Case of Slain Husband*, SANTA BARBARA NEWS-PRESS, Feb. 12, 1999.

Aggravation about Mitigation

Nowhere does comprehension have greater significance than when people's lives are literally at stake, as is true in capital cases. The typical death penalty statute requires jurors to consider or balance aggravating and mitigating circumstances. While this scheme does indeed give the jury some guidance on how to decide the defendant's fate, it has a serious flaw: its reliance on the technical terms *aggravation* and *mitigation*. Most judges assume that jurors understand these words in their legal sense. The Supreme Court of Georgia has asserted — with no supporting evidence — that mitigation “is a word of common meaning and usage.”²⁹ California's high court apparently agrees, having held at one time that these words do not have to be defined for the jury.³⁰

The reality is that even in its ordinary sense, *mitigate* is a formal word that many ordinary jurors will not understand very well.³¹ As former Justice Thurgood Marshall observed, in its technical legal usage, *mitigating* is “a term of art, with a constitutional meaning that is unlikely to be apparent to a lay jury.”³² This is confirmed by a study of California's capital jury instructions by Lorelei Sontag, who discovered that even relatively well-educated college students poorly understood the word.³³

In contrast, *aggravate* is a fairly common word. But familiarity can be deceptive. Normally, *aggravating* means something like “annoying” or “irritating” (*that mosquito really aggravates me*). This ordinary meaning of *aggravate* is not a recent innovation. Well over a hundred years ago, John Stuart Mill wrote:

The use of “aggravating” for “provoking,” in my boyhood a vulgarism of the nursery, has crept into almost all newspapers and into many books; and when writers on criminal law speak of aggravating and extenuating circumstances, their meaning, it is probable, is already misunderstood.³⁴

In fact, linguist Otto Jespersen noted that this meaning can be traced back at least as far as 1611.³⁵ *Aggravate* therefore commonly means “annoy” or “irritate.” But surely jurors should not vote to put someone to death merely because the defendant, or his crime, “aggravates” them!

Strong evidence that jurors have trouble with the meaning of these terms comes from several reported cases where capital jurors — after they have been “instructed” — come back to ask the judge to define or clarify what these terms mean, or request

a dictionary to look them up. In one California case, the jury sent a note to the judge requesting “a definition of aggravation and mitigation.” The judge replied that the words should be given their “commonly accepted and ordinary meaning.” The jury responded: “Being unfamiliar with the term of mitigation we would like the dictionary meaning of both mitigation and aggravation, please.”³⁶ In the published American opinions alone, there are at least ten capital cases during the past decade or two in which the jury is reported to have requested a definition or clarification of *mitigating* or *aggravating*.³⁷ No doubt these represent merely the tip of the iceberg.

The study by Lorelei Sontag of capital juries in California came to similar conclusions. Of the thirty post-verdict jurors whom she interviewed, only thirteen showed adequate understanding of the terms *aggravating* and *mitigating*.³⁸ No less than **half** of the juries had asked their trial judges for definitions of these critical terms.³⁹ One juror reported:

The first thing we asked for after the instructions was, could the judge define mitigating and aggravating circumstances. ... I said, “I don't know that I exactly understand what it means.” And then everybody else said, “No, neither do I,” or “I can't give you a definition.” So we decided we should ask the judge. Well, the judge wrote back and said, “You have to glean it from the instructions.”⁴⁰

Another of Sontag's interviewees broke down in tears, confessing, “I still don't understand the difference between aggravating and mitigating.”⁴¹

Using technical vocabulary with lay jurors is one of the surest ways to befuddle them. Yet as mentioned earlier, many judges respond to jury questions by just rereading the original instructions. Fortunately, some appellate courts have begun to suggest that when it is clear that a jury is confused, the trial judge cannot just refer back to the original instructions.⁴² Yet this can place judges in a difficult position. Like the judge in *People v.*

Most judges assume that jurors understand these words in their legal sense.

29. *Cape v. State*, 272 S.E.2d 487, 493 (Ga. 1980).

30. *People v. Lang*, 782 P.2d 627 (Cal. 1989).

31. See Peter Meijes Tiersma, *Dictionaries and Death: Do Capital Jurors Understand Mitigation?*, 1995 UTAH L. REV. 1, 14.

32. *Watkins v. Murray*, 493 U.S. 907, 910 (1989) (Marshall, J., dissenting from denial of certiorari).

33. LORELEI SONTAG, *DECIDING DEATH: A LEGAL AND EMPIRICAL ANALYSIS OF PENALTY PHASE JURY INSTRUCTIONS AND CAPITAL DECISION-MAKING* 76 (1990) (available from University Microfilms International in Ann Arbor, Michigan; order number 9033148).

34. STUART MILL, *A SYSTEM OF LOGIC* 451 (People's ed., 1886), *cited in* OTTO JESPERSEN, *GROWTH AND STRUCTURE OF THE ENGLISH LANGUAGE* 111 (10th ed. 1982).

35. Jespersen, *supra* note 34, at 111-12.

36. *People v. McLain*, 757 P.2d 569, 580 (Cal. 1988).

37. Tiersma, *supra* note 31, at 15-18.

38. Sontag, *supra* note 33, at 115. See also Craig Haney and Mona Lynch, *Comprehending Life and Death Matters: A Preliminary Study of California Death Penalty Instructions*, 18 LAW & HUM. BEHAVIOR 411, 420-21 (1994) (fewer than half of the subjects could provide even a partially correct definition of mitigation).

39. Two judges told the jurors to derive the meaning from the instructions as a whole. One gave them definitions out of *Black's Law Dictionary*. Another jury got definitions, but the source was unclear. And as to the fifth, the juror who was interviewed recalled only that the judge's response was very obscure. Sontag, *supra* note 33, at 121.

40. *Id.* at 111.

41. *Id.* at 124-5.

42. See, e.g., *McDowell v. Calderon*, 130 F.3d 833 (9th Cir. 1997) (en banc).

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Ruge, they may fear that their efforts to clarify something for the jury may just lead to a reversal.

A better approach is to define the terms in the instructions themselves, so judges do not have to do so on the fly. This is now the approach of California,

which contains definitions of *aggravating* and *mitigating factors* in CALJIC 8.88:

An aggravating factor is any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself. A mitigating circumstance is any fact, condition or event which does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the application of the death penalty.

Although explaining the legal definitions of *mitigation* and *aggravation* is an excellent idea, the implementation leaves much to be desired. First of all, the definition is overly formal and syntactically complex. Consider the beginning statement that an aggravating factor is *any fact, condition or event attending the commission of a crime which ...* Why not just state that an aggravating factor is *anything about the crime which ...*? Additionally, how often do you hear terms like the *enormity* of a crime, or *injurious consequences* in everyday speech?

Mitigation is, curiously enough, defined as *extenuation*, which is an even more formal and unusual word. Defining one difficult term with another is no definition at all, but rather what you would expect from a thesaurus. Even worse, the so-called definition starts out by declaring that mitigation does not include a justification or excuse for the crime. This seems to mean that jurors cannot consider possible justifications or excuses as mitigating evidence. Yet that cannot be correct. At least in ordinary speech, aren't many types of mitigation an "excuse" of some sort? Or suppose that the defendant unsuccessfully presented a justification for the crime at the guilt phase — must the jury really ignore that evidence in deciding whether to put him to death?

Much of the problem is that part of the definition can be traced back at least as far as the New York case of *Heaton v. Wright*, decided in 1854 (incidentally, it had nothing to do with the death penalty).⁴³ Its definition of mitigating circumstance was amplified and incorporated into the revised fourth edition of *Black's Law Dictionary*. California cases borrowed the wording from the dictionary, it seems. And the CALJIC committee seems

to have copied the definition directly from the cases. The language might be tolerable in a legal dictionary, which needs to distinguish *mitigation* from similar concepts, like justification. But as part of the concluding instruction in a death penalty case, this statement strikes me as extremely dangerous and — in seeming to exclude justifications and excuses — absolutely wrong.

Paths to Improvement

This article has suggested various ways in which we can improve jury instructions. My concluding comments will summarize some of the existing difficulties with instructions and suggest ways to avoid them.

Fortunately, several federal courts have made progress in this area. Some states have also written more comprehensible instructions, including Alaska (civil), Arizona, and Michigan (criminal). The Judicial Council of California has appointed a task force to make that state's instructions more user-friendly, and there seems to be interest in the topic elsewhere.⁴⁴ Much remains to be done. The following are some suggestions on how to implement reform.⁴⁵

Limit the use of technical vocabulary, and always provide a definition in ordinary language. The point has probably been sufficiently made earlier in this article. One aspect of technical terms not yet mentioned is that they can be divided into categories, depending on how well or poorly they communicate to ordinary citizens. The easiest to deal with are words that are totally or almost totally unknown in ordinary speech, such as *malice aforethought*, *proximate cause*, and *undue influence*. Both judges and jurors generally realize that the average person does not understand these words, so the judge will explain it to them, or the jury will probably ask.

Another class is legal words or phrases with which the public is familiar, including terms like *defendant*, *murder*, *negligence*, *reasonable doubt*, *self-defense*, and *witness*. These words may be problematic because both judges and jurors may believe that the jurors understand them, whereas in fact their understanding may be limited or outright wrong from a legal perspective. This should not surprise us, given that most people probably derive most of their knowledge about the law from watching the O.J. Simpson trial or Judge Judy on television.

Finally, there are words that have both an ordinary meaning and a technical legal usage. Examples include *aggravation*, *assault*, *burglary*, *malice*, or *personal property*. Again, what jurors know about the ordinary meaning of words like *aggravation* or *malice* can be dangerous in a legal context. In common usage, *burglary* requires stealing something and *assault* is similar to what lawyers call *battery*. With such words, which I have elsewhere called **legal homonyms**,⁴⁶ careful definition is essential. Where feasible, avoiding the terms entirely would be even better.

Do not use overly formal or antiquated language. The

43. 10 How. Pr. 82 (N.Y. Sup. Ct. 1854).

44. See Michael Higgins, *Not So Plain English: In Many States, Jury Instructions Are Confusing*, 84 A.B.A.J. 40 (1998).

45. See AMIRAM ELWORK, BRUCE D. SALES, AND JAMES J. ALFINI, MAKING JURY INSTRUCTIONS UNDERSTANDABLE (1982); Robert P. Charrow and Veda R. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 COLUM. L. REV. 1306

(1979); FEDERAL JUDICIAL CENTER, PATTERN CRIMINAL JURY INSTRUCTIONS (1988) (Appendix A, entitled *Suggestions for Improving Juror Understanding of Instructions*, by Allan Lind and Anthony Partridge, makes suggestions for drafting comprehensible instructions based on the work of the Charrows and the Elwork, Sales and Alfini team).

46. Tiersma, *supra* note 2, at 111-12.

basis for this piece of advice is that you should always remember your audience and use language that the audience is likely to be able to follow. What is appropriate in a law review article is not suitable in jury instructions. Nor is the flowery and often difficult prose of opinions written in the 1850s.

Putting this principle into practice is not always easy. Most judges are well-educated individuals with an extensive vocabulary. They may not realize that what seems to them a perfectly ordinary word is difficult for jurors. As the United States Supreme Court has noted, “[J]urors are not necessarily experts in English usage. Called as they are from all walks of life, many may be uncertain as to the meaning of terms which are relatively easily understood by lawyers and judges.”⁴⁷

At the same time, the truth of the matter is that deciding whether the “average juror” understands a word is not an easy task. Normally, we base our assessments on how often we hear a word in ordinary conversation. I am fairly confident, for example, that I have never heard *extenuate*, *injurious consequences*, or *misrecollection* in ordinary lay discourse. A study of people called to jury duty in Florida discovered that only fifty-one percent understood the word *demeanor*.

In any event, it is self-evident that the more ordinary word should generally be preferred. In most jury instructions I have seen, the jury never *decides* anything. Rather, jurors only seem to be able to *conclude* or *determine* that something is true. (This is typical for the language of lawyers, who never *say* or *tell* anything; instead, they *indicate* to opposing counsel that they are rejecting a settlement offer, and *advise* their clients that the deposition begins at nine o’clock.)

Some further illustrations of needlessly formal language:

Formal Word	Ordinary Word
append	attach
approximately	about
cease	stop
commence	begin
conceal	hide
deem	consider
demise	death
desist	stop, leave off
detain	hold
donate	give
effectuate	carry out
employ	use
endeavor	try
forthwith	soon, immediately
imbibe	drink
initiate	begin
inquire	ask ⁴⁸

And so the list goes on. Incidentally, most of the ordinary words are English (or Anglo-Saxon) in origin. English has been the

language of ordinary people for roughly the past fifteen centuries. The words in the “formal” column largely derive from French and Latin — the languages of the English elite.

Avoid abstractness. As Judge Learned Hand once wrote, “[i]t is exceedingly doubtful whether a succession of abstract propositions of law, pronounced staccato, has any effect but to give [jurors] a dazed sense of being called upon to apply some esoteric mental processes, beyond the scope of their daily experience.”⁴⁹ The criminal law is supremely abstract, applying to anyone that comes within its scope (*whoever...; any person who...*). Applying abstract principles to specific facts is something that students learn to do in law school. But as Judge Hand observed, it is not part of the experience of the average juror. My colleague, Professor Christopher May, sat on two juries recently and had this to say about his experiences:

[J]uries often confront the serious problem of not knowing what to do with the law they are given. Neither jury I sat on was sure of how to use or access the instructions. To my surprise they did not realize that each of the claims or offenses contained in the charge consisted of a series of elements. It was not obvious to them that in order to reach a verdict it was necessary to go through each claim or offense and determine whether each one of the elements had been satisfied. Moreover, there were times when the jury was unable to relate the facts to the law in the sense of knowing which evidence was to be matched with which legal element.⁵⁰

The lesson is that instructions should tell jurors, as plainly as possible, what to do. Inform jurors that *you may* or *you should* or *you must* do something (avoiding less direct language like *it is required of you to* or *it is your duty*). If you expect jurors to carefully consider whether the defendant’s conduct meets each of three elements and to return a guilty verdict if the answer is yes, say so.

Keep sentences relatively short and simple. Lawyers have a tendency to write long and convoluted sentences. Until fairly recently, statutes typically consisted of a single sentence, including preamble, exceptions, and provisos. Jeremy Bentham lampooned this tendency: “With as much reason, and with similar utility, might the whole of Coke-Littleton [a legal treatise] have been squeezed into one sentence, or the whole of a Serjeant’s-Inn dinner have been mashed up together into one dish.”⁵¹

If CALJIC is any indication, jury instructions no longer have the extremely long sentences that they once did. Complexity also seems to have decreased a bit, but consider the following

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47. McDonough Power Equipment, Inc., v. Greenwood, 464 U.S. 548, 555 (1984).

48. BRYAN A. GARNER, *DICTIONARY OF MODERN LEGAL USAGE* (2d ed. 1995). See the heading *Formal Words* at 369.

49. *United States v. Cohen*, 145 F.2d 82, 93 (2d Cir. 1944).

50. Christopher N. May, “What Do We Do Now?” : *Helping Juries Apply the Instructions*, 28 *LOY. L.A. L. REV.* 869, 869-70 (1995).

51. 3 *THE WORKS OF JEREMY BENTHAM* 264 (John Bowring ed., 1843).

sentence from CALJIC 1.02: "Do not assume to be true any insinuation suggested by a question asked a witness." By itself, shortness is no guarantee of comprehension. This sentence has several levels of embedding, along with two passives (*suggested* and *asked*), as well as the formal phrase *do not assume to be true*. Saving the sentence may require splitting it in two. My suggested revision: *Sometimes a lawyer's question insinuates or suggests something. Do not assume that this insinuation or suggestion is true.*

Pay attention to organization. People expect information to come to them in a fairly predicable sequence. The basic principles of organization require that the general come before the specific, and the rule before any exceptions. With jury instructions, give information when the jurors need it. At least some instructions on evidence (e.g., explaining stipulations and objections) should come at the beginning of the trial, rather than long after the objections have been made and ruled upon. Moreover, some initial comments on the nature of the case and the specific charges will allow jurors to concentrate on and organize the relevant evidence as it is presented to them.

CALJIC mostly adheres to these principles, but not always. Consider CALJIC 1.01:

If any rule, direction or idea [is] [has been] repeated or stated in different ways in these instructions, no emphasis [is] [was] intended and you must not draw any inference because of its repetition. Do not single out any particular sentence or any individual point or instruction and ignore the others. Consider the instructions as a whole and each in light of all the others.

Observe that the general rule comes at the very end; it should be first, because that is the basic point of this instruction. The middle sentence should probably come next, because it is the next most general rule. The first sentence is the most specific. Consequently, the last sentence should be first, and the first should be last.

Do not overload jurors with marginally relevant information or unnecessary tasks. In some ways, this may be the most difficult principle to implement. Counsel typically have long lists of instructions they would like to have read. Sometimes the course of least resistance is to include everything that might in any sense be relevant, rather than risk an appeal. This is not my area of expertise, but I wonder whether we are sometimes overloading jurors with marginally relevant information.⁵²

Do we really need to tell jurors that people sometimes forget things (failure of recollection is common), or that sometimes people honestly think they remember something that did not really happen (innocent misrecollection is not uncommon)? Wouldn't experience and common sense inform jurors that they might want to believe a witness even if there were some minor inconsistencies in her testimony? And must we really explain

to jurors that a lawyer's question is not evidence, but the witness's answer is?

Moreover, we may be asking jurors to do too much. Tennessee jurors are instructed on how to reduce a sum to present value, for example.⁵³ Back in California, capital jurors may have to decide whether something is a *bomb* or an *explosive* (CALJIC 8.81.4), whether a peace officer made a lawful arrest (CALJIC 8.81.8), or whether the statement of a co-conspirator is admissible (CALJIC 6.24). Perhaps there are legal obstacles, but logically it makes more sense for judges to make these sorts of decisions. After all, judges have a lot of practice in statutory interpretation and ruling on the admissibility of evidence.

Conclusion

Several hundred years ago, when lawyers and judges were still using Law French, they were well aware of public pressure to switch to English. In 1549, Thomas Cranmer, the first Protestant archbishop of Canterbury, commented: "I have heard suitors murmur at the bar because their attornies pleaded their cause in the French tongue which they understood not."⁵⁴ When pressed, lawyers gave several reasons for retaining French. Sir Edward Coke suggested it protected the public by preventing people from trying to act as their own lawyers. Others argued that Law French was much more precise than English. Roger North claimed that "the law is scarcely expressible properly in English."⁵⁵ As we all know, lawyers and judges shifted to English without any catastrophic results.

Today there are modern doomsayers who continue to claim that the law is scarcely expressible in ordinary English. It is time to prove them wrong.



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52. See also Schwarzer, *supra* note 5, at 747-55.

53. Bethany K. Dumas & Dennis H. Inman, *Jury Instructions from the Judge's Perspective*, presentation made at Law and Society Annual Meeting, Aspen, Colorado, June 4-7, 1998.

54. Tiersma, *supra* note 2, at 35.

55. *Id.* at 28-9.