

6-1-1982

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3 Miss. C. L. Rev. 165 (1982-1983)

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BOOK REVIEW

Making Jury Instructions Understandable. Amiram Elwork,* Bruce D. Sales,** and James J. Alfini.*** Contemporary Litigation Series, The Michie Company, 1982, Pp. 390, \$35.00.

*Reviewed by Mark M. Dobson*****

In the course of its function, there is both war and peace, joy and sadness, affection and hatred, rational and irrational behavior. There is tolerance and bigotry. Religion, race, color, and education all become issues at one time or another. The jury is a living, breathing, changing animal.¹

The jury occupies a special part in our system of justice. Juries have traditionally been considered a major protection against oppressive judges or unjust prosecutions. The right to jury trial in certain criminal² and civil³ cases is constitutionally guaranteed. The Founding Fathers considered these guarantees important bulwarks against the king's tyranny they wished to escape. To ensure this, juries must have the opportunity of representing a fair cross section of the community.⁴

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1. Goldberg, *The Trials of a Juror*, THE PENNSYLVANIA GAZETTE, April 1981, at 19.

2. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed

U.S. CONST. amend. VI.

This right has been applied to the states through the fourteenth amendment's Due Process Clause. *Duncan v. Louisiana*, 391 U.S. 145 (1968). However, the right only applies to serious crimes, not petty offenses. *Id.* at 158.

3. In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved

U.S. CONST. amend. VII.

Unlike the sixth amendment right to a jury trial for serious criminal offenses, the seventh amendment right to jury trials for civil cases has not been extended to the states. *See Palko v. Connecticut*, 302 U.S. 319, 324 (1937).

4. "[T]he American concept of the jury trial contemplates a jury drawn from a fair cross section of the community." *Taylor v. Louisiana*, 419 U.S. 522, 527 (1975). *Taylor* held that a jury selection system automatically excluding women from jury service unless they file a written declaration of their desire to serve violates the sixth amendment. However, there is no requirement that different community segments actually be represented on a particular jury. *Apodaca v. Oregon*, 406 U.S. 404, 413 (1972).

Yet the American jury system has recently come under much criticism often aimed at the expense and delays of jury trials. Efforts to reduce the size of juries have increased.⁵ In addition, judges have called for decreasing attorney participation in jury selection.⁶ However, the most serious criticism is that juries are sometimes incapable of functioning effectively, because jurors cannot understand either the factual presentation of a case or the law involved.⁷

Although jurors were once finders of both law and fact, they now receive instruction on the law from judges and are trusted only with deciding facts.⁸ To function effectively, the American jury system assumes that juries can and do understand the law in a judge's instructions. Although there are isolated instances where the United States Supreme Court has declared certain jury instructions incapable of being followed because of a case's unique characteristics,⁹ the Court assumes jurors follow the law.¹⁰

5. *Williams v. Florida*, 399 U.S. 78 (1970), held that the sixth amendment does not constitutionally require a twelve person jury. However, *Ballew v. Georgia*, 435 U.S. 223 (1978), found that the sixth amendment forbids a jury composed of less than six members.

Twelve person juries are not constitutionally required to reach unanimous verdicts in non-capital criminal cases. *E.g.*, *Apodaca v. Oregon*, 406 U.S. 404 (1972) (upholding Oregon constitutional provision allowing guilty verdicts based on agreement of ten members of a twelve person jury). However, *Burch v. Louisiana*, 441 U.S. 130 (1979), declared non-unanimous guilty verdicts by six person juries unconstitutional. Federal criminal trials require unanimous verdicts. FED. R. CRIM. P. 31(a).

6. For conflicting views on how much involvement attorneys should have in questioning prospective jurors, compare Frates and Greer, *Jury Voir Dire: The Lawyer's Perspective*, 2 LITIGATION, Winter 1976, at 17 (voir dire should be conducted by attorneys) with Atkins, *Jury Voir Dire: The Judge's Perspective*, 2 LITIGATION, Winter 1976, at 19 (voir dire should be conducted by the court).

7. An exception to the seventh amendment right to civil jury trial when the case presents unusually complex factual or legal questions has been urged. Courts and commentators have split on this issue. See *Bernstein v. Universal Pictures*, 79 F.R.D. 59, 70 (S.D.N.Y. 1978) (demand for jury trial stricken because the size of the class action and complex relationships between numerous parties made it beyond "the ability and competence of any jury to understand and decide with rationality"); *In re Japanese Electronic Products Antitrust Litigation*, 631 F.2d 1069, 1084 (3d Cir. 1980) (fifth amendment due process clause requires striking jury demand; inability to understand the law undermines traditional jury role as "verdicts will be erratic and completely unpredictable, which would be inconsistent with evenhanded justice"); Comment, *Non-Jury Trial of Civil Litigation: Justifying a Complexity Exception to the Seventh Amendment*, 15 RICH. L. REV. 897 (1981) (arguing that in exceptional cases, a jury trial can be denied without violating the seventh amendment). *But see In re U.S. Financial Securities Litigation*, 609 F.2d 411 (9th Cir. 1979) (refusing to recognize a complexity exception to the seventh amendment and adopting an historical test to decide whether an issue is legal rather than equitable, thus requiring a jury trial); *Radial Lip Machine Inc. v. International Carbide Corp.*, 76 F.R.D. 224 (N.D. Ill. 1977) (refusing to recognize a complexity exception to the seventh amendment). See generally Note, *A Due Process Limitation on the Seventh Amendment Right to Jury Trial in Complex Civil Litigation*, 3 W. NEW ENG. L. REV. 547 (1981) (summarizing the arguments for and against jury trials in complex civil cases).

8. See *Sparf v. United States*, 156 U.S. 51 (1894) (rejecting the argument that jurors can determine the law for themselves in a criminal case and thus should be instructed on lesser included offenses even where there was no evidence to support them).

9. For example, *Bruton v. United States*, 391 U.S. 123 (1968), reversed a conviction when at a joint trial a non-testifying co-defendant's confession also incriminating Bruton was introduced, although the jury was instructed to disregard it in determining Bruton's guilt or innocence. Since the co-defendant did not testify and could not be cross-examined, this violated Bruton's

When a jury does not understand the law given it, jurors are expected to request clarification or supplemental instructions. After jurors have been individually polled on whether a verdict represents their decision, they have long been forbidden to later impeach it by claiming the instructions were misunderstood.¹¹ Despite these assumptions, there is a growing belief that many jurors do not understand instructions although they remain silent about their individual or collective ignorance.¹² When jurors do fail to understand the instructions, our judicial system fails, since one of its basic premises is negated.

Making Jury Instructions Understandable is the product of several years' detailed research by two social scientists, one with a law degree, and a lawyer to demonstrate and remedy this problem. In essence, this book is both an advocate's guide and a practice manual. The first three chapters contain the advocacy guide and begin by supplying authoritative sources and arguments for

sixth amendment right to confrontation, despite the instruction, because "there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." *Id.* at 135. See also *Jackson v. Denno*, 378 U.S. 368 (1964) (New York procedure leaving the determination of the voluntariness of a confession to the jury violated fourteenth amendment due process since the court, despite instruction to the jury, cannot be certain the jury resolved the issue of voluntariness before considering the confession's reliability).

10. "A crucial assumption . . . is that juries will follow the instructions given them by the trial judge. Were this not so, it would be pointless for a trial court to instruct a jury, and even more pointless for an appellate court to reverse . . . because the jury was improperly instructed." *Parker v. Randolph*, 442 U.S. 62, 73 (1979) (holding that when a defendant's confession "interlocks" with the non-testifying co-defendant's confession, the Confrontation Clause does not require reversal if the jury was instructed that each confession could only be used against the person making it). See generally Haddad, *Post- Bruton Developments: A Reconsideration of The Confrontation Rationale, and a Proposal for a Due Process Evaluation of Limiting Instructions*, 18 AMER. CR. L. REV. 1 (1980) for a discussion of interlocking confession problems and solutions.

11. FED. R. EVID. 606(b) states in part:

Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict . . . a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict . . . or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror.

This forbids any claim that jurors misunderstood instructions or voted incorrectly. See *United States v. Homer*, 411 F. Supp 972 (W.D. Pa. 1976), *aff'd* 545 F.2d 864 (3rd Cir. 1976), *cert. denied*, 431 U.S. 954 (1977), where two jurors claimed they did not understand the effect of their answers when polled and claimed they did not hear that a verdict must be unanimous. "As far as the jurors understanding the court's instructions, the court's instructions were clear." *Id.* at 978; *United States v. D'Angelo*, 598 F.2d 1002 (5th Cir. 1979) "The possibility that the jury misunderstood or even intentionally misapplied the law . . . does not warrant reversal of the conviction. . . . There is no claim that the court erred in giving the law to the jury as it did." *Id.* at 1003. See generally Carlson and Sumberg, *Attacking Jury Verdicts: Paradigms for Rule Revision*, 1977 ARIZ. ST. L.J. 247, for a discussion of the rational forbidding impeachment of jury verdicts, exceptions thereto, and proposed changes in FED. R. EVID. 606(b).

12. One troubling study cited by the authors showed that, after having been read the Florida Standard Jury Instructions relative thereto, only fifty percent of the Florida jurors studied understood a criminal defendant did not have to present evidence of innocence. See Strawn and Buchannan, *Jury Confusion: A Threat to Justice*, 59 JUDICATURE 478 (1976).

the interested practitioner to use in convincing judges and jury instruction committees how often and why misunderstanding of instructions occurs. The authors then briefly outline their own research, which underlies what may be characterized as the book's major theme, i.e., that the problem not only exists but also that theirs is the most realistic approach to remedy it.

Jury misunderstanding is attributed to several major flaws. The authors first claim that while pattern instructions have eliminated the problem trial judges face in accurately phrasing instructions to avoid appellate reversal, this is all such instructions have accomplished. Legal experts developed pattern instructions with an eye to assuring legal accuracy, and the authors contend that "relatively little attention has been given to insuring that they are understandable and easy for jurors to use."¹³ One experiment demonstrates the minimal effect pattern instructions may actually have on a jury's comprehension. The authors tested one set of standard instructions in which the crucial element was contributory negligence. Results showed that incorrect verdicts¹⁴ were reached forty percent of the time where no instructions at all were given, yet pattern instructions still produced incorrect verdicts thirty-nine percent of the time.¹⁵ The supposedly legally correct instructions amounted to little better than no improvement.

Besides insufficient attention to instructions' comprehensibility, the book also criticizes how instructions are customarily presented to a jury. At a trial's beginning, jurors are traditionally given rather perfunctory instructions, if any, on their role, with substantive instructions on the law waiting until the trial's conclusions. The authors argue that jurors, despite being instructed not to consider the merits of the case until its conclusion, have a preconceived result in mind before they receive substantive law instructions. Therefore, jurors are unlikely to passively receive evidence during the trial. This increases the chances of a lawless verdict as jurors "select and evaluate evidence in terms of their own sense of morality and justice"¹⁶ as the trial progresses. Once

13. A. Elwork, B. Sales and J. Alfini, MAKING JURY INSTRUCTIONS UNDERSTANDABLE § 1-2, at 9 (1982) [hereinafter cited as MAKING JURY INSTRUCTIONS UNDERSTANDABLE]. For another criticism of pattern instructions see Schwarzer, *Communicating with Juries: Problems and Remedies*, 69 CALIF. L. REV. 731, 737-740 (1981) [hereinafter cited as *Communicating with Juries*]. "[D]espite their convenience as a starting point, they are for the most part a poor vehicle for communicating with jurors." *Id.* at 739.

14. This occurred "whenever a juror failed to correctly apply the law to his/her own beliefs of the facts of the case." MAKING JURY INSTRUCTIONS UNDERSTANDABLE § 1-3, at 13.

15. *Id.* at 14.

16. *Id.* § 1-4(B), at 23. A recent article describing a new method of jury research supports this conclusion. See Vinson, *The Shadow Jury: An Experiment in Litigation Science*, 68 A.B.A.

a juror has formed a conclusion as to the evidence, the decision may be irreversible regardless of what law is later presented. Thus the authors recommended that substantive instructions be given both at the beginning and the end of trials.¹⁷ The authors also criticize the practice of not allowing jurors to have written copies of instructions to both read while the judge instructs them and keep for later reference. Admitting that there are no legal studies assessing the effect of such, the authors argue that studies in educational and cognitive psychology support their conclusion that allowing written instructions would improve comprehension.¹⁸

However instructive the authors' work may be, the most remarkable aspect of their discussion on how instructions are given is its brevity. Unfortunately, they apparently have seen fit to ignore or disregard other innovative methods of instruction without explaining why they do so. For example, there is no consideration on how giving juries audio-taped instructions to take into the jury deliberation room might affect comprehension.¹⁹ Likewise, there is no discussion about whether final instructions should be given to the jury before or after closing arguments.²⁰ Since the authors feel the current method of presenting instructions is one of two basic causes for misunderstanding, more attention to this subject would have been appropriate.²¹

J. 1243 (1982). "[M]any jurors come to a decision very early in the trial and then seek support for their conclusion." *Id.* at 1244.

17. The authors are not alone in this suggestion. See Prettyman, *Jury Instructions—First or Last?*, 46 A.B.A. J. 1066 (1960). Unfortunately, the authors do not supply an example of what these preliminary instructions on both substantive law and the jury's role should contain. For a brief sample by one writer agreeing with the author's suggestion see *Communicating with Juries*, *supra* note 13, at 760-62.

18. The authors also make strong practical arguments for doing so:

Having the judge read the jury instructions first assures that each juror pays attention to them at least once. Giving . . . a chance to make written notes of [unclear sections] increases the chances that they will return to them. Giving [a copy to keep] increases the probability that they will . . . remember the instructions and allows easy access to them anytime clarification is needed.

MAKING JURY INSTRUCTIONS UNDERSTANDABLE § 1-4(A), at 20.

Unfortunately most courts discourage allowing jurors to retain written copies for fear they will single out certain instructions. See *United States v. Schilleci*, 545 F.2d 519 (5th Cir. 1977). "[T]he practice is conducive to dissection of the charge by the jury and overemphasis of isolated parts rather than consideration of the charge as a whole." *Id.* at 526.

19. See *United States v. Watson*, 669 F.2d 1374 (11th Cir. 1982) refusing to reverse on the grounds that tape recorded instructions were provided to the jurors since the jurors were adequately informed to consider the charges as a whole.

20. In federal criminal trials, instructions are given after closing argument. See FED. R. CRIM. P. 30. In at least one state, instructions are given before closing argument. See KAN. STAT. ANN. § 60-251(a) (1976).

21. *Communicating with Juries*, *supra* note 13, at 747-755, suggests limiting the number of instructions, a point the authors do not discuss.

There are more recent indications, partly attributable to the authors' work, that judges are considering innovative methods of increasing the jury's role. See *Judges Push Increased Jury Role*, Nat'l. L.J., Aug. 16, 1982, at 1, Col. 5.

After briefly discussing these two central problems with jury instructions, insufficient attention to the instructions' comprehensibility and the problems with the method of presentation, the advocacy section argues that the authors' approach to the problem is the best available. Simply rewriting instructions is not enough, since this still will not insure that instructions will achieve "sufficient comprehensibility,"²² a concept crucial to understanding the authors' work. Improved instructions are not enough unless they reach a satisfactory minimum level of comprehension that the legal community can live with. The authors end their advocacy part by describing how they analyzed two sets of instructions, one simple and one complex, in an attempt to reach this level.²³ After one rewrite, jurors receiving the simple instructions correctly answered eighty percent of the questions asked about the instructions. The same level was reached with two rewrites of the complex set.²⁴ This would seem logical, as the initially more complex set contains more potential for error and thus needs more work. However, since the complex set was not patterned but the simple set was, does this mean that pattern instructions as a whole are likely to be more comprehensible to begin with? Since only one set of each was analyzed, unfortunately, no firm conclusions can be drawn. What can be concluded from the authors' experience in analyzing and rewriting instructions is that the process is not nearly as simple as their book describes. The authors admit they ran out of money before reaching their desired "sufficient comprehensibility" level, yet profess their belief that one more rewrite would be enough. Unfortunately this seems to undercut their later arguments on how long any rewriting effort will take. If the designers of the process were wrong in estimating the time and money required, how likely are novices to be any more successful?

The practice manual aspect of *Making Jury Instructions Understandable* consists of the remaining four chapters and several appendices. The authors' methodology is designed around a fourstep approach: (1) initial testing, (2) evaluation of test results,

22. The authors admit that no rewriting procedure can define what is a sufficient level of understanding. While believing an ideal level of comprehension exists when evaluators can be ninety percent (90%) certain two-thirds of a jury's members understand each point of law, *MAKING JURY INSTRUCTIONS UNDERSTANDABLE*, § 2-3(A) at 38, the authors admit that "[i]n the final analysis, however, the definition of what is or is not sufficiently comprehensible [will] have to depend on the judgments of the legal community of each jurisdiction adopting our procedures." *Id.* at 36.

23. The complex instructions, from a Nevada attempted murder trial, involved several lesser included offenses and an insanity defense. The simple instructions were from a mock burglary trial using *FLORIDA JURY INSTRUCTIONS IN CRIMINAL CASES* (1975).

24. *MAKING JURY INSTRUCTIONS UNDERSTANDABLE* § 3-2, at 45-46.

(3) rewriting of instructions and (4) testing of the rewritten instructions. However, the authors carefully point out that not all the steps must be used by every person concerned about a set of instructions. Bar association committees should be interested in all, but lawyers concerned with only making a record against certain instructions could stop after evaluating the results of initial testing. To describe the authors' complete rewriting process would needlessly duplicate their already detailed work. From a chapter devoted to telling how to begin the initial organization process in forming a rewriting team to a final section on concerns in re-drafting, the reader is led step-by-step through the entire process. Instructions on how to read and evaluate several computer printouts, as well as sample printouts, are included to guide readers unfamiliar with social science work.

Unfortunately, as detailed as the description is, several serious questions remain unanswered. In addition, a major mistake in the testing process is made. After describing how evaluative questions should be written for each particular instruction's initial testing, the authors describe how juror questionnaires should be administered. In so doing, they recommend giving each juror adequate time to study the instructions after a tester has read them. However, this is not the way instructions are usually administered in court. Even when jurors are given instructions to read along with the judge, the instructions are usually collected *immediately* afterwards. Thus by allowing volunteer jurors to study instructions longer than real jurors can, the authors distort the testing process. This may, in turn, distort their initial comprehensibility assessment's results. Jurors tested under the authors' format are likely to achieve a higher level of comprehension than would jurors who do not have time to study instructions. Since the same questionnaire administration process is again used to evaluate whether rewritten instructions have achieved "sufficient comprehensibility," a second warping of results is possible. Their mistake, although a serious one, is easily explainable. The authors apparently believe their recommendations of allowing jurors to have written instructions to read and keep for reference will be followed. Thus they have formulated their test administration procedures based on such. This demonstrates the possible need to deviate from the authors' particular recommendation on how questionnaires should be administered and adopt the approach to the procedures a particular jurisdiction actually uses in instructing juries. If juries cannot study instructions after the judge reads them, the testing pro-

cess should eliminate this or judges should be persuaded to change their instruction procedure as the authors suggest.

Besides this error, *Making Jury Instructions Understandable* is troubling for several questions it fails to address. Computer results of any evaluation not only indicate how many jurors understand a particular initial or rewritten question but also show whether the sample of volunteer jurors utilized is representative of actual panels in a particular jurisdiction. However, the authors give no indication of what should be done when an unrepresentative set of sample jurors achieves "sufficient comprehensibility" on a set of rewritten instructions. Should testing continue until both realistic representation and sufficient comprehensibility is achieved? Or is sufficient comprehensibility alone enough?

Finally, the authors fail to adequately address the question of cost. They calculate that rewriting a fifty page set of complex instructions will take a recommended team²⁵ three to four months of part-time work. Since any bar association committee considering adopting the authors' method will be concerned with cost in terms of dollars as well as time, the failure to supply any monetary estimate will retard the method from being utilized.²⁶ More importantly, cost in terms of the time involved does not stop once a set of instructions reaches "sufficient comprehensibility." Especially in jurisdictions having no required set of pattern instructions, and even in those that do, appeals based on the legal accuracy of the new instructions should be expected. Thus, until approved by a jurisdiction's highest court, any new instructions will create uncertainty and costs related thereto.

Even with the omissions noted, the authors' approach deserves careful consideration. No one can seriously dispute the problem of "legalese" in modern instructions. However, the question is whether the authors' complete suggested methodology or a less radical approach, such as using only their grammatical drafting suggestions, should be adopted. The authors hope their method will be initially appealing to jury instructions committees but admit this is unlikely. They believe such committees will ultimately be forced into adopting their suggestions by lawyers who successfully use the suggested techniques to win appellate reversals. Whether this is realistic remains to be seen. How many firms or

25. See MAKING JURY INSTRUCTIONS UNDERSTANDABLE § 5-1 for a description of each team member's role.

26. The authors apparently secured several grants to develop and test their methodology. MAKING JURY INSTRUCTIONS UNDESTANDABLE at xi. Interested individuals or committees may possibly obtain some cost estimate by contacting them directly.

lawyers have the time, money and capability of utilizing the procedures described is questionable, especially since some access to computers is necessary. Lawyers may find the time involved in using the method to create an appellate record the hardest problem to master. As a matter of trial procedure, all objections to instructions must be made *before* the jury retires.²⁷ Thus, in order to use the authors' suggested methodology, lawyers must anticipate months in advance what the exact wording of the instructions will be and which instructions will be given. This will not be possible in all jurisdictions, especially where pattern instructions are not utilized.

Even if the full testing technique and rewriting procedure presented in *Making Jury Instructions Understandable* is never adopted, the book is well worth reading; although at thirty-five dollars per copy it seems definitely over-priced. Some of the empirical data generated by the authors' research is of immense practical value to the trial bar. For example, the authors' research confirms that better educated jurors are more likely to understand instructions and that beyond a certain age the ability of jurors to comprehend instructions substantially decreases.²⁸ As the research also reveals that the less comprehensible instructions are, the more likely verdicts are to favor plaintiffs, their results should be of some assistance to counsel in deciding which jurors to peremptorily challenge. Likewise, the outlined grammatical principles for rewriting should especially help lawyers in nonpattern instructions states to improve comprehension of instructions.

However, even given these benefits, whether *Making Jury Instructions Understandable's* procedures and ideas will ever be fully adopted is debatable. The authors envision a national reform project, possibly along the lines of the American Law Institute's work on model codes, which will serve as a clearinghouse for reform of jury instructions. Since some instructions could be developed for use nationwide, this would alleviate duplication of work problems. One possibility the authors surprisingly neglect considering is reforming the organization of bar committees which presently oversee pattern instruction drafting. Each state could establish a permanent instruction research team to complete the

27. See FED. R. CIV. P. 51.

28. This poses the critical question whether there should be a maximum age and minimum education requirement for jury service. The authors chose not to address this, being content to merely state their research results: "[S]ome jurors were truly less than minimally competent and simply incapable of understanding certain key points of law *regardless of how well they were explained*. For example, as a group, jurors who were very old and relatively uneducated" (emphasis added). MAKING JURY INSTRUCTIONS UNDERSTANDABLE § 3-4(A), at 63.

testing, evaluation and redrafting process. The bar committees could discuss the research team's work and decide on accepting the final product. However, such massive, coordinated efforts are probably at least several years away. Considering the initial logistical problems involved in any detailed rewriting effort the authors recommend, advocates of the authors' approach will probably have to be satisfied with using it to begin dispelling the skepticism lawyers and bar associations have towards drastic procedural changes²⁹ and wait for others to accomplish the task of making jury instructions truly understandable.

29. The attempt to reform the Model Rules of Professional Conduct provides an excellent recent example. After several years of research and debate, the new rules were only recently approved by the American Bar Association House of Delegates.