South Carolina Law Review

Volume 52 | Issue 1 Article 5

Fall 2000

Using Social Sciences to Assess the Need for Jury Reform in South Carolina

Roger M. Young
University of Nevada, Reno

USING SOCIAL SCIENCE TO ASSESS THE NEED FOR JURY REFORM IN SOUTH CAROLINA

JUDGE ROGER M. YOUNG*

---

* Master-in-Equity, Charleston, S.C. This Article is in partial fulfillment of the requirements for the Master of Judicial Studies degree program at the University of Nevada, Reno. The author would like to express is appreciation to Professor James T. Richardson of the University of Nevada-Reno, Neil Vidmar of Duke Law School, and Douglas Lind of the University of Idaho for their assistance and encouragement in the preparation of this Article.

I. INTRODUCTION

> Trial lawyer to jury:
> *The reason we selected the twelve of you to hear this matter is because we wanted people to hear it who have common sense. Otherwise, we'd just have the judge hear this case.*[1]

A review of a thousand years of jury history leaves one with the unmistakable impression that jury procedures seem to be in a relatively constant state of change. Like most areas of life, the law is not now what it was in the past. Still, what could be considered the essence of a trial by jury—the right to be judged by one's peers and not by the sovereign—remains.[2] Changes in jury procedures have been an attempt to improve and protect the integrity of the right to a trial by jury. This goal has been a constant in an otherwise tumultuous area of the law.

The cornerstone of the American judicial system is the right to a trial by jury.[3] The founding fathers considered the jury trial so important that they embodied the right to a jury in criminal and civil trials in the Constitution.[4]

---

1. Old lawyer's tale.

2. *See Mushroom Reform*, NAT'L L. J., Sept. 1, 1997, at A16 ("In theory, the purpose of a trial is to achieve justice, which should have some relationship to that elusive commodity, the truth.").

3. *See* Colgrove v. Battin, 413 U.S. 149, 157 (1973) ("[T]he purpose of the jury trial in criminal cases [is] to prevent government oppression . . . and, in criminal and civil cases, to assure a fair and equitable resolution of factual issues . . . ." (citations omitted)).

4. U.S. CONST. art. III, § 2, cl. 3 provides, "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed . . . ."

The Sixth Amendment to the Constitution of the United States provides:

> 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, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. amend VI.

The Seventh Amendment to the Constitution of the United States provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

However, over two hundred years of experience has taught us that, like any institution, the jury system needs to be periodically examined to determine if reform is in order.

In recent years, there have been highly publicized jury verdicts in criminal and civil trials that provide anecdotal evidence of the need for reform. Jury verdicts are the driving force behind much of the ongoing public debate over reforming the American justice system.[5] But long before the controversial verdicts in the O.J. Simpson trial[6] and *BMW of North America, Inc. v. Gore*,[7] social scientists and legal scholars were studying the jury trial system in this country to see what parts of the jury system work and what parts need to be fixed. "Complaints about juries . . . are not a recent phenomenon."[8] But there have now been several decades of accumulated empirical research that strongly suggests that parts of the jury system are broken and need repair.

It is important that the bench and bar address these concerns because an inevitable outcome of any process that produces irrational results is a call for change or abolition. One writer noted, "Courts and bar associations in 27 states have committees studying ways to improve the process. They know that if lawyers and judges do not take the lead, reform will be left up to the politicians. And few desire that."[9] Therefore, it is incumbent upon the bar and the judiciary to take a proactive role in this process and, at a minimum, study the large body of data available on jury reform. Otherwise, the jury trial as we know it may very well fade away as it has in England, where "Parliament has abolished juries in most types of civil cases and restricted their availability in lesser criminal offenses."[10] We must not forget that the role of the jury is that of the "guardian of the public trust and the voice of the community's values inside a legal system dominated by lawyers and judges."[11]

This Article does not advance reform for reform's sake. Valerie Hans and Neil Vidmar, two of the most avid and eloquent defenders of the jury system,

---

U.S. CONST. amend. VII.

5. *See* STEPHEN DANIELS & JOANNE MARTIN, CIVIL JURIES AND THE POLITICS OF REFORM 1 (1995).

6. *See, e.g.*, Mark Curriden, *Jury Reform: No One Agrees on Whether the System is Broken, But Everyone is Trying to Change It*, 81 A.B.A.J., Nov. 1995, at 72, 72 ("'When people are acquitted in criminal cases, there is a tendency to say that the system is broke and needs fixing,' according to Nashville, Tenn., District Attorney Victor "Tory" Johnson, vice president of the National District Attorneys Association.").

7. 517 U.S. 559 (1996) (finding an Alabama court's award of two million dollars for punitive damages resulting from an automotive dealer's nondisclosure to be grossly excessive).

8. DANIELS & MARTIN, *supra* note 5, at 1.

9. Curriden, *supra* note 6, at 73.

10. John Paul Ryan, *The American Trial Jury: Current Issues and Controversies*, 63 SOC. EDUC. 458, 458 (1999).

11. *Id.*

agree that change is necessary.[12] After exhaustively studying the jury system and its inner-workings, they concluded:

> Our final judgment on the jury system is a positive one. Despite some flaws, it serves the cause of justice very well. For over 700 years it has weathered criticism and attack, always to survive and to be cherished by the peoples who own it.[13]

Yet, Hans and Vidmar did not argue to leave well enough alone. Instead, they went on to point out that "[a]daptability has been the key to its survival. It should remain open to experimentation and modification . . . ."[14]

In many respects, studies of the jury system have not only shown what aspects need reform, but have also produced a large body of empirical data that suggests remedies for many of the problems of the jury system. Some states, such as Arizona, New York, Colorado, and Delaware, have embarked on ambitious jury reform projects that so far have produced very promising results. However, many states, including South Carolina, are moving very slowly, if at all, towards adopting any aspect of reform.

Justice Brandeis challenged legal scholars:

> [A]dvances in the exact sciences and the achievements in invention remind us that the seemingly impossible sometimes happens . . . . In large measure these advances have been due to experimentation . . . .
>
> It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.[15]

In the spirit of Brandeis's challenge, this Article begins with a brief review of jury history to show that, while juries have been part of the legal system of Western Civilization for nearly a thousand years, juries have changed in the purpose and manner for which they were originally conceived. This Article then analyzes decades of social science data which conclusively demonstrates that there is at least one area of the jury trial process—juror comprehension of jury instructions—that can be improved by adopting two reforms: (1) using model jury instructions written in "plain English" and (2) providing a copy of

12. VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 251 (1986).
13. *Id.*
14. *Id.*
15. New State Ice Co. v. Liebmann, 285 U.S. 262, 310-11 (1932) (Brandeis, J., dissenting).

written instructions to jurors.[16] Furthermore, this Article contends that no impediment exists in current South Carolina law to the adoption of either of these reform procedures and presents a survey of South Carolina judges which was designed to measure the judges' perception of the need for jury reform and their willingness to adopt the proposals suggested by this research. Finally, this Article integrates the results of the social science studies, the overview of South Carolina law, and the survey of South Carolina judges to make recommendations for changes in the current practice of instructing juries in South Carolina courts.

II. HISTORY

> *That a sophisticated people would leave decisions affecting fortune, honor and life to a fixed number of individuals, selected at random, without regard to intelligence, experience or education would seem to defy rational explanation.*
>
> *The reasons lie in history.*[17]

A. Overview

After exhaustively reviewing the history of juries and jury reform efforts, one scholar noted:

> Although the right to a trial by jury in both civil and criminal cases has been deemed one of the most fundamental of rights, essential to civil liberty in the United States since the colonial era, the way in which this fundamental right has been implemented in practice has never been rigidly dictated.[18]

---

16. Many facets of the jury reform movement are beyond the scope of this Article. For example, some recommendations for jury reform include broadening the pool of people eligible to serve on juries, streamlining the voir dire process, allowing non-unanimous verdicts, eliminating peremptory strikes, allowing jurors to take notes and ask questions, giving jurors notebooks that include exhibits, allowing counsel to sum up arguments throughout the case, allowing jurors to discuss the evidence among themselves prior to receiving the final charge from the judge, and using juror "tutorials" to explain unfamiliar terminology or technology in complex cases.

17. LLOYD E. MOORE, THE JURY: TOOL OF KINGS, PALLADIUM OF LIBERTY vii (1973).

18. Douglas G. Smith, *The Historical and Constitutional Contexts of Jury Reform*, 25 HOFSTRA L. REV. 377, 386 (1996) (citing Edith Guild Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289, 289, 299 (1966)).

A long view of history supports the assertion that many of our jury practices and procedures are not much more than simple custom. Thus, nothing prevents a state from adopting any aspect of jury reform it so desires, as long as the essential principles of a fair trial are observed.[19] Furthermore, as this Article will demonstrate, many of the changes to the jury process over the centuries have passed constitutional scrutiny.[20]

As one delves into the area of jury reform, the question may rightly be asked, "Why haven't we done this already?" In the final analysis, the only true impediments are internal and endemic to the legal profession. That is to say, the only thing preventing reform are the judges and lawyers who have a natural tendency to "leave well enough alone."[21] Yet if asked, undoubtedly most judges, lawyers, and lay people would agree that if a proven technique can measurably improve the administration of justice, then all else being equal, we should adopt it. This Article will show that not only are these reform measures proven, they are rooted in legal history and precedent, and already widely used in the federal courts and many other state courts throughout the United States. Furthermore, scholars almost universally agree that effective communication with jurors is a requisite to providing a meaningful trial by jury.[22]

---

19. *See* Renée B. Lettow, *New Trial for Verdict Against Law: Judge-Jury Relations in Early Nineteenth-Century America*, 71 NOTRE DAME L. REV. 505, 505 (1996) ("Our jury system is not carved in stone: it has evolved considerably over the centuries, and will continue to develop.").

20. *See* Austin Wakeman Scott, *Trial by Jury and the Reform of Civil Procedure*, 31 HARV. L. REV. 669, 671 (1918) ("The question of the constitutionality of any particular modification of the law as to trial by jury resolves itself into a question of what requirements are fundamental and what are unessential, a question which is necessarily, in the last analysis, one of degree.").

21. As one scholar has noted:

> Despite the fact that reform of jury procedures may result in beneficial improvements in jury performance, significant barriers to such reform remain . . . . [M]ost of the procedural innovations suggested by commentators to remedy these problems are not constitutionally problematic and are already provided for within the current legal framework. Furthermore, many of the procedures enjoy a substantial historical pedigree, having been employed at one time or another in the United States. However, inertia on the part of judges and lawyers may account to a great extent for the failure of the legal system to experiment with, and ultimately adopt, these procedures.

Smith, *supra* note 18, at 384-85.

22. *See* AMIRAM ELWORK ET AL., MAKING JURY INSTRUCTIONS UNDERSTANDABLE 4 (1982) [hereinafter ELWORK, MAKING JURY INSTRUCTIONS UNDERSTANDABLE] ("[T]here is no justification for juries, out of ignorance, to reach verdicts that are inconsistent with the law."); Robert P. Charrow & Veda R. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 COLUM. L. REV. 1306, 1359 (1979) ("[I]f many jurors do not properly understand the laws that they are required to use in reaching their verdicts, it is possible that many verdicts are reached either without regard to the law or by using improper law."); William W. Schwarzer, *Communicating with Juries: Problems and Remedies*, 69 CAL. L. REV. 731, 759 (1981) ("Proper communication with jurors is the most direct and effective way of mobilizing [jurors'] qualities to further the cause of intelligent administration of justice.").

B. *Origins of the Jury*

It is instructive to first review the history of the jury, both to recognize the historical basis for the reform measures discussed in this Article and to understand that the entire history of the jury is indeed one of change and reform.

The present role and function of juries in our system of justice have slowly, but greatly, evolved over many centuries.[23] While scholars may believe that juries date from ancient Greece,[24] the laws of the Solon, system of Judices found in the twelve tables of Roman law imported during the Roman Conquest of England,[25] and early Scandinavian and German tribunals, most agree there is no real documentary evidence that juries predated the Norman Conquest in 1066.[26] However, the roots of the jury system can be traced to an early Anglo-Saxon quasi-trial procedure that used a type of witness/juror called a compurgator before the time of the Norman Conquest. The compurgators had different functions depending on the type of case, and their role was more analogous to that of the present day grand jury rather than the petit or trial jury.[27]

These early criminal trials were conducted in different manners according to the nature of the alleged crime.[28] If the crime was non-violent or no witnesses were present, the defendant swore an oath of his innocence and was allowed to choose twelve compurgators who would swear to his credibility.[29] A defendant with a bad reputation or questionable character might have been required to obtain three times the standard number of compurgators.[30] If the required number of compurgators attested to the accused's credibility, the accused was

---

23. HANS & VIDMAR, *supra* note 12, at 23.

24. *See* MOORE, *supra* note 17, at 1. Arguably, the trial of the god Ares for the murder of Halirrhothius, son of Poseidon, was the first jury trial. Ares was acquitted because the twelve-god jury was split evenly. *Id.* (citing THE NEW CENTURY CLASSICAL HANDBOOK 149 (Catherine B. Avery ed., 1962)). On slightly more sound footing is the assertion that the first trial of a mortal took place over three thousand years ago and was the setting for the play *Eumenides* by Aeschylus. *Id.*

25. Smith, *supra* note 18, at 391-92.

26. HANS & VIDMAR, *supra* note 12, at 23; Robert H. White, *Origin and Development of Trial by Jury*, 29 TENN. L. REV. 8, 14-15 (1961) ("[I]t behooves anyone to be exceedingly wary about asserting that this or that is the *sine qua non* regarding the actual *origin* of . . . trial by jury.").

27. HANS & VIDMAR, *supra* note 12, at 23-24.

28. *Id.*

29. *Id.* at 24.

30. MOORE, *supra* note 17, at 29.

found not guilty.[31] This type of "trial" was called a "wager of law" and was essentially a test of the defendant's character.[32]

Another procedure, known as the Ordeal, was used to determine the guilt or innocence of the accused by the judgment of God if the accused was caught in the act, had actual witnesses against him, was unable to obtain the necessary number of witnesses to swear to his credibility, had previous convictions, or was charged with a violent crime.[33] The Ordeal took many forms and was surrounded by Christian ceremonies.[34] Ordinarily, the accused was required to carry a red-hot pound of iron for nine feet.[35] Another common method of trial by ordeal was to have the accused stick his hand in a pot of boiling water to retrieve a stone.[36] In both instances, the accused's hand was then bound in bandages for three days.[37] If the hand was not infected, the accused was deemed innocent; if it was infected, he was found guilty.[38] An equally unsatisfactory method of determining guilt was to bind the accused with rope and then toss him into a body of water.[39] If the accused sunk to the prescribed depth, he was declared innocent and set free.[40] If he floated he was found guilty.[41] It was presumed that Divine intervention played a large role in these procedures.[42]

After 1066, the conquerors carried over the practices they learned from the Carolingian empire to the new duchy of Normandy.[43] William the Conqueror soon became the first jury reformer, though change was slow and gradual.[44] Early changes included such sophisticated innovations as the trial by battle, which permitted civil litigants to settle their disputes on the battlefield.[45] The battles were not often fought between the litigants themselves but through the litigants' champions, individuals hired to fight on behalf of the litigants.[46] The

---

31. HANS & VIDMAR, *supra* note 12, at 24.

32. THEODORE F. T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 115 (Little, Brown and Co. 1956) (1929).

33. Charlemagne is often credited with the creation of the ordeal because of his decree: "Let doubtful cases be determined by the judgment of God." MOORE, *supra* note 17, at 30. Many scholars also attribute it to Bishop Poppo, who, having little success proselytizing the Jutlanders of Denmark, obtained an agreement from them that they would believe in the divineness of his message if he touched a hot iron without suffering injury. *Id.* Thereafter he thrust his hand into a red hot iron glove and removed it uninjured. *Id.* at 31.

34. PLUCKNETT, *supra* note 32, at 114.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. HANS & VIDMAR, *supra* note 12, at 24.

40. *Id.*

41. *Id.*

42. *Id.* at 24-25.

43. PLUCKNETT, *supra* note 32, at 110.

44. HANS & VIDMAR, *supra* note 12, at 25.

45. *Id.*

46. *Id.*

winner of the battle won the case.[47] In some criminal cases guilt was determined by allowing the accused to fight his accuser.[48] Again, Divine intervention was believed to play a large role in this method of trial.[49]

These early methods of determining guilt or innocence began to attract enough detractors that during the 13th century the trial by ordeal fell out of favor and was replaced by something that began to more closely resemble the present trial by jury.[50] In 1215, Pope Innocent III forbade priests to participate in the religious rituals surrounding the trial by ordeal, thus diminishing the Divine intervention aspect which underscored the validity of the ordeal[51] and thereby providing for the introduction of a more recognizable predecessor to the present-day trial by jury.[52]

Early English juries were notable for the active role they played in a trial.[53] This role was more comparable to witnesses than triers of fact.[54] Individual jurors were chosen primarily for their knowledge of the parties and events surrounding the trial, rather than their lack of knowledge or impartiality.[55] Jurors, as we know them, first appeared in a process known as the inquisition.[56]

The early English inquisition was typically used to obtain information concerning the king's real property rights, although it extended to other royal matters as well.[57] Jurors were witnesses called to provide testimony upon which the court could render its verdict.[58] The juror's role remained as such for roughly the first five centuries of jury usage in England.[59] Around the time of Henry II, the use of such jurors was eventually extended to the general public and was thereby used to resolve private disputes.[60] This process of resolving disputes became enormously popular and widespread for a variety of reasons, not the least of which was the relative unpleasantness of the alternative methods of trial—the ordeal, the battle, and the wager of law.[61]

The institutional right to a trial by jury was constitutionally protected under the Magna Carta in 1225, yet continued to evolve significantly. For instance, early in the fifteenth century juries were limited to considering only evidence

---

47. *Id.*
48. *Id.*
49. *Id.*
50. HANS & VIDMAR, *supra* note 12, at 25.
51. *Id.* at 26; PLUCKNETT, *supra* note 32, at 118.
52. Smith, *supra* note 18, at 390.
53. *Id.*
54. HANS & VIDMAR, *supra* note 12, at 26.
55. *Id.*
56. Smith, *supra* note 18, at 392.
57. *Id.*
58. HANS & VIDMAR, *supra* note 12, at 26.
59. John Marshall Mitnick, *From Neighbor-Witness to Judge of Proofs: The Transformation of the English Civil Juror*, 32 AM. J. LEGAL HIST. 201, 201 (1988).
60. Smith, *supra* note 18, at 394.
61. *Id.*

that was offered in open court.[62] During the fifteenth or sixteenth century, the role of the juror shifted from witness to trier of fact.[63] By the early seventeenth century, as the volume of litigation began to rise, juries commonly based their decisions on testimony presented in court, rather than on personal knowledge.[64]

During this time of evolution, two important occurrences began to converge with regards to the role of the jury. First, the role of the jury became much more critical in the role of governing society. Second, the jury began to have a role in the assignment of power in government.[65] Blackstone summarized this role the jury began to play as follows:

> [A] competent number of [s]en[s]ible and upright jurymen, cho[s]en by lot from among tho[s]e of the middle rank, will be found the be[s]t inve[s]tigators of truth, and the [s]ure[s]t guardian[s] of public ju[s]tice. For the most powerful individual in the [s]tate will be cautious of committing any flagrant inva[s]ion of another's right, when he knows that the fact of his oppre[ss]ion must be examined and decided by twelve indifferent men, not appointed till the hour of trial; and that, when once the fact is a[s]certained, the law mu[s]t of cour[s]e redre[s]s it. This therefore pre[s]erves in the hands of the people that [s]hare which they ought to have in the admini[s]tration of public ju[s]tice, and prevents the encroachments of the more powerful and wealthy citizens.[66]

Thus, the role of the jury shifted from an arm of the King's authority to a protector of the citizenry. This transition was the precursor to our present-day view of the jury—the American experience.

C. The Jury in America

The earliest settlers in Virginia and Massachusetts brought the jury trial with them. All the colonies eventually adopted a right to a trial by jury.[67] Their allegiance to the king originally prompted the colonists to base their form of government upon the English model.[68] However, their rebellious nature and

---

62. *Id.* at 416.

63. Stephan Landsman, *The Civil Jury in America: Scenes from an Unappreciated History*, 44 HASTINGS L. J. 579, 587 (1993).

64. *Id.*

65. 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 380 (The Univ. of Chicago Press 1979) (1768).

66. *Id.*

67. Landsman, *supra* note 63, at 592. South Carolina first adopted the right to a trial by jury in 1712. *Id.*

68. HANS & VIDMAR, *supra* note 12, at 32.

distance from the mother country eventually caused them to drift from English practices.[69] Because the purpose of the American Revolution was, in essence, the establishment and protection of personal freedoms, the jury trial was viewed as the final line of defense in the fight to preserve these freedoms.[70] Accordingly, the guarantee of a right to a trial by jury is protected by the United States Constitution[71] and is also found in some form in every state constitution.[72]

D. Jury Instructions

Scholars speculate that because the colonies lacked legally-trained judges, the American jury was considered on comparable footing with the judiciary when it came to the determination of the applicable law.[73] As the rebellion began to grow, colonists realized that the jury was the last line of defense for individual liberties.[74]

Although it is impossible to know the precise role of jury instructions at the time of the Revolution, it is believed that early American juries played a much greater role in determining the law than their modern counterparts.[75] John Adams, writing immediately prior to the Revolution, stated:

> It is not only . . . [the juror's] right, but his duty, in that case, to find the verdict according to his own best understanding,

---

69. At this time in England it was fairly well settled that the jury possessed the power to judge issues of fact, but not of law. Blackstone argued that although juries were perfectly competent to investigate facts, they were less qualified to determine issues of law. 3 BLACKSTONE, *supra* note 65, at 379-80. He warned, "If the power of judicature were placed at random in the hands of the multitude, their deci[s]ions would be wild and capricious, and a new rule of action would be every day e[s]tabli[s]hed in our courts." *Id.* at 379-80. This allocation of power was not universally accepted, and English juries were known to disregard instructions of the law by judges. Smith, *supra* note 18, at 416.

70. *E.g.*, THE FIRST CONTINENTAL CONGRESS, DECLARATIONS AND RESOLVES V (1776) (stating that "the respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law"); THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776) (identifying the denial of "the benefits of [t]rial by [j]ury" as one of the grievances that led to the Revolution).

71. U.S. CONST. art. III, § 2; U.S. CONST. amend. VI; U.S. CONST. amend. VII.

72. HANS & VIDMAR, *supra* note 12, at 31. Professors Hans and Vidmar contrast this protection with that of England, Scotland, Wales, and Canada which do not have such stringent standards for criminal trials and note that outside North America the civil jury trial has all but disappeared. *Id.*

73. *See* Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 904 (1994) ("In the absence of law books and law-trained judges, jurors may have seemed about as well suited to resolve legal issues as anyone else."); HANS & VIDMAR, *supra* note 12, at 32.

74. HANS & VIDMAR, *supra* note 12, at 36.

75. *Id.* at 37.

> judgment, and conscience, though in direct opposition to the direction of the court.[76]

The United States Constitution is silent on the role of the jury, but the writings of the founding fathers suggest that the jury could decide issues of both law and fact.[77] At the time of the adoption of the Constitution, a great deal of diversity existed among the colonies concerning the way juries functioned.[78] Yet, for the following half century, juries generally operated as triers of both law and fact.[79] Towards the mid-nineteenth century the role of the jury regarding issues of law began to diminish, due, in part, to the emergence of a better-educated judiciary.[80] The directed and special verdicts are examples of the judiciary's increased attempts, during this time, to limit the ability of the jury to determine the applicable law.[81] Over the next several decades, jurisdictions continued to limit the role of the jury in deciding the law[82] so that by 1895 the stage was set for the United States Supreme Court to formalize the break.[83]

In *Sparf v. United States*[84] the United States Supreme Court acknowledged the long-standing practice of instructing juries as to their role as judge of the

---

76. *Id.*

77. *Id.*

78. Smith, *supra* note 18, at 421; *see also* MOORE, *supra* note 17, at 112 (stating that around the time of the adoption of the Constitution several states either constitutionally or statutorily provided that jurors had the right to decide the law).

79. *See, e.g.*, WILLIAM E. NELSON, AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830, 28 (1975) ("As one looks generally over the various rules regulating the division between the functions of judge and jury, it becomes clear that although the jury's power to find facts was limited by rules excluding relevant evidence and keeping the jury from weighing probability and credibility, its power to find law was virtually unlimited."); Smith, *supra* note 18, at 446-47 ("In contrast to the traditional English jury, American juries were often granted the authority to resolve issues of law as well as issues of fact. This authority was recognized in constitutions, statutes, and judicial decisions following the Revolution." (citations omitted)).

80. *See* Smith, *supra* note 18, at 450. Smith explains:

> [T]he authority of juries to pass judgment on issues of law may have been a peculiar feature of the American system that was a result of the ignorance of early American legal professionals, and which, therefore, disappeared as knowledge of law possessed by legal professionals increased over time relative to that possessed by the general public.

Id.

81. HANS & VIDMAR, *supra* note 12, at 39; Smith, *supra* note 18, at 451.

82. *See, e.g.*, Commonwealth v. McManus, 21 A. 1018, 1020 (Pa. 1891) (explaining that a jury decides a case upon the law and evidence but is instructed by the court as to what is the best evidence of law); State v. Burpee, 25 A. 964, 974 (Vt. 1892) (stating the doctrine that jurors are the judges of the law in criminal cases is untenable).

83. *See generally* Sparf v. United States, 156 U.S. 51 (1895) (ruling that a jury must abide by the judge's instruction on the law in criminal cases).

84. 156 U.S. 51 (1895).

law as well as the facts.[85] However, the Court clarified that juries must follow the judge's instructions of the law in federal criminal trials.[86] As a practical matter, juries could ignore the judge's instructions and return whatever general verdict they saw fit, but, after *Sparf*, they did not have the legal right to do so.[87] Most state courts followed suit.[88]

Today, with a few notable exceptions,[89] it is well-accepted that the judge instructs the law, and the jury determines the facts in evidence and applies the law as instructed. This division between the roles of the judge and the jury solidified as appellate courts reviewed jury instructions more frequently. As judges now instruct the jury on the applicable law, it is logical to require that they do so correctly. Under the common law, jury instructions were oral.[90] Therefore, many states required instructions to be written in order to provide an accurate record of the judge's instruction so that an appellate court could review it.[91] According to one treatise published in 1877, many states required jury instructions be in writing in order to prevent uncertainty as to their language and terms.[92] This requirement still remains in many jurisdictions to this date.[93]

Providing jurors with a copy of written instructions is not only an accepted practice in many states, but the United States Supreme Court has approvingly discussed written instructions on at least two occasions,[94] thus alleviating any concerns about their constitutionality.[95] States' current use of written instructions can be generally summarized as follows:

---

85. *Id.* at 102 ("It is the duty of juries in criminal cases to take the law from the court.").

86. *Id.*

87. HANS & VIDMAR, *supra* note 12, at 40.

88. The state constitutions of Georgia, Maryland, and Indiana still provide that juries have the right to decide the law, but the effect of these provisions has been virtually eliminated by judicial decisions. Smith, *supra* note 18, at 453.

89. *Id.*

90. R. J. Farley, *Instructions to Juries—Their Role in the Judicial Process*, 42 YALE L.J. 194, 204 (1932) (citing Vicksburg R.R. Co. v. Putnam, 118 U.S. 545 (1886)).

91. *See id.* at 204 n.59 (citing over thirty states which either require mandatory written jury instructions or provide they be reduced to writing upon the request of either party).

92. JOHN PROFFATT, A TREATISE ON TRIAL BY JURY 416 (1877).

93. *See, e.g.*, State v. Bennington, 25 P. 91, 91 (Kan. 1890) (upholding a Kansas statute which requires jury charges to be in writing); State v. Tompkins, 71 Mo. 613, 617 (1880) (holding it is not error to permit the jury to take written instructions into deliberation); State v. Bungardner, 66 Tenn. 163, 165-66 (1874) (upholding act that requires jury instructions be delivered in writing); Newman v. State, 65 Tenn. 164, 165 (1873) (holding that in every felony case a judge's charge must be in writing); Edwards v. Washington Territory, 1 Wash. Terr. 195, 197 (1862) (holding that it is not an error to submit written charges to the jury); Loew v. State, 19 N.W. 437, 437 (Wis. 1884) (holding it was not error to permit a jury to take statutes into a jury room).

94. Haupt v. United States, 330 U.S. 631, 643 (1947); Hopt v. People, 104 U.S. 631, 634-35 (1881).

95. *See* Smith, *supra* note 18, at 456 ("[M]ost of the reforms discussed . . . have never been found to be constitutionally objectionable, and are actually authorized by current procedural rules in some jurisdictions.").

> At one extreme, a state constitution or statute may require that all instructions be in writing, and that there can be no waiver. At the other extreme, the rule may be that instructions are to be given orally, at the court's discretion, even though both parties have requested a writing. But most provisions seem to require instructions to be in writing, unless waived.[96]

E. Jury Reform Efforts

The history of the jury has been one of relative change. It may take years, or even hundreds of years, for a change to take hold. As we have seen, the modern jury in many respects has little in common with its predecessors other than its overall purpose of determining guilt or innocence and assessing fault. One can infer that behind each change was the desire to improve the process in a way that the majority would perceive beneficial.

The role and function of the jury have undergone extensive study over the last half-century. Some jury reform movements have been the result of the judiciary and the bar perceiving a need for reform.[97] Others have resulted from serious academic study by social scientists outside the legal profession, who have an interest in how people receive and process information.[98] But a review of jury reform starts with one last area of historical note—the modern jury reform movement.

Over the past several decades, formal studies have led states to implement a variety of jury reforms.[99] Federal and state courts have both joined the effort. The pace of jury-reform efforts began to quicken in the 1960s with the advent of better court-management procedures, challenges to the representativeness and randomness of the jury selection process, an increased awareness of the value of the juror's time and cost to the community, and the increased availability of automation.[100] The impetus for various reform efforts ranged from court decisions to academic scholarship to national conferences of the bench and bar.[101] Although not a conscious effort at jury reform, a number of early changes originated in Texas during the 1960s and 1970s involving innovations such as a call-in system where jurors call the courthouse the night before scheduled service to see if they are still needed, the use of the multiple voir dire, and the "one-day/one trial" concept.[102]

---

96. MICHIE'S JURY INSTRUCTIONS, THE LAW OF INSTRUCTIONS TO JURIES IN CIVIL AND CRIMINAL CASES § 1-5-1501 (3d ed. 1960 & Supp. 1994).

97. *See infra* notes 99-114 and accompanying text.

98. *See infra* Part II.C.

99. G. Thomas Munsterman, *A Brief History of State Jury Reform Efforts*, 79 JUDICATURE 216, 216 (1996).

100. *Id.*

101. *Id.*

102. *Id.* at 216-17.

The first statewide approach to jury reform occurred in Colorado with the state's adoption of the Uniform Service and Selection Act in 1972.[103] This law implemented the recommendation of a federal law that merged drivers' lists and voters' lists through automation at the state level.[104] The state also implemented random jury selections and developed qualification questionnaires which were utilized by smaller counties.[105] In 1978, Massachusetts also adopted the one-day/one-trial concept and began a series of statewide jury reforms, including a progressive payment plan for jury service.[106]

In 1978, an American Bar Association task force issued *Standards Relating to Juror Use and Management*, a set of nineteen uniform jury standards based on a number of actual practices in various state courts.[107] These standards outline procedures by which a state can reform their jury system, and have served as the basis for a number of state-court, jury-reform efforts.[108] More recently, there have been jury reform efforts in four notable states—Arizona,[109] California, Colorado, and New York—along with the District of Columbia, which leads the way with the most thorough and wide-ranging efforts.[110]

Many states have created statewide commissions that recommend and implement comprehensive reforms in state courts. Some states have only recently begun to form committees, while others utilize the resources of existing entities as the basis for their reform efforts.[111] These recent efforts are directed at every facet of jury service, from the time citizens are summoned to the conclusion of their service.[112] The American Judicature Society recently released the results of a survey sent to all state court administrators and determined that all but twenty-two states have undertaken some sort of examination of the jury process.[113] South Carolina currently does not have any such jury reform study underway.[114]

---

103. *Id.* at 217.

104. *Id.*

105. Munsterman, *supra* note 99, at 217.

106. AMERICAN JUDICATURE SOCIETY, ENHANCING THE JURY SYSTEM: A GUIDEBOOK FOR JURY REFORM 2 (1999).

107. Munsterman, *supra* note 99, at 218.

108. *Id.*

109. Arizona's recent reforms, ordered by the Arizona Supreme Court on October 24, 1995, are the most far-reaching. They include: (1) mini-opening statements before voir dire; (2) time limits for trials; (3) juror notebooks to be provided in appropriate cases (containing instructions, exhibits, photos of witnesses, other key documents); (4) preliminary jury instructions; (5) juror note taking; (6) written copies of jury instructions available to jurors; (7) jurors may ask questions of witnesses; and (8) jurors may discuss the evidence among themselves as the trial progresses. Robert J. Hirsh, et al., *Attorney Your Dire and Arizona's Jury Reform Package*, ARIZ. ATT'Y., April 1996, at 24.

110. AMERICAN JUDICATURE SOCIETY, *supra* note 106, at 3.

111. *Id.* at 2.

112. *Id.*

113. *Id.* at 218-19.

114. *See id.*

Most jury reform studies recommend giving some attention to the area of jury instructions. For instance, both Arizona and California recommended that jury instructions be made more understandable, and the ABA's *Standards Relating to Juror Use and Management* recommends that instructions be either reduced to writing or recorded and delivered in a manner that can be readily understood by individuals who are unfamiliar with the legal system.[115]

As noted earlier, these reform movements began for many different reasons and in many different ways. Fundamentally, each effort was undertaken because of a shared belief that things could be done in a better way. But no matter how commonsensical or obvious the need for a particular reform may appear, some skeptics will always resist change unless the need for change and the validity of the proposed change is proven.

Judges have been among those particularly skeptical of reform movements. Error in instructing the jury is the "single most common cause of reversal" in jury trials.[116] Consequently, trial judges are understandably hesitant to implement changes or experiment with new jury procedures. Those outside the judiciary should be sensitive to this concern when lobbying for reform. The need for reform must be made persuasively to overcome these institutional concerns.

To this end, social science has contributed significantly, for what drives much of the jury reform movement is the existence of a large body of empirical data that supports the need for reform in the area of juror comprehension. More importantly, social science data suggests what specific type of reform is required.

III. SOCIAL SCIENCE

> *The Anglo-American jury is a remarkable political institution . . . . [which] represents a deep commitment to the use of laymen in the administration of justice . . . . It opposes the cadre of professional, experienced judges with this transient, ever-changing, ever-inexperienced group of amateurs. The jury is thus by definition an exciting experiment in the conduct of serious human affairs, and it is not surprising that, virtually from its inception, it has been*

115. A.B.A., STANDARDS RELATING TO JUROR USE AND MANAGEMENT STANDARD 138-39 (1983).

116. James J. Alfini & Herbert Harley, *Pattern Jury Instructions*, 17 AM. JUDICATURE SOC. (1972); *see also* Laurence J. Severance & Elizabeth F. Loftus, *Improving the Ability of Jurors to Comprehend and Apply Criminal Jury Instructions*, 17 LAW & SOC'Y REV. 153, 154 (1982) ("Appeals based on errors in instructing the jury occur frequently in the practice of criminal law, and a verdict will often be reversed if the instructions to the jury have misstated the law.").

> *the subject of deep controversy, attracting at once the most extravagant praise and the most harsh criticism.*[117]

A. Background of the Scientific Method and the Law

At the heart of any scientific method is reliability[118] and validity.[119] Similarly, in law, we at least try to maintain reliability and, hopefully, validity.[120] As a result of recent court cases, judges are forced to assess the validity and reliability of scientific methods used by experts at trial.[121] John Monahan and Laurens Walker note that "*Daubert* signals a new receptivity to science as a functional component of American jurisprudence."[122] Monahan and Walker also predict that *Daubert* will result in common practices of science becoming common practices of law.[123] If judges are to rely on the validity of scientific methods to determine the outcome of a case, then judges should also rely on such methods to determine how juries should receive instructions.

> Although American courts are no strangers to science, a number of practices that are now the subject of frequent and heated debate would come to be routinely accepted as judicial techniques for solving urgent problems. More specifically, under this broad reading three currently contentious practices would become standard operating procedures in the law. First, the empirical approach of science—what the Court [in Daubert] referred to as the "falsifiability, or refutability, or testability" of science—would be readily incorporated in a range of law-making ventures, including techniques for reforming many types of court rules. Second, judicial fact-

---

117. HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 3-4 (1966).

118. *See* JOHN MONAHAN & LAURENS WALKER, SOCIAL SCIENCE IN LAW 55 (4th ed.1998) ("Reliability means that different people measuring the same variable will arrive at the same value.").

119. *Id.* at 56 ("[A] variable is said to be valid to the extent that it truly or accurately measures what it is supposed to measure.").

120. Michael J. Saks, *Enhancing and Restraining Accuracy in Adjudication*, LAW & CONTEMP. PROB., Autumn 1988, at 243, 245. "To analogize to ideas familiar to lawyers, once we are satisfied that like cases are treated alike, we can ask whether the correct decisions have been reached on those similar cases." *Id.* at 246 n.10.

121. *See, e.g.*, Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 597 (1993) (holding that trial judges determine the relevancy and reliability of expert scientific testimony); Kumho Tire Co. v. Carmichael, 526 U.S. 137, 141 (1999) (extending *Daubert* to testimony "based on 'technical' and 'other specialized knowledge'"); State v. Council, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (1999) (holding that trial judge determines whether expert scientific testimony is helpful and reliable).

122. Laurens Walker & John Monahan, *Daubert and the Reference Manual: An Essay on the Future of Science in Law*, 82 VA. L. REV. 837, 838 (1996).

123. *Id.*

> gathering practices founded on random sampling and inferential statistics, rather than individualized adjudication, would come to be routinely accepted, particularly in the resolution of mass tort cases. Finally, simulation research would gain greater acceptance as a basis for judicial decision-making in areas such as jury instructions.[124]

Although, originally, a proffered scientific principle needed only to be generally accepted in the relevant scientific community in order to be admitted into evidence,[125] the trial judge now must focus on and understand the methodology behind the proffered science in order to determine admissibility.[126] Thus, it is important to understand what social science is and what social scientists do.

Physicists study the properties and interactions of matter and energy. Chemists study the composition and properties of substances. Social scientists study the structure of society and the interaction of its members.[127] "The subject matter of the social sciences is the human animal."[128] Just like the "hard" sciences, such as physics and chemistry, social scientists attempt to test hypotheses through objective, quantifiable observations.[129] Social scientists use both empirical[130] and clinical methods[131] to study human behavior.[132] Like all scientists, the social scientist's aim is to predict when an event will occur, under what conditions it will occur, and to have an understanding of what causes the event to occur.[133]

> Empiricism is a way of knowing or understanding the world that relies directly or indirectly on what we experience through our senses: sight, hearing, taste, smell, and touch. In other words, information or data are acceptable in science only insofar as they can be observed or "sensed" in some way

---

124. *Id.* at 839 (citations omitted).

125. *See* Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923).

126. *See* G. Ross Anderson, *Evidence Eggshell—A New Walk for Experts*, THE BULLETIN, Fall 1999, at 10 (stating that in the context of both federal and state courts, "[m]ethodology will be probably the most important aspect concerning admissibility").

127. *See* STATE JUSTICE INST., A JUDGE'S DESKBOOK ON THE BASIC PHILOSOPHIES AND METHODS OF SCIENCE 169 (1999).

128. *Id.*

129. *Id.* at 169-70.

130. *Id.* at 170 ("Empirical research refers generally to methodologically sound studies, regardless of whether the researchers are primarily clinicians or empirical researchers.").

131. *Id.* ("The clinical method is based on observation and relies primarily on personal examination, history-taking and testing.").

132. *Id.*

133. MONAHAN & WALKER, *supra* note 118, at 48.

> under specifiable conditions by possessing the normal sensory apparatus, intelligence, and skills.[134]

The goal of the experimental researchers using these processes is to produce new knowledge.[135] Broken down to its basics, "[t]he research process consists of seven principal stages: (1) statement of the problem; (2) hypothesis development and hypothesis-testing; (3) research design; (4) measurement; (5) data collection; (6) data analysis; and (7) generalization."[136]

Scientists of every type who use the empirical method, including social scientists, limit themselves to problems and issues that can be resolved by making observations of some kind.[137] "Appeals to authority, tradition, revelation, intuition, or other nonempirical ways of knowing... cannot be used as scientific evidence."[138]

The test for the reliability (and thus admissibility in terms of evidentiary proceedings) of any social science conclusion is the same as that of any other scientific conclusion: Was the methodology used by the social scientist generally accepted? Was it used industry-wide? Do others in that field employ the same methodology, and is it capable of being tested?[139] It is not enough to accept that the following studies would be admissible in court because they used reliable methodology to reach their conclusions. It needs to be understood that the studies' conclusions are valid as well and that their validity is based upon numerous reliable studies reaching similar results. Perhaps it makes more sense to understand this principle in the following context: It would be one thing for the results of one study to show that the instructions judges typically give jurors are confusing and sometimes downright incomprehensible, but it is quite another thing to have those conclusions published, replicated, tested, and verified repeatedly. Repetition of the same result not only establishes the conclusions' reliability, but their validity.

Courts have used social science to resolve disputes in many areas of law. The first appellate court use of social science was the 1908 case of *Muller v. Oregon*,[140] in which the Supreme Court relied on economic and psychological statistics in upholding a state statute that limited women's working hours.[141] It is in this case we saw the first use of what is now known commonly as a Brandeis brief.[142] Courts now routinely recognize the use of social science in

---

134. SELLTIZ ET AL., RESEARCH METHODS IN SOCIAL RELATIONS 22 (3d ed. 1976).
135. STATE JUSTICE INST., *supra* note 127, at 51.
136. *Id.*
137. ROYCE A. SINGLETON, JR. ET AL., APPROACHES TO SOCIAL RESEARCH 30 (2d ed. 1993).
138. *Id.*
139. *See* Anderson, *supra* note 126, at 10 ("As lawyers and judges, we must never lose sight that conclusions are irrelevant in the admissibility stage.").
140. 208 U.S. 412 (1908).
141. *Id.* at 423.
142. *See id.* at 419 n.1 (presenting an abstract of the brief).

cases ranging from trademark violations to constitutional issues such as obscenity, redistricting, and the death penalty.[143]

B. The Problem of Juror Comprehension

One jury reform scholar has noted "Although, under our system, it is deemed essential that instructions be made intelligible to a jury, there is no requirement that they be useful to a jury."[144] In his nineteenth-century treatise on jury trials, Proffatt wrote:

> In discharging the important function of instructing the jury on the law, a court may avoid some of the errors and mistakes [of incorrectly instructing the law], and yet fail to adequately discharge its duty. The statement of the law may be given in such a manner as to be beyond the comprehension of the jury, in a too technical or in an indirect manner. Something more is required from a court than mere abstract statements of law; there is required an exposition of the law pertinent to the case before the jury, in its adaptation as well as exceptions.[145]

For as long as courts have issued jury instructions, there has been a constant struggle to balance correctness with comprehensibility and comprehension is very often the loser.

The legal community has long recognized the problem of incomprehensible jury instructions, and this concern has led to a movement, beginning as far back as the 1930s, to standardize jury instructions.[146] Prior to this movement, the process of writing jury instructions was done in most states just as it is still done in South Carolina—each counsel submits proposed instructions to the judge who either agrees to read the proposed instructions, rejects them, modifies them, or drafts them anew.[147] One group of scholars identified the problems readily apparent with this process: "(1) it [is] time consuming, (2) it result[s] in erroneous instructions and subsequent appeals and reversals, and (3) it force[s] judges to insure the legal accuracy of their instructions at the expense of comprehensibility because of these frequent reversals by appellate courts."[148] Jerome Frank once noted:

---

143. MONAHAN & WALKER, *supra* note 118, at 48.
144. Farley, *supra* note 90, at 208 (citations omitted).
145. PROFFATT, *supra* note 92, at 411.
146. ELWORK, MAKING JURY INSTRUCTIONS UNDERSTANDABLE, *supra* note 22, at 7.
147. *Id.*
148. *Id.*

> What a crop of subsidiary semi-myths and mythical practices the jury system yields! Time and money and lives are consumed in debating the precise words which the judge may address to the jury, although everyone who stops to see and think knows that these words might as well be spoken in a foreign language—that, indeed, for all the jury's understanding of them, they are spoken in a foreign language. Yet, every day, cases which have taken weeks to try are reversed by upper courts because a phrase or sentence, meaningless to the jury, has been included in or omitted from the judge's charge.[149]

The idea of pre-endorsed pattern or model instructions first came about in an attempt to solve these problems.[150] A judge could simply pick and choose which instructions to charge from a set of uniform instructions.[151] The first such effort was made in California in 1938, and was so successful that by 1980 approximately 43 states, the District of Columbia, and most federal courts now use some form of pattern jury instructions.[152]

While this development has generally been hailed as a success, one major weakness still remains: while jury instructions may be legally accurate, not much effort has been made to insure that they are understandable to jurors.[153] Thus, while a movement to recognize the value of plain English has swept through many areas of government, that movement has bypassed jury instructions.[154]

However, the value of "plain English" jury instructions has gained recognition since juror comprehension has undergone empirical study in recent years. These studies have been important in three respects: (1) it has been demonstrated with credibility that there is a problem with incomprehensible jury instructions, (2) this problem exists as a result of how jury instructions are both written and presented, and (3) the problem is pervasive.[155] The following sections examine each of these concerns.

---

149. JEROME FRANK, LAW AND THE MODERN MIND 181 (1930).

150. ELWORK, MAKING JURY INSTRUCTIONS UNDERSTANDABLE, *supra* note 22, at 7-8.

151. *See id.* at 8.

152. *Id.*

153. *Id.* at 9.

154. *See* Charrow & Charrow, *supra* note 22, at 1306-07 n.2 (reviewing a number of federal and state statutes that make the use of plain English mandatory in certain areas such as consumer goods contracts).

155. ELWORK, MAKING JURY INSTRUCTIONS UNDERSTANDABLE, *supra* note 22, at 11-12.

C. *Problems with Comprehensibility*

There have been several methods used over the years to empirically test juror comprehension.[156] In 1976, David Strawn and Raymond Buchanan showed randomly-selected Florida jurors videotape instructions and then tested the jurors with multiple-choice and true-false questions to measure their comprehension.[157] A control group that was not given any instructions was also tested.[158] The results showed that, while the group who received instructions scored higher than the group who had not, the instructed group still missed 30% percent of the test items.[159] Furthermore, in critical areas like "reasonable doubt," the instructed group's comprehension was remarkably low at 50%, which was 20% lower than its overall rate of comprehension.[160]

In 1977, Elwork, Sales, and Alfini published a study in which seven groups of randomly selected subjects were shown an entire videotaped trial.[161] Six of the seven groups viewed videotapes with either Michigan civil pattern jury instructions or a version rewritten for clarity.[162] These groups were presented with the instructions at the beginning of the trial, the end of the trial, or both.[163] The control group was not given any instructions.[164] All groups were then tested on various aspects of the law as it pertained to the trial they had watched. The results showed no significant increase in comprehension among the instructed groups as compared to the uninstructed group.[165] In other words, not only was there an extraordinarily high error rate in comprehension among those instructed in the law, but the instructed jurors showed roughly the same level of understanding as those who had never been instructed.

A few years later, these same researchers went one step further and conducted another study to show the effect of plain English techniques on juror comprehension.[166] This study compared the effectiveness of two sets of jury instructions: one from a criminal trial, which was fairly complex, and one from

---

156. *See* Joel D. Lieberman & Bruce D. Sales, *What Social Science Teaches Us About The Jury Instruction Process*, 3 PSYCHOL., PUB. POL'Y., & L. 589, 591-96 (1997) (analyzing the methodology used in mock trial and jury simulations studies in general and the particular methodology used in many of the studies discussed in this Article).

157. David U. Strawn & Raymond W. Buchanan, *Jury Confusion: A Threat to Justice*, 59 JUDICATURE 478, 480 (1976).

158. *Id.*

159. *Id.*

160. *Id.* at 480-81.

161. *See* Amiram Elwork et al., *Juridic Decisions: In Ignorance of the Law or in Light of It?*, 1 LAW & HUM. BEHAV. 163, 173 (1977) [hereinafter Elwork, *Jurisdic Decisions*].

162. *See id.*

163. *See id.*

164. *See id.*

165. *See id.* at 175.

166. ELWORK, MAKING JURY INSTRUCTIONS UNDERSTANDABLE, *supra* note 22, at 43.

a mock burglary trial in Florida, which was somewhat easier.[167] This Article will focus only on the Florida jury instruction results.

The groups were given instructions based upon Florida pattern-jury instructions on criminal law.[168] They were then given a questionnaire based upon those instructions.[169] The average (mean) percentage of correct answers per juror was 65%.[170] The instructions were then redrafted—focusing on vocabulary, grammar and organization; replacing legal jargon with common words and passive voice with active voice; and avoiding compound sentences.[171] After the redrafts, the average percentage of correct answer per juror rose to 80%, which is a statistically significant increase.[172]

Charrow and Charrow conducted a study in 1979 that focused on the problems inherent in oral jury instructions.[173] These researchers speculated that in states (like South Carolina) where jury instructions are usually given orally and jurors are rarely given "access to a printed copy of the instructions," jurors were likely to paraphrase the judge's instructions to their level of understanding.[174] Using psycholinguistic methodology,[175] the researchers administered a paraphrase task to their test subjects.[176] In a paraphrase task "a subject either listens to or reads some material and is then required to paraphrase it."[177] The premise behind a paraphrase task is that the subject will not be able to accurately paraphrase material with which the subject is not familiar, and is thus more likely to focus on those areas that are more familiar and comprehensible—and thereby "gloss over or omit less comprehensible" material.[178] The researchers ran two experiments.[179] In the first, jurors were asked to paraphrase fourteen standard California jury instructions which were then linguistically analyzed.[180] The results were used to rewrite the instructions to eliminate problematic items and constructions.[181] The tests were repeated

---

167. *See id.* at 43-44.
168. *See id.* at 44.
169. *See id.* at 45.
170. *See id.* at 46.
171. *Id.* at 145.
172. *See generally* ELWORK, MAKING JURY INSTRUCTIONS UNDERSTANDABLE, *supra* note 22, at 46 (discussing guidelines on re-writing jury instructions in plain English).
173. Charrow & Charrow, *supra* note 22, at 1307.
174. *Id.* at 1310.
175. Psycholinguistic methodology is the use of "techniques of experimental psychology to investigate a language problem." Veda R. Charrow, *Linguistics and the Jury*, 8 U. BRIDGEPORT L. REV. 303, 306 (1987).
176. *See* Charrow & Charrow, *supra* note 22, at 1309-10.
177. *Id.* at 1310.
178. *Id.*
179. *Id.* at 1311.
180. *Id.*
181. *Id.*

with a new group using the revised instructions.[182] Using an approximation measure, the results showed improved comprehension in all of the modified instructions.[183]

In 1982, Severence and Loftus performed a series of experiments on jury instructions.[184] One experiment analyzed cases where juries asked judges questions during deliberations.[185] This experiment identified a number of pattern instructions that frequently presented comprehension problems; however, the researchers decided to isolate only three specific instructions for further testing: intent, reasonable doubt and the use of prior convictions.[186]

Using these three isolated instructions and one general instruction, the second experiment was aimed at "pinpoint[ing] sources of misunderstanding."[187] First, subjects studied a videotape of a trial and then were divided into three groups.[188] One group was given no instructions, another was given general instructions, and the third group received specific instructions.[189] The groups were then questioned on key concepts of law covered by the general and specific instructions.[190] The group with no instructions missed 35.6% of the questions, the group with general instructions missed 34.7% of the questions, and the group receiving specific instructions missed 29.6% of the questions.[191]

Using these results, the researchers then conducted another experiment aimed at reworking the "target instructions to enhance subjects' comprehension and ability to apply the instructions."[192] They also employed the psycholinguistic techniques developed by the Charrows and the Elwork groups.[193] This experiment tested groups of students that received general and specific instructions, revised instructions, and no instructions.[194] The results showed a lower error-in-comprehension rate of 24.3%, 20.3%, and 29.3% respectively.[195] As in the previous experiment, jurors receiving instructions did

182. *See* Charrow & Charrow, *supra* note 22, at 1311.
183. *Id.* at 1333.
184. Severance & Loftus, *supra* note 116, at 153. These experiments were also analyzed in Laurence J. Severance et al., *Toward Criminal Jury Instructions That Jurors Can Understand*, 75 J. CRIM. L. & CRIMINOLOGY 198, 203-13 (1984).
185. Severance & Loftus, *supra* note 116, at 164.
186. *Id.* at 178-79.
187. *Id.* at 173.
188. *Id.* at 173-74.
189. *Id.* at 176-77.
190. *Id.*
191. Severance & Loftus, *supra* note 116, at 180.
192. *Id.* at 183.
193. *Id.* at 184.
194. *Id.* at 188.
195. *Id.* at 189.

better than those who did not.[196] Moreover, this experiment showed that those receiving the revised instructions had the best overall comprehension.[197]

It is also noteworthy that in their first experiment examining 405 cases from the State of Washington, Severance and Loftus discovered that about one-quarter of all juries halted their deliberations in order to request judicial clarification of one or more instructions, and in virtually all these cases the courts refused to elaborate on the original instructions provided.[198]

In 1988, Steele and Thornburg published the results of their attempts to rewrite pattern jury instructions using many of the techniques advanced by the Charrows and Elwork studies.[199] Their results confirmed that jurors understood the rewritten instructions much better than the pattern instructions already in use, with the revised answers showing a 91% increase in comprehension over the older pattern instructions.[200]

In 1989, acting on criticism that mock jurors do not take jury deliberation as seriously as real jurors, Phoebe Ellsworth published the results of a California study that showed while mock jurors take jury instructions very seriously and work hard at applying them in their deliberations, they still misunderstood the instructions nearly 50% of the time.[201] While acknowledging the results of these studies, there remained criticism in legal circles that the results were based upon mock trials or jury simulations and not real juries.[202] It is, of course, not legally or ethically possible to view inside an actual jury room during deliberations. However, in response to these criticisms, several studies were undertaken using actual jurors from real trials to see if the results differed significantly from those previously mentioned.[203]

Responding to the growing awareness of problems with juror comprehension, the Michigan State Bar Foundation and the State Bar of Michigan funded "The Juror Comprehension Project."[204] In 1990, Kramer and Koenig published the study's results of how adequately over 600 Michigan jurors understood criminal jury instructions in actual trials.[205] The study was a

---

196. *Id.* at 180, 189.

197. Severance & Loftus, *supra* note 116, at 189.

198. *See id.* at 172.

199. Walter W. Steele, Jr. & Elizabeth G. Thornburg, *Jury Instructions: A Persistent Failure to Communicate*, 67 N.C. L. REV. 77, 94 n.107 (1988).

200. *Id.* at 90-91.

201. Phoebe C. Ellsworth, *Are Twelve Heads Better Than One?*, 52 LAW & CONTEMP. PROBS. 205, 218-19 (1989).

202. *See, e.g.*, Alan Reifman et al., *Real Juror's Understanding of the Law in Real Cases*, 16 LAW & HUM. BEHAV. 539, 542 (1992) (discussing the problems with mock jury simulations).

203. *See, e.g.*, 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, 401 (1990) (citing Michigan experiment which tested the comprehension of actual jurors in real criminal trials).

204. *Id.*

205. *Id.* at 402.

collaboration of social science researchers from Michigan State University and judges and lawyers who were members of the Michigan Criminal Jury Instructions Committee.[206]

The survey identified problematic jury instructions and prepared a questionnaire to be answered by actual jurors immediately following their service on a trial.[207] In order to assess comprehension of jury instructions, the project compared those who had received a particular instruction with those who had not.[208] The results corroborated and validated many of the results obtained by the Charrow and the Elwork groups.[209] They showed low rates of comprehension for many areas of instruction, including "startling" low rates in the areas of reasonable doubt, impeachment by prior conviction, and circumstantial evidence.[210] While the researchers point out that a number of external factors, such as educational level, influence juror comprehension and are thus beyond the court's control, they also point out that some factors can be controlled by the court.[211] They suggest that one way courts can improve juror comprehension would be to provide a copy of written instructions to jurors.[212]

In 1992, Reifman, Gusick, and Ellsworth published the results of a study conducted in Ann Arbor, Michigan, using real jurors in real cases.[213] The researchers sent out questionnaires to actual jurors after they had completed jury service.[214] They asked jurors various questions about their service, including nineteen questions testing the juror's understanding of the law.[215] The researchers then compared those responses to actual or prospective jurors who had not received any instructions on the law.[216] The results again corroborated previous research[217] and showed that jurors—whether in real trials or mock trials—answered fewer than half of the questions on substantive and procedural law correctly.[218]

In 1998, Bradley Saxton published the results of a study, conducted in Wyoming, using real jurors and real civil and criminal cases.[219] Saxton sent questionnaires to jurors immediately after they reached their verdict so that the

206. *Id.* at 405.
207. *Id.* at 406.
208. *Id.*; Kramer & Koenig, *supra* note 203, at 406.
209. *See supra* notes 166-83 and accompanying text.
210. Kramer & Koenig, *supra* note 203, at 429.
211. *Id.* at 431.
212. *Id.*
213. Reifman et al., *supra* note 202, at 539.
214. *Id.* at 543.
215. *See id.* at 544-45.
216. *See id.* at 546.
217. *See supra* notes 166-83 and accompanying text.
218. *See* Reifman et al., *supra* note 202, at 547.
219. 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, 61, 79 (1998).

questions would test comprehension rather than recall.[220] The study also involved participating judges answering questionnaires.[221] The studies showed that the jurors spent, on average, a third of their time in deliberations discussing jury instructions[222] and that over 90% of the jurors felt that the judge's instructions were either "fairly helpful" or "very helpful."[223] The results showed an average comprehension rate in criminal trials of 74% compared with an average comprehension rate in civil trials of 57%.[224] What is significant about this is that the Wyoming criminal-pattern jury instructions had just recently been revised to make the instructions clearer and more understandable.[225] The civil pattern jury instructions were dated.[226] Saxton noted that many of the attorneys and judges who participated in the study specifically commented that the civil pattern jury instructions were difficult to understand.[227]

As a result of extensive study over many years, Dr. Veda Charrow now recommends that jury instructions be rewritten using the following plain English guidelines in order to increase juror comprehension:

1. Write short sentences.
2. Avoid intrusive phrases and clauses.
3. Put the parts of each sentence in a logical order.
4. Untangle complex conditionals. A conditional is a statement of the "if-then" or "when-then" type.
5. Use the active voice rather than passive voice whenever possible.
6. Avoid nominalizations (nouns constructed from verbs and used to take the place of a verb clause). Use verb clauses and adjectives instead. For example, say that a person "admitted" something; don't speak of the party's "admission." Nominalizations are abstract and can be especially difficult to follow for someone who is not already familiar with the subject matter.
7. Use the positive unless you want to emphasize the negative. Do not use multiple negatives.
8. Avoiding noun strings. That is, noun-noun-noun, as in "policy implementation" or "decision analysis."

---

220. *Id.* at 76.
221. *Id.* at 80.
222. *Id.* at 83.
223. *Id.* at 85.
224. *Id.* at 88.
225. Saxton, *supra* note 219, at 88.
226. *Id.*
227. *Id.* at 88-89. Saxton also noted that he was a law professor who spent a considerable time with both sets of instructions while formulating his questionnaire, and he found the civil instructions much wordier and complex. *Id.*

Like nominalizations, noun strings are hard for the listener or reader to process.

9. Avoid ambiguity in words and sentences.
10. Eliminate redundancy and extraneous words; avoid overspecificity.
    These constructions occur more often in contracts than in jury instructions, but they come up in jury instructions as well.
11. Choose your vocabulary with care.
    Many words that are very familiar to lawyers are meaningless or confusing to most jurors. For example, an "information," an "action," and "proximate" are words that might be confusing to jurors.
12. Use parallel structure.
13. Use an appropriate tone.[228]

In short, these numerous studies, using both mock jurors and real jurors, have corroborated findings that jurors have great difficulty understanding the jury instructions they are asked to apply. Because of the use of legal jargon in jury instructions, many jurors have no better understanding of the law than if they had never been instructed at all. What is most disturbing is that some of these instructions—presumption of innocence, reasonable doubt, limiting instructions, death penalty instructions, and damage award instructions—are the most fundamental principles of our system of justice.

D. Problems with Presentation

In a study published in 1982, Forston examined sixteen juries in three different types of jury simulation.[229] Six juries "were provided with a summary sheet of important facts and issues" and were given written jury instructions.[230] Another six juries listened to detailed audio recordings of an edited trial.[231] Finally, four juries participated in actual live trial situations.[232] Forston's "qualitative analysis of the juries' performanc[e]" showed that juries which used written jury instructions were more efficient and "exhibited higher quality deliberations."[233] These jurors "made fewer comments about confusion, spent

228. Veda Charrow, *Some Guidelines for Clear Legal Writing*, 8 U. BRIDGEPORT L. REV. 405, 406 (1987).

229. Robert F. Forston, *Sense and Non-Sense: Jury Trial Communication*, 1975 BYU L. REV. 601, 607 (1976).

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.* at 610.

less time inappropriately applying the law, [and] wasted less time trying to ascertain the meaning of the instructions."[234] Forston's research also showed that "juries supplied with written instructions spent more than twice as much deliberation time specifically applying the rules of law as did the juries that only heard oral instructions."[235] These jurors also expressed a higher level of confidence "that they had reached the best decision."[236] Forston concluded that juries using written instructions "were more efficient and exhibited higher quality deliberations."[237]

In 1982, "Chief Judge Wilfred Feinberg of the United States Court of Appeals for the Second Circuit appointed a Committee on Juries to 'consider ways to improve the work of juries'" in that circuit.[238] As a result of that committee's work, a series of experiments were implemented in 1983.[239] In one experiment four judges furnished jurors with written copies of the court's charges to take with them into the jury room for deliberation.[240] Three of the participating judges prepared typewritten copies of their instructions, which they gave to the jury.[241] Two judges gave jurors copies of the instructions to read along with the judges' oral reading, but they stopped this practice because it was distracting and prevented "judicial extemporizing."[242] Thereafter, the judges only gave copies to jurors after they had been charged for use in the jury room.[243] "The fourth judge had the court reporter prepare a written copy of the charge from the oral presentation in court."[244]

The judges provided written charges to jurors in seventeen trials.[245] The judges were then asked to answer questionnaires about their experiences.[246] "The judges' overall evaluations varied."[247] One judge declared the process "excellent" and stated he would thereafter consistently use the procedure.[248] Another found the procedure "very helpful," and a third judge found the

---

234. *Id.*

235. Forston, *supra* note 229, at 619.

236. *Id.* at 610.

237. *Id.*

238. 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, 423 (1985).

239. *Id.* at 423-24.

240. *Id.* at 424. The federal circuit courts of appeal have consistently found that it is within the trial court's discretion to provide jurors with copies of the instructions. *See, e.g.*, United States v. Engleman, 648 F.2d 473, 480 (8th Cir. 1981); United States v. Cobb, 397 F.2d 416, 419 (7th Cir. 1968); Untied States v. Blane, 375 F.2d 249, 255 (6th Cir. 1967); Oertle v. United States, 370 F.2d 719, 729 (10th Cir. 1966).

241. Sand & Reiss, *supra* note 238, at 454.

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.*

247. Sand & Reiss, *supra* note 238, at 455.

248. *Id.*

procedure "somewhat helpful," noting it "appeared to save a rereading of the instructions and was, overall, an improvement."[249] The fourth judge was somewhat pleased in two of five trials, but maintained the process was not worth the effort, even though it was his standard practice to have a written charge prepared that he read to the jury.[250] This "experiment" was not, of course, a scientific experiment as previously defined.[251] It also should be noted that some federal district courts now routinely provide written copies of jury instructions for the jury to use during their deliberations.[252]

As a result of Saxton's study of juror comprehension among real jurors in real trials in Wyoming, he recommended that courts "give each juror a copy of the instructions so that jurors can read along with the judge as the judge charges the jury."[253] He noted that some judges already use the practice in Wyoming and a number of jurors participating in the study "suggested that jurors could better follow the judge's instructions" if provided a copy.[254] This recommendation comports with other social science research establishing that individuals process information more easily and with better retention when the information is presented to them visually as well as in auditory form.[255]

Saxton acknowledges that there may be some practical problems to this approach: for example, some jurors may read slowly or become distracted by particular instructions and thus may not follow the judge's entire charge.[256] He suggests that judges set aside a block of time either before or after reading the instruction for the jurors to read to themselves silently and at their own pace, or that the judge use an overhead projector or some other mechanism to ensure that each juror views the instruction as the judge reads it.[257]

Elwork, Sales, and Alfini also note that educational psychologists long ago determined that students comprehend and remember much better when they are given written texts rather than when they listen to lectures.[258] As a result, they

---

249. *Id.*

250. *Id.*

251. *See supra* notes 118-43 and accompanying text.

252. Sand & Reiss, *supra* note 238, at 453-54.

253. Saxton, *supra* note 219, at 110.

254. *Id.*

255. SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, THE AMERICAN JURY ON TRIAL: PSYCHOLOGICAL PERSPECTIVES 146 (1988) ("Educational psychologists, interested in the didactic value of different methods of communication, have found that students comprehend and remember more material when they obtain it through reading texts rather than listening to lectures.").

256. Saxton, *supra* note 219, at 111.

257. *Id.*; *see also infra* notes 258 and 260 and accompanying text.

258. ELWORK, MAKING JURY INSTRUCTIONS UNDERSTANDABLE, *supra* note 22, at 19 & nn. 30-31 (citing K.C. Beighly, *An Experimental Study of the Effect of Four Speech Variables on Listener Comprehension,* 19 SPEECH MONOGRAPHS 249 (1952); Stephen M. Corey, *Learning from Lectures v. Learning from Readings*, 25 J. EDUC. PSYCHOL. 459 (1934); Howard B. Siegel, *McLuhan, Mass Media, and Education*, 41 J. EXPERIMENTAL EDUC. 68 (1973); and Robert Q. Young, *A Comparison of Reading and Listening Comprehension with Rate of Presentation*

conclude that one way to increase the probability that jurors will comprehend instructions is to present them in auditory and written form.[259] In fact, they suggest that the combination of having the judge give the oral charge while the juror has the written instruction in hand may be the best of both worlds:

> When people are given written texts they in fact are given a chance to go over material several times; it is this factor which explains the superiority of written material over lectures in terms of being more comprehensible and memorable. The superiority of written presentation over vocal presentation does not suggest that it is not necessary to present materials vocally when they are presented in written form. Several experimenters have shown that vocalization of written materials facilitates memory. Thus, the ideal is to present materials in both modes at the same time.[260]

Larry Heuer and Steven Penrod field tested several aspects of the advantages and disadvantages of providing jurors with written jury instructions.[261] They were met with mixed results.[262] While their results showed only a modest increase in juror comprehension resulting from the use of written instructions, they found no disadvantages to the process and were able to dispel many of the expected disadvantages such as fearing that jurors would spend too much time studying the instructions and less time reviewing the evidence and deliberating.[263] Furthermore, their study showed that jurors perceived that written jury instructions were helpful.[264]

Consistent with those jurors' perceptions, one former chairman of the Maryland Pattern Jury Instruction Committee wrote about his experiences, over a period of five years, interviewing jurors immediately after their verdicts.[265] He spoke to hundreds of jurors from a broad cross-section of demographics about their experiences as jurors.[266] He then conducted several informal interviews

---

Controlled, 21 A.V. COMM. REV. 327 (1973)).

259. ELWORK, MAKING JURY INSTRUCTIONS UNDERSTANDABLE, *supra* note 22, at 20.

260. *Id.* at 19-20 & n.32 (citing Murray, *Vocalization-at-Presentation and Immediate Recall, with Varying Recall Methods*, 18 Q. J. EXPERIMENTAL PSYCHOL. 9 (1966) and Phillip M. Tell & Alexander M. Ferguson, *Influence of Active and Passive Vocalization on Short-Term Recall*, 102 J. EXPERIMENTAL PSYCHOL. 347 (1974)).

261. Larry Heuer & Steven D. Penrod, *Instructing Jurors: A Field Experiment with Written and Preliminary Instructions*, 13 L. & HUM. BEHAV. 409 (1989).

262. *Id.* at 429-30.

263. *Id.*

264. Michael Cramer, *Effective Instructions: Put Them in Writing*, 8 U. BRIDGEPORT L. REV. 335 (1987).

265. *Id.* at 420.

266. *Id.* at 337.

with jurors who unanimously agreed that the primary problem with the jury instruction process was that the instructions were not in writing.[267] In preparation for a presentation at a University of Bridgeport symposium in 1987, Cramer again received permission to speak to a randomly picked jury that had just rendered a verdict.[268] Each juror was individually asked, "What's wrong with the jury instructions?"[269] Although admittedly not an empirical study, every juror again indicated the problem was that the instructions were not in writing.[270]

E. Problems with Pervasiveness

Not only do studies show that there is a problem with comprehension, studies also show that the problem is widespread. The studies previously cited demonstrate that there is a less than 50% comprehension rate of jury instructions in Florida,[271] California,[272] Arizona,[273] Michigan,[274] and Nevada.[275] While there have been no such studies undertaken in South Carolina, it is difficult to imagine that South Carolina is somehow immune from such a national phenomenon. Not only has South Carolina never undertaken any sort of effort to reform the manner in which jury instructions are presented, it has never made a systematic effort to consciously improve the style in which instructions are written. This nationally pervasive problem with juror comprehension suggests that comprehension levels in South Carolina are equally poor.

F. Death Penalty Cases

Society and the legal profession should be particularly concerned about poor jury-instruction comprehension in death penalty cases. The United States Supreme Court has endorsed the notion of guided discretion.[276] Through the use of legal instructions, states may establish sentencing schemes that would tell the

---

267. *Id.* at 337.
268. *Id.* at 339.
269. *Id.*
270. Cramer, *supra* note 264, at 339.
271. ELWORK, MAKING JURY INSTRUCTIONS UNDERSTANDABLE, *supra* note 22, at 12; Raymond W. Buchanan et al., *Legal Communication: An Investigation of Juror Comprehension of Pattern Instructions*, COMM. Q., Fall 1978, at 33-35; Strawn & Buchanan, *supra* note 157, at 481-82.
272. *Id.*
273. ELWORK, MAKING JURY INSTRUCTIONS UNDERSTANDABLE, *supra* note 22, at 12.
274. *Id.*
275. *Id.*
276. *See* Shari Seidman Diamond & Judith N. Levi, *Improving Decisions on Death by Revising and Testing Jury Instructions*, 79 JUDICATURE 224, 224 (1996).

jury what factors it could consider in deciding whether to impose the death penalty and how those factors may be weighed in order to produce rational and consistent death penalty determinations.[277] The problem, of course, is that if jurors do not comprehend the instructions, the instructions are of little consequence.

James Luginbuhl tested 115 subjects on their comprehension of North Carolina's instructions regarding the existence of mitigating circumstances and the guidelines for incorporating their existence into the jury's recommendation of life imprisonment or the death penalty.[278] One group was shown a videotape of jury instructions given in an actual North Carolina death penalty trial.[279] The other group was shown a videotape of North Carolina's revised death-penalty instructions.[280] Both groups were tested to determine how well they understood the rules to be used in determining life or death; they were not tested on whether they would impose life or death in a particular case.[281] The results showed that juror comprehension of the old instructions, regarding mitigating circumstances, was dramatically worse than juror comprehension of the rewritten instructions: 5% versus 90%.[282] The jurors' understanding of how to weigh those circumstances was almost as dismal.[283] Jurors instructed under the old instructions misunderstood the law 79% of the time versus misunderstanding 31% of the time by jurors using the newer instructions.[284]

Diamond and Levi tested 170 jury-eligible subjects in three problematic areas of death penalty instructions that had been given in an Illinois death penalty case: (1) unenumerated mitigating factors (consideration of mitigating factors not specifically listed in the statute), (2) non-unanimity on mitigating factors (juror consideration of a factor in mitigation even if other jurors disagree), and (3) weighing issues (how jurors should go about weighing aggravating and mitigating factors in reaching a verdict).[285] They tested one group of subjects using the old instructions and another group using instructions revised with the techniques suggested by the Charrows and the Elwork groups.[286] Overall performance was significantly better with the revised instructions.[287] The overall percentage of correct answers increased from 50%

277. *Id.*
278. James Luginbuhl, *Comprehension of Judges' Instructions in the Penalty Phase of a Capital Trial: Focus on Mitigating Circumstances*, 16 LAW & HUM. BEHAV. 203, 207 (1992).
279. *Id.* at 208.
280. *Id.*
281. *Id.* at 208.
282. *Id.* at 212.
283. *See id.*
284. Luginbuhl, *supra* note 278, at 212.
285. Diamond & Levi, *supra* note 276, at 226-28.
286. *Id.* at 224.
287. *Id.* at 230.

to 65% using the revised instructions.[288] On questions regarding unenumerated mitigating factors, the percentage of correct answers rose from 41% to 58%, when the revised instructions were used.[289] On questions regarding the weighing of those factors, the percentage rose from 51% to 66% when using the revised instructions.[290] On questions regarding the lack of unanimity on mitigating factors, the percentages rose from 65% to 81%.[291] Diamond and Levi suggest that the optimal way to diagnose and remedy comprehension problems is collaboration among attorneys, judges, psychologists, and linguists.[292] They stress that a serious attempt to improve jury instructions does not end when a new set of instructions are written.[293] Testing of the revised instructions is essential to assess whether an acceptable level of performance has been achieved and to identify further areas of needed improvement.[294]

G. Summary

So why is this important? Perhaps Professor Saks explained it best:

> If the instructions that judges give to juries are the essential link for transmitting to the decisionmakers the rules of decision that courts and legislatures have arduously worked out to their present state of development, and if the possibility exists for more effective transmission of that information to jurors, then why have courts resisted making improvements in the process of instructing jurors? To forego this vital link is to keep the world of statutes and appellate opinions from influencing jury decision-making. It is to render the work of legislatures and appellate courts more or less irrelevant, and to invite—indeed, to require—jurors to borrow rules of decision from the general culture or to make up their own as they go along.[295]

In other words, if we do not attempt to make jury instructions simpler to understand, we run the risk that all the hard work that goes into making them correct will be wasted because, quite simply, they will either be misunderstood or ignored.

---

288. *Id.*
289. *Id.*
290. *Id.*
291. Diamond & Levi, *supra* note 276, at 230.
292. *Id.* at 232.
293. *Id.*
294. *Id.*
295. Saks, *supra* note 120, at 265.

IV. SOUTH CAROLINA LAW

> *The question of the constitutionality of any particular modification of the law as to trial by jury resolves itself into a question of what requirements are fundamental and what are unessential, a question which is necessarily, in the last analysis, one of degree.*[296]

One jury-reform scholar has noted that "most of the procedural innovations suggested by commentators to remedy these problems [of juror understanding] are not constitutionally problematic and are already provided for within the current legal framework. Furthermore, many of the procedures enjoy a substantial historical pedigree, having been employed at one time or another in the United States."[297]

A. Federal Courts Generally

The federal courts and many states allow trial judges to submit the jury charge to the jury in writing. Some courts give instructions to juries so they can read along when the trial judge orally charges the jury. Others orally charge the jury first and then allow them to take a copy of the written instructions into the jury room during deliberations. Federal courts consistently have held that the trial judge possesses the discretion to submit a written copy of the oral charge.[298] As noted earlier, while the United States Supreme Court has not addressed the issue of jury submissions at length, the Court has held that submitting a copy of the judge's charge to the jury did not amount to "unfairness or irregularity."[299] Most federal courts that have adopted the

---

296. Scott, *supra* note 20, at 671.

297. Smith, *supra* note 18, at 384-85.

298. *See, e.g.*, United States v. Watson, 669 F.2d 1374, 1386 (11th Cir. 1982) ("[U]nder appropriate circumstances, the use of a taped charge or a written charge could well aid juror comprehension, as well as expedite the proceedings."); United States v. Engleman, 648 F.2d 473, 480 (8th Cir. 1981) (holding that "whether written instructions are necessary is a matter left to the discretion of the trial judge"); United States v. Johnson, 466 F.2d 537, 538 (8th Cir. 1972) (finding that the failure to give written instructions did not constitute error); United States v. Cobb, 397 F.2d 416, 419 (7th Cir. 1968) (noting that the practice of supplying the jury with copy of the instructions is discretionary); United States v. Blane, 375 F.2d 249, 255 (6th Cir. 1967) (holding that giving the jury written copy of the entire charge was proper in view of the length of the trial and extensive matters covered in the instructions); Oertle v. United States, 370 F.2d 719, 729 (10th Cir. 1966) (finding that the submission of copy of instructions to the jury is within the sound discretion of the trial judge).

299. Haupt v. United States, 330 U.S. 631, 643 (1947). The Court wrote, "There are many other complaints about the conduct of the trial, such as permitting the indictment to go to the jury room, [and] allowing the jury to have a typewritten copy of the court's charge. . . . We find nothing in any of them to warrant the inference of unfairness or irregularity in the trial." *Id.*; *see*

procedure rationalize the practice along the lines stated by the D.C. Court of Appeals in *Copeland v. United States*.[300] In *Copeland*, although the court found that a trial judge properly refused a jury's request for written instructions because counsel on both sides had objected to the request, the court recognized that it is "frequently desirable" for written instructions to be handed over to the jury.[301] Noting that such a course is widely practiced and that courts are free to follow it, the court stated: (1) it saw no good reason why members of a jury should always be required to debate and rely on their several recollections of what a judge said when proof of what he said is readily available and (2) the question should be left to the judge's discretion.[302]

B. State Courts Generally

The states are split on the issue of written jury instructions.[303] Some states require the submission of written instructions, some states leave the decision to the discretion of the trial judge, and some states prohibit it. In as many as twenty states, the legislatures and courts remain silent on the submission of written instructions.[304] The majority of states require, by statute or rules of procedure, the submission of a written jury charge in criminal cases or permit the submission in the discretion of the trial judge.[305]

---

also Hopt v. People, 104 U.S. 631, 634-35 (1881). In dictum, the Court approved a Utah statute requiring the jury charge to be put in writing and permitting it to "be taken by the jury on retiring for deliberation." *Id.* at 634-35. The Court reversed the state court on the grounds that the provisions of the statute were violated. *Id.* at 635.

300. 152 F.2d 769 (D.C. Cir. 1945).

301. *Id.* at 770.

302. *Id.*

303. *See* Severance & Loftus, *supra* note 116, at 155 n.4 (noting that at least seven states prohibit juries from receiving written jury instructions and twelve states require juries to be given written instructions); Annotation, *Propriety and Prejudicial Effect of Sending Written Instructions with Retiring Jury in Criminal Case*, 91 A.L.R.3d 382, 391-96 (1979) (revealing that while approximately half of the states permit written instructions to be submitted to the jury, only one state forbids it).

304. Severance & Loftus, *supra* note 116, at 155 n.4.

305. For those states generally supporting the submission of written instructions, see Note, *The Submission of Written Instructions and Statutory Language to New York Criminal Juries*, 56 BROOK. L. REV. 1353, 1362 n.36 (1991) listing the following: *Orr v. State*, 23 So. 696, 696 (Ala. 1898) (noting that at defendant's request, judge must charge jury in writing under state statute); *Manner v. Raskin*, 545 P.2d 927, 929 (Ariz. 1976) (noting that the practice of sending written instructions into jury room is mandatory in criminal cases under state procedural rule); *Rutledge v. State*, 262 S.W.2d 650, 653 (Ark. 1953) (permitting jury to take written instructions into jury room, within discretion of court); *People v. Sheldon*, 771 P.2d 1330, 1334 (Cal. 1989) (recounting that under state statute written jury instructions may be submitted at the jury's request or at the discretion of the court in the absence of a request); *Rhodus v. People*, 418 P.2d 42, 45 (Colo. 1966) (finding that submission of written instruction containing typographical error was not reversible error); *State v. Crouse*, 1988 Del. Super. LEXIS 461, at *2-3 (Del. Super. Ct. Dec. 12, 1988) (allowing jury instructions to be given orally with two written copies provided in

C. *Practice and Rules*

South Carolina state courts follow the practice that the proper way to instruct a jury is by means of a single oral recitation of the law. Trial judges do

---

response to jury request); *Priestly v. State*, 537 So. 2d 690 (Fla. Dist. Ct. App. 1989) (trial judge has discretion in providing the jury with written jury instructions); *Harris v. State*, 230 S.E.2d 1, 4 (Ga. 1976) (reaffirming the statutory requirement that instructions be given in writing to jury for its deliberation); *State v. Peters*, 352 P.2d 329, 332 (Haw. 1959) (stating that trial court in its discretion may permit jury to take written instructions to jury room, if the manner in which it is done is not prejudicial); *State v. Grigg*, 138 P. 506, 506 (Idaho 1914) (stating that submission of written instructions, despite a hand-written notation of "guilty," was not reversible error); *State v. Jackson*, 397 N.W.2d 512, 513 (Iowa 1986) (noting that state rules of criminal procedure require the court to charge the jury in writing); *State v. Bundy*, 81 P. 459, 461 (Kan. 1905) (noting that under state statute "'the judge must charge the jury in writing,'" as "it is believed to be a common and proper practice"); *Underhill v. Commonwealth*, 289 S.W.2d 509, 511-12 (Ky. 1956) (stating that a technical error in caption of written instructions submitted to jury was not reversible error); *Baumgartner v. State*, 319 A.2d 592, 601 (Md. Ct. Spec. App. 1974) (noting that the submission of written instructions is in sole discretion of trial judge under state rules of procedure); *State v. McCloud*, 349 N.W.2d 590, 592 (Minn. Ct. App. 1984) (recognizing that the state's highest court had ruled that submitting written instructions to jury is within discretion of trial court); *Newell v. State*, 308 So. 2d 71, 78 (Miss. 1975) (ruling that trial judges may, in their discretion, initiate appropriate written instructions for use by the jury in deliberations); *Kansas City v. Martin*, 369 S.W.2d 602, 608 (Mo. Ct. App. 1963) (requiring under state procedural rule that trial judges must instruct juries in writing in criminal cases); *State v. McDonald*, 70 P. 724, 724 (Mont. 1902) (submitting written instructions with signatures of counsel is not commendable, but not reversible error); *Kaufmann v. State*, 200 N.W. 998, 999 (Neb. 1924) (submitting written instructions with typographical error is not prejudicial error); *State v. Beal*, 146 P.2d 175, 183 (N.M. 1944) (explaining that the state rule of procedure requires the trial judge to send written instructions with a retiring jury, when proper request made by either party); *State v. Pearce*, 250 S.E.2d 640, 648 (N.C. 1979) (approving the submission of written elements to jury); *State v. Simpson*, 50 N.W.2d 661, 667 (N.D. 1951) (authorizing a trial judge under state procedural rule to direct that an oral charge be reduced to writing and taken by jury in retirement); *State v. Gerhardt*, 184 N.E.2d 516, 520 (Ohio Ct. App. 1961) (citing statutory provision that instructions submitted in writing if either party requests); *Page v. State*, 332 P.2d 693, 696 (Okla. Crim. App. 1958) (permitting a jury under state statutory provision to take written instructions given by judge, but not making it mandatory); *State v. Looper*, 713 P.2d 1099, 1100 (Or. Ct. App. 1986) (citing under statute, if either party requests it, the charge shall be written or tape recorded and taken by the jury into deliberations); *McElhaney v. State*, 420 S.W.2d 643, 645 (Tenn. 1967) (requiring under state statutory provisions that written instructions be submitted in felony cases); *Dominguez v. State*, 759 S.W.2d 185, 189 (Tex. Ct. App. 1988) (permitting use of written instructions by jury in the jury room); *Bowles v. Commonwealth*, 48 S.E. 527, 534 (Va. 1904) (permitting universal practice in the state for a jury to take instructions when retiring to deliberate), *rev'd on other grounds*, Graham v. Commonwealth, 103 S.E. 565, 577 (Va. 1920); *Loew v. State*, 19 N.W. 437, 439 (Wis. 1884) (according to state law it is not error to permit a jury to take written charge to jury room); *State v. Riggle*, 298 P.2d 349, 366 (Wyo. 1956) (holding that written instructions containing interlineations did not constitute reversible error); see also Severance & Loftus, *supra* note 116, at 172 n.17 ("In Washington, a written copy of the judge's instructions accompanies the jury into the jury room and is available during deliberations."); Francis C. Sullivan, *Criminal Trial Procedure*, 45 LA. L. REV. 263, 302 n.235 (1984) (citing the provision of LA. CODE CRIM. PROC. ANN. art. 801 (West 1998), "[t]he court shall reduce its charge to writing if it is requested to do so by either a defendant or the state . . . .").

not give jurors a copy of the instructions and judges expect jurors to reconstruct the law from memory. The trial judge has discretion to repeat or clarify instructions when jurors so request.

A survey of South Carolina law reveals little on the method of presentation of jury instructions. Article V, Section 17 of the South Carolina Constitution provides that "[j]udges shall not charge juries in respect to matters of fact, but shall declare the law."[306] In civil cases a party may file written requests with the court asking the court to instruct the jury on the law.[307]

Judges follow the same practice in criminal trials except that the request must include an accurate citation to the authority relied upon, and failure to object to giving or failing to give a particular instruction constitutes waiver.[308]

D. Statutes

While no South Carolina statute prohibits the practice of giving jurors a written copy of jury instructions, only two statutes directly address the method in which a jury is to be instructed, and both involve death penalty cases.[309] South Carolina Code section 16-3-20(C) lists the mitigating factors that a jury

---

306. S.C. CONST. art. V, § 17.

307. See Rule 51 of the *South Carolina Rules of Civil Procedure*, which provides:

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds for his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

S.C. R. CIV. P. 51.

308. See ALEX SANDERS ET AL., TRIAL HANDBOOK FOR SOUTH CAROLINA LAWYERS § 35:1, at 1031-32 (2000), and Rule 20 of the *South Carolina Rules of Criminal Procedure*, which provides:

> (a) Time for Request. All requests for legal instructions to the jury shall be submitted at the close of the evidence, or at such earlier time as the trial judge shall reasonably direct. All requests must include accurate citation to authorities relied upon.
>
> (b) Objections to Charge. Notwithstanding any request for legal instructions, the parties shall be given the opportunity to object to the giving or failure to give an instruction before the jury retires, but out of the hearing of the jury. Any objection shall state distinctly the matter objected to and the grounds for objection. Failure to object in accordance with this rule shall constitute a waiver of objection.

S.C. R. CRIM. P. 20.

309. *See* S.C. CODE ANN. §§ 16-3-20(C) to -21 (Supp. 1999).

may consider during the penalty phase of a death penalty case.[310] This section provides that the trial court judge may instruct the jury that certain factors can be considered as aggravating or mitigating circumstances in its deliberations regarding the death penalty.[311] It also provides that if the judge so instructs the jury, those instructions must be in writing and given to the jury for use during its deliberation.[312] South Carolina law also provides that the trial court must orally instruct jurors on certain rights they have concerning their ability to discuss their verdict after the trial and that this instruction should be reduced to writing and provided to the jury upon their dismissal from service.[313] Thus, not only is there statutory precedent which allows the jury to use written instructions during deliberations, there is no authority which prohibits the practice.

E. Cases

A review of South Carolina appellate court jurisprudence reveals no cases which deal with the particular manner in which jury instructions should be presented. Rather, the cases deal with whether a particular instruction should or should not have been allowed under the facts of a particular case.[314] The South Carolina Supreme Court has stated that "[t]he purpose of instructions is to enlighten the jury and to aid it in arriving at a correct verdict."[315] The court has spoken in general terms about the insufficiency of a particular instruction,[316] and, of course, has stated that an instruction may not be misleading or confusing.[317] However, beyond that it appears that a trial judge

---

310. S.C. CODE ANN. § 16-3-20(C).

311. *Id.*

312. See *id.* which provides, in part:

> The judge shall consider, or he shall include in his instructions to the jury for it to consider, mitigating circumstances otherwise authorized or allowed by law and the following statutory aggravating and mitigating circumstances which may be supported by the evidence .... The statutory instructions as to statutory aggravating and mitigating circumstances must be given in [the] charge and in writing to the jury for its deliberation.

313. S.C. CODE ANN. § 16-3-21.

314. *See, e.g.*, Ross v. Paddy, 340 S.C. 428, 437, 532 S.E.2d 612, 617 (S.C. Ct. App. 2000) ("The trial judge is required to charge the current and correct law.").

315. State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 273 (1987).

316. *See, e.g.*, Powers v. Temple, 250 S.C. 149, 163, 156 S.E.2d 759, 766 (1967) ("[W]e should point out that defendant's request to charge . . ., which was charged by the trial judge, is an incomplete statement of that legal proposition.").

317. State v. Simmons, 269 S.C. 649, 652, 239 S.E.2d 656, 657 (1977) ("The trial judge has no duty to grant a request to charge which does not correctly state the law or which may confuse or mislead the jury.").

in South Carolina only has a duty to give a requested instruction that correctly states the law applicable to the issues and the evidence.[318]

Thus, South Carolina law is silent on written jury instructions except where the consequences of a jury's decision are most severe—a death penalty trial. In those cases, where the stakes are the highest, the legislature has mandated that jurors be given copies of at least a portion of the jury instructions. This decision by the legislature implicitly recognizes that oral jury instructions may not always be easily followed and understood and that written instructions can enhance juror comprehension and application of the law. Furthermore, the South Carolina Supreme Court has neither spoken against the practice nor questioned its constitutionality.

On the issue of comprehensibility itself, the South Carolina appellate courts have said that the language used by trial courts in their instructions must be clear and correct, but they provide no guidance on how to arrive at that goal.[319] However, former Chief Judge Alex Sanders of the South Carolina Court of Appeals may have foretold of the coming change when he wrote:

> It is not always sufficient for a judge to simply open a charge book and read a generic statement of the law to a jury, no matter how correct that statement may be in the abstract. This is particularly true where, as here, the judge is called upon to answer a well-framed question following the initial charge. Quite often, the judge must tailor, mold and even sculpt the law in fashioning an answer to fit the question. In this respect, the judge must be an artist, not a mere technician.[320]

V. SURVEY OF SOUTH CAROLINA JUDGES

> *"[U]nfortunately, or fortunately, I am not sure which, our law is not a science."*[321]

At least one commentator has suggested that the lack of any movement towards jury reform is attributable to simple inertia of the bench and bar.[322] While that assertion may be true, there is usually some reason a particular group insists upon retaining the status quo. This Article will now attempt to explore (1) whether South Carolina judges perceive a need for improvements to the current practice of instructing juries and (2) whether South Carolina

318. SANDERS ET AL., *supra* note 308, § 35:6; *see Ross*, 320 S.C. at 437, 532 S.E.2d at 617 ("The trial judge is required to charge the current and correct law.").

319. *See Simmons*, 269 S.C. at 652, 239 S.E.2d at 657.

320. State v. Smith, 304 S.C. 129, 132, 403 S.E.2d 162, 164 (S.C. Ct. App. 1991).

321. Belfast Ropework Co. v. Bushell, 1 K.B. 210, 213 (1918) (Bailhache, J.).

322. Smith, *supra* note 18, at 384 n.13.

judges are receptive to adopting any of the reforms suggested by the studies outlined in Part III. This study employed the social science technique of a survey questionnaire.

A. Methodology

The questionnaire consisted of forty-six questions and was mailed to eighty-eight South Carolina state judges and twelve federal trial court judges. This group comprised the entire body of active and retired trial court judges in South Carolina who were serving above the magistrate court level and who regularly presided over jury trials.[323] The overall response rate was 62%. Fifty-four state court judges and eight federal court judges responded.

The respondents have a wide variety of experience. Most (61.3%) are active members of the judiciary.[324] The remaining respondents fell into one of the following four groups: retired from the bench but still active in the practice of law (9.7%), retired but still serving as a trial court judge on appointment (8.1%), now an appellate judge (6.5%), or retired (14.5%).[325] The respondents' length of service in a trial court also varied.[326] A majority of respondents served less than ten years, and a significant number served over 15 years.[327]

The survey questioned both state and federal judges because while the practice of providing juries with copies of written instructions is practically non-existent in South Carolina state courts, it is fairly common in South Carolina federal courts. Of the fifty-four state judges who responded, only one indicated a routine use of written instructions.[328] By contrast, five of the eight federal judges indicated that they provided written instructions to juries at some point during the trial.[329]

B. Comprehension and Written Instructions

The survey first attempted to measure judges' impressions concerning juror comprehension of jury instructions.[330] Overall, more than half of the judges surveyed (58.1%) indicated that they thought juries were occasionally confused by jury instructions.[331] A significant number of judges (22.6%) indicated that

---

323. Masters-in-equity, family court judges, and administrative law judges were also not surveyed since they preside over trials without a jury.

324. *See infra* Appendix 1 at q.1.

325. *Id.*

326. *See infra* Appendix 1 at q.2.

327. *Id.*

328. *See infra* Appendix 1 at q.7.

329. *Id.*

330. *See infra* Appendix 1 at q.3.

331. *Id.* 55.67% of responding state judges and 75% of responding federal judges thought juries were occasionally confused. *Id.*

juries were frequently confused by jury instructions.[332] The judges were then asked to estimate a percentage of cases where the jurors asked them to repeat or explain jury instructions.[333] Nearly half of the judges indicated that 1-10% of the time jurors asked for assistance.[334] A large number (33.9%) indicated they were asked to repeat jury instructions in anywhere from 10-25% of cases.[335] Only a few (9.7%) of the combined responses indicated a repeat rate of 25-50%,[336] while even fewer (4.8%) stated they were asked to repeat instructions in 50-75% of their cases.[337] The judges were then asked whether written instructions were requested by either the jury or one of the parties *before* the jury was charged.[338] A minority of the responding judges (26.4%) indicated they had never been asked to provide copies to the jury *before* they charged the jury.[339] In contrast, most of the judges (64.8%) had been asked to provide a copy of the instructions *after* the charge had been given to the jury.[340] This increase in requests for written instructions after the oral recitation of the instructions indicates a heightened awareness of problems with comprehension. However, the low rate of judges providing written instructions upon request[341] indicates that there is an unwillingness among judges to adopt the practice even though, as shown in Part IV, there is nothing in South Carolina law prohibiting the practice.

A majority of responding state court judges either had considered (59.6%)[342] or would consider (57.7%)[343] providing copies of written instructions to the jury. The state court judges' responses regarding aid to juror comprehension, while interesting, are largely speculative since almost all do not follow the practice at any stage.[344] However, it is insightful to study the

---

332. *Id.* 24.1% of responding state judges and 12.5% of responding federal judges thought juries were frequently confused. *Id.*

333. *See infra* Appendix 1 at q.6.

334. *Id.* 48.1% of responding state judges and 50% of responding federal judges estimated that they had to repeat instructions between 1 and 10% of the time. *Id.*

335. *Id.* 35.2% of responding state judges and 25% of responding federal judges estimated that they had to repeat instructions between 10 and 25% of the time. *Id.*

336. *Id.* 9.3% of responding state judges and 12.5% of responding federal judges estimated that they had to repeat instructions between 25 and 50% of the time. *Id.*

337. *Id.* 3.7% of the responding state judges and 12.5% of the responding federal judges estimated that they had to repeat instructions between 50 and 75% of the time. *Id.*

338. *See infra* Appendix 1 at q.9.

339. *Id.*

340. *See infra* Appendix 1 at q.14.

341. Of the state court judges who indicated that they had been asked to provide a copy of instructions *before* charging a jury, only 13% did so once they had been asked. *See infra* Appendix 1 at q.9. Of the state court judges who indicated they had been asked to give a copy of instructions to juries *after* they charged the jury, only 21.1% indicated they had ever done so. *See infra* Appendix 1 at q.14.

342. *See infra* Appendix 1 at q.21.

343. *See infra* Appendix 1 at q.22.

344. *See infra* Appendix 1 at q.7.

responses of the federal judges who already routinely follow the practice.[345] One federal judge wrote, "Requests to re-charge on a particular aspect of the case has become almost non-existent since I have furnished jurors with a copy of my instructions. I highly recommend this practice."[346] Another wrote, "All my jurors comment favorably on this [and the] number of questions from jurors [has been] greatly reduced once I began using written charges."[347] Still another wrote, "It gives them a chance to focus or re-read anything that was unclear. It eliminates any disputes or differences in their collective recollection."[348]

As to when written instructions should be given, most judges (69.0%) felt juror comprehension would be aided by giving written instructions after the judge charged the jury.[349] Likewise, most judges believed that it would aid juror comprehension to have the instructions with them during their deliberations.[350] However, less than half of the state judges (45.8%) and only a quarter of the federal judges (28.6%) felt comprehension would be improved by providing written instructions at the time the judge charges the jury.[351]

The federal judges were mixed on whether they felt it aided jurors to have the instructions while the judge was giving the charge. One wrote, "Absolutely. Since I started giving the jury a copy of the final charge, I have only been asked one time to recharge them on a certain area of the law."[352] Another wrote, "Jurors carefully follow along as I charge and report much better comprehension from seeing and hearing as opposed to hearing only."[353] However, some pointed out a potential problem. One federal judge wrote, "I prefer to have jurors pay attention to my reading of the instructions. Providing a copy during that time could distract them."[354] In a similar vein, another judge wrote, "They pay more attention if you read it to them. Some would be distracted trying to 'keep up' while reading, others would 'read ahead.'"[355] Some state court judges also voiced a concern about this potential problem in response to the same question.[356]

On the whole, both state and federal judges favor allowing judges to use their discretion to decide whether to give written instructions to the jury.[357]

---

345. *Id.*

346. *See infra* Appendix 1 at q.27.

347. *Id.*

348. *Id.*

349. *See infra* Appendix 1 at q.24. 68.6% of responding state judges and 71.4% of responding federal judges favored giving written instructions to juries after they are charged. *Id.*

350. *See infra* Appendix 1 at q.26. 67.3% of the state judges and 71.4% of the federal judges favored juries having written instructions during deliberations. *Id.*

351. *See infra* Appendix 1 at q.22.

352. *See infra* Appendix 1 at q.23.

353. *Id.*

354. *Id.*

355. *Id.*

356. *Id.*

357. *See infra* Appendix 1 at qq.33 & 35.

Most judges disfavor making it a required practice.[358] Few judges (21.3%) either highly favored or somewhat favored making it a requirement that jurors be given a copy of instructions at the time the jury is charged,[359] while most judges (57.4%) were either somewhat opposed or highly opposed to such a requirement.[360] This same trend continues when judges were asked if they favored a requirement that jurors be given copies of instructions *after* the jury has been charged.[361] Only about a third of responding judges (35.5%) favored making this practice a requirement,[362] while exactly half of the responding judges were either somewhat or highly opposed to making this a required practice.[363]

Conversely, the responses indicate that most judges (59.0%) either highly favored or somewhat favored giving judges the discretion to provide jurors written instructions at the time the jury is charged,[364] while few judges (21.3%) were somewhat or highly opposed to giving judges such discretion.[365] Additionally, when asked if they favored giving judges this discretion after the jury has been charged, most judges (62.9%) responded highly favor or somewhat favor,[366] while less than a quarter of judges (24.2%) were highly or somewhat opposed.[367]

When asked if they favored allowing jurors to take copies of the instructions to the jury room during deliberations, the majority of both state and federal judges again approved of this practice.[368] Over half of responding

---

358. *See infra* Appendix 1 at qq.32 & 34.

359. *See infra* Appendix 1 at q.32. Only 22.2% of responding state judges and 14.3% of responding federal judges at least somewhat favored making written instructions a requirement. *Id.*

360. *Id.* 57.4% of responding states judges and 57.2% of responding federal judges were at least somewhat opposed to making written jury instructions a requirement. *Id.* 21.3% of responding judges were neutral on the issue. *Id.*

361. *See infra* Appendix 1 at q.34.

362. *Id.* 31.5% of responding state judges and 62.5% of responding federal judges. *Id.*

363. *Id.* 51.9% of responding state judges and 37.5% of responding federal judges. *Id.* 14.5% of responding judges were neutral on the issue. *Id.*

364. *See infra* Appendix 1 at q.33. 58.5% of responding state judges and 62.5% of responding federal judges at least somewhat favored giving judges the discretion to provide written jury instructions. *Id.*

365. *Id.* Only 18.9% of responding state judges and 27.5% of responding federal judges were at least somewhat opposed to giving judges discretion. *Id.* 19.7% were neutral on the issue. *Id.*

366. *See infra* Appendix 1 at q.35. 62.9% of responding state judges and 62.5% of responding federal judges at least somewhat favored written instructions after the jury has been charged. *Id.*

367. *Id.* Only 24.1% of responding state judges and 25.0% of responding federal judges were at least somewhat opposed to written instructions after the jury has been charged. *Id.* 12.9% of responding judges were neutral on the issue. *Id.*

368. *See infra* Appendix at q.36.

judges (57.7%), highly favored or somewhat favored the practice,[369] while only a third of responding judges were either somewhat opposed or highly opposed.[370]

Even though a majority of state court judges either had considered or would consider providing copies of written jury instructions,[371] typically they felt restricted from doing so because of logistical problems or because they were unsure if it was permitted.[372] As to the logistical problems involved, one judge wrote, "I like the idea, however, it would be cumbersome to compile a charge and then come to have it typed or printed before or after charging."[373] Another responded, "I'd like to, but really don't have the means to do so."[374] One judge responded that he would not consider the practice "because of the practical problem of editing and producing the instruction (however, it is a good idea)."[375]

In addition to logistical problems, several judges responded that they were uncertain whether the practice is permitted in South Carolina.[376] For instance, one judge wrote, "I believe jurors should have written instructions, but until a rule is implemented, I have only been willing to provide written instructions if the attorneys do not object."[377] One retired judge wrote that he would have used the practice "if permitted. In my years we were not allowed to give copies."[378] Another retired judge responded, "Although I considered providing a copy, during my tenure . . . the Supreme Court [sic] was clear in its position that it should not be done."[379] One current judge responded, "Until our court definitively allows this procedure, I will not."[380]

---

369. *Id.* 55.8% of responding state judges and 62.5% of responding federal judges at least somewhat favored allowing jurors to have a copy of written instructions during deliberations. *Id.*

370. *Id.* Only 32.7% of responding state judges and 37.5% of federal judges were at least somewhat opposed to allowing jurors to have written instructions during deliberation. 10% of responding judges were neutral on the issue. *Id.*

371. *See infra* Appendix 1 at qq.19 & 20.

372. *See infra* Appendix 1 at q.21.

373. *Id.*

374. *Id.*

375. *Id.*

376. *Id.*

377. *Id.*

378. *See infra* Appendix 1 at q.21.

379. *Id.* In a follow-up discussion, one retired state-court judge indicated that giving written instructions was frowned upon years ago. The judge indicated that the practice was never formally forbidden, but judges were told at annual circuit court judicial conferences that it was not a good idea primarily because instructions were not uniform. This would explain why several older judges indicated that they were of the impression that the South Carolina Supreme Court disfavored the practice. It would also explain why younger judges were of the impression that the practice is prohibited. A number of judges indicated that they received jury instructions from older judges. It is likely that they adopted the senior judges' practices as well.

380. *See infra* Appendix 1 at q.21.

These responses indicate that judges deny the request for written instructions primarily because they are uncertain about South Carolina law regarding the practice. The clear implication is that fear of reversal keeps many judges from allowing the jury to have copies of instructions, despite the fact that 86.4% of the judges responded that they knew of no prohibition against giving jurors a written copy of jury instructions.[381] While eight state court judges responded affirmatively to the question of whether they knew of a prohibition against giving juries written instructions,[382] a closer examination of their follow-up responses indicates that their reasoning was essentially that the practice must not be allowed since it is uncommon and the South Carolina appellate courts have never voiced approval of the practice.[383] No judge cited any authority to support the belief that the practice is prohibited in South Carolina.[384]

C. Plain English Techniques and Pattern Instructions

The South Carolina judges in the survey were very enthusiastic about using plain English techniques to make jury instructions clearer and more understandable. One hundred percent of both state and federal respondents indicated that they thought it was a good idea that jurors better understand jury instructions.[385] Likewise, 100% felt that using plain English techniques would aid juror comprehension.[386]

Of course, the practical implications of writing jury instructions using plain English techniques must be carefully considered. While it is possible for judges to sit down and consciously write instructions using these techniques (and several judges did indicate they made a conscious effort to make their jury instructions comprehensible),[387] this Article has shown that even rewritten instructions work better if they are tested to insure comprehension. Furthermore, the responses indicate that trial court judges are very reluctant to use any jury instruction or practice that varies from those that are court approved.[388] Therefore, for plain English instructions to be best utilized, they should be tested for comprehension and preapproved by courts. In other words, plain English instructions would be best used in the context of court-approved pattern instructions.

---

381. *See infra* Appendix 1 at q.28. 84.3% of responding state judges and 100% of responding federal judges knew of no prohibition. *Id.*

382. *Id.*

383. *See infra* Appendix 1 at q.29.

384. *Id.*

385. *See infra* Appendix 1 at q.40.

386. *See infra* Appendix 1 at q.39.

387. *See infra* Appendix 1 at q.41.

388. *See infra* Appendix 1 at q.29.

South Carolina has never formally adopted any pattern jury instructions. Jury instructions typically come from cases that specifically approve or disapprove of a particular instruction. A vast majority of the respondents (74.6%) use some combination of the following methods to prepare jury instructions: (1) the parties propose instructions which are then modified and read to the jury, (2) the judges personally (or with a law clerk) research and draft them, or (3) they use some form of "model" instructions.[389] As for model instructions, state court judges responded that they typically used instructions given to them by older judges. Seven state court respondents indicated that they used former Circuit Court Judge Tom Ervin's publication *South Carolina Requests to Charge*,[390] and several mentioned instructions given to new judges by the circuit court judges advisory committee.[391]

Almost 65% of the respondents either highly favored or somewhat favored South Carolina adopting pattern jury instructions.[392] Over 20% were neutral, and only 17.7% of the state court judges either somewhat opposed or highly opposed the idea.[393] No federal court respondents opposed adopting pattern instructions.[394]

D. Accuracy Versus Comprehension

Judges were also asked which of the following statements best reflects their viewpoint: "I believe it is more important that jury instructions be legally accurate than understood by jurors," or "I believe it is more important that jury instructions be understood by jurors than legally accurate."[395] The results of this question were perhaps the most interesting of all. Only half (53.2%) of the judges responded by choosing one of the two opinions provided.[396] Of those who picked one of the two, the results were almost equally split. Of the combined responses, 54.5% chose legally accurate as being more important, while 45.5% chose juror comprehension as more important.[397] The judges were given the chance to explain their responses, and many expressed frustration at

---

389. *See infra* Appendix 1 at q.37. 74.5% of responding state judges and 75% of responding federal judges use a combination of methods. *Id.*

390. *See infra* Appendix 1 at q.38. *See also* TOM J. ERVIN, ERVIN'S SOUTH CAROLINA REQUESTS TO CHARGE—CIVIL (1994); TOM J. ERVIN, ERVIN'S SOUTH CAROLINA REQUESTS TO CHARGE—CRIMINAL (1994).

391. *See infra* Appendix 1 at q.38. These instructions generally cover the matter of qualifying juries and do not address areas of substantive law.

392. *See infra* Appendix 1 at q.42. 60.8% of responding state judges and 87.5% of responding federal judges highly favored or somewhat favored adopting pattern jury instructions. *Id.*

393. *Id.*

394. *Id.*

395. *See infra* Appendix 1 at q.44.

396. *Id.*

397. *Id.*

being asked to choose between the two.[398] A number expressed the opinion that instructions should be both legally accurate and understood by jurors and that the choices need not be mutually exclusive.[399] One judge wrote, "This is a difficult question. The instructions must be legally accurate. No judge likes to be reversed. By the same token, each judge wants the jury to understand his instructions."[400] Another judge wrote, "Jury instructions must be legally accurate and understood by the jury. Anything less would result in possible prejudice—the law requires the charge to be legally accurate and for the jury to do their job, they must understand what law to apply to their findings of fact."[401]

The judges who felt compelled to choose one over the other were equally frustrated by the current system. One state judge expressed the opinion that "[u]nless our appellate courts want to waive 'legal accuracy' in favor of understanding, the accuracy argument will always prevail. It is impossible to achieve accuracy and understanding."[402] One federal judge wrote, "As long as appeals courts insist upon legal mumbo-jumbo, trial judges must comply with their wishes, although I do not agree with the present system of slavish adherence to ancient custom."[403] Another state judge wrote, "Legally accurate, while important, is in vain if there is no understanding or comprehension."[404] But perhaps one state judge summarized the dilemma most eloquently with the simple statement, "If not accurate, reversible. If not understood, worthless."[405]

The ultimate question, of course, is how to achieve both.

VI. CONCLUSIONS AND RECOMMENDATIONS

No one who has studied and written on the subject of juror comprehension has ever concluded that jury instruction practices like those currently used by South Carolina state trial courts enhance juror comprehension. To the contrary, a large body of empirical evidence suggests that juror comprehension of jury instructions, when delivered as they are in South Carolina, is so low as to be dysfunctional.

Again, this Article's recommendations are limited to the use of written jury instructions. While there are many other areas of possible jury reform, the scope of this Article has been confined to the study of the unnecessary

398. *See infra* Appendix 1 at q.45.
399. *Id.*
400. *Id.*
401. *Id.*
402. *Id.*
403. *Id.*
404. *See infra* Appendix 1 at q.45.
405. *Id.*

complexity of jury instructions themselves and the process by which they are delivered to the jury. For, as Professor Landsman writes:

> A close look at a number of cases, including several in which jury verdicts appear mistaken, does not show juries that are befuddled by complexity. Even when juries do not fully understand technical issues, they can usually make enough sense of what is going on to deliberate rationally, and they usually reach defensible decisions. To the extent that juries make identifiable mistakes, their mistakes seem most often attributable not to conditions uniquely associated with complexity, but to the mistakes of judges and lawyers, to such systematic deficiencies of the trial process as battles of experts and the prevalence of hard-to-understand jury instructions, and to the kinds of human error that affect simple trials as well.[406]

On the whole, judges have not been particularly receptive to written instructions.

As one group of commentators has put it: "It is as if the courts prefer not to communicate clearly to their juries."[407] Courts should be especially mindful of their role in the trial process, particularly when communicating the law jurors should apply in deciding the case. Furthermore, the bench and bar alike share equal responsibility in assuring that justice rests upon a correct application of the facts to the law. If the legal profession hopes to maintain public confidence and legitimacy, it should require no less of itself. The survey results indicate South Carolina judges are receptive to the idea of jury instruction reform as long as they receive the support and guidance necessary to implement the practices that social scientists have demonstrated will improve juror comprehension.

Despite judges' concerns, providing jurors with written jury instructions can be implemented without any change to current South Carolina law. There is no reason to think that our appellate courts will doubt the constitutionality of a practice that has been commented upon favorably by the United States Supreme Court and used in many state and federal courts throughout the nation.

---

406. Stephan Landsman, *The Civil Jury in America*, 62 LAW & CONTEMP. PROBS. 285, 296 (1999) (quoting Richard Lempert, *Civil Juries and Complex Cases: Taking Stock After Twelve Years*, *in* VERDICT: ASSESSING THE CIVIL JURY SYSTEM 181, 234 (Robert E. Litan ed., 1993)).

407. KASSIN & WRIGHTSMAN, *supra* note 255, at 152; *see also* Michael J. Saks, *What Do Jury Experiments Tell Us About How Juries (Should) Make Decisions?*, 6 S. CAL. INTERDISC. L.J. 1, 35 (1997) ("Perhaps the most important thing to say about judicial instructions to juries is that, as practiced in the great majority of American courts, they may be little more than a superfluous ritual.").

Furthermore, the results of the judges' survey show that a large number of South Carolina trial court judges are willing to try the procedure if they are confident that the appellate courts will approve.

Whether to present the jurors with copies of written instructions at the time of the charge or immediately after affects juror comprehension only in a matter of degree. But the practice of giving jurors a written copy of the instructions at some point does improve comprehension. It should also be noted that the federal court judges in South Carolina who already provide juries with copies of written instructions are very enthusiastic about the practice. Any perceived inconvenience is more than offset by a decreased use of the court's time and resources in rereading or clarifying instructions. Again, the federal experience indicates a remarkable drop in the number of times judges are requested to reinstruct the jury.

It is already common practice in South Carolina trial courts to read whatever jury instructions they have prepared to the jury. Ultimately, it is really only a matter of making extra copies for the jury. Logistical problems may exist in more rural counties where copy machines are not readily available. But most state court judges now have the opportunity to use laptop computers, which could aid in the process. Thus, state trial court judges in South Carolina should strongly consider allowing the jury to take a copy of the instructions to the jury room during deliberation, a practice already mandated in death penalty cases and otherwise within their discretion for all other cases.[408]

Judge Leonard Sand of the Federal District Court in New York, who served as Chairman of the Committee on Juries of the Judicial Council of the Second Circuit,[409] states that in his experience the advantages of giving jurors copies of written instructions far outweighs any disadvantages.[410] When he charges the jury he hands out an instruction containing the following language: "If you would rather, put the typed charge face down on your lap and just listen. If you'd rather read and listen, that's your privilege. Do whatever it is that you think will help you to the greatest extent in following [along]."[411]

Ultimately, absent a court rule or statute mandating the procedure, it is within the trial court judge's discretion when, if, and how to utilize this technique. The survey results show that judges prefer having the discretion to provide copies to juries rather than making it a requirement. But the studies highlighted by the Article show that written instructions increase juror comprehension, reduce the need to repeat instructions, and increase juror satisfaction with the decision. Any judge wishing to find a way to easily improve the judicial process should consider implementing the practice.

---

408. *See supra* note 312.

409. Leonard B. Sand, *Experiments in the Second Circuit with Techniques for Aiding Juror Comprehension*, 8 U. BRIDGEPORT L. REV. 325, 325 (1987).

410. *Id.* at 331.

411. *Id.*

It will take more effort, however, on the part of the bench and bar to adopt the use of plain English jury instructions. But the survey results show unanimous support for plain English instructions by South Carolina judges. Clearly South Carolina judges are not dogmatic about continuing antiquated practices. They recognize the problems jurors face comprehending instructions that are written primarily to satisfy appellate court review, and they clearly would like to do something to help jurors do their job. But they feel hamstrung by current conditions.

Trial court judges certainly possess the ability to rewrite instructions using plain English given the time and willingness to make the extra effort. However, it should be remembered that even experts acknowledge rewriting instructions using plain English is a difficult and time-consuming task.[412] But even assuming that trial court judges are inclined to take the time to rewrite instructions, many will still hesitate to use a jury instruction that has not been specifically approved by appellate courts. Therefore, South Carolina should follow the example of other states and undertake a jury reform project to rewrite South Carolina's jury instructions using plain English. Pattern instructions have proven advantages, and they also save judges and lawyers time by eliminating the need to rewrite instructions in every case. Pattern instructions should also reduce the number of appeals based upon faulty jury instructions and further ensure that jurors in similar cases hear the same instructions regardless of the judge's feelings about the case.

A pattern-jury-instruction committee should consist of, at a minimum, an appellate court judge, a trial court judge, a law professor who teaches plain English writing techniques, an experienced lawyer who practices extensively in criminal law, an experienced lawyer who practices extensively in civil law, and a linguist. The committee should consider consulting the notable works of Robert and Veda Charrow[413] and Elwork, Sales, and Alfini.[414] It is vitally important that, after the committee has drafted a set of instructions, the proposed pattern instructions be tested to determine problem areas. The idea is not to have pattern instructions for their own sake, but to have pattern instructions that increase juror comprehension. The pattern instructions should not be released for use until after the committee has studied and redrafted the instructions based upon the test results. Ideally the revised instructions should be retested once more to ensure that the revisions actually increase

412. The use of plain English instructions in fact is one of the least controversial reforms in theory, but remains one of the most difficult to implement because it is an extremely labor-intensive task. *See* G. Thomas Munsterman & Paula L. Hannaford, *Reshaping the Bedrock of Democracy: American Jury Reform During the Last 30 Years*, 36 JUDGES J., Fall 1997, at 5, 9 (1997) (stating that juror comprehension improves by eliminating unfamiliar terminology).

413. *See generally* Charrow & Charrow, *supra* note 22.

414. *See generally* ELWORK, MAKING JURY INSTRUCTIONS UNDERSTANDABLE, *supra* note 22.

comprehension. Otherwise, "the alternative is an investment in revisions that are inadequate or perhaps even harmful."[415]

If judges wish to be understood, there is simply no better method than to use language that their audience is likely to understand. Judges too often write for appellate courts; however, appellate courts do not have to apply these instructions, juries do. It only makes sense that if we are going to ask jurors to apply the law, we must explain it to them in language they can understand and present it to them in a manner designed to help them accomplish their task.

415. Diamond & Levi, *supra* note 276, at 232.

APPENDIX 1
JURY INSTRUCTION QUESTIONNAIRE RESULTS

These are the results of a survey of current and former trial court judges in South Carolina. The purpose of the study was to assess trial court judges' impressions of juror comprehension of jury instructions in federal and state trial courts in South Carolina.

1. What is your status as a member of the judiciary?

Total number of respondents answering this question	62	
Respondents answered in the following manner	Number	Percent*
A. Active	38	61.3%
B. Retired from the bench but still active in practice of law	6	9.7%
C. Retired but still serving as a trial court judge on appointment**	5	8.1%
D. Now an appellate court judge	4	6.5%
E. Retired	9	14.5%
Total	62	100.0%

Number of state respondents answering this question	54	
Respondents answered in the following manner	Number	Percent
A. Active	31	57.4%
B. Retired from the bench but still active in practice of law	6	11.1%
C. Retired but still serving as a trial court judge on appointment	4	7.4%
D. Now an appellate court judge	4	7.4%
E. Retired	9	16.7%
Total	54	100.0%

* Throughout this Appendix "Percent" refers to the percentage of respondents who answered the question. As indicated, the number of respondents varies because some judges did not provide answers to certain survey questions.

** Includes senior active status federal judges.

Question 1 Continued

Number of federal respondents answering this question	8	
Respondents answered in the following manner	Number	Percent
A. Active	7	87.5%
B. Retired from the bench but still active in practice of law	0	0.0%
C. Retired but still serving as a trial court judge on appointment**	1	12.5%
D. Now an appellate court judge	0	0.0%
E. Retired	0	0.0%
Total	8	100.0%

2. How long have you or did you serve as a trial court judge?

Total number of respondents answering this question	61	
Respondents answered in the following manner	Number	Percent
A. 1-5 years	11	18.0%
B. 6-10 years	22	36.1%
C. 10-15 years	14	23.0%
D. Over 15 years	14	23.0%
Total	61	100.0%

Number of state respondents answering this question	53	
Respondents answered in the following manner	Number	Percent
A. 1-5 years	10	18.9%
B. 6-10 years	20	37.7%
C. 10-15 years	12	22.6%
D. Over 15 years	11	20.8%
Total	53	100.0%

Number of federal respondents answering this question	8	
Respondents answered in the following manner	Number	Percent
A. 1-5 years	1	12.5%
B. 6-10 years	2	25.0%
C. 10-15 years	2	25.0%
D. Over 15 years	3	37.5%
Total	8	100.0%

3. With respect to a juror's understanding of jury instructions, which of the following best reflects your views?

Total number of respondents answering this question	62	
Respondents answered in the following manner	Number	Percent
A. Juries are almost never confused by jury instructions	1	1.6%
B. Juries are seldom confused by jury instructions	11	17.7%
C. Juries are occasionally confused by jury instructions	36	58.1%
D. Juries are frequently confused by jury instructions	14	22.6%
E. Juries are almost always confused by jury instructions	0	0.0%
Total	62	100.0%

Number of state respondents answering this question	54	
Respondents answered in the following manner	Number	Percent
A. Juries are almost never confused by jury instructions	1	1.9%
B. Juries are seldom confused by jury instructions.	10	18.5%
C. Juries are occasionally confused by jury instructions	30	55.6%
D. Juries are frequently confused by jury instructions	13	24.1%
E. Juries are almost always confused by jury instructions	0	0.0%
Total	54	100.0%

Number of federal respondents answering this question	8	
Respondents answered in the following manner	Number	Percent
A. Juries are almost never confused by jury instructions	0	0.0%
B. Juries are seldom confused by jury instructions.	1	12.5%
C. Juries are occasionally confused by jury instructions	6	75.0%
D. Juries are frequently confused by jury instructions	1	12.5%
E. Juries are almost always confused by jury instructions	0	0.0%
Total	8	100.0%

4. In the area of criminal trials, can you name any specific areas where jurors appear to have difficulty understanding jury instructions (such as areas of substantive law, procedure, evidentiary inferences, etc.)?

State respondents answered as follows:

Lesser included offenses (3); manslaughter (voluntary/involuntary) (2); circumstantial evidence (3); burden of proof (5); constitutional arguments

Question 4 Continued

and/or charges; evidentiary inferences (4); reasonable doubt (10); going outside record; mitigating and aggravating circumstances in capital murder trial; accomplice liability (hand of one, etc.); malice (2); elements of crime (2); intent; prior record of criminal defendant; multiple charges; accomplice liability; murder vs. manslaughter; presumptions, instructions to strike inadmissible evidence or testimony, theories of conspiracies; relationship between primary offense and lesser included offenses.

"[I]nsanity - but we all do!"

"Not if you keep it simple and explain 'with the idea' it is the first time they have been exposed in this area - don't talk fast."

"Lengthy instructions on various criminal offences or civil causes of action."

"Not if I do my job."

"Being sole judge of the facts is often difficult - using believable evidence to reach conclusions and applying this to reasonable doubt is often difficult."

Federal respondents answered as follows:

Burden of proof by government; substantive law on conspiracy and similar complicated legal principles; reasonable doubt

"The law is usually clearer in criminal cases."

Conspiracy, other bad acts 404(b).

"Instructions in criminal cases are usually clearly understood. Juries sometimes have difficulty in conspiracy cases differentiating conspiracy counts from substantive counts."

5. In the area of civil trials, can you name any specific areas where jurors appear to have difficulty understanding jury instructions (such as areas of substantive law, procedure, evidentiary inferences, etc.)?

State respondents answered as follows:

Where there are numerous causes of actions (breach of contract, fraud, unfair trade practice) (3); comparative negligence (16); products liability (2); evidentiary inferences; circumstantial evidence; burden of proof (2), going outside record; gross negligence; proximate cause (2); clear and convincing vs. preponderance (3); when many causes of action are joined; warranties, statute of limitations; per se statutes; very complicated definitions such as medical malpractice (2), construction law and predicate liability.

"Not if you keep it simple and explain 'with the idea' it is the first time they have been exposed in this area - don't talk fast."

"Not if I do my job."

Federal respondents answered as follows:

Comparative negligence; punitive damages versus actual damages; the burden shifting scheme in Title VII (2) and Civil Rights cases; burden of proof in employment discrimination cases; complex cases with multiple causes of action, each of which has several essential elements

6. In what percentage of cases are you asked by jurors to repeat or explain jury instructions?

Total number of respondents answering this question	62	
Respondents answered in the following manner	Number	Percent
A. I am never asked to repeat or explain jury instructions	1	1.6%
B. 1-10%	30	48.4%
C. 10-25%	21	33.9%
D. 25-50%	6	9.7%
E. 50-75%	3	4.8%
F. 75-100%	1	1.6%
Total	62	100.0%

Question 6 Continued

Number of state respondents answering this question	54	
Respondents answered in the following manner	Number	Percent
A. I am never asked to repeat or explain jury instructions	1	1.9%
B. 1-10%	26	48.1%
C. 10-25%	19	35.2%
D. 25-50%	5	9.3%
E. 50-75%	2	3.7%
F. 75-100%	1	1.9%
Total	54	100.0%

Number of federal respondents answering this question	8	
Respondents answered in the following manner	Number	Percent
A. I am never asked to repeat or explain jury instructions	0	0.0%
B. 1-10%	4	50.0%
C. 10-25%	2	25.0%
D. 25-50%	1	12.5%
E. 50-75%	1	12.5%
F. 75-100%	0	0.0%
Total	8	100.0%

7. Do you routinely provide a copy of written jury instructions to the jury at any time during the trial?

Total number of respondents answering this question	62	
Respondents answered in the following manner	Number	Percent
A. Yes	6	9.7%
B. No	56	90.3%
Total	62	100.0%

Number of state respondents answering this question	54	
Respondents answered in the following manner	Number	Percent
A. Yes	1	1.9%
B. No	53	98.1%
Total	54	100.0%

Question 7 Continued

Number of federal respondents answering this question	8	
Respondents answered in the following manner	Number	Percent
A. Yes	5	62.5%
B. No	3	37.5%
Total	8	100.0%

8. If the answer to the previous question is yes, at what stage of the trial do you provide the jury with copies?

State respondents answered as follows:

Retired judge answered "no" to previous question but wrote "Not routinely, but sometimes," beside answer. Then wrote for #8 "Before my instructions to them."

"Only if asked."

"Not permitted when I served. Might be a very good idea - but I have not studied."

(Judge answered yes) "At the end when the [jurors] begins [sic] their deliberations."

Federal respondents answered as follows:

"When they retire to jury room for deliberations."

"Before the lawyers' final arguments - it really helps."

"During the charge in open court and thereafter; they are allowed to take their copies into deliberations."

"After I charge, I send a copy to the jury room during their deliberations. I always give a preliminary charge at the start of the trial as background for the jury. I tell them they will have a copy of the charge in the jury room."

"After giving the charge orally."

9. If you do not routinely provide jurors with copies of jury instructions, do you recall ever being asked by the jury or the parties to provide a copy of written jury instructions to the jury before you charge the jury?

Total number of respondents answering this question	56	
Respondents answered in the following manner	Number	Percent
A. Yes	14	25.0%
B. No	42	75.0%
Total	56	100.0%

Number of state respondents answering this question	53	
Respondents answered in the following manner	Number	Percent
A. Yes	14	26.4%
B. No	39	73.6%
Total	53	100.0%

Number of federal respondents answering this question	3	
Respondents answered in the following manner	Number	Percent
A. Yes	0	0.0%
B. No	3	100.0%
Total	3	100.0%

10. If you were asked, please estimate the number of times you were asked. _____ times.

Total number of respondents answering this question	8	
Respondents answered in the following manner	Number	Percent
A. 1-2 times	3	37.5%
B. 3-4 times	1	12.5%
C. 5-6 times	1	12.5%
D. 7-8 times	0	0.0%
E. 9-10 times	1	12.5%
F. 11-20 times	1	12.5%
G. over 20 times	1	12.5%
Total	8	100.0%

Question 10 Continued

Number of state respondents answering this question	8	
Respondents answered in the following manner	Number	Percent
A. 1-2 times	3	37.5%
B. 3-4 times	1	12.5%
C. 5-6 times	1	12.5%
D. 7-8 times	0	0.0%
E. 9-10 times	1	12.5%
F. 11-20 times	1	12.5%
G. over 20 times	1	12.5%
Total	8	100.0%

Number of federal respondents answering this question	0	
Respondents answered in the following manner	Number	Percent
A. 1-2 times	0	0.0%
B. 3-4 times	0	0.0%
C. 5-6 times	0	0.0%
D. 7-8 times	0	0.0%
E. 9-10 times	0	0.0%
F. 11-20 times	0	0.0%
G. over 20 times	0	0.0%
Total	0	0.0%

11. If you were asked, did you ever provide a copy of your instructions to the jury?

Total number of respondents answering this question	24	
Respondents answered in the following manner	Number	Percent
A. Yes	3	12.5%
B. No	21	87.5%
Total	24	100.0%

Question 11 Continued

Number of state respondents answering this question	23	
Respondents answered in the following manner	Number	Percent
A. Yes	3	13.0%
B. No	20	87.0%
Total	23	100.0%

Number of federal respondents answering this question	1	
Respondents answered in the following manner	Number	Percent
A. Yes	0	0.0%
B. No	1	100.0%
Total	1	100.0%

12. If you were asked, did any of the attorneys object?

Total number of respondents answering this question	17	
Respondents answered in the following manner	Number	Percent
A. Yes	8	47.1%
B. No	9	52.9%
Total	17	100.0%

Number of state respondents answering this question	16	
Respondents answered in the following manner	Number	Percent
A. Yes	8	50.0%
B. No	8	50.0%
Total	16	100.0%

Number of federal respondents answering this question	1	
Respondents answered in the following manner	Number	Percent
A. Yes	0	0.0%
B. No	1	100.0%
Total	1	100.0%

13. If any of the attorneys objected, please state the nature and frequency of the objection and how you ruled.

State respondents answered as follows:

"Once."

Judge provided copy of instructions but stated he would not do so over objection of counsel.

"There was an objection every time because of S.C. (state) law. Objection was sustained. Even if attorneys had agreed to do it, I would not have."

"If objection made I don't feel that I can provide written charges to jury."

"Provide all or provide none/sustained."

"A few times either jurors have asked or I have given the jurors a typed instruction on a single proposition of law."

"None have objected."

"Rules do not allow and/or provide for furnishing copies of jury instructions to the jury. Sustained the objection."

"Usually some part of anticipated instructions are objected to prior to beginning instructions. Objections to copy to jury are to preserve those objections or simply to reiterate that in SC instructions are not usually given to jury in writing."

No federal respondents answered this question.

14. If you do not routinely provide jurors with copies of jury instructions, do you recall ever being asked by the jury or the parties to provide a copy of written jury instructions at any time after you charged the jury?

Total number of respondents answering this question	57	
Respondents answered in the following manner	Number	Percent
A. Yes	36	63.2%
B. No	21	36.8%
Total	57	100.0%

Question 14 Continued

Number of state respondents answering this question	54	
Respondents answered in the following manner	Number	Percent
A. Yes	35	64.8%
B. No	19	35.2%
Total	54	100.0%

Number of federal respondents answering this question	3	
Respondents answered in the following manner	Number	Percent
A. Yes	1	33.3%
B. No	2	66.7%
Total	3	100.0%

15. If you were asked, please estimate the number of times you were asked. _____ times.

Total number of respondents answering this question	24	
Respondents answered in the following manner	Number	Percent
A. 1-2 times	6	25.0%
B. 3-4 times	3	12.5%
C. 5-6 times	6	25.0%
D. 7-8 times	0	0.0%
E. 9-10 times	4	16.7%
F. 11-20 times	2	8.3%
G. over 20 times	3	12.5%
Total	24	100.0%

Question 15 Continued

Number of state respondents answering this question	23	
Respondents answered in the following manner	Number	Percent
A. 1-2 times	6	26.1%
B. 3-4 times	3	13.0%
C. 5-6 times	5	21.7%
D. 7-8 times	0	0.0%
E. 9-10 times	4	17.4%
F. 11-20 times	2	8.7%
G. over 20 times	3	13.0%
Total	23	100.0%

Number of federal respondents answering this question	1	
Respondents answered in the following manner	Number	Percentage
A. 1-2 times	0	0.0%
B. 3-4 times	0	0.0%
C. 5-6 times	1	100.0%
D. 7-8 times	0	0.0%
E. 9-10 times	0	0.0%
F. 11-20 times	0	0.0%
G. over 20 times	0	0.0%
Total	1	100.0%

16. If you were asked, did you ever provide a copy of your instructions to the jury?

Total number of respondents answering this question	39	
Respondents answered in the following manner	Number	Percent
A. Yes	8	20.5%
B. No	31	79.5%
Total	39	100.0%

Question 16 Continued

Number of state respondents answering this question	38	
Respondents answered in the following manner	Number	Percent
A. Yes	8	21.1%
B. No	30	78.9%
Total	38	100.0%

Number of federal respondents answering this question	1	
Respondents answered in the following manner	Number	Percent
A. Yes	0	0.0%
B. No	1	100.0%
Total	1	100.0%

17. If you were asked, did any of the attorneys object?

Total number of respondents answering this question	31	
Respondents answered in the following manner	Number	Percent
A. Yes	14	45.2%
B. No	17	54.8%
Total	31	100.0%

Number of state respondents answering this question	30	
Respondents answered in the following manner	Number	Percent
A. Yes	14	46.7%
B. No	16	53.3%
Total	30	100.0%

Number of federal respondents answering this question	1	
Respondents answered in the following manner	Number	Percent
A. Yes	0	0.0%
B. No	1	100.0%
Total	1	100.0%

18. If any of the attorneys objected, please state the nature and frequency of the objection and how you ruled.

State respondents answered as follows:

"Attorneys wanted jurors to be recharged by listening to charge a second time."

"Once."

"Their objection was that such practice is (was) not permitted by S.C. (state) law. Objections sustained."

"Don't want to create a collateral appeal issue."

"Provide all or provide none/sustained."

"I would not provide instructions after charge for fear something may be taken out of context. I would simply recharge any requested instruction."

"If either attorney objected I did not do so."

"If objected, none were provided."

"Only once. Did not provide instructions."

"25%. Allowed written instructions."

"Not proper."

"Objected on generic ground that written jury instructions are not used in SC."

(Judge answered that he was asked and attorneys objected) "Always overruled. Jurors reading something exactly as had been orally instructed not harmful unless it unduly emphasizes something to detriment of other parts of instructions."

"Each time - did not provide."

No federal respondents answered this question.

19. If you do not routinely provide jurors with copies of jury instructions, have you ever considered providing a written copy of your jury instructions to the jury?

Total number of respondents answering this question	55	
Respondents answered in the following manner	Number	Percent
A. Yes	32	58.2%
B. No	23	41.8%
Total	55	100.0%

Number of state respondents answering this question	52	
Respondents answered in the following manner	Number	Percent
A. Yes	31	59.6%
B. No	21	40.4%
Total	52	100.0%

Number of federal respondents answering this question	3	
Respondents answered in the following manner	Number	Percent
A. Yes	1	33.3%
B. No	2	66.7%
Total	3	100.0%

20. If you do not routinely provide jurors with copies of jury instructions, would you consider providing a written copy of your jury instructions to the jury?

Total number of respondents answering this question	55	
Respondents answered in the following manner	Number	Percent
A. Yes	30	54.5%
B. No	25	45.5%
Total	55	100.0%

Question 20 Continued

Number of state respondents answering this question	52	
Respondents answered in the following manner	Number	Percent
A. Yes	30	57.7%
B. No	22	42.3%
Total	52	100.0%

Number of federal respondents answering this question	3	
Respondents answered in the following manner	Number	Percent
A. Yes		0.0%
B. No	3	100.0%
Total	3	100.0%

21. Please briefly explain your answer to the previous question.

State respondents answered as follows:

"Providing instructions to the jury is dangerous because they will interpret them to mean what they want them to be as opposed to the verbal instructions provided by the court. Tell them you will re-charge them if desired."

"I believe providing [a] copy of instructions may be helpful in certain cases."

"Until our court definitively allows this procedure, I will not."

"During my time on the bench (1961-1980), there was no precedent for furnishing instructions of which I am aware."

"When I was a trial judge we never gave written instructions."

"Invited jurors to speculate."

"Would require all instructions to be reduced to writing unduly burdensome!"

"It would be helpful, but attorneys usually object rather strongly."

Question 21 Continued

"It would be helpful to the jury."

"An example: a civil action for adverse possession of land, or something like that, i.e., where there are many elements in the issue at trial. I once considered doing that, but not the whole charge, only as to adverse possession. But, I would not do it for fear of making an error of law."

"Although I would consider, I am not persuaded that written instructions would not create more questions than they answer."

"Certain portions would be good, i.e., the elements of a crime; full charge may be as confusing to the listeners as the verbal charge to the readers."

"This would allow improper interpretations of charge."

"I strive to give straight forward understandable charges and feel that written charges are simply not needed."

"If SC Supreme Court approved I would consider it where instruction is complex or easily confused."

"It would cause more confusion."

"E.g., on elements of offense."

"I don't have a copy I could give the jury. Instructions are a compilation of the various matters addressed with corrections, additions and deletions and are not in a form I could distribute. If I ever get 30 days off I may prepare instructions which could be printed and distributed."

"Only in limited circumstances with approval of counsel."

"I don't charge or read instructions to jury as do many judges but deliver the charge as most attorneys make summaries with limited notes."

"[D]elay and true copies have been a genuine consideration. Reading a copy loses effect."

"Not necessary."

"It is not provided in state law or rules of court."

Question 21 Continued

"It was not the generally accepted practice to provide written instructions to the jury. However, if all parties agreed, I would do so."

"I think jurors can do their job better when they have instructions in writing - focus on what is important."

"Rules do not provide for this."

"I would consider it - but would have some concerns about providing a copy. Primarily I would be concerned because of the quality of my instructions, i.e. their appearance."

"Although I considered providing a copy, during my tenure (79-91) the Supreme Court was clear in its position that it should not be done."

"I generally don't give 'cookie cutter,' 'one size fits all' charges. I will vary the charge to the particular case and therefore my charge is not in some neat typewritten format."

"Retired, but if not, would not. I would want to know what & why the jury did not understand in order to explain to them, so as to make it understandable and be sure that they did understand it."

"In South Carolina it just isn't done or I have not - rules do not provide for written instructions."

"The problem I have is that instructions generally are not in a form suitable to be distributed to the jury."

"I like the idea, however it would be cumbersome to compile a charge and then come to have it typed or printed before or after charging."

"If you explain them properly in a 'teaching' manner, there is no need."

"Yes, if the law permitted it."

"I would consider it if requested; however, I was never requested"

"We do not have uniform standard charges which have been approved. Most of the time preparation of the charge is not completed until just before final arguments. The charge is not totally organized nor is there time to get them copied."

Question 21 Continued

"I believe jurors should have written instructions, but until a rule is implemented, I have only been willing to provide written instructions if the attorneys do not object."

"I'd like to, but really don't have the means to do so."

"Yes if permitted. In my years we were not allowed to give copies."

"It was not permissible under our procedure."

"If jury instructions were standardized and could be provided quickly."

"Providing written instructions would make matters more complicated and lead to more arguments in the jury room."

"The reason not is because of the practical problem of editing and producing the instruction (however, it is a good idea)."

Federal respondents answered as follows:

"I do not prepare instructions in a form that would be submitted to a jury."

"I do not prepare written jury instructions."

"I am opposed to providing written jury instructions to the jury."

22. Do you think it aids juror comprehension of jury instructions to have a written copy of the instructions <u>at the time</u> the judge charges the jury?

Total number of respondents answering this question	55	
Respondents answered in the following manner	Number	Percent
A. Yes	24	43.6%
B. No	31	56.4%
Total	55	100.0%

Question 22 Continued

Number of state respondents answering this question	48	
Respondents answered in the following manner	Number	Percent
A. Yes	22	45.8%
B. No	26	54.2%
Total	48	100.0%

Number of federal respondents answering this question	7	
Respondents answered in the following manner	Number	Percent
A. Yes	2	28.6%
B. No	5	71.4%
Total	7	100.0%

23. Please briefly explain your answer to the previous question.

State respondents answered as follows:

"To allow them to have what you are reading to them only serves the purpose of dividing the minds of the jurors - trying to hear you and read the instructions at the same time."

"I believe in certain cases it may be beneficial to jurors to have charges at beginning of [a] trial and during deliberations as jurors would understand instructions better."

"If written charges were provided, they may be a distraction to some jurors."

"Jurors seldom asked for clarification."

"It will help jurors understand."

"Would be the jury's first exposure."

"It is difficult for most jurors to follow both the oral instructions and read papers in their hands. Such a procedure would cause confusion more often than not once the jury begins deliberations. The confusion being one juror remembering an oral instruction and another disagreeing based upon what he read."

Question 23 Continued

"As with the evidence in the trial, a jury should concentrate on the presentation of the instruction, not their comprehension of the writing."

"I would consider allowing the jurors to read along from view graph."

"Usually instructions are more easily understood where one can read along as instructed and more easily see context of instruction."

"Common sense."

"In some cases but not all."

"Jurors may read and listen at different rates of speed."

"I think it distracts from looking at and listening to the judge."

"This would clear up any misunderstanding."

"We still encounter juror's [sic] who have limited reading skills and serve on juries, therefore someone in the jury room would obviously read and interpret instructions for these jurors."

"It helps them concentrate."

"To give them a copy to look at while charging them allows them to thumb through it and not listen to what you are telling them."

"Juries spend too much attention looking at the charge and are routinely looking ahead or behind where the judge is, i.e. they don't listen. Same problem with jurors who take notes during testimony - some never look up to observe witness's demeanor."

"Depends on kind of jury and how it is done."

"I put yes but I really mean maybe."

"I feel many people are better able to comprehend when they are both reading and hearing instructions."

"They would know what to listen for."

Question 23 Continued

"You would still have to explain the charges in a teaching manner. They might be reading instead of listening and become somewhat confused."

"I don't know"

"They would try to read the instructions while you were explaining them."

"In most cases, I would be concerned about jurors having their focus diverted. Using a display system to project the charge on a TV monitor or screen might be preferable."

"I'd rather the jury concentrate on what I'm telling them."

"Have no experience - just my opinion."

"Reading aids comprehension."

"'Picture is worth 1,000 words.' Seeing it in writing also strengthens the understanding. Instructions can be referred to accurately in the jury room."

"So they could read the instructions as the judge reads."

"It would be better for the jurors to listen to the instructions and not be distracted."

"Because the verbal and visual interaction with the instruction enhances understanding."

"I think it would benefit the jury to follow while you read the instructions - you are re-enforcing the verbal communication."

Federal respondents answered as follows:

"It is difficult to follow the written charges (instructions) while I'm reading."

"Absolutely. Since I started giving the jury a copy of the final charge I have only been asked [one] time to recharge them on a certain area of the law."

"Jurors carefully follow along as I charge and report much better comprehension from seeing and hearing as opposed to hearing only."

Question 23 Continued

"Maybe."

"I prefer to have jurors pay attention to my reading of the instructions. Providing a copy during that time could distract them."

"They pay more attention if you read it to them. Some would be distracted trying to 'keep up' while reading, others would 'read ahead.'"

"I think it needs to be given to them after the oral instruction, so they won't read ahead of the judge."

24. Do you think it aids juror comprehension of jury instructions to have a written copy of the instructions after the judge charges the jury?

Total number of respondents answering this question	58	
Respondents answered in the following manner	Number	Percent
A. Yes	40	69.0%
B. No	18	31.0%
Total	58	100.0%

Number of state respondents answering this question	51	
Respondents answered in the following manner	Number	Percentage
A. Yes	35	68.6%
B. No	16	31.4%
Total	51	100.0%

Number of federal respondents answering this question	7	
Respondents answered in the following manner	Number	Percent
A. Yes	5	71.4%
B. No	2	28.6%
Total	7	100.0%

25. Please briefly explain your answer to the previous question.

State respondents answered as follows:

"Providing instructions to the jury is dangerous because they will interpret them to mean what they want them to be as opposed to the verbal instructions provided by the court. Tell them you will re-charge them if desired. To allow them to have what you are reading to them only serves the purpose of dividing the minds of the jurors - trying to hear you and read the instructions at the same time."

"No, I believe jurors start to 'nit-pick' the charge when written instructions are provided."

"Would this lead to unsupervised debate in the jury room - off the record?"

"It will help jurors understand."

"They would have time to study and discuss them."

"A written document can cause as much confusion as an oral one."

"If attorneys cannot agree on the law as written (ergo - we have courts of appeal), can we expect lay jurors to be more comprehending?"

"The elements of crime and maybe the burden of proof but not whole charge."

"Always helpful to have an opportunity to review legal instructions."

"They would examine each word ad nauseam and never reach a verdict."

"Common sense."

"Sometimes. If there are specific technical issues which are foreign to lay people."

"Sometimes it may help with complex issues."

"I have concern for delays."

"Either before or after would help. I would think after would be better."

Question 25 Continued

"I believe it would be a better practice to provide written instructions in the long run."

"It gives them something to refer to should a question arise."

"Judge can go back and follow it step by step."

"They need to be able to read over what you previously told them to clear up questions and to better focus."

"It helps jurors resolve disputes in deliberations - jurors occasionally argue about what the judge said in his or her charge."

"It may in some cases."

"Maybe"

"Yes - but maybe not as much as having the instructions while the charge is being given."

"They can't remember everything in the charge."

"Not necessary"

"I don't know"

"They could go over the instructions as to each charge or cause of action when they are considering them."

"Cut down on questions."

"I don't understand when a juror would look at the charge between completion of the charge and deliberations. If you are talking about an interim period to read the charge, obviously we don't have that now."

"They can refer back to portions where the focus of the discussion occurs."

"They can then consult during their deliberations."

"Yes - my opinion."

"More exposure."

Question 25 Continued

"Providing written instructions would make matters more complicated and lead to more arguments in the jury room."

"It is helpful to allow the jury to refer to."

"The juror can refer to the instructions during deliberation."

Federal respondents answered as follows:

"I've tried it both ways. Jurors appear confused especially when they lose their place in their copy."

"I allow them to take their copies into the jury room and refer to them during their deliberation."

"Maybe."

"It could aid their comprehension, but I prefer them to focus on the evidence rather than on picking apart the instructions."

"It gives them a chance to focus or re-read anything that was unclear. It also eliminates any disputes or differences in their collective recollection."

"I think it needs to be given to them after the oral instruction, so they won't read ahead of the judge."

26. Do you think it aids juror comprehension of jury instructions to have a written copy of the instructions during their deliberations?

Total number of respondents answering this question	59	
Respondents answered in the following manner	Number	Percent
A. Yes	40	67.8%
B. No	19	32.2%
Total	59	100.0%

Question 26 Continued

Number of state respondents answering this question	52	
Respondents answered in the following manner	Number	Percent
A. Yes	35	67.3%
B. No	17	32.7%
Total	52	100.0%

Number of federal respondents answering this question	7	
Respondents answered in the following manner	Number	Percent
A. Yes	5	71.4%
B. No	2	28.6%
Total	7	100.0%

27. Please briefly explain your answer to the previous question.

State respondents answered as follows:

"Let them know that you will gladly recharge them on any aspect of the law at anytime if they so desire - the judge's explanation is the best source for a full understanding by the jury."

"No, I believe jurors start to 'nit-pick' the charge when written instructions are provided."

"Would this lead to unsupervised debate in the jury room - off the record?"

"It will help jurors understand."

"They would have time to study and discuss them."

"A written document can cause as much confusion as an oral one."

"Written instructions crave interpretation, where oral instructions give direction to applicable principles - you do not have to be [a] mechanical engineer to operate a vehicle powered by an internal combustion engine."

"The elements of crime and maybe the burden of proof but not whole charge."

Question 27 Continued

"Ability to review and apply while discussing facts and evidence."

"They would examine each word ad nauseam and never reach a verdict."

"Common sense."

"Sometimes. If there are specific technical issues which are foreign to lay people."

"Sometimes it may help with complex issues."

"A juror trying to do a good job would have the opportunity to do so."

"Here again, it would clear up any misunderstanding."

"The jury could still request the judge to further clarify instructions even when provided written instructions."

"It gives them something to refer to should a question arise."

"I think furnishing written copies would confuse more than they would help."

"Judge can go back and follow it step by step."

"They need to be able to read over what you previously told them to clear up questions and to better focus."

"It helps jurors resolve disputes in deliberations - jurors occasionally argue about what the judge said in his or her charge."

"It may in some cases."

"Maybe."

"I believe it would reduce the requests to re-charge or have (unintelligible) explained."

"To be able to refer to some list of law while discussing some aspect fo the evidence."

Question 27 Continued

"Don't see where it would aid if you had the attention of the jury during your charge."

"I don't know"

"They could go over the instructions as to each charge or cause of action when they are considering them."

"Cut down on questions."

"They can then consult during their deliberations."

"Written instructions need to be in the simplest possible common language and illustrations."

"More exposure."

"Written instructions would help answer questions jurors may incur."

"Providing written instructions would make matters more complicated and lead to more arguments in the jury room."

"It is helpful to allow the jury to refer to."

Federal respondents answered as follows:

"Requests to re-charge on a particular aspect of the case has become almost non-existent since I have furnished jurors with a copy of my instructions. I highly recommend this practice."

"All my jurors comment favorably on this; number of questions from jurors greatly reduced once I began using written charge."

"Maybe."

"It could aid their comprehension, but I prefer them to focus on the evidence rather than on picking apart the instructions."

"It gives them a chance to focus or re-read anything that was unclear. It also eliminates any disputes or differences in their collective recollection."

"I think it needs to be given to them after the oral instruction, so they won't read ahead of the judge."

28. Are you aware of any prohibition against giving jurors a written copy of jury instructions?

Total number of respondents answering this question	59	
Respondents answered in the following manner	Number	Percent
A. Yes	8	13.6%
B. No	51	86.4%
Total	59	100.0%

Number of state respondents answering this question	51	
Respondents answered in the following manner	Number	Percent
A. Yes	8	15.7%
B. No	43	84.3%
Total	51	100.0%

Number of federal respondents answering this question	8	
Respondents answered in the following manner	Number	Percent
A. Yes	0	0.0%
B. No	8	100.0%
Total	8	100.0%

29. If your answer is yes, please briefly explain.

State respondents answered as follows:

"I do not believe our Supreme Court has ruled definitively on this issue."

"Not a good idea."

"Not allowed by S.C. (state) law.

"The only thing allowed in the jury room is verdict form and evidence. I am also aware of a case in S.C. [that] prevents jurors from note-taking."

"Custom."

"Not allowed or at least not approved and frowned upon by supreme court."

Question 29 Continued

"Not aware of written prohibition but it's not common practice, especially in criminal cases."

"Yes. If you give it, it must be entire charge so that jury isn't focused on one issue."

"Explains itself." (Judge responded yes to question)

Judge answered yes but gave no explanation.

Judge answered no and wrote "If they are pretty much standard-pre-approved charges and can be timely copied."

"I am continually told it is improper, but never have taken the time to really study."

No federal respondents answered this question.

30. Are you aware of any requirement that jurors be given a written copy of jury instructions?

Total number of respondents answering this question	61	
Respondents answered in the following manner	Number	Percent
A. Yes	3	4.9%
B. No	58	95.1%
Total	61	100.0%

Number of state respondents answering this question	53	
Respondents answered in the following manner	Number	Percent
A. Yes	3	5.7%
B. No	50	94.3%
Total	53	100.0%

Question 30 Continued

Number of federal respondents answering this question	8	
Respondents answered in the following manner	Number	Percent
A. Yes	0	0.0%
B. No	8	100.0%
Total	8	100.0%

31. If your answer is yes, please briefly explain.

State respondents answered as follows:

"Death penalty cases."

"Certain aspects of capital cases."

"Other states other than S.C."

No federal respondents answered this question.

32. Would you favor or oppose a requirement that jurors be given copies of jury instructions at the time the jury is charged?

Total number of respondents answering this question	61	
Respondents answered in the following manner	Number	Percent
A. I highly favor such a requirement	6	9.8%
B. I somewhat favor such a requirement	7	11.5%
C. I am neutral on such a requirement	13	21.3%
D. I somewhat oppose such a requirement	15	24.6%
E. I highly oppose such a requirement	20	32.8%
Total	61	100.0%

Question 32 Continued

Number of state respondents answering this question	54	
Respondents answered in the following manner	Number	Percent
A. I highly favor such a requirement	6	11.1%
B. I somewhat favor such a requirement	6	11.1%
C. I am neutral on such a requirement	11	20.4%
D. I somewhat oppose such a requirement	14	25.9%
E. I highly oppose such a requirement	17	31.5%
Total	54	100.0%

Number of federal respondents answering this question	7	
Respondents answered in the following manner	Number	Percentage
A. I highly favor such a requirement	0	0.0%
B. I somewhat favor such a requirement	1	14.3%
C. I am neutral on such a requirement	2	28.6%
D. I somewhat oppose such a requirement	1	14.3%
E. I highly oppose such a requirement	3	42.9%
Total	7	100.0%

33. Would you favor or oppose giving judges the discretion to give jurors copies of jury instructions at the time the jury is charged?

Total number of respondents answering this question	61	
Respondents answered in the following manner	Number	Percent
A. I highly favor giving judges this discretion	25	41.0%
B. I somewhat favor giving judges this discretion	11	18.0%
C. I am neutral on giving judges this discretion	12	19.7%
D. I somewhat oppose giving judges this discretion	3	4.9%
E. I highly oppose giving judges this discretion	10	16.4%
Total	61	100.0%

Question 33 Continued

Number of state respondents answering this question	53	
Respondents answered in the following manner	Number	Percent
A. I highly favor giving judges this discretion	22	41.5%
B. I somewhat favor giving judges this discretion	9	17.0%
C. I am neutral on giving judges this discretion	12	22.6%
D. I somewhat oppose giving judges this discretion	2	3.8%
E. I highly oppose giving judges this discretion	8	15.1%
Total	53	100.0%

Number of federal respondents answering this question	8	
Respondents answered in the following manner	Number	Percent
A. I highly favor giving judges this discretion	3	37.5%
B. I somewhat favor giving judges this discretion	2	25.0%
C. I am neutral on giving judges this discretion	0	0.0%
D. I somewhat oppose giving judges this discretion	1	12.5%
E. I highly oppose giving judges this discretion	2	25.0%
Total	8	100.0%

34. Would you favor or oppose a requirement that jurors be given copies of jury instructions after the jury has been charged?

Total number of respondents answering this question	62	
Respondents answered in the following manner	Number	Percent
A. I highly favor such a requirement	12	19.4%
B. I somewhat favor such a requirement	10	16.1%
C. I am neutral on such a requirement	9	14.5%
D. I somewhat oppose such a requirement	13	21.0%
E. I highly oppose such a requirement	18	29.0%
Total	62	100.0%

Question 34 Continued

Number of state respondents answering this question	54	
Respondents answered in the following manner	Number	Percent
A. I highly favor such a requirement	9	16.7%
B. I somewhat favor such a requirement	8	14.8%
C. I am neutral on such a requirement	9	16.7%
D. I somewhat oppose such a requirement	13	24.1%
E. I highly oppose such a requirement	15	27.8%
Total	54	100.0%

Number of federal respondents answering this question	8	
Respondents answered in the following manner	Number	Percentage
A. I highly favor such a requirement	3	37.5%
B. I somewhat favor such a requirement	2	25.0%
C. I am neutral on such a requirement	0	0.0%
D. I somewhat oppose such a requirement	0	0.0%
E. I highly oppose such a requirement	3	37.5%
Total	8	100.0%

35. Would you favor or oppose giving judges the discretion to give jurors copies of jury instructions after the jury has been charged?

Total respondents answering this question	62	
Respondents answered in the following manner	Number	Percent
A. I highly favor giving judges this discretion	27	43.5%
B. I somewhat favor giving judges this discretion	12	19.4%
C. I am neutral on giving judges this discretion	8	12.9%
D. I somewhat oppose giving judges this discretion	7	11.3%
E. I highly oppose giving judges this discretion	8	12.9%
Total	62	100.0%

Question 35 Continued

Number of state respondents answering this question	54	
Respondents answered in the following manner	Number	Percent
A. I highly favor giving judges this discretion	24	44.4%
B. I somewhat favor giving judges this discretion	10	18.5%
C. I am neutral on giving judges this discretion	7	13.0%
D. I somewhat oppose giving judges this discretion	6	11.1%
E. I highly oppose giving judges this discretion	7	13.0%
Total	54	100.0%

Number of federal respondents answering this question	8	
Respondents answered in the following manner	Number	Percent
A. I highly favor giving judges this discretion	3	37.5%
B. I somewhat favor giving judges this discretion	2	25.0%
C. I am neutral on giving judges this discretion	1	12.5%
D. I somewhat oppose giving judges this discretion	1	12.5%
E. I highly oppose giving judges this discretion	1	12.5%
Total	8	100.0%

36. Would you favor or oppose allowing jurors to take copies of jury instructions to the jury room during deliberations?

Total number of respondents answering this question	60	
Respondents answered in the following manner	Number	Percent
A. I highly favor allowing this procedure	23	38.3%
B. I somewhat favor allowing this procedure	11	18.3%
C. I am neutral towards allowing this procedure	6	10.0%
D. I somewhat oppose allowing this procedure	5	8.3%
E. I highly oppose allowing this procedure	15	25.0%
Total	60	100.0%

Question 36 Continued

Number of state respondents answering this question	52	
Respondents answered in the following manner	Number	Percent
A. I highly favor allowing this procedure	18	34.6%
B. I somewhat favor allowing this procedure	11	21.2%
C. I am neutral towards allowing this procedure	6	11.5%
D. I somewhat oppose allowing this procedure	5	9.6%
E. I highly oppose allowing this procedure	12	23.1%
Total	52	100.0%

Number of federal respondents answering this question	8	
Respondents answered in the following manner	Number	Percent
A. I highly favor allowing this procedure	5	62.5%
B. I somewhat favor allowing this procedure	0	0.0%
C. I am neutral towards allowing this procedure	0	0.0%
D. I somewhat oppose allowing this procedure	0	0.0%
E. I highly oppose allowing this procedure	3	37.5%
Total	8	100.0%

37. How do you generally prepare your jury instructions?

Total number of respondents answering this question	59	
Respondents answered in the following manner	Number	Percent
A. I rely on the parties to give me proposed instructions which I then read verbatim	0	0.0%
B. I rely on the parties to give me proposed instructions which I then alter or amend	0	0.0%
C. I personally research and draft my own instructions	11	18.6%
D. I and my law clerk research and draft my own instructions	4	6.8%
E. I rely on pattern or model jury instructions provided by some authority	0	0.0%
F. I rely on a combination of _____ listed above	44	74.6%
Total	59	100.0%

Question 37 Continued

Number of state respondents answering this question	51	
Respondents answered in the following manner	**Number**	**Percent**
A. I rely on the parties to give me proposed instructions which I then read verbatim	0	0.0%
B. I rely on the parties to give me proposed instructions which I then alter or amend	0	0.0%
C. I personally research and draft my own instructions	10	19.6%
D. I and my law clerk research and draft my own instructions	3	5.9%
E. I rely on pattern or model jury instructions provided by some authority	0	0.0%
F. I rely on a combination of _____ listed above	38	74.5%
Total	**51**	**100.0%**

Number of federal respondents answering this question	8	
Respondents answered in the following manner	**Number**	**Percent**
A. I rely on the parties to give me proposed instructions which I then read verbatim	0	0.0%
B. I rely on the parties to give me proposed instructions which I then alter or amend	0	0.0%
C. I personally research and draft my own instructions	1	12.5%
D. I and my law clerk research and draft my own instructions	1	12.5%
E. I rely on pattern or model jury instructions provided by some authority	0	0.0%
F. I rely on a combination of _____ listed above	6	75.0%
Total	**8**	**100.0%**

38. If you rely on them, what pattern or model jury instructions do you use?

State respondents answered as follows:

"Instructions 'handed down' from other S.C. judges."

"Bench book; case cites."

Question 38 Continued

"I read many sources such as the federal manual, explicit S.C. Supreme Court decisions which spell out exactly what the charge would be, some 'horn' books, etc."

"Those provided by the circuit judges advisory committee and court administration."

"Those provided by supreme court to circuit judges."

"All extant sources."

"Those from a former judge."

"My own; prepared and modified during my 20 years on bench."

"The circuit court judges advisory committee prepared jury instruction notebook for all new judges."(2)

"Common pleas notebook."

"I had a big notebook compiled by other SC judges."

"I have accumulated my own which I try to keep revising then."

"Generally the proposed charges given by court administration in new judges' school."

"Judges' desk books compiled and provided by court administration with aid of experienced judges."

"Old judges' past charges."

"State."

"We do not have model instructions in S.C. which have been approved except in case law."

"Those provided to all circuit court judges."

"Devitt & Blackman."

Ervin's South Carolina Requests to Charge - Civil and Criminal(6)

Question 38 Continued

Federal respondents listed the following resources:

4th Circuit and 5th Circuit and Moore's

Modern Federal Jury Instructions

Devitt and Blackman

Various federal circuit publications and the two recognized "handbook" publications.

Note: Linguists often recommend using "plain English" techniques to make writing clearer and more understandable. Some "plain English" techniques include: writing shorter, less complex sentences; writing in the active voice instead of the passive voice; avoiding the use of nominalizations; and avoiding ambiguity in words and sentences.

39. Do you think it aids juror comprehension to have jury instructions written in "plain English" as opposed to more formal legal writing?

Total number of respondents answering this question	60	
Respondents answered in the following manner	Number	Percent
A. Yes	60	100.0%
B. No	0	0.0%
Total	60	100.0%

Number of state respondents answering this question	52	
Respondents answered in the following manner	Number	Percent
A. Yes	52	100.0%
B. No	0	0.0%
Total	52	100.0%

Number of federal respondents answering this question	8	
Respondents answered in the following manner	Number	Percent
A. Yes	8	100.0%
B. No	0	0.0%
Total	8	100.0%

40. Do you think it is a good idea for jurors to better understand jury instructions?

Total number of respondents answering this question	61	
Respondents answered in the following manner	Number	Percent
A. Yes	61	100.0%
B. No	0	0.0%
Total	61	100.0%

Number of state respondents answering this question	53	
Respondents answered in the following manner	Number	Percent
A. Yes	53	100.0%
B. No		0.0%
Total	53	100.0%

Number of federal respondents answering this question	8	
Respondents answered in the following manner	Number	Percent
A. Yes	8	100.0%
B. No		0.0%
Total	8	100.0%

41. Please briefly explain your answer to the previous question.

State respondents answered as follows:

"Jury instructions should be charged in their plain and ordinary meaning with the specific law being charged as written in the Code of Laws for S.C."

"Often instructions given in 'legalese' are confusing and difficult to understand."

"For a juror to make an intelligent decision, he/she needs to understand the law as it is charged or instructed."

"My instructions were short - and in plain English - where possible."

"We have jurors apply the correct law in reaching their verdict."

"My instructions are prepared with 'plain English.' I have already put together a set of them."

Question 41 Continued

"Common sense. That is why I would write my own charges rather than copy verbatim some old passage from a 1922 supreme court decision."

"You must put the fodder down where the calves can get it."

"I usually charged the jury extemporaneously in plain English using an outline, but quoting applicable statutes. I felt this was better than reading a charge but to look the jurors in the eye."

"This is one reason we need to go back to drawing jury panels from the voter registration list and not from the driver's license pool."

"Obviously important for juries to understand instructions since they must apply the law to their determination of fact in order to arrive at a decision."

"Makes sense."

"No good is achieved to talk over the head of a juror."

"Better understanding should lead to better result."

"Anything that aids the jury in understanding and comprehending jury instructions allows the jury to perform its duty responsibly and thereby aids justice. Also, if a juror understands their duty and responsibility then the juror will feel better about the service as a juror."

"Very often jurors do not have a high school education."

"Needs no explanation."

"Even lawyers have trouble understanding some of them."

"That's what I try to do - explain law in simple, understandable terms."

"This needs explaining?"

"The jury decides facts and apply law - better they understand law or jury instructions."

"No explanation needed - most lay people find it easier to understand plain English than 'legalese' with which they are not familiar."

"The alternative is to have jurors who do not understand jury instructions - that is ludicrous!"

Question 41 Continued

"You have to understand they are not schooled in this area and you have to teach them with as simple language as possible."

"No explanation necessary."

"I think jurors should understand elements of a civil cause of action and a criminal offense."

"This should be obvious."

"If I didn't want the jury to understand the charge, why give it?"

"Needs no explanation"

"I think jurors, even with limited education, can understand if great effort is made to illuminate and give examples which do not intrude on the facts."

"Would insure a verdict based on the law."

"It is difficult enough for jurors to understand the English language, much less legal language"

"If a jury must apply legal principals it is appropriate that they have the capability of interpreting."

Federal respondents answered as follows:

"All jury instructions are worded for appeals courts, not jurors, hence jurors have some difficulty with the legal jargon."

"How could it be a bad idea for jurors to understand? How could it be a good idea for jurors not to understand?"

"Self-explanatory."

"This should be self-evident."

"The more 'conversational' the more comprehensible."

"I think we judges need to work very hard to make instructions understandable. It is the weakest part of a common law trial."

42. Would you favor or oppose South Carolina adopting pattern jury instructions?

Total number of respondents answering this question	59	
Respondents answered in the following manner	**Number**	**Percent**
A. I highly favor South Carolina adopting pattern jury instructions	19	32.2%
B. I somewhat favor South Carolina adopting pattern jury instructions	19	32.2%
C. I am neutral toward South Carolina adopting pattern jury instructions	12	20.3%
D. I somewhat oppose South Carolina adopting pattern jury instructions	6	10.2%
E. I highly oppose South Carolina adopting pattern jury instructions	3	5.1%
Total	**59**	**100.0%**

Number of state respondents answering this question	51	
Respondents answered in the following manner	**Number**	**Percent**
A. I highly favor South Carolina adopting pattern jury instructions	15	29.4%
B. I somewhat favor South Carolina adopting pattern jury instructions	16	31.4%
C. I am neutral toward South Carolina adopting pattern jury instructions	11	21.6%
D. I somewhat oppose South Carolina adopting pattern jury instructions	6	11.8%
E. I highly oppose South Carolina adopting pattern jury instructions	3	5.9%
Total	**51**	**100.0%**

Question 42 Continued

Number of federal respondents answering this question	8	
Respondents answered in the following manner	**Number**	**Percent**
A. I highly favor South Carolina adopting pattern jury instructions	4	50.0%
B. I somewhat favor South Carolina adopting pattern jury instructions	3	37.5%
C. I am neutral toward South Carolina adopting pattern jury instructions	1	12.5%
D. I somewhat oppose South Carolina adopting pattern jury instructions	0	0.0%
E. I highly oppose South Carolina adopting pattern jury instructions	0	0.0%
Total	**8**	**100.0%**

43. Would you favor or oppose the use of "plain English" techniques to make jury instructions more comprehensible?

Total number of respondents answering this question	59	
Respondents answered in the following manner	**Number**	**Percent**
A. I highly favor South Carolina using "plain English" techniques in jury instructions	44	74.6%
B. I somewhat favor South Carolina using "plain English" techniques in jury instructions	12	20.3%
C. I am neutral towards South Carolina using "plain English" techniques in jury instructions	3	5.1%
D. I somewhat oppose South Carolina using "plain English" techniques in jury instructions	0	0.0%
E. I highly oppose South Carolina using "plain English" techniques in jury instructions	0	0.0%
Total	**59**	**100.0%**

Question 43 Continued

Number of state respondents answering this question	51	
Respondents answered in the following manner	**Number**	**Percent**
A. I highly favor South Carolina using "plain English" techniques in jury instructions	37	72.5%
B. I somewhat favor South Carolina using "plain English" techniques in jury instructions	11	21.6%
C. I am neutral towards South Carolina using "plain English" techniques in jury instructions	3	5.9%
D. I somewhat oppose South Carolina using "plain English" techniques in jury instructions	0	0.0%
E. I highly oppose South Carolina using "plain English" techniques in jury instructions	0	0.0%
Total	**51**	**100.0%**

Number of federal respondents answering this question	8	
Respondents answered in the following manner	**Number**	**Percent**
A. I highly favor South Carolina using "plain English" techniques in jury instructions	7	87.5%
B. I somewhat favor South Carolina using "plain English" techniques in jury instructions	1	12.5%
C. I am neutral towards South Carolina using "plain English" techniques in jury instructions	0	0.0%
D. I somewhat oppose South Carolina using "plain English" techniques in jury instructions	0	0.0%
E. I highly oppose South Carolina using "plain English" techniques in jury instructions	0	0.0%
Total	**8**	**100.0%**

44. Which of the following best reflects your viewpoint?

Total number of respondents answering this question	33	
Respondents answered in the following manner	**Number**	**Percent**
A. I believe it is more important that jury instructions be legally accurate than understood by jurors	18	54.5%
B. I believe it is more important that jury instructions be understood by jurors than legally accurate	15	45.5%
Total	**33**	**100.0%**

Question 44 Continued

Number of state respondents answering this question	29	
Respondents answered in the following manner	**Number**	**Percent**
A. I believe it is more important that jury instructions be legally accurate than understood by jurors	15	51.7%
B. I believe it is more important that jury instructions be understood by jurors than legally accurate	14	48.3%
Total	**29**	**100.0%**

Number of federal respondents answering this question	4	
Respondents answered in the following manner	**Number**	**Percent**
A. I believe it is more important that jury instructions be legally accurate than understood by jurors	3	75.0%
B. I believe it is more important that jury instructions be understood by jurors than legally accurate	1	25.0%
Total	**4**	**100.0%**

45. Please briefly explain your answer to the previous question.

State respondents answered as follows:

"Instructions should be legally accurate so as to avoid any miscarriage of justice - explain, in plain English, to the jury until they stop asking for further instructions - if they need further clarification they will ask for it until they understand."

"I believe in a combination of A & B above. Instructions can be accurate and understood."

"Unless our appellate courts want to waive 'legal accuracy' in favor of understanding, the accuracy argument will always prevail. It is not impossible to achieve accuracy and understanding."

"We simply can't have erroneous jury instructions."

"Dumb question. It is more important that jury charges be legally accurate and understood by the jury."

"While it is necessary to keep the record accurate, this can be done while giving 'plain English' instructions. That is what I do with my instructions."

Question 45 Continued

"You forced me into A! The S.C. constitution and our oath of office require us to correctly (accurately) instruct the jury to the law. Also, we should not be presumptive and assume jurors cannot comprehend a charge. Look, a 'bunch' of jurors (I don't know how to quantify the number) either do not care to completely understand or are incapable of comprehending the entire charge; even lawyers will argue for hours over an instruction. Enough jurors get it and successful[ly] work it out in the jury room."

"Must be both!!"

"Both are needed but if jury doesn't understand legal accuracy does not assure correct results."

"In complicated cases, I felt I was charging the record, rather than the jury to protect the case on appeal."

"I believe it is equally important that an instruction be accurate and understandable, otherwise a decision may be based upon flawed logic."

"Instructions should be both legal[ly] accurate and understandable."

"Neither choice is acceptable. It must be both."

"Instructions must be legally accurate or reversal will occur. If you mean the use of verbatim legal phrases and terms and quotes, this is less important that [sic] an understanding. Instructions are damaging if not understood."

"Legal accuracy is an absolute standard which provides stability and predictability to the law - understanding of jurors is a subjective and flexible standard which varies according to the understanding of individual jurors. It must not form the standard against which the law is interpreted." **(Argument to this is that the two do not have to be mutually exclusive.)**

"If not accurate reversible. If not understood worthless." **This was the one judge who stated that state court judges already possess the discretion to provide written instructions to jurors.**

"There should be a combination of the 2 which would be understood and also accurate."

"I don't believe the choices to #44 are legally fair. The instructions should be understood and be legally accurate."

Question 45 Continued

"This is a difficult question. The instructions must be legally accurate. No judge likes to be reversed. By the same token, each judge wants the jury to understand his instructions."

"I believe both should be accomplished. Be legally accurate and understood by jury."

"To obtain a verdict that speaks the truth the jury must be given accurate information."

"Instructions should be legally correct and understandable - too often they are too technical."

"I believe they can be both."

"This is a stupid question!"

"I don't view these as mutually exclusive - both clarity and correctness can be achieved."

"If the jury does not understand, then the instructions are worthless."

"Jurors are lay people and should not expect to fully understand the law - judges don't always understand - that's why we have so many appellate courts."

"I believe you can have both - i.e. instructions that are legally accurate but that can also be understood by most jurors."

"Obviously, the law must be stated correctly - one would never obtain a just verdict according to the law and facts if the law were incorrect."

"Jury instructions must be legally accurate and understood by the jury. Anything less would result in possible prejudice - the law requires the charge be legally accurate and for a jury to do their job, they must understand what law to apply their findings of fact."

"I believe it is most important that jury instructions be understood and legally accurate."

"Really both - plain English can be legally accurate."

"Neither A or B are correct."

"They must be both."

Question 45 Continued

"I really believe both - the charge has to be expressed in a manner that is legally accurate and understood."

"Neither."

"Legally accurate while important is in vain if there is no understanding or comprehension."

"Both objectives can be achieved."

"I believe it most important that instructions be legally accurate and understood by juries."

"It is equally important that instructions be accurate and understood."

"Both are necessary."

"I think that instructions must be accurate however there is no reason why A & B are not both possible."

"I believe that the charges should be legally accurate and understood by jurors."

Federal respondents answered as follows:

"As long as appeals courts insist upon legal mumbo-jumbo, trial judges must comply with their wishes, although I do not agree with the present system of slavish adherence to ancient custom."

"Instructions can be legally accurate and understood by jurors."

"Both are necessary."

"I believe both are equally important."

"I do not believe it is an 'either-or' situation. Instructions must be legally accurate first and foremost but that does not mean archaic or difficult."

46. Please list the specific areas about which you have read in the area of jury reform.

State respondents answered as follows:

"Explain to the jurors the importance of jury service - how honorable it is to serve and how they help to promote justice and fair play to our fellow citizens."

"I can't recall specifics, but I have read about jury reform in many professional journals such as S.C. Bar, ABA, other printed media, written by lawyers, judges and laymen."

"National Judicial College Program jury qualification."

"Some jurisdictions require written instructions to the jury. If pattern charges are approved by the Supreme Court and kept current, that would be good."

"Jury nullification and its ramifications."

"Smaller trial jury (6 instead of 12 in civil cases). Each courthouse should have a jury assembly room apart from courtroom."

"Pattern jury charges and jury nullification."

"I didn't know that we needed to 'reform' the jury."

"I have read about pattern or model jury instructions, jurors asking questions, etc."

"I was on a jury reform study committee about 20 years ago - since then nothing in particular."

"Many ABA and law journals."

"Reno - info I received in that context."

Federal respondents answered as follows:

"Almost everything that has been published."

"Whether to allow jurors to question witnesses; have note, etc. Instructions suggestions - re form, copies, etc."

47. Please name any other areas of dealing with jurors you would like to see addressed in the future.

State respondents answered as follows:

"Do not give charge to the jury late in the afternoon because they are usually tired at that time and somebody will be denied true justice for lack of serious deliberation. The most important part of the trial is the verdict."

"For jurors to fully 'understand' instructions, we should revert to the registered voter qualification for jury service. The drivers license and I.D. card addition has diluted the quality of juries, and makes it very hard to find enough jurors to run court some terms!"

"Should jurors be advised of possible sentences and express their proposed range of sentences."

"None. The system is working. It is better than any alternative. It can be tweaked with here and there but I feel such adjustments are and have been done over the years to keep the jury system in tune."

"Shortening jury trials. Give trial judges discretion to define the issues."

"There are too many reversals and remands."

"Use ADR more effectively. Require ADR. More terms of court and pre-trial conferences (with written orders that resolve evidentiary & procedural issues)."

"In civil cases, reduce juries to 6 people."

"Increase use of summary courts and masters by mandating trials of certain cases."

"Reduce discovery. Lawyers are abusing it."

"Limit jury service to registered voters."

"Basic educational requirements."

"Limit number 12 is too many. No need for unanimity in civil cases."

"How to make jurors feel comfortable in the courtroom. A comfortable juror, generally is a 'thinking' juror - able to 'do justice.'"

Question 47 Continued

"Use of juror time must always appear important. At the end of a week or term, court should talk to jury panel and explain areas or matters which jurors had question about without being case specific as nearly as possible."

"Revoke the driver's license qualification and return to selecting only from the voter registration list."

"I would like to see non-unanimous verdicts in criminal cases - many states permit 10-2 verdicts in criminal cases."

"Better pay."

"Requirement - must be registered voters."

"If you are to deal with jurors you first must have jurors that can be dealt with. Our procedure for selecting jury pools needs to be changed. Judges and lawyers are held to certain standards. If a jury is to be the final arbiter, they as individuals should meet certain standards to assure not only fairness and impartiality but certain qualities."

"Giving jurors capacity to take notes; preliminary instructions & definitions and allowing jurors to ask questions."

"The attorneys should be allowed to talk with jurors if the jurors want to talk and/or the judge."

Federal respondents answered as follows:

"Quit treating jurors like idiots. We send a message of distrust when we have to sequester them, lock them up for days or weeks and generally treat them as criminals. I have never locked up a jury overnight and never intend to. Incidentally, I've never been reversed on this ground during my 20 years as a trial judge."

"Allowing juror questions to witnesses after screening by trial judge."

"Jurors being allowed to take notes and pose written questions (screened by courts)."

"Treat jurors as 'judges' of the facts - do not patronize them. Explain fully the developments and rulings as the trial progresses."