The Problematic Nature of Jury Instructions in Death Penalty Cases

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A fundamental assumption of the Anglo-American jury process is that a jury will be capable of performing its obligation to apply the law to the facts of a case and return a fair verdict. There is abundant evidence, however, that often jurors are unable to understand the nature of their duties, let alone carry them out. Since the task of informing the jury of its responsibilities is assigned to the judge, those who want to remedy the situation have focused on the judge's instructions to the jury. The initial response of the legal community has been to draft pattern jury instructions, which are standardized but often still incomprehensible. Psycholinguists have concentrated on the language of jury instructions, improving the form and weeding out the "legalese." But neither approach has been able to address the questions jurors ask when they are forced to reconcile their ways of decision making and morality with that of the judicial system.

In this paper I examine the problematic nature of jury instructions from several methodological angles. I intend to address the reaction of three communities to the problem of jury instructions: the legal community, the academic community and the lay community. A look at the history of legal language and it's defining features comprises the first part of the paper. The second part is devoted to understanding the origin of the problem by examining how the legal community and lay community interact, using an ethnomethodological perspective. In the third part of the paper, the psycholinguist's reaction to inadequate jury instructions is demonstrated by applying the research to an actual set of instructions and evaluating the insight that this sort of an
analysis can provide. The fourth part of the paper is a review of an appeal by a man condemned to death by Illinois jurors, who is basing his case on the fact that jury instructions used in sentencing were both confusing and presumed a verdict of death. Finally, the fifth part of the paper details the response of jurors themselves to both the instructions and the attempts to improve them by lawyers and linguists. This is accomplished by examining both the types of questions which jurors have actually asked while deliberating, and judicial responses to these questions. By working within the framework of three different communities, with three different approaches, it will be easier to see the directions that future work on jury instructions might take. Without this three-pronged approach, it is easy to remain closed-minded as to the direction from which change and improvement should come.

Part I- Legal Language

One of the insidious qualities of legal language in the Anglo-American judicial tradition is that, on its surface, it appears to be English. Therefore, a native speaker of English, presented with some bit of legal language, is likely to assume that he or she is able to understand it, although it may require some extra effort.

But in reality, without legal training, a lay person is extremely unlikely to be able to “translate” a passage of legal text into standard English correctly. A problem arises when both those in the legal community and those in the lay community fail to appreciate this gulf in understanding. By perpetuating the myth that legal language is comprehensible to all speakers of English, both
communities ignore the flawed nature of a judicial system whose participants are unable to carry out their duties.

Legal language is both a written and spoken language. It is a professional language used by lawyers and judges and legal scholars in the execution of their various duties. It is also the written language of statutes, judicial opinions and law books. Both forms differ in many ways from ordinary English, especially at the level of the lexicon.

David Mellinkoff (Mellinkoff, 1963) proposed a number of characteristics that distinguish legal language. These include:

“frequent use of common words with uncommon meanings..., frequent use of Old English and Middle English words once in common use, but now rare..., frequent use of Latin words and phrases..., use of Old French and Anglo-Norman words which have not been taken into the general vocabulary..., use of terms of art..., use of argot...,” and “deliberate use of words and expressions with flexible meanings” (Mellinkoff, 1963).

Terms of art are marked, technical words with specialized meaning, such as “contributory negligence” or “injunction”. (Mellinkoff,1963). For those in the legal community, terms of art have a specific, understandable meaning, as opposed to other legal terms which are used in a more flexible and contextual way. Those outside the legal community do not understand the term but recognize it as a marker of legal language.

Argot, as defined by Mellinkoff, is the use of terms of art at the discourse level. It is the discourse strategies employed by lawyers and judges when communicating with other lawyers and judges. Examples include the codified rules of speech used when making an objection, the types of turn-taking allowed
in a courtroom, the peppering of one's speech with terms of art or the stylistic employment of a formal, high register. The result is a code or dialect that can be switched into or out of quickly by legal professionals, and that is easy to recognize, even by those outside the circle of its usage.

Mellinkoff defines other characteristics of legal language more subjectively, citing it as “wordy,” “unclear,” “pompous” and “dull” (Mellinkoff, 1963). He attributes these characteristics to redundant descriptions, extremely long and complex sentences, ambiguous words and constructions and an inflated sense of importance underlying the simplest of phrases (Mellinkoff, 1963). The syntactic and organizational characteristics of legal language are explored in greater detail in Parts III and IV.

Part II: The Legal Community’s Response

If jury instructions originate from the legal community, then we should now look at the methodology of that community to discover why jury instructions frequently are not entirely clear. How has the legal community historically responded to claims that jury instructions are difficult to understand?

Originally, instructions to the jury were drafted on a case-by-case basis. To eliminate the need for this constant redrafting, some jurisdictions created commissions that were instructed to create “pattern” jury instructions. These would be a standard set of instructions that could be used for many different cases, in the hope that this would eliminate redundant rewriting of instructions and result in fewer appellate reversals due to misstatements of the law. The commissions succeeded in making a set of standardized instructions that were
legally accurate. Still, these “pattern” instructions were sometimes incomprehensible to juries.

Harold Garfinkel’s article, “‘Good’ Organizational Reasons for ‘Bad’ Clinic Records” can serve as a model for the problems encountered when the agenda of the legal community does not match jurors’ concerns. Garfinkel looked at the “normal, natural troubles” that arose for researchers trying to obtain information from clinical records. He found that clinic workers had established ways of reporting their activities, integral to the normal functioning of the clinic, that have become, for the workers, the “right” way of doing things. The normal, natural troubles occur when a researcher looks at the clinical files to try to answer questions that are not important to the practical routine or theoretical purpose of the clinic. The “right” way of doing things for the clinic worker is not necessarily the “right” way of doing things from the researcher’s standpoint. Often clinic workers are aware of the shortcomings of the clinical filing system, but their need to accomplish certain tasks within a limited time does not allow these workers the space to correct those shortcomings. Clinic workers remain faithful to the reporting practices of their own community. (Garfinkel, 1967)

The analysis applied to clinic workers and outside researchers may also be applied to the relationship between those in the legal community and those in the lay community. Like the clinic workers, lawyers and judges have established a “right” way of doing things, based on legal accuracy and precedent. In creating documents they make use of a system of heuristics (i.e. legal jargon) to represent complex legal concepts. Any document, in order to be considered “good,” should present the relevant concepts using these heuristics. A document should rely
upon precedent to determine what is accurate and what is not. Examples of this can be seen in statements by judges regarding the role of one kind of document: jury instructions. "...if the totality of the instructions fairly and accurately state the applicable law, they are sufficient." "When reviewing jury instructions, we look at all the instructions as a whole and, if they provide a full and correct statement of the law applicable to the case, the instructions are not erroneous." "A trial court has broad discretion in formulating its jury instructions, provided they are an accurate reflection of the law and the facts of the case." "Jury instructions should fairly and accurately state the law while being concise, impartial, free from argument and not misleading." These statements make perfectly clear the approach preferred within the judicial system and the legal community.

Like the clinic workers, judges have a responsibility to fulfill the obligations imposed on them by their community: the judicial system. This responsibility takes precedence over other duties that those outside the community would impose upon judges. From the judge's perspective, the needs of the legal community cannot be sacrificed to stylistic demands. The primary objective of writing jury instructions in the legal community, quite simply, is to accurately state the law.

Knowing the basis upon which judges and lawyers evaluate the worth of jury instructions, it is not surprising that those instructions are not easy for jurors to understand. The jury instructions are not actually directed to jurors. Instead, they are directed to appellate courts which will evaluate the worth of the instructions not on clarity to lay people, but on their legal accuracy.
Garfinkel notes that once the "normal, natural troubles" have been discovered, they are extremely difficult to get rid of:

"Let the investigator attempt a remedy for shortcomings and he (sic) will quickly encounter interesting properties of these troubles. They are persistent, they are reproduced from one clinic's files to the next, they are standard and occur with great uniformity as one compares reporting systems of different clinics, they are obstinate in resisting change, and above all, they have the flavor of inevitability. This inevitability is revealed by the fact that a serious attempt on the part of the investigator to remedy the state of affairs, convincingly demonstrates how intricately and sensitively reporting procedures are tied to other routinized and valued practices of the clinic. Reporting procedures, their results, and the uses of these results are integral features of the same social orders they describe. Attempts to pluck even single strands can set the whole instrument resonating. (Garfinkel, 1967)."

This description should seem familiar to anyone who has tried to resolve the problems encountered by lay people when dealing with the legal community. Just as reporting procedures are entangled with other values and routine practices of the clinic, the writing of jury instructions falls under the norms and practice of legal language and the protocol of the court. An attempt to change procedure at the level of the instructions calls into question the entire legal methodology.

Problems of comprehensibility persist, therefore, because merely affirming their existence does nothing to eliminate them. In order to allow judges to write better instructions, there must be a shift in the goals of the legal community. The definition of legal accuracy should be expanded to include the proposition that jurors must be able to understand the instructions.
At present, there is little if any motivation for judges to make jury instructions understandable, either by rewriting them or by addressing questions raised by the jury in plain English. Verdicts have been overruled by appellate courts when the judge has attempted to make the instructions more understandable. In addition, where the thesis underlying appellate review is the "incomprehensibility" of instructions given to a jury, those appeals have rarely been successful (although one initially successful bid for appeal is described later in this paper). The safest course for a judge to take in addressing questions from the jury is to reread the instructions word for word, hardly an adequate response from the viewpoint of the jurors.

The solution lies in making the goals and practice of the legal community include the needs of jurors. Once incorporated into the functioning of the legal community, the needs of jurors would be as faithfully attended to as the need for legal accuracy. How might this come about? Judges need to revise instructions for comprehensibility or they should supplement the legal instructions with an explanation that jurors can understand. Judges should also make it clear to juries that they are allowed to ask questions. Appellate courts need to be tolerant of these attempts to make instructions less confusing, and in addition, allow for the overturning of verdicts in cases where jurors misunderstood the instructions. But how are those in the legal community to draw up guidelines for writing comprehensible jury instructions? After all, legal professionals are trained to be experts in the field of law, not language. Enter the linguists.

Part III-The Academic Community's Response
We have seen how the legal community has responded to the problem of jury instructions. Those outside of the legal community may be separated into two groups, lay people who are selected for jury duty and academics, including psychologists, linguists and sociologists.

Academics have taken part in the debate over jury instructions in several roles. Some perform studies that demonstrate that existing instructions are faulty. Others write new instructions based on these studies and on general psycholinguistic principles of comprehensibility. Others serve as expert witnesses in cases under appeal due to questions of the soundness of the jury instructions used in the original case. In general, the role of the academic is to point out problems and to come up with alternatives supported by psycholinguistic research.

The discussions of juror comprehension that occurred before 1970’s included little concrete evidence for the claims that instructions were badly written. The difficulties were blamed on “legalese,” the style of language used by lawyers and judges in the courtroom, without defining what legalese was or exactly how it decreased comprehension (Charrow & Charrow, 1979). “Plain English” laws were enacted in several states, requiring that legal documents be written in understandable language, without providing a methodology for how to do so (Charrow & Charrow, 1979). Attempts to quantify juror comprehension were mostly limited to word frequency dictionaries and readability tests (Charrow & Charrow, 1979), which were largely irrelevant since most instructions are given orally.

Near the end of the 1970’s, several teams of researchers began to conduct
serious research into the area of juror comprehension of instructions. They approached the problem with a decidedly psycholinguistic perspective. Their agenda was to prove that standard jury instructions were difficult to understand, that this misunderstanding was due to the way the instructions were written (i.e. the linguistic constructions used) and that comprehension could be improved by rewriting the instructions in language that was less problematic.

The team of Robert and Veda Charrow used the paraphrase method for testing comprehensibility of standard jury instructions from California (Charrow & Charrow, 1979). Subjects listened to the original instructions and were scored on their ability to correctly paraphrase the important legal concepts. Using these scores and a linguistic analysis of the original instructions, the Charrows developed revised instructions and tested them on new subjects. They found that jurors frequently did not understand the original instructions, and that the revised instructions were better understood by a second group of jurors (Charrow and Charrow, 1979).

Amiram Elwork and Bruce Sales, who, along with James Alfini, have contributed much research to the field, used an approach that looked at the effect of jury instructions upon subsequent juror deliberation (Elwork & Sales, 1985). The jurors saw a video-taped trial, and deliberated in six person groups. One half were given the original instructions and one half were given instructions revised according to psycholinguistic variables. They found that jurors who were given the original instructions were confused, failed to discuss critical issues and focused on legally irrelevant issues (Elwork & Sales, 1985).

Phoebe Ellsworth and her colleagues administered a true-false test to
subjects who had viewed a mock trial and then deliberated in groups. On average the subjects correctly answered only 11.7 out of 18 questions, about the same as random guessing (Ellsworth, 1989). The researchers also watched tapes of the deliberation process and coded statements that jurors made about the law into three categories: correct, incorrect or unclear. Only 51 percent of the statements jurors made were coded as correct. 28 percent were coded as unclear and 21 were coded as incorrect (Ellsworth, 1989).

Severance and Loftus (Severance & Loftus, 1982) used an interdisciplinary approach to their studies of comprehension. They began by using questions submitted by deliberating juries to judges. They used these questions to pinpoint legal concepts within instructions that jurors found confusing. They then wrote alternate instructions using psycholinguistic principles, and asked lawyers and judges to review the rewritten instructions for legal accuracy. Finally, the revised instructions were tested against the original instructions to see if any increase in comprehension was achieved (Severance & Loftus, 1982). They found that the revised instructions were comprehended better than the original instructions, and that juries who were give the new instructions were more effective at applying the law. However, the new instructions could not completely eliminate errors of comprehension or application (Severance & Loftus, 1982).

What are the principles that psycholinguists are using to rewrite instructions? Bruce Sales, Amiram Elwork and James Alfini (Sales et al., 1977), provide a good framework of psycholinguistic variables which may be used to rewrite instructions. I have applied their framework here to a set of instructions given to juries in Ohio who are deciding whether a defendant convicted of a crime
should be sentenced to life imprisonment or the death penalty. I have used examples from these instructions to illustrate the types of psycholinguistic variables that Sales et al. have identified as crucial in determining the readability of instructions. The original instructions follow:

Ohio Jury Instructions in Death Penalty Trials

Members of the jury, you have heard the evidence and the arguments of counsel and you will now decide whether you will recommend to the court that the sentence of death shall be imposed upon the defendant and if not, whether you will recommend that the defendant be sentenced to life imprisonment with parole eligibility after serving twenty full years of imprisonment or to life imprisonment with parole eligibility after serving thirty full years of imprisonment. You will consider all the evidence, arguments, (the statement of the defendant), (the pre-sentence investigation) (the mental examination report) and all other information and reports which are relevant to the nature and circumstances of the aggravating circumstance(s) [e.g., killing the president of the USA, killing for hire, killing to escape capture or trial, killing two or more persons, killing a peace officer, killing while committing rape, aggravated arson, etc., or killing a witness to a crime] or to any mitigating factors including but not limited to the nature and circumstances of the offense and the history, character, and background of the defendant and all of the following (RC § 2929.04 (B)):

(1) Whether the victim of the offense induced or facilitated it;
(2) Whether it is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion or strong provocation;
(3) Whether at the time of committing the offense, the defendant, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law;
(4) The youth of the defendant;
(5) The defendant’s lack of a significant history of prior criminal convictions and delinquency adjudications;
(6) If the defendant was a participant in the offense but not the principal offender, the degree of the defendant’s participation in the offense and the degree of the defendant’s participation in
the acts that lead to the death of the victim;

(7) Any other factors that are relevant to the issue of whether the defendant should be sentenced to death.

2. BURDEN. The prosecutor has the burden to prove beyond a reasonable doubt, that the aggravating circumstances of which the defendant was found guilty outweigh the factors in mitigation of imposing the death sentence. To outweigh means to weigh more than, to be more important than. The existence of mitigating factors does not preclude or prevent the death sentence, if the aggravating circumstances outweigh the mitigating factors.

3. REASONABLE DOUBT. Reasonable doubt is present when, after you have carefully considered and compared all the evidence, you cannot say you are firmly convinced of the truth of the charge. Reasonable doubt is a doubt based on reason and common sense. Reasonable doubt is not mere possible doubt, because everything relating to human affairs or depending on moral evidence is open to some possible or imaginary doubt. Proof beyond a reasonable doubt is proof of such character that an ordinary person would be willing to rely and act upon it in the most important of his own affairs.

4. CONCLUSION: you shall recommend the sentence of death if you unanimously (all twelve) find by proof beyond a reasonable doubt, that the aggravating circumstances outweigh the mitigating factors.

   If you do not so find, you shall unanimously recommend either life sentence with parole eligibility after serving twenty years of imprisonment or life sentence with parole eligibility after serving thirty years of imprisonment.

Vocabulary

1. “High Frequency versus Low Frequency Words”

Words which do not appear often in discourse are more difficult to process and remember than words which appear frequently (Sales et al, 1977). In the instructions above, low-frequency words in a phrase such as “whether the victim induced or facilitated it” could be replaced with more familiar synonyms or a longer phrase, i.e., “whether the victim caused it to happen or made it more
likely to happen.”

2. “Homonyms”

Words that are spelled and pronounced alike, but have different meanings are called homonyms. They can be confusing to jurors when it is not clear which meaning is intended by the judge (Sales et al, 1977). An example from the above instructions is the word “appreciate” which is used in legal terminology to mean “understand” or “recognize,” but is colloquially used more often to express gratitude. The instruction could be rewritten this way, “Whether at the time of committing the offense, the defendant, because of a mental disease or defect, lacked substantial capacity to \textit{recognize} the criminality of his conduct or to conform his conduct to the requirements of the law;

3. “Antonyms”

Antonyms formed by affixing a negative modifier to a favorable word are more difficult to process than antonyms that contain a different root (Sales et al, 1977). In this following instruction, the negatively modified “unlikely” has been changed to an antonym with a different root. “Whether it is doubtful that the offense would have been committed, but for the fact that the offender was under duress, coercion or strong provocation;”

4. “Negation”

Affirmative sentences are easier to understand than negative sentences, especially if there is more than one negator in the sentence. Examples include the instruction mentioned immediately above, which contains the negators
"unlikely" and "but. It could be rewritten as an affirmative sentence, "Whether the fact that the offender was under duress, coercion or strong provocation led the offender to commit the offense."

5. "Legal Jargon"

Although legal jargon is regarded by many in the legal community as performing a vital function of defining complex legal concepts, and indispensable to the practice, it serves only to confuse jurors who are not privy to the legal background which lawyers and judges have (Sales et al, 1977). In the following instruction, a unessential jargon word "adjudications" is replaced with a more familiar word, "The defendant's lack of a significant history of prior criminal and delinquency convictions."

6. "Sentence Length and Complexity"

It is logical to assume that the longer and more complex a sentence is, the more difficult it will be to process and remember. However, length is not as important as complexity, and certain kinds of constructions are more complex that others (Sales et al, 1977). Sentences may be simple, compound, self-embedded or compound self-embedded, the latter two types being the most difficult to process (Sales et al, 1977). Self-embedded sentences may have adverbial, relative or complement clauses which are right-branching, left-branching or center embedded (Sales et al, 1977). Only one subordinated clause should be used in a sentence, and left-branching and center embedded clauses should be avoided altogether (Sales et al, 1977). The first sentence of the Ohio jury
instructions has well over one clause.

Members of the jury, you have heard the evidence and the arguments of counsel and you will now decide whether you will recommend to the court that the sentence of death shall be imposed upon the defendant and if not, whether you will recommend that the defendant be sentenced to life imprisonment with parole eligibility after serving twenty full years of imprisonment or to life imprisonment with parole eligibility after serving thirty full years of imprisonment.

It can be rewritten this way:

Members of the jury, you have heard the evidence and the arguments of counsel. You must now decide whether you will recommend to the court that the sentence of death shall be imposed upon the defendant. If not, you must decide whether you will recommend that the defendant be sentenced to life imprisonment with parole eligibility after serving twenty full years of imprisonment or after serving thirty full years of imprisonment.

Although the length is roughly the same (76 versus 71 words) the second version should be much easier to understand.

7. “Holistic organization”

A document that presents ideas in a well organized fashion will be better remembered than one which fails to delineate where one concept ends and the next begins (Sales et al, 1977). The aggravating circumstances and mitigating factors are crucial to the deliberation process in a death penalty case, and yet in the instructions above they are presented in one enormous sentence, in a series of parenthetical lists and “e.g.’s”. A more sensible arrangement might look like this:
In deciding your verdict, you will consider all the information which has been presented to you so far. This includes:

1. the evidence and arguments
2. the statement of the defendant
3. the pre-sentence investigation
4. the mental examination report

You will also consider all other information and reports which are relevant to the nature and circumstances of the aggravating circumstance. Examples of aggravating circumstances include but are not limited to:

1. killing the president of the USA,
2. killing for hire,
3. killing to escape capture or trial,
4. killing a peace officer,
5. killing while committing rape, aggravated arson, etc.
6. killing a witness to a crime.
7. killing two or more persons

You will also consider any mitigating factors. These may include but are not limited to the nature and circumstances of the offense and the history, character, and background of the defendant. You should also consider if any of the following mitigating factors apply:

Although the changes made here were designed primarily as examples and are not comprehensive, they still seem make a noticeable improvement in comprehensibility. The real test of these revised instructions, however, would be to see whether they are able to instruct jurors on critical points of law.

See Appendix A for a version of these instructions which contains all the revisions made here.

Part IV- The James P. Free Case

Up to this point I have looked at the problem of jury instructions in a generalized, abstract way, as the relation between three communities: the legal
profession, the academy and the community-at-large. But there is another figure in this debate. The real purpose of the entire judicial process is to determine the fate of the defendant, to try his or her case and, if he or she is found guilty, to determine a sentence. If jury instructions are less than perfect, or if indeed they are seriously flawed, the final measure of those instructions rests with the defendant. Nowhere is this more true than in the case of a person who has been convicted and sentenced to death.

In the last section, the set of jury instructions used to demonstrate the psycholinguistic variables relevant to comprehensibility was a set of instructions to a jurors who were deciding whether the crime committed by the defendant warranted the death penalty. The defendant had already been convicted of his or her crimes by a different jury. These instructions are given to jurors to determine sentencing, whether the defendant will be required to spend his or her life in prison, or whether he or she will be put to death. In this set of instructions, therefore, the problematic nature of jury instructions suddenly acquires an even greater urgency. Instructions that confuse the jury or presume a verdict are obstructions to justice, and a matter of life and death.

This was the thesis motivating the appeal of a death penalty case in the US District Court, Northern District of Illinois, Free v. McGinnis (U.S. Ex Rel Free v. McGinnis, 1992). Here are the facts of the case:

*In 1979, James P. Free Jr. is convicted by an Illinois court of one count of murder, one count of attempted murder and two counts of attempted rape (Levi, 1992).

*The jury which hears the sentencing phase of his trial returns a death
penalty verdict. Free makes numerous appeals, all of which are rejected by the State of Illinois, until he files a habeas corpus petition in 1989 (Levi, 1992).

*Three of the 21 grounds on which Free bases his petition concern the jury instructions used in the sentencing portion of his trial, and it is to these three grounds which Judge Marvin E, Aspen responds (Levi, 1992). He directs the US District Court Magistrate Judge Bernard Weisburg to hold evidentiary hearings to determine whether the Illinois death penalty statute violated Free's Eighth Amendment rights by allowing the death sentence to be imposed on him arbitrarily and without proper guidance (U.S. Ex Rel Free v. McGinnis, 1992).

*As an independent research project, Hans Zeisel, Professor Emeritus of Law and Sociology at the University of Chicago, conducts a survey of potential jurors, using the facts from the Free case, to determine the juror's ability to comprehend the Illinois Pattern Jury Instructions for capital sentencing, which were extremely similar but not identical to the instructions used in Free's sentencing (Levi, 1992).

*Free attempts to use the findings from Zeisel's survey as evidence to prove his claims that the jury instructions used in his case and the Illinois Death Penalty Act (1) presume death as the default verdict; (2) are vague and confusing to a degree that is unconstitutional and (3) violate Free's Eighth and Fourteenth Amendment rights by imposing the death sentence arbitrarily (Levi, 1992).

*After initial arguments that the Zeisel survey was inapplicable to the case
because the two sets of jury instructions were not comparable, Zeisel runs his survey again using the exact instructions used in the original Free case (Levi, 1992).

The defense put together a team of social scientists to testify at the evidentiary hearings that the jury instructions used in the Free case were confusing to jurors. Included was a linguist, Judith Levi, who was added by the defense attorneys in order to:

"identify features of the language of the instructions that, in my professional opinion, were likely to have caused the confusion so well documented by Zeisel;...to show that such an independent linguistic analysis not only reinforced but also explained the findings of the Zeisel survey;...to introduce expert testimony concerning the similarities and differences between the instructions used by Zeisel and those used by the Free judge, and their significance in the current context; and...to use my comparative analysis to argue that the results of the Zeisel survey were indeed applicable to the Free case-despite the State's attempts to claim that the differences rendered the Zeisel study wholly irrelevant.(Levi, 1992)"

Levi found, in her analysis, that the idea of the death sentence as the normal or default verdict was manifest in the syntax, semantics, pragmatics and discourse organization of the instructions (Levi, 1992). In addition, she found that there were confusing elements in each of the above linguistic categories (Levi, 1992).

**Syntax**- Levi found multiple instances of negatives, including overt negatives like “no” and “not”, and covert negatives like the word “deny” which has a negative embedded within it’s meaning (Levi, 1992) In addition she found cases where critical legal concepts were embedded in subordinate clauses within lengthy sentence, making them much less likely to be remembered by the jury

**Semantics** - In the semantic arena, Levi found problems in the instructions caused by vocabulary items that jurors might be familiar with but unable to define ("preclude" being her test example), by ambiguous word like "you" which may take a singular or plural reading, and by vague words like "sufficient," which without proper context are meaningless to jurors (Levi, 1992). These problems are not minor stylistic flaws, they are critical to proper interpretation of the state's statute on the death penalty.

**Discourse Organization** - Levi found the ordering of many of the instructions to be problematic. Key legal terms (like mitigating factor) were used in the instructions long before they were defined, making it more difficult for jurors to parse the instructions and store them in long term memory (Levi, 1992). In addition to this lack of organization, examples of important legal concepts such as the mitigating factor and aggravating factor were either few or none (Levi, 1992).

**Pragmatics** - According to Levi, the Free instructions had problems of pragmatics because they required the jurors to infer all but a few of the critical legal points of the law (Levi, 1992). The jurors were not given adequate information to make these inferences (Levi, 1992), and, if the instructions are to be considered comprehensible, should not have to make any inferences at all, but instead should be instructed *directly* on important legal concepts.

After the testimony of the Zeisel surveys and that of the other social scientists had been heard, Magistrate Weisburg handed down his final recommendation to Judge Aspen:
"...The issue here is whether the instructions given to the Free jury provided adequate guidance under the Constitution. We conclude that such guidance was not given to the Free jury, nor do the IPI instructions provide such guidance to other juries in Illinois... We conclude that the Illinois statute, as implemented through these jury instructions, permits the arbitrary and unguided imposition of the death sentence and that Free's sentence was imposed in violation of the Eighth and Fourteenth Amendments. (Levi, 1992)."

Judge Aspen adopted the magistrate's recommendation and granted Free's petition for habeas relief, lifting the sentence of death. However, the case has been appealed, and continues to move through the legal system. James P. Free is not yet free.

Part V- The Lay Community's Response

It is not difficult to determine the perspective of the legal community on the status of jury instructions. It may be read from the instructions themselves or from the opinions written by judges regarding the fate of cases appealed on the grounds that jurors did not understand the instructions. The scholastic community has also made it's position clear in the articles published in law reviews and texts on psychology.

But it is much harder to determine the response that a lay person has when attempting to use jury instructions to make his or her decision. The average juror is much more concerned with trying to understand the instructions than he or she is concerned with pinpointing exactly why he or she finds them hard to comprehend. Most jurors do not have access to scholarly journals or law
reviews, even if they wished to utilize them to recount their experiences in the courtroom.

But it is possible to gain some insight into the reactions of jurors to impenetrable jury instructions. Although often jurors are not explicitly told that they may ask questions of the judge (although they are entitled to), when they cannot answer a question themselves, they frequently submit a written inquiry to the judge. These questions become part of the legal record of a trial, at least in some jurisdictions, and are therefore accessible to anyone interested. Laurence Severance and Elizabeth Loftus collected questions submitted by 99 juries to judges in the Superior Court of King County, Washington, in order to target legal concepts which particularly troubled jurors, (Severance & Loftus, 1982). Here are a few of the questions asked by juries along with the answer given by the judge (Severance & Loftus, 1982).

<table>
<thead>
<tr>
<th>Jury</th>
<th>Judge</th>
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</thead>
<tbody>
<tr>
<td>“Is there such a thing as assault without intent?”</td>
<td>“See the instructions.”</td>
</tr>
<tr>
<td>“If part of the witnesses’ testimony is perceived as unbelievable, should we generalize that all of their testimony is unbelievable and therefore non-credible?”</td>
<td>“You must rely on your instructions and your memories.”</td>
</tr>
<tr>
<td>“Does the [pattern] intent instruction mean ‘to accomplish any action which results in a crime’?”</td>
<td>“The court cannot clarify any instructions.”</td>
</tr>
</tbody>
</table>

These questions indicate that jurors’ difficulties go far beyond problems with single words or problems with recall. Rather, jurors are coming up against
the fact that, although not trained in the law, they are being asked to wield it. Admirably, they attempt to clarify issues of law which they do not understand. But the system usually only allows reference back to the original instructions (which were inadequate to begin with).

Here is where the limit of the psycholinguistic approach is reached. Instructions that have been revised according to psycholinguistic principles will indeed be shorter, clearer, and easier to remember than traditional instructions.

But revised instructions are still flawed if they contain words whose definition in legal contexts is vague. Easy-to-read instructions will not be helpful to a juror who is trying to decide the proper context to situate certain ambiguous or vague referents.

In addition the researchers themselves admit that making the instructions more comprehensible and getting the jury to apply the law correctly are separate tasks. Jurors are still left to grapple with fitting their personal sense of justice and morality with that of the legal system. Consider the following revised “pattern” instruction from Maricopa County, Arizona (Noyes, 1991):

**Personal Injury Damages**

**Damages for Wrongful Death of Spouse, Parent or Child**

If you find defendant liable to plaintiff, you must then decide the full amount of money that will reasonably and fairly compensate (name of each survivor) [separately] for each of the following elements of damages proved by the evidence to have resulted from the death of (name of decedent).

1. The loss of love, affection, companionship, care, protection and guidance since the death and in the future.
2. The pain, grief, sorrow, anguish, stress, shock, and mental suffering already experienced, and reasonably probable to be experienced in the future.
3. The income and services that have already been lost as a result of the death, and that are reasonably probable to be lost in the future.
4. The reasonable expenses of funeral and burial.
5. The reasonable expenses of necessary medical care and services for the injury that resulted in the death.

There is no unnecessary legal jargon in this instruction, the sentences are not unduly long or complicated, and the organization is clear and straightforward. Yet this does not help the juror wrangle with the issue of deciding what is “reasonable compensation” for loss of love and affection, or how to put a monetary value on “companionship, care, protection and guidance.” Neither the judge nor the linguist can resolve this question for the juror.

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The problem of jury instructions begins in the legal community and ends with the juror and the fate of the defendant on trial. In this paper I have tried to look at the origins of the problem in the legal community, examine how it has been mediated by the scholastic community, and understand how it is still an obstacle for the lay community. It is clear that the problem will not be solved by any one approach. Lawyers, linguists and lay people must cooperate, each bringing their perspective to the debate, until a compromise is reached.
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Notes


2. **First Western Bank, Sturgis, v. Livestock Yards Co.**, 466 N.W.2d 853, 858 (S.D.1991)


5. These instructions were presented in a handout at a lecture given by Michael Geis, in the Language and Human Affairs lecture series, during the 1993 Linguistic Society of America’s Linguistic Institute.
Appendix A - Revised Instructions

(new wording is in italics)

Ohio Jury Instructions in Death Penalty Trials

Members of the jury, you have heard the evidence and the arguments of counsel. You must now decide whether you will recommend to the court that the sentence of death shall be imposed upon the defendant. If not, you must decide whether you will recommend that the defendant be sentenced to life imprisonment with parole eligibility after serving twenty full years of imprisonment or after serving thirty full years of imprisonment.

In deciding your verdict, you will consider all the information which has been presented to you so far. This includes:

1. the evidence and arguments
2. the statement of the defendant
3. the pre-sentence investigation (and)
4. the mental examination report

You will also consider all other information and reports which are relevant to the nature and circumstances of the aggravating circumstance. Examples of aggravating circumstances include but are not limited to:

1. killing the president of the USA,
2. killing for hire,
3. killing to escape capture or trial,
4. killing a peace officer,
5. killing while committing rape, aggravated arson, etc.
6. killing a witness to a crime.
7. killing two or more persons

You will also consider any mitigating factors. These may include but are not limited to the nature and circumstances of the offense and the history, character, and background of the defendant. You should also consider if any of the following mitigating factors apply:

(1) Whether the victim of the offense caused it to happen or made it more likely to happen;
(2) Whether the fact that the offender was under duress, coercion or strong provocation led the offender to commit the offense.
(3) Whether the defendant, because of a mental disease or defect, lacked substantial capacity to recognize the criminality of his behavior or to conform his conduct to the requirements of the law;
(4) The youth of the defendant;
(5) The defendant’s lack of a significant history of prior criminal and delinquency convictions;
(6) If the defendant was a participant in the offense but not the principal offender, the degree of the defendant’s participation in the offense and the degree of the defendant’s participation in the acts that lead to the death of the victim;
(7) Any other factors that are relevant to the issue of whether the defendant should be sentenced to death.
2. BURDEN. The prosecutor has the burden to prove beyond a reasonable doubt, that the aggravating circumstances of which the defendant was found guilty outweigh the factors in mitigation of imposing the death sentence. To outweigh means to weigh more than, to be more important than. The existence of mitigating factors does not preclude or prevent the death sentence, if the aggravating circumstances outweigh the mitigating factors.

3. REASONABLE DOUBT. Reasonable doubt is present when, after you have carefully considered and compared all the evidence, you cannot say you are firmly convinced of the truth of the charge. Reasonable doubt is a doubt based on reason and common sense. Reasonable doubt is not mere possible doubt, because everything relating to human affairs or depending on moral evidence is open to some possible or imaginary doubt. Proof beyond a reasonable doubt is proof of such character that an ordinary person would be willing to rely and act upon it in the most important of his or her own affairs.

4. CONCLUSION: you shall recommend the sentence of death if you unanimously (all twelve) find by proof beyond a reasonable doubt, that the aggravating circumstances outweigh the mitigating factors.

If you do not so find, you shall unanimously recommend either life sentence with parole eligibility after serving twenty years of imprisonment or life sentence with parole eligibility after serving thirty years of imprisonment.
Bibliography


