TAILORED JURY INSTRUCTIONS: WRITING INSTRUCTIONS THAT MATCH A SPECIFIC JURY'S READING LEVEL

INTRODUCTION

> *"Jury instructions must be legally accurate . . . . [but] for the jury to do their job, they must understand what law to apply to their findings of fact."*[1]

Imagine you are a layperson with an eighth-grade reading level.[2] You are a juror in a capital murder sentencing, and life or death hinges on your determination of fact and application of the

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[1] Roger M. Young, *Using Social Science to Assess the Need for Jury Reform in South Carolina*, 52 S.C. L. REV. 135, 182 (2000) (internal quotation marks omitted) (quoting a judge's answer to Judge Roger Young's survey).

[2] "The principal barrier to effective communication is probably not the inherent complexity of the subject matter, but our inability to put ourselves in the position of those not legally trained." Prentice H. Marshall, *Introduction* to PATTERN CRIMINAL JURY INSTRUCTIONS: REPORT OF THE FEDERAL JUDICIAL CENTER COMMITTEE TO STUDY CRIMINAL JURY INSTRUCTIONS, at vii (1982), https://www.ncjrs.gov/pdffiles1/Digitization/110372NCJRS.pdf [https://perma.cc/3XJV-V8SN].

law. The judge reads the instructions, and then sends you and the other jurors to deliberate. Your decision depends on your understanding of how to apply aggravating and mitigating factors according to this sentencing instruction:

> If you find from the evidence that the Commonwealth has proved, beyond a reasonable doubt, either of the two alternatives, and as to that alternative, you are unanimous, then you may fix the punishment of the defendant at death, or if you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment of the defendant at imprisonment for life, or imprisonment for life with a fine not to exceed $100,000.[3]

In the most tremendous jury-based decision, would this instruction help an average jury properly apply the law?[4]

The average American adult has an eighth-grade reading level.[5] Approximately thirty-two million American adults cannot read, and twenty-one percent of American adults are considered illiterate, that is, having below a fifth-grade reading level.[6] Low literacy in the United States causes problems in jury trials because pattern instructions, on average, are written at a twelfth-grade reading level.[7]

The discrepancy between juries' reading levels and the reading level needed to comprehend pattern instructions results in jury miscomprehension.[8] Juries that miscomprehend instructions

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[3] Weeks v. Angelone, 528 U.S. 225, 229-30 (2000). *See infra* Appendix to view the *Weeks* instruction tailored to a jury of average American adults.

[4] It did not. For a detailed analysis of the *Weeks* case and a quotation of the question the jury wrote to the judge regarding this instruction, see *infra* Part IV.B.1.

[5] Bethany K. Dumas, *Jury Trials: Lay Jurors, Pattern Jury Instructions, and Comprehension Issues*, 67 TENN. L. REV. 701, 725 (2000).

[6] *The U.S. Illiteracy Rate Hasn't Changed In 10 Years*, HUFFINGTON POST (Nov. 27, 2017), http://www.huffingtonpost.com/2013/09/06/illiteracy-rate_n_3880355.html [https://perma.cc/J62V-MNHW].

[7] *See* Steven E. Perkel & Benjamin Perkel, *Jury Instructions: Work in Progress*, JURY EXPERT, May 2015, at 1, 3, http://www.thejuryexpert.com/2015/05/jury-instructions-work-in-progress [https://perma.cc/PLQ6-TRJY].

[8] "The U.S. Department of Education, National Institute of Literacy found that 21% to 23% of adult Americans were not 'able to locate information in text', could not 'make low-level inferences using printed materials', and were unable to 'integrate easily identifiable pieces of information.'" *Id.* (quoting IRWIN S. KIRSCH ET AL., NAT'L CTR. FOR EDUC. STATISTICS, ADULT LITERACY IN AMERICA: A FIRST LOOK AT THE

rely on facts, emotions, and other improper considerations to render verdicts because of their inability to properly apply the law.[9] Although most jury verdicts may fit on a spectrum of *seemingly* reasonable application of the law, mere reasonableness of a verdict does not indicate that the jury *properly* applied the law.

This Comment is the first to propose that instead of using one-size-fits-all instructions, attorneys should write instructions that match the jury's reading level. Specifically, this Comment calls for implementation of tailored instructions and grounds its analysis and assertions within scientifically valid measuring tools of text readability and audience reading comprehension. Accordingly, this Comment begins in Part I by providing a prerequisite knowledge of linguistics to survey the applicable tools that measure specific juries' reading levels and particular instructions' readability. Then, in Part II, this Comment conveys how pattern instructions negatively impact proper jury application of the law. Critically, in Part III, this Comment reveals why Plain English instructions are an unreliable alternative to pattern instructions. Shifting in Part IV, this Comment establishes the necessity and benefits of tailored instructions to proper jury application of the law. In Part V, this Comment prescribes the method to write tailored instructions. Vitally, in Part VI, this Comment contends appellate courts will uphold trial judges' implementation of tailored instructions. This Comment concludes that tailored instructions—the process of crafting instructions that match a specific jury's reading level—is the *only* instruction method that both ensures proper jury application of law and survives appellate review.

FINDINGS OF THE NATIONAL ADULT LITERACY SURVEY, at xvi (3d ed. 2002)). *See also infra* Part II.A.

[9] *See infra* note 77 and accompanying text.

I. CAN A SPECIFIC AUDIENCE COMPREHEND A PARTICULAR TEXT?

"The comprehensibility or difficulty of a message is dominated by the familiarity of the semantic units and by the complexity of the syntactic structures used in constructing the message."[10]

Whether a specific jury can comprehend a particular text can be determined by the scientific discipline of linguistics. Linguistics is the study of language and encompasses several specific components. This Comment focuses only on the semantic component and the syntactic component. Semantics comprises the use of individual words: the use of rare or common words and the frequency in which they are used. Syntax comprises the structural complexity of words organized into thoughts and sentences. These two linguistic components can measure whether a specific audience can comprehend a particular text. This Comment begins with a pre-requisite review of linguistic-measurement to survey the scientifically valid tools necessary for writing instructions that match a specific jury's reading level.

A. Text: Linguistic Tools Measure Readability Levels

Scholars use "readability" as an interchangeable term in three different ways: to indicate (1) "legibility of either handwriting or typography"; (2) "ease of reading due to the interest-value or the pleasantness of writing"; and (3) "ease of understanding or comprehension due to the style of writing."[11] This Comment employs the third definition, which can be further defined for the particular purpose of this Comment: determining

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[10] A. Jackson Stenner & Donald S. Burdick, *The Objective Measurement of Reading Comprehension In Response to Technical Questions Raised by the California Department of Education Technical Study Group*, ERIC (Jan. 3, 1997), https://lexile-website-media-2011091601.s3.amazonaws.com/resources/materials/Stenner__Burdick_Objective_Measurement_Reading_Comprehension__.pdf [https://perma.cc/J2M6-FNW5].

[11] Patrik Larsson, Classification into Readability Levels: Implementation and Evaluation 8 (June 14, 2006) (unpublished Master's thesis in Computational Linguistics, Uppsala University) (on file with the Department of Linguistics and Philology, Uppsala University) (describing the different factors used to measure each term of readability).

the difficulty of comprehending a jury instruction based on "the structure of sentences, words and phrases . . . ."[12]

A jury instruction's readability can be measured by "mathematical and statistical analysis of specific linguistic characteristics of the given text."[13] There are two hundred readability formulas and over a thousand published studies validating them.[14] Readability formulas have been used for over eighty years despite researchers' widespread debate on different formulas' usefulness and validity.[15]

Readability formulas apply a multiple-correlation-analysis, which can measure the complexity of semantic elements and of syntactic elements.[16] The formulas assign each element different constants to signify importance of that element in the text's readability.[17] The formulas then employ the formula as a mathematical equation arranging the constants as numbers and usually multiply them by the degree of the element's weight on comprehension, giving an output score that correlates with the grade-level needed to comprehend the text.[18]

Although some social-science scholars disagree about the accuracy of some readability formulas, most scholars agree that there are several steps to ensure reliable results in

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[12] *Id.*

[13] Katarzyna Barczuk, *The Usefulness of Readability Formulas in the Insurance Industry*, 10(4) OLSZT. ECON. J. 339, 342 (2015) (describing the helpfulness of readability formulas as a "handy overview of whether or not a sentence is too long and/or so full of polysyllabic words that it is virtually unreadable . . . .").

[14] WILLIAM H. DUBAY, THE PRINCIPLES OF READABILITY 1, 2 (2004), http://www.impact-information.com/impactinfo/readability02.pdf [https://perma.cc/3R4U-B4E9]. This Comment focuses on only a few formulas because "despite the multiplicity of readability formulas, only a few of these are being used . . . ." Julien B. Kouamé, *Using Readability Tests to Improve the Accuracy of Evaluation Documents Intended for Low-Literate Participants*, 6 J. MULTIDISCIPLINARY EVALUATION 132, 133 (2010).

[15] DUBAY, *supra* note 14, at 2 (describing the established history of readability formulas). For a list of articles criticizing readability formulas see *id.* at 2-3.

[16] Larsson, *supra* note 11, at 9, 19 (describing different linguistic factors such as syntactic depth, sentence-length, prepositional phrases, subordinating conjunctions, difficult words, vowels per word, nominal quotient, noun/pronoun quotient, attributes, phrase-length, and definite articles).

[17] *Id.* at 10.

[18] *Id.*

implementation.[19] Computerized readability formulas need at least a hundred words to deliver an accurate measurement; scholars advise measuring large portions of text instead of smaller texts.[20] Researchers of one study concluded "it is advisable to calculate a readability estimate by taking an average across several pieces of literature, across several different formulas . . . ."[21] Thus, to ensure reliable results in implementing readability formula scores: (1) use multiple formulas, (2) on multiple pieces of text, (3) avoid measuring small texts, (4) and take the average score.

This Comment suggests using the following readability formulas for writing tailored instructions, and thus briefly surveys each formula. Flesch Grade Level (Flesch): In 1976, the United States Navy modified the 1948 Flesch formula to score on grade-level for easier application.[22] Flesch is currently the most used and publicized readability formula.[23] Flesch calculates the average sentence length, ASL, the average number of syllables per word, ASW, then multiplies the ASL by 0.39, adds it to the ASW

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[19] Scholars that claim readability formulas are inaccurate often do not understand the reasoning for the discrepancies in scores of the same text. Inaccuracy is not a valid description of individual formulas because formulas often measure different semantic and syntactic factors, assign different constants to the factors, and score on different percentages of how much of the text needs to be understood to be considered readable for a certain grade-level. Therefore, individual formulas are accurate measures of the factors they measure compared to the target of comprehension they define. For a more detailed analysis on the difference of validity and discrepancy see DUBAY, *supra* note 14, at 56-57 .

[20] Larsson, *supra* note 11, at 9.

[21] Stephen L. Mailloux et al., *How Reliable is Computerized Assessment of Readability?*, 13 COMPUTERS IN NURSING 221, 221-25 (1995), https://www.researchgate.net/publication/15614441_How_reliable_is_computerized_assessment_of_readability [https://perma.cc/X5WR-HXUQ]. When one specific piece of literature was tested, the formulas estimated the reading level ranged between 8.5 grade-levels. *Id.* at 224. But when twenty-eight different pieces of literature from the same source were tested, "the variation is reduced significantly, to a discrepancy of 2.3 grades." *Id.*

[22] *The Flesch Grade Level Readability Formula*, READABILITY FORMULAS, http://www.readabilityformulas.com/flesch-grade-level-readability-formula.php [https://perma.cc/C9YW-ZJ89] (last visited Jan. 25, 2017) [hereinafter Flesch]. The United States Department of Defense currently uses Flesch. *Id.*

[23] Pooneh Heydari & A. Mehdi Riazi, *Readability of Texts: Human Evaluation Versus Computer Index*, 3 MEDITERRANEAN J. SOC. SCI. 177, 177 (2012).

multiplied by 11.8, and subtracts 15.59 from the total: (0.39 x ASL) + (11.8 x ASW) – 15.59.[24]

Coleman-Liau was created to help the United States Department of Education determine the readability of public school textbooks based on grade-level.[25] Coleman-Liau calculates the average number of letters per hundred words, L, and the average number of sentences per hundred words, S, then applies the formula (0.0588L – 0.296S – 15.8).[26]

Automated Reading Index (ARI): ARI, like the others, determines the grade-level needed to comprehend a text and calculates ASL into its formula.[27] However, ARI "relies on . . . characters per word [CHW] instead of the usual syllables per word."[28] ARI is best used in technical documents and manuals.[29] ARI's formula is (4.71 x CHW + 0.5 x ASL – 21.43).[30]

Thus, by using these readability formulas and applying the method prescribed by social-science scholars, attorneys can ascertain particular jury instructions' readability level.

B. Audience: Linguistic Tools Measure Reading Comprehension Levels

> *"Reading comprehension ability is widely recognized as the best predictor of success in . . . on-the-job performance."*[31]

Once an attorney ascertains an instruction's readability level, the attorney must also ascertain a jury's reading level through a method similar to the method used to determine the instruction's readability level. Fortunately, readability formulas employ linguistic-measurements in a comparative manner to reading comprehension tests. They both measure the same linguistic components, semantics and syntax, and the same elements of each component. However, like readability measurement, reading

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[24] Flesch, *supra* note 22. This illustrates a formula's multiple-correlation-analysis.

[25] *The Coleman-Liau Readability Formula*, READABILITY FORMULAS, http://www.readabilityformulas.com/coleman-liau-readability-formula.php [https://perma.cc/YNV8-NGX5] (last visited Jan. 25, 2017).

[26] *Id.*

[27] Barczuk, *supra* note 13, at 343.

[28] *Id.*

[29] *Id.* at 344.

[30] *Id.*

[31] Stenner & Burdick, *supra* note 10, at 9.

comprehension measurement has an excessive amount of different tests available to implement; there are approximately a hundred different reading comprehension tests.[32] Of greater complication, readability formulas' and reading comprehension tests' outputs can both vary greatly depending on if different tests assign different weights to the same components or elements.[33]

Vital to tailored instructions, two reading comprehension tests, Degrees of Reading Power (DRP) and Lexile scale, can link reading comprehension measurements to several readability measurements.[34] These two reading comprehension tests purposefully correlate the same linguistic components and elements thereof in the same manner as several of the readability formulas described above.[35] They place "scores on comprehension measures on the same scales as [] readability . . . ."[36] Thus, for the particular purpose of tailoring instructions, this Comment suggests implementing these tests in addition to the readability formulas above.

Nonetheless, these tests differ slightly in two ways. First, DRP scores on grade-level like the readability tests above, but Lexile scale created its own alternative scoring system.[37] Second, DRP requires use of its specific reading comprehension test, but

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[32] *Id.* (describing how an excessive amount of tests brings confusion to those trying to implement them). An abundance of tests were created because "comprehension is not a unitary construct. It consists of multiple cognitive processes." Janice M. Keenan et al., *Reading Comprehension Tests Vary in the Skills They Assess: Differential Dependence on Decoding and Oral Comprehension*, SCI. STUDS. READING 281, 282 (2008), http://www.tandfonline.com/doi/pdf/10.1080/10888430802132279 [https://perma.cc/KY7E-MEAV].

[33] *See id.* at 282. Reading comprehension tests also vary in format—oral or silent, length of passage, particular types of comprehension assessments, but format is outside the scope of this Comment. *Id.* at 284.

[34] P. David Pearson & Diane N. Hamm, *The Assessment of Reading Comprehension: A Review of Practices–Past, Present, and Future*, *in* CHILDREN'S READING COMPREHENSION AND ASSESSMENT 13, 50 (Scott G. Paris & Steven A. Stahl eds., 2005) (describing the Degrees of Reading Power and the Lexile scale reading comprehension tests).

[35] *Id.* at 51 ("[u]sing the mainstays of readability formulas (word frequency and sentence length) . . . .").

[36] *Id.* at 50.

[37] *See* Colleen Lennon & Hal Burdick, *The Lexile® Framework as an Approach for Reading Measurement and Success*, METAMETRICS 2, 4-5 (Aug. 5, 2014), https://cdn.lexile.com/cms_page_media/135/The%20Lexile%20Framework%20for%20Reading.pdf [https://perma.cc/T33U-R67A].

the Lexile scale can be attached to many different reading comprehension tests in order to link comprehension-scores to readability-scores. Thus, while DRP scores on grade-level, making comparison of the jury's reading level to the instruction's readability level easy, it also restricts the option of using other reading comprehension tests. In contrast, the Lexile scale requires additional work to convert its comprehension-scores to grade-level, but it can attach to other reading comprehension tests, opening the door for more options.

Ultimately, these reading comprehension tests ensure that measurements of the jury's reading level and the instructions' readability correlate. Apart from this approach, comparing readability and comprehension scores is futile. Thus, when this Comment refers to reading comprehension tests, it refers only to those able to measure comparatively with the readability formulas surveyed above.[38]

Therefore, by using both reading comprehension tests and readability formulas that measure the same linguistic components in order to ascertain a specific jury's reading level and a particular instruction's readability level, an attorney can accurately demarcate the tailored instruction's readability level needed to maximize jury comprehension.

II. PATTERN JURY INSTRUCTIONS CAUSE COMPREHENSION PROBLEMS FOR JURIES

Pattern instructions confront juries with several problems that obstruct proper jury application of the law, but imperatively, two major problems demand an alternative instruction method to ensure proper jury application of the law. First, according to various social-science studies, pattern instructions confuse juries' comprehension of the law. Second, because of this miscomprehension, pattern instructions result in disparity in juror participation and capital sentencing. Thus, pattern

[38] The Lexile scale allows many different reading comprehension tests to be used, however the Lexile scale would have to be converted into grade equivalent levels to match the grade levels of the readability tests. Determining which reading comprehension test to use is outside the scope of this Comment—it need only be comparable to the linguistic factors measured by the readability tests above.

instructions obstruct juries' ability to properly apply the law, rather than clearly instructing the jury.

A. Pattern Jury Instructions Confuse Juries

> *"This is not to say that there aren't methodological problems with some of these studies . . . But there is valuable information here, particularly about what can go wrong, and what can be done to avoid some well-established pitfalls."*[39]

First, juries' confusion of pattern instructions demands an alternate instruction method. According to numerous empirical studies,[40] pattern instructions inadequately instruct juries by confusing juries' comprehension of the law.[41] Although social-scientists employ different methods of empirical data-collection, the output of every method's data-collection sustains this overarching conclusion. Thus, the inherent truth that pattern instructions confuse jury comprehension is irrefutable.[42] Grounding this assertion in a survey of methodically diverse

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[39] Memorandum from John H. Blume, Cornell Law School, An Overview of Significant Findings From the Capital Jury Project and Other Empirical Studies of the Death Penalty Relevant to Jury Selection, Presentation of Evidence and Jury Instructions in Capital Cases, Cornell Law School, at 1 (2008), http://essaydocs.org/an-overview-of-significant-findings-from-the-capital-jury-proj.html [https://perma.cc/5PV9-3ALL]. Blume speaks directly of empirical study methods used in the Capital Jury Project, but this pragmatist view applies to similar empirical studies of jury comprehension.

[40] "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 under specifiable conditions by possessing the normal sensory apparatus, intelligence, and skills." Young, *supra* note 1, at 135, 152-53 (quoting CLAIRE SELLTIZ ET AL., RESEARCH METHODS IN SOCIAL RELATIONS 22 (3d ed. 1976)).

[41] *See* R. J. Farley, *Instructions To Juries—Their Role in the Judicial Process*, 42 YALE L.J. 194, 206 (1932) (explaining the primary purpose of jury instructions–to "give an exposition of the principles of law appropriate to the case, restricted to the matters in issue, in such manner as to be readily understood by the mind untrained in the law"). Although studies of jury comprehension began in the 1970's, legal scholars have acknowledged problems of jury instruction miscomprehension since the 1930s. *See* Robert M. Hunter, *Law in the Jury Room*, 2 OHIO ST. U.L.J. 1 (1935).

[42] For a more detailed analysis of these different methods than this article provides 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); *see also* Young, *supra* note 1.

studies "not only establishes the conclusions' reliability, but their validity."[43] Not only does this analysis prove juries often miscomprehend instructions, but it also proves jury miscomprehension has pervaded a national scale for over forty years.[44]

One line of studies used the video/participant method: using video of a trial, and administering pattern instructions to determine participants' comprehension of the instructions. In 1976, a Florida study by Strawn and Raymond revealed jurors that studied video of criminal pattern instructions comprehended the legal concepts only 10% more than jurors that did not receive instructions; further, only 50% of the instructed jurors comprehended "reasonable doubt."[45] In 1977, a study by Elwork, Sales, and Alfini revealed 44% of participants that watched a real Michigan automobile collision tort case on video, including all of the instructions, only comprehended around half of the instructions.[46] In a 1982 study, Severance and Loftus revealed participants that studied video of a real trial, then received general instructions missed 34.7% of questions given to determine

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[43] Young, *supra* note 1, at 153.

[44] *See* David U. Strawn & Raymond W. Buchanan, *Jury Confusion: A Threat to Justice*, 59 JUDICATURE 478 (1976); Amiram Elwork et al., *Juridic Decisions: In Ignorance of the Law or in Light of It?*, 1 L. & HUM. BEHAV. 163 (1977) [hereinafter Juridic Decisions]; AMIRAM ELWORK ET AL., MAKING JURY INSTRUCTIONS UNDERSTANDABLE (1982) [hereinafter ELWORK]; Lawrence J. Severance & Elizabeth F. Loftus, *Improving the Ability of Jurors to Comprehend and Apply Criminal Jury Instructions*, 17 L. & SOC'Y REV. 153 (1982); Walter W. Steele, Jr. & Elizabeth G. Thornburg, *Jury Instructions: A Persistent Failure to Communicate*, 67 N.C. L. REV. 77 (1988); Phoebe C. Ellsworth, *Are Twelve Heads Better Than One?*, 52 L. & CONTEMP. PROBS. 205 (1989); 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 (1990); Phoebe C. Ellsworth et al., *Real Jurors' Understanding of the Law in Real Cases*, 16 L. & HUM. BEHAV. 539 (1992) [hereinafter Real Jurors' Understanding]; 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 (1998); Shari Seidman Diamond et al., *The "Kettleful of Law" in Real Jury Deliberations: Success, Failures, and Next Steps*, 106 NW. U. L. REV. 1537 (2012) [hereinafter Diamond].

[45] *See* Strawn & Buchanan, *supra* note 44, at 480-82 (testing jurors with comprehension tests of the legal concepts explained by the pattern instructions).

[46] Juridic Decisions, *supra* note 44, at 173-75 (explaining further that a control group of participants that did not receive the instructions miscomprehended the legal concepts in the instructions at the same error rate as those who received them).

instruction-comprehension, while participants given specific instructions missed 29.6% of the same questions.[47]

Other studies shifted from the video/participant method and examined actual jurors' comprehension after trial by administering surveys that ascertained the jurors' comprehension of the instructions they just applied. In 1990, Kramer and Koenig employed this method to verify low comprehension-rates of criminal pattern instructions, similar to the video and participant method's comprehension-rates.[48] In 1992, Reifman, Gusick, and Ellsworth modified this method by giving the same survey to participants without providing them jury instructions and determined instructed jurors and un-instructed participants *both* incorrectly answered over half the survey.[49] In 1998, Bradley Saxton employed the modified survey method in Wyoming, and revealed that juries comprehend only 57% of civil pattern instructions.[50]

Recently, the Arizona Project[51] videotaped real jury deliberations and revealed the average civil jury makes fifty-two legally inaccurate comments per deliberation.[52] Juries' miscomprehension of pattern instructions accounted for 83.2% of the legally inaccurate comments.[53] However, the Arizona Project also revealed other jurors corrected approximately half of the legally inaccurate comments.[54]

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[47] Severance & Loftus, *supra* note 44, at 165-80 (examining 405 cases using Washington State pattern instructions on reasonable doubt, intent, prior convictions, and juror's duties, they found approximately 100 of the juries stopped deliberation to send a question about the instructions to the judge).

[48] *See* Kramer & Koenig, *supra* note 44, at 401-06 (surveying over 600 Michigan jurors); *see also supra* notes 9-11 and accompanying text.

[49] Real Jurors' Understanding, *supra* note 44, at 543-47 (surveying jurors and participants in Ann Arbor, Michigan).

[50] Saxton, *supra* note 44, at 76, 79, 88 (innovating more reliable results with this method by surveying the jurors immediately after the verdict to ensure the data measured comprehension, not recall).

[51] The Arizona Project, authorized by the Arizona Supreme Court, videotaped the entire jury process, including discussions and deliberations in fifty civil cases. Diamond, *supra* note 44, at 1546-47. The study recorded every juror comment made during deliberations and analyzed each comment regarding the instructions as to whether it was an accurate or inaccurate statement of the law. *Id.* at 1548-49.

[52] *Id.* at 1556.

[53] *Id.* at 1557.

[54] *Id.* at 1558.

The United States criminal justice system assigns capital sentencing authority, the ultimate penal sanction, to the jury.[55] Crucially, the Capital Jury Project determined the extent that guided discretion statutes limited arbitrary capital sentencing after the United States Supreme Court condemned arbitrary capital sentencing in *Furman v. Georgia*.[56] Accordingly, the Capital Jury Project evaluated jurors' considerations of imposing either life or death sentences by interviewing eighty to one hundred and twenty jurors per state in fourteen states.[57] The Capital Jury Project revealed numerous, disturbing tendencies in jurors' capital sentencing considerations. Significantly, juries frequently miscomprehend capital sentencing instructions.[58]

Juries primarily miscomprehend how to apply aggravating and mitigating factors; 60% of jurors miscomprehend two key components of capital sentencing instructions: burden of proof and mitigation procedure.[59] Startlingly, juries impose the death sentence at higher rates when they miscomprehend the instructions.[60] But many jurors believe they understand the

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[55] *See* Ring v. Arizona, 536 U.S. 584, 609 (2002) (holding that the Sixth Amendment to the United States Constitution guarantees a defendant's right to a jury's determination whether to impose a death sentence).

[56] William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 IND. L.J. 1043 (1995) [hereinafter The Capital Jury Project]. See *infra* note 113, for an analysis of the holding in Furman v. Georgia, 408 U.S. 238 (1972) (per curium).

[57] The Capital Jury Project, *supra* note 56, at 1043 n. 2.

[58] Some of the other problematic factors in capital jurors' decisions include premature decision making, unwillingness to accept responsibility for their decisions, incorrect prior assumptions of law, and demographics. For more detailed analysis on these and other unmentioned factors see Blume, *supra* note 39.

[59] Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 CORNELL L. REV. 1, 10-11 (1993) (demonstrating that 20% of jurors believed that the burden of proof for aggravating factors was a preponderance of the evidence or something similar); William J. Bowers et al., *The Capital Sentencing Decision: Guided Discretion, Reasoned Moral Judgment, or Legal Fiction*, *in* AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF THE ULTIMATE PENAL SANCTION 413-67 (James R. Acker et al. eds., 2d ed. 2003) (explaining that approximately 50% of capital jury project jurors believed that the burden of proof for mitigating factors was beyond a reasonable doubt and that they had to agree unanimously on the mitigating factors).

[60] *See* Ursula Bentele & William J. Bowers, *How Jurors Decide on Death: Guilt is Overwhelming; Aggravation Requires Death; and Mitigation is No Excuse*, 66 BROOK. L. REV. 1011, 1031-32 (2001) (explaining jurors believed the instructions required the death sentence if they found an aggravating factor); David Barron, *I Did Not Want to*

instructions and confidently rely on incorrect application of sentencing instructions.[61]

Thus, regardless of empirical study method, type of case, or geographic location, pattern jury instructions ubiquitously produce jury miscomprehension. Without a reliable alternative to pattern instructions, attorneys cannot ensure proper jury application of the law.

B. Pattern Jury Instructions Cause Disparities in Juror Participation and Capital Sentencing

Second, pattern jury instructions' disparate effects on juror participation and capital sentencing also demand an alternative instruction method. Pattern instructions "exclude[] many jurors from equal participation[.]"[62] Statistically, minorities have low reading levels: 41% of Hispanic American adults and 24% of African American adults read below a basic level, compared to only 9% of Caucasian American adults.[63] Jurors revert to sociological and psychological behavioral mechanisms instead of proper jury application of the law during deliberation when they fail to comprehend instructions.[64] Thus, current pattern

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Kill Him but Thought I Had To: In Light of Penry II*'s Interpretation of* Blystone*, Why The Constitution Requires Jury Instructions on How to Give Effect to Relevant Mitigating Evidence in Capital Cases*, 11 J.L. & POL'Y 207, 244-45 (2002) (demonstrating that 64% of jurors believed an non-specified mitigating factor could not over-come a death sentence and 58% believed the death penalty was proper even if non-specified mitigating factors outweighed the aggravating factors); William S. Geimer & Jonathan Amsterdam, *Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Cases*, 15 AM. J. CRIM. L. 1, 25 (1988) (quoting one juror's interpretation of the instructions, "It seemed that the State of Florida called for the death penalty. There didn't seem to be any choice.").

[61] Valerie P. Hans, *How Juries Decide Death: The Contributions of the Capital Jury Project*, 70 IND. L.J. 1233, 1238 (1995) (explaining the problem of juror recall with post-sentencing interviews regarding sentencing instructions).

[62] Janet Randall, *Improving Juror Comprehension: Reading While Listening*, LINGUISTIC SOC'Y AM., http://journals.linguisticsociety.org/proceedings/index.php/ExtendedAbs/article/view/3023/2766 [https://perma.cc/FJ5Z-R5KR] (last visited Jan. 25, 2017) [hereinafter Improving Juror Comprehension].

[63] *Illiteracy Statistics*, STATISTIC BRAIN, http://www.statisticbrain.com/number-of-american-adults-who-cant-read [https://perma.cc/YTJ3-JCJC] (last visited Jan. 25, 2017).

[64] *See infra* note 77 and accompanying text. Jurors respond to confusion by either making up their own interpretation or by following the leader in order to appear in sync with another's understanding. This creates disparate participation in deliberation

instruction practice precludes a higher percentage of minorities in racially diverse juries from being able to comprehend instructions and properly apply the law.

Pattern instructions similarly impact equal participation among geographically diverse juries. The average American adult reading level varies depending on location: lower reading levels in rural areas and higher reading levels in other areas.[65] Accordingly, jurors from rural areas sitting on the same jury as jurors from urban areas statistically have a less chance to comprehend pattern instructions. Thus, pattern instructions not only exclude minority jurors from equal participation in deliberation, they also exclude rural jurors.

Furthermore, pattern instructions result in racially motivated capital sentencing. The Capital Jury Project revealed the rate at which white jurors impose the death penalty on black defendants significantly increases when white jurors miscomprehend sentencing instructions.[66] Thus, pattern instructions' negative effects of both miscomprehension and disparity in participation and capital sentencing cause an intolerable level of improper jury application of the law.

III. PLAIN ENGLISH INSTRUCTIONS CAUSE COMPREHENSION PROBLEMS AND APPELLATE REVERSAL

Pattern instructions cause jury miscomprehension primarily because they "are often poorly organized, replete with syntactical flaws, and contain legal terms that are foreign to most jurors."[67] Addressing the miscomprehension of pattern instructions, the Plain English instruction reform holds that revision of both syntactic flaws and semantic legal jargon will increase jury comprehension. Although Plain English reform successfully increases comprehension in other legal areas, Plain English

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if more minorities rely on these behavioral mechanisms than other juries do. Jurors, regardless of background, deserve an instruction method that maximizes their opportunity to properly apply the law.

[65] Dumas, *supra* note 5, at 725.

[66] Mona Lynch & Craig Haney, *Capital Jury Deliberation: Effects on Death Sentencing, Comprehension, and Discrimination*, 33 L. & HUM. BEHAV. 481, 486-90 (2009).

[67] John P. Cronan, *Is Any of This Making Sense? Reflecting on Guilty Pleas to Aid Criminal Juror Comprehension*, 39 AM. CRIM. L. REV. 1187, 1236 (2002).

revision of jury instructions produces undesirable results. First, it dismantles pattern instructions' legal precision, creating invalid statements of law. Secondly, it inaptly demarcates specific juries' reading levels by assuming every jury can or should comprehend a Plain English standard. Thus, Plain English instructions fail to adequately fix pattern instructions and reveal the need for a more reliable, innovative jury instruction method.

A. Plain English Instructions Create Invalid Statements of the Law

The first undesirable result of Plain English instruction reform stems from its goal to "eliminat[e] overly technical language in exchange for plain language."[68] Although juries comprehend Plain English instructions more than pattern instructions, Plain English instructions produce a severe consequence: invalid statements of the law prone to appellate reversal.[69]

Plain English instructions risk reversal "[b]ecause instructions often track judicial opinions and statutes to ensure legal accuracy, [someone] who rewrites [pattern] jury instruction[s] risks losing the instruction's tight correspondence to the law."[70] Trial judges are overly concerned that "particular word[s] or phrase[s] properly embod[y] the law" because appellate courts often reverse them for diminishing instructions' legal precision, that is, their legalese.[71]

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[68] *Id.* This scholar gives examples of Plain English, such as replacing "preponderance of the evidence" with "more likely true than not []" and replacing "circumstantial evidence" with "evidence that proves something indirectly." *Id.*

[69] *See* Janet Randall & Lucas Graf, *Linguistics Meets "Legalese": Syntax, Semantics, and Jury Instruction Reform*, LINGUISTIC SOC'Y AM. (January 2-5, 2014) [hereinafter Linguistics Meets Legalese] (finding that "[c]urrent jury instructions **are** more difficult to understand than Plain English jury instructions and [] linguistic factors . . . **do** contribute to processing difficulty"); Shari Seidman Diamond & Judith N. Levi, *Improving Decisions on Death by Revising and Testing Jury Instructions*, 79 JUDICATURE 224 (1996); ELWORK, *supra* note 44; Severance & Loftus, *supra* note 44; Steele & Thornburg, *supra* note 44.

[70] Cronan, *supra* note 67, at 1240. Pattern Jury Instructions are long and complicated because trial judges fear being reversed on appeal; revisions must be made under extreme caution. *Id.*

[71] Nancy S. Marder, *Bringing Jury Instructions into the Twenty-First Century*, 81 NOTRE DAME L. REV. 449, 461 (2006).

Nonetheless, the leading proponent of Plain English reform, Peter Tiersma,[72] suggests that legalese should be removed from jury instructions altogether.[73] He calls for clearly defined terms juries can comprehend instead of "legalese defined by more legalese."[74] Although his reasoning that "legal accuracy . . . [is] meaningless if jurors do not understand [it,]" is sound, the opposite is also true: comprehensibility is *meaningless* if reversed on appeal.[75]

B. Plain English Instructions Inaptly Demarcate Specific Juries' Reading Comprehension Levels

The second undesirable result of Plain English instruction reform stems from its one-size-fits-all approach. By implementing only one standard of readability for instructions, Plain English instructions inaptly demarcate juries' reading levels. Although juries may comprehend Plain English instructions more than pattern instructions, Plain English instructions do not maximize comprehension for specific juries to insure proper jury application of the law in a particular case.

Inaptly demarcating juries' reading levels results in either over-revised instructions or under-revised instructions. Under-revision: some juries have reading levels lower than Plain English instructions' readability; "[t]his excludes many jurors from equal participation" just the same as pattern instructions.[76] Consequently, under-revision triggers the same sociological and psychological behavioral mechanisms as pattern instructions: jurors may either seek "approval over independence and

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[72] Professor Tiersma (1952-2014) used his Ph.D. in linguistics and his J.D. to lead the legal community into an understanding of the relational importance of effective communication and the law. Before his death, he helped rewrite California's jury instructions to make them comprehensible. If every state had a Tiersma, juror comprehension would no longer be a major issue.

[73] *See* Peter Tiersma, *The Rocky Road to Legal Reform: Improving the Language of Jury Instructions*, 66 BROOK. L. REV. 1081, 1107-11 (2001) (advocating for the use of ordinary words over statutory or court holdings' legalese in jury instructions).

[74] *Id.* at 1110.

[75] *Id.* The state of California, thanks to people like Peter Tiersma, has avoided reversal issues in using non-standard pattern instructions because the state adopted the Plain English instructions drafted by a state appointed committee. But Plain English instructions face risk of reversal in most jurisdictions.

[76] Improving Juror Comprehension, *supra* note 62.

objectivity" when deliberating, or they may make up their own rules.[77] Hence, Plain English instructions fail to adequately instruct juries with reading levels lower than its Plain English revision.

In contrast, over-revision: some juries have reading levels higher than the Plain English instructions' readability. Over-revision diminishes instructions' legal precision more than necessary to obtain comprehension. Consequently, over-revision creates invalid statements of law prone to appellate reversal with little to no added benefit to the jury.[78] Thus, Plain English instructions generally fail to efficiently and adequately ensure specific juries can properly apply the law.

IV. ATTORNEYS SHOULD TAILOR INSTRUCTIONS TO SPECIFIC JURIES

> *"[I]t is doubtful that legal professionals can intuitively gauge the degree to which laypeople understand legal language."*[79]

Attorneys not only have the ability to tailor instructions to a specific jury's reading level, but attorneys also have compelling evidence that they *should*. Having established the inadequacy of both pattern instructions and Plain English instructions, this Comment shifts to analyze the necessity of proper jury application of the law and how tailored instructions represent a reliable method to maximize specific juries' comprehension and safeguard proper jury application of the law.

Juries must comprehend instructions in order to properly apply the law. Unfortunately, courts presume juries comprehend instructions and essentially protect this presumption from rebuttal. This presumption results in court-protected jury miscomprehension and court-protected disparity in juror

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[77] *See* The Capital Jury Project, *supra* note 56, at 1072 n.159 (1994) (citing an unpublished dissertation's idea that uncertainty of instructions cause jurors to make up their own rules, based on Tamotsu Shibutani's sociological study on genesis of rumor in ambiguous situations). *See also id.* at n.160 (applying Stanley Schachter's psychological study of affiliation to jurors who are insecure about their ability to follow the instructions which cause them to choose "approval over independence and objectivity in decision-making").

[78] *See infra* Part VI.A.

[79] Peter Meijes Tiersma, *Reforming the Language of Jury Instructions*, 22 HOFSTRA L. REV. 37, 41 (1993).

participation and capital sentencing. This presumption also gives attorneys incentive to focus juries on considerations other than a proper application of the law. Thus, because proper application of the law requires jury comprehension and because courts inadequately ensure jury comprehension, attorneys *should* draft tailored instructions to specific juries.

A. Proper Jury Application of the Law Requires Jury Comprehension

> *"[J]ury instructions [must] be legally accurate [and] understood by jurors." Moreover, "for the jury to do their job, they must understand what law to apply to their findings of fact."*[80]

Proper jury application of the law requires jury comprehension because administering justice, that is, applying the law to their determination of fact, hinges on juries' understanding of the law.[81] According to one legal scholar, incomprehensible jury instructions lead to "misinformed verdicts."[82] Most legal scholars ultimately fear instructions that lead to unreliable verdicts.[83] Although the clearest signs of injustice in the jury system are unreliable verdicts,[84] juries often

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[80] Young, *supra* note 1, at 181-82 (quoting two judges' responses to Judge Young's survey).

[81] *See* Roger M. Young, *Using Social Science to Assess the Need for Jury Reform in South Carolina*, 52 S.C. L. REV. 135, at n.2 (2000) (quoting *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.")); Improving Juror Comprehension, *supra* note 62.

[82] Improving Juror Comprehension, *supra* note 62.

[83] "Rewriting jury instructions . . . would improve justice by helping jurors to better understand the law and reach more reliable, and ultimately fairer, verdicts." *Id.* "Jury misunderstanding of the law may lead to arbitrary and literally lawless verdicts." Christopher N. May, *"What Do We Do Now?": Helping Juries Apply the Instructions*, 28 LOY. L.A. L. REV. 869, 872 (1995). "[I]f public confidence in the jury as an institution capable of arriving at 'correct' or just outcomes is undermined then there will be a corresponding reduction in the ability of the jury to confer legitimacy upon trial proceedings." Douglas G. Smith, *Structural and Functional Aspects of the Jury: Comparative Analysis and Proposals for Reform*, 48 ALA. L. REV. 441, 483 (1997).

[84] *See* The Capital Jury Project, *supra* note 56, at 1063 (describing arbitrary verdicts are when "legally relevant considerations are misunderstood, mistakenly applied, or ignored due to vagueness, ambiguity, unnecessary complexity, or improper instruction in the legal standards"). But this is not a true definition of "reliability;" this defines "properly."

reach *reliable* verdicts through *improper* application of the law.[85] Hence, at issue is something deeper than mere unreliable verdicts; at issue is *improper* application.

One legal scholar suggests improper jury application of the law violates criminal defendants' right to due process.[86] Although improper jury application of the law in civil cases may result in reliable verdicts, criminal cases are entirely different in nature because of their heightened burden of proof: beyond a reasonable doubt.[87] This standard acts as "a prime instrument for reducing the risk of convictions resting on factual error"; but although it heightens the factual battle of evidence, this standard confuses juries, rendering them incompetent to apply the "beyond a reasonable doubt" standard to their determination of fact.[88] Justice Thurgood Marshall argued in *Tanner v. United States,* "[e]very criminal defendant has a constitutional right to be tried by competent jurors."[89] Thus, under this rationale, the *Weeks* capital sentencing, analyzed directly below, violated Weeks' due process because the jury announced its own incompetence to properly apply the "beyond a reasonable doubt" standard from a portion of its capital sentencing instruction.[90]

Currently, much of the jury process remains hidden to legal scholars and attorneys.[91] This creates a need to provide juries

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[85] *See* Diamond, *supra* note 44.

[86] For more discussion on this argument, see Cronan, *supra* note 67, at 1214-15.

[87] An integral difference between civil and criminal cases is that in criminal cases, because of defendants' rights to due process, the prosecution must prove each element of the crime beyond a reasonable doubt. Mullaney v. Wilbur, 421 U.S. 684, 701 (1975); "If jurors fail to understand the law, there is no way to be certain that the reasonable doubt standard has been satisfied." Cronan, *supra* note 67, at 1215. *See In re* Winship, 397 U.S. 358, 364 (1970) (holding that "the Due Process Clause protects the accused against conviction except upon proof beyond reasonable doubt of every fact necessary to constitute the crime with which he is charged").

[88] *Id.* at 363.

[89] Tanner v. United States, 483 U.S. 107, 134 (1987) (Marshall, J., concurring in part and dissenting in part).

[90] *See infra* Part IV.B.1.

[91] Nina Totenberg, *Supreme Court Hears Case on Racial Bias in Jury Deliberations*, NPR (Oct. 11, 2016, 4:39 AM), http://www.npr.org/2016/10/11/497196091/top-court-hears-case-on-racial-bias-in-jury-deliberations?utm_source=twitter.com&utm_campaign=politics&utm_medium=social&utm_term=nprnews [https://perma.cc/HJJ5-Y4TR]. "[T]he Supreme Court [in 2014] ruled that to allow an inquiry into jury deliberations would threaten the integrity of the jury system by inhibiting jurors' discussions." *Id.*

with comprehensible instructions during deliberation to ensure that juries have optimal opportunity to properly apply the law.

B. The Current Judicial System Fails to Adequately Ensure Jury Comprehension

The Supreme Court obliterated the relevance of jury instructions in the current trial court system when it affixed jury comprehension to an inappropriate buttress of judicial presumption. By over-protecting this presumption of comprehension, courts have built a seemingly insurmountable barrier of court protection around a broken practice of pattern instructions.

1. Courts Erroneously Presume Jury Comprehension

The Supreme Court traded proper jury application of the law back for the same improperness the Court once prohibited from capital sentencing in *Furman v. Georgia*.[92] The Court articulated the *Furman* standard of proper jury application of the law in *Boyde v. California*, which stated, "the proper inquiry . . . is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence."[93] But in decisions other than capital sentencing, the Court previously held juries presumably *follow* their instructions.[94] Thus, capital defendants seemed protected from juries miscomprehending and improperly sentencing their punishment.

However, the Court in *Weeks v. Angelone*, a capital murder case, took the presumption of following instructions a step further. The Court held juries not only presumptively *follow* the

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[92] *See* Furman v. Georgia, 408 U.S. 238 (1972) (per curiam) (holding that capricious death penalty sentencing by juries violate the Eighth Amendment as cruel and unusual punishment). Justice Stewart's concurrence analogized the capriciousness of jury decisions to the capriciousness of "being struck by lightning." *Id.* at 309 (Stewart, J., concurring). If improper capital sentencing violates the Eighth Amendment, presumably any improper jury application of the law violates procedural due process.

[93] Boyde v. California, 494 U.S. 370, 380 (1990). The *Weeks* jury did just this: the jury did not consider mitigation evidence, which *is* constitutionally relevant. *See infra* Part IV.B.1.

[94] *See, e.g.*; Richardson v. Marsh, 481 U.S. 200, 211 (1987); Parker v. Randolph, 442 U.S. 62, 73 (1979).

instructions, but they presumptively *comprehend* the instructions.[95] In the *Weeks* trial, the jury convicted Lonnie Weeks of capital murder and rendered a death sentence.[96]

But the jury improperly applied the law due to incomprehensible sentencing instructions. During deliberation, the *Weeks* jury sent the judge this question:

> If we believe that Lonnie Weeks, Jr. is guilty of at least 1 of the alternatives, then is it our duty as a jury to issue the death penalty? Or must we decide (even though he is guilty of one of the alternatives) whether or not to issue the death penalty, or one of the life sentences? What is the Rule? Please clarify?[97]

Clearly, the sentencing instruction's readability level did not match the *Weeks* jury's reading level because the jury could not comprehend the appropriate application of aggravating and mitigating factors. The jury implored the judge to clarify the rule, but to no avail.[98] The judge responded to the jury's cry for help by merely referring them back to the original, incomprehensible sentencing instruction.[99]

The jury not only rendered an improper sentence, but the sentence also stained the jurors hearts; after rendering the

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[95] Weeks v. Angelone 528 U.S. 225, 234 (2000). In the *Weeks* Court's analysis, it applied the *Furman* standard as articulated in *Boyde*, but nonetheless still held that "[a] jury is presumed to follow its instructions." *Id.* (citing Richardson v. Marsh. 481 U.S. 200, 211 (1987)). Although a presumption of comprehension is inconsistent with the findings of the Capital Jury Project, a presumption that jurors desire to follow the law would be more accurate. *See* The Capital Jury Project, *supra* note 56, at 1097-98 (evaluating jurors' responses to questions asking them about their responsibility in the decision-making process, Bowers wrote, "This preeminence of the law, over the juror or the jury, is an apparent testimony to the desire of jurors to defer to the law . . . whether or not they understand its requirements or directives.").

[96] *Weeks*, 528 U.S. at 228, 231.

[97] *Id.* at 229.

[98] *Id.* at 241.

[99] *Id.* Although the judge did not clarify the instructions, but merely restated them, the Court held on this point, "a jury is presumed . . . to understand a judge's answer to its question." *Id.* at 226. (citing Armstrong v. Toler, 24 U.S. (11 Wheat.) 258, 279 (1826)). *See also* Teaney v. City of St. Joseph, 548 S.W.2d 254, 256 (Mo. Ct. App. 1977) (holding pattern jury instructions "do not require further clarification or amplification"). One scholar described the Supreme Court's approval of this response as "disturbingly inadequate attention paid to juror comprehension[.]" Cronan, *supra* note 67, at 1191.

sentence, many of the jurors wept.[100] As one legal scholar describes this, "condemning someone to death is a wrenching decision, but it is even more agonizing if jurors believe that there are reasons to spare the defendant's life, but that they are legally prevented from considering them."[101] Even worse, the *Weeks* jury believed there were reasons to spare the defendant's life and although they believed they were legally prevented from considering them, they legally and properly should have considered them.

Because the Court extended the presumption juries follow and comprehend instructions to capital sentencing, the most likely implication is that "*Boyde* and *Weeks* will 'solidify appellate resistance to needed reform'"[102] and will "govern judicial review of juror confusion outside the context of capital sentencing."[103] Thus, attorneys need either a method to rebut this presumption, or better yet, comprehensible instructions for specific juries that will render the presumption obsolete.

2. Courts Discourage Rebuttal of the Presumed Jury Comprehension

> *"[A]ppellate courts invalidated jury instructions with even less frequency following the publication of extensive research indicating juror confusion."*[104]

Attorneys have unsuccessfully attempted rebutting the presumption of jury comprehension both through actual and empirical evidence.[105] In *Free v. Peters*, the Seventh Circuit rejected empirical research aimed at overcoming the jury's presumed comprehension.[106] In Judge Posner's opinion, he scorned the validity of an empirical study because it failed to use a

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[100] Weeks v. Angelone, 528 U.S. 225, 248 (2000) (Stevens, J., dissenting).

[101] Tiersma, *supra* note 73, at 1097. *See generally* Barron, *supra* note 60, at 244-45.

[102] Cronan, *supra* note 67, at 1214 (quoting Dumas *supra* note 5 at 721).

[103] *Id.*

[104] *See id.* at 1220 & n.285.

[105] *See, e.g.,* Wingate v. Lester E. Cox Med. Ctr., 853 S.W.2d 912, 916 (Mo. 1993) (holding that actual evidence by testimony or affidavit is inadmissible for the purposes of impeaching a verdict).

[106] *See* Free v. Peters, 12 F.3d 700 (7th Cir. 1993) (reversing the lower court's decision to vacate and rehear the case regardless of Hans Zeisel's research that showed the significant extent of miscomprehension of the instructions used in trial).

control group and failed to test jury comprehension of revised instructions.[107] Although Judge Posner did not disqualify all empirical evidence, other courts' implementation of his opinion created a difficult hurdle for empirical evidence of jury confusion to clear.[108]

Courts collectively imply that (1) evidence of confusion in the present (jury questions such as those in *Weeks*); (2) evidence of confusion in the past (such as testimony and affidavits of jurors admitting confusion); and (3) hypothetical evidence and empirical research are all insufficient to overcome presumed jury comprehension. Thus, the Supreme Court's presumption induced an "insurmountable barrier to reforming jury instructions through court challenges[.]"[109]

Crucially, evidence of jury confusion in the foreground—that is, ascertaining a specific jury's reading level—may clear the courts' hurdle and effectively rebut the Court's presumption. Although tailored instruction practice may act as a rebuttal to presumed jury comprehension, this Comment primarily suggests this method to ensure specific juries are positioned from the onset of the trial to comprehend instructions in order to properly apply the law.[110] Thus, the tailored instruction method is meant primarily to encourage juries to properly apply the law at the trial level, not solely as an appellate weapon.

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[107] *Id.* at 705-06.

[108] The residual effect of Judge Posner's decision can be seen in other judges' views of jury instruction reform: Judge Schwab discourages reform because "[t]inkering with something that's tried and true is always dangerous[.]" Caitlin Liu, *Say What, Your Honor?*, L.A. TIMES (Sept. 7, 2000), http://articles.latimes.com/2000/sep/07/news/mn-16940 [https://perma.cc/7JPL-TPBL]. Judges like Posner and Schwab seem to believe that despite overwhelming evidence of juries miscomprehending pattern instructions, the instructions are still "tried and true." *Id.*

[109] Robert Rich, *The Most Grotesque Structure of All: Reforming Jury Instructions, One Misshapen Stone at a Time*, 24 GEO. J. LEGAL ETHICS 819, 825 (2011). This may be because if a criminal defendant is acquitted based on jury miscomprehension, then Double Jeopardy bars further prosecution of the defendant. *See also* U.S. CONST. amend. V ("nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb").

[110] "Jury instruction reform and innovation should not depend on the willingness of courts to admit jury comprehension studies into evidence. The real opportunity to improve jurors' understanding lies in [reform through] drafting of pattern jury instructions." Marie Comiskey, *Initiating Dialogue about Jury Comprehension of Legal Concepts: Can the "Stagnant Pool" Be Revitalized?*, 35 QUEEN'S L.J. 625, 677 (2010).

Further, presumed jury comprehension renders instructions irrelevant in current practice; pattern instructions lead to improper jury application of the law in most cases.[111] Juries are fact finders, not law interpreters; judges deliver instructions to clarify the law, but when judges deliver incomprehensible instructions, juries must either attempt to interpret the law themselves or rely on improper considerations.[112] Regardless of whether a confused jury delivers a reliable verdict, a confused jury always improperly applies the law. Accordingly, this problem demands an alternative instruction method to ensure comprehension and safeguard proper jury application of the law.

C. Tailored Instructions Promote Proper Jury Application of the Law

By tailoring instructions, attorneys can convert *presumed* jury comprehension into *actual* jury comprehension. Tailored instructions produce four necessary benefits to instruction practice: (1) improved jury comprehension, (2) supported equal participation for rural and minority jurors, (3) deterred racial motives in capital sentencing, and (4) provided incentives for attorneys to focus juries on proper application of the law instead of improper considerations.

1. Tailored Instructions Improve Jury Comprehension

The primary benefit: tailored instructions improved jury comprehension. The tailored instruction method employs primarily syntactic measures of linguistics for two key purposes.[113] First, to ascertain a specific jury's reading level and to ascertain a particular instruction's readability level. This enables attorneys to craft instructions that match the syntactic

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[111] Diamond, *supra* note 44, at 1558. "[C]omprehension errors occurred in nearly all of the cases (forty-eight out of fifty)[.]" *Id.*

[112] *See id.* at 1570. "[I]n a case involving a manufacturer's warranty, a juror used the admonition regarding equal treatment of corporations to defend the corporation's alleged unwillingness to honor the warranty . . . . and was convinced that the instruction reduced the corporation's responsibility to the purchaser." *Id.*

[113] *See supra* Part I (analyzing tools available to measure two key components of linguistics: semantics and syntax).

complexity a specific jury can comprehend.[114] Instead of inaptly demarcating juries' reading levels like Plain English one-size-fits-all instructions, tailored instructions appreciate specific juries' individuality, creating particular instructions tailored to specific juries' reading levels.[115]

Second, tailored instructions employ primarily syntactic measures to enable attorneys to craft instructions that retain maximum legal precision. Contrastingly, Plain English instructions' *semantic* revision of key statutory language and court holding language renders them an unreliable method to increase jury comprehension because appellate courts frequently reverse this revision on appeal.[116] Although the tailored instruction method permits heavy syntactic revision, it eliminates the option of heavy semantic revision to maintain appellate court approval.

Nevertheless, syntactic revision of instructions significantly increases clarity and readability.[117] Avoiding heavy semantic revision does not hinder improving readability.[118] Poor syntax taxes juries mentally, causes ambiguity, and buries the instruction's proper application.[119]

Pattern instructions provide ample opportunity for heavy syntactic revision because they "use [] long, convoluted sentences," are "poorly organized, avoid[] transitions, [] place[] exceptions before general statements of law," overly use passive voice, and commonly "use *nominalizations* in place of [] verbs or adjectives

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[114] *See supra* Part I.

[115] *See supra* Part III.B.

[116] *See supra* Part III.A.

[117] "[S]entence-length and syntactic depth . . . are used as measurements of the same phenomenon; complexity of the sentence . . . . [S]entence-length has been established by previous research to be a good measurement of readability . . . . [M]ore than 50% of the formulas use average sentence-length as a component." Larsson, *supra* note 11, at 19, 23.

[118] Measuring "only a fraction of all factors that actually contribute to the comprehensibility of particular document . . . can [still] significantly improve text simplicity and, therefore, its readability." *See* Barczuk, *supra* note 13, at 345.

[119] See *id.* (describing the importance of simple syntax and observing that "sentences are generally harder to understand and read due to the fact that they require more mental work by the reader. In any case, the clearer and simpler, the better for the reader . . . ."); Larsson, *supra* note 11, at 19 (explaining that ambiguity stems from high rates prepositional phrases per sentence and that high amounts of subordinate clauses and negations affect readability).

from which they are derived."[120] Hence, tailored instructions allow attorneys to retain the legal precision so fervently preferred by trial and appellate judges, while significantly increasing jury comprehension through syntactic revision of pattern instructions.[121]

2. Tailored Instructions Support Equal Participation for Minority and Rural Jurors

The second benefit, relevant to current problems of racial inequality, is that tailored instructions represent a progressive innovation that ensures equality among socioeconomically diverse juries. The tailored instruction method can help to aid jurors from different social backgrounds by increasing instructions' usability and reducing unnecessarily technical construction.[122] Unlike pattern instructions or Plain English instructions, tailored instructions ensure that jury instructions are more accessible to statistically more rural and minority citizens, helping to reduce the likelihood that verdicts may be subject to instruction-induced appellate reversal.[123] Thus, increased comprehension aids in strengthening engagement among wider groups of jurors from various backgrounds.

3. Tailored Instructions Deter Racially Motivated Capital Sentencing

The third benefit: tailored instructions deter racially motivated capital sentencing through improved jury comprehension. Incomprehensible sentencing instructions result in white jurors relying on improper, underlying racially-motivated considerations instead of properly applying the law. Statistically, white jurors are more prone to sentencing black defendants to death when they miscomprehend sentencing instructions.[124] Thus, white jurors are more likely to properly apply the law when

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[120] Tiersma, *supra* note 73, at 1010-13.

[121] For a detailed analysis of how pattern jury instructions' poor syntax hinders juror comprehension, see Dylan Lager Murray, Comment, *Plain English or Plain Confusing?*, 62 MO. L. REV. 345 (1997).

[122] *See supra* Part III.B.

[123] *See id.*

[124] *See* Lynch & Haney, *supra* note 66, and accompanying text.

attorneys craft tailored instructions instead of improperly sentencing black defendants to death.

4. Tailored Instructions Cause Attorneys to Focus Juries on Proper Jury Application of the Law

> *"The lawyer's duty toward the tribunal, in other words, necessarily assumes secondary importance, and the drafting of jury instructions, like other parts of a trial, is one more issue to be litigated in a client's favor."*[125]

The fourth benefit: tailored instructions produce incentive for attorneys to focus juries on proper application of the law instead of improper considerations. Attorneys have a duty to zealously advocate for their clients, even when attorneys think the jury cannot comprehend a set of poorly written instructions. By doing nothing to focus juries on proper application of the law, attorneys can focus juries on other improper considerations for the benefit of their clients.[126] Dramatic evidence that does not match the law may improperly compel juries. If an attorney thinks a jury will latch on to certain facts, but knows the applicable law does not favor those facts, the attorney may divert the jury's attention away from proper application of the instructions. Legal scholars believe this strategy mainly benefits plaintiffs in civil cases and the state prosecution in criminal cases.[127]

However, some attorneys have clear incentives for comprehensible jury instructions, such as the defense attorneys in *Weeks*,[128] and therefore need a reliable method to ensure juries properly apply the law. If one party's attorney tailors instructions to the jury, then this shifts the other party's attorney to focus the jury on proper application of the law. Because tailored instructions increase comprehension, attorneys now have increased incentive to present evidence and plan trial strategy centered on proper jury application of the law.

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[125] Rich, *supra* note 109, at 827.

[126] *See* MODEL RULES OF PROF'L CONDUCT r. 1.3 cmt. 1 (AM. BAR ASS'N 2015) ("A lawyer should . . . take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor . . . . [and] must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.").

[127] *See* Steele & Thornburg, *supra* note 44.

[128] *See* Weeks v. Angelone, 528 U.S. 225 (2000).

V. HOW TO WRITE TAILORED INSTRUCTIONS

Because pattern instructions decimate jury comprehension, and because Plain English instructions' wholesale-reform fails to provide a reliable alternative, attorneys need to craft tailored instructions: the only method that ensures both jury comprehension and remains legally viable.

Attorneys can draft tailored jury instructions by using a simple three-step process. First, attorneys should ascertain the jury's reading level. Second, the applicable pattern instructions' readability level should be determined. Third, attorneys should revise the pattern instructions to match the syntactic complexity of both the jury's reading level and the applicable pattern instructions' readability.

A. Ascertain the Jury's Reading Comprehension Level

The first step is to ascertain the jury's reading level. The jury should complete a reading comprehension test between being selected and the start of trial. *Voir dire* provides attorneys and judges the opportunity to assess their audience. Assessing the jury's reading level positions attorneys to craft tailored instructions and provides the trial judges evidentiary support to implement tailored instructions.[129]

The tailored instruction method minimizes contention over which reading comprehension test jurors should take because only two tests correlate with the most effective readability tests capable of comparative revision: either the DRP, or the Lexile scale.[130]

Reading comprehension tests can be administered without delaying trial or causing prejudice. To prevent prejudice to either party, courts should administer the tests and the party advocating tailored instructions should be sealed on the record.

Reading comprehension tests will not delay trial. Tests can be administered on paper or electronically, usually within an hour. Although some courts possess insufficient electronic technology to expedite the scoring process, completed written tests can be priority mailed with hand-graded results the following day.

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[129] *See infra* Part VI.C.

[130] *See supra* Part I.B.

Thus, trial courts can practically administer reading comprehension tests without causing delay or prejudice.

Jurors' individual scores should be sealed on the record to foster juror cooperation and trust in the trial court system. Some jurors may be hesitant or unwilling to take a reading comprehension test. Trial judges, upon party request to tailor instructions, should clarify to the jurors the purpose and safety of the test: the results enable attorneys to craft instructions in a fashion that non-attorneys can comprehend and properly apply; the court will seal on the record the individual scores so that no one will know their individual scores; and tailored instructions discourage attorneys from taking advantage of them not being legally trained. If a juror refuses after explanation, then the juror should be presumed to comprehend the instructions, as the Supreme Court held in *Weeks*.[131]

B. Ascertain the Pattern Instruction's Readability Level

Next, the applicable pattern instructions' readability level should be determined. However, not all pattern instructions need revision, only substantive instructions. Substantive instructions typically include burden of poof, necessary elements to a cause of action, damages, and other crucial matters. By limiting revision to only substantive instructions, attorneys avoid wasting time revising mundane instructions and limit contention to only instructions deemed "important enough" that an attorney believes the jury should absolutely understand, i.e., the *Weeks* capital sentencing instruction.[132] Accordingly, even solo-practitioners can implement tailored instructions to some effect.

Attorneys can use the computerized readability formulas in Part I to assess the instructions' readability levels.[133] Both courts and legal databases store current pattern instructions for

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[131] *See supra* note 95 and accompanying text.

[132] *See supra* note 3 and accompanying text.

[133] *See generally* Measure Text Readability, READABLE.IO, https://readability-score.com/text/ [https://perma.cc/2CHT-UFQU] (last visited Feb. 6, 2018). This online linguistic tool runs text through multiple algorithms at once and "can tell you roughly what [grade-level] someone will need to be able to read a piece of text easily." *Id.* For solo practitioners, this tool currently costs three dollars a month, but larger firms can get one hundred accounts for seventy-five dollars a month. *Id.*

attorneys' use.[134] After discovering the relevant instructions, attorneys can type or copy and paste the instructions into the computerized readability formulas. The formulas then produce the readability level of the instructions and provide analysis of the syntactic-complexity of the text.[135]

Social scientists agree that to ensure accurate results, "it is advisable to calculate a readability estimate by taking an average across several pieces of literature, [and] across several different formulas . . . ."[136] So for an accurate readability level of instructions, an attorney should (1) use an on-line tool that employs several formulas, (2) test several relevant pattern instructions, and (3) average the instructions' scores to calculate the reading level the jury needs to comprehend those particular instructions.

C. Tailor: Revise the Pattern Instructions to Match the Jury's Comprehension Level

> *"[C]omprehension of jury instructions is peak when the reading level of the juror is equal to the readability score of the jury instruction . . . ."*[137]

The American Bar Association believes jury instructions should be written more comprehensibly.[138] Despite overwhelming evidence of how often pattern instructions confuse juries,

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[134] *See* Jury Instructions, LEXIS ADVANCE RESEARCH, https://advance.lexis.com/practice?config=014FJAAzZmMzODkzMS1mYmY2LTRjYmEtOTA2Ni1kZTA3MDM2ZDk2MTEKAFBvZENhdGFsb2fxfRNqmEtg8dXas5s3MceU&pdbcts=1476567545468&prid=18890bf0-0d85-44c9-9840-dca3e6911eae&crid=76b6d05c-b85d-4b80-8637-acbfe8d8dad5 [https://perma.cc/YZR3-MNKY]. Lexis Advance Research has pattern criminal and civil jury instructions for every state and for federal courts. *Id.* For practitioners without a Lexis account, a court can provide the appropriate jury instructions.

[135] *See generally* Measure Text Readability, READABLE.IO, https://readability-score.com/text/ [https://perma.cc/TJ6C-JD29] (last visited Feb. 6, 2018).

[136] Mailloux et al., *supra* note 21, at 225. When they tested one specific piece of literature, the formulas estimated the reading level ranged between 8.5 grade-levels. *Id.* at 224. But when they tested 28 different pieces of literature from the same source, "the variation is reduced significantly, to a discrepancy of 2.3 grades." *Id.* at 224.

[137] Bill G. Horton & Leah R. Thompson, *Jury Instructions: Are They Too Complicated for Jurors to Understand?*, 4 COMM. L. REV. 1 (2002), http://commlawreview.org/Archives/v4i1/Jury%20Instructions.pdf [https://perma.cc/52CX-4CF8].

[138] *See* Linguistics Meets Legalese, *supra* note 69, at 3.

"collaborations between legal professionals and linguists are rare."[139] Thus, attorneys must take advantage of linguistic tools to craft comprehensible tailored instructions on their own.

After contrasting the jury's reading level to the pattern instructions' readability level, an attorney can then revise the jury instructions' readability until the instructions match the jury's reading level.[140] After each revision, the attorney can simply reassess the revised instructions' readability level with a computerized readability formula. By repeating this process, an attorney can systematically revise the syntactic complexity of the instructions until they match the jury's reading level.

However, it may be impracticable or even impossible in some instances to revise a substantive instruction to a readability level low enough for each juror to comprehend. If a juror has an overwhelmingly low comprehension, that is, fifth-grade or lower, then instructions tailored to that level might lose all legal validity or be impossible to accomplish without heavy semantic revision. Thus, this approach tailors instructions for a specific jury, not individual jurors.

Although this Comment recognizes no method is perfect, the tailored instruction method stands alone in accomplishing both improved jury comprehension and appellate approval. Tailored instructions greatly improve jury comprehension when there is a low standard deviation, i.e., most jurors scoring within several grade-levels. But when there is a high standard deviation, that is, most jurors widely dispersed across a broad range of grade-levels, tailored instructions improve comprehension to the same degree of Plain English instructions. Nonetheless, tailored instructions are still superior because they are less likely to be reversed on appeal.[141]

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[139] *Id.*

[140] *See* Horton & Thompson, *supra* note 137. Although this novel idea comes from Horton and Thompson, they suggest using this information to support their argument to rewrite all jury instructions in Plain English. *Id.* However, this Comment argues the better approach, although similar to the Plain English method, is to rewrite problematic pattern jury instructions to the reading comprehension level of a paneled jury, not to rewrite all of the pattern instructions at once.

[141] *See infra* Part VI.

VI. TRIAL JUDGES CAN IMPLEMENT TAILORED INSTRUCTIONS WITHOUT APPELLATE REVERSAL

A. Trial Judges Fear Deviating from Pattern Instructions

"We have treated juror comprehension and legal correctness as mutual exclusives, and sacrificed the former on the altar of the latter to immunize against appellate reversal."[142]

Judicial preference of pattern instructions exists for two reasons. First, pattern instructions are essentially immune from reversal.[143] Second, errors in instructing the jury cause more reversals on appeal than any other appellate challenge.[144] Jury instructions address two audiences, not just the jury; the second audience is the appellate court. With this view, pattern instruction drafters "concentrate on the language" to "accurately convey the law as it has been expressed in statutes or interpreted in case law" because "they know that the appellate judges will review the instructions with a fine-tooth comb."[145]

The preference of pattern instructions hinders proper jury application of the law. Judges fear implementing alternate jury instructions even if they are clearer because appellate courts regularly reverse deviation from pattern instructions.[146] Critically, current appellate review practice creates a strong preference for pattern instructions among trial judges. Nevertheless, the implications of this appellate practice contradict its rationale: with strict standards of precise statements of law comes a greater rate

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[142] DAVID WATT, HELPING JURORS UNDERSTAND 18 (2007).

[143] *See* Marder, *supra* note 71, at 459 ("The trial judge is usually careful not to deviate from the instruction because he or she does not want to be reversed on appeal and have the case return for a new trial."); Young, *supra* note 1, at 180 ("[T]rial court judges are very reluctant to use any jury instruction or practice that varies from those that are court approved."); Rich, *supra* note 109, at 824 ("Many states and courts either require or strongly recommend that pattern or standardized jury instructions be used when available . . . ."); Cronan, *supra* note 67, at 1216 n.254 (noting that pursuant to ILL. ST. S. CT. R. 451(a), "in Illinois state criminal trials, the trial judge *must* use the applicable Illinois pattern instruction 'unless the court determines that it does not accurately state the law'").

[144] Young, *supra* note 1, at 150.

[145] *See* Marder, *supra* note 71, at 460-61.

[146] *See* Rich, *supra* note 109, at 827; *see also* Marder, *supra* note 71, at 461 ("When faced with the choice of simplifying the language but risking reversal or using the legal language, the legal language prevails.").

of incomprehensible jury instructions that produce improper application of the precise statements of the law.[147]

Introducing tailored instructions to a trial judge will diminish judicial preference of pattern instructions. Through the tailored instruction process, the trial judge learns both the comprehension of the jury and the readability level of the pattern instructions. Consequently, if a trial judge knowingly administers pattern instructions far above a jury's comprehension, then the judge has presumably abused his/her discretion by selecting incomprehensible instructions.[148] On the other hand, if a trial judge administers tailored instructions, the trial judge possesses overwhelming evidentiary support on appellate review, which heightens the posture of the trial judge's discretion on appellate review.

B. Tailored Instructions Are Legally Valid

> *"The courts increasingly rely on readability formulas to show the readability of texts in protecting the rights of citizens to clear information."*[149]

Readability formulas appear ubiquitously in research articles, real world application, and the legal system.[150] Since 1975, many state legislatures have imposed readability requirements on written communications such as "bank loans, insurance policies, rental agreements, and property-purchase contracts."[151] Numerous statutes proceed to mandate which

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147 Rich, *supra* note 109, at 833-34.

148 The trial judge is "the governor of the trial for the purpose of assuring its proper conduct[.]" Quercia v. United States, 289 U.S. 466, 469 (1933).

149 DUBAY, *supra* note 14, at 54.

150 For a sample of readability studies see *id.* at 55 (listing studies on political literature, corporate annual reports, customer service manuals, drivers' manuals, health information, consent forms, privacy notices, and medical journals). For a sample of readability applications see Heydari & Riazi, *supra* note 23, at 178 (listing applications such as education, media, newsletters, wire services, brochures, websites, manuals, and TV programs).

151 DUBAY, *supra* note 14, at 55. *See also* Louis J. Sirico Jr., *Readability Studies: How Technocentrism Can Compromise Research and Legal Determinations*, 26 QUINNIPIAC L. REV. 147, 148 n.6 (2007) (listing statutes requiring readability of consumer contracts, such as CONN. GEN. STAT. ANN. § 42-152 (West 2007), N.J. STAT. ANN. § 56:12-10 (West 2007), OR. REV. STAT. § 180.545 (2005), and 73 PA. CONS. STAT. § 2205 (West 2006)).

formula to implement along with a required minimum readability score.[152] Upon court challenge of these statutes, courts consistently uphold readability formulas and award damages centered on readability requirement violations.[153]

Courts not only uphold readability formulas in the private sector, but in *David v. Heckler*, a federal court imposed readability requirements on the United States Department of Health and Human Services.[154] The court compared the comprehension of a specific group of people, aged sixty-five years and older, to the readability of the department's Medicare denial letter, and found a seven grade-level discrepancy between half of the specific group's reading levels and the letters readability level.[155] The court held due process requires procedure that correlates with the specific situation—that situation being the discrepancy between an audience's reading comprehension and a letter's readability.[156]

The courts' general favor of readability formulas creates a unique opportunity to implement readability formulas in jury instruction innovation. If statutes can impose readability requirements on private sector corporations and private citizens, and if courts can impose readability requirements on government agencies, then appellate courts face an insurmountable barrier of evidentiary support that demands appellate approval of trial judges' decision to administer tailored instructions.

Tailored instructions answer the Supreme Court's "'call[] for procedures fitted to the circumstances of particular situations.'"[157]

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[152] *See, e.g.*, ARK. CODE ANN. § 23-80-206 (West 2017) (requiring insurance policies to score at least forty on the Flesch Reading Ease test); 505 ILL. COMP. STAT. 17/20(a)(4) (West 2018) (requiring agricultural production contracts to score no higher than the twelfth-grade on the Flesch-Kincaid test); MINN. STAT. ANN. § 144.056 (West 2017) (requiring consumer materials on public assistance to be understandable at the seventh-grade level using the "Flesch scale analysis readability score").

[153] *See* DUBAY, *supra* note 14, at 55. Other applications of readability formulas have been applied to other areas in the legal system such as "criminal rights, product labeling, private contracts, insurance policies, ballot measures, warranties, and warnings . . . ." *Id.* at 54-55.

[154] *See* David v. Heckler, 591 F. Supp. 1033 (E.D.N.Y. 1984) (holding that letters of Medicare denial written at readability levels far over the target audience's comprehension were insufficient to give notice).

[155] *See* DUBAY, *supra* note 14, at 55 (describing the court's use of readability in *David v. Heckler*).

[156] *Heckler*, 591 F. Supp. at 1042-43.

[157] *Id.* at 1042 (quoting Goss v. Lopez, 419 U.S. 565, 578 (1975)).

"[R]ecipients of [documents written at an overly-high level] may think they understand or [are] hesitant to admit they do not understand them."[158] Indisputably though, jury instructions "are written at a level well beyond most [jurors], with no discernable added benefit from [the] complexity [of the syntax] provided."[159] Hence, tailored instructions provide "procedures fitted" that is, crafting instructions that match a jury's reading level to particular instructions' readability level, "to the circumstances of particular situations", that is, eliminating "unnecessarily confusing [syntactic] language" in pattern instructions while "achieving the goal of clarity with no loss in precision" of the legal validity of the instructions.[160]

C. Tailored Instructions Heighten Trial Judges' Degree-of-Deference on Appellate Review

> *"The standard of review applicable to mixed questions usually depends upon where they fall along the degree-of-deference continuum: the more fact-dominated the [mixed] question, the more likely it is that the trier's resolution of it will be accepted unless shown to be clearly erroneous."*[161]

If a trial judge considers tailored instructions at trial, the posture of appellate court review shifts in two ways that heightens the trial judge's degree of deference on appellate review. First, tailored instructions significantly increase trial judges' use of factual findings to select jury instructions. Secondly, tailored instructions provide sufficient evidence to overcome the insurmountable barrier of court protection to rebut the *Weeks* presumption of jury comprehension.[162]

First, tailored instructions significantly increase trial judges' use of factual findings to select jury instructions, which results in increased deference. Tailored instructions are not only statements of the law; they are statements of the law factually determined for the use of a specific jury based on their reading level. Thus,

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158 *Id.* at 1043.

159 *Id.*

160 *Id.* at 1042-43 (citations omitted).

161 *In re* Extradition of Howard, 996 F.2d 1320, 1328 (1st Cir. 1993) (citations omitted).

162 *See supra* note 116 and accompanying text.

tailored instructions require trial judges to make fact-dominated considerations in selecting instructions, creating a mixed question of law and fact, and thus heightening the judge's degree of deference.

Appellate courts defer to trial judges' findings of demeanor of juror bias.[163] Tailored instructions extend this deference to findings of instructions' incomprehensibility according to the jury's reading level. Trial judges observe jurors' responses to questionnaires and to oral questions in *voir dire*, which postures them to perceive juror miscomprehension; trial judges determine juror bias in the same manner.[164] If a trial judge perceives juror miscomprehension during *voir dire*, and if the tailored instruction process reveals to the trial judge the same juror has a lower reading level than the pattern instructions' readability level–which should be sealed on the record–then the trial judge's discretion to administer tailored instructions "cannot be easily discerned from an appellate record."[165] Thus, this fact-intensive determination shifts instructions from a question of law standard of review, de novo, to a deferential standard.[166]

Secondly, tailored instructions provide sufficient evidence to overcome the insurmountable barrier of court protection and can rebut the *Weeks* presumption of jury comprehension in two ways.[167]

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[163] See Wainwright v. Witt, 469 U.S. 412, 428 (1985) ("[W]hether a venireman is biased has traditionally been determined through *voir dire* culminating in a finding by the trial judge concerning the venireman's state of mind . . . . based upon determinations of demeanor and credibility that are peculiarly within a trial judge's province.").

[164] "[A trial judge's] predominant function in determining juror bias involves credibility findings whose basis cannot be easily discerned from an appellate record." *Id.* at 429.

[165] *Id.*

[166] "[T]he review standard of a mixed question depends on where it falls along a degree-of-deference continuum: the more fact-dominated the mixed question, the more deference given to the trial court." Rex S. Heinke & Jason A. Park, *Second Chances: What Appellate Courts Can (and Cannot) Do for You*, METROPOLITAN CORP. COUNS., http://www.metrocorpcounsel.com/articles/11655/second-chances-what-appellate-courts-can-and-cannot-do-you [https://perma.cc/GV45-WRRT]. Discretion in using tailored instructions is a mixed question deserving of high deference because although jury instructions are law-intensive, the tailored aspect of jury comprehension to the instructions is heavily fact-dominated.

[167] *See supra* note 95 and accompanying text.

The first way tailored instructions can rebut *Weeks* is that ascertaining the jury's reading level irrefutably either denies or confirms the Supreme Court's presumption of juror comprehension. Further, this overcomes the "insurmountable barrier" of overcoming courts' ubiquitous rejection of miscomprehension evidence because the tailored instruction method provides evidence specific to the jury at hand and in a timely manner—not an offsite experimental jury, not evidence submitted after the verdict, and not evidence of juries submitting questions to the trial judge during deliberation.[168]

The second way tailored instructions can rebut *Weeks*: if less than six jurors' reading levels match or exceed the instructions' readability level, then the jury must presumptively *not* comprehend the instructions "to a constitutional degree."[169] Thus, tailored instructions create the only method able to rebut the *Weeks* presumption. Unlike other rebuttal attempts rejected by courts, the tailored instruction method creates overwhelming evidentiary support not yet considered by appellate review while simultaneously advancing strong public policy and constitutional reasoning to rebut the *Weeks* presumption.

CONCLUSION

Jury miscomprehension, such as in *Weeks v. Angelone*, demands an alternative instruction method to ensure proper jury application of the law. While Plain English instructions attempt to fix a broken pattern instruction practice, they merely create invalid statements of law prone to appellate reversal and inaptly demarcate juries' reading levels to one standard. Because jury comprehension cannot be adequately achieved with one-size-fits-all instructions, the problem requires a more specific solution.

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[168] *See supra* Part IV.B.2.

[169] "[T]he purpose and functioning of the jury in a criminal trial is seriously impaired, and to a constitutional degree, by a reduction in size to below six members." Ballew v. Georgia, 435 U.S. 223, 239 (1978). Although this holding refers to numbers in size of the jury, this Comment suggests that constitutional size and comprehension should be viewed equally. If the minimum is six total jurors, then the minimum amount of competent jurors able to comprehend the instructions should also be six. Thus, if a state allows twelve jurors, then six of the twelve should constitutionally be required to comprehend the instructions, but if the state only allows six, then all six of the jurors must be able to comprehend the instructions.

Tailored instructions represent a reliable method for maximizing specific juries' comprehension and safeguarding proper jury application of the law.

The idea for tailored instructions derives from the inherent truth that jury instructions are more than just mere statements of the law; they are statements of the law for the particular use of a specific jury. The relevance of the rule of law in jury trials is grounded in the belief that through instructions, the jury will properly apply the law. Among the potential options for reform, tailored instructions are the best-suited to promote proper jury application of the law.

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APPENDIX: TAILORED INSTRUCTION EXAMPLE

This appendix implements the method prescribed in Part V to provide visual representation of a tailored instruction. Accordingly, this example determines the reading level needed to comprehend the *Weeks* capital sentencing instruction, VA. PRAC. JURY INSTRUCTIONS § 80:5,[170] and then tailors them to a jury comprised of average American adults. Based upon the *Weeks* jury's question to the judge, this instruction has been tailored specifically for them.

A. Pattern Instruction's Readability Level: 14th Grade[171]

You have convicted the defendant of an offense which may be punished by death. You must decide whether the defendant shall be sentenced to death or to imprisonment for life or to imprisonment for life and a fine of a specific amount, but not more than $100,000. Before the penalty can be fixed at death, the Commonwealth must prove beyond a reasonable doubt at least one of the following two alternatives:

1. That, after consideration of his history and background, there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society; or

2. That his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved depravity of mind or aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder.

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[170] The instruction is "[a]dapted from the language . . . approved and given in Weeks v. Angelone, 176 F.3d 249 (4th Cir. 1999), *aff'd*, 528 U.S. 225, 120 S. Ct. 727, 145 L. Ed. 2d 727 (2000)." VA. PRACT. JURY INSTRUCTIONS § 80:5. cmt. (2017).

[171] Estimated by Measure Text Readability, READABLE.IO, https://readability-score.com/text [https://perma.cc/YQV3-LQ49] (last visited Feb. 6, 2018). The formulas estimated as follows: Flesh-Kincaid Grade Level – 14.4; Coleman-Liau Index – 12.1; Automated Readability Index – 15.9. *Id.*

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt either of the two alternatives, and as to that alternative you are unanimous, then you may fix the punishment of the defendant at death or if you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment of the defendant at life imprisonment or imprisonment for life and a fine of a specific amount, but not more than $100,000.

If the Commonwealth has failed to prove beyond a reasonable doubt at least one of the alternatives, then you shall fix the punishment of the defendant at life imprisonment or imprisonment for live *[sic]* and a fine of a specific amount, but not more than $100,000

B. Tailored Instruction's Readability Level: 8th Grade[172]

What punishments may I consider?

You convicted the defendant of capital murder. Now you must decide to sentence the defendant to either:

(a) Death,

or

(b) Imprisonment for life.

If you decide to sentence life, you may also include a fine of any amount up to $100,000.

How must I decide which punishment to sentence?

You must not consider sentencing the defendant to death unless the Commonwealth proves beyond a reasonable doubt at least one of the following two alternatives:

1. You believe there is probability that the defendant will commit criminal acts of violence that constitute a

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[172] Estimated by Measure Text Readability, READABLE.IO, https://readability-score.com/text [https://perma.cc/Z3ME-QPKK] (last visited Feb. 6, 2018). The formulas estimated as follows: Flesh-Kincaid Grade Level – 6.2; Coleman-Liau Index – 12.5; Automated Readability Index – 5.3. *Id.*

continuing serious threat to society. But you must believe this after considering the defendants history and background; or

2. You can define his conduct in committing the crime as at least one of the following:
    a. Outrageously or wantonly vile;
    b. Horrible or inhuman by either involving:
        i. depravity of mind, or
        ii. aggravated battery to the victim beyond the minimum necessary to murder the victim.

What if we all agree the Commonwealth failed to prove either alternative?

You must sentence the defendant to life if the Commonwealth failed to prove beyond a reasonable doubt either alternative. You may also include a fine of any amount up to $100,000.

What if we disagree whether the Commonwealth failed to prove either alternative?

You must sentence the defendant to life if the Commonwealth failed to prove beyond a reasonable doubt either alternative. You may also include a fine of any amount up to $100,000.

What if we all agree the Commonwealth proved at least one or both alternatives?

You may consider sentencing the defendant to death if:

1. You all agree the Commonwealth proved beyond a reasonable doubt one or both alternatives; and
2. You all find this from the evidence;

but you may still sentence the defendant to life in prison if:

1. You all agree the death penalty is not justified; and
2. You agreed on this from all the evidence.