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Volume 28

Number 3 *Symposium—The Sound of the Gavel:  
Perspectives on Judicial Speech*

Article 6

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4-1-1995

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#### Recommended Citation

Christopher N. May, *What do we do Now: Helping Juries Apply the Instructions*, 28 Loy. L.A. L. Rev. 869 (1995).

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# **“WHAT DO WE DO NOW?”: HELPING JURIES APPLY THE INSTRUCTIONS**

*Christopher N. May\**

*“That you be a light to the jurors to open their eyes, but not a guide to lead them by the nose.”<sup>1</sup>*

## **I. INTRODUCTION**

During the past six years, I served as a juror in two cases, one criminal<sup>2</sup> and the other civil.<sup>3</sup> These experiences suggest that juries often confront the serious problem of not knowing what to do with the law they are given. Neither jury I sat on was sure of how to use or access the instructions. To my surprise they did not realize that each of the claims or offenses contained in the charge consisted of a series of elements. It was not obvious to them that in order to reach a ver-

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1. Jack B. Weinstein, *The Power and Duty of Federal Judges to Marshall and Comment on the Evidence in Jury Trials and Some Suggestions on Charging Juries*, 118 F.R.D. 161, 163 (1988) (quoting Francis Bacon (instructing judge about to assume duties)).

2. The case was tried in the California Superior Court in 1989. It arose out of an incident at a small shopping plaza where a customer parked her car so as to block a parking space designated for handicapped drivers. The customer refused requests by security guards that she move her vehicle; during the three hours she was illegally parked, she also repeatedly activated her car alarm. After the plaza owner finally called the police, the customer attempted to drive off the premises. Security guards blocked her exit, and the plaza owner then broke the side window of her car with a hammer and removed the keys from the ignition. In the altercation the customer suffered an injury to her mouth. The plaza owner was charged with two felonies: assault with intent to inflict severe bodily harm, and false imprisonment. After a one-week trial, the 12-member jury acquitted the defendant on both counts.

3. The case was filed in the California Superior Court by an engineer against a large hospital for which he had worked as an independent researcher. Under an agreement with the hospital, the plaintiff was to develop an invention; any royalties from the invention, were it completed and patented, would be shared equally by the parties. In the fourth year of the project, when the invention remained uncompleted, the hospital remodeled the area where the plaintiff's laboratory space was located, and everything in the space was discarded. The plaintiff sued the hospital for \$9 million, asserting five claims for relief: breach of contract; breach of implied covenant of good faith and fair dealing; bailment; and both intentional and negligent interference with prospective economic advantage. The trial in the summer of 1994 lasted about one month. The 12-member jury awarded the plaintiff \$167,000.

dict it was necessary to go through each claim or offense and determine whether each one of the elements had been satisfied. Moreover, there were times when the jury was unable to relate the facts to the law in the sense of knowing which evidence was to be matched with which legal element.

Upon reflection my surprise was unjustified. What it comes down to is that these juries did not know how to apply the law to the facts. I have been teaching law for more than twenty years; the problem that these juries faced is identical to that which confounds most law students—sometimes well into the second year. Lay jurors, who have received no more than an hour or two of legal instruction, cannot be expected to perform better than those who have studied diligently for months. It is all too easy for those of us who are lawyers or judges to forget what the world looked like before we entered law school. Mark Twain observed that once he had become trained as a skilled river pilot, he could no longer see the Mississippi in the way that he had as a boy.<sup>4</sup> The same phenomenon may hold for those of us who have been trained in the law. We must try to recapture our innocence if we are to make the jury's task a meaningful one.

To help rectify this situation, I offer two suggestions. First, in charging the jury at the end of a case, the judge should include an instruction that encourages the jury to break each claim or offense down into its component elements, to deal with the elements one at a time, and to ask whether the evidence established each element. Second, in jurisdictions where the court is permitted to summarize the evidence,<sup>5</sup> the judge should either weave the evidence into the instructions, or use the threat of doing so to induce counsel to link the evidence to the law in their closing arguments.

The thoughts put forward here stem from a very narrow evidentiary base. At the same time, my experience appears not to have been atypical, for it is mirrored in, and confirmed by, many published studies concerning jury behavior.<sup>6</sup> Nevertheless, I acknowledge that the suggestions made here are based on little more than a hunch. Whether they will help juries in the future remains to be seen.<sup>7</sup> In

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4. See LEO MARX, *THE MACHINE IN THE GARDEN: TECHNOLOGY AND THE PASTORAL IDEAL IN AMERICA* 321-25 (1964) (discussing this observation in Twain's works).

5. ROBERT G. NIELAND, *PATTERN JURY INSTRUCTIONS: A CRITICAL LOOK AT A MODERN MOVEMENT TO IMPROVE THE JURY SYSTEM* 31-33 (1979) (noting that judges are permitted to summarize evidence in 40 states and in federal courts).

6. See *infra* part III.

7. See MARTIN GOLDING, *LEGAL REASONING* 2-4 (1984), *quoted in* MICHAEL J. GERHARDT & THOMAS D. ROWE, JR., *CONSTITUTIONAL THEORY: ARGUMENTS AND PER-*

short, I present them without claiming to have discovered the First Law of Jurydynamics.<sup>8</sup>

## II. THE PROBLEM OF COMPREHENDING THE LAW

In the typical case<sup>9</sup> the jury has three distinct tasks. First, it must examine the evidence and resolve disputed issues of fact; that is, it must figure out what actually happened in the case. Then it must examine the judge's instructions to determine what the applicable law is. Finally, it must apply the law to the facts in order to reach a verdict.<sup>10</sup> A jury's failure to understand the evidence, to comprehend the law, or to apply the law correctly may result in a miscarriage of justice or in the verdict being overturned by the trial or appellate courts.

Much has been written about how to assist jurors to better process and comprehend evidentiary material, including complex statistical evidence and expert testimony.<sup>11</sup> Studies indicate that juries generally do a good job of determining the facts.<sup>12</sup> From an eviden-

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SPECTIVES 17 (1993) ("The process of scientific discovery often involves hunches, intuitions and flashes of insight. . . . [W]hat characterizes the process as *science* is . . . the attempt to subject the hunch, formulated as a hypothesis, to verification by carefully controlled experiment.").

8. For an article of equally modest proportions but grotesquely dissimilar pretensions, see Paul Horowitz et al., *The Law of Prime Numbers*, 68 N.Y.U. L. REV. 185, 190 (1993) (claiming that its less-than-20 pages "may well be one of the most intelligent contributions to legal scholarship in many years").

9. Where the jury is required to return a special verdict, its tasks are much narrower. See *infra* notes 23-25 and accompanying text.

10. *Skidmore v. Baltimore & Ohio R.R.*, 167 F.2d 54, 60-61, 64 n.25b (2d Cir.) (Frank, J.), cert. denied, 355 U.S. 816 (1948); see also REID HASTIE ET AL., INSIDE THE JURY 22-23, 169, 234 (Reid Hastie ed., 1983) (noting that juries commonly approach their task by first looking at evidence to determine "what happened," then looking to judge's instructions to determine what rules are, and finally applying law to facts to reach verdict). The jury's third task of applying the law consists of two distinct steps: first, applying the law to the facts to reach a specific legal conclusion—for example, Was the defendant negligent? Did the defendant act with the intent to cause severe bodily harm?; and second, integrating these conclusions into a verdict—for example, Is the plaintiff entitled to recover? Is the defendant guilty? See Amiram Elwork et al., *Juridic Decisions: In Ignorance of the Law or in Light of It?*, 1 LAW & HUM. BEHAV. 163, 176 (1977).

11. See SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, THE AMERICAN JURY ON TRIAL: PSYCHOLOGICAL PERSPECTIVES 119-39 (1988); Richard O. Lempert, *Civil Juries and Complex Cases: Let's Not Rush to Judgment*, 80 MICH. L. REV. 68 (1981) [hereinafter Lempert, *Let's Not Rush*]; Richard Lempert, *Civil Juries and Complex Cases: Taking Stock After Twelve Years*, in VERDICT: ASSESSING THE CIVIL JURY SYSTEM 181-235 (Robert E. Litan ed., 1993) [hereinafter Lempert, *Taking Stock*]; Daniel H. Margolis et al., *Jury Comprehension in Complex Cases*, 1990 A.B.A. SEC. LITIG. 24-43, 608-10.

12. HASTIE ET AL., *supra* note 10, at 230; Phoebe C. Ellsworth, *Are Twelve Heads Better Than One?*, LAW & CONTEMP. PROBS., Aug. 1989, at 205, 217-18, 223.

tiary standpoint, it appears that there are few cases which, if handled properly, are beyond a jury's capacity to decide.<sup>13</sup>

Studies literally abound demonstrating the extent to which jurors misapprehend the relevant law.<sup>14</sup> The problem is especially severe when the law is set forth in pattern instructions that—because they are designed without the facts of any particular case in mind—tend to be abstract, general, and technical.<sup>15</sup>

Jury misunderstanding of the law may lead to arbitrary and literally lawless verdicts.<sup>16</sup> This is quite distinct from the phenomenon of jury nullification. Nullification is based on a jury's knowing and deliberate refusal to apply the law because it is contrary to the community's sense of justice, morality, or fairness.<sup>17</sup> If a jury does not

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13. Lempert, *Let's Not Rush*, *supra* note 11, at 106-32; Lempert, *Taking Stock*, *supra* note 11, at 181-235. *But see* Margolis et al., *supra* note 11, at 527-31 (finding that jurors in lengthy federal trade secrets suit involving complex chemical processes "had a great deal of difficulty deciding the facts of this case. They were stymied by both the complexity and volume of the evidence"; but suggesting that if trial had been shorter and exhibits fewer, jury might have been less confused).

14. AMIRAM ELWORK ET AL., MAKING JURY INSTRUCTIONS UNDERSTANDABLE 8-9, 12-17, 43-69 (1982); HASTIE ET AL., *supra* note 10, at 80-81 (finding that individual jurors tested "less than 30 percent accurate on questions about material stated directly in the judge's final charge, such as the elements of the legal definition of second degree murder"); KASSIN & WRIGHTSMAN, *supra* note 11, at 148-56; NIELAND, *supra* note 5, at 23-27; Jonathan D. Casper, *Restructuring the Traditional Civil Jury: The Effects of Changes in Composition and Procedures*, in VERDICT: ASSESSING THE CIVIL JURY SYSTEM, *supra* note 11, at 414, 422-23, 436, 444-45; Shari Seidman Diamond, *What Jurors Think: Expectations and Reactions of Citizens Who Serve as Jurors*, in VERDICT: ASSESSING THE CIVIL JURY SYSTEM, *supra* note 11, at 282, 295; Amiram Elwork & Bruce D. Sales, *Jury Instructions*, in THE PSYCHOLOGY OF EVIDENCE AND TRIAL PROCEDURE 280, 283-85 (Saul M. Kasson & Lawrence S. Wrightsman eds., 1985); Lempert, *Taking Stock*, *supra* note 11, at 151-52, 201-02; Margolis et al., *supra* note 11, at 43-49, 610-13; *id.* at 470-71, 516, 531-34 (noting that in complex federal trade secrets case in which judge based his charge on state pattern jury instructions, individual jurors believed they understood law well but were unable to paraphrase many terms used in instructions); J. Alexander Tanford, *The Law and Psychology of Jury Instructions*, 69 NEB. L. REV. 71, 79-80 (1990) (summarizing studies); Peter Meijes Tiersma, *Reforming the Language of Jury Instructions*, 22 HOFSTRA L. REV. 37, 41-44 (1993) (summarizing studies).

15. NIELAND, *supra* note 5, at 39; STANDARDS RELATING TO TRIAL BY JURY 112 (Advisory Comm. on the Criminal Trial, Am. Bar Ass'n 1968).

16. HASTIE ET AL., *supra* note 10, at 80-81 (finding that 43% of mock juries studied in comprehensive experiment based on actual trial reached "incorrect" verdicts in sense that they departed from what experts agreed was correct verdict).

17. *See, e.g.*, VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 149-63 (1986); HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 221-347 (1966); KASSIN & WRIGHTSMAN, *supra* note 11, at 156-62; Martha A. Myers, *Rule Departures and Making Law: Juries and Their Verdicts*, 13 LAW & SOC'Y REV. 781 (1979); Alan Schefflin & Jon Van Dyke, *Jury Nullification: The Contours of the Controversy*, LAW & CONTEMP. PROBS., Aug. 1980, at 51. Nullification can occur in criminal cases. *See, e.g.*, CHRISTOPHER N. MAY, IN THE NAME OF WAR: JUDICIAL REVIEW AND THE WAR POWERS SINCE 1918, at

understand the law, however, nullification cannot occur.<sup>18</sup> Because jury misapprehension of the law is not a ground for reversal,<sup>19</sup> it is important to do everything we can to help maximize jury comprehension. Otherwise, it is pointless and even hypocritical to go through the ritual of instructing juries.

In addition to producing arbitrary and lawless verdicts, jury misunderstanding of the law may be highly inefficient. If a jury has no clear standards to guide it, its members may have difficulty reaching the required degree of unanimity, resulting in a hung jury. Alternatively, the verdict that the jury does reach may be so clearly erroneous that the court will set it aside on a motion for judgment n.o.v. or a new trial.<sup>20</sup> If this occurs, not only will the time and resources devoted to the trial have been totally wasted, but it may also spawn an equally expensive and possibly futile second trial.

There have been many suggestions as to how to deal with the jury's difficulty in comprehending the law. One solution would be to entirely relieve the jury of any role in applying the law to the facts. The jury would then never need to hear, much less understand, the law that governs the case. There are two ways this might be done, both applicable only in civil cases. First, the courts might create a "complex cases" exception to the Seventh Amendment right to jury trial.<sup>21</sup> However, the Supreme Court has not recognized such an exception, and the case for doing so appears not to have been made.<sup>22</sup>

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85, 184-86 (1989) (noting jury refusals to convict under wartime laws that government sought to enforce after 1918 armistice). Nullification can also occur in civil cases. See HANS & VIDMAR, *supra*, at 160-63; Lempert, *Let's Not Rush*, *supra* note 11, at 80-84.

18. ELWORK ET AL., *supra* note 14, at 3-5; Lempert, *Let's Not Rush*, *supra* note 11, at 86. There may be times when the jury's role as a reflector of society's values comes into play not by choosing to ignore the law, but by resolving conflicts in societal values the resolution of which is not clearly articulated by the law. See George L. Priest, *Justifying the Jury*, in VERDICT: ASSESSING THE CIVIL JURY SYSTEM, *supra* note 11, at 106-18.

19. KASSIN & WRIGHTSMAN, *supra* note 11, at 151-52; Tanford, *supra* note 14, at 102; Tiersma, *supra* note 14, at 55-59.

20. See Lempert, *Let's Not Rush*, *supra* note 11, at 87-88, 92, 126-30.

21. Casper, *supra* note 14, at 426-27; Lempert, *Let's Not Rush*, *supra* note 11; Lempert, *Taking Stock*, *supra* note 11; Tiersma, *supra* note 14, at 45-46 & n.37. The Seventh Amendment has not been extended to the states through the Fourteenth Amendment. See *Minneapolis & St. Louis R.R. v. Bombolis*, 241 U.S. 211 (1916); *Walker v. Sauvinet*, 92 U.S. 90 (1875). However, a state might make such an exception to a jury trial right conferred by state law.

22. Lempert, *Let's Not Rush*, *supra* note 11, at 129-32; Lempert, *Taking Stock*, *supra* note 11, at 235.

A second option would be to have civil juries return a special verdict that resolves only the disputed questions of fact.<sup>23</sup> The court would then apply the law to the facts as found by the jury. While this procedure is recognized in most jurisdictions,<sup>24</sup> special verdicts do not entirely eliminate the need for the jury to understand and apply the law. Even with a special verdict, the jury must often decide issues of "ultimate fact" such as negligence and causation, which entail difficult legal instructions.<sup>25</sup> Moreover, the special verdict is highly controversial, often provoking sharp resistance,<sup>26</sup> for it exposes a fundamental ambivalence in our perception of the jury's role.<sup>27</sup> On the one hand, we insist that the jury apply the law as given it by the judge. Except in a few states,<sup>28</sup> the jury does not have the *right* to ignore the law. On the other hand, we acknowledge that because a jury reflects the conscience of the community, it has the *power* to nullify the law if justice, morality, or common sense so dictate.<sup>29</sup> This nullification function is all but lost when a special verdict is employed.<sup>30</sup> Lawyers, recognizing that juries may in fact ignore or at least take the rough edges off the

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23. This solution was urged by Judge Jerome Frank, who argued that with a general verdict, we never know whether the jury correctly performed any of the steps necessary to reach a verdict. *Skidmore v. Baltimore & Ohio R.R.*, 167 F.2d 54, 60-61, 64 n.25b (2d Cir.) (Frank, J.), *cert. denied*, 355 U.S. 816 (1948). Judge Frank hoped that the Federal Rules of Civil Procedure would be amended "to make compulsory either special verdicts or written interrogatories in civil jury cases." *Id.* at 67. In the same case, Judge Learned Hand stated that "it would be desirable to take special verdicts more often." *Id.* at 70 (Hand, J., concurring); see JEROME FRANK, *COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE* 141-42 (1949); see also Margolis et al., *supra* note 11, at 235, 328-29 (indicating that special verdict form was used in federal civil antitrust action because judge believed it would serve as road map for jury in its deliberation). *But see* Casper, *supra* note 14, at 433-44 (noting problems with use of special verdicts).

24. See, e.g., FED. R. CIV. P. 49; CAL. CIV. PROC. CODE § 625 (West 1976); JACK H. FRIEDENTHAL ET AL., *CIVIL PROCEDURE* 533 (2d ed. 1993).

25. See JOHN F. WELLS & LISE A. PEARLMAN, *CALIFORNIA FORMS OF JURY INSTRUCTIONS* § 1.03[7] (1994); Casper, *supra* note 14, at 436; Margolis et al., *supra* note 11, at 213, 228, 242-43, 293-329 (reporting that in federal civil antitrust case where jury was given special verdict form consisting of five questions, instructions were 32 pages long, took one hour to deliver, and contained multiple definitions of conspiracy).

26. See Stephen A. Saltzburg, *Improving the Quality of Jury Decisionmaking*, in *VERDICT: ASSESSING THE CIVIL JURY SYSTEM*, *supra* note 11, at 341, 360-61.

27. KASSIN & WRIGHTSMAN, *supra* note 11, at 215.

28. Georgia, Indiana, and Maryland recognize that juries have the *right* to decide both the law and the facts, though only in the latter two states is the jury expressly instructed that it has this right. Schefflin & Van Dyke, *supra* note 17, at 79-85.

29. See *supra* note 17 and accompanying text.

30. On the use of special verdicts and general verdicts with interrogatories, see FLEMING JAMES, JR. ET AL., *CIVIL PROCEDURE* 377-81 (4th ed. 1992); FRIEDENTHAL ET AL., *supra* note 24, at 533-34; Casper, *supra* note 14, at 440, 449-52.

law, frequently oppose the use of a special verdict, for they do not always want a case to be decided on the strict letter of the law.<sup>31</sup>

These extreme solutions are rarely pressed. More often, jury confusion about the law is addressed through a variety of mechanical and procedural innovations which are designed to increase the level of juror comprehension. These include such devices as giving substantive pretrial instructions;<sup>32</sup> repeating the instructions;<sup>33</sup> allowing jurors to take notes on the judge's instructions;<sup>34</sup> giving the jury a written copy or copies of the instructions;<sup>35</sup> and having the judge answer jurors' questions about the instructions.<sup>36</sup> Many of these innovations have been implemented at the state and federal levels.<sup>37</sup> Another option is to employ a general verdict with interrogatories. Here, the jury is asked to return a general verdict, but is also asked to answer specific questions which may force it to take the steps necessary to correctly reach a verdict.<sup>38</sup> This is beneficial to the extent that it focuses jurors' attention on key legal issues.<sup>39</sup> However, it may be wasteful if, due to inconsistent responses, the verdict is later overturned.<sup>40</sup>

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31. See Casper, *supra* note 14, at 437-38 (noting "plausible a priori theorizing" that special verdicts may, in close cases, favor defendant, but noting that others see possible bias for plaintiff); Margolis et al., *supra* note 11, at 214, 222 (noting that plaintiffs in federal antitrust action opposed court's use of special verdict form, "believing that it put the plaintiff at a disadvantage because 'if the jury wants to go home early, they answer the first question no, and they can go home'" (quoting plaintiff's attorneys); jury answered first question as plaintiff's counsel had feared).

32. ELWORK ET AL., *supra* note 14, at 21-24; NIELAND, *supra* note 5, at 32-34; Tanford, *supra* note 14, at 83-84; Margolis et al., *supra* note 11, at 49-50, 614-17.

33. See Tanford, *supra* note 14, at 84-85.

34. NIELAND, *supra* note 5, at 30-31; Margolis et al., *supra* note 11, at 604.

35. ELWORK ET AL., *supra* note 14, at 18-20; NIELAND, *supra* note 5, at 28-30; Margolis et al., *supra* note 11, at 51, 622-24; see CAL. CIV. PROC. CODE § 612.5 (West 1976) (stating that court must advise jury that written copy of instructions is available and give jury copy upon request). In California Superior Courts, some judges give each juror a written set of instructions. Telephone Interview with the Honorable Frederick J. Lower, Jr., Judge, Los Angeles County Superior Court (Dec. 20, 1994).

36. Lempert, *Taking Stock*, *supra* note 11, at 228; Margolis et al., *supra* note 11, at 52-53.

37. Tanford, *supra* note 14, at 93-94.

38. See, e.g., FED. R. CIV. P. 49(b); CAL. CIV. PROC. CODE § 625 (providing for general verdict with special findings of fact); FRIEDENTHAL ET AL., *supra* note 24, at 533-39; JAMES ET AL., *supra* note 30, at 378-81.

39. JAMES ET AL., *supra* note 30, at 381; Casper, *supra* note 14, at 434-37; Margolis et al., *supra* note 11, at 624.

40. See FED. R. CIV. P. 49(b) ("When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial."); Margolis et al., *supra* note 11, at 624; *id.* at 128-29 (reporting that federal judge in sexual harassment case rejected use of special verdict and special

Another approach to improving juror comprehension of the law is to change the way judges speak to juries when giving them instructions. There is a considerable body of social science evidence showing that rewriting and simplifying the language of jury instructions significantly increases jurors' understanding of the law.<sup>41</sup> However, courts have generally been slow in responding to the findings of social science research;<sup>42</sup> this is particularly true with respect to revising pattern jury instructions.<sup>43</sup> Judges are often reluctant to depart from the approved pattern instructions for fear that they will be reversed.<sup>44</sup>

Yet, even if the response were much better, a serious problem would remain. Studies show that even when using revised and simplified instructions, jurors understand no more than eighty percent of the law and usually far less.<sup>45</sup> This may indicate that there is a limit to

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interrogatories for fear that attorneys might claim there had been inconsistent verdicts which could then lead to mistrial); *id.* at 457-58, 471 (reporting that federal judge in complex trade secrets case rejected cross-defendant's request for use of special interrogatories in order to prevent possible mistrial). *But see* JAMES ET AL., *supra* note 30, at 380 (noting that general verdicts with interrogatories allow errors to be isolated and perhaps found to be harmless, thereby reducing necessity for reversal on appeal).

41. *See* ELWORK ET AL., *supra* note 14, at 12-17, 43-69; NIELAND, *supra* note 5, at 24-27; Elwork et al., *supra* note 10, at 170-71, 175-78; Margolis et al., *supra* note 11, at 45; Tanford, *supra* note 14, at 80-82.

42. On the problem in general, see J. Alexander Tanford, *Law Reform by Courts, Legislatures, and Commissions Following Empirical Research on Jury Instructions*, 25 LAW & SOC'Y REV. 155 (1991).

43. KASSIN & WRIGHTSMAN, *supra* note 11, at 152-53; NIELAND, *supra* note 5, at 22-27; Elwork et al., *supra* note 10, at 164; Joseph Kimble, *Plain English: A Charter for Clear Writing*, 9 COOLEY L. REV. 1, 39-40 (1992); Lempert, *Taking Stock*, *supra* note 11, at 201, 244 n.98; Alan Reifman et al., *Real Jurors' Understanding of the Law in Real Cases*, 16 LAW & HUM. BEHAV. 539, 541-42 (1992); Saltzburg, *supra* note 26, at 355-56; Tanford, *supra* note 14, at 91-93; Tiersma, *supra* note 14, at 52-62. In one federal criminal case where pattern instructions were used, the jury itself tried to rewrite the instructions using lay terminology. Margolis et al., *supra* note 11, at 377, 397.

44. Saltzburg, *supra* note 26, at 355-56; Weinstein, *supra* note 1, at 162.

45. ELWORK ET AL., *supra* note 14, at 64-69 (reporting study in which mock jurors deliberating with standard instructions had 40% comprehension of the law, while those using revised instructions had 78% comprehension); NIELAND, *supra* note 5, at 26 & nn.44-45 (1979) (noting Arizona study where juror comprehension of standard pattern instructions was 52.06%, while with revised instructions their comprehension showed "a 20% improvement"—that is, jurors understood 62% of revised instructions); Robert P. Charrow & Veda R. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 COLUM. L. REV. 1306, 1333, 1370 (1979) (reporting study in which mock jurors who were read pattern California jury instructions had comprehension level of 44.7%, while their understanding of modified instructions was 59.2%); Elwork et al., *supra* note 10, at 170, 175 (reporting two experiments in which mock jurors using standard Michigan instructions involving simple automobile negligence case had comprehension rates of 60% and 62%, while jurors given rewritten instructions had comprehension rates of 81% and 71%; in neither case did mock jurors discuss instructions among them-

how coherent the law can be made for lay persons.<sup>46</sup> In addition, however, the seeming inability of jurors to comprehend the law may also reflect the fact that juries often have no idea how to use the instructions. They therefore spend little time reviewing them, and consequently they may score poorly on recall and paraphrase tests regardless of how clearly the instructions were written.

### III. THE PROBLEM OF APPLYING THE INSTRUCTIONS

Even if it were possible for juries to understand the evidence and the law perfectly, they would still confront the distinct and often bewildering task of attempting to apply the instructions to the facts of the case.

The point at which jurors are ready to take up the instructions has been described as the "What do we do now?" phase of jury deliberations.<sup>47</sup> Because we can rarely observe actual juries at work,<sup>48</sup> it is difficult to study the deliberation process directly. Yet there are numerous indications that juries lack much-needed guidance on how to

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selves before being tested for comprehension); Margolis et al., *supra* note 11, at 43 ("The instructions given to jurors in these cases ranged from the traditional legalese to plain English. In all of the cases, the jury had difficulty dealing with legal concepts that they were called upon to apply."); Laurence J. Severance et al., *Toward Criminal Jury Instructions That Jurors Can Understand*, 75 J. CRIM. L. & CRIMINOLOGY 198, 213 (1984) (reporting study in which mock jurors given revised instructions had 20.3% error rate, compared with 24.3% rate for jurors using pattern instructions); Tanford, *supra* note 14, at 82 (noting studies).

46. Elwork & Sales, *supra* note 14, at 295; Tanford, *supra* note 14, at 102; see Margolis et al., *supra* note 11, at 138-39, 146-47 (reporting that in federal sexual harassment case where instructions were among clearest attorneys had ever seen, jurors had little understanding of several of plaintiff's claims and found instructions very difficult to use); *id.* at 168-69 (noting that "it is not the language per se that is problematic for them, but instead, that the legal concepts embodied in those words present comprehension difficulties"); *id.* at 234-35, 288-89 (noting that federal civil antitrust jury had great difficulty understanding non pattern instructions); *id.* at 291 (stating that "it is quite astonishing and disturbing how much some of the jurors did not understand"). The problem may be that the goal of making instructions accurate and the goal of making them comprehensible "often . . . come into conflict with one another. For example, an undue emphasis upon ensuring accuracy may result in an instruction which is not understandable to laymen." STANDARDS RELATING TO TRIAL BY JURY, *supra* note 15, at 111.

47. KASSIN & WRIGHTSMAN, *supra* note 11, at 181-82; see HANS & VIDMAR, *supra* note 17, at 102 ("When finally it comes time to act, judges do not give jurors much guidance on how they are supposed to go about their task. Furthermore, few jurors have had any past experience on juries. It is no wonder, then, why jurors are sometimes initially bewildered as they first sit down to deliberate.").

48. Margolis et al., *supra* note 11, at 60 (noting that this is prohibited in federal cases by 18 U.S.C. § 1508 (1988)); see, e.g., CAL. PENAL CODE § 167 (West 1988) (making it misdemeanor to eavesdrop on jury).

employ the instructions.<sup>49</sup> Those who have studied mock juries describe the discussion as being random and chaotic. "[T]he talk moves in small bursts of coherence, shifting from topic to topic with remarkable flexibility. It touches an issue, leaves it, and returns again."<sup>50</sup> Another researcher found that "issues were raised and dropped fairly unsystematically, then raised again; slowly, progress was made."<sup>51</sup> This desultory and haphazard approach would be less troubling if, in the end, it yielded sound verdicts. But this is often not the case. In one experiment, mock juries made numerous mistakes concerning the law—mistakes that were not corrected in the later deliberations. This failure to apply the law correctly was by no means a failure to take the law seriously. Discussions of the law took up one-fifth of the deliberation time and were carried out with great intensity, frequently with an apparent sense of frustration. The jurors understood that a key aspect of their task was to interpret the evidence in terms of the appropriate legal categories. They struggled to do so, but often failed.<sup>52</sup>

As one group of researchers cautioned, "[u]nless some attention is paid to the jurors' *use* of the instructions they are given, the never-ending, intensive solicitude for the wording of the law is pedantry in fantasyland . . . ."<sup>53</sup>

Every law professor knows this to be a serious problem for law students who, while they may have mastered the black-letter law, cannot apply it to a set of facts even after a semester or more of study. Students can usually grasp the facts and recite the law, but they are commonly unable to build a bridge between the two. It is only understandable that this should likewise be a problem for jurors who are "doused with a kettleful of law during the charge that would make a third-year law student blanch."<sup>54</sup>

Evidence that jurors have difficulty knowing how to use the instructions flows from many sources. This was true of the two juries on which I sat. In neither case did the jury realize, at the point when it was ready to consider the instructions, that it should consider the

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49. KASSIN & WRIGHTSMAN, *supra* note 11, at 214-15; Casper, *supra* note 14, at 432-33; Diamond, *supra* note 14, at 298; Saltzburg, *supra* note 26, at 362; Weinstein, *supra* note 1, at 187.

50. KALVEN & ZEISEL, *supra* note 17, at 486.

51. Ellsworth, *supra* note 12, at 216.

52. *Id.* at 223.

53. Reifman et al., *supra* note 43, at 553.

54. CURTIS BOK, I TOO, NICODEMUS 261-62 (1946), *quoted in* Skidmore v. Baltimore & Ohio R.R., 167 F.2d 54, 64 (2d Cir.), *cert. denied*, 355 U.S. 816 (1948), and in FRANK, *supra* note 23, at 117.

claims or offenses one at a time, and that it should decide whether or not each of the legal elements had been established by the requisite standard of proof.<sup>55</sup> The juries did not know how to apply the law, as distinct from what the law meant. Studies of actual and mock juries suggest that my experience was not unusual.<sup>56</sup>

Social scientists have found that jurors often still cannot correctly apply the law to a set of facts despite the fact that the jury instructions have been greatly simplified. While such simplification may improve juror *comprehension*, a substantial amount of confusion remains which is reflected in incorrect *application* of the law to a determined set of facts.<sup>57</sup> Juries that as a group have good comprehension of both the facts and the law nonetheless reach erroneous verdicts in a high percentage of cases.<sup>58</sup> As one researcher who studied mock juries in a murder case concluded, "[t]he instructions may have been effective in reminding the jurors of terms they had heard before, but the instructions were not very effective in educating them in new areas, or even in focusing their attention on the meaning of the familiar terms."<sup>59</sup>

Also telling are studies showing that jurors frequently cannot answer simple true-false questions concerning statements of law taken

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55. In addition, in the civil case, after the jury decided that the defendant had breached the implied warranty of good faith and fair dealing, some jurors wanted to deny recovery on that claim by applying the doctrine of comparative negligence; *see also* Lempert, *Taking Stock*, *supra* note 11, at 212 & n.71 (noting case where jury wanted to use defense of contributory negligence with claim involving strict liability).

56. *See infra* notes 57-67 and accompanying text.

57. *See* ELWORK ET AL., *supra* note 14, at 13-17 (noting study showing that even with revised instructions, 13% of jurors returned incorrect verdicts in sense of misapplying law to facts as juror understood them; another study showed incorrect verdicts in 30% of cases even with simplified instructions, as compared with error rate of 54% under pattern instructions); HASTIE ET AL., *supra* note 10, at 170, 230-31, 238 (noting juror confusion in applying instructions that were "unusually succinct, clear, and crisp," and that difficulty persisted even where judge answered questions about specific instructions); Elwork et al., *supra* note 10, at 176 (reporting experiment in which jurors given revised instructions in simple automobile negligence case reached erroneous verdicts in 12.5% of cases, as compared with 38% error rate for jurors receiving pattern instructions); Severance et al., *supra* note 45, at 205-07 (reporting experiment where instructed jurors understood law better than uninstructed jurors, but where groups had equal difficulty applying law correctly to given fact pattern).

58. HASTIE ET AL., *supra* note 10, at 80-81 (finding that even where jury, assuming members' knowledge was pooled, correctly understood 90% of evidence and over 80% of instructions, 43% of juries reached incorrect verdicts). This may suggest that even a slight misunderstanding of the law can lead to an erroneous verdict; it may also indicate that the juries never shared their individual knowledge in the deliberation process, due to the fact that they did not know how to apply the instructions, and hence spent little time discussing them.

59. Ellsworth, *supra* note 12, at 223.

from instructions they were given in court. Their understanding is often little better than that of persons who never heard the instructions at all.<sup>60</sup> This suggests that the problem is not just one of comprehension, for jurors in these studies were not asked to explain or apply the legal rules. Rather, it was simply a matter of whether they could recall or recognize instructions they had heard. Even if jurors did not understand a particular instruction, they might be expected to at least remember it if the instruction were one with which they had struggled. Their frequent inability to do so suggests that they may have spent little time with the instructions,<sup>61</sup> perhaps because they did not know how to use them in reaching a verdict.

Further indication that the deliberation process fails to sufficiently focus on the instructions is the fact that individual jurors often do not benefit from the superior understanding of others on the jury panel.<sup>62</sup> Studies show that comprehension of jury instructions—whether standard or revised—varies among jurors, partly in relation to their educational level.<sup>63</sup> When a jury includes one or more mem-

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60. See HASTIE ET AL., *supra* note 10, at 80 (finding that individual jurors tested "less than 30 percent accurate on questions about material stated directly in the judge's final charge, such as the elements of the legal definition of second degree murder"); Ellsworth, *supra* note 12, at 218 (finding that jurors who had deliberated were able to correctly answer 65% of true-false questions on elements of judge's charge, "a result not significantly different from random guessing"); Elwork et al., *supra* note 10, at 175-76; Reifman et al., *supra* note 43, at 546-51 (noting that instructed jurors were able to correctly answer less than half of questions of law pertaining to cases they had heard; their 41% correct rate compared with 35% for uninstructed individuals).

61. See HASTIE ET AL., *supra* note 10, at 85-88, 162 (finding that in mock jury deliberations, about 25% of jurors' remarks referred to judge's instructions, but only 14% of all remarks involved attempts to relate evidence to law); Ellsworth, *supra* note 12, at 215, 218-19 (finding that in first hour of deliberations, mock juries spent 21% of their time discussing law but that only half of their statements about law were correct); Phoebe C. Ellsworth, *Some Steps Between Attitudes and Verdicts*, in INSIDE THE JUROR: THE PSYCHOLOGY OF JUROR DECISION MAKING 42, 47-48 (Reid Hastie ed., 1993) ("Our observations suggest that jurors concentrate on comprehending trial events, constructing a fact sequence, evaluating credibility, and relating the evidence to a legal category. However, they do not seem to spend a great deal of time trying to define the legal categories, evaluating the admissibility of evidence they are using, or testing their final conclusion against a standard of proof.").

62. Ellsworth, *supra* note 12, at 219 ("The jury as a whole does not profit from the abilities of its best members when it comes to questions of law."); cf. Lary Lawrence, *Toward a More Efficient and Just Economy: An Argument for Limited Enforcement of Consumer Promises*, 48 OHIO ST. L.J. 815 (1987) (noting similar inability of consumers to benefit from each other's knowledge, due to lack of adequate means of communication).

63. ELWORK ET AL., *supra* note 14, at 58-59; HANS & VIDMAR, *supra* note 17, at 121; HASTIE ET AL., *supra* note 10, at 137; Charrow & Charrow, *supra* note 45, at 1320-21, 1365. But see Reifman et al., *supra* note 43, at 550 (finding no difference in actual jurors' ability to answer questions about instructions based on level of jurors' nonlegal education).

bers who, between them, understand all or most of the law, the entire panel should benefit from that knowledge, but only if it is shared. While there is evidence that deliberations do sometimes enhance jurors' comprehension of the law,<sup>64</sup> the improvement is far from optimal. In one extensive study, the typical jury panel had a collective comprehension level of more than eighty percent when its members' individual knowledge was pooled. Yet the average juror, after deliberations,<sup>65</sup> still understood less than thirty percent of the law in the instructions.<sup>66</sup> The fact that individual comprehension rates remained at a level less than half the group's level indicates that little knowledge was exchanged during the deliberations.<sup>67</sup> For whatever reason, the average jury does not discuss the instructions sufficiently to benefit from the understanding of its most enlightened members. This strongly suggests that the problem juries face in applying the law to the facts is not merely one of difficulty in comprehending the instructions. Even when some jurors do understand the law, the instructions apparently play but a peripheral role in the deliberation process.

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64. See, e.g., Margolis et al., *supra* note 11, at 132 (noting that members of alternative jury panel who observed trial and heard instructions in federal sexual harassment case, but who did not participate in three-day deliberation process with regular jurors, had much less sophisticated understanding of legal principles involved); *id.* at 341-42, 387-92, 399-400 (reporting that alternate jury in federal criminal insurance fraud prosecution spent one hour deliberating, as compared with five hours for actual jury, because alternate jurors were so confused by instructions that they did not discuss them at all); *id.* at 531-34 (noting there is often at least one member of jury who understands law well and who can educate other jurors); cf. Severance et al., *supra* note 45, at 205-07, 223-25 (reporting study in which deliberations increased jurors' understanding of law but only when instructions were initially relatively clear).

65. The average jury in this study deliberated for 138 minutes, with the longest deliberation lasting four days; if jurors wished, portions of the instructions would be reread to them. HASTIE ET AL., *supra* note 10, at 42, 51.

66. *Id.* at 80-81.

67. A possible explanation is that the knowledge is shared during deliberations but that jurors who are right about the law are unable to convince the others. See KASSIN & WRIGHTSMAN, *supra* note 11, at 146 (noting that juries that have access to written instructions during deliberations have better understanding of law and are less confused in their deliberations); Ellsworth, *supra* note 12, at 218-24 (finding that in experiment where jurors were not allowed to take copy of instructions into jury room and had to rely entirely on their memory of judge's oral charge, deliberations did not enhance level of understanding because jurors who correctly stated law were not sure enough of their position to persuade others, at least not without set of instructions to back them up); Margolis et al., *supra* note 11, at 532 (suggesting that having copy of instructions in jury room is crucial to improving jury's understanding of law since jurors no longer have to rely solely on memory). In the experiment noted in the text, because the juries could have portions of the videotaped instructions played back to them on request, lack of access to the instructions does not account for the fact that individual post-deliberation comprehension levels were 30%, as compared with the optimal group level of 80%. See HASTIE ET AL., *supra* note 10, at 51.

In addition to not knowing how to use the instructions, the jury's difficulties in applying the law may also stem from an unconscious resistance to examining the judge's charge too closely. Psychologists have found considerable support for the theory that jurors use a "story model" to evaluate the evidence and reach a verdict.<sup>68</sup> The model identifies three distinct steps in the jurors' decision-making process: First, as the trial proceeds, jurors organize the evidence by imposing a narrative on the facts, constructing a story that best explains "what happened" in the case;<sup>69</sup> second, jurors learn from the judge's instructions what the possible "verdict categories" or options are; and finally, jurors compare their story with the verdict options and select that verdict which provides the closest match or fit with the narrative they have built.<sup>70</sup>

The "central claim of the theory is that the story will determine the decision that the juror reaches."<sup>71</sup> Since the process of constructing a narrative produces a tentative predeliberation decision before a juror has received any instruction on the law,<sup>72</sup> the instructions pose a dual threat. First, they may be difficult for jurors to break down into their component elements or "feature lists."<sup>73</sup> Second, they may produce cognitive dissonance,<sup>74</sup> for they might not allow the outcome

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68. See HASTIE ET AL., *supra* note 10, at 22-23; Ellsworth, *supra* note 12, at 206, 214-17; James A. Holstein, *Jurors' Interpretations and Jury Decision Making*, 9 LAW & HUM. BEHAV. 83 *passim* (1985); Nancy Pennington & Reid Hastie, *The Story Model for Juror Decision Making*, in INSIDE THE JUROR: THE PSYCHOLOGY OF JUROR DECISION MAKING, *supra* note 61, at 192, 199.

69. For an interesting cognitive analysis of how jurors construct their stories, see Albert J. Moore, *Trial by Schema: Cognitive Filters in the Courtroom*, 27 UCLA L. REV. 273 (1989).

70. HASTIE ET AL., *supra* note 10, at 22-23, 163-65; Pennington & Hastie, *supra* note 68, at 192-221.

71. Pennington & Hastie, *supra* note 68, at 196.

72. *Id.* at 193, 196, 201, 217.

73. *Id.* at 200 ("[T]he juror's mental representation of [verdict definition information in the judge's charge probably] takes the form of a category label with a list of features. In all respects, this is a difficult one-trial learning task. If the juror has no prior knowledge of the legal categories, then learning of the abstract information is extremely difficult. In the case where prior knowledge is available, it is as likely to interfere with accurate understanding as to help . . ."). The task is also complicated by the fact that in moving from the story construction phase to that of reaching a verdict, the juror must shift from a narrative process of thought to a more complex classification process that is both reasoned and deliberate. *Id.* at 200-01, 205.

74. Cognitive dissonance occurs whenever there is an inconsistency between two of our attitudes or beliefs, or between attitudes and behavior. Moore, *supra* note 69, at 302 n.100 (citing L. FESTINGER, A THEORY OF COGNITIVE DISSONANCE 1-5 (1957)). Moore discusses the role of cognitive dissonance as it relates to jurors' filtering out trial evidence that may be inconsistent with the story they have constructed. Though he does not discuss the

called for by the juror's story.<sup>75</sup> Studies in fact indicate that if a juror's story and her chosen verdict do not closely match, the juror will experience dissatisfaction and a lack of confidence in the verdict.<sup>76</sup>

It is therefore only natural that jurors may be reluctant to scrutinize the judge's instructions too closely.<sup>77</sup> One study thus found that "many jurors simply appear to select a sketchy stereotyped theme to summarize what happened (e.g., 'cold-hearted killer plots revenge,' 'nice guy panics and overreacts') and then choose a verdict on the basis of the severity of the crime as they perceive it."<sup>78</sup> This accounts for the fact that juries at times overlook key but unsettling elements of the instructions.<sup>79</sup>

The effort to avoid cognitive dissonance may explain, in psychological terms, why juries sometimes decide cases on the basis of instinct, emotion, or conscience, rather than according to the letter of

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similar problem that occurs when the jury confronts the legal instructions, the phenomenon would seem to be virtually the same.

75. According to the story model, if the fit between the juror's initial best story and the verdict options is poor, it is possible that the story may be adjusted; but, if it cannot be, the juror must choose the default verdict—for example, in a criminal case, the juror must find the defendant not guilty. Pennington & Hastie, *supra* note 68, at 201-03.

76. Reid Hastie, *Introduction* to *INSIDE THE JUROR: THE PSYCHOLOGY OF JUROR DECISION MAKING*, *supra* note 61, at 26; Pennington & Hastie, *supra* note 68, at 201.

77. Cognitive dissonance theory has demonstrated that "[p]eople generally try to minimize cognitive dissonance, that is, inconsistencies between their actions and their attitudes and beliefs." Moore, *supra* note 69, at 302, 303 & n.104.

78. Ellsworth, *supra* note 61, at 48. Jurors who are later tested for knowledge of the instructions do not have a better understanding of the elements of the verdict option that fits their story. Pennington & Hastie, *supra* note 68, at 208. This reinforces the idea that juries may not examine the instructions very closely, for one would otherwise expect them to have the best understanding of the verdict that most closely matches the story they have constructed.

79. For example, in the criminal case on which I sat as a juror, the defendant was charged with assault with intent to inflict severe bodily harm and with false imprisonment. See *supra* note 2. Most of the jurors believed the defendant had acted improperly toward the victim. We first voted to acquit on the assault charge because no one thought the defendant had intended to harm the victim. The jury then took up the false imprisonment charge and quickly concluded that the defendant was guilty on this count. However, no one focused on the requirement that the victim must have been prevented in her person from leaving the premises. See *CALIFORNIA JURY INSTRUCTIONS: CRIMINAL (CALJIC)* No. 16.135 (5th ed. 1988) [hereinafter *CALJIC*]. When this element was finally pointed out, everyone recalled that the victim testified that she at no time felt she could not leave the shopping plaza; she simply refused to leave without her car, explaining, "Me and my car, why we go everywhere together!" We then voted to acquit on the false imprisonment charge. However, there was a shared dissatisfaction with the overall result. Jurors talked about the fact that prosecutors might have charged the defendant with mere assault, an option not presented to the jury. There was also talk of sending a message along with the verdict, to the effect that the defendant should not take the verdict as reflecting jury approval of his conduct.

the law. The theory suggests that such departures may often be unconscious, not deliberate. If, in addition to feeling a psychological aversion to the instructions, jurors are also unaware of how to use the instructions, it is even more understandable that they have difficulty applying the law to the facts.

To the extent that the story model accurately portrays a juror's decision-making process, all the more reason exists for courts to help juries focus on the instructions. By suggesting that they approach each claim or offense systematically, in a step-by-step fashion, and by having the law presented to them in a factual context, it is less likely that critical elements will be inadvertently overlooked. To be sure, the jury might in the end decide to ignore the law, but such departures may be less frequent than when the jury does not even realize that it has failed to follow the law.

#### IV. PROPOSAL FOR A SPECIAL INSTRUCTION

##### A. *The Proposal*

To help juries apply the law to the facts, the judge should give a special instruction suggesting to the jury how it might use the instructions in their deliberations. The instruction would direct the jury to those parts of the charge in which the elements of the plaintiff's claims or the criminal offenses are defined. It would recommend that if there is more than one claim or offense, the jury take these up one at a time. Jurors would be advised to consider each claim or offense in a step-by-step fashion, asking whether or not based on the evidence introduced at trial, each element was established by the requisite burden of proof.

The wording of this instruction would vary slightly depending on the case. In a civil action involving claims for breach of contract, libel, and assault, the instruction might read as follows:

#### *USING THE INSTRUCTIONS*

In a few minutes you will retire to begin your deliberations. Before you do so, I want to make a suggestion that you may find helpful in using these instructions.

As you know, the plaintiff in this case has asserted three claims against the defendant. These claims are for breach of contract, libel, and assault. I explained to you earlier in these instructions that each of the plaintiff's claims is made up of certain elements or requirements. In order for the

plaintiff to win on any of these claims, the plaintiff must prove each element of that claim by a preponderance of the evidence.

My suggestion to you is this. When you are ready to use these instructions, you might take up the plaintiff's claims one at a time. As you consider each claim, look at the instructions to see what the specific elements or requirements for proving that claim are. You should then discuss each of these elements one at a time, in the order that they are listed in the instructions.

If you find that the plaintiff has proved all of the elements of a claim by a preponderance of the evidence, then the plaintiff is entitled to win on that claim. If, on the other hand, you conclude that the plaintiff has failed to prove one or more of the elements of a claim by a preponderance of the evidence, the plaintiff loses on that claim.

After you have finished considering the plaintiff's first claim, go to the next claim and discuss it in the same way, one element at a time. Continue in this manner until you have decided upon all of the plaintiff's claims.<sup>80</sup>

In terms of timing, this instruction should be given immediately before the jury retires to deliberate. If the jurisdiction allows the judge to instruct the jury both before and after closing arguments,<sup>81</sup> the bulk of the instructions, including a description of the elements of the claims or offenses,<sup>82</sup> should preferably be given before closing arguments. This will enable counsel to structure closing arguments around the instructions.<sup>83</sup> After counsel's summations to the jury, a

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80. This instruction would need to be adapted for criminal cases, and for affirmative defenses, counterclaims, or cross-claims in civil cases. However, the underlying theory should remain the same, that is, encouraging the jury to proceed systematically in an element-by-element fashion. If it is feared that jurors might give disproportionate weight to the proposed instruction, it might be followed by the standard admonition reminding jurors not to single out any individual instruction and ignore the others. *See, e.g., CALIFORNIA JURY INSTRUCTIONS: CIVIL (BAJI) No. 1.01 (7th ed. 1986) [hereinafter BAJI].*

81. This is permitted, for example, in federal courts, *see* FED. R. CIV. P. 51; FED. R. CRIM. P. 30, and in California state courts, *see* CAL. CIV. PROC. CODE § 607 (West 1976); CAL. PENAL CODE § 1093(e)-(f) (West 1985 & Supp. 1994).

82. The court might give the bulk of the instructions prior to closing argument and state the elements of the claims or offenses afterwards. *See People v. Lamb*, 206 Cal. App. 3d 399, 253 Cal. Rptr. 465 (1988). While this has the advantage of making sure the elements are fresh in the jurors' minds, it makes it difficult in closing arguments for counsel to tie the evidence to the law the jurors will need to apply.

83. This is the heart of the second proposal made in this Essay. *See infra* part VI.

few final instructions would be delivered,<sup>84</sup> including the instruction proposed here.<sup>85</sup> If the jurisdiction requires the judge to give all of the substantive instructions after closing arguments, this special instruction should be given at the end of the charge, just before the jury retires.

Since the purpose of this instruction is to focus jurors' attention on the instructions and encourage them to approach this part of their task in a systematic manner, it is imperative that jurors be allowed to take a written copy of the instructions with them into the jury room.<sup>86</sup> Otherwise, they will have to depend on their ability to recall the instructions; if the instructions are lengthy, this will be virtually impossible.<sup>87</sup> Moreover, without the ability to refer to the instructions, those jurors who do correctly recall the law as stated by the judge may be unable to persuade the other jurors that they are right.<sup>88</sup>

### B. *Rationale and Justification*

The instruction proposed here furthers three distinct and important goals. First, it may help to produce better verdicts in the sense that they are based on the law. If a jury does not know how to use the instructions, any correlation between the verdict and the law is likely to be purely coincidental. A jury that applies the instructions in a systematic way is less likely to overlook key elements of law.<sup>89</sup> In the felony case on which I sat, the jury was on the verge of convicting the defendant for false imprisonment when it was pointed out that one element of the offense, which had not been discussed at all, was

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84. For a sample set of instructions in which the judge delivers the bulk of the general instructions prior to closing arguments, with a few procedural "closing instructions" delivered afterward, see William W. Schwarzer, *Communicating with Juries: Problems and Remedies*, 69 CAL. L. REV. 731, 755-56, 759-69 (1981).

85. To assure that the court has the jury's full attention, it would perhaps make sense to give a brief recess between closing arguments and the final instructions. "In my experience, so long as the jurors are given a short break following closing arguments, they are likely to be eager to pay attention to the neutral arguments of the judge after having been surfeited with lawyers' arguments tailored to meet their clients' needs." Weinstein, *supra* note 1, at 171 n.30.

86. See *supra* notes 35 and 67. In both of the cases on which I sat, the jury was allowed to take a set of the written instructions into the jury room.

87. See KASSIN & WRIGHTSMAN, *supra* note 11, at 146 (noting that juries given copy of written instructions have better understanding of law and more confidence in their verdicts); Elwork & Sales, *supra* note 14, at 290.

88. See *supra* note 67.

89. See Elwork & Sales, *supra* note 14, at 287 (noting that juries that cannot understand instructions are less likely to discuss critical points of law).

clearly not established by the evidence.<sup>90</sup> Even in a case where there is to be jury nullification, the jury must be conscious of the fact that it is refusing to follow the law. Otherwise, while the verdict is literally lawless, it is probably not defensible on the ground that it reflects community notions of fairness and justice.

Second, the proposed instruction should reduce the amount of time spent in deliberations. In each of the cases on which I sat, the jury did not know where to begin in terms of how to access the instructions. The set of written instructions given to the jury consisted of a stack of half and whole sheets of paper clipped together, each page containing one instruction.<sup>91</sup> The pages at the top of the stack did not talk about the claims or offenses. These were to be found further down in the pile. The jurors had no clue that most of the instructions dealt with general principles to be used in evaluating the evidence, and that the heart of their task involved the relatively few pages defining the elements of the claims or offenses.<sup>92</sup> What the jury needed was a sign that read, "Start here!"

When a jury knows what its task is, it wastes less time trying to figure out what to do and less time talking about irrelevant matters.<sup>93</sup> Moreover, if it is clear that a claim or offense consists of a series of elements each of which must be proved, a jury may be able to save time by going for the jugular. In the civil case on which I sat, the claims for intentional and negligent interference with prospective economic advantage both required that the defendant "knew of the existence of the relationship"<sup>94</sup> in question. Once the jury realized that

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90. The element in question required that the victim's "personal liberty" have been restrained and that the "person" was prevented from leaving the premises. The victim admitted on the witness stand that she felt free to leave at all times. See CALJIC, *supra* note 79. The jury ultimately acquitted defendant on this charge. See *supra* note 79.

91. See CAL. CIV. PROC. CODE § 607a (West 1976) (requiring that each instruction submitted by counsel be on separate sheet of paper); CAL. R. Cr. 229(b).

92. For another instance where the jury did not know what to do with the instructions, see Margolis et al., *supra* note 11, at 341-42, 375-76, 387-92, 396-97, 399-400 (reporting that in federal criminal trial for insurance fraud, though instructions followed step-by-step format and prosecutor's closing argument linked evidence to offenses, three-member alternate jury ignored instructions entirely and used indictment—which included offenses for which defendant had not been charged; after one hour, alternate panel returned guilty verdicts on all counts; actual 12-member jury figured out how to use instructions on second day of deliberations and then analyzed offenses element-by-element, carefully examining evidence; after five hours of deliberation, it returned guilty verdicts on all counts; that these two juries reached same verdicts appears to have been purely coincidental).

93. See ELWORK ET AL., *supra* note 14, at 16 (noting that juries using standard instructions spent more time talking about "legally inappropriate topics" than did those that received more comprehensible instructions); Elwork & Sales, *supra* note 14, at 286-87.

94. See BAJI, *supra* note 80, Nos. 7.82 & 7.82.1 (7th ed. 1986 & Supp. 1994).

this was an essential element of each claim, it took less than five minutes to dispose of them, for there was no evidence introduced at trial from which such knowledge could be inferred.

Third, the proposed instruction will help structure the deliberation process without the negative features that accompany special verdicts and general verdicts with interrogatories.<sup>95</sup> Unlike those devices, no issues are taken from the jury, and no external controls are placed upon it. The jury remains the master of its deliberations and is free to proceed as it wishes. Moreover, the proposed instruction places few additional burdens on the court. Because it involves a pattern form requiring only slight adaptation to the case, it does not have the drawbacks of attempting to tailor the entire set of instructions to the individual case.<sup>96</sup> While the latter approach is no doubt superior in terms of helping juries to comprehend and apply the law, it is probably so burdensome as to be administratively infeasible in most cases.

### C. *Response to Potential Criticism*

Some might argue that this proposal is unnecessary because the court or counsel, or both, have already achieved its purposes. It might also be contended that the proposal improperly interferes with a lawyer's prerogative to present the case as the lawyer sees fit. I will address each of these concerns.

#### 1. Courts and counsel now provide this guidance

Most standard jury instructions define each claim or offense as consisting of a set of specific elements. The jury is advised that in order to find for the plaintiff in a civil case, or for the state in a criminal case, it must find each element of the claim or offense to have been satisfied in accord with the requisite burden of proof.<sup>97</sup> Conse-

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95. See *supra* notes 23-31, 38-40 and accompanying text.

96. For a set of instructions tailored to the facts of an automobile negligence case and used in an experiment with mock jurors, see Elwork et al., *supra* note 10, at 184-86; cf. David U. Strawn et al., *Reaching a Verdict, Step by Step*, 60 JUDICATURE 383, 385-86 (1977) (recommending use of "process" instructions that are written and tailored to each case and that consist of series of questions that break each legal issue down into its smallest possible components).

97. See, e.g., BAJI, *supra* note 80, No. 2.60; Federal Judicial Center, *Pattern Criminal Jury Instructions* 73-159 (1988); see also Margolis et al., *supra* note 11, at 401-19 (describing federal criminal insurance fraud case in which instructions gave jury step-by-step approach for deciding whether defendant was guilty on each count of indictment); *id.* at 538-74 (discussing federal trade secrets case in which instructions set forth each of 11 claims for relief, element-by-element). In neither of these cases, however, did the instructions tell the jury

quently, it might seem that the proposed instruction is redundant and unnecessary.

While this might be true in theory, the fact is that in the two cases on which I sat as a juror, the instructions were in the form described above, yet this was not enough to make clear to either jury how it ought to proceed. And as noted earlier, the instructions setting forth the elements of the claims or offenses are usually buried in the middle of the judge's charge,<sup>98</sup> or, in a case involving multiple claims or counts, they may be scattered throughout a long set of instructions.<sup>99</sup> In either case, by the time the court gets to the end, the jury may have no idea how to undertake deliberations. The matter is compounded if the bulk of the instructions are given prior to closing arguments, for then the mention of the elements is still more remote in time and thus even less likely to give juries the necessary guidance.

Instructions that merely set forth the elements of a claim or offense fail to expressly tell juries that as a strategy for conducting deliberations, they should deal with the claims or offenses one at a time, element by element, asking whether or not each element has been proved.<sup>100</sup> To be sure, some juries figure this out from the way the instructions are framed. A further clue may be provided if the verdict form asks the jury to state its verdict separately for each claim.<sup>101</sup> But that some juries catch on cannot make up for the fact that many others do not.

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that it might take up the claims or offenses one at a time and proceed through each of them element-by-element.

98. See, e.g., Margolis et al., *supra* note 11, at 293-327 (reporting that in civil antitrust action, portion of instructions that defined elements of claims appeared on pages six through 23 of 35-page set of typewritten instructions).

99. See, e.g., *id.* at 401-19 (reporting that in criminal insurance fraud action, elements of offenses were scattered throughout 20 pages of typewritten instructions).

100. See *id.* at 119, 124, 135, 176-84 (revealing that in federal sexual harassment case using instructions that broke down each claim element-by-element, and that lawyers said "were the finest, most easily comprehended [instructions] that they had ever seen," jury still found it difficult to follow step-by-step process outlined in instructions).

101. See *id.* at 442, 481-82, 495, 499-500, 507, 538-77 (noting that in federal trade secrets case where verdict form required that jury separately state its verdict for each of 11 claims for relief, and instructions set forth each claim element-by-element, jury began deliberations by taking up claims in order and discussed evidence as it related to each claim; it may have been critical that two of six regular jurors in this case were electrical engineers; a five-member alternate jury that included two teachers proceeded in similar manner). In the civil case on which I sat, a special verdict form was used which asked the jury to state its verdict separately for each of the five claims for relief. This no doubt helped to focus the jury on the individual claims; however, it did not highlight the fact that each of the claims was made up of a series of elements to be approached one at a time.

It might also be argued that the suggested instruction is unnecessary because lawyers provide juries with this guidance in their closing arguments.<sup>102</sup> However, the court cannot count on this, for not all lawyers take the jury through a step-by-step review of what it needs to do to reach a verdict. Rather than leaving the matter to chance, courts should give the instruction proposed here in all cases, as a clear and explicit means of helping juries to conduct their deliberations properly.

## 2. Interference with counsel's prerogative

Sometimes lawyers do not provide juries with this type of guidance for strategic reasons. Counsel may not want the jury to focus closely on the law,<sup>103</sup> as doing so may be detrimental to their case.<sup>104</sup> There are no doubt instances where one or both lawyers want a jury that is incapable of properly applying the instructions. If the jury was selected on this principle, as it sometimes is,<sup>105</sup> counsel will surely have no desire to clarify the law or the method of applying it.<sup>106</sup> Yet the court should not lend its assistance to such schemes. The judge has a responsibility to help assure that the jury decides the case on the evidence and the law. Notwithstanding the adversarial system, it is the court's obligation to see that the jury is properly instructed.<sup>107</sup>

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102. See *id.* at 153 (describing federal sexual harassment case where defense lawyer's closing argument gave jury guidelines for determining whether there had been harassment); *id.* at 274 (noting that in federal antitrust action, closing arguments told jury what it had to do and what each side must prove to win); Tanford, *supra* note 14, at 103-06.

103. Margolis et al., *supra* note 11, at 57, 118 (noting that lawyers sometimes oppose use of special verdict even when it is combined with general verdict).

104. See ELWORK ET AL., *supra* note 14, at 16-17 (noting that in mock automobile negligence cases, failure to understand pattern instructions led to more plaintiff verdicts and to higher plaintiff verdicts, due to difficulty of law of contributory negligence); HANS & VIDMAR, *supra* note 17, at 117 (suggesting that more legally inclined juries more closely resemble judges, and noting that in criminal cases at least there are differences between how judges and juries tend to rule).

105. See F. LEE BAILEY, TO BE A TRIAL LAWYER 118 (1985) ("A lawyer who has what he believes is a very weak case may be interested in impaneling twelve people of limited intellectual ability."); Ellsworth, *supra* note 12, at 207 (observing that attorneys sometimes select jurors for their perceived incompetence); Lempert, *Taking Stock*, *supra* note 11, at 204 n.48, 229.

106. See Saltzburg, *supra* note 26, at 355-56, 365 (suggesting that some resistance to simplifying instructions stems from lawyers' desire to confuse jury); Frederick Woleslagel, *The "Kiss" Principle of Jury Communication*, 14 WASHBURN L.J. 252, 254 (1975) ("There even have been times when it seemed the lawyer, in a case with all the evidence running against him, sought instructions that would so baffle a jury that they could not reach a verdict.").

107. 8A JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 30.03[1] (2d ed. 1994) (stating that in criminal cases, "the trial judge is responsible for charging the jury in

Just as counsel cannot entirely waive instructing the jury or consent to the use of erroneous instructions,<sup>108</sup> lawyers have no right to have the instructions presented in a way that makes them useless to the jury.<sup>109</sup> While American lawyers at one time could urge the jury to apply whatever law it believed appropriate,<sup>110</sup> nearly every American jurisdiction today limits counsel's role to arguing the facts.<sup>111</sup> Thus, even if it is true that some lawyers may prefer to keep a jury in the dark, that is no reason for the court to refrain from giving the guidance necessary for the jury to employ the instructions properly. As Judge Edward Devitt said thirty years ago, "[t]he nub of our job is to tell the jury what the pertinent law is so that the members will understand it."<sup>112</sup>

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compliance with the evidence and the law, regardless of whether the parties have so requested"); STANDARDS RELATING TO TRIAL BY JURY, *supra* note 15, at 115-16 (indicating that judge in criminal case has independent responsibility to ensure that certain essential instructions are given, and that concept of waiver does not apply); 5 BERNARD E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW §§ 2924-2925 (2d ed. 1989) (noting that judge in criminal case must instruct on general principles of law necessary to jury's understanding of case, even if counsel do not request such instructions); 7 BERNARD E. WITKIN, CALIFORNIA PROCEDURE § 243 (3d ed. 1985) (advising that court in civil cases has duty to see that jury is given guidance on controlling legal principles and basic issues of case); 9 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2552 (1971) ("Ultimately it is the responsibility of the court to be sure that the jury is properly instructed."); Elwork & Sales, *supra* note 14, at 281 (observing that some state courts have held that in criminal cases judge is responsible for ensuring that jurors understand law).

108. See, e.g., CAL. PENAL CODE § 1127 (West 1985) (mandating that court in criminal case must refuse to give requested instruction that is not correct); 5A MOORE ET AL., *supra* note 107, at ¶ 51.04 (noting that in civil cases, trial court's instructions may be reversed on appeal, even absent objection by counsel, if they contain plain or fundamental error that would produce miscarriage of justice); 5 WITKIN & EPSTEIN, *supra* note 107, § 2923 (indicating that judge may modify any proposed instruction to correct defects); 7 WITKIN, *supra* note 107, §§ 240, 247 (noting that judge in civil case may refuse to give proposed instructions that are misleading or incorrect); 9 WRIGHT & MILLER, *supra* note 107, § 2558 (1971 & Supp. 1993) (providing that in civil cases, federal appellate court may reverse on basis of plain error in instructions, even if counsel raised no objection).

109. Concerning a lawyer's ethical obligation not to deliberately seek to confuse the jury, see *infra* note 138 and accompanying text.

110. See Stefan Landsman, *The History and Objectives of the Civil Jury System*, in VERDICT: ASSESSING THE CIVIL JURY SYSTEM, *supra* note 11, at 22, 32-47; Note, *The Changing Role of the Jury in the Nineteenth Century*, 74 YALE L.J. 170 (1964).

111. See, e.g., Friedenthal et al., *supra* note 24, at 462; cf. *supra* note 28 and accompanying text (noting that juries are not permitted to decide questions of law in most jurisdictions).

112. Edward J. Devitt, *Ten Practical Suggestions About Federal Jury Instructions*, 38 F.R.D. 75, 79 (1966).

## V. PROPOSAL FOR LINKING THE LAW TO THE FACTS

### A. *The Proposal*

It has often been recommended that when judges instruct a jury, they should weave in the facts, the evidence, or the parties' contentions, so that the law is presented to the jury in the context of the specific case.<sup>113</sup> However, if the court is unwilling to marshal the evidence in this way, it should at least hold out the threat of exercising its right to summarize the evidence as a means of encouraging counsel to tie the law to the facts in their closing arguments. The judge might advise counsel that unless they do this, the court will marshal the evidence for the jury at the end of counsel's own summations. The court's summary might be no more elaborate than a statement of the parties' opposing contentions on each legal issue. In this way, jurors will have been provided—either by counsel or by the court—with a bridge between the instructions and the evidence, thereby improving the quality of the deliberation process.

### B. *Rationale and Justification*

When a judge weaves the facts or the parties' contentions into the charge to the jury, the court exercises, in a limited fashion, its right to summarize the evidence.<sup>114</sup> In doing so, the judge aids the jury in two separate but related senses. First, when the facts illuminate the abstract legal concepts set forth in the instructions, jurors' understanding of the law greatly improves.<sup>115</sup> While the court might use hypothetical rather than actual facts to achieve this goal,

[j]udges are often reluctant to use examples which have not received appellate court approval for fear of committing reversible error. Some jurors stated, however, that they would

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113. See, e.g., Margolis et al., *supra* note 11, at 293-327 (reporting that judge in federal civil antitrust action summarized parties' contentions on each point in charge to jury but without reference to specific evidence); Saltzburg, *supra* note 26, at 357-58; Schwarzer, *supra* note 84, at 744-45 ("Instructions should incorporate the relevant persons, transactions, conduct, and events and state concretely the questions the jury is to decide."); Weinstein, *supra* note 1, at 173.

114. See Saltzburg, *supra* note 26, at 357-58; Weinstein, *supra* note 1, at 172-73 (noting six different ways in which judges may summarize evidence). In contrast to a judicial comment on the evidence, a summary does not give the jury advice on evaluating credibility or assessing the weight and sufficiency of the evidence; nor, of course, would it encompass the judge's own impression of the evidence. *Id.* at 168.

115. Elwork et al., *supra* note 10, at 172 ("In helping interpret the evidence, jury instructions should explain how the facts of a case relate to the legal issues involved and how the legal issues, in turn, relate to a verdict."); Margolis et al., *supra* note 11, at 46-48; Tanford, *supra* note 14, at 82-83; Weinstein, *supra* note 1, at 173.

have appreciated examples or illustrations to give meaning to the legal definitions, for even though the surface language might be straightforward, the concepts at issue were unfamiliar.<sup>116</sup>

Unless counsel or the court makes an effort to present the law as it relates to the facts of the case, the law may be virtually incomprehensible.

For example, in the civil case on which I sat as a juror, one of plaintiff's claims was for breach of the implied covenant of good faith and fair dealing. While the jury was instructed on this claim, it did not have the vaguest idea of how the abstract legal instruction pertained to the case. It was not clear what contract such a covenant might have been a part of, nor what conduct of defendant's might have amounted to a lack of good faith or fair dealing. No examples were given in either the instructions or in closing arguments, nor was the instruction in any other way linked to the facts of the case.<sup>117</sup> The jury was in the same boat as a first-year law student who, after taking a contracts exam based on the facts of this case, realized that he failed to "spot" the implied covenant issue. In contrast to law students, however, juries are not expected to "spot the issue." That is the job of counsel and the court.

Second, by utilizing the facts to illustrate the law, the jury's ability to use the instructions in a systematic manner is enhanced, reducing the possibility that it may overlook key elements or evidence critical to the outcome of the case.<sup>118</sup> If, on the other hand, a jury does not know what a particular legal element means or how it relates to the case, the jury may simply ignore it.

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116. Margolis et al., *supra* note 11, at 47; *id.* at 47-48 (citing instances where jurors might have benefited from examples illustrating legal concepts and suggesting that these be added to judge's instructions).

117. The covenant of good faith and fair dealing would have sprung to life had the jury been told that in the context of this case, the covenant was an implied part of the plaintiff's contract of employment with the hospital. The covenant then would have been violated if the jury found that the hospital, after not renewing plaintiff's employment, failed to give him adequate notice and a reasonable opportunity to retrieve his belongings before they were destroyed.

118. See Margolis et al., *supra* note 11, at 349, 374-75 (reporting that in criminal insurance fraud case where federal prosecutors used closing argument to link evidence to charged offenses, jury on second day of deliberations used indictment to itemize exactly what each count required and to enumerate evidence presented by government; until that point, jury had been leaning 10 to two toward acquittal; it ultimately voted unanimously to convict).

The court's ability to integrate the law and the facts, through exercise of its right to summarize the evidence, is thus of vital importance. Judges enjoy this right in the federal courts,<sup>119</sup> and in roughly forty of the fifty states.<sup>120</sup> Yet the right is apparently exercised infrequently.<sup>121</sup> There are several reasons for this. For one thing, it places considerable added burdens on the court. If the court knows that it may have to later summarize the evidence, the judge must follow the trial more closely and perhaps take careful notes.<sup>122</sup> The judge must also prepare a written draft of the proposed summary,<sup>123</sup> so that it can be shared with counsel.<sup>124</sup> Besides creating extra work, summarizing the evidence creates added risks of reversal. If the summary is not balanced, and emphasizes the evidence of one party at the expense of another, this may amount to reversible error.<sup>125</sup> In states that permit judges to summarize the evidence but not to comment upon it, a one-sided or partisan summary may be deemed a judicial commentary and thus grounds for reversal.<sup>126</sup>

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119. Federal judges may summarize the evidence in both civil and criminal cases. See *Quercia v. United States*, 289 U.S. 466, 469-71 (1933); Bolita J. Laws et al., *The Right of a Judge to Comment on the Evidence in His Charge to the Jury*, Discussion at the Judicial Administration Section of the American Bar Association (date unknown), in 6 F.R.D. 317, 320-26 (1947); Weinstein, *supra* note 1, at 162 (noting that when Congress declined to approve proposed Federal Rule of Evidence that would have codified right of federal judges to summarize and comment upon evidence, it did so with understanding that this would leave intact federal judges' existing authority to summarize and comment).

120. NIELAND, *supra* note 5, at 31-33 (updating data from KALVEN & ZEISEL, *supra* note 17, at 420, which found that as of 1966, only 28 states allowed judges to summarize evidence); see, e.g., CAL. CIV. PROC. CODE § 608 (West 1976) (allowing judge to "state the testimony of the case").

121. KALVEN & ZEISEL, *supra* note 17, at 417-27; Weinstein, *supra* note 1, at 169.

122. Weinstein, *supra* note 1, at 186-87 (suggesting that this added labor, together with increased risk of reversal, largely explains why American judges, in contrast to their British counterparts, seldom summarize by undertaking a "full treatment of the evidence").

123. See Margolis et al., *supra* note 11, at 234-35 (discussing federal judge in civil anti-trust action who summarized parties' contentions in charge to jury, but without reference to specific evidence, and who prepared draft of instructions before trial began).

124. See Weinstein, *supra* note 1, at 170, 186 (advising that judge planning to summarize evidence should prepare comments in advance and share them with counsel to avoid risking reversal by inadvertently misstating parties' contentions). To the extent a judge plans to deliver the summary as part of the instructions, statutes and court rules requiring the judge to inform counsel of the instructions in advance might be deemed to apply to the court's summary as well. See, e.g., CAL. CIV. PROC. CODE § 607a (stating that court must, upon request, "advise counsel of all instructions to be given").

125. Schwarzer, *supra* note 84, at 744-45 n.69; Weinstein, *supra* note 1, at 176.

126. STANDARDS RELATING TO TRIAL BY JURY, *supra* note 15, at 125-26; Weinstein, *supra* note 1, at 168 ("To the extent that a summary given by the court falls short of a recitation of the entire transcript, the very process of choosing which testimony to review and which to leave out is in itself a comment on the evidence.").

If a judge is unwilling to summarize the evidence, the court should at least threaten that it will invoke this power. This may induce counsel to perform this function instead. If the advocates provide the jury with a summary that links the law to the facts, the judge is then relieved of this duty. Of course, if the lawyers refuse, or if they fail to do an adequate job of it,<sup>127</sup> the court will have to make good on its threat by giving the jury its own summary of the evidence.<sup>128</sup> However, there are ways of making this task less onerous for the court, as explained further below.

### C. Response to Potential Criticism

A number of objections might be raised to this proposal. Specifically, one might contend that it is unnecessary because lawyers already perform this function; that it is undesirable because to the extent that lawyers fail to link the law to the facts, this is for sound strategic reasons which courts should respect; that the proposal is self-defeating because it will only further confuse jurors; and that the idea is unrealistic because judges will never adopt it.

#### 1. Good lawyers already do it

It might be thought that the proposal advanced here is unnecessary because all competent lawyers explain the law to the jury by

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127. See Weinstein, *supra* note 1, at 169-70 (noting that whether or not judge summarizes or comments upon evidence may in part depend on whether counsel's closing arguments are confusing or misleading).

128. The timing of the court's summary will turn on whether the jurisdiction permits judges to instruct the jury before and after closing arguments, as is now true in federal court, *see* FED. R. CIV. P. 51; FED. R. CRIM. P. 30, or whether it follows the traditional rule that substantive instructions must be given after closing arguments. *See, e.g.*, Schwarzer, *supra* note 84, at 755. If the court must instruct the jury after closing arguments, the judge's summary of the evidence would be delivered with or immediately following the substantive instructions. By contrast, under the federal courts' approach, substantive instructions are normally given before closing arguments as this affords "counsel the opportunity to explain the instructions, argue their application to the facts and thereby give the jury the maximum assistance in determining the issues and arriving at a good verdict on the law and the evidence." FED. R. CIV. P. 51 advisory committee's note. If counsel do not invoke this opportunity, the court would then give the jury its summary after closing arguments. If it is clear in advance that counsel do not intend to summarize the evidence, the court might deliver its summary with the substantive instructions rather than waiting until after closing arguments. California permits the judge in civil and criminal cases to give the instructions before or after closing arguments or both. *See* CAL. CIV. PROC. CODE § 607; CAL. PENAL CODE § 1093(e)-(f) (West 1985 & Supp. 1994); WELLS & PEARLMAN, *supra* note 25, § 1.03[5]; 5 WITKIN & EPSTEIN, *supra* note 107, § 2930 (2d ed. 1989 & Supp. 1994).

weaving the evidence into the instructions in closing arguments.<sup>129</sup> To the extent that attorneys in fact do this, the proposal places no added burdens on either counsel or the court. The reality, however, is that lawyers oftentimes do not provide the jury with this type of assistance. To the extent that counsel discuss the instructions, they often emphasize only a few of them, with the result that jurors remain unenlightened as to many critical points of law.<sup>130</sup>

## 2. Lawyers don't always want this done

It may also be argued that when lawyers fail to integrate the law and the facts, it is for tactical reasons which judges ought to respect. An undue focus on the law may interfere with counsel's efforts to have the jury decide the case on the basis of a "story" which counsel has carefully sought to construct throughout the trial. According to the story model of juror decision-making, jurors' decisions are determined by the narrative each juror constructs from the evidence.<sup>131</sup> It follows from this theory that trial counsel should use opening and closing arguments and the order of presenting evidence to help jurors construct a narrative that favors the attorney's case.<sup>132</sup>

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129. See, e.g., EDWARD J. IMWINKELRIED, *CONTRACT LAWSUITS: TRIAL STRATEGIES AND TECHNIQUES* 493, 499-503 (2d ed. 1989) (instructing that closing argument should relate law to facts and show jurors that evidence establishes elements of counsel's legal theory); THOMAS A. MAUET, *FUNDAMENTALS OF TRIAL TECHNIQUES* 273-74, 292-93 (2d ed. 1988) (advising that closing argument should weave facts together with corresponding instruction, including those instructions covering elements of claims and defenses); Margolis et al., *supra* note 11, at 349, 359, 367, 384 (1990) (indicating that federal prosecutors in insurance fraud case used closing argument to "tie everything together for the jury" and to explain "how each of these little pieces and information fit together and spelled 'guilt.'"); Tanford, *supra* note 14, at 105 (suggesting that lawyers "should place the instructions in the context of the facts of the case").

130. See Margolis et al., *supra* note 11, at 119-20 (reporting that lawyers in federal sexual harassment case stressed only small number of instructions in closing argument); *id.* at 228 (discussing that lawyer in federal antitrust case later agreed he should have tried to weave more of judge's charge into his closing argument); *id.* at 444, 456 (indicating that counsel in federal trade secrets case with multiple claims delivered "fairly general" closing arguments without attempting to link evidence to law); Reifman et al., *supra* note 43, at 551 ("In consulting with trial lawyers, one of us has often been faced with blank stares when she suggested that voir dire and closing argument should educate the jurors about the law . . . [P]oints of law that neither side considers particularly advantageous may go unmentioned.").

131. See *supra* notes 68-76 and accompanying text.

132. For suggestions that trial lawyers present their case in the form of a story, see, for example, MAUET, *supra* note 129, at 272, 274; JANICE SCHUETZ & KATHRYN H. SNEDAKER, *COMMUNICATION AND LITIGATION: CASE STUDIES OF FAMOUS TRIALS* (1988); WILLIAM TWINING, *RETHINKING EVIDENCE: EXPLORATORY ESSAYS* 219-61 (1990); Moore, *supra* note 69, at 315-41. This appears to be a more effective trial approach

Yet, it is not necessarily incompatible with the story model for a lawyer who has sought to have the jury build a favorable narrative to then assist the jury in translating that story into a favorable verdict. If a juror is unable to match the story with one of the verdict options found in the instructions, the benefits to counsel of having constructed the story could be totally lost. Jurors may need help identifying the evidence that supports—or defeats—the essential elements of a claim. Otherwise, a juror who is conscientiously trying to apply the instructions may conclude reluctantly that their preferred verdict, based on the story the juror constructed, is legally unjustified because the evidence necessary to establish or defeat a key element is missing.<sup>133</sup>

For example, in the civil suit in which I participated, the plaintiff's case was built around a story, the theme of which was that a sympathetic and enterprising inventor was taken advantage of by a large corporate defendant that hoped to steal his ideas. It would not have been inconsistent with this story approach for plaintiff's counsel to have used closing argument to link the evidence to some of the critical legal elements of plaintiff's claims. Yet counsel never specified which contract defendant had breached or what evidence established the breach, with the result that the jury found against plaintiff on this claim. On the cause of action for breach of the implied covenant of good faith and fair dealing, plaintiff again failed to indicate which contract the covenant pertained to, or what conduct by defendant constituted the breach. While the jury found for plaintiff on this claim, it took considerable effort; the jury decided that it could imply this covenant into plaintiff's expired employment contract, and that defendant's failure to give plaintiff adequate notice and opportunity to clear out his laboratory area before the contents were destroyed breached the covenant. Plaintiff's counsel took an enormous risk in expecting the jury to figure this out on its own.<sup>134</sup>

To be sure, a lawyer who knows that some elements critical to success are but weakly supported by the evidence will not want to

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than one that is organized in terms of legal issues and arguments. Pennington & Hastie, *supra* note 68, at 195, 210-12, 217.

133. See HASTIE ET AL., *supra* note 10, at 169 (noting that jurors's "stories of what happened [were] relatively resistant to persuasive argumentation from other jurors [and that] virtually every dramatic shift in juror verdict preferences . . . occurred because of changes in opinion about the law or jury procedures").

134. Several jurors later stated that had there not been a lawyer on the panel, they would never have understood, much less ruled for the plaintiff on, the breach of implied covenant claim.

focus the jury's attention on those aspects of the case.<sup>135</sup> But in such situations, one would expect that opposing counsel would have every incentive to point this out, in which event the jury will have some help in linking the evidence to the law, at least on those critical points.<sup>136</sup> Yet, even if both parties may wish the jury to ignore the law and to decide the case based purely on sympathy or emotion, the judge has no duty to aid and abet such efforts. To the contrary, the court has an independent responsibility to help assure that the jury decides the case based on the evidence and the law.<sup>137</sup> This can happen only if jurors understand how the instructions are to be applied to the facts of the case. While counsel may at times believe they will benefit from a confused jury, it is unethical for a lawyer deliberately to sow such confusion.<sup>138</sup> Judges should not have the slightest hesitation about seeking to counteract such efforts.

It might also be feared that a lawyer who uses closing argument to tie the evidence to specific elements of the instructions may, in the jury's eyes, appear to be relying on legal technicalities rather than on what is right and just. It might thus seem picayune for the defense to emphasize plaintiff's failure to offer evidence on some small but essential element of a claim.<sup>139</sup> Yet, if counsel's review of the evidence is part of a closing argument that discusses all of the claims in issue and that also emphasizes the equities of the client's case, it is doubtful

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135. This concern is similar to the objection lawyers sometimes raise to having the jury use a special verdict. See Margolis et al., *supra* note 11, at 57.

136. This does not always happen. In the criminal case on which I sat, the jury realized on its own that one necessary element of the false imprisonment charge was wholly unsupported by the evidence; however, the jury nearly overlooked this element and was about to convict defendant of this felony. See *supra* note 79. Rather than leaving the matter to chance, the defense might have pointed out this critical defect during its closing argument.

137. See *supra* notes 107-13 and accompanying text.

138. Lawyers have an ethical duty not to bring a case knowing it can be won only if the jury misunderstands the law or the evidence. See Lempert, *Let's Not Rush*, *supra* note 11, at 87 & n.47 (citing MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102 (1980)). Rule 5-200 of the California Rules of Professional Conduct provides that a lawyer presenting a matter to a tribunal "[s]hall not seek to mislead the judge, judicial officer, or jury by an artifice or false statement of fact or law . . . ." CAL. RULES OF PROFESSIONAL CONDUCT Rule 5-200 (1994); see also *Klemme v. Hoag Memorial Hosp. Presbyterian*, 103 Cal. App. 3d 640, 649, 163 Cal. Rptr. 109, 114 (1980) (holding that deliberate attempts by counsel to mislead jury constitute prejudicial error); STANDARDS FOR CRIMINAL JUSTICE, Standards 3-5.8, 4-7.7 (Am. Bar Ass'n 1993) (stating that prosecutors and defense counsel shall not intentionally mislead jury or make arguments that will divert jury from its duty to decide case on evidence).

139. This may explain why defense counsel in the civil suit on which I sat never pointed out to the jury that plaintiff had introduced no evidence to support a key element of its claims for intentional and negligent interference with prospective economic advantage. See *supra* note 94 and accompanying text.

that the jury will be left with the impression that the attorney has been nitpicking.

### 3. It will only make matters worse

A third possible objection to this proposal is that it may have the opposite of its intended effect, and will leave juries more, rather than less, confused. Particularly in a complex case, if counsel or the court go through every element of every claim and summarize all of the evidence that pertains to each, jurors will be even more bewildered.<sup>140</sup> This is a tactic sometimes employed by the defense to confuse juries, especially in criminal cases where only a reasonable doubt need be created in order to gain an acquittal.<sup>141</sup> This danger can be avoided, however, by providing a less detailed review, perhaps one confined to stating the parties' opposing contentions as to each element of the case. If counsel should provide a summary so detailed that the jury is likely to be confused, the court might give its own brief summary following closing arguments.<sup>142</sup>

### 4. Judges won't go along with it

Finally, it may be objected that the proposal advanced here is naively unrealistic because judges are not about to adopt it. As noted earlier, courts rarely exercise their authority to summarize the evidence due to the extra work involved and the enhanced risk of reversal.<sup>143</sup> For the same reasons, a judge may be hesitant to threaten counsel with the exercise of this authority, for if the lawyers decline the bait, the court will have to make good on its threat. Yet neither of these drawbacks to summarizing the evidence need deter a judge from following the proposal advanced here.

As far as the court's workload is concerned, it may be possible for the judge to insist that counsel prepare a summary of the evidence, either as a stipulation on which all parties agree, or as separate summaries that might serve as the basis for reaching a negotiated agree-

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140. Lempert, *Let's Not Rush*, *supra* note 11, at 127 (noting that in complex cases it is almost impossible to truly summarize evidence).

141. IMWINKELRIED, *supra* note 129, at 503. However, such conduct is unethical. See *supra* note 138.

142. As noted earlier, there are many ways of summarizing the evidence. The approach followed will depend on the nature and complexity of the case. The summary need not be minute and exhaustive. It might consist of little more than a review of the parties' opposing factual contentions on each disputed element, without attempting to identify the evidence used to support those contentions. See Weinstein, *supra* note 1, at 172-73.

143. See *supra* notes 125-28 and accompanying text.

ment.<sup>144</sup> The court could insist that counsels' drafts be of limited length and in a prescribed form, so as to assure that they serve the goal of enlightening rather than confusing the jury. The summaries would be submitted immediately at the close of the evidence, but prior to the charging conference at which they would be discussed. The court could use these drafts as the basis for its own summary, in the event that it had to deliver one. Because of the assistance provided by counsel, the burden falling on the court will have been very substantially reduced.

The risk that summarizing the evidence may lead to reversal can also be minimized. The risk, of course, will vanish entirely if the summary is given by counsel rather than by the court. The fact that the parties will have drafted and perhaps agreed upon a summary of the evidence may greatly increase the instances where closing arguments link the evidence to the law, for counsel have already done all the work. And even if only one side agrees to provide such a summary, opposing counsel may feel compelled to follow suit.

In those instances where it is necessary for the court to perform this task, counsel may have agreed to the contents of the summary,<sup>145</sup> thereby eliminating any basis for challenging it on appeal. Even if no such stipulation was reached, after the court delivers its summary, it might afford counsel an opportunity to suggest any corrections or additions, thereby giving the judge an opportunity to cure whatever errors may have been made.<sup>146</sup> Finally, the risk of reversible error can

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144. Since the court's summary of the evidence is often delivered as part of the instructions, *see supra* note 128, existing statutes and rules that require counsel to submit proposed instructions might be construed to give judges the authority to require that counsel also submit a proposed summary of the evidence; *see, e.g.*, CAL. CIV. PROC. CODE § 607a (West 1976). The proposed instructions and the proposed summary of the evidence would not be submitted together, however, since the former is usually due prior to the start of trial, *see, e.g., id.*; C.D. CAL. LOCAL R. 13.2.1, while the latter would be submitted after the trial had concluded.

145. According to Chief Judge Weinstein,

Charges, including discussions by the judge of the legal contentions of the parties . . . , should be negotiated. This requires that the judge have his own proposed charge typed in advance of summations. It also requires, of course, that the parties get their requests in early so they can be incorporated as needed. The proposed charge is distributed, studied by the lawyers, and then corrected page by page. In most cases, full discussion and compromise result in a charge everyone can accept. If a party refuses to compromise, the record is clear and the unreasonable and recalcitrant party's position at the trial and appellate level is undercut.

Weinstein, *supra* note 1, at 186.

146. *See* Margolis et al., *supra* note 11, at 327 (reporting that in federal civil antitrust action where judge's instructions included summary of parties' contentions on each point, charge ended: "Now, if you will bear with me just a few more moments, please, you may

be reduced still further if the court confines its summary to stating the parties' principal contentions on each legal issue, without reviewing the specific evidence offered to prove them. This will avoid the danger that the judge's account will be found to have been biased because it omitted or mischaracterized a key piece of evidence.

Thus, the fact that courts in the past have been reluctant to summarize the evidence for the jury need not doom the proposal offered here. If counsel prepare draft summaries for the court, or agree upon a summary, the burden on the court and the risk of reversal both diminish considerably. Perhaps this is enough of a difference that judges will be willing to give the idea a try.

## VI. CONCLUSION

If juries are to return verdicts that are based on the law, it is necessary that they understand how to use the court's instructions. A great body of research has focused on the inability of juries to comprehend the law. Efforts to revise jury instructions so as to make them more intelligible are promising, if underutilized. In addition to problems of comprehension, however, juries face a distinct and formidable difficulty in not knowing what to do with the instructions. This should come as no surprise. If beginning law students have a hard time learning to apply the law to the facts, why should it be any easier for jurors, whose total legal education consists of a brief lecture from the judge? Even the most simply written instructions are of no use to a jury that does not know what to do with them.

It is up to the court to assure that juries know how to employ the instructions. To that end, this Essay makes two suggestions. First, shortly before the jury retires, the judge should provide a brief instruction that suggests how the jurors might make better use of the instructions as a tool in reaching a verdict. Second, courts should take fuller advantage of their authority to summarize the evidence as a way of encouraging counsel to link the law to the evidence during closing argument. These proposals are made in the spirit of Francis Bacon's advice that judges "be a light to the jurors to open their eyes."<sup>147</sup> Without some additional illumination, our elaborate process of instructing the jury may amount to little more than an empty ritual.

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stand and stretch, but I will need another moment to confer with counsel to see whether I have inadvertently misstated or omitted anything.").

147. Weinstein, *supra* note 1, at 163 (quoting Francis Bacon).

