Asking Jurors to Do the Impossible: A Response to Peter Tiersma

Janet Ainsworth

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SUMMERS-WYATT SYMPOSIUM
“ASKING JURORS TO DO THE IMPOSSIBLE”

FRIDAY, MARCH 27, 2009

THE UNIVERSITY OF TENNESSEE COLLEGE OF LAW
WELCOME AND INTRODUCTION

PROFESSOR WHITE: My name is Penny White and I am the Director for the Center for Advocacy and Dispute Resolution and the faculty advisor for the Tennessee Journal of Law and Policy along with Dr. Otis Stephens.

I want to begin by telling a story. It's an automobile accident case. A simple car wreck. The lawyers are good. They're well experienced. They know how important it is to communicate with juries. The law is clear. The judge is learned. The judge is not only learned, but patient. Does this sound like a dream world so far?

The judge has carefully instructed the jury on the law. The jury has been in deliberations for about three hours when there is knock, knock, knock on the door. A question. These are the jury's questions: What are the three lawsuits? What damages have been done? Who is suing whom, for what? These really were questions written by Tennessee jurors in a lawsuit within the last several years.

It is my honor to welcome you to the first Summers-Wyatt symposium and to begin by expressing our gratitude to the members of the Summers-Wyatt law firm for the opportunity to come together. We are lawyers and judges. We are linguists and psychologists. We are students and citizens. We have come to confront the question: Are we asking jurors to do the impossible?

Because of the abiding faith in the American Justice System and a tireless devotion to the protection of individual rights that the members of the Summers-Wyatt law firm has, they have generously enabled the College of Law and the Center for Advocacy and Dispute Resolution to partner with the Tennessee Journal of Law and Policy and host this symposium. Join me in thanking them. Not only will this symposium have an effect hopefully on those of you in the audience today, but it will also have a lasting
effect because these proceedings, as well as the papers of the experts who speak with us today, will be published in a special edition of the Tennessee Journal of Law and Policy. Now, I would like to introduce to you the person who makes all of these efforts at the law school possible by his continuing support and his endless energy, Dean Blaze.

DEAN BLAZE: Well, welcome to the law school. On behalf of everybody here, we are really excited to have you. Now, we're talking about juries, but it's kind of intimidating when you look out at the audience and the jury that you're talking to is made up entirely of judges or primarily of judges. I'm used to talking to law students, I'm used to talking to lawyers. Your Honors, welcome and we're glad you're here and participating. This is an exceptional program that Penny and the Journal have put together. I want to add my thanks to the Summers-Wyatt law firm for everything you've done to make this possible, for your ongoing support for the law school. And to the students, I want to add my thanks for everything you've done, the staff of the Tennessee Journal of Law and Policy.

You know, we're excited to have this because this is a perfect place for this kind of program. This law school is—I'm going to sound like a Dean—but I firmly believe that it's the best place in the country for training people to be lawyers. Whether they want to be transactional lawyers, whether they want to be a general practitioner, whether they want to go to a law firm, whether a large firm, or whether they want to be advocates in the courtroom, this is the best place for it.

This is an incredibly important topic. It is a topic that is near and dear to my heart. In fact, Professor Dumas and I had a research project going for a while on the "heinous, atrocious, and cruel" instructions being used in Tennessee. We were going to explore the comprehensibility of that. We had a survey set up. Then,
thank God, the Sixth Circuit said: “You don't need to do that; ‘heinous, atrocious, and cruel’ makes no sense. We're not going to use it in Tennessee anymore.” While I missed doing the research with you, Bethany, I'm glad that happened.

We're always talking about the importance of lawyers. Lawyers are essential, but the jury system is absolutely crucial to our system of justice. To use a very simple example, we hold up “To Kill a Mockingbird,” Harper Lee’s book, and Atticus Finch as the best of our legal system. Atticus was incredibly capable and committed to justice. He stepped forward and did what needed to be done in the small town to represent Tom Robinson. That's fabulous and we should embrace that image, but remember that Tom Robinson, despite having Atticus Finch, still ran. He still ran and was killed while escaping. Why did he run? Because the system failed him because the jury system failed him.

Now, we're here today not to talk about bias embedded in potential juries. We're not talking about “To Kill a Mockingbird,” Tom Robinson running, or Scottsboro. We are talking about proper functioning of juries and properly instructed, properly informed, properly engaged juries can do a lot to overcome bias and can actually make a difference in the proper functioning of our system. In conclusion, I hope you enjoy our program, and I hope you learn and that your thoughts are provoked today. Thank you.

INTRODUCTION TO SYMPOSIUM

PROFESSOR WHITE: Our symposium is divided into two distinct parts: acquisition and application. I tell you this because it's going to be a little different than your run-of-the-mill symposium. This morning we are in the acquisition phase. We will acquire knowledge.
Knowledge about language and how we can better communicate with juries for the purpose of helping them perform what the United States Supreme Court has called the most awesome responsibility. Beginning with our keynote speaker and a panel of distinguished individuals, we will acquire this knowledge from a diverse group of experts, diverse in their expertise, in their approaches, and in their viewpoints.

After our morning of acquiring knowledge, we will move on this afternoon to application. This afternoon, based on a case modeled after a Tennessee decision, we will ask lawyers and judges, aided by law students, to contemplate jury instruction issues while a mock jury of undergraduate students deliberates the same case in another room. At the end of the day, we will join in again to exchange what we have learned in the hopes that in some small way, we will make the task of jurors less impossible in the future.

At this point, I want to turn the program over to the Editor-in-Chief of the Tennessee Journal of Law and Policy and we'll get started. Ashley Musselman, who has worked on this program with me since about September. Thank you, Ashley.

MS. ASHLEY MUSSELMAN: Good morning. My name is Ashley Musselman. I'm the Editor-in-Chief of the Tennessee Journal of Law and Policy. I want to start off by saying, on behalf of the Tennessee Journal of Law and Policy that you all for coming. I want to also recognize some of the members of the board of the Journal. When I say your name, please stand and be recognized. Ashonti Davis, managing editor. Chris Hayden, and Ashley White, research editors. Jade Dodds and Sara White, articles' editors. Jonathan Buckner, publication editor. Jesyca Westbrook, candidacy-process editor. Thank you all for your hard work and dedication to the Journal. I would also
like to thank the Journal members that were part of the symposium committee. I would like to recognize a few of them as well. When I say your name, please stand and be recognized, Sally Goade, Sean McDermott, Monica Rice, Jesyca Westbrook, Ashley White and Crystal Young.

At this time, I'd like to introduce the keynote speaker at our event today, Peter Tiersma. Dr. Tiersma is a Professor of Law at Loyola University in Los Angeles, California. He is a nationally renowned speaker and expert in writing comprehensible jury instructions. He has written extensively on language and the law and on jury instructions. His recent publications include “Communicating with Juries,” “How to Draft a More Understandable Jury Instruction,” “Some Myths about Legal Language,” and “Speaking of Crime: The Language of Criminal Justice.” So, without further ado, please join me in welcoming Dr. Tiersma.

[Professor Tiersma’s keynote speech was a summary of his article, Asking Jurors To Do the Impossible, located on pages 105 to 147 of this journal. Following his presentation, he was asked the following questions.]

QUESTIONS AND ANSWERS

MS. MEREDITH RAMBO: You had mentioned what you called the gag rule. Basically about how it's been impossible to keep jurors from talking to each other during the entire process versus in deliberation, but then later you had mentioned something about being lie detectors and twelve heads being better than one. Don't you run into the fact that if jurors are conversing during the entire process, that one person's bias may influence how those other jurors hear the evidence and process it themselves? Might the
problem arise that this may lead one person to make the judgment?

PROFESSOR TIERSMA: Well, that, I suppose, is the concern. That's probably the reason you have those restrictions. The ABA came up with a rule recently, which allows jurors, as a group to discuss things during breaks, but everyone has to be there.

That's one fairly conservative way of implementing that idea. Yes, there is a problem if one juror is a loudmouthed juror who dominates a discussion. I think that's a concern. But you know, it's also a concern when they're all together in the jury room at the end.

I know that's an answer that judges and lawyers often have with respect to jury instructions being rather difficult to understand. They argue that some of the jurors are going to be relatively well educated. They can explain it to the others. Ultimately, they'll all understand what the instructions mean. Some research has suggested that in fact that isn't necessarily the truth. That what happens is that it's not the person who understands the instructions best who explains it to the others. It's the loudmouth. That person might understand them correctly or that person might not understand them correctly. He or she tends very forcefully to state his or her opinions. He or she might be wrong; he or she might be right. So, you've got that sort of person on just about any jury.

MR. ALEX RIEGER: Along with the gag order questions, say there was a jury that didn't involve that loudmouth person but still didn't have the gag rule. They deliberated and discussed amongst themselves before all the evidence is presented, wouldn't possibly letting them discuss early and letting them all be together, wouldn't we still be afraid that there would be some sort of band wagon approach, where twelve people essentially group think their way to an
early answer and stubbornly and steadfastly stand by that answer until all evidence is presented and basically just ignore the other evidence in favor of the decision they've already made?

PROFESSOR TIERSMA: The question is this: Is it possible for jurors to keep an open mind? If we tell them, "You can discuss it, but keep an open mind. You're going to hear other evidence. You might be surprised by what you hear."

We've got a psychologist here to tell us more about how people reach decisions. Typically, you tend to reach a tentative conclusion. That's going to happen regardless of whether they discuss it or not. They're going to reach tentative conclusions and they're going to modify that conclusion as additional evidence comes in.

I think that jurors are fair-minded enough that if you tell them, "Reserve judgment until the end. You can talk about it, listen to the witnesses, you can reach a tentative conclusion. You've got to listen to the other jurors and reserve your final judgment until the end." I think they should be capable of doing that. We actually have a certain amount of evidence on this from Arizona. Jury experts have been looking at actual deliberations. Shari Diamond has written about this very issue. She concluded that there are some dangers to this, but that overall the process seems to be working pretty well.

JUDGE ROBERT CHILDERS: Have there been any studies on group dynamics, particularly on group dynamics in the jury in a court setting that are allowed to talk to jurors. What about a group of jurors getting together and having lunch every day and that sort of thing and the group just sort of leads the jury in the direction that they want to go during the deliberations? Are you familiar with any studies on group dynamics?
PROFESSOR TIERSMA: Well, no, that's not an area that I'm really an expert on to be honest. I mean I'm a law professor and I used to be a linguist, so I'm really concentrating on language.

PROFESSOR WHITE: I want to ask the last one. As an evidence professor, I'm struck that you suggest that one solution to unringing the bell is to specify the evidence you're asking them to forget, which is what why we often teach law students that they may just not want to object because they will re-emphasize.

PROFESSOR TIERSMA: That's a strategic question for the lawyers.

PROFESSOR WHITE: If the judge restates it, "Don't take into consideration that the defendant assaulted his past three girlfriends," that improves the jurors' comprehensibility?

PROFESSOR TIERSMA: Well, does it improve juror comprehensibility? I think it commonly does. It also reinforces that message. So, this is very much a strategic decision. If you really want to have an effective limiting instruction, I think the judge would have to say, "Evidence has been introduced that the defendant attacked his previous girlfriends. You can consider that evidence on the question of whether the defendant testified truthfully when he denied doing so, but you should not consider it on the question of guilt."

Now, once you say it that way, you begin to realize how problematic limiting instructions are. But at least that would focus the jury on the issue. If it's a punitive damages case, you might say, "You've heard testimony of some incidents that happened outside of Tennessee. You can
consider that on the question of this but not that." Rather
than simply talk about other state evidence generally, you
identify exactly what you're talking about. That's my idea.
Yes, they're extremely problematic. There's no doubt.

INTRODUCTION

MS. ASHLEY MUSSELMAN: At this time, I would like
to introduce our panel. Our panel is comprised of members
of various disciplines, including law, psychology, criminal
justice, and linguistics. The panel is here today to provide
a response to this issue addressed from their perspective of
their various disciplines. So please help me in welcoming
our panelists.

Janet Ainsworth, a professor of law at Seattle
University School of Law. John Clark, III, an associate in
criminal justice at Troy University. Bethany Dumas,
Professor of English here at the University of Tennessee at
Knoxville, and David Ross, Professor of Psychology at the
University of Tennessee at Chattanooga. We'll start with
Professor Ainsworth.

COMMENTS OF JANET AINSWORTH

PROFESSOR AINSWORTH: It's a real honor to be here
today and to be able to comment and make a few
observations on Professor Tiersma's interestingly titled
"Asking Juries to Do the Impossible" presentation. I'm
struck that you said this as though it's a bad thing. When I
think of the impossible things I am reminded of the line
from Alice in Wonderland. When Alice said, "Well, I can't
do that. It's impossible." The Red Queen replied, "Well, I
often believe six impossible things before breakfast."

So I guess the question that I want to ask today is:
Are these things really impossible? Lawyers and judges
can do things to make those impossible tasks that we give
to jurors perhaps a little bit more possible. I work with issues of language in law, but today I'm really wearing a somewhat different hat. I was a trial attorney before coming into the academy. I practiced criminal defense for about eight and a half years, and tried somewhere in the neighborhood of 100 to 150 cases—and they were virtually all jury trials. My thinking about this issue is much less as an academic and probably much more as a lawyer.

When Professor Tiersma talked about impossible thinking, he talked about a great many different things that we ask jurors to do. These tasks really fall into several different kinds of categories. What might be instructive for us is to think about the ways in which we can help jurors with some of these categories, whereas others we may not be able to do as much about. For example, Professor Tiersma reminds us that jurors are often asked to make decisions about issues instructed in technical language or archaic language, or with confusing, convoluted, poorly structured, and lengthy sentences. Those are all examples of one set of problems—namely, that jury instructions are often fairly opaque. They are not user-friendly.

A second problem is that jurors are often asked to make determinations about matters that we think of as more properly legal matters in which they have relatively little guidance about how to think about the legal issues. Third, we often ask jurors to make decisions in which they ought to make decisions sequentially in some order, but we fail to tell them that. In other words, we don't road map for them how the various issues they are deciding may fit together. Finally, we ask jurors to both assess the past and predict the future, or sometimes even to construct a hypothetical present and future as though something different had happened in the past. All of these tasks are in some sense impossible. I'm going to speak to each one of them briefly. I hope to make some suggestions about ways that lawyers
and judges can deal with some of these impossible tasks, building on the things that Professor Tiersma has said.

I'm not going to speak very much about the problem that is probably the easiest for us to do something about, which is drafting jury instructions that make sense in plain English. Getting rid of some of the archaic language. Breaking sentences down into simpler sentences, not embedding clause, upon clause, upon clause, nominalization upon nominalization, upon nominalization—all these can make train wrecks of jury instructions. Rather we should make them instructions that people can actually understand.

Simple as this sounds, there are a number of challenges to this. For one thing, all of us today are here because we were trained in the use of language in specialized ways, as judges, as lawyers, as legal professionals, and as social scientists. It's sometimes easy for us to forget how difficult it is for ordinary jurors, who don't have as much experience with parsing that kind of specialized literary language to understand what it is that we're saying. I suspect this is only going to get worse. I keep being reminded that my students now are millennials. They're not used to reading long things. They're not even used to reading e-mails anymore—that's for old people. They're not even using IM's anymore. I've been told those are for semi-old people. Now they're twittering. I've been told, although I don't twitter myself, that twitter limits what you can say to 140 characters. I believe that includes spaces. So any statement which is longer than 140 characters may be daunting to the jurors of the future. This is something we need to think about.

My advice to lawyers in preparing to craft instructions is to talk to the jurors in your cases when you're finished. I've often found that jury instructions that seemed clear and intelligible to me turned out to present land mines for jurors. They didn't to me because I had read...
them so many times before and heard judges utter them so many times before that they seemed completely obvious to me. Only when I spoke to jurors after the trial did I understand how confusing they were, or did I understand that the jurors actually misapprehended the instructions. I learned a lot about jury instructions, and frankly, I learned a lot about lawyering generally every time I spoke to jurors after trial. My suggestion to those of you who are in the practicing bar is, if a judge allows you to speak with jurors after they conclude their jury service on your case, take full advantage of that. You'll always learn something interesting and important from them.

I pointed out that jurors are often asked to deal with what we might consider legal questions. Professor Tiersma gave you a couple of examples. One example that I felt the most vexing when I was in practice came out of a habitual criminal statute in Washington State. This statute was an early “three strikes and you're out” statute, which meant that if you had three convictions of certain types of felonies, you got a sentence of life in prison. The Supreme Court in our jurisdiction decided that, in order to get a conviction under the statute, all the elements needed to be proven beyond a reasonable doubt, including that the convictions all be constitutionally valid. Therefore, the question of the legality of any prior conviction had to be answered by the jury. The jurors were instructed that it was their job to determine whether prior convictions, often by guilty pleas, were constitutionally valid beyond a reasonable doubt.

So the jurors had to figure out whether a particular guilty plea was constitutionally valid. This is something that has sorely tried many judicial minds. The idea that jurors could do it was somewhat counter-intuitive, to say the least. Worse yet, they had to make their determination beyond a reasonable doubt. What it means to a jury to decide that something was constitutionally valid beyond a
reasonable doubt was even more problematic. We managed to fix that, of course, by scrapping the entire statute and coming up with a new "three strikes and you're out" law, which doesn't have that problem. The new statute has a variety of other problems but that's beyond the scope of this talk.

I think if there's a wonderful take away from the examples that Professor Tiersma was giving to us, it's that jurors are really not told very much about how to be jurors. They are not given an instruction manual. They're not given a good road map about how they should proceed. That's easy for us to forget because those of us who are lawyers and who are judges have seen so many jury trials that it seems blatantly obvious how jurors ought to begin their deliberations, how they ought to determine what the issues are and how to decide them. In reality, that isn't necessarily the case, and becomes particularly clear when you talk to jurors after trial.

A greater use of meta-instructions—instructions about instructions, instructions about how to proceed—are certainly useful. Indeed, in Washington they've began to use some of those meta-instructions, telling jurors how to think about the decision making process. However, they didn't replace the old instructions and so we now have probably the worst of all possible worlds. For example, in our criminal instructions in Washington, we gave an instruction that begins, "A person commits the crime of X when. . ." blah, blah, blah, followed by a description of the elements of the crime. We refer to that as the "a person commits" instruction. Jurors were sometimes confused because they didn't understand how the elements related to each other and whether each of the elements were essential to conviction.

So the jury instruction committee got together and said, "Let's come up with a new instruction—kind of a meta-instruction. We will call that the "to convict"
instruction, reading, "To convict a person of the crime of X, you must first find X. You must then find Y. You must then find Z. If you have found all these elements beyond a reasonable doubt, it's your duty to return a verdict of guilty. If, however, you have a reasonable doubt as to any one of these elements, it will be your duty to return a verdict of not guilty." But, they weren't sure whether they should get rid of the "a person commits" instruction, so now jurors get both. This ends up being very confusing. A number of jurors have said, "Well, we couldn't figure out which of those instructions was the real one. So we (a) flipped a coin, (b) tried to apply both, (c) discarded both of them." Those are all options that jurors have picked. You can see that continuing to use both instructions turns out to be not very helpful.

Cases involving lesser-included offenses provide a classic example of an issue needing some kind of meta-instruction that tells jurors how to make decisions about lesser-included offenses. The suggestion is often made that special verdict forms—verdict forms that actually walk the jurors sequentially through the fact determinations they have to make—can be helpful to jurors. Why then do lawyers and judges find special verdict forms so difficult? Why are they so resistant to using them? I think one reason is a fear of inconsistent verdicts. If we actually could open up the black box of a jury verdict and get something other than "thumbs up, thumbs down," we're worried that we might in fact find that the jurors had made inconsistent factual findings. This would be a problem, making us face up to facts we might prefer not to know.

One interesting potential solution to that problem could come from technology, oddly enough. If you've bought anything online in recent years, you probably know that at some point they're going to show you a little box following the sales terms that says, "I accept." You put a little green dot in that box to get to the next screen. There's
no place on that screen where you can do anything other than to either click "I accept" or get out of the program and not buy the thing. If you take a technological approach to using a special verdict, you could set the form so that once the jurors made a particular determination; they would never then see the rest of the instructions that no longer were relevant. For example, in a lesser-included offense situation, you could actually have the jurors get a little box to check if they found the defendant guilty of the greater offense. If they check that box, they never see the follow-up screens asking them to consider lesser offenses. If they find the defendant not guilty of the greater offense, then up pops the next screen instructing them on the lesser offenses. This electronic jury verdict form would get rid of the distracting things jurors don’t need to consider but instead give them forms describing the issues that they really need to decide in the case.

With respect to the impossibility of predicting the future and dealing with hypothetical futures like, for example, what would have happened if the disease had been appropriately diagnosed, let me say this. It is true that jurors are certainly not able to do that, but nobody else is either. I think that actually telling the jurors that explicitly is not a bad idea. Jurors get nervous about not being able to perform their job correctly. If you can tell them that some things are inherently not knowable by anyone, not just by them because they're not legally trained, but by any of us, legally trained or otherwise, they feel much more comfortable about making the kind of determinations that we ask them to do.

If juries are in fact asked to do the impossible, as Professor Tiersma suggests very colorfully that they are, it only seems fair to encourage lawyers and judges to do the merely challenging—that is, to assist them in performing their roles. If we do this through better instructions, we may help make the impossible for jurors into the merely
challenging, whether it is in fact before or after breakfast. Thank you.

COMMENTS OF JOHN W. CLARK III

PROFESSOR CLARK: It's good to be here. I just kind of tell it like it is. That's always been my approach. I'm real straightforward and I conduct a lot of jury research. I am very passionate about this idea of twelve persons coming together and trying to deliberate and ultimately reach a verdict. Back in 2000, I was really thinking a lot about the criminal justice system, law enforcement, courts and corrections, and equity, due process. I remember in graduate school thinking about where I want to go with this. I love the legal system. I love engaging in dialogue with attorneys and judges. I mean I've really been fortunate. I owe my career to judges who gave me the opportunity to conduct jury research.

I've surveyed, examined, and discussed a lot of different studies, attitudes, ideologies, personalities, technology, mental retardation with jurors. I've actually examined, met with, and discussed over 4,000 since 2000. And predominantly this is all in Alabama and some in Texas. I've always been, as I say today, a straight shooter with this. I very much appreciate the professor's opening if you will. I've learned a lot. I've thought a lot about jury instructions. One of the words that I've heard today is control.

Well, I drove here because I wanted to be in control rather than fly. Because I'm not in control. So I can control so much. I mean I am very eclectic. You can tell already. I've heard this idea of functioning. Functioning. Well, I'm probably dysfunctional, as well as most of society. Our society, you could argue, is dysfunctional and then we try to make them functional in a jury system that is, some would argue, dysfunctional. We have a lot of
dysfunction going on. It seems that we're trying to make it functional. If this doesn't make sense, then it might later. If you drink a beer, it might then. I do my best work, you know, late at night. I've written my best articles late at night.

But with that said, tomorrow it may even make better sense. With that being said, this idea of truth and this idea of equity, and sometimes I get really caught up on it, is that really what it's about? I mean is that what we want? I think more times than not, we all get caught up in our prescribed rules and our processes in the roles that we follow. Sometimes we tend to forget control, function, truth, and equity. What are we really trying to do? I'm really in it for the pure essence of finding out something and going in to examine something.

I've had the real unique opportunity to speak to a lot of different persons before. Whether it's law school students, or undergraduate students, graduate students, attorneys, and judges. They'll all tell you, in the past, that I just come at it the way I come at it in my approach. I really do think that we need to recognize again, when it comes to jurors, that they do have their own lives. I've conducted a lot of research in this stuff. And I've met with a lot of jurors as I've indicated.

Jurors have their own lives. We summon them and we're lucky to get probably half of all that go out. There's already this idea of cross representation and how many jurors are we truly bringing in. Nonetheless, we take them from their lives where it's chaotic—there's work, kids, responsibilities, trying to keep a job, the economy that we live in. Nonetheless, they have a life. We ask them to come down to this foreign atmosphere, and foreign room. We place them in some really unusual situations.

Nonetheless, we put them in this environment and we expect so much from them. They're just out of their element. We have to understand that. They have their own
lives. We've got to understand and recognize we're taking them from their world and putting them somewhere that may be very different. I think sometimes we lose focus of that.

We also, secondly, must recognize that when it comes to jurors, they have their own personalities. So, I think this is really cool because we're thinking about jury instructions. We're really focused on meticulously and the semantics and the lexicon and putting these words in place and trying to make sure that the instructions and it's just right. We all need to do the best that we can.

With that being said, we can be perfect on instructions. Then think back to yourself when you were in school. How many people follow the instructions? You take a test and it gives you instructions. How many people don't follow instructions? So there's something to be said for that. Think about the personalities. Think about attitudes. Think about ideology. How is this and instructions related? Well, the case could be made that no matter how good a job we do it might not matter.

No matter how good we come across with instructions, and we want to maintain control as we've already indicated. We want jurors to function, as they need to function. But can we ever get away from recognizing what jurors bring in when we come inside the threshold of the courtroom door. Never forget or just accept the personality, attitudes, and ideology that's brought inside these courtrooms.

Ultimately, you could have the greatest instructions but we all must recognize that there's some things that we can't control. Because I'm extraverted and I score high on neuroticism. I score high on openness. I score high on conscientiousness. I score very low on agreeableness, which means I don't really get along with a lot of people.

That's called the five factor model personality. When you think about, again, recognizing control and
function and everything that works fine. The point is there's a human dynamic to this. There's a human element, and that's what I want everyone to recognize. Of course, judges, attorneys, and the law students especially. There's the individuality. There's this discussion of understanding that you select.

We're thinking about trial advocacy, thinking about twelve jurors and some alternates. Ultimately, there's this idea of it's better to have twelve than to have one. Understand that when jurors are deliberating, and this is important, the twelve become one. This is fascinating. As a trial attorney, you select individuals and excuse. Ultimately, twelve do make one. The key to this, to how much and how important the one becomes is with the passage of time. If it's a real slam shut case and the strength of evidence is very strong, the twelve may not necessarily come to be one. With the passage of more time, the twelve mold together. That's when you get into a collective personality. I think that's really important and that's not really mentioned a lot in the literature. You may go out and you look for individuals that you think are best suited for the case at hand, but ultimately, the twelve, with enough time, could easily become one.

With respect to note taking, I think maybe it's not necessarily a bad thing. I know there's the pros and the cons for that. But, maybe if we're in the courtroom and it's isolated and they're writing something, maybe something's pertinent enough. That does show a degree of conscientiousness, and maybe it could be germane later in the deliberations.

With respect to discussing this with other jurors: we must keep in mind, no matter what we do, jurors are going to discuss the case with other persons. That's the reality of this. We have to accept that. Whether they discuss it amongst themselves, but more importantly, without them being sequestered, going to their homes and
at night. It's so abnormal not to talk at times and discuss. Whether it's a family member, whether it's a friend, they will get it off their chest. It's a stressful situation. They are taken from their lives and responsibilities into a trial. Even more importantly, they are exposed to very visual, very graphic, very heinous evidence. They want to talk about it. They may also want to take notes.

Another thing we must recognize in this process is the debriefing. We should debrief and allow the recognition that jurors go through a lot in some instances. Having some sort of psychological debriefing program is important. Throughout this country, you really do not find that. There are a few other counties throughout the country, such as King County, which debrief.

I have plenty of examples to demonstrate psychological issues that jurors have encountered after the fact—during the trial and even afterwards. Ultimately, jurors like technology as well. So as the instructions and thinking about, are we asking jurors to do the impossible. I know how savvy individuals are. I know that the technology is important in the twenty-first century. Jurors are expecting certain things.

COMMENTS OF BETHANY DUMAS

PROFESSOR DUMAS: Let me introduce myself briefly for those of you whom I do not know yet. I am delighted to be here. I am always pleased and honored to be involved with this College of Law in any way at all. I have been since my first days here, although they were not always extremely easy and pleasant days. Just a very brief comment or two about where I come from with respect to all of this: I began life as an English major—well, not quite, but near the third grade I think. I was going to be a literature professor definitely I decided. I've been thinking about my life as I've been listening to others this morning.
and thinking about how is it that I got led to be here this morning talking about what I'm going to be talking about this morning. Looking back, I've always been, in a sense, data driven. I'll give you one example of what I mean by that. I got part of the way through a Ph.D. in Literature and then I had to take some philology courses—Old English, history of the English language, Beowulf in the original language. You know, you read six lines of it once. I fell in love with that. I thought this is wonderful. This is what life is really about is each time you would pull those from the page from the year 450.

At a certain point, I also was tired of not ever, ever, ever having any money at all. I decided I would teach for a year or two in this and then finish my doctorate. So I taught literature courses for two years at a state college. I hated it. Then I got an opportunity to teach at another university for a year and I took it. Then I took a job over the telephone at Southern University in Baton Rouge in 1964. I went down to Baton Rouge to teach at the largest essentially all black state supported university in the country. It was one of the more educational things I've done in life I took the job because of the fact that I thought I would learn something. In 1964, there were no books and really no articles on what at that time we were calling Black English or African American English. Most of my students were from small southern towns in Southern Louisiana. Many of them, quite frankly, had never interacted much with a white person other than a store clerk or a postal clerk. So, we had some communication problems. I was very fortunate in that the department head at Southern, shortly after I got there, became Melvin Butler, who was African American and who was a linguist.

So when I got stuck, I would go to Melvin and say, "Tell me what's going on. Tell me what to do. Tell me what I need to know that I don't know already." I had already taken some linguistic courses in language variation
and dialect studies, but that year, I decided that I wanted to understand why the kind of variations that exist in the American English exist, and why was it that we couldn't talk to each other more easily. I actually changed into a linguistics concentration that year. It was that particular trip. That's what I mean by being data driven. This I was interested in. It was exciting. I wanted to understand it. So I did finish in linguistics and did research in language variations beginning with Ozark English and moving to Tennessee to continue my studies of Appalachian English.

I had been here four or five years. I was wondering, do I want to run around with a tape recorder doing this kind of study all my career or will I want to do something different at a certain point? Understand that I had never been remotely interested in the law, except to stay as far away from it as possible as a graduate student.

More or less by accident, I read that 1980, '81 article by Ferro and Ferro, the short version of the Columbia Law Review article on why jurors don't understand jury instructions. They had actually conducted a careful research in the Washington D.C. area, about that particular point. I read that. The short article fascinated me, and I went and read the long law review article. I guess it was the first law review article I ever read. I decided that judges, Your Honors, and lawyers needed to know something about language that linguists know. I decided that I wanted to help teach judges and lawyers. However, I couldn't think of any reason why any of them would listen to me.

So I decided that I needed to understand legal process. I thought I could do it in one year. I quietly got myself admitted to the College of Law, and for four years between 1981 and '85, I taught full-time except for the final year, and I also came over here to begin my real education. That's how I got where I am. Jury instructions have been a passion of mine for a long time, and some of the work that
I've done has actually resulted in some detailed examinations of the kinds of things that Peter has told us about and written about extensively.

One of the fortunate things that happened to me fairly early in the beginning of this research is that Judge Inman corresponded with me, and over a period of years he shared with me some of his solutions to some of the policies we're discussing. One is paraphrasing entire instructions. Another involves pre-narrative examples, which are not extremely popular with judges. I understand why. But, he shared a number of those kinds of things with me.

For instance, just to show you one short example, talking to a jury about the concept of present cash value. Most jurors are not accountants, and so that is kind-of a strange phrase. If we examine the pattern of instruction in Tennessee, I won't read that. We could go get the paraphrasing. It makes the language a little bit simpler. We could even add a brief example. Hopefully, the simple example will be of some benefit.

If you know that a person will need $1,000.00 five years from now, you would normally not give him the $1,000.00 now. Well, in today's market, actually, you probably would. Maybe you would give him $2,000.00. But if you were required to give him money now, you would give him only the amount of money which, when invested, back when we could invest, would equal $1,000.00 in five years. How much that money should be now is for you to decide. That would be kind of a narrative paraphrasing example that I learned the existence of from Judge Inman.

Another example, and I'm going to show you one more, would be something like proximate cause, which might include both positive and negative examples. There again, of course, from Judge Inman. Some of these legal concepts or principles can be difficult for laypersons to
understand. I hope this example will illustrate for you a practical example of proximate cause. It is negligent for a driver to drive a car that has bad or slick tires. If that automobile with bad tires slammed into the rear of a car because the driver could not stop due to a combination of slick tires and wet pavement, then the negligence of the driver in driving with bad tires would be a proximate cause of the accident.

Of course, the other problem here is that “proximate” sounds to a layperson like “approximate,” a very different meaning. But, it is possible for the person to be negligent without that negligence being a proximate cause of the accident. If the driver of that car with bad tires is stopped for a red light and is struck in the rear by another car, obviously the bad tires had nothing to do with the accident. In other words, the driver's negligence in driving a car with bad tires was not a proximate cause of that accident. This is a straightforward example it seems to me.

I'd love to go through the history of having juries in the U.S., but I will not. I will move to trials just a little bit. Let me say, before I move into this, that my head is filled this morning with data, and it's a little bit different from what it had been filled with while I had been standing here in the past years. I have been focused a lot upon how undergraduate students at Duke University understand the nature of legal process and the nature of jury service. I've also been having two to three novels and views of films on “To Kill a Mockingbird,” “Runaway Jury,” and “The Runaway Jury” that are still in the book and other such things.

Also, I want to mention that last fall I had the interesting experience of challenging, pre-requiring students to write a novel involving a lawyer. I'm teaching a little undergraduate course—it's a special topic course. I looked at all the special topic courses, and I didn't like any of them, so, of course, I invented my own: Lawyers in
Literature. We started out with the thriller, “The Runaway Jury.” We went into excerpts from novels, that kind of thing. Then the day after the drop deadline came, I went in and told the students what we were actually going to be doing in class. The preceding summer, as I had been planning the course, it occurred to me finally that 254 is a writing intensive course, and that I was probably expected to have all my students to write a research paper. I did not want to read some library research papers on any topic whatsoever. So I thought, okay, what do we write instead? I decided that we would corroboratively write a novel. This applied to all my students the day after the drop deadline. They looked at me like, woman from Mars, what are you talking about?

They didn't think we could do it or would do it. What I had done prior to that day is to have them do some writing exercises, both in and out of class, such that I knew they could write sentences and weave together coherent narratives. Those are the two things I thought they needed to do. My motive for having them write the novel is that I wanted to, in effect, put them in the driver's seat with respect to fiction. I wanted them to think hard about what does a fiction writer have to do? How do you think about plot, how do you develop characters, how do you identify a conflict, how do you write? How do you do all this stuff when you're the author? So that for the rest of their lives they might occasionally, in reading a novel, think about, well, I wonder if he thought about going here instead, or he thought about going there instead? That kind of thing.

Now, it was a large class for this kind of activity. There were thirty-one students in the class. And we didn't get to do what Ken Kesey did with his graduate students in Oregon back in the '80s. I learned, actually after my course started, that Ken Kesey had done this experiment once with graduate students. Well, they came to his house twice a week and all sat around a table and wrote a pretty bad
novel. You can buy it if you want to. It's out in print, and you can buy it.

We couldn't do that, I mean thirty-one students twice a week for an hour and fifteen minutes. We developed a plot outline. We identified our characters, our conflict, and our resolutions; then divided ourselves into groups to write the individual chapters. We finished a 100-page draft. It's a bad draft. But, my requirement was not that they write a good novel. It was that they write a novel—a draft of a novel.

Furthermore, four of them decided they would like to continue working on it. So they've been working all semester this spring with me. The idea was that they would take the 100-page draft, flush it out, and improve it. That lasted for about four weeks. They came in the fifth week and said, "We have an announcement to make." What's the announcement? "We have thrown away the 100 pages and we are starting over."

They're doing a pretty good job.

So, what's the point I'm trying to make? I wanted to examine the extent to which untrained, laypersons, undergraduate students, and these are not pre-law students, would depict legal process and depict jury service. Because I think one of the problems with jury instructions is that jurors are regarded as sort-of minor players even when they're doing a very major sort of function—that they, themselves, don't have a clear picture of what a jury service is.

I'd like to conclude by just suggesting that the improvement of languages, the addition of paraphrasing and narrative is extremely important. But I think that there's a kind-of discrepancy between lip service paid to jurors just prior to the fact and the way the jurors, in fact, are often actually treated. I have suggested that they have to be empowered into kind-of a lay expert they're being asked to be. That is, the lay expert on facts. I think that the
way they're treated in court would probably have to be changed just a little bit. I've even suggested at one point seriously that if in 1979 or sometime during the 1980s, or even in the 1990s judges could have taken early research on syntax and semantics of jury instructions totally seriously, they might well have made or authorized changes in sentence structure and vocabulary choice that many of us have been advocating. But if they had done only that, I think that would have been actually totally inadequate. It's far more important for us to do—and I've been suggesting this morning, to stand back and look at the whole picture of what we're asking jurors to do when they walk into that courtroom, what we're removing them from, what their perceptions are as they, in fact, attempt to follow the kinds of instructions that we are both charging them with and also always trying to improve. I welcome your comments and suggestions later. Thank you very much.

COMMENTS OF DAVID ROSS

PROFESSOR ROSS: My name is David Ross, and I've got kind-of a different perspective on the topic. Don't leave. I'm a Professor of Psychology at the University of Tennessee Chattanooga. For many years, I've been studying juries and eyewitness memory and doing a lot of work. When I was in graduate school, I thought I would get all this great science, and the legal system would just open its arms, understand it, and want to hear about it. Little did I know how incredibly naive I am. Part of that education came when I met the Honorable Neal Thomas in Chattanooga. We've been working together for many years on issues like trying to increase juror comprehension and things like that. It's been an incredible journey.

I wanted to share with you three points that I think might be different here as well, that we haven't talked about here. One of the first things I want to do is ask you a
question. What's the literacy rate in Tennessee? Does anybody know? Currently, the illiteracy rate, I should say, reading level below sixth grade in Tennessee, is forty-three percent. You know what it is nationally? Twenty-seven percent. So the very first question that we have to ask is to what extent are we going to match the language level of our jury instructions to the people who come in to hear them?

First of all, as we have established today, court is a very foreign place. It is intimidating. People don't know about it. In fact, how many people in this room know that we actually have a jury orientation videotape available to every court in Tennessee? Well, the person who made that videotape is sitting right here: Judge Thomas. His whole idea has been to help educate jurors from the moment they walk in the door to help them feel more comfortable. We've done a careful research on the impact of the jury orientation tape that makes jurors feel more comfortable, and it increases their comprehension of the process, which is a critically important thing. If we look at the literacy problem, it becomes even incredibly more important.

In fact, those of you, for example, the judges—and I'll pose this question to you as well—in your jurisdiction, do you know what percentage of jurors show up who have been summoned for jury duty? In Hamilton County, where we're from, it's thirty-two percent. Thirty-two percent. The number one reason that jurors don't show up for jury duty, from the research, is that—does anybody want to take a guess at it? Yes?

UNIDENTIFIED SPEAKER: The mail.

PROFESSOR ROSS: The mail? This is actually a good guess. A lot of them don't get it. But people who have actually gotten the summons, why they don't show up?

UNIDENTIFIED SPEAKER: They can't read it?
UNIDENTIFIED SPEAKER: They're not getting paid enough.

PROFESSOR ROSS: Well—pay is a problem, plus fear of being made a fool of. Fear of not being competent. Fear of humiliation. That ties right into the question of how are we going to make this entire process easier? Maybe we need to expand the jury orientation videotape to make them understand that they're going to hear things like jury instructions that are going to be complex.

We do—one of the things I've done over the years too is that I do a lot of trial consulting with attorneys. We'll look at a jury instruction, and I'll read it and I give it to them. Will you please tell me what this means? They don't know. They say, "Well, I'm not really quite sure." I say, "Well, I don't know. If you don't know, how is the jury going to know?" So the issue of literacy and comprehension starts from understanding who your jury panel is, how these people are going to be competent to understand. If you have a literacy rate of forty-three percent, if thirty-two percent of your community shows up for jury duty, we're looking at a substrata of our population that we've got to pay attention to before we even start looking at the question of jury instructions.

It's not just a jury instruction issue. It's a much broader issue than that. Making them feel comfortable. Making them understand the process. So that was the first point I wanted to talk about. We really didn't hit literacy. It's a really, really, really important problem, and it varies even within our state when sometimes we go to real rural communities and deal with jurors there. Literacy rates even within counties vary enormously.

I always tell the attorneys when we're practicing for a trial or we're working on something, that if your presentation doesn't pass the granny test, it's not a good one. By that, meaning—and not anything about
grandmothers—but I use that example, Granny didn't go to law school. It's got to be in a language that everybody can understand. So the jury instructions have to follow or pass the granny test. That's my first point.

My second point hasn't been, I don't think, addressed yet today. I think this is even more problematic. What happens when the content of the jury instructions is wrong? Let me give you these concrete examples of our own work. The single largest, the single biggest reason for wrongful conviction in the criminal justice system. Does anybody know what it is? Eyewitness testimony, eyewitness identification. Of the first forty DNA exoneration studies, ninety—or examples—ninety percent of those were due to errors in line-up identification accuracy. Five of those people were on death row waiting to be executed. One was two hours from execution and got a stay.

Well, if you look at the jury instructions that are given in most states regarding how to evaluate the accuracy of eyewitness identification, the content is wrong. The content is wrong. We have approximately today about 3,000 studies of eyewitness identification. The typical jury instruction to the jury is to rely on witness competence. Competence bears little to no accurate relationship to witness accuracy. The same thing with detail. It bears little to no relationship to witness accuracy. So, jurors are actually given an instruction that is just the opposite of what the science tells them.

So, you wonder how many of those cases—and if you look at the DNA exoneration studies that are continuing to go on, those preventatives are still hovering around seventy-five, eighty percent errors in line-up identification accuracy. How much of that error in the system is because jurors are given instructions to use to evaluate an eyewitness that are factually wrong? That points them in the wrong direction? Because something
like witness competence is an extraordinarily easy thing to manipulate. What we know from many, many studies from the '80s is that from the time the person experiences the event to when they actually testify, witness confidence or competence goes like this (indicating downward). By the time they get on the stand and they go, "Yeah, that's the guy," that competence measure means nothing. But the Court instructs the jury, that's what you use among other things. So that was my second point.

I will give you another example of a very important issue where the content of the jury instruction was wrong. Years ago, we were interested in the issue of child witnesses. Children were really starting to testify in court, and legal changes were making it easier for children to testify at very young ages. One of the issues that the courts were concerned about was how do we protect a very young child, a four or five-year-old child, from the trauma of testifying? Because when the child comes in and sits in the witness box, whom would that child typically look at? Who's in front of the child? Who? The defendant. Exactly.

The theory is that having the defendant there may produce such trauma to the child that it may impact his or her testimony or make the child unavailable to the court because the child can't speak. It's too fearful. So, courts started putting protective shields between children and defendants or using video monitoring systems, where they would leave the defendant and the jury in the courtroom, and they would have the child directly across in the judge's chambers.

Well, this raised the issue of what? What does this deny the defendant? Exactly. The Sixth Amendment right to confront his accuser. The Supreme Court of the United States heard a number of cases on this issue in a very short period of time. They came down with the conclusion, based on a jury instruction, that it was not unconstitutional
as long as the judge gave the instruction to the jury just prior to the child testifying that the jury is to ignore—as you talked about ignore the pink elephant in the room—ignore the screen that's being placed between the child and the defendant. You are not to infer anything about the guilt or innocence of the defendant as the function of the presence of that screen.

Their court opinion was without any data, that the instruction was sufficient to undo any presumed prejudice that would be introduced by that screen. Well, what does that do? First of all, it assumes that the screen would actually prejudice the outcome of the trial, number one. Number two, it assumes that the jury instruction would eliminate the prejudice. Well, at that time, there was no data on the topic, and we had a NSF Grant to look at that. To make a long story short, we spent an enormous amount of money and time to look at whether this is the case, that the presence of a screen actually increases conviction rates, which was the concern of the court. The reasons for the instruction.

We did a study. We did a very large-scale, elaborate study. Not only did we find that it had not had an impact, it had the opposite impact. That if you protect a child and you put a protective screen between the child and the defendant, conviction rates don't go up. They go down; and they go down significantly. Just the opposite of what the court concluded and argued. Moreover, what does that do to the utility of the instruction? The instruction says what? The instruction says, "Look. Don't let the screen imply that the defendant is guilty." But if you look at the data, it doesn't do that. It actually decreases conviction rates. Just the opposite of what the court concluded. So the content of the instruction was wrong. So if you were going to rewrite the instruction, what would it say? It would say the opposite, you know. Don't let the presence of the screen make you think the defendant is not guilty.
But actually, what it was doing, what it was really doing is they had it backwards. The presence of the screen was not impacting perceptions of the defendant. The presence of the screen was impacting the perceptions of the child. Because if you put a screen between a child and the defendant, the assumption about the child was what? Was what? Fragile, unreliable, had to protect it, and couldn't rely on the testimony of the child. If you were going to write an instruction that was actually accurate based on data, the instruction would have been something about don't allow the presence of the screen to influence your judgment about the credibility of the child's testimony.

Those are the kinds of issues that I thought so critically important. If we could correct all of the linguistic structures, to make it easier for people to understand the jury instructions and things like that. But the question is, what happens when the content of the instruction is wrong? What can we do as scientists to help supply the courts information to correct the instruction? That's when I started to work with Judge Thomas in asking, "Well, why can't we just change it?" Very naively. Little did I know how little, how difficult it is for the legal system to change and to make these changes because of concerns about reversibility and things like that. And I was incredibly naive, thinking as long as we had this data, everything would be fine. But it's really been an incredible experience to see the interaction between science and the legal system, and wondering, how do we get those two to mesh and actually get the wheels of the legal system to turn a little bit faster than they're turning, to make changes in accordance to what we're finding in scientific studies of jurors and issues facing the court system?

Thank you for allowing me the honor to be among you.
QUESTIONS AND ANSWERS

MS. ASHLEY WHITE: At this time, we're going to open the floor up for questions for the panel.

MR. SID GILREATH: Your illustration about the deduction of present value in a tort. We have that instruction for deducing present value for pain and suffering. We have an instruction before that says, "There is no fixed rule in which to determine pain and suffering." So we have an inconsistent situation there, and I wish that the people who write the rules and procedures, the Supreme Court, were here today. Anyway, that shows the inconsistency that we have in our instructions as you talked about in California.

PROFESSOR DUMAS: Thank you for that comment. I don't know exactly how that committee works. But do such committees ever have an editor who is just an editor, who looks for things like that, rather than importing substantive information into them? It might be an idea.

JUDGE CREED MCGINLEY: The chairman of the committee is here. This gentleman.

PROFESSOR DUMAS: Then I'll sit down and listen. Can you comment?

JUDGE ROBERT CHILDERS: You want me to comment? Sure. On the Civil Pattern Jury Instructions, we completely re-wrote several instructions after McIntyre v. Balentine came out in 1992. As part of that, we broke up into subdivisions or working groups and assigned each working group a section of the instructions. We also created what we call the Clarity Subcommittee. The Clarity Subcommittee looked at every instruction to try to clarify,
without changing the substance, and to try to gender neutralize the instructions as much as possible. So we did that.

Unfortunately, without the benefit of the linguist, which I wish in hindsight we had one, however, we are now looking at the possibility of engaging the service of a linguist because when I came on the bench in 1984, some of the instructions were one-paragraph long sentences. I couldn't understand them. So, my goal since I've been a member of this committee and I've been chair, and I've been the chair since 1991. And so we continue to try to do what you folks are talking about today. And that is to make the instructions as understandable as we can. We put our third edition—we’re now up to the eighth edition this year because we're putting it in a softbound volume each year like the criminal committee is doing.

We tried to reach an eighth grade education level. The computer tells us we reached a tenth grade level. You know, we took out words like “exercise” and put in “use.” We eliminated “proximate.” As I used to tell the jury when I got to proximate cause, I would literally spell the word out. I'm saying, "Proximate, P-r-o-x-i-m-a-t-e, not approximate, like we're used to using in our everyday language."

We've taken out other words to try to again use the plain English language and not this stilted language that the law has always used. So I hope that briefly explains the process we use. I also have lay judges trying to make jury instructions understandable for lay people.

PROFESSOR DUMAS: Thank you. Can I just say one thing? The thing I'm most grateful for is that the word “captious” disappeared from the reasonable doubt instruction. I once asked a room full of linguists to define the word captious for me. One person in the room offered a definition.
UNIDENTIFIED SPEAKER: Were they right?

PROFESSOR DUMAS: I don't know.

MS. ASHLEY WHITE: Yes?

MR. BRADLEY SMITH: My name is Bradley Smith. This question is actually for Professor Ross. In regard to your statement about there being instructions that were factually inaccurate, where we're actually asking the jury to do something instructionally wrong, how much do you think that ties into what Professor Tiersma stated about rape identification? Not only telling them that it made a difference, you're supposed to consider it, but actually telling them why you're supposed to consider it? Do you feel like by not only changing those instructions to be accurate, but by telling the jurors why they were inaccurate, do you think that would affect the outcome?

PROFESSOR ROSS: I think actually I would rewrite the entire instruction regarding eyewitness identification because when they talk about things like rape, that's actually a category of variable that it's difficult for psychologists to talk about. Because there's rape, stress, all kinds of things that the eyewitness experiences. The field of eyewitness identification has much clearer definitions and instructions for jurors on how the police collected the identification evidence. In fact, there are the Department of Justice Guidelines instructing exactly what you should have done.

The instructions should be not about the eyewitness. The instruction should be about the procedures that were used to collect the identification evidence, and whether they followed the guidelines that had been published by the
Department of Justice and have been sent to every law enforcement agency in the United States.

So, cross-race ID is a tough one because even if it's a cross race ID case, no one can tell you. No one. There's no psychologist in the country who can tell you whether or not a particular eyewitness is susceptible to making an error because of cross-race ID. We can only talk in generality. That's a misleading instruction. But what we can do is say, "Look. There's agreed upon in the science among judges, attorneys, the DOJ Guidelines about how the evidence should have been collected. That's what the instructions should be about. Not about what are called estimated variables, things like cross-race identification. They're looking at the wrong variables. So, I would rewrite the whole instruction on something we really have much better science on.

JUDGE BOB JONES: Judge Bob Jones, also a Professor of Law. When you studied the screen between the minor and the defendant, did you also study the impact upon the jurors on the purity of instructions? The purity of instruction by the judge about not letting the prejudice intercede about the guilt of the defendant?

PROFESSOR ROSS: Yes. Yes, we did. And we looked at a lot of the questions about that in terms of their reaction to it, the reactions to the judge giving the instruction, and things like that. But the thing that we found most disturbing about the reaction to the instruction is we asked them to recall it. Guess what percentage recalled it. Five percent recalled the instruction, which I couldn't believe. Five percent recalled the instruction.

That's another issue I think, in terms of jury instructions and memory, is where do they fall. That instruction fell in the middle of the trial. You know, for example, an instruction like what we were talking about in
regard to the eyewitness. Well, if you read it at the end, after the testimony has already been given, how can a juror go back, take that instruction and apply it to assessing the credibility of a witness that they may have heard a week ago? So, why not give the instruction just prior to the presentation of the witness. We were very disappointed by how many of the jurors couldn't even remember the instruction.

MS. MEREDITH PASAY: I have a question about the same study along those same lines. Because I was thinking I don't know a lot about the details of the study. If the instruction was, if you see the child on the screen, don't let it affect your judgment about the guilt of the defendant, and then it comes out that they find not guilty, and the conviction rate goes up. So it seems like the instruction makes it worse.

PROFESSOR ROSS: Well, we had a control group that was compared to a control group that didn't get any instructions. What we found with the instruction—so we have one condition where they see the entire trial—and what we did is we took actual cases that went before the Supreme Court by hiring attorneys to write a model case. We manipulated the presence or absence of the instruction. It had no impact at all on conviction rate gain; the reason being is I think only five percent remembered it. But then again, the question is, well, if you do more and try to give it more and more, the problem is it's still the wrong instructions. The instruction should be don't let it undermine your perceptions of the credibility of the child. It's really not about the defendant. So, to answer, it was a fascinating study. I can give it to you if you would like to read it.
MR. JOHN ROGERS: My name is John Rogers. I have a question for the entire panel. I would hope that each of you is more than aware of the fact that the institution that we're talking about here, the American jury trial is not on the verge of extinction, but certainly it's extremely ill. The reduction in the number of trials that take place all across this land, state or federal, has been fueled with a fire and the fire generated by those institutions in our society like the business roundtables, the insurance lobbyists to destroy, to take away that fundamental right of all citizens. I want to know, have any of you ever worked directly for the Chamber of Commerce, been employed, had studies funded, that you have been involved with, provided the capital to administer those studies, and if it bothers you? If it hasn't happened yet, would you do so, work for the very forces in our society that are trying to deny every citizen the right to a fair and impartial jury trial?

PROFESSOR AINSWORTH: I'd like to briefly comment. You are actually talking about the elephant in the room that nobody is talking about, which is that jury trials are a vanishing species in our system. Mark Galanter wrote a very influential article in 2004 called The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts. All of the studies that have come out since Professor Galanter's study have confirmed his empirical findings that civil and criminal trials are going away.

It's a very complex matter to figure out why this is happening. For example, in the criminal area, which I'm more familiar with, it is largely a function in federal court of sentencing, with mandatory minimum sentences that make it almost impossible to get your day in court without risking five, ten, and even higher mandatory minimum sentences unless you plea bargain. So it's a foolish defendant who tries.
On the state court level, it's also a function of factors like the dramatically increasing case loads among public defenders. I've been looking at situations where, although the ABA suggests that 150 to 180 cases per attorney per year is about the right caseload, there are jurisdictions now in which public defenders are assigned 700, 800, 900 cases per attorney per year. We're talking about felonies in many cases. Well, if you've got 900 cases per year, I'm going to guarantee you're not going to try very many of them.

On the civil side, there are a combination of factors to point to. Things like damage caps in tort reform have made it much more difficult to have get the kind of damage awards that would make a jury trial economically plausible. And so cases are simply settling on that basis rather than going to trial. But in many respects, it may be that if we came back here in twenty years to talk about jury instructions, the question will be, why? If so few cases are actually being tried to juries, is a jury instruction conference somewhat of a sideshow compared to the real issues that face us in terms of our civil and criminal justice system? I agree you've raised a really important issue. I hope and would like to believe that we can preserve the jury trial. Because I think it's crucial. Somebody talked about legitimacy. Today I think it's crucial to the functioning of a legitimate justice system that there be community input into its most important decisions.

PROFESSOR CLARK: Following up, very good question. Personally, I've never done any work for private types of organizations. I know there is a lot of money to be made. You know, you get into especially pharmaceutical companies and research studies that are done. Making references, legitimizing justice system, recognizing even in jury consultants there is a $450 million a year industry on that. My research has always just been very pure, going
into it for recognizing and understanding something. Not necessarily going into it and whatever the outcome may be, but trying to understand that whether it's a positive or a negative, this is a finding. And it's a finding. Not going into it hoping to find something or steering it in a certain manner.

I very much appreciate that question because of the necessity to have an ordinary group of twelve persons—lay persons—come in and render these verdicts. I don't want to go to an expert of jurors. You've heard other countries making use of jurors who are considered just experts. I'm very much opposed to that. So I hope I have answered your question.

PROFESSOR TIERSMA: Can I say just one thing about that too? Although it is definitely true, trials and juries, jury trials especially, have gone down quite a bit over the last decade or two. Maybe to put it in perspective, on the positive side, there are other countries that are starting to adopt the jury system. For example, Japan and Korea have started to use something like a jury system or what they sometimes call lay assessors. So, even as—it’s rather odd, isn't it—that while jury trials are decreasing in the United States, we've in a sense exported the idea to some other countries, which are now starting to adopt it. So, there is a positive note, I suppose, to that issue.

MR. ROGERS: One of the reasons I asked that question is particularly with your presentation, I would think that—well, while it was not intended for that purpose, I want you to know I'm not complaining or insinuating in any way that you would be for the annihilation of the jury system. But when you point to this long litany of areas within the jury instructions, which create this sort of imbecilic circus that must go on in the jury deliberation room because they're required to apply these impossible, nonsensical rules, I
think it does a disservice to the lawyers whose job it is to explain many of the jury instructions. You know, we have them before the jury is charged. We put them on board or voir dire, and we explain to the jury what we believe. You can't tell them what the law is, but we tell them what we think about how to apply those laws to the facts of this case.

All I want to say to all of you is that you need to keep in mind that this analysis you're doing may only be half the story. You have to take into account what the bar is doing in the courtroom to bring to light this sometimes archaic language. To deal with that archaic language in a way that makes sense, makes common sense, and why the American jury system still is the greatest form of resolving disputes in the history of mankind.

PROFESSOR TIERSMA: I think I probably should respond to that because I don't take your comments personally. But you know, it's interesting that in California, I've been involved for the last twelve years on the effort in California to make jury instructions more comprehensible. How did that start? It started out with the riots basically in Los Angeles. It was an indirect result of that and the O.J. Simpson case.

What we call the Rodney King case, which is the case of Rodney King being badly beaten by these police officers. The police officers were put to trial, and they were acquitted. Then O.J. Simpson was acquitted. In California, a lot of people began to think the jury system is broken. Right? And so there was a blue ribbon commission that was appointed by the State Supreme Court, which basically made a lot of recommendations as to how the jury system could be improved. They made many recommendations, but one of them was that jury instructions ought to be made more user-friendly.
Our Chief Justice Ronald George took that, and that's how this whole process began that I became involved in—very involved in, I hate to think of how many hours I spent on this whole process over the last twelve years. But it's quite a few. But at any rate, I've been involved in that as a result of this whole soul-searching that we went through about the jury system and whether it is broken.

So, when we're talking about making jury instructions more comprehensible, we're certainly not talking about getting rid of the jury. What we're talking about is making the process for jurors, involving them more, making them more educated about what they're doing, and making them more comfortable with the process. It seems to me that that, in the long run, is going to strengthen the jury system rather than undermine it. If jurors know what they're doing, and they're not being confronted with weird instructions and legalese that make them feel like they're strangers to the system and we don't really want them there because we don't make the effort to address them personally, we don't address them as "you." We always talk about "the jurors" and that sort of thing. That really puts them off, and that's what we want to avoid.

Ultimately, this is about making jurors know what they're doing, carry out their job better, and feel better about the process after they've been through it because they understood what was happening and they feel confident about the verdict that they've reached. This is all about strengthening the jury system. It's not about undermining it in any sense.

PROFESSOR DUMAS: And just for the record, John, no, I have never been engaged by one of these companies and nor do I plan to be.

PROFESSOR ROSS: Ditto for me. To reiterate the same spirit, I think all of us would share that same ideology that
this work is designed to help preserve and to improve, not to tear down and eliminate. So, the spirit is the opposite of that.

MS. DOROTHY STULBERG: I'm Dorothy Stulberg. I don't think it makes any difference what is happening if nobody's having jury trials. So, I think his comment is extremely important. None of us, as practicing lawyers, want to go to jury trial. The insurance companies want us to go to jury trials because the remedy is so low. There are so many factors that come in before juries. I am scared to death of what the Chamber of Commerce is doing. They are specifically opposed. The business world is specifically opposed to juries. They don't want the public to have some concept of what justice is. So I—it scares me because I agree—I think somebody said the value of twelve people sitting there commenting on what's right for our world. It bothers me, as a practicing attorney, that it looks like the legal system is so strong because of the publicity of the power structure. I think it's relevant to make it easier, but make it easier, and nobody is going to use juries. Anyway, that's my comment.

MS. ASHLEY WHITE: We have time for one more question.

UNIDENTIFIED LAW STUDENT: You said earlier that there is life outside of serving on a jury. That made me think about a jury trial that I got to witness this summer. After the jury selection process, the jurors that were excused seemed excited, even seemed like they had dodged a bullet because they didn't have to serve. That made me think about whether you had come across any research or thought of the possibility that either (a) jurors don't want to serve on juries, and/or (b) they don't really care about the
administration of justice and how does that affect the system?

PROFESSOR CLARK: That's a great question. That's amazing that you brought that up. I've got a study that's being written up right now that deals with juries over the period since 2000 and my involvement in conducting jury research. I'm amazed that on that Monday morning when the summoned jurors show up, and they go through the orientation, I've absolutely been amazed at the number of jurors that, for whatever it's worth, they'll get up and then they'll run to get in line and say, "This is why I need to go. This is why I've got to be excused." It's upsetting, and I cannot believe it.

You can just guarantee that half of the people—if there are 160, 80-something—are going to get up. What's interesting is, again, touching on this issue of the importance of dating back to 1215 of the Magna Carta of the conscience of the community. Twelve persons coming together and rendering a verdict, being that conscience of the community and trying to have the pulse of right and wrong as fellow citizens.

The number is startling of them trying to get out of jury service, again, for whether it's medical reasons or unjust or unsound issues. There is a lot of evidence that does indicate that jurors—what are they going to get out of this experience? What are they going to get out? In Alabama, for example, if you're paying jurors $10.00 a day, I mean you know, and they're saying, "What am I going to get out of this?"

So many persons see this as a job to the extent, as a liability, as frustration and aggravation. That's why we're trying to improve the jury system, and along with this, making it user-friendly. Let's make the jury system user-friendly and keep trying. It's almost like you have to go back to Civics again. Listen, this is a privilege that you can
serve on a jury, and you must understand that. I think we need to do a better job of conveying that message. But it's amazing how jurors and persons come together. I learned this a long time ago from a judge that the juries and persons being summoned for duty, they're wheels, if you will, to the extent that when you're a defendant and you're on the fourth floor, and on the first floor there's 160 people down there, wow. That really, that gets it going, don't it?

So, the importance of having those jurors. But I am amazed, and studies indicate again the frustration, aggravation, low pay, what am I going to get out of this. I don't have time for this. Accompanied with what I said about their own lives and what they're going through, the dysfunction, if you will, and issues. It makes it very tough. Okay, it's tough, but that's the reality. And that's what I wanted to indicate to everyone: the reality of what we're dealing with. The reality of the world that we live in, in 2009 is not easy. But we must understand who we're dealing with and how we can improve it. And I think that's what we're doing today.

INTRODUCTION

MS. JESYCA WESTBROOK: Good afternoon, ladies and gentlemen. My name is Jesyca Westbrook, and I'm the Candidacy Process Editor for the Tennessee Journal of Law and Policy. I'm also the logistics chair for this symposium. Before I introduce Judge Dann, I would first like to thank him again for graciously being here. We could not ask for a better outcome after Mr. Munsterman could not join us.

Today we also could not ask for a more experienced or distinguished afternoon keynote speaker. Judge Dann is a retired Phoenix, Arizona Superior Court Judge with over twenty years of experience on the bench, five of them spent as Chief Judge. After retiring in 2000, instead of playing golf as many others do, he then completed two visiting
fellowships at the National Center for State Courts and the National Institute of Justice.

His dedication to jury research, jury trial innovations, and reform has helped to shape the future of jury trials in the U.S. And he's a nationwide leader in the effort to transform the way courts view jurors. He has been called a pioneer trailblazer in the field and, as a result, has received the William Rehnquist Award for Judicial Excellence and the ABA Inaugural Jury Impact Award. So, on behalf of the Center for Advocacy and Dispute Resolution, The Tennessee Journal of Law and Policy, and the Summers-Wyatt Symposium, please join me in welcoming Judge B. Michael Dann.

COMMENTS OF MICHAEL DANN

JUDGE DANN: Thank you. And did you say retired or tired? Today it's both. Good afternoon. I'm really happy to be here. Sad that Tom Munsterman couldn't make it. Many of you know Tom. Tom is a good friend of thirty years and a walking encyclopedia on matters having to do with the American jury.

Maybe you don't know about Tom. He has no legal background, training, education, experience. He, by background and education, is a mechanical engineer, electrical, one of those. He was called to Federal Court for a jury trial in a drug transaction sale case or something and was so taken, moved, and unmoved by the experience that he wrote the judge after the trial and said, "Have you ever considered doing things a little differently with regard to the jury's needs?" The judge welcomed the letter and invited Tom to come in to chat. They had a nice visit, and Tom shared his wisdom with the judge. The judge suggested that Tom, since he had so much to offer, consider going into the business of juries and jury trials.
Tom took him seriously and founded his own firm, which was eventually a jury research and re-engineering, if you will, re-engineering the jury trial. His small firm was absorbed by the National Center for State Courts, where he has remained for twenty-some years. He's a wonderful guy, who has visited probably every state and a lot of foreign countries. I know he spent a lot of time in Russia recently, as they have made halting attempts to adopt some form of jury that fits the Russian culture and politics. And Japan, and Korea, and so forth. Maybe you've had the pleasure of hearing him before. He's a very urbane fellow. Speaking for myself, I'm undergoing urban renewal. Maybe some of you miss Tom already.

The pleasure, finally, after years of hearing about Peter Tiersma and reading his work, and knowing of its impact nationally on the movement to produce understandable jury instructions and to improve jury comprehension. It's the first time I've had the chance to press his flesh, as LBJ used to say, to hear him live and making a presentation. Peter, thank you for all your work.

I don't think it's any coincidence that his work followed soon after release of the monumental ABA study on jury comprehension in complex civil cases in 1988 or thereabout. It showed that juries indeed do manifest a lot of confusion in cases involving complex civil cases, involving complex issues, technical and so forth. Over fifty percent of the source of jury confusion in these cases is attributable and traceable to the judge's jury instructions. Over half of their errors and sources of confusion are the judge's own jury instructions. Something judges and/or lawyers, you may consider have full control over and have had forever.

Take our own Arizona jury instructions. Please take them. When I went there fresh out of school in the mid to late '60s, and this was before any reform or rewrites and the committee. I don't know about the rest of you, but I
think bench bar committees who are tasked to rewrite instructions to make them understandable, composed solely of lawyers and judges, are wholly incapable of reaching that goal, wholly incapable of doing that.

If unaided by experts in the field, non-lawyer experts in the field of linguistics, psychology, etc., and by former jurors and without road testing them, subject to being evaluated by appropriate experts and feedback to the committee as to how the road testing went. I think we lawyers and judges need to recognize that, you know, law schools sharpen the mind all right. But in my experience, they sharpened my mind by narrowing it. There was precious little when I went to school pre-war—I forget what war it was, but pre-war; there have been so many—precious little on appreciating what other disciplines have to tell us, to inform us, law students, lawyers, judges, etc.

There have been published articles by folks who study the judicial process and the legislative process, showing that judges and legislators pay little heed to the work of social scientists, psychologists, sociologists, and so forth, and so on in writing laws and procedures and then designing court processes. Pay little heed. That's a very recent article.

Well, let me share with you my favorite Arizona jury instruction. Our task was to take the Law French, Latin, and legalese—and translate it. Our goal was not to reach plain English, but to go from all of that to plain Latin. So this is what we came up with early on [indicating projected document]. For those of you are sight impaired, I apologize. “Ladies and gentlemen of the jury, you are instructed that the crime of theft requires not only proof of actus reus, but also mens rea, or in more understandable terms, animus furandi.”

“In considering the evidence, you may determine the facts under the doctrine of res ipsa loquitur. Remember, however, that ignorantia non-excusat, or as the
courts popularly put it, that's necessitas non habit legen. The defendant's defense is assumpsit. One or the other of these theories may not apply to the case sub judice. In that event, you should apply the rule of inclusio unius est exclusio, alterius, so as to choose between ex parte and ex hypolthese.” I like it.

Well, you get the idea. Are we asking too much? Of course. But we're not asking too much of ourselves. Jurors. Something we have to weigh. Peter's suggestion today and in this slide, and in one of his slides, an interesting suggestion. He asks, well, why don't we turn to the jury after we've read the instructions to them, and hopefully, they've read along from their copy that they have in front of them, each of the jurors. Someone said, "Well, our court can't afford a copy for each juror, so we'll give them one." Oh, really, who gets the one copy? Who gets to read from it while the judge is reading it? Studies show that comprehension goes up when they can read and hear at the same time.

A copy for everyone in this day and age of rapid, inexpensive duplications and so forth. A copy for every juror. Turn to the jury box and say, "Okay. Having just read the instructions to you, and you have your own copies in front of you, I'll take questions during your deliberations if you have any. You can write questions, in writing, then I'll meet with the attorneys, and we'll get back to you. Ask them right then and there in addition to an invitation, do any of you, at this early juncture, do any of you have any questions about what you just heard and read? I'll be happy to take them."

In Arizona when I voiced that suggestion to the judges, they said, "Oh, my God, no. I can't do that. (1) I would embarrass the jurors and put them under pressure, making them feel like they have to come up with questions, or—that's speculative—or (2) they might actually have a question, and that might embarrass me. Or I'd get in
trouble with the Appellate Court for answering, for not answering, or the way I answered, or what I said or didn't say.' Fear of reversal. So that suggestion has gone nowhere in Arizona so far. But we will come back another day and make another run at it.

I've done it, and I've never been embarrassed. Of course, nothing would embarrass me. I think, in the five to ten times I've tried it, maybe one question has come up. They just don't feel comfortable. But they sure feel comfortable later during deliberations in asking questions. Some of those questions about the instructions are among the most difficult.

I'm supposed to talk about the modern jury. In the vernacular, in the words of the billboard sign, we've come a long way, baby, since the mid '60s. We have been somewhat successful, I think, all of us working together, of dragging the traditional form of jury trial and jury service, kicking and screaming first into the twentieth century. We're still working to drag them into the twenty-first century.

I think a lot of this work started in the mid '60s with the publication of Kalvin and Zeisel's landmark study, The American Jury. The first major effort to study real world juries and jurors—reality, facts, fact-based, empirical. It opened the door to a whole generation of researchers and social scientists. Some judges and lawyers joined the movement, all card-carrying members of the movement. The result was a lot of research, surveys, studies, writing articles, and so forth, and so on. There's a flood of information out there for us lawyers and judges to take advantage of, policy makers, legislators, etc. A whole subset of scientists and social scientists developed called jury experts.

In the meantime, during this period, beginning '50s, '60s, trials began, although maybe falling off in number attributable to a number of causes—I think no single
cause, but for the reasons, some of which you've heard mentioned here today. The number of trials has diminished. I think another reason not mentioned yet is a lack of trust in juries and lay people deciding these disputes. On the other hand, Trials grew more complex on the theory that any case worth litigating, civil or criminal, is worth at least one expert. And one expert is worth the other side producing a rebuttal expert. Well, since I'm calling one, let's make it three. Okay, three versus two or three. Suddenly American juries have been confronted in just what used to be a run-of-the-mill case or street crime with a handful of experts, many of whom don't agree on important points of evidence.

This makes it so that it's now more difficult to sort out who has the better evidence. The battle of experts and so forth; complex scientific evidence and terminology. So it's our job to help them the best we can. Public dissatisfaction with the American jury has started to increase or grow, given the result of certain high-profile civil and criminal trials in the '90s and 2000.

Then we had the ABA stuff that I mentioned. Since then, and because of all this coming about, over twenty-five states, including, I'm happy to say, Tennessee, have conducted their own, as have two or three federal circuits, the Ninth and the Seventh. Also, the D.C. Circuit, Washington D.C. Have conducted their own, thoroughgoing soup-to-nuts study of their jury system, and decided for themselves what they would like to change. And they've set about to do so.

Tennessee adopted, as I read, the Cullins summary of the 2003 amendments, Civil and Criminal Rules, adopted thirteen important innovations for changes. Tennessee Jury Practice. And because of this work, the model of the active juror emerged. I don't know who originated it, but an active juror replacing the older tradition model. A tradition of 200, 300 years. The passive
juror model. Now, we've heard those terms applied to judges. An active judge versus a passive judge. A magistrate trial versus a passive umpire. Just sits back and waits to be called upon.

But it applies to jurors too. What do they mean by active juror model? I'd like to think that it means to give the jurors the tools they need, some of the tools being participatory in nature. You create an action activity, giving active jurors the tools they need to help them better decide today's cases, civil and criminal, and to reach better verdicts or to have a greater comfort level with their own verdict. And hopefully a greater public acceptance and understanding of the verdict. All consistent with due process. In other words, without depriving anyone of a fair trial. And I think that none of the Tennessee changes—thirteen changes or innovations—rule changes, if properly managed and controlled by the court is going to deprive anyone of a fair trial.

Our goal should be a fair trial. Insuring a fair trial, not necessarily a perfect trial, without undue fear of reversal. I think we're calling upon appellate judges to cut us more slack, possibly the trial judges and lawyers. More slack to be innovative, to experiment a little bit with those instructions, to adapt them to the case at hand, to help make them more understandable. Judges, in my experience—too many judges, not all by any means—have a heightened fear of reversal. And I think exaggerated. I mean, what's the worst that can happen? If a case gets sent back and tried by someone else, of course it's embarrassing. You can be censured. You can be removed, flogged and so forth, impeached, but that's the worst thing that can happen to you.

All this culminated in the 2005 ABA, the lawyers' own professional association, telling us, "Yeah, these things are good for America, for the American jury, and for the future to help assure the future of a vibrant, functioning,
"...well-functioning jury." The ABA standards, or principles as they are called, Principles for Juries and Jury Trials. This little booklet. I heartily recommend that you get one. Each principle or standard black letter is followed by a good commentary citing the reasons for the thing and the legal support.

For example, Principle 13, Paragraph F, black letter, jurors in civil cases may be instructed—may, not must—may be instructed that they will be permitted to discuss the evidence among themselves in the jury room during recesses from trial when all are present, as long as they reserve judgment about the outcome of the case until deliberations commence. That's the language. And the commentary goes on for a page or so to explain why, and how, and what, and so forth.

I've done it in civil, criminal cases, including murder cases. A fellow on death row being retried for five murders. The jury reached an impasse. I'm sorry—I'm off-base. In Arizona, this procedure is mandatory. We must instruct civil juries accordingly in Arizona, in Indiana, and some other states, that they may discuss the case among themselves, etc., subject to these structured jury instructions—structured jury discussions they call them. I was thinking of another procedural change and innovation. We may get to that later; it is one that I've tried and with success in murder cases.

So, the ABA Jury Standard, this is the most recent word or collection of words on the subject. Of course, we've had two, or three, or four National Jury Summits since all this started. All right, where are we? I think the changes, and updates, innovations, reforms, call them what you will, fall into three or four—at least three general categories. The first category being that it all has to do with justice. Doing justice with this and justice with that.

Juries serve the cause justice. In the name of doing justice to jury service, I think we've increased the
representativeness and diversity of our jury, of the juries we're seeing, as a result of such reforms as coming up with new source lists. Not limiting ourselves to the voters or driver's license or both, but moving beyond those one or two lists to other kinds of source lists, broadening the pool of eligible people to call. Modern, updating our source list.

One day, one trial. Especially in urban areas; I know this may not be practical in rural, small, lightly populated counties or circuits. But one day, one trial in urban areas greatly increases the number of people called and makes for more rapid turnover, shorter terms of jury service. One day. If you're not selected that one day, you're done. Or one trial. If you're selected for a trial, you serve that trial, whether it's three days, or three weeks, or three months. So then you're done. Whatever the numbers. However long the numbers. Three years. Two years. Four years. That depends on the population, and so on and so forth.

Creature comforts such as, well, increases in pay, realistic payment for mileage, making arrangements for parking. I know we've got a long way to go on parking and pay in many states. You heard about what, in Alabama—some states are lower than $10.00 a day. What is it here?

UNIDENTIFIED SPEAKER: Eleven.

JUDGE DANN: Yeah. It's not supposed to be a profit-making endeavor. I don't think we have to worry about $40.00 a day or even minimum wage per day or per hour even being harmful to the process. Efforts to provide paid-for child care at the courthouse. I think, again, urban courts ought to consider that. So mothers of young children, caretakers of young children can have a greater chance to participate. And efforts to deal with juror stress. Recognition that there is considerable stress in serving on the jury. Not just a criminal—a horrific criminal case—but
a long civil case. Sometimes just the sheer length of a trial is oppressive and stressful. It's all new and different.

A juror told me, who sat on a Tucson murder case—we had five former jurors on our reform jury innovations committee, and that's probably the wisest decision we made in terms of membership. Yeah, we had a token law school professor too. Five former jurors were worth their weight in gold. They held our feet to the fire and said, "You can't justify, judges and attorneys, you can't justify giving centuries old practice. Maybe it's time to take a look at it. I mean we don't buy your justification that you've always done it that way. That's no justification. That's a cop-out."

But this Tucson juror told me—he was on the committee in Arizona—he said, "You know, we're not stupid. These jurors who come to the courthouse to serve, who are fortunate enough to be selected. We're not stupid, but we're ignorant. This is a strange, new world to most of us who are called. Most of us for the first time. And it's intimidating and stressful, and a lot of it we don't understand. So in that sense we're ignorant, but we're not stupid. The trouble with you judges and lawyers is that you treat us both—both at once—as both stupid and ignorant." As brilliant too, he might have added. Because we expect them to make all these grand decisions.

There are some other things that are being done regarding term of service, conditions of service, to be more palatable. But justice for service. Justice for comprehension or cognition. Cognitive justice, I like to call it. Procedural justice. Various procedural aids intended to increase comprehension and give today's jurors a better shot at a chance to understand today's cases. The law and the evidence. You know, you start with plain English, a rewrite of jury instructions.

Pre-instructing the jury before they start hearing the evidence, or even opening statements with as much
substantive law, in addition to the usual housekeeping stuff—that’s important—but give them as much substantive law as you can about the case. The burdens of proof, the necessary definition of legal terms, the elements of the crime or what a plaintiff must prove in a medical malpractice case. Don't wait until the very end of a case to tell them.

It would be like asking me to watch, understand, and enjoy a game of cricket without telling me what in the devil is going on. What are they doing and why, and so forth. Give them a road map in advance to follow, and they're more likely to reach the destination that we want. Pre-instructions. Copies of the instructions for every juror. Allowing jurors to put questions in writing through the judge, with the attorneys and then the judge, the question should go forward. If it stands any objection, the attorneys can object out of their presence. Maybe you're doing that already here.

Structured jury discussions. Maybe a pilot project might be in order in civil cases to see how that works. Use of—in complex or lengthy trials—multi-purpose jury notebooks. Not for every case, but if it's important, it's hard work, and a lot of work for the judge's staff to determine to get it right. Not allowing each side to prepare and bring in their own notebooks. That kind of notebook would be more advocacy. And the judge loses control over the notebooks then. The judge should, in pre-trial meetings, make assignments. You prepare this and exchange it before we come back next time and reach an agreement on a glossary of terms, legal and technical terms in the case. You prepare your witness list, get it to him by e-mail, and so forth. Come back with the first witness list explaining, listing, the names of witnesses and their affiliation at the time of the events. Not necessarily now but so the jurors can deliberate. Juror notebooks.
Allowing entry of summaries, reading, and giving the final instructions before closing arguments, rather than waiting until after. There's always the housekeeping stuff to take care of after the closing arguments conclude. So, both before and after they hear from the judge. The judge should be the one making the instructions clear. That's the judge's principle responsibility. We shouldn't be relying on lawyers through advocacy, arguments and comments to the jury at trial to explain the instructions. That's the judge's job. Every time that happens, too often when the lawyers get into explaining and reading ("Ladies and gentlemen, you're about to hear this final instruction read," and this is what they get wrong. They're advocating, and they're arguing their case. And you don't want that kind of emphasis or slant put on it. The judge has responsibility for instructing the jury after hearing from the lawyers.

Debriefing, I agree with whoever said it. I've found that debriefing jurors as a group, having them in the judge's chambers or going into the jury room, onto their turf and having a casual visit, without robe and taking the jacket off and so forth, talking with the jurors about their experience. And listen, I've learned so much. Maybe most of what I needed to know about jury changes, innovations from former jurors. It's like the book: "I learned what I needed about life in kindergarten." I learned it from former jurors.

These people have almost always done their very best to get it right. You may not always agree with the result, but they work very hard. They take it very seriously, to a man and to a woman, to get it right, to do justice, given the tools they have and the evidence and so forth and so on. Very conscientious. They take a lot of pride in their work. And one of the questions is, "Judge, do you agree with our verdict?" Usually I skirt around that. There's no point in my telling them that. Your job isn't over yet. But talking to them in general terms about their experience, not asking them why they found a certain way or how they might have
reached a verdict, but how did the trial procedure strike you. And they'll give you some wonderful feedback.

Debriefing. Now attorneys, a lot of the judges will debrief but not permit the attorneys to talk to them. A lot of judges, especially in the federal side, in my experience, don't allow lawyers to talk with the jurors post-verdict. They just have a blanket rule. I think that's a mistake. It's possible for the judge to invite the jurors, those who wish of their own free will and volition to stay behind to chat with the attorneys, telling them; it's very valuable as a litigator, as a trial attorney, to get some feedback from jurors. These attorneys are not going to grill you on why or how. A lot of attorneys regret that they don't have that opportunity. I think we ought to consider giving it to them in a structured, careful way. And maybe have a bailiff, or a court staff person present to interrupt if there's any overreaching, or abuse, or browbeating by attorneys. But attorneys, you know, they're not going to want to offend the jurors.

Okay. That's cognitive justice. Substantive. I think the next way you can reform will be taking a look at the substantive power and reach, jurisdiction, of the American jury. It started a few years ago with a group of decisions: Apprendi v. New Jersey, Ring v. Arizona, and recent—let’s see, the most recent decision I think is Ice v. Oregon—struck a cautionary note, telling us that juries are the ones who must decide certain categories of disputed facts necessary for the judge's decision. For the judge to do so becomes sentencing, death penalty qualifications, that kind of consideration. Jurors must decide those issues and may come to a verdict or make findings, and then the judge, based upon those findings, does the judge thing—imposes sentence, or makes a death/life decision.

But mind you, several states have gone to jury sentencing in death penalty cases, something I find troubling. The legislatures said, "Well, the Supreme
Court's ruled juries must decide these death penalty cases." That's not what the Supreme Court held in *Rain*. The Supreme Court said, "They must make certain findings of dispute. Resolve certain issues of disputed fact."

But the death penalty is supposed to be reserved for the worst of the worst; it's not intended for every homicide. And almost every murder has its grizzly, if not horrific, heinous, aspect. But the death penalty is supposed to be reserved for the most egregious, the worst of the worst. The worst of the bad. How on Earth can a one-shot jury determine which is the worst of the worst? They have no basis for comparison, where the judge over time sees and hears a lot of these cases and can better determine, or a panel of two or three judges working together, on a series of two or three minds. I think Colorado has gone to this. I'm not certain if it's Colorado. But two or three judges sit and make that ultimate decision, life or death. Because they're better able to see a variety of cases and better able to identify which is the worst of the worst. The jury, to them the case they hear is the worst of the worst because it probably is. I'll get off my soapbox.

But the jury's jurisdiction and power is expanding. And you may hear more about what some people refer to as the nullification debate. One argument is that the Sixth Amendment, the right to an impartial jury, along with the history of the English-American—the American jury creates some space, allows, and mandates some space for the jury at a particular point in the criminal case. We must allow room, as judges and lawyers, trial and appellate, must reserve some room for the jury to exercise some discretion. It's called mercy sometimes. It's called community conscience sometimes.

When, for them to convict, for example, when all of the elements have been proven beyond a reasonable doubt, you typically tell them, "You must convict. You shall convict." Two-thirds of the state and federal courts handle
it that way. As if we're attempting and we fear the nullification so much that to eliminate jury nullification, not just to find it, but to eliminate it altogether by telling the juror, the jury, they can't. They don't have that right. No, you cannot. You must find, according to these instructions, you must convict. Telling the jury to convict under any circumstances; is that consistent with the Sixth Amendment? The right of the jury to exercise some wiggle room perhaps to acquit when to convict, would do violence to a strongly held conscientious belief of theirs and the belief of the community. But to convict would be a terrible injustice.

Spousal-assisted suicide. You name the case. I don't care. Some drug cases. You know, mandatory three-strikes laws. Is the jury simply a computer, or is it intended to reflect the sentiment, which if it ignores, it causes great injustice and calls the law itself into question? The credibility of the law may be at stake in such cases. I think that debate remains to be resolved. But it might be the next debate.

It comes down in my book to being honest and respectful, honest with the jury and respectful of the jury. If you feel that way—what's the word—empathy. In other words, try to put our—step out of our judge and attorney advocate roles—and put ourselves in the place of the juror hearing these debated cases, and ask ourselves, well, what tools would we like? How would we like to have a case presented? What tools would we like to have? What would I like to have if I were sitting there charged with the responsibility of deciding this person's fate? That will answer a lot of questions for us. Not all, but, I mean, there are limitations.

Where are we going from here? What does the future hold? There will be suggestions for more—to speed up the trial process, make it less expensive for presentation of videotaped testimony rather than live. Virtual trials have
been suggested and speculated about by some. That is where the jurors don't—the actors, including the jurors—don’t even come together in the same place. They are aware of who they are. We're all watching the same presentation on the computers and weigh in with questions and deliberations, a chat room for deliberations. I'm very leery about that. At some point, even I become a traditionalist and want to preserve the face-to-face deliberations, the exchange, viewing witnesses, etc. So, I'm not a big fan of the suggestion of virtual trials.

A word needs to be said I think about evaluating these procedures or doing a pilot study if you're leery. Have it evaluated by experts to get the feedback, rather than relying on suppositions and assumptions, and age-old understandings. In Arizona, the Arizona Supreme Court opened up a whole bunch of trials, criminal and civil, to study by some of the experts you've heard named: Hans, Diamond, Munsterman, and others. Fifty civil trials, jury trials in Tucson were—and deliberations with the parties' consent—lawyers’, jurors’, and so forth and so on—consent. The Supreme Court's consent, conditional. Videotaped and produced six or eight articles, some of which are listed in your materials, evaluating juror discussions, jury deliberations, etc., and answering many of our questions. Resolving some of our fears, and not resolving others, leaving them open. Empathy, trust, fear of reversal. Was it Erica Jong who wrote Fear of Flying? Did she pass away? Well, if she's still with us, I wish she would do a book for us that is Fear of Reversal.

Okay. Questions about anything I've said or haven't said; Arizona's experience, or experience in other states?

QUESTIONS AND ANSWERS

MR. JEFFREY BELEW: I'm Jeffrey Belew. I've got a question not necessarily for you, but maybe for some of the
judges this time. We've implemented some of those things that he suggested with jurors. I was curious what Judge Thomas or some of the other judges would chime in on jury questions during the trial. What have you found to be, percentage-wise, good questions, questions that would just—obviously a lot of times they know it's insurance, which we don't let come in, in Tennessee. But what has been your experience with some of the questions that have been asked of the jurors during the trials?

JUDGE MCGINLEY: I'm Creed McGinley, and I'm a judge in a rural district. I try a whole lot of jury cases. And I was actually part of the pilot project that we've referred to. They pulled me screaming and kicking into this thing on some of the issues. I'm doing everything right now that is suggested here as far as jury notebooks, complete instructions. I charge them as much as I can on the front end. I'm allowing juror questions. It has not been any problem whatsoever. You relatively, you hardly ever have questions. And when you do, sometimes it actually suggests to the attorneys some deficiencies in their presentation. And if a jury trial was a search for the truth, then I think that's appropriate. But these things, everyone having a copy of the instructions. A lot of these things that I said couldn't be done, I'm doing every one of them now because I can tell the difference in these cases.

MR. BELEW: Is that before the trial or after the trial?

JUDGE MCGINLEY: The what?

UNIDENTIFIED SPEAKER: You said there were deficiencies identified by the questions jurors asked. Are they asking those questions after the presentation or before?
JUDGE MCGINLEY: Yes, that's when you charge them that after witnesses testify, but before they are excused. They're permitted to ask questions and so forth and so on. And sometimes it will bring up something that likely should be developed. And the attorneys, I think probably both sides appreciate it because it helps them.

JUDGE DANN: If I can join in on that. One way to look at it is that there's no such thing as a bad juror question, as even the bad or off-the-wall question—what we think was off-the-wall—is important to that juror. Otherwise, the juror would not have taken the time and trouble in reaching out for help with something.

JUDGE MCGINLEY: You do have to screen because . . . .

JUDGE DANN: Oh, sure.

JUDGE MCGINLEY: They will ask questions that are not appropriate as far as the Rules of Evidence.

JUDGE DANN: My favorite question in a criminal case asked the testifying defendant, "Well, if you didn't do this crime, do you know who did?" You've heard of that. But these strange or bad questions we do have sometimes alert the judge and the lawyers that something may need to be better done about that misunderstanding to clear up something, add, clarify, and so forth. It does take additional time in the trial, and you have to vent it with the attorneys, give them a chance to object outside. But in my book, we can take the time—the trade-off is worth it. Juror satisfaction, juror comprehension is worth it—and the care we like to think we take with these matters, these serious matters. It's worth the trade-off, the extra time and effort.
DEAN BLAZE: Judge, following up on this. What about re-argument in response to some of the questions? If I remember correctly, there were a number of times in Arizona when this was done, I don't know if you did it or Judge Martone.

JUDGE DANN: Yeah, both of us did it. Judge Marton and I did it in different homicide cases. This procedure was also approved by the ABA. It's called in some courts reopening for additional argument, instruction, or even evidence sometimes. That is, the juror reaches—you get the familiar note—I think we've reached an impasse. Now, where they noticed this word impasse is beyond me. But they know what word to use, the magic word impasse. So instead of calling them into the jury room and saying, "Are you really?" and then leading, the next conversation is, "Are you hopelessly deadlocked? You are, aren't you?" And lead them through—we do this dance, tradition dance, and a mistrial.

Well, the only thing worse than trying some of these cases once is trying them twice, needlessly so. At that first mention of a possible mistrial, Arizona law allows—it doesn't require—it depends on the circumstances, judge's discretion, to ask the deliberating jury, "I received your note. You think you've reached an impasse on one or all counts or whatever. If you would like to do so, but only if you want, please write down the issues that divide you that have led to an impasse, if the issue is having to do with the evidence, or the instructions, or a combination. And I will take your list up with the lawyers and we'll see what, if anything, we can do to assist you in moving along and avoiding deadlock." And the note comes out.

Sometimes they say, "We don't want to" or "We can't list anything. We can't even agree on what to list, what our differences are." Or they'll list three things or four things. Among those three or four, there are two or
three, or maybe just one that you're able to address. You do that through additional argument. Ask the attorneys to supplement their argument on this point. How does the law of conspiracy, for example, in a murder case, tie in this particular defendant? How does it relate to this defendant?

Well, the law on conspiracy is enough to choke even a knowledgeable Tennessee attorney and let alone lay jurors. It's complex, heavy-duty stuff. So you allow the attorneys, as we did, half an hour each. The jury went back in this murder case, and an hour and a half or so later they came out with verdicts acquitting on some counts and convicting on others. It helped them; they said post trial in a debriefing. Now, sometimes you can't. Your hands are tied. You can't call in additional witnesses or something in the record. You've got the burden of proof, the jeopardy considerations, and all that due process. Sometimes you can do something and save the trial, save the investment to the public and private money.

UNIDENTIFIED SPEAKER: Judge, I was just going to follow up on what Judge McGinley said about juror questions. The juror questions are a golden opportunity for the lawyers to get into the minds of the jurors about what they're thinking during the trial. And one other thing that I've added that's not specifically provided for in our Rule: eleven juror questions. To allow each side follow-up questions if a witness brings out new information that neither attorney has gotten out of their questions, then I allow each side one opportunity to ask follow-up questions of them.

SECOND UNIDENTIFIED SPEAKER: I go back to direct and cross or whatever. After I've determined the question is appropriate with the lawyers, asked the juror the questions, and they get the answers from the witness. And
then I'll say, "Anything further from this side? Anything further from that side?"

UNIDENTIFIED SPEAKER: I've had more than one lawyer say, "Judge, that's a great question. I wish I had thought of that."

JUDGE DANN: Thank you. If you still miss Tom Munsterman at this point, that's your problem.