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HOW TO TALK SO JURIES WILL LISTEN

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At the Linguistics & Law Lab at Northeastern University we investigate issues at the intersection of language and law, where linguistic analysis can provide insight and tools for understanding language in legal contexts. Our goal, across all of our work, is to improve justice through linguistic research. In what follows, I will discuss one project in our lab, the Jury Instruction Project.

I. THE JURY INSTRUCTION PROJECT

Our project on jury instructions began when the Massachusetts Bar Association ("MBA") asked me, a linguistics professor, to help them rewrite the state's jury instructions into Plain English. The MBA was addressing a growing problem confronting US courtrooms: jury instructions are often incomprehensible to jurors, especially those with little education or rudimentary English.[1] This excludes many jurors from equal participation but worse, it has led to misinformed verdicts and wrongful convictions.[2]

Massachusetts' interest in working with a linguist was inspired by California,[3] which rewrote its instructions in 2003, and its team crucially included linguists. An excerpt of one of their original instructions is in (1):

1. *See* AMIRAM ELWORK ET AL., MAKING JURY INSTRUCTIONS UNDERSTANDABLE (1982); Robert P. Charrow & Veda R. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 COLUM. L. REV. 1306, 1306 (1979); Shari Seidman Diamond et al., *The "Kettleful of Law" in Real Jury Deliberations: Success, Failures and Next Steps*, 104 NW. L. REV. 1537, 1538 (2012); Shari Seidman Diamond, *Truth, Justice, and the Jury*, 26 HARV. J. L. & PUB. POL'Y 143, 154 (2003); PETER M. TIERSMA, COMMUNICATING WITH JURIES: HOW TO DRAFT MORE UNDERSTANDABLE JURY INSTRUCTIONS 16 (2009), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1507298 [https://perma.cc/N3K8-3Y3Y].

2. *See* Robert W. Benson, *The End of Legalese: The Game is Over*, 13 N.Y.U. REV. L. & SOC. CHANGE 519, 545-47 (1985); Nancy S. Marder, *Bringing Jury Instructions into the Twenty-First Century*, 81 NOTRE DAME L. REV. 449, 451 (2006); Lawrence Solan, *Convicting the Innocent Beyond a Reasonable Doubt*, 49 CLEV. ST. L. REV. 465, 469 (2001).

3. In 1996 the Blue Ribbon Commission on Jury System Improvement stated that "jury instructions as presently given in California and elsewhere are, on occasion, simply impenetrable to the ordinary juror." In response to the commission's recommendation, the Judicial Council created the Task Force on Jury Instructions in 1997. *Why did the Judicial Council authorize drafting new plain English*

(1) *Failure of recollection is common. Innocent misrecollection is not uncommon*.[4]

Though the judges or lawyers who wrote this obviously had no problem with it, most jurors would probably prefer the version in (2), from the 2003 revision:

(2) *People often forget things or make mistakes in what they remember*.[5]

And this version would certainly benefit jurors whose native language is not English or who have lower levels of education than others. But why **exactly** do we prefer the new version? Below we'll look at some of the linguistic factors that make (1) difficult to parse and (2) so much easier. But first, a little background.

A. Background

California started its jury instruction project in 1997, as part of a larger movement across the US. It was not an easy path to take; the movement has faced many barriers. The first is, of course, ordinary inertia. But there is also active resistance of many kinds.[6] Some members of the legal profession consider jury instructions "sacred texts" that should inspire in jurors a sense of awe & respect for the court. Some have claimed that the empirical studies showing their comprehension difficulties were simply wrong. Others, who acknowledge the difficulties, think that revising the instructions wouldn't get jurors to listen anyway. A large number of judges oppose changing the instructions because they fear that it will lead to past decisions being challenged and to more appeals. And many legal professionals think that there's really nothing wrong with them. So unless and until it's been accepted that jurors can't understand the instructions, there will be no motivation to change them.

But the MBA was not among the resistors and, serendipitously, just at the time that they contacted me, the Linguistic Society of America (my professional organization) had started an effort of public outreach, urging

jury Instructions?, CALIFORNIA JURY INSTRUCTIONS, https://www.courts.ca.gov/partners/315.htm?print=1 [https://perma.cc/8UJD-GCHU].

4. *Civil Plain English Comparison*, CALIFORNIA JURY INSTRUCTIONS, https://www.courts.ca.gov/partners/314.htm [https://perma.cc/U9CT-SY4M]; Peter M. Tiersma, *Reforming the Language of Jury Instructions*, 22 HOFSTRA L. REV. 37, 70 (1993); *Jury Instructions*, PLAINLANGUAGE.GOV, https://www.plainlanguage.gov/examples/brochures/jury-instructions/ https://perma.cc/NQ8Q-AYX3 (last visited Nov. 20, 2019).

5. Tiersma, *supra* note 4, at 48.

6. Marder, *supra* note 2, at 464-66, 474.

its members "to engage the public in learning about linguistics and its broader value to society." The coalescence of these two things was too much to ignore and so I agreed to jump in. But knowing about the resistance—and being a researcher—it was clear to me that we couldn't just start rewriting. We had no funding, we had no staff, and there were two other prerequisites. First, we had to establish that the purported confusion holds for **Massachusetts** jurors hearing **Massachusetts** instructions. Second, we needed to know what makes the instructions so difficult. Only if we know that our instructions are confusing will the judiciary agree to a rewriting effort. And only if we know what specific linguistic elements cause the confusion will we know how to rewrite them effectively.

B. A Linguistic look at Jury Instructions: a preview

To get the flavor of what kinds of problems plague instructions, let's go back to the excerpts in (1) and (2):

(1) *Failure of recollection is common. Innocent misrecollection is not uncommon*.

(2) *People often forget things or make mistakes in what they remember.*

This snippet in (1), just ten words long, previews three problems that we will see in more depth below: 1) vocabulary, 2) negatives and 3) nominals.

1. Vocabulary

Often, legal writing is thick with the specialized vocabulary of the law, what lay-people sometimes call "legalese." Legalese terms are not in general parlance outside the legal profession and studies have shown that outsiders, including jurors, are often clueless about what they mean. One study of jurors who had served on a trial found that more than 25% could not define *admissible evidence, impeach,* or *burden of proof*. And more than 50% thought "a preponderance of the evidence" meant either "a slow, careful, pondering of the evidence" or "looking at the exhibits in the jury room."[7]

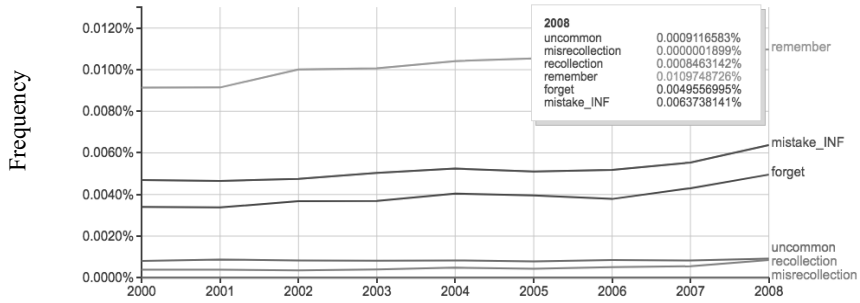
Now, you might have noticed that (1) doesn't contain any legalese *per se*. But legalese is not the only problem. The same study showed that these jurors also had trouble with non-legal vocabulary. More than 25%

7. Tiersma, *supra* note 4.

could not define *inference* and more than 50% could not define *speculate.* The problem is that these are "low-frequency" words. If jurors don't encounter a word, it would be unlikely that they would know what it means. So if this is the explanation for difficulty of (1) in contrast to (2), then there should be a difference in their words' frequencies.

The chart in (3), computed by Google's NGram Viewer,[8] compares the relative frequencies of *uncommon*, *recollection* and *misrecollection* from (1) with the frequencies of *forget, remember* and *mistakes* from (2).[9] The former, unsurprisingly, clustered at the low end, are much less frequent than the latter.

(3)

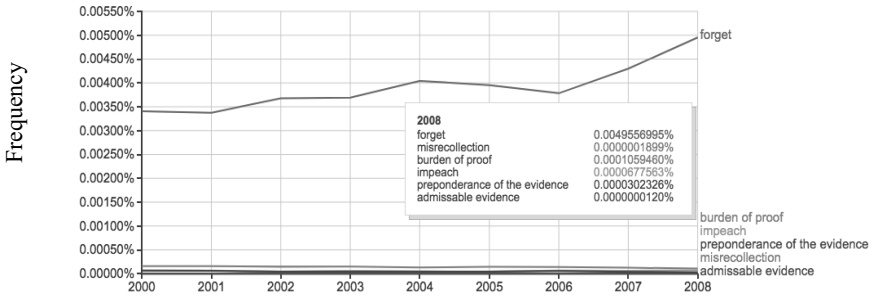


So, it is likely that the less-frequent words are more difficult for jurors. But how can we show this without comprehension data for these words? We can estimate their comprehension from words with similar frequencies whose comprehension we know.

8. An Ngram is a contiguous sequence of *n* items from a given sample of text or speech. The Google Books Ngram Viewer is an online search engine that charts the frequencies of any set of comma-delimited search strings using a yearly count of N-grams found in sources printed between 1500 and 2008. The search terms used here are the six words on the right of the chart. The years displayed are 2000 - 2008. *See* GOOGLE BOOKS NGRAM VIEWER, https://books.google.com/ngrams [https://perma.cc/D3BP-4VHV] (last visited Nov. 20, 2019).

9. To better estimate the frequency of *mistakes* (as opposed to *mistake*) the INF function is used, which gives the combined frequency for a word and its inflected forms.

(4)



(4) shows *forget* at the top with the highest frequency; *mistake* and *remember*, shown in (3), are even higher. All of these words sit quite a distance above *misrecollection,* which clusters with the low-frequency legal terms that fewer than 25% of the jurors understood, and where the other low-frequency terms (*recollection* and *uncommon,* omitted for clarity) would also cluster. To complete the argument, it must be the case that jurors understand the frequent words *remember*, *mistake* and *forget.* But since these words are well-known to elementary school students, they will also certainly be familiar to jurors.

2. Negatives

Strikingly, of the ten words in (1), four are negative expressions, which are known to be harder to process than positive statements.[10] There is one overt negative, [*not*], two prefixes, [*mis-*] and [*un-*], and an "inherent" negative, [*failure*]. Even more challenging is the more complex expression [***not*** [***un****common*]] which contains two negatives with one embedded inside the other. The outer negative has scope over the inner one, which makes this combination harder to parse than two negatives whose scope does not interact, as in *Sally did [**not**] catch the 8:00 train so she is [**un**]likely to be on time.*

3. Nominals

A third challenge in the ten words in (1) are the many **nominals,** shown in boldface below.

10. Marcel Adam Just & Patricia A. Carpenter, *Eye Fixations and Cognitive Processes*, 8 COGNITIVE PSYCHOL. 441, 460 (1976); Marcel Adam Just & Herbert H. Clark, *Drawing Inferences from the Presuppositions and Implications of Affirmative and Negative Sentences*, 12 J. VERBAL LEARNING & VERBAL BEHAV. 21, 21 (1973); P. C. Watson, *The Processing of Positive and Negative Information*, 11 Q. J. EXPERIMENTAL PSYCHOL. 92 (1959).

(1) **Fail**ure of **recollect**ion is common. Innocent **misrecollect**ion is not uncommon.

Nominals are complex nouns built from verbs and this excerpt contains three: *failure* from *fail*; *recollection* from *recollect* and *misrecollection* from *misrecollect*. Research has demonstrated that a nominal is more difficult to process than its corresponding verb, especially for poor readers.[11] Why is this? When a verb turns into a nominal, the process eliminates one or more of the verb's *arguments*, which are the central pieces of the verb's meaning. As shown in (5a), the verb *fail* takes one argument, the subject. This argument is not expressed in the nominal *failure* in (5b), though the nominal nevertheless entails that "someone" or "something" failed. *Recollect* and *misrecollect* each take two arguments, a subject and an object. And though the arguments are not expressed, the nominals *recollection* and *misrecollection* both entail that "someone" had a recollection or a misrecollection of "something."

(5) a.	[someone]	**fails**		
	[someone]	**recollects**	[something]	
	[someone]	**misrecollects**	[something]	
b.	**fail**ure			
	recollection			
	misrecollection			

When we parse sentence (1) and try to assemble the components into a meaning, we relate the nominals back to their verbs and look for the verbs' arguments. When we don't find them, we must mentally put them back in, an operation that has a cost. Recognizing this, California's rewriters created the new version in (2) by replacing the nominals with verbs (*forget*, *make, remember*) along with all their subjects and objects, and the sentence turns out to be much more understandable:

(6) [$_{subject}$ People] often **forget** [$_{object}$ things]
or **make** [$_{object}$ mistakes]
in [$_{object}$ what][12] [$_{subject}$ they] **remember**

11. *See* Frederick A. Duffelmeyer, *The Effect of Rewriting Prose Material on Reading Comprehension*, 19 READING WORLD 1 (1979); Jan H. Spyridakis & Carol S. Isakson, *Nominalizations vs. Denominalizations: Do They Influence What Readers Recall?*, 28 J. TECHNICAL WRITING & COMM. 163, 163 (1998).

12. The object of *remember*, [what], is "fronted" in this relative clause construction.

C. A Recap and a Roadmap

Our preview of legal language identified three problems with the two-line snippet in (1):

Though the sentences are short, (a) they contain many low-frequency words; (b) the message is framed in negatives, including the very challenging complex negative, [**not** [**un**common]], and (c) the verbs have been nominalized, their subjects and objects deleted. But this is the tip of the iceberg. The instructions that jurors hear are much longer than this snippet. In Section II, we turn to one of those, Massachusetts' Standard of Proof instruction, and consider the linguistic challenges it poses and how those challenges can be overcome. Section III introduces a Plain English version of the instruction, written by our team of lawyers, judges, and linguists. In Section IV, we look at data from a series of experiments that tested whether the new versions lead to better comprehension. In Section V, we conclude with our future plans and goals.

II. STANDARD OF PROOF

A common instruction given to jurors is *Standard of Proof* in (7).

(7) Standard of Proof, Massachusetts current instruction [13]

1. The standard of proof in a civil case is that a plaintiff must prove
2. [his/her] case by a preponderance of the evidence. This is a *less*
3. stringent standard than [**is applied**] in a criminal case, where the
4. prosecution must prove its case beyond a reasonable *doubt*.
5. By contrast, in a civil case such as this one, the plaintiff [**is** *not*
6. **required**] to prove [his/her] case beyond a reasonable *doubt*. In a
7. civil case, the party bearing the burden of proof meets the burden
8. when [he/she] shows it to be true by a preponderance of the
9. evidence.

10. The standard of a preponderance of the evidence means the greater
11. weight of the evidence. A preponderance of the evidence is such
12. evidence which, WHEN [**CONSIDERED**] AND [**COMPARED**] WITH ANY
13. OPPOSED TO IT, has more convincing force and produces in your

13. *See* MASSACHUSETTS SUPERIOR COURT CIVIL PRACTICE JURY INSTRUCTIONS (P.F. Brady, J. D. Lipchitz & S. D. Anderson eds., 2008).

14. minds a belief that what [**is sought**] [**to be proved**] is more
15. probably true than *not* true.

16. A proposition [**is proved**] by a preponderance of the evidence if,
17. AFTER YOU HAVE WEIGHED THE EVIDENCE, that proposition [i**s made**]
18. to appear more likely or probable in the sense that there exists in
19. your minds an actual belief in the truth of that proposition
20. [**derived**] from the evidence, *notwithstanding* any *doubts* that may
21. still linger in your minds.

22. Simply [**stated**], a matter has [**been proved**] by a preponderance
23. of the evidence if you determine, AFTER YOU HAVE WEIGHED ALL OF
24. THE EVIDENCE, that that matter is more probably true than not true.

The linguistic challenges that plague sentence (1) can also be seen here. Leaving aside vocabulary for now, the other two—*negatives* (italicized) and nominals (underlined)—are both syntactic and related to the structure of the sentences. But this instruction poses other serious syntactic challenges as well.

A. Syntactic challenges

1. Passive verbs

First, the instruction is filled with [**passive verbs**]—11 in 24 lines—which are much more challenging to process than their active counterparts.[14] The reason is clear in (8) with the two-argument (transitive) verb *consider*. In the active sentence, (8a), the arguments are in the canonical English order, subject—verb—object. The *passive* in (8b) disrupts the order: the object is in subject position and the subject is in a *by*-phrase, following the verb. In (8c), the "truncated passive," the subject is eliminated altogether.

(8)a. Active [**subject** The jury] must consider [**object** all the evidence].
b. Passive [**obj** All the evidence] must be considered [by [**subj** the jury].
c. Truncated Passive [**object** All the evidence] must be considered.

14. *See, e.g.*, Fernanda Ferreira, *The Misinterpretation of Noncanonical Sentences*, 47 COGNITIVE PSYCHOL. 164, 175-79 (2003); David R. Olson & Nikola Filby, *On the Comprehension of Active and Passive Sentences*, 3 COGNITIVE PSYCHOL. 361, 361 (1972).

In *Standard of Proof* all of the passives are truncated passives, missing their logical subjects. But even more confusing is that a different kind of by-phrase, [*by a preponderance of the evidence*], appears after two of these and tempts the listener to think that this is a passive *by*-phrase that contains the logical subject. However, as is clear from lines 1-2 of the instruction, [a plaintiff must prove [his/her] case by a preponderance of the evidence], the subject is [a plaintiff] and it's missing.

2. Interjections

Another syntactic obstacle in this instruction are three INTERJECTED PHRASES, shown in (9) in small caps, which break the flow of their sentences by splitting them in two. To understand the sentences, we have to mentally reassemble the two parts, while omitting the [INTERJECTIONS]. To see what this requires, consider a simpler case in (9a). When an interjection is jammed into the middle, separating the subject from the verb, the result is (9b), which certainly feels harder to process than (9a). Compare this to (9c) and (9d), where the same clause is not interjected, but tacked on either at the beginning or the end. The message is the same, but processing it is much easier.

(9) a. [The jurors must agree on a decision].
b. [The jurors] AFTER CONSIDERING ALL OF THE EVIDENCE [must agree on a decision].
c. AFTER CONSIDERING ALL OF THE EVIDENCE [the jurors must agree on a decision].
d. [The jurors must agree on a decision] AFTER CONSIDERING ALL OF THE EVIDENCE.

3. Multiple embeddings

Above, we saw an embedded negative [**not** [**un**common]]. But embedding can also involve sentences. And the embedding process can be repeated, the embedded sentence embedding another sentence inside of **it**, and so on, like a set of nested Russian dolls. This instruction has sentences with 3-, 4-, and 5- levels of embedding. Figure (10) shows the "deconstructed" 4-level sentence, which begins on line 11. And notice that clause 2 is broken up by an interjection (in **bold**), which as we just saw, adds one more parsing problem.

(10) **[1** A preponderance of the evidence is such evidence
[2 which,
[when considered and compared with any opposed to it],
has more convincing force and produces in your minds a belief
[3 that what is sought
[4 to be proved **4]**
is more probably true than not true **3] 2] 1]**

But even without the interjection, the sentence would be extremely challenging to listeners. If there is one solid result in the psycholinguistic,[15] neurolinguistic,[16] and readability literature,[17] it is that embedded structures are more difficult to process than "flat" structures with little or no embedding.

B. Semantic challenges

A separate set of challenges come from the instruction's words and phrases. As shown in (11), using a fresh version of the instruction, four of these expressions (in **bold)** are **low-frequency**: *stringent, sought, such evidence,* and *notwithstanding*. Nineteen (in SMALL CAPS) are "LEGALESE," also known to make processing more difficult.[18] Expressions that are both **low-frequency** and LEGALESE appear in **BOLD SMALL CAPS**.

(11) Standard of Proof, Massachusetts current instruction:
LEGALESE and **low-frequency** words

1. The **STANDARD OF PROOF** in a CIVIL CASE is that **A PLAINTIFF**
2. must prove [his/her] case by **A PREPONDERANCE OF THE**
3. **EVIDENCE**. This is a less **stringent** standard than is applied in a
4. CRIMINAL CASE, where **THE PROSECUTION** must prove its case

15. Thomas G. Bever, *The Influence of Speech Performance on Linguistic Structure*, *in* ADVANCES IN PSYCHOLINGUISTICS 65, 67 (Giovanni B. Flores d'Arcais & Willem J.M. Levelt eds., 1970); George A. Miller & Noam Chomsky, *Finitary Models of Language Users*, *in* HANDBOOK OF MATHEMATICAL PSYCHOLOGY 419, 475 (R. Duncan Luce et al. eds., 1963).

16. Marcel Adam Just et al., *Brain Activation Modulated by Sentence Comprehension*, 274 SCI. 114, 114 (1996).

17. *See* George R. Klare, *A Second Look at the Validity of the Readability Formulas*, 8 J. READING BEHAV. 129, 148 (1976).

18. *See, e.g.*, Rachel A. Diana et al., *Models of recognition: A review of arguments in favor of a dual-process account*, 13 PSYCHONOMIC BULL. & REV. 1, 1 (2006). The article makes the point that "unfamiliar" language is difficult to process, and legalese would be unfamiliar for most jurors, who are legal professionals.

5. **BEYOND A REASONABLE DOUBT**. By contrast, in a CIVIL CASE
6. such as this one, the **PLAINTIFF** is not required to prove [his/her]
7. case **BEYOND A REASONABLE DOUBT**. In a CIVIL CASE, the PARTY
8. BEARING THE BURDEN OF PROOF MEETS THE BURDEN when
9. [he/she] shows it to be true by **A PREPONDERANCE OF THE**
10. **EVIDENCE**.

11. The standard of **A PREPONDERANCE OF THE EVIDENCE** means the
12. greater weight of the evidence. **A PREPONDERANCE OF THE**
13. **EVIDENCE** is **such evidence** which, when considered and
14. compared with any opposed to it, has more convincing force and
15. produces in your minds a belief that what is **sought** to be proved is
16. more probably true than not true.

17. A **PROPOSITION** is proved by **A PREPONDERANCE OF THE**
18. **EVIDENCE** if, after you have weighed the evidence, that
19. **PROPOSITION** is made to appear more likely or probable in the
20. sense that there exists in your minds an actual belief in the truth of
21. that **PROPOSITION** derived from the evidence, **notwithstanding**
22. any doubts that may still linger in your minds.

23. Simply stated, a matter has been proved by **A PREPONDERANCE**
24. **OF THE EVIDENCE** if you determine, after you have weighed all of
25. the evidence that that matter is more probably true than not true.

Notice that eighteen of the nineteen legalese terms are never defined. The one term that is—**A PREPONDERANCE OF THE EVIDENCE**—is defined only after jurors have heard it three times, too late to be of much help. But there is one more problem with some of these legal terms. Some are made up of familiar words like *meet* in *meet the burden*. These pose a potentially worse challenge than even the strictly legal expressions. A listener will access the ordinary meaning of the common word, understanding *meet* as in *meet the new neighbors*, realize that this isn't the intended meaning, and then need to recover and figure out what the intended meaning is, all while the rest of the instruction is going by.

III. STANDARD OF PROOF: A PLAIN ENGLISH VERSION

Now that we have seen some of the difficulties in this instruction, consider the Plain English version in (12). It was rewritten by a team of

lawyers, judges, and linguists connected with the MBA. The problematic expressions are coded as follows: **negatives**, nominals, *passives*, [interjections], **LEGALESE,** and LOW-FREQUENCY words.

(12) Standard of Proof, Plain English instruction

1. This is a CIVIL case. In a civil case, there are two parties, the
2. "**PLAINTIFF**," and the "**DEFENDANT**." The plaintiff is the one who
3. "**BRINGS THE CASE**" against the defendant. And it is the plaintiff who
4. must convince you of his case with stronger, more believable evidence.
5. In other words, it is the plaintiff who bears the "**BURDEN OF PROOF**."
6. After you hear all the evidence on both sides, if you find that the greater
7. weight of the evidence [- also *called* "**THE PREPONDERANCE OF THE**
8. **EVIDENCE**"-] is on the plaintiff's side, then you should decide in favor
9. of the plaintiff. But if you find that the evidence is stronger on the
10. defendant's side, or the evidence on the two sides is equal, 50/50, then
11. you must decide in favor of the defendant.

12. Now, you may have heard that in some cases, the evidence must
13. convince you "**BEYOND A REASONABLE DOUBT**." That's only true for
14. CRIMINAL cases. For civil cases like this one, you might still have
15. some **doubts** after hearing the evidence, but even if you do, as long as
16. one side's evidence is stronger [- even slightly stronger -] than the
17. other's, you must decide in favor of that side. Stronger evidence does
18. **not** mean more evidence. It is the quality or strength of the evidence,
19. **not** the quantity or amount, that matters.

This instruction either eliminates or minimizes all of the confusing linguistic challenges in the current instruction.

A. Syntax

Instead of six **negatives**, there are three. The six nominals have been reduced to two. Ten of the eleven *passive verbs* are gone, and so are the [interjections]. This version does contain two new [interjections], but they are there to clarify the preceding phrase, not to insert a new idea. And the multiple levels of embedding are reduced to two.

B. Semantics

All of the LOW-FREQUENCY words and phrases—**STRINGENT**, **SOUGHT**, **SUCH EVIDENCE**, AND **NOTWITHSTANDING**—are now replaced by more commonplace expressions. And though most of the **LEGALESE** remains (**STANDARD OF PROOF**, **PLAINTIFF**, **BURDEN OF PROOF**, **PREPONDERANCE OF THE EVIDENCE**, **BEYOND A REASONABLE DOUBT**) and two have been added (**BRINGS THE CASE** and **DEFENDANT**), each term is defined as soon as it appears, either explicitly or by appearing in a clear context.

The question is, will this revised instruction be easier to understand?

IV. EXPERIMENTAL EVIDENCE: A SET OF STUDIES

The answer is yes. Our lab has been running a series of studies, comparing comprehension of current Massachusetts jury instructions with Plain English versions, focusing on two of the linguistic factors that contribute to listeners' difficulty: passive verbs and "legalese." We also asked whether reading the texts of the instructions while listening will boost understanding. We framed our research questions as the three hypotheses in (12). Study 1 tested undergraduate students; Study 2 used a more diverse subject group, Amazon MTurk participants, to try to more closely match the jury pool.

(13) Hypotheses

H1. **Plain English** instructions will show better comprehension than **Current** instructions.
H2. Two linguistic factors significantly impede comprehension: **passive verbs** and **legalese**.
H3. **Reading while listening** will improve comprehension over **listening only**.

Below is a brief overview of some of our findings.

A. Study 1: Undergraduate Student Subjects

Study 1 tested 214 undergraduates randomly assigned to the four groups in Figure 1. All subjects listened to recordings of six **C**urrent jury instructions or their **P**lain English counterparts. Two of the four groups had the text to **R**ead along (**CR** & **PR**) the other two just **L**istened (**CL** & **PL**).

	Current	Plain English
Listening Only	CL	PL
Reading +Listening	CR	PR

Figure 1

After each recording, subjects answered a set of true/false questions to measure their comprehension. Before beginning, to introduce them to the task, all subjects had one practice trial.

Hypothesis 1 predicted that the comprehension scores for the Plain English instructions would be higher than those for Current instructions and as Figure 2 shows, they were, (**CL 83%** vs **PL 86%**) and (**CR 87%** vs. **PR 90%**), though these differences were not large enough to be statistically significant (noted as n.s.). There *was* a significant boost, however, with the addition of reading, as Hypothesis 3 predicted (**CL 83%** vs **CR 87%** and **PL 86%** vs. **PR 90%**). Significance levels are shown by asterisks * = P ≤ .05; * = P≤ .01; *** = P≤ .001).

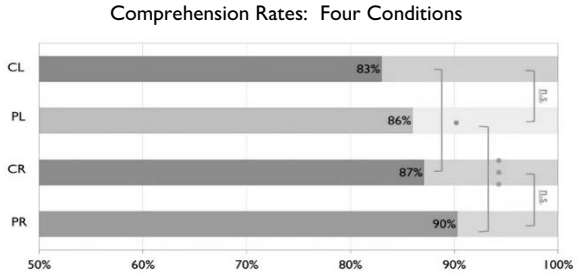


Figure 2

But to understand what happened with the switch to Plain English, we need to look at the six instructions individually.

As Figure 3 shows, switching to Plain English did have an effect, especially for the listening-only condition, in particular for instructions 3 and 6. These showed the biggest jumps from **CL** to **PL** and from **CR** to **PR**.

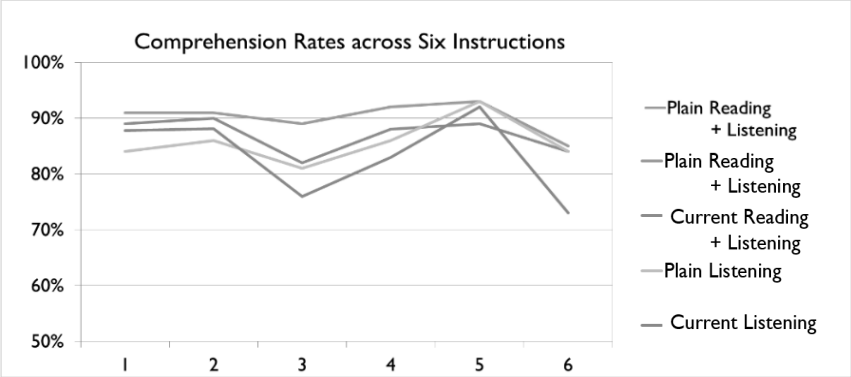


Figure 3

But why did these instructions show the greatest boosts? The explanation lies in Hypothesis 2. Hypothesis 2 predicted that the current instructions that pose the most linguistic challenges—those containing the highest rates of passive verbs and legalese—should be the most difficult. And this is the case, as shown in the left-hand bars in Figures 4 and 5.

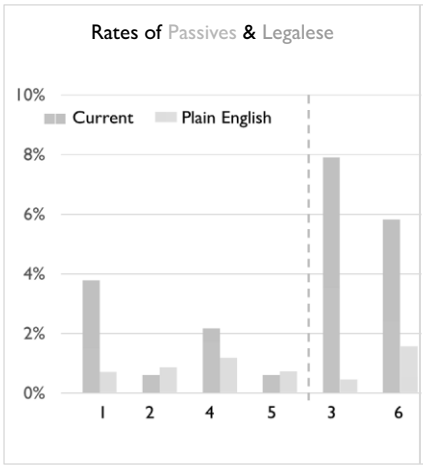


Figure 4

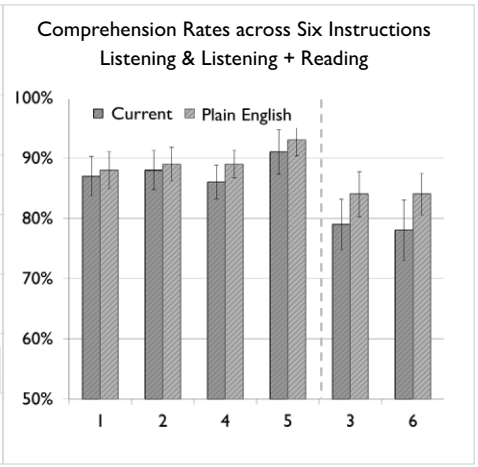


Figure 5

Instructions 3 and 6, on the right side of the dashed line, were the worst offenders (Figure 4). They had the highest rates of these two factors, and these same instructions had the lowest rates of comprehension (Figure 5).

Plain English versions, which eliminated most of the difficult language, improved comprehension. Over the six instructions overall, the rates of passives and legalese dropped (Figure 4, right hand bars of each pair), with the largest drops for instructions 3 and 6. And, as Figure 5 shows, it was these two instructions where comprehension improved most. The difference in the left and right bars of each pair in Figure 5 is considerably greater for instructions 3 and 6 than for the rest.

But now you may be wondering why the improvements were not larger? There is a good reason for this: comprehension of the current instructions was quite high to start with. The **blue** bar (Current Listening condition) is at 83%. And why? These subjects were Northeastern University undergraduates. Would real jurors perform as well? Probably not.

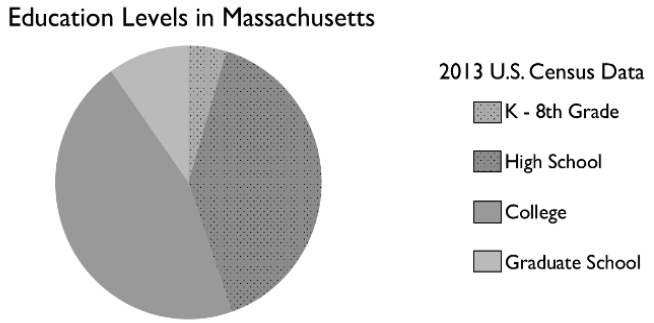


Figure 6

Figure 6 shows the Massachusetts jury pool, nearly half of which (the yellow-green areas) has not gone beyond high school. If we want to approximate juror comprehension overall, we would have to find a new subject pool, people who are more like Massachusetts jurors. And that's exactly what we did.

B. Study 2: MTurk Subjects

Our next study used a more diverse subject pool of 389 subjects in the same 4 conditions, recruited through Amazon's Mechanical Turk (MTurk) crowd-sourcing platform. The methodology, materials and experimental design were identical, and our prediction was confirmed. These results show **striking** improvements across all four conditions, as the bottom graph in Figure 7 illustrates.

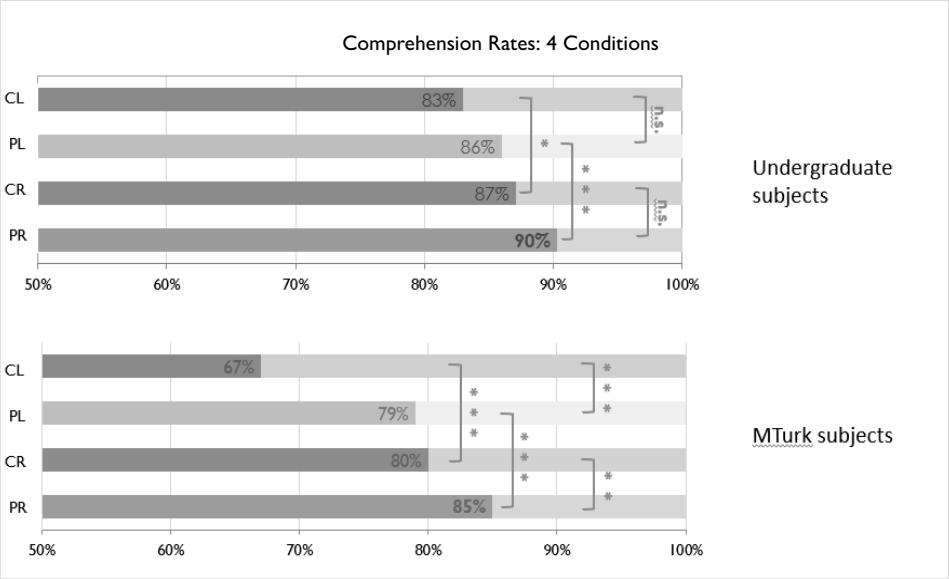


Figure 7

The reason is the subjects' baseline scores, which were much worse than the students' baseline scores. So, there was much more room for improvement. For the Current Listening **CL** condition, the blue bar, the MTurk subjects scored not 83% but only **67%**—missing a full third of the questions. Those who had the advantage of reading, in the **CR** condition, scored **80%.** Switching to Plain English raised both of these: **CL 67%** went up to **PL 79%** and **CR 80%** up to **PR 85%.** Viewing these results the other way, the improvements in the scores from the two listening-only groups versus the listening plus the reading groups were also significant: **CL 67%** rose to **CR 80%**, **PL 79%** rose to **PR 85%**). Figure 8 shows the same pattern in the individual instructions. Just like the students, these subjects found instructions 3 and 6 the most difficult, returning comprehension scores of 60% and 59% in the Current Listening **CL** condition, the scores across the six instructions again correlating with their rates of challenging linguistic factors in Figure 4. But here, as predicted, the blue **CL** condition line for the MTurkers is much lower across all the instructions than the line for the students.

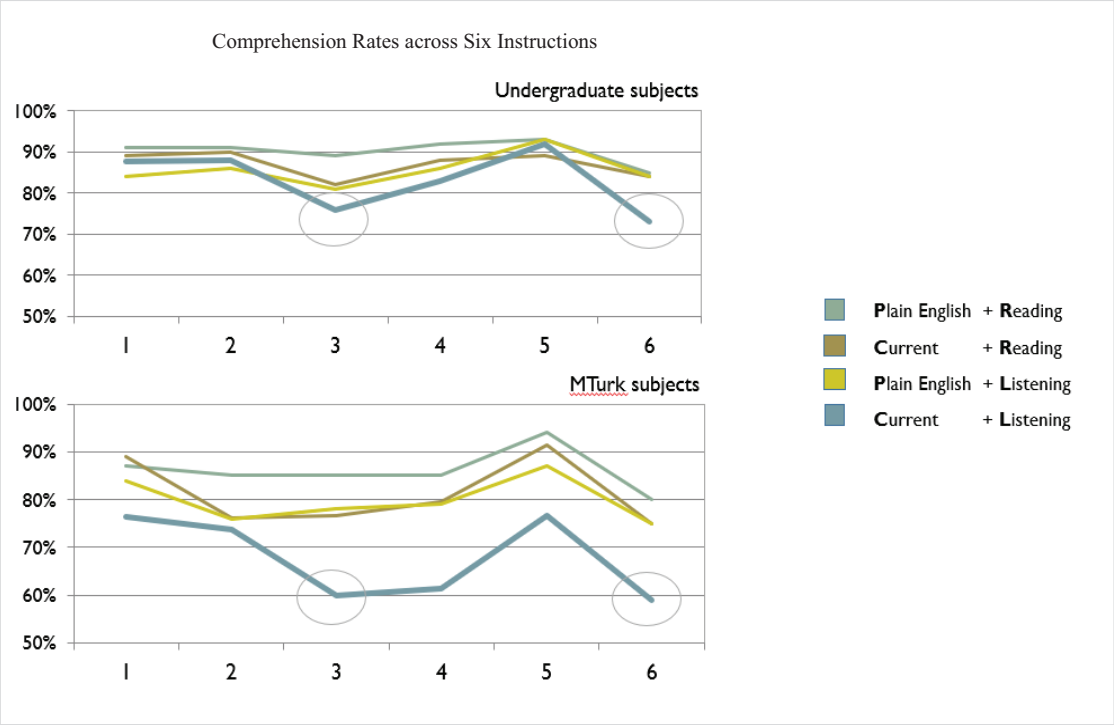


Figure 8

C. Can We Better Approximate Jurors' Experience? Grouping the Instructions: Study 3

The MTurk subjects of Study 2 showed significantly worse understanding of the six Massachusetts instructions that we tested. For the more challenging instructions, 3 and 6, they correctly answered only two-thirds of the questions, while the students correctly answered over 70%. But we suspect that **actual** juror comprehension is probably even worse. Here's why.

The procedure that we used for both of our experiments is shown on the left side of Figure 9: subjects listened to the first instruction, answered its corresponding true/false questions, then moved to the next, and so on, through all six. They had to process and retain each instruction only long enough to answer its questions before dismissing it and moving on.

In contrast, in a courtroom, the judge generally presents all the instructions "grouped" together, as shown on the right side of Figure 9.

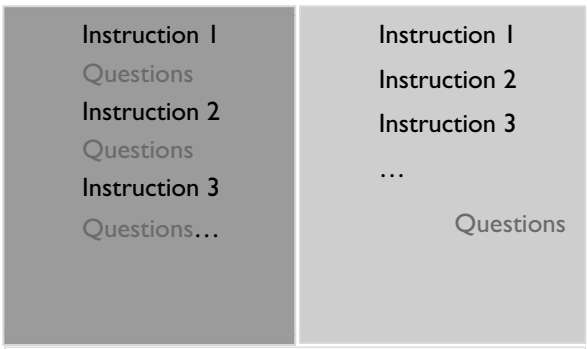


Figure 9

And this is more challenging in two ways. The jurors have no time between instructions to process the instructions individually, which puts a greater load on their "working memory".[19] And they have the additional memory challenge of remembering the entire group of instructions until much later, when they go to the jury room to deliberate. The challenge of holding onto memories over time is captured in Ebbinghaus' classic "Forgetting Curve"[20] shown in Figure 10.

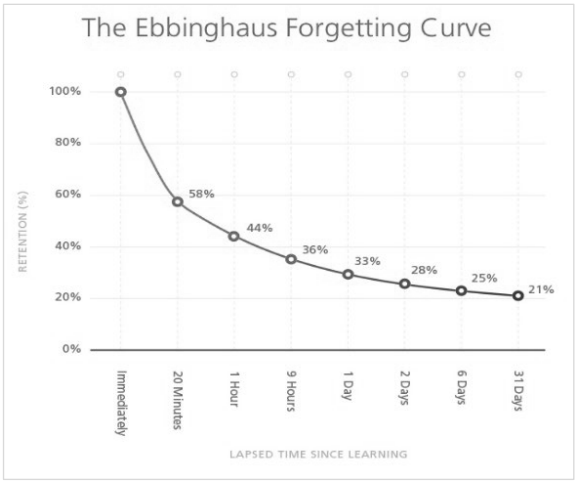


Figure 10

19. Nelson Cowan, *The Magical Mystery Four: How Is Working Memory Capacity Limited, and Why?*, 19 CURRENT DIRECTIONS IN PSYCHOL. SCI. 51, 51 (2010).

20. Hermann Ebbinghaus, ÜBER DAS GEDÄCHTNIS: UNTERSUCHUNGEN ZUR EXPERIMENTELLEN PSYCHOLOGIE (1885).

After 20 minutes of holding onto a memory, the likelihood of remembering it drops to 58%. After an hour, the amount we recall is down to less than half, 44%. Since judges can spend up to several hours instructing the jury,[21] the likelihood of remembering the earliest instructions is quite small.

Suppose we tried to approximate this situation, by presenting all of the instructions in a group and saving the questions for the end, as shown on the right side of Figure 9. This "grouped" order, we hypothesized, would result in lower comprehension rates compared to the "ungrouped" instruction order of Studies 1 and 2. And we tested this hypothesis in Study 3.

Study 3 is the "grouped" counterpart to Study 1 and uses identical materials, design, and student subject pool. The only difference is the procedure. Instead of hearing each instruction followed by its questions, here, subjects first heard all six instructions and then the six sets of questions, in the same order as the instructions. The subjects were 180 Northeastern undergraduates.

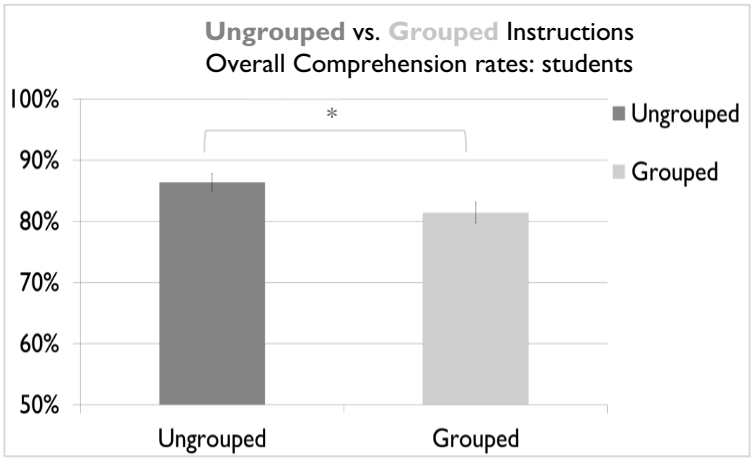


Figure 11

21. Marder, *supra* note 2, at 452.

In Figure 11 are the **overall** comprehension rates of our Study 3 subjects (the lighter bar) compared with the subjects in Study 1 (the darker bar). The results confirm our hypothesis. The subjects who heard the grouped instructions performed significantly worse overall than those who heard the ungrouped instructions ($p < 0.001$). In other words, the new

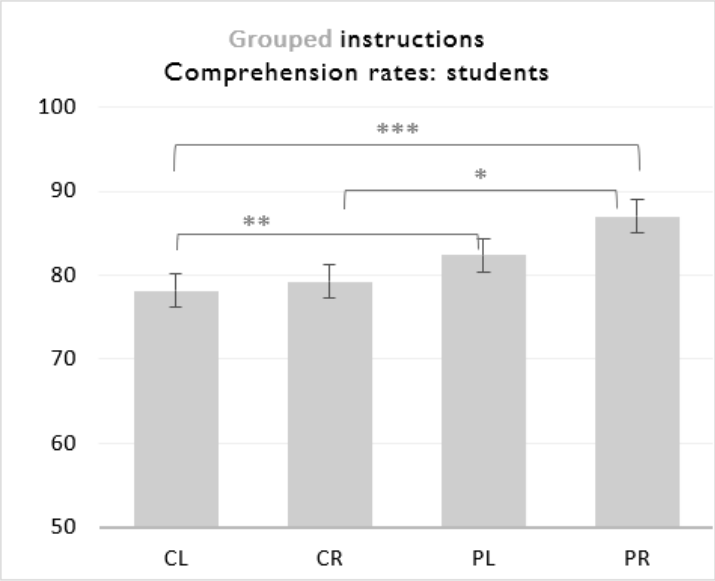


Figure 12

Study 3 subjects, who heard the instructions grouped together and had to hold them in memory to answer questions at the end, gave significantly fewer correct responses than the Study 1 subjects, who answered the questions for each instruction immediately after hearing it.

Figure 12 shows the "grouped" results broken down by condition. As in our earlier two studies, here again switching to Plain English made a significant difference. Scores for the Plain English instructions were significantly higher than for Current instructions for both the Listening-only (PL 82% vs. CL 79%; $p < 0.01$) and Reading (PR 87% vs CR 79%; $p < 0.05$) conditions. Reading also improved comprehension for both the current and Plain English instructions, though those differences did not reach significance. However, the **combined** effects of reading and Plain English were **highly** significant (PR 87% vs. CL 79%; $p < 0.001$).

Finally, Figure 13, which compares the two studies by condition, shows the expected trends. In every condition, the grouped scores (the

lighter bars) are lower than the ungrouped scores (the darker bars). Also as predicted, CL has the lowest comprehension rates, PR has the highest, and CR and PL fall in between. So, Study 3 reinforces the conclusions of our two earlier studies: (1) Plain English instructions improve comprehension over Current instructions; (2) Giving listeners the possibility to read the instructions while listening improves comprehension even more. But Study 3 adds one other important piece of the picture, by getting us closer to predicting what jurors will do.

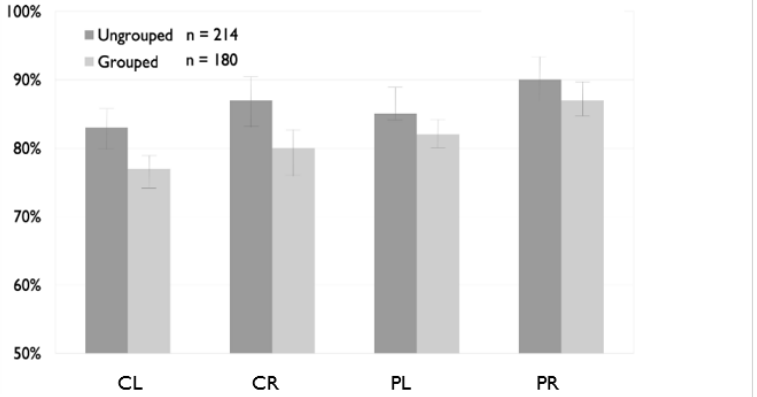


Figure 13

Like the subjects in Study 3, jurors hear a stream of jury instructions without a break and later, sometimes hours later, they are asked to think back about what they remember of them. With its procedure much more like what jurors confront, Study 3, to use a term of art, has more "ecological validity" than our earlier studies. Presenting the instructions in a group rather than interspersing them with their corresponding questions adds to real-world jurors' processing and memory loads and decreases their comprehension.

V. CONCLUSIONS AND FUTURE DIRECTIONS

Taken together, Studies 1, 2, and 3 demonstrate that (a) current jury instructions pose difficulties for understanding; (b) two linguistic factors—passive verbs and legalese—affect difficulty: instructions with higher rates of passive verbs and legalese are more challenging than those with lower

rates; and (c) rewritten instructions that minimize or eliminate these linguistic factors are easier to understand. Understanding is also improved when listeners (d) can read the instructions while they listen; (e) have time to process each instruction before hearing the next; and (f) are able to apply the instructions before they forget them.

Our findings can inform courts on how to modify their instructions and their procedures for jury trials. Allowing jurors to read the instructions while listening to them will help. Breaking up the unbroken stream of instructions could also make a difference. And when courts decide to rewrite instructions to make them more understandable to jurors, they might want to follow California's lead and add a linguist to their rewriting team. It's not clear that courts are ready to do what is a long and potentially expensive overhaul of their instructions, however. There are many impediments. Aside from inertia and the cost and outlay of resources is the fear that new instructions will lead to more appeals.[22] But there is also a widespread belief that the problem is not with the instructions but with the jurors, who just don't listen carefully, so no amount of revising will help.[23]

The courts might be more convinced to address the problem if they knew what jurors actually do. Our first study used college students as our subject pool; our second drew participants through an on-line platform to more closely match the demographics of Massachusetts jurors. Our third study made our procedure more parallel to what jurors face in court. What we need is evidence from **actual** jurors and, as this article goes to press, a new study with exactly this subject pool is in the planning stages. The study will use our more realistic "grouped" methodology and a subject pool of actual Massachusetts jurors. However, it is important for the jurors not to have served on a trial, since they would have been exposed to instructions, so our study will use dismissed jurors, jurors who came to the courthouse but were not empaneled.

If our new results align with our prior findings, we will have strong evidence that it is time for courts to recognize the challenges of current jury instructions—and the way they are presented—and to take steps to improve

22. This, in fact, is not true. According to an official of the California Civil Jury Instructions Legal Services Office, Bruce Greenlee (pers. comm., January 24, 2013), "on the civil side we have had a few reversals (less than five in 10 years now), [but] *none of these reversals or criticisms had anything to do with plain language*. They were all about the underlying legal premise. In short, there is absolutely no reason to hesitate with plain-language civil jury instructions based on a fear that appellate courts will require the verbatim iteration of legalistic language found in civil statutes and case law. It just doesn't happen."

23. Marder, *supra* note 2, at 472-73.

them. And we will also have evidence about how informative collaborations between linguists and legal professionals can be.

ACKNOWLEDGEMENTS

I am grateful to the Massachusetts Bar Association for its initial interest in this project, for sponsoring me as a Research Fellow, and for awarding me and my team a small grant to get our research going. Since then, we have benefitted from a grant from the Northeastern University Humanities Center and from a series of student research and travel grants from the Provost's office and the College of Social Science & Humanities. We have profited from the comments of audiences where we have presented our work—including the Flaschner Institute for Judicial Education, the Northeastern University School of Law, the NYU Civil Jury Project, the Massachusetts Bar Association, and a number of linguistics and psychology conferences and colloquia.

In addition, many individuals played roles in various aspects of this research and to them I extend my personal thanks: the Honorable Gabrielle Wolohojian, Associate Justice, Appeals Court; the Honorable Judith Fabricant, Chief Justice, Superior Court; the Honorable Francis Fecteau, Associate Justice, Appeals Court (Emeritus); Jack McDevitt, Northeastern University Associate Dean, College of Social Sciences & Humanities; Anna Offit, Dedman School of Law at SMU; Jeremy Paul, former Dean, Northeastern University School of Law; the Honorable Douglas Wilkins, Massachusetts Superior Court; and the Honorable William Young, U.S. District Court and his Judicial Assistant, Elizabeth Sonnenberg. But my largest debt is to my hard-working and inspiring student research team. They have earned my deepest thanks for their dedication to our work, comments, suggestions and thought-provoking ideas, and for keeping things going through thick and thin. This year's team members were (in alphabetical order): Samantha Bonnin, Leah Butz, Julien Cherry, Samantha Laureano, Abbie MacNeal, Ryan Semple, Rachel Smith, Hannah Wolfe, and Yian Xu. But two alumni also deserve my heartfelt thanks for holding up the legal end of this project: Katie Fiallo and Alex Jones. And though my team has been invaluable in the work presented here, all errors and omissions are mine.

THE PRACTICE OF NULLIFICATION

SONALI CHAKRAVARTI*

There is a cyclic quality to scholarly debates about nullification, the power juries have to offer a verdict of not guilty for reasons other than a lack of evidence, with proponents drawing on the vaulted legacy of jury independence as central to the legal system and opponents raising concerns about the ill effects of sanctioned departures from the rule of law.[1] While both sides go back and forth, citing recent notable cases and the legal concerns of the day, there is a sense that the conceptual conflict is at an impasse. The debate in the courts has often hinged on what, precisely, juries should be told about their power to nullify in the charge they receive from the judge. Drawing on the description of a *practice* by Alasdair MacIntyre, this paper offers another approach to thinking about the education of jurors, one that acknowledges that the jury's relationship to law and justice, and the potential conflict between the two, is complex and requires repeated exposure and reflection.[2] His idea of a practice is grounded in an Aristotelian framework that predicates the development of *phronesis*, or practical wisdom, on repeated opportunities for assessing which virtues are best demonstrated in which contexts, an approach I will explore as it relates to the civic education of jurors.[3] Considering jury service as a practice provides a method to think about the standards of excellence for the activity in relation to its distinctive telos. Through education in the practice, jurors, aware of the power of nullification, are also aware of the standards of excellence for exercising it. In contrast to thinking about jury service as a practice, I will examine three notable cases involving nullification to examine how judges have understood the question of juror education and how the emphasis on the charge aides or detracts from a more ambitious vision

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1. *See, e.g.*, CLAY S. CONRAD, JURY NULLIFICATION: THE EVOLUTION OF A DOCTRINE (1999); Nancy J. King, *Silencing Nullification Advocacy inside the Jury Room and Outside the Courtroom*, 65 U. CHI. L. REV. 433 (1998); David C. Brody, *Sparf and Dougherty Revisited: Why the Court Should Instruct the Jury of Its Nullification Right*, AM. CRIM. L. REV. 33 (1995); Darryl K. Brown, *Jury Nullification within the Rule of Law*, 81 MINN. L. REV. 1149 (1997).

2. ALASDAIR MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY 187 (1981)..

3. *Id.* at 137-53.

of jurors' capabilities. Lastly, I will consider the unusual ways in which the jury in the Camden 28 trial in 1973 experienced some of the benefits of thinking about jury service as a practice. Highlighting the multiple opportunities for civic education afforded to the jury in the case provides a bridge to thinking about the education outside the courtroom necessary for achieving the practical wisdom nullification decisions require.

I. ARISTOTLE AND THE PRACTICE OF NULLIFICATION

The virtue ethical framework put forth by Aristotle is, from its inception, marked by an orientation toward political life as the space of human flourishing.[4] It is the political sphere, and not that of the family or market relationships, that is marked by equality and a commitment to deliberation about collective well-being.[5] Within the American system, it is arguably the jury process where citizens are most likely to have the experience to "rule and be ruled" in turn as they have a type of authority that is unusual for laypeople, selected by lot, in democratic institutions.[6] To better understand the type of virtues that are cultivated through jury service, it is necessary to determine its telos—that is, its point of highest flourishing. Within an Aristotelian framework, one cannot simply say that "X" is good; one must ask, "Good for what?" and then examine "X" in relation to that highest ideal.[7] With the increase in political partisanship and rancor in the highest workings of political life, the telos of the American republic is in dispute, yet the telos of jury service does not need to follow this same fate.[8] People from across the political spectrum can better understand what it means to do one's job as a juror well—including the application of the law to the facts at hand in an unbiased way as well as understanding the difference between law and justice. More profoundly, the telos of jury service includes enacting humanistic values such as situated judgement, wisdom, compassion, and mercy in ways that cannot be formulaic.[9]

4. *See* ARISTOTLE, THE POLITICS OF ARISTOTLE (Univ. of N.C. Press 1997); ARISTOTLE, THE NICOMACHEAN ETHICS (Oxford Univ. Press 1998).

5. Melissa Schwartzberg, *Aristotle and the Judgment of the Many: Equality, Not Collective Quality*, 78 UNIV. CHI. J. POL. 733-45 (2016).

6. ARISTOTLE, THE POLITICS OF ARISTOTLE, *supra* note 4, at Book VI.

7. *Id.* at Book I.

8. *See generally* JEFFREY ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY (2000); Vikram D. Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203 (1995).

9. This was the dominant view of juries at the time of the American founding. LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004).

Much of citizenship today, especially as it pertains to voting, is premised on committing to a person or position and then marshalling all the evidence and support one can for it.[10] Being a juror is an entirely different enterprise, in which the full discussion of the people and events involved must be considered prior to a decision about the guilt.[11] Robert Burnes writes that the "hard tension of opposites created by the trial actually reveals something that could not be stated more directly" and that it is the juror's task to experience this dialectical process.[12] Yet for many citizens, the task of jury service is detached and removed from everyday life, even everyday political life.[13] When a person receives their jury summons, their first thought is often about the inconvenience of the timing or the reasons they might give to the judge so that they will be excused from service.[14] It does not appear to be an activity for which they are well-prepared and which will rely on previous reflections on what it means to be juror. The thought that jury service will be a chance to enact skills and practical wisdom that have been a long time in the making likely does not cross their mind.[15] It is a one-off obligation, with the assumption that all relevant information about the obligation will be provided as needed. An alternative is to consider jury service to be a practice, an endeavor built upon the ongoing commitment to a variety of skills that are simultaneously necessary to achieve just outcomes. The language of practice is taken from Alasdair MacIntyre's definition in *After Virtue*:

> By a "practice" I am going to mean any coherent and complex form of socially established cooperate human activity through which goods internal to that form of activity are realized in the course of trying to achieve those standards of excellence which are appropriate to, and partially definitive of, that form of activity, with the result that human powers to achieve, and human conceptions of the ends and goods involved, are systematically extended. Tic-tac-toe is not an example of practice in

10. *See* ROBERT P. BURNS, THE DEATH OF THE AMERICAN TRIAL (2009); NEIL VIDMAR & VALERIE P. HANS, AMERICAN JURIES: THE VERDICT (2007).

11. For experimental evidence about the conditions for high quality jury deliberation, see JOHN GASTIL ET AL., THE JURY AND DEMOCRACY: HOW JURY DELIBERATION PROMOTES CIVIC ENGAGEMENT AND POLITICAL PARTICIPATION (2010).

12. ROBERT BURNS, A THEORY OF THE TRIAL 220 (1999).

13. I thank Nancy Marder for sharing some forthcoming work on this topic with me. *See* NANCY S. MARDER, THE JURY PROCESS (2005).

14. Akhil Amar has suggested that all citizens be prepared to offer one week of the year to jury service and could schedule it when most convenient. A fine of two weeks' salary would be the penalty for shirking service. Akhil Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. DAVIS L. REV. 1169, 1178-79 (1995).

15. Andrew Guthrie Ferguson, *The Big Data Jury*, 91 NOTRE DAME L. REV. 935, 979-80 (2016).

> this sense, nor is throwing a football with skill; but the game of football is, and so is chess. Bricklaying is not a practice, architecture is.[16]

The historical tradition of the jury in the common law system, including its prominence in the Magna Carta which ensured a "jury of one's peers" and later, the significant ways in which the jury system protected politically motivated prosecutions in the American colonies, attests to jury service as a "socially established human activity."[17] The internal goods of judgement, justice, and mercy emerge from the act of being a juror and sitting in the courtroom and deliberating with fellow jurors; they cannot solely be understood in the abstract, but with an appreciation of the responsibilities and powers jury service entails. The language of a practice further suggests that repeated exposure and education is necessary to achieve a familiarity with both the rules of play and the challenges that emerge while engaging in the activity.[18] While the jury is celebrated for its role in achieving justice, the standards of excellence that are "appropriate to, and partially definitive of" jury service have been undertheorized, largely restricted to obedience to the judge and commitment to the application of the law as written. Burns considers this to be the "received view" of the trial that offers a version of substantive legitimacy that comes with treating like cases alike is only capable of communicating partial truths about the trial to jurors.[19] While these standards of excellence are not to be discounted, they are incomplete and there is a need for greater attention to thinking about what excellence in difficult situations of judgment, including nullification, looks like. This requires a commitment to civic education and discussion outside the courtroom about the history of the jury, its responsibilities, and the challenges of being a good juror. Out of these conversations, the standards of excellence for jury service may be debated and internalized. To put it another way, through their engagement with jury service as a practice, jurors should be able to understand what the novelist John Gardner meant when he said, "Every time you break the law you pay, and every time you obey the law you pay."[20] What it means to "pay" as a juror is symbolic and connected both to the integrity of the institution of the jury and the legal system, and to one's own sense of fairness. There is a cost to legitimizing

16. MACINTYRE , *supra* note 2, at 187.

17. MARY ANN GLENDON ET AL., COMPARATIVE LEGAL TRADITIONS (W. Publ'g Co. 1983); KRAMER, *supra* note 9.

18. MACINTYRE , *supra* note 2.

19. BURNS, *supra* note 12, at 11.

20. Paul F. Ferguson et al., *John Gardner: The Art of Fiction No. 73*, PARIS REV. (1979), https://www.theparisreview.org/interviews/3394/the-art-of-fiction-no-73-john-gardner [https://perma.cc/PR3E-RLK9].

punishment when, as a juror, one does not agree with that outcome, as much as there is a cost of undermining the rule of law by letting prejudice and shortsightedness influence the verdict. To understand which is the greater cost at the moment in question requires what Aristotle calls *phronesis*, or practical wisdom.[21]

For Aristotle, phronesis is connected to intellectual virtue and, as such, requires the rational part of the soul that can be developed and trained over time.[22] It is also housed in the part of the soul that molds motivation such that one's desires are aligned with the virtues rather than in tension with them.[23] It is not enough to understand what the virtues of courage, temperance and magnanimity, among others, mean in an intellectual sense, but how one should embody them given the situation at hand.[24] Using Aristotle's understanding of practical wisdom to assess jury service, the intellectual task becomes salient as it includes a wide range of skills, not limited to the ability to evaluate the validity and significance of evidence, the understanding of probability and statistics (as it relates to DNA evidence, intellectual property and other topics), the psychology of human nature and its variations, the challenges of memory and eyewitness testimony, as well as self-knowledge about one's own prejudices and biases.[25] These are all skills and areas of knowledge that jurors must possess as they aspire to the telos of jury service, the just outcome, but they must also consider a variety of other circumstances, including the legitimacy of the law itself, the integrity of the prosecution, and the circumstances of the defendant.[26] A consideration of circumstances and its relationship to the evidence can be done in either a thoughtful or reckless manner; only the quality of the deliberation, maintained by the jurors themselves, separates one from the other.[27] The fact that jury deliberations must be private and confidential suggests the need for greater education about the practice of jury service before a trial. There is no official to intervene when deliberations steer off course, so a broad knowledge about what jurors are expected to do before the trial is advantageous. The standards of excellence must be known in advance,

21. ARISTOTLE, THE NICOMACHEAN ETHICS, *supra* note 4, at Book VI.

22. *See* JULIA ANNAS, INTELLIGENT VIRTUE (Oxford Univ. Press 2011).

23. *See* ARISTOTLE, NICOMACHEAN ETHICS, *supra* note 4, at Book VI.

24. *Id.* at Book III.

25. I develop this idea more fully in my book. SONALI CHAKRAVARTI, RADICAL ENFRANCHISEMENT IN THE JURY ROOM AND PUBLIC LIFE (2019).

26. *See generally* DANIEL KAHNEMAN, THINKING FAST AND SLOW (2011); MAHZARIN BANAJI & ANTHONY GREENWALD, BLINDSPOT: HIDDEN BIASES OF GOOD PEOPLE (1st ed. 2013).

27. *See* ALBERT DZUR, PUNISHMENT, PARTICIPATORY DEMOCRACY, AND THE JURY 139 (2012); Sherman J. Clark, *The Juror, the Citizen, and the Human Being: The Presumption of Innocence and the Burden of Judgment*, 8 CRIM. L. & PHIL. 421, 426 (2014).

including the power of nullification and its potential for misuse, so that jurors can draw on this knowledge during their closed sessions. Within the structure of the trial, jurors receive so much information from the judge and opposing attorneys that additional information during the jury charge about nullification may not be as beneficial as education prior to service.[28]

The fears that judges have about deviating from sentencing guidelines suggests how difficult considerations of culpability and punishment are, even for those with experience and expertise. In their book *Practical Wisdom*, Barry Schwartz and Kenneth Sharpe quote a judge who preferred the narrow constraints of sentencing guidelines because they take into account "all those factors I don't feel competent to weigh: punishment, deterrence, rehabilitation, harm to society, contrition—they're all engineered into the machine; all I have to do is wind the key."[29] This instinct to merely wind the key and get to a decision that incorporates the complex factors of a verdict with minimal effort may be appealing to jurors as well. If we want jurors to understand the standards of excellence that exist as part of the practice, we cannot wait until they have arrived at the courtroom to prepare them for it.

As part of his diagnosis for the crisis in moral reasoning in contemporary life, MacIntyre regrets the loss of impersonal criteria that may be legible to others regarding what motivates an action.[30] The presence of what MacIntyre calls "emotivism" is what critics of nullification fear—jurors will use the power in whatever way they choose without regard for any criteria beyond personal preference or political affiliation.[31] He writes, "Emotivism in the doctrine that all evaluative judgments and more specifically moral judgments are nothing but expressions of preference, expressions of attitude or feeling, insofar as they are moral or evaluative in character."[32] The impersonal criteria when it comes to nullification is one of the hardest to define; critics have argued that it can never be done in an impersonal way because of the way political motivations will influence the standard.[33] It is the concept of the practice that provides an alternative to emotivist debates that result in stalemates. Through examining the skills and goals that are intrinsic to the activity and developed for the sake of its

28. *See* Sonali Chakravarti, *Mistaken for Consensus: Hung Juries, the Allen Charge and the End of Jury Deliberation*, *in* LAW'S MISTAKES (Austin Sarat et al. eds. 2016).

29. BARRY SCHWARTZ & KENNETH SHARPE, PRACTICAL WISDOM 116 (2010).

30. MACINTYRE, *supra* note 2, at 4.

31. *Id.* at 11.

32. *Id.* at 11-12.

33. *See* Irwin A. Horowitz et al., *Jury Nullification: Legal and Psychological Perspectives*, 66 BROOK. L. REV. 1207, 1209 (2001).

telos, a standard of excellence emerges that can be understood by all practitioners. Without the language of a practice, the link between the means and ends of an activity can be easily severed and manipulated to suit other objectives.[34]

In the case of jury service as a practice, the impersonal criteria for nullification can only emerge through sustained discussion of the prescribed means of action, the nature of excluded concerns, and the various meanings of a just verdict—the telos of the practice. The impersonal criteria may then include the presence of compelling reasons to find the defendant not guilty in light of the ideals for democratic life to which jurors subscribe. Jurors do not need to believe that the verdict offered once should be the same in every similar case, but they should be confident that the decision to nullify is consistent with the standards of excellence for jurors, not political power or self-interest.[35] This requires repeated conversations over time with varying contexts for nullification and the ability to discern the relevant legal principles and personal virtues in each one. Still, one area where the expectations of a practice seem to diverge from jury service is in the repeated nature of the activity. One cannot play chess or football well if one does it once in a lifetime, or even once every five years. The complex nature of the undertaking that constitutive of MacIntyre's definition of a practice requires time and repeated effort to develop, understand, and master.[36] The practical wisdom necessary for excellence in a practice comes from learning from the variety of outcomes that are possible and considering what aspects of a situation one might have missed in predicting those outcomes. None of this is possible with jury service as it is currently understood, but there are opportunities for much greater engagement with jury service through schools and community organizations, as will be addressed below.

A. On Jury Departures from the Rule of Law

The 1973 work by Kadish and Kadish on judicial discretion still remains influential, and their analysis has much in common with the idea of legal judgment as a practice.[37] Their emphasis on defining the distinctive role that different actors occupy in the legal world is critical to their framework for understanding when an actor may go beyond prescribed

34. MACINTYRE, *supra* note 2, at Ch. 5.

35. *See* Sherman J. Clark, *The Courage of Our Convictions*, 97 MICH. L. REV. 2381, 2434-35 (1999).

36. MACINTYRE, *supra* note 2, at 187.

37. *See* MORTIMER R. KADISH & SANFORD H. KADISH, DISCRETION TO DISOBEY: A STUDY OF LAWFUL DEPARTURES FROM LEGAL RULES 73 (1973).

means in order to achieve the ends (telos) of the role.[38] Each actor in the legal process must determine (1) the specific task his role is designed to accomplish, (2) the role's function in the larger institution, and (3) the commitment to norms that transcend any institutionalized.[39] Examining the specific task each role is designed to accomplish and understanding it in relation to the larger institution of the justice system is their way of defining the telos of the practice and highlighting the powers jurors, for example, have in relation to judges, police officers, etc. Once the purpose and context of the role are established, the next task is to consider the prescribed means for the task and its relation to the prescribed end of the activity. In thinking about departures from prescribed means for performing one's roles, they use the language of *legitimate interposition* in order to highlight how the agent "legitimates the interposition between the rule and his action of his own judgment that departure from the rule best serves the prescribed end."[40] The legitimacy of the intervention depends on the proper understanding of the ends of the role in light of the concerns that must be necessarily excluded in making such a judgment (e.g., favoritism, bias, or self-enrichment). Kadish and Kadish dismiss an approach to jury nullification that tries to demarcate exactly when it is legitimate and when it is not, instead expecting jurors to understand themselves to be involved in something more like a practice, an activity that can only be understood in relation to the range of possible action and the distinctive ends of the role.[41] Perhaps the most important aspect that emerges from both the idea of jury service as a practice and the role-based framework offered by Kadish and Kadish is the context it provides for understanding jurors obligations to the rule of law while considering the value of nullification. To say, on the one hand, that jurors should not aspire to fairness and equality under the law would threaten the integrity of the entire process; on the other hand, to say that it can never be questioned or challenged would threaten the ultimate function, or telos, of the jury. This middle ground of respect and adherence to the law and an appreciation that the role of the jury is to determine when law and justice might diverge and act in accordance with the telos of the institution is what must be cultivated in the education of jurors.

38. For another look at role morality, see generally ARTHUR ISAK APPLBAUM, ETHICS FOR ADVERSARIES: THE MORALITY OF ROLES IN PUBLIC AND PROFESSIONAL LIFE (1999).

39. *See* KADISH & KADISH, *supra* note 37, at 18-20.

40. *Id.* at 67.

41. *Id.* at 18-19.

B. On the Education of Jurors

For potential jurors to understand the function of the jury, its prescribed means, and the possibilities of departure for these ends, requires more than a short video in the courthouse before jury selection.[42] It is a topic that can be introduced in primary education, reinforced with greater attention to the complexity of the task in high school and college and then revisited though community education.[43] The civic education required for jurors could include discussion of the relationship between justice and legal decision-making as distinct from other types of civic involvement, even involvement on legal issues. For example, when high school or college students learn about drug policy changes, they should examine the issue from a variety of perspectives, including as an elected official, an anti-prison activist, a family member of a drug offender, and a juror in a specific case. Each role requires a different set of considerations, including the demands of justice (in its many definitions), political expediency and ideals, policy, and medical treatment. Only by disaggregating the many different issues that come up with the complex issues of crime in society can citizens start to see what is distinctive about each role and develop familiarity with the practice of jury service. They can also begin to see how one can inhabit different positions yet still be motivated by the desire to be fair and enact justice to the best extent possible. One does not have to hold the same position across all roles.

Social movement participants as well as political campaigns could publicize the responsibility of jury service and draw attention to community workshops. I have attended one such workshop at the Urban League in New Orleans. William Snowden, a former public defender and the founder of the "Juror Project," led the workshop and, over the course of an hour, spoke about the jury selection process, the benefits of a diverse jury, and important court cases affirming the importance of the jury as a democratic institution.[44] He conducted mock voir dire interviews, giving participants a chance to see how their responses to attorneys and judges might be understood. Based on the questions participants asked at the end of the session, they seemed to be convinced of the responsibility they had to serve as jurors and wanted to spread the word to their friends and families. Snowden did not talk about nullification during the workshop and gave no indication

42. BURNS, *supra* note 12, at 5.

43. *See generally* Sara G. Gordon, *What Jurors Want to Know: Motivating Juror Cognition to Increase Legal Knowledge & Improve Decisionmaking*, 81 TENN. L. REV. 751 (2014).

44. For more information, see www.thejurorproject.org [https://perma.cc/R8MZ-MX9N].

of the value of departures in the sense Kadish and Kadish discuss.[45] The decision to omit such a discussion seemed both principled and strategic: As a defense attorney, he appeared to feel that diverse juries who could assess the evidence in an unbiased way would be a significant step in the direction of justice, leaving aside the question of nullification. Strategically, given that the workshops were already raising concern with local prosecutors who considered them to unfairly bias potential jurors, he did not want to draw further attention to himself by addressing the question of nullification within the sessions.[46] His decisions further support the idea that even for those most committed to ideologically and racially diverse juries, some aspects of jury power are too provocative for casual discussion.

As a former prosecutor in Washington D.C., Paul Butler saw Black jurors issuing not-guilty verdicts in certain drug crimes where there was substantial opposing evidence.[47] He found that these not guilty verdicts, likely nullification verdicts, were only issued when the offense was a non-violent crime that did not involve selling drugs to children.[48] Butler's analysis was that the jurors who voted against conviction in these cases did not think that removing the defendant from his community was the best response to the charge.[49] The considerations of violence and the impact on children that jurors took into account gave Butler a sense that jurors could be discerning with the tool of nullification even if they have not been formally taught about it, but that it would be advantageous to expand learning about nullification. In this way, he saw that these jurors had an emergent understanding of the telos of jury service and the use of both prescribed means and departures from it as a way to achieve this telos.[50] He coined the term, "MLK jurors," to capture this method of following a rigorous set of standards before committing to a nullification verdict, akin to the standards for nonviolent resistance as practiced by Dr. Martin Luther King, Jr.[51] The reference to Dr. King can also be seen as using the standards of civil disobedience as a shorthand for the standards of the practice of jury service, highlighting the principles that should guide these types of civic engagement. In his discussion of the guidelines for MLK jurors, he discusses the

45. *See* KADISH & KADISH, *supra* note 37, at 10.

46. These observations are based on conversations with William Snowden in March 2018.

47. Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 678 (1995).

48. Shari Collins-Chobanian, *Analysis of Paul Butler's Race-Based Jury Nullification and His Call to Black Jurors and the African American Community*, 39 J. BLACK STUD. 508, 508 (2009).

49. Butler, *supra* note 47, at 679.

50. *Id.* at 689-93.

51. PAUL BUTLER, LET'S GET FREE: A HIP-HOP THEORY OF JUSTICE (2009).

appropriateness of conviction for those who have committed murder or rape, distinguishing his argument for one that uses nullification as a way to stop punishment altogether.[52] Furthermore, he suggests that MLK jurors who use strategic nullification "must engage in outside-the-courtroom interventions as well. They would be obligated to take some civic intervention in the name of public safety and criminal justice."[53] This connection between what jurors do in the courtroom and their involvement with legal questions outside gets close to the idea of jury service as a practice that overlaps with citizenship more broadly. It also speaks to the component of virtue that Aristotle understands to be central to practical wisdom.[54] To truly understand the telos of jury service requires that one sees the relationship between the actions of a jury and the opportunity to develop one's character in demanding ways. The experience of nullification, in particular, should reflect a more demanding grappling with the tensions between law and justice. Once one has considered the factors that are involved in a decision resulting in nullification, one is better prepared, intellectually and ethically, to be involved with everyday questions of safety and liberty.

II. NULLIFICATION IN THE COURTS

Understanding nullification within the practice of jury service contextualizes the action in helpful ways that illuminate how jurors should think of their task. Yet, it seems nearly impossible for the court to take up this way of understanding it because the debate remains fixed on what jurors *should be told in the courtroom* about the power to nullify.[55] That juries have the power to decide on the facts of the case as well as the law is often presented as a type of open secret, which is both obvious to anyone who cares to pay attention and a highly volatile power to be obfuscated and mired in ambiguity. When the court continues to maintain a high level of secrecy around nullification through punishing those who distribute pamphlets about it near the courthouse, for example, it assumes that the status quo level of education and awareness about the jury is optimal.[56] Such a position fails to consider how the consideration of jury service as a practice with its own internal goods and standards of excellence may, in fact, be the

52. *Id.* at 72-73.

53. *Id.* at 74.

54. *See* ARISTOTLE, NICOMACHEAN ETHICS, *supra* note 4, at Book I, Ch. 9.

55. CONRAD, *supra* note 1, at 11; Aaron McKnight, *Jury Nullification as a Tool to Balance the Demands of Law and Justice*, 2013 B.Y.U. L. REV. 1103, 1103 (2014).

56. Brody, *supra* note 1, at 92; Roger Roots, *The Rise and Fall of the American Jury*, 8 SETON HALL CIRCUIT REV. 1, 31-32 (2011).

best way to achieve the type of considered judgment that motivates both defenders and skeptics of jury nullification. In the following section, I turn to cases that represent the status of nullification in the courts to show how assumptions about notification is the key question that undermines considerations of jury service as a practice.

The case of the recalcitrant jury who refused to convict William Penn in his 1670 trial remains the test case for the limits of jury independence and the foundation for all future claims of the power of a jury to nullify.[57] The decision in the case maintained that jurors cannot be punished for their verdict and a not guilty verdict rendered by a jury, however unpopular, must stand.[58] Yet, the 1895 Supreme Court decision in *Sparf and Hansen v. United States* amended that power by stating that a jury need not be explicitly told about its powers and has since been the precedent that has governed decisions regarding the education of jurors on the topic.[59] A 2018 case in California is a vivid example of how the court acknowledges it cannot outright ban certain references to nullification in the context of a jury charge, but it is not interested in how the power might be effectively communicated to the jury. In *United States v. Kleinman*, a case involving the operator of a medical marijuana dispensary, the Court of Appeals for the Ninth Circuit found that the jury charge offered by the judge went too far in suggesting that jury nullification was an illegitimate action of the jury in the following charge:

> You cannot substitute your sense of justice, whatever that means, for your duty to follow the law, whether you agree with it or not. It is not for you to determine whether the law is just or whether the law is unjust. That cannot be your task. *There is no such thing as valid jury nullification[.] You would violate your oath and the law if you willfully brought a verdict contrary to the law given to you in this case.* [60]

Upon review of the charge, the court found that the first three lines of the following charge were acceptable, but the last two italicized here were not. However, they reasoned that while the wording in the last two lines was too strong and erroneously portrays nullification as unacceptable, it is not the type of error that warrants a reversal. The opinion goes on to read, "[B]ecause there is no right to jury nullification, the error is harmless."[61] The decision makes clear that while a judge cannot prohibit nullification

57. *Andrew Murphy, Trial Transcript as Political Theory: Principles and Performance in the Penn-Mead Case*, 41 POL. THEORY 775, 776 (2013).

58. VIDMAR & HANS, *supra* note 10, at 29.

59. 156 U.S. 51, 64-65 (1895).

60. United States v. Kleinman, 880 F.3d 1020, 1031 (9th Cir. 2017) (emphasis added).

61. *Id.* at 1041.

explicitly, the court is not at all concerned about jurors developing a nuanced sense of the larger goals of the task of judgement. Moreover, there is not the belief, as described above, that jurors who have an understanding of nullification are in fact more familiar with the telos of their function and this familiarity would be beneficial in cases far beyond those where nullification is an active consideration. I would argue that ¨substituting one´s sense of justice¨ may, in fact, be consistent with the ends and purpose of the jury, but this would require a juror to have a more thorough understanding of the task and the intellectual virtue of impartial judgment. Out of context, the previous lines, acceptable to the court in this case, would also be misleading to the jury. The charge as excerpted above aims to enforce the idea that jurors must only decide on the facts of the case, not the justness of the law, and the court found this to be an acceptable distinction in the charge above. The subtle differences between the meaning of the lines that were acceptable the court from those that were unacceptable would be far less significant if the jurors came in with an understanding of their range of powers and the ways in which nullification could be misused. The charge would act as a reminder of both the telos of jury service and excluded factors but would not bear the weight of alerting jurors to this aspect of their power.

Although I am critical of the court's focus on the language of the jury charge in *United States v. Kleinman* and the cases discussed below, the court is not wrong to be worried about giving jurors the wrong impression about nullification. The concept demands more sustained attention as part of the civic education of jurors, a responsibility that is outside of the court's jurisdiction. Yet the fear of educating jurors about their power of nullification has led to a broader fear of educating the jury about the work of judgement as a practice, one with obligations and standards that must be developed and scrutinized over time. Fearing the overuse of nullification, the courts' perception of the nature and extent of the education of jurors has become overly rudimentary. Currently, both the court and the broader society do not treat jury service as a practice worthy of greater consideration. An examination of how the court has understood the nature of jury education in *United States v. Dougherty* and *United States v. Spock* stands in sharp contrast to conception of jury service as practice described above.

In the case of *United States v. Dougherty*, the Court of Appeals for the D.C. circuit considered whether the jury for the "D.C. Nine," who were charged with breaking and entering Dow Chemical Company as a protest against their manufacturing involvement in the Vietnam War, should have

been alerted of their option to nullify.[62] The court was sympathetic to the claim that the defendants were not given the opportunity for self-representation to which they were entitled (a separate basis for appeal), but on the question of whether the jury should have been told about their power to nullify, the court found that the trial judge had not erred in omitting the reference.[63] The majority opinion explicated the important role of nullification in the history of the legal system, including references to its pivotal function during the American founding, but ultimately did not see this history as leading to a mandate for the jury to be notified about nullification. Surprisingly, their decision conveys a hope in the broader education of jurors that I advocate for here, but wrongly suggests that it is already being achieved. The opinion is worth quoting at length:

> The way the jury operates may be radically altered if there is alteration in the way it is told to operate. The jury knows well enough that its prerogative is not limited to the choices articulated in the formal instructions of the court. The jury gets its understanding as to the arrangements in the legal system from more than one voice. There is the formal communication from the judge. There is the informal communication from the total culture-literature (novel, drama, film, and television); current comment (newspapers, magazines and television); conversation; and, of course, history and tradition. The totality of input generally convey adequately enough the idea of prerogative, of freedom in an occasional case to depart from what the judge says. Even indicators that would on their face seem too weak to notice—like the fact that the judge tells the jury it must acquit (in case of reasonable doubt) but never tells the jury in so many words that it must convict-are a meaningful part of the jury's total input. Law is a system, and it is also a language, with secondary meanings that may be unrecorded yet are part of its life.[64]

This is a remarkable set of observations about the education that the judges assume jurors are currently getting; and what they know "well enough" without the court taking responsibility for educating jurors in the full range of their prescribed means. They also acknowledge that a somewhat rigorous education is necessary to understand law as a "system" and to read the subtext of explanations of the reasonable doubt standard for example, but they do not consider themselves to be responsible for ensuring that this education is provided.[65] Still, analogous to any other complex system, a juror must have familiarity and a robust sense of norms of the practice to understand what is unspoken, especially in the charged and for-

62. United States v. Dougherty, 473 F.2d 1113, 1130-31 (D.C. Cir. 1972).
63. *Id.* at 1128-29, 1136-37.
64. *Id.* at 1135.
65. *Id.*

mal environment of the courtroom and the judge's instructions to the jury. Yet it is this realm of the unspoken that the court in *United States v. Dougherty* would like to leave the power to nullify. This is an unusual line of thinking given how much of courtroom procedure is counterintuitive (being told to strike something from the record, for example) and how sternly jurors are told not to do outside research on the case. However, the excerpt above suggests that jurors will retain, and be able to act on, other information they gathered about their role from "current comment (newspapers, magazines and television)" in an ambient manner. Later, the majority also expresses fears about thinking about jurors as ¨mini-legislators" who would be paralyzed by their power to decide on the law, a fear that is based in jurors' perceived confusion about the nature of their role.[66] If jury service had its own standards of excellence that were known and discussed in many fora, there would not be any confusion between juries and mini-legislatures because the ends, constraints, and means of jurors as opposed to elected legislators would be understood. Furthermore, the opinion is marked by deep ambivalence about what civic education for jurors entails and should become—the majority seems to fear their own idealism about the practice of jury service. The opinion concedes that being a juror requires much more training and time for reflection than is possible in the courtroom, but they are not particularly concerned about ensuring the jurors receive this. Moreover, they are naïve about the impact of judicial instruction on a jury. The judge is the authority in the courtroom and the one who has the power to hold jurors in contempt. Jurors must heed this voice above all others. The power to depart from the judge's instruction, even in rare circumstances, requires focused education in the practice of jury service.

In his dissent, Justice Bazelon is critical of what he calls a "deliberate lack of candor" in the court's discussion of jury power.[67] He writes, "Nullification is not a 'defense' recognized by law, but rather a mechanism that permits a jury, as community conscience, to disregard the strict requirements of law where it finds that those requirements cannot justly be applied in a particular case."[68] In this interpretation, he diverges from the majority with his suggestion that the trial judge´s instruction effectively closed off a consideration of "community concepts of blameworthiness," a fundamental aspect of jury deliberation.[69] Bazelon is also skeptical of the anarchy which the majority worried would ensue with change in the notification to jurors.

66. *Id.* at 1136.
67. *Id.* at 1139 (Bazelon, C.J., concurring in part and dissenting in part).
68. *Id.* at 1140.
69. *Id.*

In contrast to the preference for spontaneous nullification conceded by the majority, Bazelon makes an argument much more in line with the notion of a practice when he says the following:

> The juror motivated by prejudice seems to me more likely to make spontaneous use of the power to nullify, and more likely to disregard the judge's exposition of the normally controlling legal standards. The conscientious juror, who could make a careful effort to consider the blameworthiness of the defendant's action in light of prevailing community values, is the one most likely to obey the judge's admonition that the jury enforce strict principles of law.[70]

Bazelon trusts the juror to be conscientious even when considering concepts that requires considerations beyond the letter of the law. Moreover, knowledge about nullification does not need to be left to chance and personality in the jury pool; it can be cultivated over time. Arguing a case before a jury that is aware of their power to nullify is the proper way to adjudicate a crime such as the destruction of property at Dow Chemical. A clearer understanding of jury service as a practice that requires education over time would not only help jurors see the different dimensions of such a case, but it would also give citizens paying attention to the verdict important information about the legitimacy of the law and the courts. In order to maintain the standards of excellence of jury service, there should be open discussion of verdicts by the public, including discussion of the uses and abuses of nullification. Justice Bazelon says, in a way that is resonant with the Camden 28 decision discussed below, as follows:

> If revulsion against the war in Southeast Asia has reached a point where a jury would be unwilling to convict a defendant for commission of the acts alleged here, we would be far better advised to ponder the implications of that result than to spend our time devising stratagems which let us pretend that the power of nullification does not even exist."[71]

When the standards of the practice of jury service are understood and internalized, a nullification decision can become more informative than if it were a secret because the verdict is a better marker of what jurors want to convey. In an environment where everyone understands the telos of the jury and the means for achieving it, the public is also more able to react to the verdict (while respecting the confidentiality of the deliberation) and what it may indicate about the perceived integrity of the prosecution, the law, or other salient issues.

70. *Id.* at 1141.
71. *Id.* at 1144.

The appellate justices in the case of *United States v. Spock* were more attuned to the inherent power dynamic present between judge and jury, and saw the need to protect the jury's ability to be independent and offer the verdict they deemed appropriate.[72] In the 1969 case, Dr. Benjamin Spock and three others were on trial for aiding and abetting the evasion of the draft. The defense's case had rested on First Amendment protections of free speech, but they were found guilty by a Boston jury who had been told by the judge that the case was "not trying the legality, morality or constitutionality of the war in Vietnam, or the rights of a citizen to protest."[73] The grounds for the appeal rested in part on the judge's decision to give the jury a special verdict, ten questions that referred to different aspects of the law in question and the strength of the evidence, which were to be answered yes or no by the jurors as part of their verdict. The defense claimed that the questions acted as stepping stones for a path to a guilty verdict. For example, the first question read: "Does the Jury find beyond a reasonable doubt that defendants unlawfully, knowingly and willfully conspired to counsel Selective Service registrants to knowingly and willfully refuse and evade service in the armed forces of the United States in violation of Section 12 of the Military Selective Service Act of 1967?"[74] The defense further claimed that the questions reinforced the idea that a not guilty verdict could only emerge from a failure of the evidence to persuade beyond a reasonable doubt, thereby eliminating consideration of a not guilty verdict for other reasons (i.e., nullification). The court agreed with the defense in their ruling, finding that the inclusion of the special verdict serves to efface the decisive moment where a jury must decide whether guilt in relation to the evidence should result in a general verdict of guilt. We see the First Circuit's vigorous defense of the independence of the jury in the following excerpt:

> In a criminal case a court may not order the jury to return a verdict of guilty, no matter how overwhelming the evidence of guilt . . . In the exercise of its functions not only must the jury be free from direct control in its verdict, but it must be free from judicial pressure, both contemporaneous and subsequent.[75]

Here, the court is not comfortable relying solely on procedural protections of the jury from undue pressure from counsel and the court but indi-

72. *See generally* United States v. Spock, 416 F.2d 165 (1st Cir. 1969).

73. *Id.*; John H. Fenton, *Dr. Spock Guilty With 3 Other Men in Antidraft Plot*, N.Y. TIMES (June 15, 1968), https://archive.nytimes.com/www.nytimes.com/books/98/05/17/specials/spock-guilty.html [https://perma.cc/9Y3M-M65Q].

74. *Spock*, 416 F.2d at 180.

75. *Id.* at 180-81.

cates a willingness to look at the many ways pressure may be exerted on the jury's verdict, even in subtle forms, and uphold its right to an independent decision. While post-hoc decisions such as this one that affirm the power to nullify are important, and it is worth noting that the decision here goes much further than the decisions in *United States v. Kleinman* and *United States v. Dougherty* in ensuring that the function of the jury is protected, inculcating in jurors a better understanding of the standards of the task before they reach the courtroom could further this goal.

The debate in the courts about the exact terms used to discuss nullification has led proponents of education around nullification to develop their own versions of the jury charge. Andrew Ferguson has suggested that jury instructions are a place of constitutional education where jurors develop a broader understanding about the many ways that juries are critical to the fairness of the legal system and with such an expanded discussion, even without mentioning it by name, the concept of nullification would become salient to jurors.[76] Another proponent of greater juror education, David Brody, has formulated the following charge as a way to communicate to the jury the essential contours of their task:

> While it is proper and advisable for you to follow the law as I give it, you are not required to do so. You must, however, keep in mind that we are a nation governed by laws. Refusal to follow the court's instructions as to the elements of the crime(s) charged should occur only in an extraordinary case. Unless finding the defendant guilty is repugnant to your sense of justice, you should follow the instruction on the law as given to you by the court. You must also keep in mind that you may not find the defendant guilty unless the State has established guilt beyond a reasonable doubt as it was defined previously in these instructions.[77]

Here, Brody is providing an account of the dominant task of a jury and what a jury in the context of a "nation governed by laws" is and then presenting an exceptional circumstance, a guilty verdict "repugnant" to the jurors' sense of justice. With this scenario, Brody is providing one path to nullification while also communicating the gravity of the law and the jurors' responsibility to it. In many ways the charge is using tone, one that is measured and cautious, to convey an intellectual orientation to the practice of nullification. The charge also re-asserts the explicit authority of the judge after opening up the possibility of nullification with the sentence that begins, "You must also keep in mind . . .".[78] This back and forth between

76. Andrew Guthrie Ferguson, *Jury Instructions as Constitutional Education*, 84 UNIV. COLO. L. REV. 233, 235 (2013).

77. Brody, *supra* note 1, at 121.

78. *Id.*

the authority of the judge and jury is also meant to convey the different considerations that must be balanced when deliberating about the verdict. With this charge, Brody is offering to jurors in a nutshell the set of concerns that should govern their deliberations. This nutshell quality, however, may in fact distort the work of judgment in a way that is desirable neither for those who want greater education around nullification nor those who do not. It is too short to teach and too long to ignore. The charge also resorts to the shorthand of emotional response because a full consideration of the potential misuses of nullification is not possible. "Repugnance" has a visceral quality that suggests that a juror should use moral outrage as a way to gauge whether a not guilty verdict is the appropriate response, rather than a consideration of set of factors that can be discussed and debated in the same manner as other legal questions. The language of repugnance thus seems to invite excluded prejudices in (that may be intertwined with moral outrage) without a context for examining them. Moreover, the language of the extraordinary case, while effective in establishing a tone of caution, detracts from a full consideration of the telos of the jury and a consideration of standards intrinsic to the practice. The attempt to communicate the broader function of the jury in a short jury charge is admirable and may realistically be the best hope today for informing jurors about their power, but it cannot fully convey what is required for excellence in the practice.

A. The Jury and the Camden 28

Given that the model of jury service as a practice may seem far too ambitious to achieve, is it possible that the best we can hope for is the type of cultural education that the majority described in *United States v. Dougherty*? I turn now to the case of the Camden 28 as an example of a jury that received education about nullification from a variety of sources in the context of a lively public debate about the failure of state institutions to fulfil their roles.[79] While we cannot say that the Camden 28 jurors were given the repeated exposure, education, and knowledge about standards of excellence before the trial that would be consistent with a practice, they may have come closer to the type of knowledge gained with a practice than jurors in almost any other case.

On August 22, 1971, a group of twenty-eight anti-war activists, including two Catholic priests and a Protestant minister, broke into the draft

79. *See* THE CAMDEN 28 (Anthony Giacchino 2006); Lynne Williams, *Anti-War Protestors and Civil Disobedience: A Tale of Two Juries*, 26 JURY EXPERT 1, 22 (Nov. 2014). I also conducted research at the Swarthmore College Peace Collection which houses the Camden 28 archives and includes interviews with jurors, documents from the defense team, and media coverage of the case.

board office located on the fifth floor of the federal building in Camden, New Jersey.[80] They attempted to destroy the paper records of all class 1-A draft registrants who had been cleared for unrestricted military service, but the action was foiled when they were caught by FBI agents, who had been alerted to the plan by an informant active in the group.[81] Arrested and indicted, seventeen participants were charged with seven felonies, including the destruction of government property and interfering with the Selective Service system.[82] The trial was unusual in several ways, including the fact that several of the defendants represented themselves and that the informant, Tom Hardy, testified for the defense instead of cooperating with the prosecution. Furthermore, testimony about the history of the jury in America was part of the trial in a remarkable way.

According to defense attorney David Kairys (who worked alongside those defendants engaging in self-representation), the independence of the jury and jury nullification animated the defense team from the very beginning.[83] Yet, as evident in the case of the Dow Chemical plant break-in above, juries had not been sympathetic to acts of theft and destruction tied to anti-war sentiment. Still, Kairys commissioned his assistant to put together a memo on jury nullification that was circulated among the defendants, and there was ongoing discussion about how to frame the actions of the group.[84] In addition to references to the military action in Vietnam, including those against civilians, the defense strategy was to also include criticisms of Camden's urban renewal policies that hurt its most vulnerable residents as examples of the failure of government in both local and international affairs.[85] When called to the stand by the defense, Howard Zinn, the populist historian, talked about the role colonial juries played in marking a separation from England and the important role of nullification before the civil war when northern juries refused to convict runway slaves.[86] The

80. I was introduced to the case through the documentary, "The Camden 28" made by Anthony Giacchino, who also gave me permission to look at his research for the film. THE CAMDEN 28, *supra* note 79.

81. Donald Janson, *Camden 28 Jury Asks Re-Reading*, N.Y. TIMES, May 19, 1973, at 78, https://www.nytimes.com/1973/05/19/archives/camden-28-jury-asks-rereading-hears-again-what-informer-for.html?auth=link-dismiss-google1tap [https://perma.cc/MH3T-FMRM].

82. *Id.*

83. Transcript of Interview by Anthony Giacchino with David Kairys (2004) (on file with the Swarthmore College Peace Collection, Box: DG 235: 1).

84. Memorandum from the Camden 28 Defense Team on Jury Nullification (1st Draft) (1973) (on file with the Swarthmore College Peace Collection, Box DG235.5).

85. THE CAMDEN 28, *supra* note 79; Donald Janson, *17 of Camden 28 Found Not Guilty*, N.Y. TIMES, May 21, 1973, at 1, https://www.nytimes.com/1973/05/21/archives/17-of-camden-28-found-not-guilty-admitted-draftoffice-raidboth.html [https://perma.cc/T2CC-9K69].

86. Transcript of Interview by Anthony Giacchino with Howard Zinn (2004) (on file with the Swarthmore College Peace Collection, Box DG235.2).

jury was again reminded of the storied history of the institution of the jury in David Kairys' closing arguments.[87] The repeated references to the jury's previous standing in the American legal process served as a type of ongoing civic education and helped jurors makes the distinction between its telos as an institution and obedience to the letter of the law. Another way jury independence and, by extension the distinctive telos of the jury, was conveyed to the jurors was in the emphasis on the fact that the jury verdict could not be overturned or second-guessed by other officials. The jurors were well-aware of the media coverage of the trial and knew that their decision would be closely scrutinized in the media, but they did not seem to be worried about making the "wrong" decision.[88]

The judge, Clarkson Fisher, also seemed to be attuned to the dialectic of thought that would aide jurors in thinking about nullification. At times, he sustained objections made by the prosecution rebuking comments by the defense team about the jury's power. On the topic of nullification, he even went so far as to say, "[Juries] do it but they are not supposed to do it."[89] Yet, at other points in the trial, including in the testimony of Zinn and in the closing statement of David Kairys, he allowed extended discussion of the importance of jury independence and he allowed the jurors to consider their actions in light of a long tradition. Judge Fisher made clear that nullification was not be considered lightly and even more forcefully said that the legitimacy of the war in Vietnam should not be the determining factor in the verdict.[90] Yet, he was open to drawing attention to the questionable methods used by the prosecution in their employment of Tom Hardy, one of the participants in the group, as an informant.

Considering the practice of jury service in relation to its ends throughout the trial also primed the jurors to be receptive to the argument made by the defense that the government went "too far" in the methods it used leading up to the break-in. When the informant Tom Hardy testified on behalf of the defense, he emphasized how much monetary and logistical assistance he provided to the group, supported by the FBI.[91] In a striking visual display, the jury was able to see all of the equipment purchased by the FBI for the break-in laid out on a table in the courtroom, and it was clear then that

87. Transcript of Interview by Anthony Giacchino with David Kairys, *supra* note 83.

88. Search for Jury Members (2002-2003), (on file with the Swarthmore College Peace Collection, Box:DG 235:1).

89. Camden 28 Trial: Miscellaneous Documents, (on file with the Swarthmore College Peace Collection, Box: DG 235:5) [hereinafter Miscellaneous Documents].

90. THE CAMDEN 28, *supra* note 79.

91. *Id.*

the crime would have been impossible to execute without it.[92] Hardy also conveyed that he was told that the participants would be arrested during a practice run of the action, not after the break-in itself, incurring far less punishment, if any at all.[93] When this early interception did not happen because of a directive from the White House, Hardy felt that the deal he made with the FBI had been undermined and this contributed to his decision to testify for the defense. When filmmaker Anthony Giacchino interviewed jurors in 2002 about their reasons for a Not Guilty verdict, all five jurors he was able to contact thought Hardy's experience and the FBI's involvement were important reasons for the verdict.[94] The 1973 Supreme Court decision in *United States v. Russell* about the limits of the government's ability to "manufacture crime" granted legitimacy to considering the role of entrapment in the break-in.[95] The issue of FBI misconduct was on the minds of the jurors as seen in a question one of the jurors, Samuel Braithwaite, sent to the judge (as was allowed in the case) for the witness Phillip Berrigan, a Catholic anti-war activist and priest.[96] Braithwaite asked, "If the government punishes people who break the law, who is there to punish the government when the government breaks the law?"[97] Allowing the question, Judge Fisher suggested that he was open to hearing critiques of the FBI in this case because of the Supreme Court ruling and later agreed to include language about the overreaching state in his charge to the jury.[98]

Jury deliberation lasted three days, and the jurors asked for a re-reading of Hardy's testimony as well as those of the two FBI agents who testified. Jurors reported heated discussion of the breaking and entering component of the charge. They all went to mass together at a Catholic church.[99] Based on notes by attorney David Kairys's newspaper clippings, and Giacchino's interviews, it seems that the jurors in the Camden 28 case had a sense of the broader ends of the jury in way that is necessary for the account of the practice of jury service given here.[100] This understanding did not rely heavily on the jury charge, rather it came from jurors being ex-

92. *Id.*
93. Miscellaneous Documents, *supra* note 89.
94. Search for Jury Members (2002-2003), *supra* note 88.
95. United States v. Russell, 411 U.S. 423, 427-29, 436 (1973).
96. Camden 28: Chronology of Trial, Opening Statements, (on file with the Swarthmore College Peace Collection, Box:235:5).
97. *Id.*
98. *Id.*
99. Miscellaneous Documents, *supra* note 89.
100. Transcript of Interview by Anthony Giacchino with David Kairys, *supra* note 83.

posed to multiple accounts of the function of the jury and the variety of interventions it had made in the history of the United States. The nature of the trial and of the issues raised by the use of an informant put the question of citizenship at the fore, giving jurors an opportunity to consider the role and telos of the jury in relationship to the other roles in the courtroom. Consistent with Kadish and Kadish's justification of the "discretion to disobey," they were able to take into account the prescribed means for jury action, the constraints on what they could consider in their role, and the broader ends of jury service and ultimately offered a not guilty verdict.[101]

Moreover, the case of the Camden 28 exemplifies Kadish and Kadish's observation that shifts in the ecology of legal institutions affect agents' considerations of roles and ends.[102] The political context of the Vietnam war and urban renewal in Camden, and the riots by Black and Latinx residents against the police, called into question whether or not the government was truly acting in the service of the public good.[103] In this way, it was an unusual time where both officials and citizens had a reason to reconsider the ends of the roles of a police officer, city politician, and federal agent. Aspects of each of these roles had interfered with their ability to effectively achieve the ends of their role. Such a change in roles and role constraints reverberates across the ecological system. The Camden 28 jury can be understood as having a heightened sense of its own role within this shifting landscape and the education they received about how the history of jury aided in this process. The crime in question was itself commentary on the ends of the United States government in drafting young people for military service. That the defendants were willing to contest their expected legal roles as compliant citizens opened up a similar possibility for the jurors.

There are two areas where the education of the Camden 28 jurors was underdeveloped and reveals the need for a more systematic form of civic education in order to experience the benefits of a practice. The first is in the jurors' apparent lack of sustained attention to erroneous uses of nullification; that is, nullification based on prejudicial motives where the departure from the prescribed means was prompted by sentiments that should not influence the legal process. More pointedly, nullification decisions that convey callousness to the violence experienced by fellow citizens should be contended with as part of the process of juror education. Because of the sources of information about nullification, it seems unlikely that the Cam-

101. *See* KADISH & KADISH, *supra* note 37, at 11.
102. *Id.*
103. THE CAMDEN 28, *supra* note 79.

den 28 jurors would have been exposed to much of this information, though they may have thought about it in the context of their closed-door deliberations. The second area that must be enhanced for the sake of the practice are the standards of excellence jurors must develop for themselves as they engage with the function and prescribed means of the jury. The Aristotelian basis for the idea of a practice carries with it the hope of the improvement of character through the activity itself and the opportunities for growth and reflection it entails. This improvement requires scrutinizing the assumptions, contradictions, and biases one brings to the work of being a juror and is best developed over time. The jurors in the Camden 28 trial did not necessarily have to engage with these questions, though they likely appeared during deliberation. Moreover, the jurors in the Camden 28 case were presented with a group of defendants toward whom they may have been particularly sympathetic, but in developing a sense of the standards of excellence of the practice, they must also confront cases where they lack this sympathy. Considering jury service to be a practice entails not only a sophisticated understanding of the complexity of the endeavor, but of the individual virtues one must cultivate.

At this moment in American history, as in the early 1970's, the legal system is experiencing shifts in the ecology of political and legal institutions and their roles. With the Cliven Bundy case in Oregon, where a jury found the defendant not guilty of occupation of federal land, to cases of activists arrested during Black Lives Matter protests, politically motivated cases on both the right and the left are making their way to trial.[104] Juries are once again on the front lines of determining what crimes to punish when legal and political authority is questioned. Furthermore, investigation of bias within the legal system, including with policing, prison treatment, and treatment by judges, have led to greater reflection on the ends of each stage in the process and the professionals who are engaged in the corresponding practices. The role of juror is thus primed to be reconsidered as a practice, with renewed attention to the education required for it. Understanding jury service as a practice in the way described by MacIntyre allows for a break in the impasse that has settled into debates about nullification as a type of "nuclear option" in the legal literature and can contribute to jurors understanding their function in this transformed legal

104. Sam Levin & Lauren Dake, *Bundy Brothers Found Not Guilty of Conspiracy in Oregon Militia Standoff*, THE GUARDIAN (Oct. 27, 2016), https://www.theguardian.com/us-news/2016/oct/27/oregon-militia-standoff-bundy-brothers-not-guilty-trial#:~:text=A%20jury%20has%20found%20that,ranchers%20in%20the%20American%20west.; Vaidya Gullapalli, *Decades-Old Protections for Protesters Are in Jeopardy*, THE APPEAL (Dec. 11, 2019), https://theappeal.org/decades-old-protections-for-protesters-are-in-jeopardy/.

ecology. If we understand nullification as a practice rather than a secret that is to be revealed in the jury charge, we increase awareness of the standards of excellence for jury service, including interrogation of appropriate considerations and excluded concerns when considering the verdict. To achieve the status of a practice, there is a need for jury education in secondary school, college, and community organizations so that the telos of the jury, and the many skills that are necessary to achieve it, can be better understood. The circumstance of the Camden 28 case, including the nature of the crime, the use of an informant, the range of witnesses, and *pro se* representation by some of the defendants all served to spark in the jurors a heightened consideration of the telos of a jury. It is this sense of vitality and significance that all potential jurors should be aware of before they ever receive a jury summons.