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Ritter: Ritter: Your Lips Are Moving...but the Words Aren't Clear:
**Your Lips Are Moving . . . But the Words
Aren't Clear:¹ Dissecting the Presumption
that Jurors Understand Instructions**

Judith L. Ritter*

Do not those unintelligible words uttered by the judge in the presence of the jury resemble the talismanic words of Word-Magic?²

I. INTRODUCTION

For many years appellate courts in the United States have relied upon a presumption that jurors understand and follow a trial court's formal jury instructions.³ The judiciary's steadfast reliance on this premise frequently takes on an imperative tone. For instance, the Supreme Court has stated, "we adhere to the crucial assumption underlying our constitutional system of trial by jury that jurors carefully follow instructions."⁴ Because courts subscribe to the notion that questioning the validity of this presumption poses a threat to the survival of our system of justice, in all but a few exceptional situations, appellate courts are unreceptive to claims that jury instructions were incomprehensible.⁵

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1. John Lennon & Paul McCartney, *I'm Looking Through You*, on RUBBER SOUL (Capital EMI Records, Ltd. 1965).

2. JEROME FRANK, LAW AND THE MODERN MIND 181 (1930).

3. See, e.g., *Weeks v. Angelone*, 528 U.S. 225, 234 (2000); *Francis v. Franklin*, 471 U.S. 307, 324 (1985); *Parker v. Randolph*, 442 U.S. 62, 73 (1979), *abrogated by Cruz v. New York*, 481 U.S. 186 (1987); see *infra* notes 50-65 and accompanying text.

4. See *Francis*, 471 U.S. at 324; see also *Parker*, 442 U.S. at 76 n.7 (stating that "[t]he 'rule'—indeed, the premise upon which the system of jury trials functions under the American judicial system—is that juries can be trusted to follow the trial court's instructions"); *Opper v. United States*, 348 U.S. 84, 95 (1954) (noting that "[o]ur theory of trial relies upon the ability of a jury to follow instructions").

5. See, e.g., *Weeks*, 528 U.S. at 234; *Gacy v. Welborn*, 994 F.2d 305, 312 (7th Cir. 1993); see J. Alexander Tanford, *Law Reform by Courts, Legislatures, and Commissions Following Empirical Research on Jury Instructions*, 25 LAW & SOC'Y REV. 155, 157, 164-67 (1991); Peter Tiersma, *The Rocky Road to Legal Reform: Improving the Language of Jury Instructions*, 66 BROOK. L. REV. 1081, 1086-99 (2001). See generally J. Alexander Tanford, *The Limits of a Scientific Jurisprudence: The Supreme Court and Psychology*, 66 IND. L.J. 137, 144-50 (1990) (exploring the Court's reluctance to accept psychological research regarding juror behavior).

The presumption that delivered instructions are actually understood by jurors is curious; it is not supported by an adequate foundation. It cannot be supported by historical experience.⁶ Empirical data directly refute it.⁷ And, given the legalistic wording of most jury instructions,⁸ common sense would suggest that the presumption ought to be that lay persons would have great difficulty in understanding them.⁹

This Article examines and questions the jurisprudence that turns a blind eye to evidence that the jury instruction presumption is ill-founded. While the presumption applies in any jury trial, this Article emphasizes the particular injustice associated with its application in criminal cases. Evidentiary presumptions¹⁰ in criminal cases are subject to the rigorous requirement that they reflect “accumulated common experience” both in the past and the present.¹¹ A presumption based upon anything less violates an accused’s right to due process of law.¹² Therefore, it is particularly troubling that in criminal cases, the presumption regarding the efficacy of crucial jury instructions remains baseless.

Part II of this Article traces and documents the judiciary’s stubborn adherence to the presumption that instructions are understood and followed.¹³ In this context, Part II first discusses the curious use of the terms “presumption” and “assumption” as if they were synonymous¹⁴ and then suggests that neither term is truly accurate.¹⁵ Part II then describes the extent to which the

6. See *infra* notes 143-73 and accompanying text.

7. See *infra* notes 191-212 and accompanying text.

8. See, e.g., AMIRAM ELWORK ET AL., MAKING JURY INSTRUCTIONS UNDERSTANDABLE 199 (1982) (containing instructions given to jury in Nevada murder trial defining express malice as “that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof”); see also Robert P. Charrow & Veda R. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 COLUM. L. REV. 1306, 1324 (1979) (describing the difficulty jurors have with legal terminology).

9. Ironically, I was summoned for jury duty while writing this Article. While waiting in the jury room I, along with other potential jurors, was asked to complete a short biographical questionnaire. The form was self-explanatory and quite simple, yet, we were shown a videotape in which a judge provided detailed, kindergarten-like instructions as to how to complete the questionnaire. I could not help noting that jurors were presumed to understand complex legal instructions, but were presumed not to understand how to complete the form. Unfortunately, but not surprisingly, I was not selected for a jury.

10. See *infra* notes 38-43 and accompanying text.

11. See *Barnes v. United States*, 412 U.S. 837, 844 (1973); see also *Tot v. United States*, 319 U.S. 463, 467 (1943).

12. See *infra* notes 173-74 and accompanying text.

13. See *infra* notes 50-65 and accompanying text.

14. See *infra* notes 28-34 and accompanying text.

15. See *infra* note 48 and accompanying text.

presumption dominates the judiciary's review of poorly drafted jury instructions¹⁶ and highlights the judicial view that the presumption is vital to the jury trial system.¹⁷ Part II also examines the nature of the presumption: whether it is analogous to evidentiary presumptions,¹⁸ whether it is rebuttable and by what means.¹⁹

Part III explores five possible bases for the jury instruction presumption: legal precedent, history, logic and rationality, empirical evidence, and policy. That Part reveals the lack of solid legal precedent for the presumption.²⁰ It also argues that the history and development of trial by jury offers no support.²¹ Additionally, Part III shows that the presumption satisfies neither rationality nor empirical tests.²² Finally, in Part III I argue that it is far less impractical than thought, and far more just to discard this presumption.²³

Part IV suggests that a new, well-grounded presumption about juries and instructions could someday replace the present one. Part IV argues that a proper presumption should only be adopted when new pattern instructions are drafted, redrafted perhaps and pass empirical testing.²⁴

Justice is not advanced by the judiciary's reliance on an unsupported and false presumption. Part V advocates suspending the presumption that jurors understand instructions²⁵ and urges the judiciary to recognize that the viability of the jury system is not dependent on the continuation of this unjustifiable premise.²⁶ At least until new and tested instructions become widely used, the presumption should not be used by courts as an excuse to ignore empirical evidence demonstrating that a particular instruction was most likely misunderstood. The Article concludes with an examination of the problem presented in the unique context of a death penalty trial and condemns the continued use of a jury instruction presumption that shields from scrutiny incomprehensible instructions given to juries in capital cases.²⁷

16. See *infra* notes 50-65 and accompanying text.

17. See *infra* notes 60-65 and accompanying text.

18. See *infra* notes 66-120 and accompanying text.

19. See *infra* notes 66-120 and accompanying text.

20. See *infra* notes 128-42 and accompanying text.

21. See *infra* notes 143-72 and accompanying text.

22. See *infra* notes 173-212 and accompanying text.

23. See *infra* notes 213-33 and accompanying text.

24. See *infra* notes 234-59 and accompanying text.

25. See *infra* notes 261-66 and accompanying text.

26. See *infra* notes 267-72 and accompanying text.

27. See *infra* notes 273-81 and accompanying text.

II. THE JURY INSTRUCTION PRESUMPTION

In this Article, the phrase “jury instruction presumption” is used to express the idea that our judicial system subscribes to a rule that takes for granted that jurors understand and follow instructions. Before considering the crucial question of whether such a notion has legal authority, or rational, historical or empirical bases, this Part explores the precise nature of the “presumption,” and how it is called into service by the courts.

A. “Presumption,” “Assumption” or Something Else?

When referring to the fundamental concept that jurors follow instructions, courts use the words “presumption” and “assumption” as though they were synonymous.²⁸ In its plurality opinion in *Parker v. Randolph*²⁹ the Supreme Court proclaimed that “[a] crucial *assumption* underlying [the] system [of trial by jury] is that juries will follow the instructions given them”³⁰ In *Weeks v. Angelone*³¹ the Court stated, “A jury is *presumed* to follow its instructions.”³² Within the same paragraph one might find both terms used as though they were entirely interchangeable. In its opinion in *United States v. Olano*³³ the Court recognized “the almost invariable *assumption* of the law that jurors follow their instructions,” citing for authority language in an earlier opinion explaining, “we *presum[e]* that jurors . . . follow the instructions given them.”³⁴

28. Compare *Francis v. Franklin*, 471 U.S. 307, 324 (1985), and *Parker v. Randolph*, 442 U.S. 62, 73 (1979), *abrogated by Cruz v. New York*, 481 U.S. 186 (1987), with *Weeks v. Angelone*, 528 U.S. 225, 234 (2000), *Gacy v. Welborn*, 994 F.2d 305, 313 (7th Cir. 1993), and *United States v. Brown*, 983 F.2d 201, 202 (11th Cir. 1993).

29. 442 U.S. 62 (1979), *abrogated by Cruz v. New York*, 481 U.S. 186 (1987).

30. *Id.* at 73 (emphasis added); see also *Yount v. Maddock*, No. 00-17432, 2002 U.S. App. LEXIS 17214 (9th Cir. Aug. 16, 2002); *United States v. Kahn*, 381 F.2d 824, 839 (7th Cir. 1967) (referring to “the assumption of the jury system that jurors understand and follow instructions on the law”).

31. 528 U.S. 225 (2000).

32. *Id.* at 234 (emphasis added); see also *United States v. Scheffer*, 523 U.S. 303, 336 (1998); *Zafiro v. United States*, 506 U.S. 534, 541 (1993); *Whitney v. Horn*, 280 F.3d 240, 257 (3d Cir. 2002); *United States v. Waldon*, 206 F.3d 597, 607 (6th Cir. 2000).

33. 507 U.S. 725 (1993).

34. *Id.* at 740 (alteration in original) (emphasis added); see also *Thomas v. Peters*, 48 F.3d 1000, 1009 (7th Cir. 1995) (Easterbrook, J., concurring) (supporting the presumption that jurors follow their instructions with reference to case holding that there is an assumption that they do).

In actuality, in both the legal and non-legal worlds, “presumption” and “assumption” have different meanings with varying consequences. Moreover, an examination of references to the jury instruction presumption and/or assumption suggests that neither term is appropriate.

Presumption, in the more or less non-legal sense, is “an attitude or belief dictated by probability [or] the ground, reason, or evidence lending probability to a belief.”³⁵ In law, the word “presumption,” often misused,³⁶ means “a legal inference or assumption that a fact exists, based on the known or proven existence of some other fact or group of facts.”³⁷ This might best be termed an “evidentiary presumption.”³⁸

Evidentiary presumptions are fairly common.³⁹ Simply put, a necessary fact may be presumed by the trier of fact upon sufficient proof of a related fact or set of facts.⁴⁰ Typically, a state⁴¹ or the federal legislature writes a presumption into

35. WEBSTER'S NEW COLLEGIATE DICTIONARY 932 (9th ed. 1983).

36. See generally Michael H. Graham, *Presumptions—More Than You Ever Wanted to Know and Yet Were Too Disinterested to Ask*, 17 CRIM. L. BULL. 431, 436 (1981) (highlighting the “general confusion” in presumption terminology); Charles V. Laughlin, *In Support of the Thayer Theory of Presumption*, 52 MICH. L. REV. 195, 195-209 (1953) (describing the various meanings attributed to the term “presumption”).

37. BLACK'S LAW DICTIONARY 1203 (7th ed. 1999).

38. Presumptions are utilized in both civil and criminal cases. In federal civil cases, their use is governed by Federal Rule of Evidence 301. See *infra* note 40. Though recommended by the Supreme Court, a proposed Rule 303 addressing the use of presumptions in criminal cases was not adopted by Congress. See *infra* note 176. The role of presumptions in criminal cases has been limited by several key Supreme Court decisions. See *Francis v. Franklin*, 471 U.S. 307, 318 (1985); *Sandstrom v. Montana*, 442 U.S. 510, 523 (1979); *County Court v. Allen*, 442 U.S. 140, 157-58 (1979); see also *infra* notes 40, 173-77 and accompanying text.

39. See generally Charles Collier, *The Improper Use of Presumptions in Recent Criminal Law Adjudication*, 38 STAN. L. REV. 423, 425-26 (1986); Leslie J. Harris, *Constitutional Limits on Criminal Presumptions as an Expression of Changing Concepts of Fundamental Fairness*, 77 J. CRIM. L. & CRIMINOLOGY 308, 317-31 (1986) (tracing the evolution of the use of the evidentiary presumption and its implications); Shari L. Jacobson, *Mandatory and Permissive Presumptions in Criminal Cases: The Morass Created by Allen*, 42 U. MIAMI L. REV. 1009, 1015 (1988).

40. Sadly, the law of presumptions and their use cannot truly be “simply” stated. In the civil context, when a party proves a particular, or what is referred to as a “basic” fact, another “presumed” fact will be assumed and the burden to produce evidence disproving the presumed fact shifts to the other party. See FED. R. EVID. 301. Under the Federal Rules of Evidence, in civil cases, once the party against whom the presumption is directed offers evidence to rebut the presumption, the presumption disappears (or “bursts”) and the burden of persuasion as to that presumed fact stays with the party who sought to use the presumption. See *id.* This is known as the “bursting bubble” or Thayer theory of presumptions. See JAMES BRADLEY THAYER, *A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW* 336-37, 339 (1898). See generally Harold A. Ashford

the criminal code by incorporating it into the proof requirements for certain forms of prohibited conduct. For example, Title 18 of the United States Code makes it a crime to knowingly transport obscene matters in interstate or foreign commerce for the purpose of sale or distribution.⁴² The same section provides that the transportation of two or more obscene publications or articles or a combined total of five publications and articles creates a rebuttable presumption that the material is intended for sale or distribution.⁴³ Pursuant to the presumption a jury is instructed that upon proof that a defendant transported two or more (or a combined total of five) obscene publications or articles, the jury may presume that it was for the purpose of sale or distribution.

An *assumption* is “[a] fact or statement taken for granted.”⁴⁴ In law there is a key connection between presumptions and assumptions. In the law of presumptions, when a basic fact (fact 1) is proven, a presumed fact (fact 2) is

& D. Michael Risinger, *Presumptions, Assumptions and Due Process in Criminal Cases: A Theoretical Overview*, 79 YALE L.J. 165, 169 (1969); Laughlin, *supra* note 36, at 209-11. A conflicting theory, originated by Professor Edmund M. Morgan, *see* 1 EDMUND M. MORGAN, BASIC PROBLEMS OF EVIDENCE 33-35 (1954), is that the presumption remains in the case and the party against whom the presumption is offered has the burden to persuade the trier of fact to reject the presumed fact. *Id.*

The law of presumptions in criminal cases is impacted by a defendant’s constitutional right to have each element of every offense proven by the prosecution beyond a reasonable doubt. *See* Mullaney v. Wilbur, 421 U.S. 684, 687-88 (1975); *In re Winship*, 397 U.S. 358, 368 (1970). In *Sandstrom v. Montana*, 442 U.S. 510 (1979), the Supreme Court ruled that a statutory presumption may not relieve the state of its burden to persuade the trier of fact of each essential element beyond a reasonable doubt. *See id.* at 523. In that case the Court struck down an irrebuttable mandatory presumption, pursuant to which, upon proof of the “basic fact,” a jury was required to find the presumed fact. *See id.* at 517. Later in *Francis v. Franklin*, 471 U.S. 307 (1985), the Court amplified its *Sandstrom* holding and ruled that even a rebuttable mandatory presumption, where a jury would be required to find the presumed fact unless the defendant persuaded it to reject it, would violate a defendant’s right to due process. *See id.* at 318. Thus, *Sandstrom* and *Francis* prohibit statutory presumptions that direct the jury to find an essential fact regardless of whether the presumption allows for rebuttal. After proof of the basic fact, a presumption may merely allow the jury to find a presumed fact without additional evidence if persuaded by the government to do so.

41. *See, e.g.*, ME. REV. STAT. ANN. tit. 17-A, § 361-A (West 2002) (establishing a presumption that one in recent exclusive possession of stolen property is guilty of the theft or robbery); 18 PA. CONS. STAT. § 3932 (2002) (establishing a presumption in the Pennsylvania Crimes Code that the lessee of rental property intends to deal with the property as his own if he fails to return the property in a timely fashion and either signs the lease agreement under an assumed name or fails to respond to demands for the property’s return).

42. *See* 18 U.S.C. § 1465 (2000).

43. *See id.*

44. BLACK’S LAW DICTIONARY 120 (7th ed. 1999).

assumed to exist.⁴⁵ In other words, when a specified fact is proven, the law allows the trier of fact to take for granted the existence of another fact; the presumed fact. Thus, if we use our earlier example, under federal law when the transportation of two or more obscene publications or articles or a combined total of five publications and articles is proven, it may be assumed that the material is intended for sale or distribution. Since the law is clear that in criminal cases there must be a rational connection between the proven and presumed facts,⁴⁶ assumptions should likewise not be called into use in the absence of that rational connection.⁴⁷

Actually, the idea that jurors understand and follow instructions is neither a presumption nor an assumption. When courts assert a crucial assumption or necessary presumption that jury instructions are understood and followed, they most likely mean to describe a principle or starting point for our system of trial by jury.⁴⁸ It is far less likely that they mean to describe a concept that fits the

45. See FED. R. EVID. 301; see also Leo H. Whinery, *Presumptions and Their Effect*, 54 OKLA. L. REV. 553, 555 (2001) (discussing the Uniform Rules of Evidence provision that defines a presumed fact as “a fact that is assumed upon the finding of a basic fact”).

46. See *infra* notes 173-77 and accompanying text.

47. Several commentators have distinguished presumption from assumption by reference to the law of burdens of proof. See Ashford & Risinger, *supra* note 40, at 173; William S. Laufer, *The Rhetoric of Innocence*, 70 WASH. L. REV. 329, 403 (1995). They point out that presumptions lay the burden of production upon the party against whom the presumption operates. In contrast, assumptions allocate the burden of persuasion. Thus, Laufer mentions those who advocate a change to an assumption (rather than presumption) of innocence since the concept is designed to place the burden of persuasion upon the prosecution. See Laufer, *supra*, at 403.

48. The term “presumption” is likewise misused in the “presumption of innocence.” The concept embodied by the presumption of innocence does not fit a presumption model. It cannot be said that when an individual is accused of a crime and the jury is allowed, or in fact required, to presume innocence it is because logically and empirically those accused are usually innocent. To fit the model, the presumption would suggest that experience and logic dictate that in the majority of cases criminal defendants have been wrongfully accused. While the cynical might agree that such a connection is rational, most, despite numerous examples of innocents being convicted, would deny its rationality in the run of cases. Indeed, what sort of barbaric or Kafkaesque system would ours be if it were based upon a true presumption that most of those accused had done nothing wrong. In fact, the required pre-trial probable cause determination flies in the face of a true *presumption* of innocence. In reality the presumption of innocence is more a governing principle of criminal procedure designed primarily to allocate burdens of proof and persuasion, see Ashford & Risinger, *supra* note 40, at 173 (arguing that better name is “assumption” of innocence because the device allocates the burden of persuasion), because the Constitution has been interpreted to require that the prosecution prove guilt beyond a reasonable doubt. See *In re Winship*, 397 U.S. 358, 362 (1970). However, the burden allocation is not, as it must be for evidentiary presumptions,

model (proof of basic fact allows assumption of presumed fact) for legal presumptions.

B. *Judicial Reliance on the Jury Instruction Presumption*⁴⁹

The expectation that trial jurors can and do follow instructions is expressed in countless appellate decisions.⁵⁰ Appellate courts cling to this presumption in several contexts. Most often the courts are responding to a litigant's complaint that a court's instruction cautioning a jury to disregard or limit its consideration of a piece of evidence was insufficient to protect the litigant's rights.⁵¹ The complaint is that despite an instruction to do so, jurors cannot purge their memories of inadmissible testimony,⁵² nor can they consider evidence for one purpose and not another.⁵³

In a somewhat different context, the presumption is also offered in response to a claim that difficult or incomprehensible instructions⁵⁴ interfered with a jury's

supported by an empirical rationale. *Cf.* Laufer, *supra* note 47, at 403-19 (arguing that the principle is better termed an "assumption" of innocence and that an assumption of innocence should have significance independent of burden allocation and should be conveyed to a jury as an assumption of factual innocence that they must use as a lens through which to view the facts of the indictment and trial and the introduction of various pieces of evidence). *See also* Graham, *supra* note 36, at 445-46.

49. Having already explained that courts refer interchangeably to a jury instruction presumption or assumption and that there are varying uses and misuses of the term "presumption," for simplicity's sake, and because it seems to be favored by courts and commentators, this Article will refer to the jury instruction *presumption*.

50. *See, e.g.*, *United States v. Olano*, 507 U.S. 725, 740 (1993); *Francis v. Franklin*, 471 U.S. 307, 324 (1985); *United States v. Burton*, No. 94-00080, 1996 WL 690155, at *4 (6th Cir. Nov. 27, 1996); *Gacy v. Welborn*, 994 F.2d 305, 312 (7th Cir. 1993). *See generally* Tiersma, *supra* note 5, at 1088 (pointing to a presumption by appellate courts that jurors understand their instructions).

51. *See, e.g.*, *Richardson v. Marsh*, 481 U.S. 200, 211 (1987); *United States v. Linwood*, 142 F.3d 418, 425 (7th Cir. 1998).

52. *See, e.g.*, *United States v. Magana*, 118 F.3d 1173, 1184 (7th Cir. 1997); *United States v. Butler*, 102 F.3d 1191, 1196 (11th Cir. 1997).

53. *See, e.g.*, *Richardson*, 481 U.S. at 211; *Linwood*, 142 F.3d at 425. The question also arises in somewhat different, but closely related contexts such as when a jury is instructed that counsel's remarks are not evidence, *see, e.g.*, *United States v. McClinton*, 135 F.3d 1178, 1189 (7th Cir. 1998), the jury is instructed not to speculate about an unexplained circumstance, *see, e.g.*, *United States v. Thigpen*, 4 F.3d 1573, 1577 (11th Cir. 1993), or when the jury is instructed to acquit a defendant it finds to be insane without consideration of the societal consequences, *see, e.g.*, *Shannon v. United States*, 512 U.S. 573, 585 (1994). All of these contexts are similar in that jurors are asked to clear their minds of information or ideas or, at the very least, to not allow this information to influence their fact-finding.

54. Occasionally the claimed problem lies with the comprehensibility of a trial

ability to render a just verdict.⁵⁵ Because a jury's role is to deliver a verdict after applying the law to the jury's factual findings,⁵⁶ the claim is that the jury's failure to comprehend the court's instructions will seriously interfere with the proper fulfillment of the jury's function.⁵⁷ Except for an accidentally correct result, the failure of a jury to understand instructions is likely to prevent the delivery of justice.⁵⁸

Whether the claim involves a jury's inability to follow or to understand instructions, the appellate courts respond with the same refrain: the law presumes that jurors follow their instructions.⁵⁹ Before exploring the

court's response to questions posed by juries concerning the instructions. *See, e.g.*, *Weeks v. Angelone*, 528 U.S. 225, 229-30 (2000) (describing a defense objection to the trial court's responding to a question concerning the meaning of an instruction by directing the jury to reread the instruction).

55. *See, e.g.*, *Free v. Peters*, 12 F.3d 700, 703-04 (7th Cir. 1993); *Gacy*, 994 F.2d at 308-09.

56. *See Sparf v. United States*, 156 U.S. 51, 102-03 (1895); *cf. infra* notes 150-55 and accompanying text (discussing phenomenon of colonial American juries deciding questions of both law and fact).

57. *See Commonwealth v. Smith*, 70 A. 850, 850 (Pa. 1908) (emphasizing that "[t]he charge should be sufficiently explicit to enable the jury to apply the law to the facts of the case . . . and, when the trial judge has not succeeded in delivering instructions on the law in such a way that they will be understood by the jury, his charge is inadequate . . ."); ROBERT G. NIELAND, *PATTERN JURY INSTRUCTIONS: A CRITICAL LOOK AT A MODERN MOVEMENT TO IMPROVE THE JURY SYSTEM* 23 (1979) (arguing that "[a] technically correct charge which is misunderstood by its audience . . . is as effective as no instruction at all in guiding jurors to a correct decision in the case").

58. *See generally* John P. Cronan, *Is Any of This Making Sense? Reflecting on Guilty Pleas to Aid Criminal Juror Comprehension*, 39 AM. CRIM. L. REV. 1187, 1214-15 (2002) (claiming that "[a criminal] defendant convicted by a confused jury has been deprived of due process"); Joel D. Lieberman & Bruce D. Sales, *What Social Science Teaches Us About the Jury Instruction Process*, 3 PSYCHOL. PUB. POL'Y & L. 589, 589 (1997) (concluding that defendants cannot be assured a fair trial if jurors cannot understand their instructions). Present day capital punishment laws draw a fine line between requiring individualized sentencing and prohibiting arbitrariness. *See infra* notes 180, 275-76 and accompanying text. *See generally* Jose Felipe Anderson, *When the Wall Has Fallen: Decades of Failure in the Supervision of Capital Juries*, 26 OHIO N.U. L. REV. 741, 756-77 (2000) (explaining evolution of sentencing discretion in capital cases). This makes the capital jury's responsibility particularly challenging and clear instructions crucial. *See McDowell v. Calderon*, 130 F.3d 833, 839 (9th Cir. 1997) (stressing that in capital cases juror confusion regarding legal instructions can result in violation of important constitutional rights).

59. *Compare* *Shannon v. United States*, 512 U.S. 573, 585 (1994), and *Ashker v. Class*, 152 F.3d 863, 871 (8th Cir. 1998), with *Gacy v. Welborn*, 994 F.2d 305, 313 (7th Cir. 1993). Of course, there are exceptions. In the case of jurors following instructions, there are times when a court will conclude that the cautionary or limiting instruction asks

justifications for this premise, let us examine the various ways the concept is expressed.

The three principal Supreme Court cases invoking and routinely cited as authority for the presumption are *Parker v. Randolph*,⁶⁰ *Francis v. Franklin*,⁶¹ and *Richardson v. Marsh*.⁶² The following are tastes of the Court's expression of the jury instruction presumption:

A crucial assumption underlying [the] system [of trial by jury] is that juries will follow the instructions given them by the trial judge. Were this not so, it would be pointless for a trial court to instruct a jury, and even more pointless for an appellate court to reverse a criminal conviction because the jury was improperly instructed.⁶³

too much of the human mind and cannot be followed. The most frequently cited example of this is the *Bruton* doctrine. See, e.g., *United States v. Edwards*, 159 F.3d 1117, 1124 (8th Cir. 1998). In *Bruton v. United States*, the Supreme Court concluded that it was unrealistic to assume that a jury could be relied upon to disregard the incriminating confession of a co-defendant in assessing the guilt of a defendant. See *Bruton v. United States*, 391 U.S. 123, 126 (1968). See generally Judith L. Ritter, *The X Files: Joint Trials, Redacted Confessions and Thirty Years of Sidestepping Bruton*, 42 VILL. L. REV. 855, 862-72 (1997) (describing the evolution of the *Bruton* doctrine). Even prior to *Bruton* Judge Learned Hand was highly skeptical of the ability of jurors to adhere to a limiting instruction. See *United States v. Delli Paoli*, 229 F.2d 319, 321 (2d Cir. 1956); *Nash v. United States*, 54 F.2d 1006, 1007 (2d Cir. 1932). In *Nash*, Judge Hand described an instruction on the limited use of hearsay as a "recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody's else." *Nash*, 54 F.2d at 1007; see also *United States v. Martinez*, 14 F.3d 543, 551 (11th Cir. 1994) (finding that the presumption fails when jurors display a willingness to disregard instructions). However, even *Bruton* was narrowly construed by the Court in *Richardson v. Marsh*, 481 U.S. 200, 211 (1987), in which Justice Scalia, writing for the majority, largely justified the narrow construction by reference to the presumption that juries follow their instructions. *Id.* But see *Gray v. Maryland*, 523 U.S. 185, 195 (1998) (limiting *Richardson's* limitation of *Bruton*).

In the case of jurors understanding instructions, see *Mitchell v. Gonzales*, 54 Cal.3d 1041, 1051-55 (Cal. 1991) (relying on empirical studies and concluding that pattern jury instruction given on proximate cause was confusing and conceptually misleading).

60. 442 U.S. 62 (1979), *abrogated by Cruz v. New York*, 481 U.S. 186 (1987).

61. 471 U.S. 307 (1985).

62. 481 U.S. 200 (1987). In addition to *Parker*, *Francis* and *Richardson*, see, for example, *Gray*, 523 U.S. at 195, and *Opper v. United States*, 348 U.S. 84, 95 (1954).

63. *Parker*, 442 U.S. at 73. For examples of the many opinions citing *Parker* regarding the presumption, see *Thomas v. Peters*, 48 F.3d 1000, 1009 (7th Cir. 1995) (Easterbrook, J., concurring); *United States v. Brown*, 983 F.2d 201, 202 (11th Cir. 1993) (deeming it "essential in this inquiry to apply the well-recognized presumption that a jury follows its instructions").

The Court presumes that jurors, conscious of the gravity of their task, attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them. . . . [W]e adhere to the crucial assumption underlying our constitutional system of trial by jury that jurors carefully follow instructions.⁶⁴

[T]he almost invariable assumption of the law [is] that jurors follow their instructions⁶⁵

C. The Nature of the Jury Instruction Presumption

The above quotations fail to make clear the precise nature of the presumption. Is it rebuttable? Is it non-rebuttable? Or is it of an entirely different nature—not a legal presumption at all but rather a fixed rule that serves as a necessary foundation for the jury system?

1. A Fixed Rule or Non-Rebuttable Presumption

The above quote from *Parker* has been interpreted by some as the Court's recognition of a fixed rule. Citing *Parker*, lower courts explain the jury instruction presumption as:

not a bursting bubble,^[66] applicable only in the absence of better evidence. It is a rule of law—a description of the premises underlying the jury system, rather than a proposition about jurors' abilities and states of mind.⁶⁷

64. *Francis*, 471 U.S. at 324 n.9. For examples of the many opinions citing *Francis* regarding the presumption, see *United States v. Olano*, 507 U.S. 725, 740 (1993), *United States v. Acevedo*, 141 F.3d 1421, 1426 (11th Cir. 1998), and *Wade v. Calderon*, 29 F.3d 1312, 1321 (9th Cir. 1994).

65. *Richardson*, 481 U.S. at 200. For examples of the many opinions citing *Richardson* regarding the presumption, see *Shannon v. United States*, 512 U.S. 573, 584 (1994) (finding “no reason to depart from ‘the almost invariable assumption of the law that jurors follow their instructions’”) (quoting *Richardson*, 481 U.S. at 206); *United States v. Lara*, 181 F.3d 183, 202 (1st Cir. 1999); *United States v. Owens*, 167 F.3d 739, 756 (1st Cir. 1999).

66. “Bursting bubble” is a reference to the Thayer theory of presumptions. See *supra* note 40 and accompanying text. In this context it undoubtedly means that the jury instruction presumption is a hard and fast rule of the system that is not subject to refutation.

67. *Thomas*, 48 F.3d at 1009 (Easterbrook, J., concurring); see *Gacy v. Welborn*, 994 F.2d 305, 313 (7th Cir. 1993); see also *Rodriguez v. Colorado*, 498 U.S. 1055, 1058

These courts, describing a fixed rule of procedure, necessarily see the rule as one that governs in all cases.⁶⁸ Other similarly-minded courts, terming this concept a “presumption” rather than a “rule,” nevertheless see it as non-rebuttable. The result, of course, is the same. Claims, and indeed proof, that instructions are particularly difficult to understand cannot be considered because of the shield of the jury instruction presumption.⁶⁹ This approach is starkly visible in the Seventh Circuit opinion in *Gacy v. Welborn*.⁷⁰

The infamous serial killer John Wayne Gacy was convicted and sentenced to death by an Illinois jury.⁷¹ In federal habeas corpus proceedings⁷² challenging his convictions, Gacy presented the results of an empirical study conducted by Professor Hans Zeisel to determine whether the Illinois jury instructions pertaining to the proper consideration of mitigation evidence in the penalty phase of a capital trial⁷³ were adequately understood by a test group.⁷⁴ The study

(1991) (Marshall, J., dissenting) (recognizing that “[a]s a matter of convention, we presume that jurors follow jury instructions”); *United States v. D’Angelo*, 598 F.2d 1002, 1005 (5th Cir. 1979) (claiming that “[t]o preserve that essential feature [of trial by jury], the law trusts that a jury will understand and follow the law as instructed”). An interesting twist on this view is contained in *Nethery v. Collins* where the Fifth Circuit held that abandonment of the jury instruction presumption would be the equivalent of establishing a new rule of criminal procedure which was not permitted in the context of a petition for a writ of habeas corpus. *See Nethery v. Collins*, 993 F.2d 1154, 1162 (5th Cir. 1993) (citing *Teague v. Lane*, 489 U.S. 288, 316 (1989)). The court in *Gacy v. Welborn* followed the same reasoning. *See Gacy*, 994 F.2d at 311.

68. *See, e.g., Brown*, 983 F.2d at 202 (deeming the presumption crucial, essential and necessary).

69. *See Tiersma, supra* note 5, at 1088 (claiming that “[i]n practice, this presumption [that jurors understand their instructions] is nearly impossible to rebut”).

70. 994 F.2d 305 (7th Cir. 1993); *see also* Peter Meijes Tiersma, *Dictionaries and Death: Do Capital Jurors Understand Mitigation?*, 1995 UTAH L. REV. 1, 35-39 (critiquing *Gacy*).

71. *Gacy*, 994 F.2d at 306. Gacy killed at least thirty-three young men over a period of six years. He buried them underneath his house and upon his arrest the police recovered the skeletal remains of most of the victims. *Id.* For details about the crimes of John Wayne Gacy, *see generally* David Lohr, *Boy Killer: John Wayne Gacy*, CRIME MAGAZINE, at <http://www.crimemagazine.com/boykillergacy.htm> (last visited Jan. 26, 2004).

72. *See* 28 U.S.C. § 2254 (2000) (delineating remedies in federal court for prisoners in state custody).

73. The instructions at issue make a case for doubting the validity of the jury instruction presumption:

“If, after your deliberations, you unanimously determine that there are no mitigating factors sufficient to preclude the imposition of the death sentence on the Defendant, you should sign the verdict form directing a sentence of death. If, after your deliberations, you are not unanimous in concluding that there are no mitigating factors sufficient to preclude imposition of the death

concluded that when mitigation instructions, nearly identical to those given in Gacy's trial, were given to test groups, a significant percentage did not correctly understand the law.⁷⁵ When this claim was rejected by the district court,⁷⁶ Gacy appealed to the United States Court of Appeals for the Seventh Circuit. The court denied Gacy's appeal⁷⁷ with curious reasoning. For the sake of argument, the court accepted the statistical findings,⁷⁸ but rejected the claim that they demonstrated a violation of Gacy's rights.⁷⁹ According to the court, without

sentence, you must sign the verdict form directing a sentence of imprisonment."

Gacy, 994 F.2d at 307.

The jurors were meant to understand that any one of them could prevent the imposition of a death sentence if he or she found even one sufficient mitigating factor. *See id.* In other words, unanimity was not required for the imposition of a life sentence. For a discussion of the rule that individual jurors may consider specific mitigating factors even if other jurors reject them, see generally *McCoy v. North Carolina*, 494 U.S. 433, 439-44 (1990), and *Mills v. Maryland*, 486 U.S. 367, 373-75 (1988). Gacy also alleged that his trial judge misread the prescribed instructions. *Gacy*, 994 F.2d at 307.

74. *Gacy*, 994 F.2d at 309-10.

75. For one sample question Professor Zeisel concluded that between 16.3 and 33.7 percent of jurors were likely to misunderstand. For another question the finding was between 26.9 and 46.1 percent. *See id.* at 309.

76. *Id.* at 308.

77. The mitigation evidence instructions in question were, of course, given to juries in the penalty phases of many other Illinois capital defendants. One of these defendants, James P. Free, Jr., had earlier offered the same study in his defense. *See United States ex rel. Free v. Peters*, 806 F. Supp. 705, 709 (N.D. Ill. 1992), *aff'd in part & rev'd in part*, 12 F.3d 700 (7th Cir. 1993). The federal district court hearing Free's case was persuaded by the study's results and vacated his death sentence. *Id.* at 732. That decision was pending an appeal by the State of Illinois when Gacy, having been denied relief on other claims by a different federal district court judge, filed a post-verdict motion asking for a hearing on the evidence presented in the study. *Gacy*, 994 F.2d at 308. The district court denied Gacy's request for a hearing. *Id.* In deciding Gacy's appeal, Seventh Circuit Judges Easterbrook, Manion and Kanne chose not to await the outcome of Free's appeal (being considered by another panel), but instead decided the merits of the claim at that time. *Id.* at 309 (commenting that "[i]mplementation of Gacy's sentences has been stayed by federal litigation since 1989 . . . Both Gacy and the State of Illinois are entitled to decision without indefinite delay"). For a description of the Zeisel study and how it was received by both the *Free* and *Gacy* courts, see generally Tiersma, *supra* note 70, at 24-44. The survey questions in their entirety and the statistical results are reported in Appendices A and B to the district court opinion in *Free*. *See Free*, 806 F. Supp. at 732-84. Professor Hans Zeisel, who designed the study, coauthored one of the earliest studies on jury behavior. *See HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY* (1966).

78. *Gacy*, 994 F.2d at 310; *cf. Free*, 12 F.3d at 705-06 (finding that the Zeisel study contained "two fatal flaws").

79. *Gacy*, 994 F.2d at 310. Specifically, Gacy argued that the instructions inhibited

proof that an alternative set of instructions was more comprehensible, there was no reason to find a constitutional violation.⁸⁰ The court took the position that even convincing proof that as many as twenty-five percent of jurors can be expected to misunderstand instructions concerning imposition of a death sentence may be ignored because improved comprehension may be unachievable.⁸¹ In essence, the court's response was that this is a complicated area of law,⁸² that laypersons may be unable to grasp unfamiliar concepts (at least without repeated exposure), and that maybe this is the best we can do.⁸³ The rationale for the court's view was—the "jury instruction presumption." Quoting *Parker, Franklin and Richardson*, the court underscored the "presumption" and "fixed rule of law" that jurors understand and follow their instructions.⁸⁴

2. A Rebuttable Rule

Some courts have a different interpretation of the jury instruction presumption and view it as rebuttable. These courts claim that they are required to rely upon the presumption, but only absent proof to the contrary.⁸⁵ This view raises a number of subsidiary issues.

First, courts often note that only admissible evidence may properly rebut the presumption.⁸⁶ One example of evidence commonly considered admissible to demonstrate juror confusion is the content of notes sent from the jury to the trial

the jurors' consideration of relevant mitigation evidence in violation of the Eighth Amendment's prohibition of arbitrary imposition of the death penalty. *Id.* at 307-10.

80. *Id.* at 311 (stating that "actual levels of comprehension must be compared with achievable levels of comprehension, not with ideal levels").

81. *Id.* In the words of the court, "[f]or as long as the United States has been a nation, judges have been using legalese in instructing juries, with an inevitable adverse effect on the jury's comprehension." *Id.* at 312.

82. For a discussion of the ways in which capital case penalty phase instructions are particularly complex, see *infra* notes 275-76 and accompanying text.

83. See *Gacy*, 994 F.2d at 311-12.

84. *Id.* at 313.

85. See, e.g., *United States v. Burton*, No. 94-00080, 1996 WL 690155, at *4 (6th Cir. Nov. 27, 1996) (utilizing jury instruction presumption "[b]ecause appellant proffers no evidence that the jury behaved to the contrary"); *United States v. Shukitis*, 877 F.2d 1322, 1329 (7th Cir. 1989) (deciding that "[b]ecause the defendant has presented no evidence to convince us otherwise, '[w]e make the crucial and valid assumption that jurors carefully follow instructions given them by the court'") (quoting *United States v. Stern*, 858 F.2d 1241, 1250 (7th Cir. 1988)) (alteration in original).

86. See, e.g., *Erikson v. Rowland*, No. 92-55371, 1993 WL 128865, at *4 (9th Cir. Apr. 26, 1993).

judge during deliberations.⁸⁷ A litigant may claim, for instance, that the jury's inability to understand and consequently follow the given instructions is demonstrated by one or more notes expressing confusion. Lack of comprehension is proven, it is argued, by either a plain statement such as, "we don't understand part X of your instructions,"⁸⁸ or by a question that, by its content, shows lack of comprehension.⁸⁹ An example of inadmissible but relevant evidence here is juror testimony concerning the content of deliberations.⁹⁰ The Federal Rules of Evidence and most state evidentiary rules bar jurors from offering testimony to impeach their verdict. Accordingly, such evidence would not be a proper rebuttal to the presumption.⁹¹

Another issue, easily resolved, is which party has the burden of proving that the jury misunderstood or failed to follow the instructions. The seemingly

87. See, e.g., *Weeks v. Angelone*, 528 U.S. 225, 228-29, 234-36 (2000) (denying the defendant's claim but considering the jury's note as evidence of alleged confusion); *McDowell v. Calderon*, 130 F.3d 833, 835-37 (9th Cir. 1997) (rejecting the presumption in the face of jury's note expressing confusion). For an extensive discussion of *Weeks*, see *infra* notes 101-20 and accompanying text.

88. See, e.g., *Commonwealth v. Smith*, 70 A. 850, 850-51 (Pa. 1908) (finding the charge inadequate because, after expressing confusion, jury was denied additional instructions).

89. See, e.g., *United States v. Barragan-Devis*, 133 F.3d 1287, 1291 (9th Cir. 1998) (Ferguson, J., dissenting) (arguing that it was "clear through juror correspondence that the jury is erecting an erroneous mandatory presumption"); *McDowell*, 130 F.3d at 837 (stating that "[t]he plain language of the jury's request for guidance demonstrates that eleven jurors were confused about the law").

90. For instance, after a verdict a party might seek to proffer testimony from one or more of the jurors that allegedly demonstrates that instructions were either misunderstood or even deliberately not followed. See, e.g., *United States v. Venske*, 296 F.3d 1284, 1287-88 (11th Cir. 2002).

91. Federal Rule of Evidence 606(b) provides in part:

Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith.

FED. R. EVID. 606(b); see, e.g., *Farmers Coop. Elevator Ass'n Non-Stock v. Strand*, 382 F.2d 224, 230 (8th Cir. 1967) (rejecting juror's affidavit concerning improper considerations of deliberating jurors stating "[i]t is a well-established rule in the federal courts and the Nebraska court that a jury verdict may not be impeached as to occurrences in the jury room which inhere in the verdict"). State codes usually contain similar restrictions. See, e.g., ALA. R. EVID. 606(b); PA. R. EVID. 606(b). For a discussion of the breadth of this rule and its repercussions, see generally Tiersma, *supra* note 5, at 1087-88 (pointing out that evidence that a particular jury was actually confused about the law has little impact because it is inadmissible).

obvious answer is that the party (usually the criminal defendant) who argues that the presumption should be rejected in a particular case has the burden to rebut it.⁹²

The standard of proof is yet another issue. Arguably, the standard is the one announced by the Supreme Court in *Boyde v. California*.⁹³ In *Boyde*, the Court held that the standard of review for a challenged jury instruction is whether there is a reasonable likelihood that the jury applied an instruction in a way that prevents the consideration of constitutionally relevant evidence.⁹⁴ *Boyde*, however, did not involve a claim that a key instruction was too difficult to understand. Rather, the allegation in *Boyde*, a capital case,⁹⁵ was that certain instructions concerning the proper consideration of mitigating evidence during the penalty phase were ambiguous and, therefore, susceptible to erroneous

92. See *United States v. Shukitis*, 877 F.2d 1322, 1329 (7th Cir. 1989); *Smith*, 70 A. at 850 (holding that the burden is upon the party who alleges inadequate instructions).

93. 494 U.S. 370 (1990).

94. *Id.* at 380. The Court elaborated by explaining that the defendant need not prove that it was more likely than not that the instruction improperly inhibited the consideration of relevant evidence, but on the other hand, a mere possibility of misapplication of the law was insufficient to establish a constitutional violation. *Id.*

95. An intriguing question is whether *Boyde* and its standard apply to non-capital cases as well. *Boyde* argued that an ambiguous jury instruction violated his Eighth Amendment right to have the jury in the penalty phase consider and give effect to all relevant mitigating evidence. *Id.* at 377-78. The Court ruled that the Eighth Amendment is only violated when there is a reasonable likelihood that the challenged instructions prevented the jury from considering "constitutionally relevant" evidence. *Id.* at 380. The Eighth Amendment has never been found to require the consideration of any particular form of evidence outside of the capital case setting. This at least partly explains why in *Gilmore v. Taylor*, 508 U.S. 333 (1993), the Court's majority suggested that *Boyde* did not apply in a non-capital case saying "in a noncapital case such as this there is no counterpart to the Eighth Amendment's doctrine of 'constitutionally relevant evidence.'" *Gilmore*, 508 U.S. at 342. However, concurring in *Gilmore*, Justice O'Connor reacted to this statement by countering that "*Boyde* did not purport to limit application of that [reasonable likelihood] standard to capital cases, nor have we so limited it." *Id.* at 348 (O'Connor, J., concurring) (pointing out that the Court had already applied *Boyde* to a non-capital case in *Estelle v. McGuire*, 502 U.S. 62, 72 (1991)). Moreover, as Justice O'Connor's concurrence emphasizes, erroneous or ambiguous jury instructions may inhibit the consideration of evidence in violation of other constitutional amendments. *Id.* at 348-49 (O'Connor, J., concurring) (citing *Rock v. Arkansas*, 483 U.S. 44, 51 (1987) (the defendant's right to testify on his or her own behalf); *Delaware v. Van Arsdall*, 475 U.S. 673, 678-79 (1986) (the Sixth Amendment's Confrontation Clause right to an opportunity for effective cross-examination)). A tougher question would be raised, perhaps, when a defendant claims that a confusing or incomprehensible instruction violates his rights under state, rather than federal law. Nevertheless, in all cases, a jury's inability to understand and thus apply the law, when sufficiently significant, cuts off the essence of the Sixth Amendment right to a trial by jury.

interpretation.⁹⁶ In cases like *Boyde*, a particular instruction lends itself to at least two plausible interpretations, one of which is an erroneous statement of law.⁹⁷ The appellate court is then asked to vacate the conviction because of the risk that the jury adopted the wrong interpretation.⁹⁸ In these cases, a presumption that jurors understand instructions does not apply because it begs the question. An ambiguous instruction, by definition, may be rationally understood in more than one way. Not surprisingly, therefore, the *Boyde* Court made no mention of the jury instruction presumption. When it announced the standard of proof for ambiguous instruction challenges,⁹⁹ the *Boyde* Court, therefore, did not indicate whether that standard of proof should apply to efforts to rebut the jury instruction presumption. Ten years after *Boyde*, however, these apples and oranges seemingly came together in *Weeks v. Angelone*.¹⁰⁰

Lonnie Weeks, Jr. was convicted in a Virginia state court of fatally shooting a state trooper.¹⁰¹ The state sought the death penalty.¹⁰² Several hours into deliberation, the jurors sent a note to the court asking whether they were

96. *Boyde*, 494 U.S. at 378-80. Specifically, the penalty phase instructions listed eleven possible mitigating factors that the jury could find, including what is usually considered a catch-all factor, designed to allow the jury to consider a broad range of factors related to the defendant's character, background, mental health, etc. *Boyde* argued that the wording of the factors, including the catch-all factor, was ambiguous and could be interpreted to unconstitutionally limit the breadth of evidence the jury would believe it could consider. *Id.* at 377-78. Applying its newly announced standard, the Court denied *Boyde* relief. *Id.* at 386. The distinction between *Boyde* and confusing instruction cases may not be terribly significant, however. In claims of both confusing and ambiguous instructions the essence of the problem is that there is a risk that the law will be misunderstood and thus incorrectly applied to the facts.

97. *Id.* at 380. The Supreme Court decided a similar issue in *Mills v. Maryland*, 486 U.S. 367 (1988). In *Mills*, the Court considered two possible interpretations of a key part of the jury instructions given during the penalty phase of *Mills*' capital trial. *Id.* at 377-78. The Court ruled in *Mills*' favor because it was not satisfied that the jury did not embrace the erroneous interpretation. *Id.* at 381, 384. Earlier, in *Francis v. Franklin*, 471 U.S. 307 (1985), the Court also took up the question of the likelihood that the jury properly interpreted an ambiguous instruction. *Id.* at 315-16.

98. See, e.g., *Mills*, 486 U.S. at 375-76.

99. The *Boyde* Court acknowledges that it has, in the past, considered claims that ambiguous jury instructions caused a constitutional violation and that the standards the Court employed to resolve these claims were not uniform. See *Boyde*, 494 U.S. at 378-80. For instance, in *Mills v. Maryland*, the Court at various points in its opinion made reference to three different standards. See *Mills*, 486 U.S. at 374-76, 377. The *Boyde* Court, therefore, thought it important to eliminate any confusion and announce a clear standard. *Boyde*, 494 U.S. at 379-80.

100. 528 U.S. 225 (2000).

101. *Id.* at 227-28.

102. *Id.* at 228-31.

obligated to return a death sentence if they found that the prosecutor had established certain facts or whether they were still permitted to impose a life sentence.¹⁰³ Rather than providing a direct answer to this question (e.g., “You may impose a death sentence, but, upon a finding of mitigation, are not obligated to do so.”), the court referred the jury to the portion of the previously given instructions that the court believed addressed this issue.¹⁰⁴ At the completion of the penalty phase the jury imposed a death sentence.¹⁰⁵

In a federal habeas corpus petition, Weeks alleged that his rights were violated when the trial court refused to adequately respond to the jury’s expression of confusion regarding its instructions.¹⁰⁶ Weeks’ position was that the court should have provided a clear answer, consistent with the law, that “yes, the jury could return a life sentence even if an aggravating factor had been proven beyond a reasonable doubt.”¹⁰⁷ While the United States Supreme Court never suggested that Weeks’ proposed answer would have been an incorrect statement of law, the Court decided that the response of the trial court, simply telling the jury to reread a portion of the previously given instructions, was acceptable.¹⁰⁸

An important part of the Court’s rationale was—the jury instruction presumption.¹⁰⁹ Like “nonsense upon stilts,”¹¹⁰ the Court added the additional

103. *Id.* at 228-29. The instruction causing confusion was one that gave the jurors two alternative aggravating factors upon which the jury could, if unanimously convinced of their existence beyond a reasonable doubt, base a sentence of death. *Id.* at 229. One alternative involved the defendant’s future dangerousness while the other involved the manner in which the murder was carried out. *Id.* The jury was instructed that if it found either of the alternatives, it *may* return a sentence of death. *Id.* The word “may” rather than “must” was used because under Virginia law the jury could impose a life sentence, despite adequate proof of one or both alternatives, if it found mitigating circumstances. *Id.* at 232. The jury asked:

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

Id. at 229. The jurors’ question demonstrated that they were confused about their obligation if one or more of the alternatives was proven.

104. *Id.* The court told the jury, “See second paragraph of Instruction # 2 (Beginning with “If you find from. . .”).” *Id.*

105. *Id.* at 230-31.

106. *Id.* at 227.

107. *Id.* at 230.

108. *Id.* at 234.

109. *Id.* (citing *Richardson v. Marsh*, 481 U.S. 200, 211 (1987)). Just before his discussion of the presumption, Chief Justice Rehnquist, writing for the majority, explained that *Buchanan v. Angelone*, a 1998 Supreme Court decision, provided support

presumption that a jury understands the court's answer to its question.¹¹¹ This presumption's application in *Weeks* meant that even though the jurors told the court that they did not understand the instruction, they were presumed to understand it after the same instruction was merely reread to them.¹¹²

It is of particular interest that the *Weeks* Court appeared to view the presumptions (regarding juror understanding of instructions and answers to questions) as rebuttable. This is implicit in the Court's amplification of what it termed "empirical support" for the presumption.¹¹³ Presumably, a premise that is not rebuttable needs no support in order to rule the day in a given case.¹¹⁴ In *Weeks*, however, the Court chose to bow to the presumption because of corroborating circumstances such as the fact that additional clarification was provided in defense counsel's summation,¹¹⁵ the lack of additional questions and

for the result in *Weeks*. *Id.* at 231-32. *Buchanan*, like *Weeks*, involved a review of Virginia's penalty phase jury instructions. See *Buchanan v. Angelone*, 522 U.S. 269 (1998). The majority on the *Buchanan* Court found that the instructions that allegedly confused *Weeks*' jury were proper. *Id.* at 279. In fact *Buchanan*'s jury was not given any instructions on the meaning of mitigating evidence or the way it may be considered by a capital jury. *Id.* at 273-74. Chief Justice Rehnquist, also writing for the majority in *Buchanan*, stated plainly that "[t]he absence of an instruction on the concept of mitigation and of instructions on particular statutorily defined mitigating factors did not violate the Eighth and Fourteenth Amendments." *Id.* at 279. In *Weeks*, Chief Justice Rehnquist pointed out that *Weeks*' jury was given even more guidance than *Buchanan*'s jury on the relevance of mitigation evidence. See *Weeks*, 528 U.S. at 231-32. Of course, the different issue raised in *Weeks* was the proper response to a jury's expression of confusion.

110. See *Arave v. Creech*, 507 U.S. 463, 480 (1993) (Blackmun, J., dissenting) (citing JEREMY BENTHAM, *Anarchical Fallacies*, in 2 WORKS OF JEREMY BENTHAM 501 (1843)).

111. See *Weeks*, 528 U.S. at 234 (citing *Armstrong v. Toler*, 24 U.S. (1 Wheat.) 258 (1826)).

112. The absurdity of the majority's logic was hardly lost on the dissenters who responded, "if the jurors found it necessary to ask the judge what that paragraph meant in the first place, why should we presume that they would find it any less ambiguous just because the judge told them to read it again?" *Id.* at 243 (Stevens, J., dissenting).

113. See *id.* at 234-35.

114. See *supra* notes 66-69 and accompanying text.

115. Cf. *United States v. Walters*, 913 F.2d 388, 392 (7th Cir. 1990) (concluding that "arguments of counsel [cannot] substitute for instructions by the court") (quoting *Taylor v. Kentucky*, 436 U.S. 478, 488-89 (1978)); Craig Haney & Mona Lynch, *Clarifying Life and Death Matters: An Analysis of Instructional Comprehension and Penalty Phase Closing Arguments*, 21 LAW & HUM. BEHAV. 575, 589-92 (1997). Haney and Lynch conclude after their study that attorneys' penalty phase closing arguments have not enhanced jurors' comprehension of legal instructions. *Id.* These researchers attribute this failure to the role of attorneys as biased advocates and to the fact that "attorneys are no more effective than judges in explaining the key concepts of aggravation, mitigation,

the two-hour-long deliberations after the court's direction to reread the given instruction.¹¹⁶ Had these circumstances been otherwise, one could reasonably speculate that the Court would have been hard pressed to blindly employ the presumption.¹¹⁷ In sum, Chief Justice Rehnquist's opinion in *Weeks* identifies a presumption that jurors understand (and follow) instructions, a presumption that jurors understand the court's responses (whatever they might be) to their questions regarding the instructions, and the possibility that these presumptions can be rebutted.¹¹⁸

Regarding the burden of proof, the *Weeks* Court utilized the *Boyd* standard.¹¹⁹ In the end, Lonnie Weeks, Jr. was denied relief because, in the eyes of the majority, he could not establish a reasonable likelihood that his jury's confusion prevented it from properly considering the evidence.¹²⁰

and extenuation in terms that are comprehensible to lay people." *Id.* at 589.

116. *Weeks*, 528 U.S. at 234-35. The Court seems to hold the jury's behavior under a microscope. The Court infers from the jury's silence that it was satisfied by the judge's response to its question. *Id.* According to the Court, this inference is bolstered by the observations that the trial court displayed "[t]he utmost willingness . . . to gratify them" and that "[t]his particular jury demonstrated that it was not too shy to ask questions." *Id.* at 234, 235-36.

117. Arguably, there is an alternative interpretation of the Court's reference to empirical support for the presumption. It could be said that the Court felt compelled by the presumption to reject Weeks' claim but pointed to the empirical support merely to illustrate that the presumption is valid and the result fair and reliable. The Court's finding that Weeks failed to persuade them to reject the presumption, however, undermines this alternative interpretation. The dissenting opinion states even more clearly that the presumption is one that may be rebutted. *See id.* at 244 n.5 (Stevens, J., dissenting).

118. My conclusion that the *Weeks* Court viewed the jury instruction presumption as rebuttable is bolstered by the Court's later decision in *Penry v. Johnson*, 532 U.S. 782, 808 (2001). In *Penry*, Justice O'Connor's majority opinion more than implies that the jury instruction presumption is rebuttable. *See id.* at 788. Penry's death sentence was set aside by the Court for a second time (for the Court's opinion setting aside Penry's first death sentence, see *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989)) because a portion of the penalty phase jury instructions was deemed too confusing. *See Penry*, 532 U.S. at 799. Beginning her analysis by stating "We generally presume that jurors follow their instructions," Justice O'Connor relied upon the context and circumstances and, citing *Boyd*, concluded that there was at least a reasonable likelihood that the jury misapplied the instruction. *Id.* at 799-800.

119. *Weeks*, 528 U.S. at 236.

120. *See id.* The dissenting justices (Stevens, Ginsburg, Breyer and Souter), while disagreeing with the outcome, agreed that the reasonable probability standard was appropriate. *Id.* at 244 (Stevens, J., dissenting). For a persuasive critique of *Weeks*, see Stephen P. Garvey et al., *Correcting Deadly Confusion: Responding to Jury Inquiries in Capital Cases*, 85 CORNELL L. REV. 627 (2000). Professors Garvey, Johnson and Marcus designed and administered a study to determine whether the *Weeks* jury probably

Whether they consider it rebuttable or firm, our courts find it necessary to adhere to the presumption that jurors understand instructions. The next Part considers whether the presumption has legs.

III. POSSIBLE JUSTIFICATIONS FOR THE JURY INSTRUCTION PRESUMPTION

Perhaps a preliminary inquiry ought to be whether and to what degree the presumption requires justification. Should it not be acceptable or even desirable for our judicial system to simply proceed under the assumption that English speaking jurors understand the English words comprising the trial court's instructions?¹²¹ The answer is, "no."¹²² A jury instruction presumption, whether or not it is rebuttable, needs an adequate foundation. If a question as important as whether juries understand their instructions is to be answered by simply asserting that they do, the judiciary should have very good reasons for doing so.

Let us consider a couple of examples. One commonly used instruction allows a jury to presume that one found to be in the recent and exclusive possession of stolen goods did steal those goods.¹²³ A jury receiving this instruction, if persuaded to do so by the prosecution,¹²⁴ may presume that a defendant found in exclusive possession of recently stolen goods is the thief. While we know that one who is not the thief may, for a variety of reasons, have possession of recently stolen items, courts sanction the use of this presumption

did or did not understand the law and whether a clarifying response to the jurors' question would have improved comprehension. *Id.* at 633-35. The results of the study suggest that the key instruction was most likely misunderstood, that referring the jury back to the same instruction did nothing to improve comprehension and that the response proposed by the defense, if given to the jury, would have dramatically increased comprehension. *Id.* at 638-40; *see also* Anderson, *supra* note 58, at 770-76 (arguing that "[t]he problems that are evidenced in the Supreme Court's *Weeks* opinion make clear that the Court has not provided adequate supervision to capital juries").

121. Or do jurors sometimes experience the kind of frustration felt by Alice at the Mad Hatter's tea party when "[t]he Hatter's remark seemed to her to have no sort of meaning in it, and yet it was certainly English"? *See* LEWIS CARROLL, *Alice's Adventures in Wonderland*, in LOGICAL NONSENSE: THE WORKS OF LEWIS CARROLL 79, 112 (Philip C. Blackburn & Lionel White eds., 1934).

122. Bethany K. Dumas, English professor and linguist, likewise rejects such a notion. She mocks Chief Justice Rehnquist's reliance on the jury instruction presumption by declaring, "Apparently, in [Rehnquist's] view, mere exposure to language guarantees comprehension!" *See* Bethany K. Dumas, *Jury Trials: Lay Jurors, Pattern Jury Instructions, and Comprehension Issues*, 67 TENN. L. REV. 701, 702 (2000).

123. *See, e.g.*, ME. REV. STAT. ANN. tit. 17-A, § 361 (West 2002).

124. As explained *supra* note 40 and accompanying text, despite the presumption, the burden of persuasion remains on the prosecution. Therefore the jury may accept the presumed fact as true only if persuaded to do so by the prosecuting attorney. *See id.*

because logic and experience teach us that often¹²⁵ those possessing things recently¹²⁶ stolen in fact are the ones who stole them. Thus, there is a rational connection between the proven fact (recent exclusive possession) and the presumed fact (larceny). Now consider another, admittedly extreme, example. Suppose a legislature added to the criminal code the presumption that redheads found in (not necessarily recent or exclusive) possession of stolen goods could be presumed to have stolen those goods. There is no rational connection between being a redhead possessing stolen goods and being responsible for the theft. Likewise there is no historical basis, no legal precedent and no empirical evidence to connect the two facts. While it is exceedingly unlikely that a jury would be persuaded to follow such a presumption, it is exceedingly unfair, and in fact unconstitutional,¹²⁷ to allow even the possibility that the presumption could substitute for better proof. This presumption would not be allowed to stand. It is no less unfair for the jury instruction presumption to govern without a sensible foundation for its use.

The following sections explore where, if anywhere, lie the bases for the jury instruction presumption. For this we look at legal precedent, history, rationality and logic, empirical data and experience, and policy and practicalities.

A. Legal Precedent and the Reference to Justice Traynor

When courts rely upon the presumption they do so without any genuine authority.¹²⁸ The following passage from *Connecticut v. Johnson*¹²⁹ is typical of how courts articulate what they perceive to be the precedent for the presumption:

Chief Justice Traynor notes in his monograph on harmless error: “In the absence of definitive studies to the contrary, we must assume that juries for the most part understand and faithfully follow instructions. The concept of a fair trial encompasses a decision by a tribunal that

125. The rational connection standard, at a minimum, requires the connection exist more often than not. See *Leary v. United States*, 395 U.S. 6, 36 (1969); *infra* notes 176-77 and accompanying text.

126. If not statutorily defined, typically case law provides interpretations for terms like “recent” and “exclusive.” See, e.g., *State v. Sapiel*, 432 A.2d 1262, 1268-69 (Me. 1981) (finding one week and nine weeks after theft to satisfy requirement that possession be recent); *State v. Mower*, 407 A.2d 729, 732 (Me. 1979) (holding that exclusive possession may be had jointly with others).

127. See *infra* notes 176-77 and accompanying text.

128. Accord JEROME FRANK, *COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE* 117 (1949) (writing that “[u]nder our system, however, the courts are obligated to make the unrealistic assumption that the often incomprehensible words, uttered in the physical presence of the jurors, have some real effect on their thought processes”).

129. 460 U.S. 73 (1983).

has understood and applied the law to all material issues in the case."¹³⁰

Justice Traynor¹³¹ did indeed suggest that we work under the assumption that jurors understand and follow instructions.¹³² However, the only authority Justice Traynor offered was a work by Harry Kalven, Jr. and Hans Zeisel entitled *The American Jury*.¹³³ While *The American Jury* reports the authors' findings on jury decision-making,¹³⁴ it cannot support the assertion that jurors understand instructions. Part of the authors' findings confirms that, in their determination of factual issues, jurors usually get it right.¹³⁵ However, the study is silent on juror comprehension of legal instructions. Ironically, the late Professor Zeisel authored a subsequent study, exclusively concerned with juror comprehension of instructions, that led him to conclude that jurors did not adequately understand Illinois pattern jury instructions for the penalty phase of a capital case.¹³⁶ In any

130. *Id.* at 87 n.14 (citing ROGER J. TRAYNOR, *THE RIDDLE OF HARMLESS ERROR* 73-74 (1970)). Traynor's monograph and cases citing to it are routinely offered as authority for the presumption. See, e.g., *Francis v. Franklin*, 471 U.S. 307, 324 (1985); *Bush v. Stephenson*, 669 F. Supp. 1322, 1340 n.17 (E.D.N.C. 1986), *aff'd*, 826 F.2d 1059 (4th Cir. 1987).

131. Roger J. Traynor was a Justice of the California Supreme Court from 1940 to 1964 and Chief Justice from 1964 to 1970. See G. Edward White, *Tribute to Roger Traynor*, 69 VA. L. REV. 1381, 1382-83 (1983); see also *Died. Roger J. Traynor*, TIME, May 30, 1983, at 88. For a discussion of Traynor's reputation, see generally John W. Poulos, *The Judicial Philosophy of Roger Traynor*, 46 HASTINGS L.J. 1643, 1643-45 (1995); John W. Poulos, *The Judicial Process and Substantive Criminal Law: The Legacy of Roger Traynor*, 29 LOY. L.A. L. REV. 429, 429-31 (1996). Traynor authored approximately 259 opinions in criminal cases. His apparent focus was on the judicial process rather than substantive issues in criminal law. Poulos, *The Judicial Process*, *supra*, at 434.

132. See TRAYNOR, *supra* note 130, at 73-74.

133. See *id.* at 105 n.210 (citing KALVEN & ZEISEL, *supra* note 77, at 55-65, 221-97, and claiming that "this assumption is supported by the findings [in *The American Jury*]").

134. See KALVEN & ZEISEL, *supra* note 77, at 55-65, 221-97. Professors Kalven and Zeisel studied the efficacy of the jury system by comparing judge and jury decision-making on the same body of evidence. *Id.* at 10-11. In other words, they sent questionnaires to trial judges asking for jury verdicts of cases tried before them and asking how they (the judges) would have decided the case. *Id.* at 45-54. The authors then looked for instances of judge/jury disagreement and tried to offer explanations for such disagreement. See *id.* at 55-81, 104-17.

135. *Id.* at 149-62, 494.

136. See *Free v. Peters*, 12 F.3d 700, 705 (7th Cir. 1993); *Gacy v. Wellborn*, 994 F.2d 305, 305 (7th Cir. 1993). In *Gacy* and *Free* the Seventh Circuit rejected Zeisel's findings noting flaws in his methodology. See *Free*, 12 F.3d at 705-06; *Gacy*, 994 F.2d at 311.

event, *The American Jury* study, contrary to Justice Traynor's reference, does not prove that jurors understand instructions.¹³⁷

Moreover, without question Justice Traynor did not intend his words to be a shield, protecting incomprehensible instructions from judicial scrutiny. The oft-cited Traynor piece was a monograph on the subject of harmless error. When he argued that we must assume that juries for the most part understand and faithfully follow instructions, Justice Traynor was simply making the point that erroneous jury instructions should not be deemed harmless simply because their legalistic language suggests that they may not have been understood.¹³⁸ Traynor chose the assumption that jurors understand and follow instructions over the other extreme: the assumption that jurors can never understand even simple and clear legal instructions.¹³⁹ Nevertheless, Justice Traynor appeared to have been quite concerned that a reviewing court be assured that this assumption holds true in any given trial. He said, "[T]he concept of a fair trial encompasses a decision by a tribunal that has understood and applied the law to all material issues in the case."¹⁴⁰ Quite significantly, Traynor went on to say, "The most troublesome instructions are not those that are demonstrably incorrect but those that may be incorrectly understood because of their inept language. If an instruction on a substantial issue is confusing to a reasonable juror, the judgment should be reversed."¹⁴¹

Aside from earlier courts' reliance on the presumption,¹⁴² Justice Traynor's remarks are the only authority referenced when the jury instruction presumption

137. See Phoebe C. Ellsworth, *Jury Reform at the End of the Century: Real Agreement, Real Changes*, 32 U. MICH. J.L. REFORM 213, 215 (1999) (pointing out that Zeisel's research published in *The American Jury* established that jurors are competent fact finders and "study after study [has] found that jurors are far less competent at understanding the law as presented to them in the judges' instructions").

138. See TRAYNOR, *supra* note 130, at 73. Justice Traynor recommended that when a jury instruction error relates to a substantial element of an appellant's case the appellate court should avoid finding it highly probable that the instruction had no influence on the verdict. *Id.* at 74. The opposite would be true if the instruction involved an issue not material to the case. *Id.*

139. *Id.* at 73. Justice Traynor acknowledged and rejected a middle ground, that it is impossible to know whether or not a jury managed to comprehend a set of instructions. *Id.*

140. *Id.*

141. *Id.* at 74.

142. This kind of empty precedent was mocked by Felix Cohen when he criticized the Supreme Court's due process jurisprudence. See Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 818-20 (1935). He complained that "[i]n practice, the Supreme Court professes to consider, in a 'due process' case, primarily its own former adjudications on the subject, apparently believing with the Bellman, that what it says three times must be true." *Id.* at 820.

is called into service. Contrary to the references, however, neither Justice Traynor's writings nor his sources support such a presumption.

B. History

An examination of the history and development of Anglo-American trial by jury¹⁴³ fails to uncover any experience that could explain the emergence of a presumption that jurors understand legalistic instructions. Nor does history reveal any commonly held belief that they would.

Pattern jury instructions (printed materials suggested for use by trial courts in a given jurisdiction that contain judicial charges on principles and elements of law) became widely available in the latter part of the twentieth century.¹⁴⁴ Up until that point, the dilemma of how or whether to teach law to jurors was tackled in a variety of ways ranging from no instructions,¹⁴⁵ to open courtroom dialogue,¹⁴⁶ to judges dictating a verdict.¹⁴⁷ Colonial¹⁴⁸ and early American practices concerning the jury's role vis-a-vis the law present interesting courtroom scenarios. Nevertheless, they far from suggest that early jurists had

143. Surprisingly there is relatively little historical study of the jury trial in America, much less jury instructions. See Harold M. Hyman & Catherine M. Tarrant, *Aspects of American Trial Jury History*, in *THE JURY SYSTEM IN AMERICA: A CRITICAL OVERVIEW* 23, 24 (Rita James Simon ed., 1975) (lamenting the "very thin body of American legal history concerning juries"); Douglas G. Smith, *The Historical and Constitutional Contexts of Jury Reform*, 25 *HOFSTRA L. REV.* 377, 421 (1996) (noting that the historical development of the American jury has been less studied than that of the English jury). Regarding trial by jury in colonial America, historian John M. Murrin discovered that seventeenth century New England was the "region best served by published court records and scholarly monographs." See John M. Murrin, *Magistrates, Sinners, and a Precarious Liberty: Trial by Jury in Seventeenth-Century New England*, in *SAINTS & REVOLUTIONARIES: ESSAYS ON EARLY AMERICAN HISTORY* 152, 154 (David D. Hall et al. eds., 1984).

144. See JOHN GUINTEHER, *THE JURY IN AMERICA* 71 (1988); NIELAND, *supra* note 57, at 4-7.

145. See BRUCE H. MANN, *NEIGHBORS AND STRANGERS* 74 (1987); Smith, *supra* note 143, at 441.

146. See THOMAS ANDREW GREEN, *VERDICT ACCORDING TO CONSCIENCE* 278 (1985); Smith, *supra* note 143, at 409.

147. See J. M. BEATTIE, *CRIME AND THE COURTS IN ENGLAND 1660-1800*, at 408 (1986); ROBERT L. MCBRIDE, *THE ART OF INSTRUCTING THE JURY* 4-8 (1969).

148. The circumstances under which one would have a right to a trial by jury were far from uniform in the colonies. See *THE FEDERALIST NO. 83* (Alexander Hamilton).

evidence that lay¹⁴⁹ jurors were capable of understanding the language of the law.

1. Colonial and Early American Juries: No Instructions

It is useful to divide the history of American juries and their responsibility for issues of law into three overlapping periods. The first covers an era from the seventeenth century through much of the nineteenth century, when jurors took it upon themselves or in some settings were even encouraged to determine questions of law as well as questions of fact.¹⁵⁰ During this period,¹⁵¹ there was a commonly held belief that jurors already knew the law as well as anyone else. In fact, quite often trial judges were laymen, no better trained in law than an average citizen called to serve on a jury.¹⁵² Either way, jurors felt free to

149. Apparently, at least in certain early English cases, special jurors were selected because of their social class or because they had particular expertise. *See* Smith, *supra* note 143, at 402. The expertise, be it land ownership or merchants' affairs, was thought to make these jurors more suitable as fact finders in related cases. *Id.*

150. Used here, questions of "law" means questions of pure law as opposed to mixed questions of law and fact. An example of a question of pure law is whether an alleged accomplice to a crime must be proven to have had the same criminal intent as the principal. *See generally* MODEL PENAL CODE § 2.06, 10A U.L.A. 110-11 (2001) (enumerating the legal requirements for criminal complicity). A related example of a mixed question would be whether the circumstantial evidence of an accused accomplice's mental state proved that she had the required criminal intent. For further explanation of the difference between questions of pure law and mixed questions, see generally *Williams v. Taylor*, 529 U.S. 362, 405 (2000) (applying the concepts of pure and mixed questions to analysis of the Antiterrorism and Effective Death Penalty Act of 1996).

151. The right of juries to decide questions of law died out in civil cases well before it did in criminal cases. *See* Stanton D. Krauss, *An Inquiry into the Right of Criminal Juries to Determine the Law in Colonial America*, 89 J. CRIM. L. & CRIMINOLOGY 111, 116 (1998). Interestingly, this right or practice was not one that the colonists borrowed from England. *See* Smith, *supra* note 143, at 446-47. While the concept that juries decided law began to fall into disfavor by the mid-nineteenth century, *see, e.g.*, *United States v. Battiste*, 24 F. Cas. 1042, 1043 (C.C.D. Mass. 1835) (No. 14,545); *see generally* Smith, *supra* note 143, at 446-53 (describing how the powers of the jury began to be questioned during the 1800s), the United States Supreme Court concluded definitively that courts rather than juries determine questions of law in both civil and criminal cases in *Sparf v. United States*, 156 U.S. 51, 102-03 (1895). Justice Harlan's opinion in *Sparf* provides an exhaustive account of how the province of the jury was viewed by English courts, lower federal courts, state courts and legal scholars. *See id.* at 64-99; *cf.* Krauss, *supra*, at 121-22 (arguing that colonial juries never actually had the "right" to decide the law, that they may not have done so to the extent many historians believe and that present day supporters of jury nullification should, perhaps, be unable to rely on the colonial jury system for authority).

152. *See* LEONARD W. LEVY, *THE PALLADIUM OF JUSTICE: ORIGINS OF TRIAL BY*

construe and determine the law for themselves, especially in criminal cases.¹⁵³ They were free to interpret the law on their own or even impose rules of law of their own creation. For obvious reasons these juries virtually never received instruction on the law.¹⁵⁴ Had the lack of instruction been due to a perception that laypersons were able to intuit and apply complex legal principles without the benefit of comprehensive instructions, this period might offer some historical support for the jury instruction presumption.¹⁵⁵ To the contrary, however, historians agree that jurors were not *told* the law because they *found* the law.

JURY 73 (1999); Eaton, *The Development of the Judicial System in Rhode Island*, 14 YALE L.J. 148, 153 n.* (1905); Smith, *supra* note 143, at 449-50.

153. See WILLIAM E. NELSON, *AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830*, at 26-30 (1975); Smith, *supra* note 143, at 446; cf. Hyman & Tarrant, *supra* note 143, at 35 (commenting that moderates and conservatives disagreed about whether juries should find facts alone or both facts and law); Krauss, *supra* note 151, at 114 (claiming that the perception that jurors had or have the “right” to decide the law is incorrect and that the nature and rules of our jury system do, however, give juries the “power” to decide law); Edson R. Sunderland, *Verdicts, General and Special*, 29 YALE L.J. 253, 253-58 (1920) (discussing the debate regarding authority for juries to decide questions of law). Accord JEFFREY ABRAMSON, *WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 90-95* (1994) (discussing the fact/law distinction and its impact on jury nullification); FRANK, *supra* note 128, at 113.

154. See MANN, *supra* note 145, at 74; Smith, *supra* note 143, at 441 (stating that in colonial Massachusetts jury instructions were either not given or were not very elaborate); see also ABRAMSON, *supra* note 153, at 9. While most historians report that most often colonial juries were given no instructions at all, see *supra* note 145 and accompanying text, Abramson reports that advisory as opposed to mandatory instructions were offered. “[Colonial] juries were crucially instructed that they had the right to decide questions of law as well as of fact. . . . Juries could disobey . . . instructions, construe the law independently, or even set aside the law entirely to render verdicts according to conscience.” ABRAMSON, *supra* note 153, at 9; see also FRANK, *supra* note 128, at 112 (explaining that “during the latter part of the 18th century and the early part of the 19th, judges told juries, especially in criminal cases, that it was for the jury to decide not only the facts but also the ‘law’ . . . and that the jury was not bound to accept the judges’ instructions concerning the rules”); LEVY, *supra* note 152, at 69.

155. There is some evidence that the jury’s power to determine the law was rooted in the notion that ordinary citizens were, from an early age, well versed in basic “regulations of society.” See, e.g., Smith, *supra* note 143, at 449-50 (citing Adams’ Diary Notes on the Right of Juries (Feb. 12, 1771), in 1 LEGAL PAPERS OF JOHN ADAMS 228, 230 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965).

2. Nineteenth and Early Twentieth Centuries: Juries Receive the Law in Various Forms

While the notion that jurors determined law continued in one form or another until the end of the nineteenth century, it began to fall into disfavor long before then.¹⁵⁶ Thus, by the end of the eighteenth century, jury instructions on law, such as they were, could be heard in American courtrooms.¹⁵⁷

Significantly, the format of the earliest instructions suggests a concern that truly legalistic instructions would be pointless. The first indications of judicial instructions to jurors might better be termed judicial recommendations.¹⁵⁸ Much of the exchange could be described as judicial marshaling of the evidence. Trial courts would sum up the testimony and frequently express personal opinions regarding witnesses' credibility.¹⁵⁹ It was not customary for courts to offer instruction on principles of law to enable jurors to then independently apply such law to facts they found during their deliberations.

Several other characteristics of the earliest jury instructions likewise provide no foundation for the instruction presumption. In England, informal dialogue

156. See FRANK, *supra* note 128, at 112; Smith, *supra* note 143, at 442-45; see also *supra* note 151 and accompanying text.

157. Naturally, as the concept that jurors could decide the law came into increasing disfavor, the need to instruct the jury on the law grew. In describing the evolution of the jury's role in Connecticut, Bruce H. Mann reveals examples of trials in which the jury, even at a time when it had more power to decide law, referred questions of law back to the bench. See MANN, *supra* note 145, at 79.

158. This practice had strong roots in England. See BEATTIE, *supra* note 147, at 408; GREEN, *supra* note 146, at 273. At times these "recommendations" were aggressively urged upon the jury. In fact historians recount true horror stories of judicial coercion of jurors. See, e.g., GREEN, *supra* note 146, at 200-64. The best known and perhaps most horrifying of these is the tale of Edward Bushnell. He and his fellow jurors endured increasingly tortuous conditions imposed by the trial court for their refusal to convict William Penn of conspiracy to disturb the peace and preach Quakerism. See GODFREY D. LEHMAN, *WE THE JURY . . . : THE IMPACT OF JURORS ON OUR BASIC FREEDOMS* 35-62 (1997) (detailing the Penn trial wherein jurors were deprived of food, drink, sleep and even chamber pots in an effort to coerce guilty verdicts); see also Smith v. Times Publ'g Co., 36 A. 296 (Pa. 1897); VALERIE P. HANS & NEIL VIDMAR, *JUDGING THE JURY* 21-22 (1986). In eighteenth century America, rather than actual coercion, it was more common to find that trial judges identified the relevant issues and commented on the evidence. See Smith, *supra* note 143, at 441-43.

159. See Smith, *supra* note 143, at 441. *But see* Eaton, *supra* note 152, at 153 n.* (quoting 1833 jury charge in which judge stated that his policy was "never to sum up the facts in the case, but merely to explain the law").

inside the courtroom between judge and jury was not unusual.¹⁶⁰ Thus, any instructions jurors found confusing could be clarified through discussion.

Further evidence of skepticism regarding jurors' ability to understand instructions on the law was the use of "special verdicts."¹⁶¹ When asked to deliver a special verdict, juries deliberate over specific factual disputes, leaving it for the court to decide the legal significance of their fact-finding.¹⁶² Special verdicts were, and remain, controversial.¹⁶³ They are criticized as a means for the bench to assert control over juries.¹⁶⁴ The ability to return a general verdict, i.e., guilty/not guilty or liable/not liable, is seen by some commentators as necessary for a jury to maintain independence.¹⁶⁵ Nevertheless, the popularity of special verdicts increased in the eighteenth century, at least partly because of a concern shared by both judges and juries that juries were ill-equipped to apply law.¹⁶⁶ Apparently, the problem of jurors being asked to apply that with which they lacked familiarity was not deemed solvable through the provision of oral instructions.

Thus, the early English and American trial systems offer no experiences, let alone proof, that jurors would comprehend and correctly apply legalistic instructions. In fact, jury instruction practices pre-dating modern day pattern

160. See BEATTIE, *supra* note 147, at 408-09; GREEN, *supra* note 146, at 278; Smith, *supra* note 143, at 409 ("The interaction between the judge and jury during this period might have been as informal as to be described as 'plain chatter.'").

161. See LEVY, *supra* note 152, at 71; MANN, *supra* note 145, at 79; Smith, *supra* note 143, at 486-88. The use of special verdicts in civil trials continues even now, authorized by Rule 49 of the Federal Rules of Civil Procedure.

162. See FED. R. CIV. P. 49; HANS & VIDMAR, *supra* note 158, at 39.

163. See Smith, *supra* note 143, at 487-88. See generally Kate H. Nepveu, *Beyond "Guilty" or "Not Guilty": Giving Special Verdicts in Criminal Jury Trials*, 21 YALE L. & POL'Y REV. 263 (2003) (describing current use of special verdicts and recommending rethinking and broadening their application); Sunderland, *supra* note 153, at 261-67 (outlining the objections to the use of special verdicts and proposing solutions).

164. See, e.g., LEHMAN, *supra* note 158, at 16. *But see* FRANK, *supra* note 128, at 114 (criticizing general verdicts because they make it impossible for trial judges or the parties to know whether the jury correctly applied the courts instructions or missapplied or misunderstood them). Judge Frank finds much fault with the system of trial by jury and, lamenting that the right to a jury trial is probably too ingrained to ever go away, he recommends that special verdicts would be a step in the right direction. *Id.* at 139-41.

165. See, e.g., GUNTHER, *supra* note 144, at 70; LEHMAN, *supra* note 158, at 16.

166. See MANN, *supra* note 145, at 79. The initiation of special verdicts could be a two-way street. Juries were permitted to report that while they reached a decision with regard to the factual disputes, they chose to refer the application of the law and verdict to the bench. *Id.* While sometimes juries returned special verdicts because they were unable to agree on the final outcome, "[t]he phenomenon of juries admitting that they did not know how to apply the law to the facts they had found was, at the very least, an admission of their limitations." *Id.*

instructions suggest a widely held belief to the contrary. Once it became the law of the land that juries must apply the law as determined and given by the court,¹⁶⁷ judges employed a number of methods to avoid entrusting juries with comprehending and applying legal principles. Recommendations regarding the correct verdict and the use of special verdicts served to relieve juries of the burden of grappling with incomprehensible instructions.

3. Late Twentieth Century Through the Present: Pattern Instructions

Of course, for quite a number of years now American trial courts have been delivering relatively¹⁶⁸ uniform jury instructions. Pattern instructions found in texts and manuals grew partly out of a concern that instructions were unintelligible.¹⁶⁹ Despite this, commissions charged with drafting uniform instructions made little effort to ensure comprehensibility.¹⁷⁰ Most commissioners (lawyers, judges, legislators), knew little of semantics or

167. See *Sparf v. United States*, 156 U.S. 51, 102-03 (1895).

168. I say relatively because in modern day courts one will frequently hear varying renditions of legal principles. See, e.g., Robert C. Power, *Reasonable and Other Doubts: The Problem of Jury Instructions*, 67 TENN. L. REV. 45, 56 (1999) (claiming that there are a number of different pattern reasonable doubt instructions). This is because jury instruction manuals often offer alternatives among approved instructions. Nevertheless, in the pre-manual days there was little consistency between trial judges, which kept appellate courts plenty busy. See NIELAND, *supra* note 57, at 16-18. In his monograph, Robert G. Nieland points out the ironic discovery that at least one post-pattern instructions study found that there was not a significant reduction in the number of appeals or reversals based upon claims of erroneous jury instructions. *Id.* at 17 (citing Robert G. Nieland, *Assessing the Impact of Pattern Jury Instructions*, 62 JUDICATURE 185 (1978)).

169. See ELWORK ET AL., *supra* note 8, at 5; NIELAND, *supra* note 57, at 22; Note, *Standard Jury Instructions*, 98 U. PA. L. REV. 223, 224 (1949) (describing the partially complete California Book of Standard Jury Instructions as setting “forth legal principles . . . in simple language”). Interestingly, the common perception is that pattern instructions were developed to enhance comprehensibility. See *McDowell v. Calderon*, 130 F.3d 833, 840 (9th Cir. 1997) (“Jury instructions are only judge-made attempts to recast the words of statutes and the elements of crimes into words and terms comprehensible to the layperson.”). According to Nieland, additional reasons for the creation of pattern instructions were the desire for consistency, impartiality, accuracy and time-saving. See generally NIELAND, *supra* note 57, at 13-22 (listing and explaining the goals of the development of pattern instructions). Early efforts to supply pattern instructions to trial judges looked like forms. See, e.g., ROBERT L. MCBRIDE, *THE ART OF INSTRUCTING THE JURY* (1969). Trial courts could access a sample of a particular type of charge, usually containing a particular set of facts, and tailor the charge to suit. See generally NIELAND, *supra* note 57, at 5-6 (discussing and listing examples of books of sample jury instructions).

170. See ELWORK ET AL., *supra* note 8, at 9; NIELAND, *supra* note 57, at 22.

linguistics.¹⁷¹ They were, therefore, ill-equipped to translate law into understandable language. Further, since empirical research on juries and instructions was largely unavailable at the time,¹⁷² drafters were probably unaware of the seriousness or magnitude of the problem.

Thus, in the evolution of jury instructions one can trace the thread of a fear, if not a firm conviction, that technical instructions would be hard, or impossible, for lay jurors to understand. Conversely, there are no aspects of this evolution that can supply a foundation for presuming that jurors comprehend. Indeed, the history suggests the embrace of precisely the opposite presumption: that technical legal instructions would be unintelligible to most laypersons.

C. *The Rational Connection Requirement for Presumptions*

If the concept that juries understand and follow instructions is, as most courts maintain, a presumption, it ought to satisfy the legal requirements for a valid presumption. Long ago the Supreme Court resolved that when presumptions are utilized in criminal cases there must be a rational connection between the fact proved and the ultimate fact presumed.¹⁷³ According to the Court, a presumption is arbitrary where, in common experience, there is a lack of connection to the proven fact.¹⁷⁴

For the jury instruction question to fit the presumption model, we should be able to say that when it is proven that jurors were properly instructed¹⁷⁵ (fact 1), it may be presumed that they understood and followed the instructions (fact 2). For such a presumption to be permitted, there would have to be a rational connection between the two facts.¹⁷⁶ In speaking of presumptions the Supreme

171. See NIELAND, *supra* note 57, at 23.

172. See *id.*

173. See *Tot v. United States*, 319 U.S. 463, 467 (1943). See generally Collier, *supra* note 39, at 426-60 (tracing the evolution of the use of presumptions in criminal cases); James F. Ponsoldt, *A Due Process Analysis of Judicially-Authorized Presumptions in Federal Aggravated Bank Robbery Cases*, 74 J. CRIM. L. & CRIMINOLOGY 363, 369-80 (1983) (analyzing the rational connection requirement); Leo H. Whinery, *Presumptions and Their Effect*, 54 OKLA. L. REV. 553, 562-69 (2001) (discussing standards for finding a rational connection).

174. See *United States v. Gainey*, 380 U.S. 63, 66 (1965) (holding that the constitutionality of a statutory presumption depends upon the rationality of the connection between the facts proven and presumed); *Tot*, 319 U.S. at 467; see also *County Court v. Allen*, 442 U.S. 140, 157-58 (1979); *Leary v. United States*, 395 U.S. 6, 32-33 (1969); *Manley v. Georgia*, 279 U.S. 1, 5 (1929) (finding the need for a rational connection between the fact proved and what is to be inferred).

175. In this context "properly instructed" merely means that the instructions contained correct and comprehensive statements of the relevant law.

176. What makes the connection sufficiently rational? In a 1969 case, *Leary v.*

Court has said, "where the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them, it is not competent for the legislature to create it as a rule governing the procedure of courts."¹⁷⁷ Whether

United States, the Supreme Court pronounced that to be deemed a rational connection the presumed fact must be more likely than not to flow from the basic fact. See *Leary*, 395 U.S. at 36 (finding an insufficient connection between possession of marijuana and knowledge that the marijuana was illegally imported into the United States). Later in *County Court of Ulster County, New York v. Allen*, the Court prescribed a modification holding that in the case of a permissive presumption, see *supra* note 40 and accompanying text, the presumed fact should more likely than not flow from the basic fact in the facts of the case at hand. See *Allen*, 442 U.S. at 171. However, when it came to mandatory presumptions, see *supra* note 40 and accompanying text, the presumed fact should, on its face and beyond a reasonable doubt, flow from the basic fact. *Allen*, 442 U.S. at 166-67. *Allen* created confusion in the already complex law of presumptions. See *Graham*, *supra* note 36, at 440 ("The only thing clear after [*Allen*] is that the case did not foster clarity."). In fact, in his dissent in *Allen*, Justice Powell charged that the majority circumvented the rational basis requirement by allowing the rational connection to be found in the facts of the case at hand alone even if the connection is not borne out by history, common sense or experience. See *Allen*, 442 U.S. at 801-04 (Powell, J., dissenting). Nevertheless, commentators agree that at least some rational basis requirement for permissive presumptions survives *Allen*. See, e.g., *Graham*, *supra* note 36, at 441; *Harris*, *supra* note 39, at 337. *Allen*'s prescription for different treatment for permissive versus mandatory presumptions lost much, if not all, of its significance when the Court in *Sandstrom v. Montana* and *Francis v. Franklin* all but outlawed the use of mandatory presumptions in criminal cases. See *supra* note 40 and accompanying text. See generally *Collier*, *supra* note 39, at 435-39 (explaining *Sandstrom* and *Franklin* and the rationale for finding mandatory presumptions unconstitutional).

While at one time it intended to do so, see MICHAEL GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 303.4, at 213-24 (5th ed. 2001), Congress has not passed legislation or rules on the proper use of permissive presumptions in criminal cases. The Federal Rules of Evidence speak only to the use of presumptions in civil proceedings. See FED. R. EVID. 301. The Federal Advisory Committee's Proposed Rule 303 (now Standard 303) covers presumptions in criminal cases. It authorizes only permissive presumptions and allows their use when the presumed fact establishes guilt or an element of the offense or negatives a defense only when a reasonable juror on the evidence as a whole, could find guilt or the presumed fact beyond a reasonable doubt. See GRAHAM, *supra*, § 303.4, at 213-24; cf. *Collier*, *supra* note 39, at 439-55 (arguing and describing empirical evidence that jurors perceive that so-called permissive presumptions are mandatory); *Harris*, *supra* note 39, at 341 (suggesting that the distinction between mandatory and permissive presumptions is lost on most jurors). In any event, the resolution of the precise standard for the rational connection test is not necessary to the thesis of this Article. The jury instruction presumption lacks the benefit of a rational connection under either test.

177. See *Tot*, 319 U.S. at 468. The Court expressed the same opinion with respect to judicially created presumptions in *Alabama v. Smith*, 490 U.S. 794, 802 (1989). In *Smith*, the Court considered the breadth of the "presumption of vindictiveness" which it

presumption or rule, the premise that jurors understand instructions is arguably one of the most important principles governing our trial court system.¹⁷⁸ Given the nature of jury instructions¹⁷⁹ a criminal defendant's access to justice depends in large part upon jurors understanding their instructions.¹⁸⁰ Because it is such a crucial link¹⁸¹ in a party's access to a just verdict,¹⁸² there should be, at the very

had previously created in *North Carolina v. Pearce*, 395 U.S. 711, 726 (1969), for situations in which a criminal defendant is retried after a successful appeal and receives a harsher sentence. *Smith* involved a defendant who was tried after a successful motion to withdraw his guilty plea. *See Smith*, 490 U.S. at 795. In refusing to extend the "presumption of vindictiveness," the Court reasoned "when a greater penalty is imposed after trial than was imposed after a prior guilty plea, the increase in sentence is not more likely than not attributable to the vindictiveness on the part of the sentencing judge." *Id.* at 801.

178. *See infra* notes 179-82 and accompanying text.

179. Jurors in criminal cases are instructed on a broad range of topics. *See, e.g.*, CALIFORNIA JURY INSTRUCTIONS- CRIMINAL 9 (7th ed. 2004); FLORIDA STANDARD JURY INSTRUCTIONS- CRIMINAL §§ 3.1-3.13 (4th ed. 2002). The order and procedures of the trial are described. *See, e.g.*, 8TH CIR. MODEL JURY INSTR.- CRIM. 1.09 (2003). Jurors are told the elements of the offenses charged and many of the elements' terms are defined. *See, e.g., id.* at 6.18.111 (providing and defining elements of the crime of assaulting a federal officer). More generally, they are instructed about the presumption of innocence, the prosecutor's burden of proof and the definition of reasonable doubt. *See, e.g.*, CAL. JURY INSTR.- CRIM. 2.90 (2004); FLA. JURY INSTR.- CRIM. 3.7 (2002); HAW. PATTERN JURY INSTR.- CRIM. 3.02 (2002). In any given case they may also be instructed regarding the elements of self-defense, *see, e.g.*, 8TH CIR. MODEL JURY INSTR.- CRIM. 9.04 (2003), intoxication or drug use, *see, e.g., id.* at 9.06, insanity, *see, e.g., id.* at 9.03, not to draw adverse inferences from the defendant's failure to testify, *see, e.g., id.* at 4.01, the proper consideration of accomplice testimony, *see, e.g., id.* at 4.05, or eyewitness testimony, *see, e.g., id.* at 4.08.

180. Nowhere is this more true than in the penalty phase of a capital trial. *See infra* notes 273-81 and accompanying text. Given the stakes, access to justice is especially crucial. Pursuant to the Constitution, the jurors' function walks a finely defined line between narrowly and broadly defined discretion. Death penalty jurisprudence requires that jurors be instructed that a defendant is eligible for a death sentence only under narrowly defined circumstances. *See Jurek v. Texas*, 428 U.S. 262, 263 (1976); *Proffitt v. Florida*, 428 U.S. 242, 254 (1976); *Gregg v. Georgia*, 428 U.S. 153, 188 (1976); *Furman v. Georgia*, 408 U.S. 238, 313 (1972). Yet, penalty phase jurors are also instructed that they must give consideration to a broad range of mitigating evidence when offered by a defendant. *See Mills v. Maryland*, 486 U.S. 367, 393-94 (1988) (citing *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Lockett v. Ohio*, 438 U.S. 586 (1978)).

181. *See United States v. Walters*, 913 F.2d 388, 392 (7th Cir. 1990) (recognizing that "[a]mid a sea of facts and inferences, instructions are the jury's only compass").

182. The government's quest for a just verdict is likewise tied to the jury's ability to understand instructions. It has been suggested that what has been labeled juror nullification in some cases is simply an example of jurors honestly misunderstanding the state of the law. *See Ellsworth, supra* note 137, at 222.

least, a rational basis for the presumption that when jurors are instructed on the law, they understand those instructions.

In examining the connection for rationality, the questions of whether jurors follow and whether they understand instructions, deserve separate treatment. Of course jurors need to understand before they can follow instructions. However, as discussed below, to the extent that they are able to comprehend some or all of an instruction, there may be rational support for a presumption that the correctly understood instruction will be followed. On the other hand, it is far less logical to presume that all instructions are understood.

The presumption that jurors follow instructions that they understand is based on two considerations. One, discussed at length *infra*,¹⁸³ is that the jury system cannot function without it. The other is that it is a logical assumption that when a juror takes an oath, he or she will appreciate the seriousness of the task and endeavor to faithfully carry it out.¹⁸⁴ Part of the oath requires following the instructions of the court.¹⁸⁵ The two facts rationally connected are that when jurors make sworn promises (fact 1), they will keep them (fact 2). For this presumption to have a sufficient rationale, we need to feel comfortable concluding that in the majority of cases jurors will exercise their free will and choose, to the best of their ability,¹⁸⁶ to follow instructions. This is a more

183. See *infra* notes 225-31 and accompanying text.

184. See *Francis v. Franklin*, 471 U.S. 307, 324 (1985) (commenting that “jurors, conscious of the gravity of their task, attend closely the particular language of the trial court’s instructions in a criminal case”); *Maxwell v. Bishop*, 398 U.S. 262, 264-65 (1970) (reaffirming that “it cannot be supposed that once such people take their oaths as jurors they will be unable ‘to follow conscientiously the instructions of a trial judge’”) (quoting *Boulden v. Holman*, 394 U.S. 478, 484 (1969)); *KALVEN & ZEISEL*, *supra* note 77, at 149-62 (documenting that jurors distinguish simple from more complicated cases, ask questions when they need to and usually understand the facts of a case); *LEHMAN*, *supra* note 158, at 11 (lauding jurors’ sense of responsibility and quoting Lord Acton: “Power shared equally with others, all strangers to it and held briefly, tends to ennoble”); *Bradley Saxton, How Well Do Jurors Understand Jury Instructions? A Field Test Using Real Juries and Real Trials in Wyoming*, 33 *LAND & WATER L. REV.* 59, 109 (1998); *Walter W. Steele, Jr. & Elizabeth G. Thornburg, Jury Instructions: A Persistent Failure to Communicate*, 67 *N.C. L. REV.* 77, 98 (1988) (revealing that their experiment “demonstrates that a typical jury makes a good faith effort to use its instructions for the purpose intended”).

185. Typically, the oath asked of jurors is as follows: “Do you solemnly swear (or affirm) that you will well and truly try the issues between the State of _____ and the defendant and render a true verdict according to the law and the evidence, so help you God.” See, e.g., *ALA. CODE* § 12-16-170 (1999); *N.H. REV. STAT. ANN.* § 606:2 (1999).

186. I say “best of their ability” because admittedly some instructions are too difficult to follow. Aside from the problem of comprehension discussed *infra*, some limiting or cautionary instructions may go beyond a juror’s ability to clear his or her mind of evidence. See *supra* note 59. This would be true despite the juror’s willingness to

comfortable connection than the one required for the presumption that the instructions are understood.¹⁸⁷

In the latter case the two facts that should be rationally connected are that when jurors are given instructions (fact 1), they understand them (fact 2). However, even the best-intentioned juror, desirous of fulfilling his or her oath, has little control over his or her ability to comprehend legalistic instructions. While the presumption that a juror will follow instructions largely depends upon the will of the juror, for the most part the presumption that the juror understands instructions does not.¹⁸⁸

D. Empirical Evidence

Demanding rationality fails to sufficiently define the requirements for presumptions. As the Supreme Court has noted, "the determination of rationality is, by its nature, highly empirical."¹⁸⁹ Whether or not it is rational to presume that jurors understand instructions should to a significant extent be determined by reference to empirical data. The empirical studies find that, at least for some important instructions, it is neither rational nor logical to conclude that instructed jurors understand what they have been told.¹⁹⁰

cooperate. See LAWRENCE S. WRIGHTSMAN, *PSYCHOLOGY AND THE LEGAL SYSTEM* 250 (1987). In these cases the presumption that jurors follow instructions is based upon practical considerations alone. See *infra* notes 225-31 and accompanying text; cf. *supra* note 59 (discussing *Bruton v. United States*, 391 U.S. 123, 126 (1968), where the Supreme Court found that under certain circumstances, the potential for unfairness outweighed the practical benefits of joint trials).

187. This is borne out empirically as well. See Steele & Thornburg, *supra* note 184, at 208 (comparing data on jurors' efforts to follow instructions and their abilities).

188. Theoretically, a juror's ability to understand instructions is affected by his or her motivation. Presumably a juror committed to fulfilling his or her function in accordance with the oath will try harder to understand instructions than a juror lacking that commitment. Some studies purporting to prove that jurors misunderstand instructions have been criticized on the grounds that the jury surveys or questionnaires fail to duplicate the seriousness of an actual courtroom setting in which a juror is far more likely to make all efforts to understand the court's instructions. See *infra* note 245. In any event, instructions that are very difficult to understand or even incomprehensible will not be understood by even the most highly motivated juror.

189. See *United States v. Gainey*, 380 U.S. 63, 67 (1965). The *Gainey* Court stressed that in the case of statutorily created presumptions one would expect the legislature to "amass the stuff of actual experience and cull conclusions from it." *Id.*

190. See *infra* notes 191-211 and accompanying text.

For more than twenty years¹⁹¹ social scientists and linguists have been conducting experiments to determine whether jurors are apt to understand many of the more commonly issued legal instructions.¹⁹² The published findings reveal many comprehensibility problems.¹⁹³ Across the board, the studies fail to provide an ounce of foundation for the jury instruction presumption.¹⁹⁴

The leading studies are fairly consistent in their strongest criticisms: pattern jury instructions are predictably misunderstood due to problems with the timing of delivery and the failure of the drafters to understand linguistics.¹⁹⁵ In one of the first studies, Professors Robert P. Charrow and Veda R. Charrow examined a number of California's pattern civil jury instructions and identified various linguistic constructions that, theoretically, could have an impact on a jury's comprehension.¹⁹⁶ For example, the researchers suspected that the overuse of nominalizations (nouns that are derived from verbs),¹⁹⁷ the use of technical legal

191. The first truly comprehensive study of the comprehensibility of jury instructions was reported in 1979 by Professors Robert P. Charrow and Veda R. Charrow. See Charrow & Charrow, *supra* note 8; see also Dumas, *supra* note 122, at 721 (commenting that the Charrows' article was a "pioneering effort on the topic of jury instructions"). There were a number of studies on the subject prior to the Charrows' work, but these were somewhat more narrow in focus. See, e.g., Amiram Elwork et al., *Juridic Decisions: In Ignorance of the Law or in Light of It?*, 1 LAW & HUM. BEHAV. 163 (1977). See generally Charrow & Charrow, *supra* note 8, at 1308 n.8 (listing and categorizing the studies conducted up until 1979).

192. See, e.g., ELWORK ET AL., *supra* note 8, at 43-73; Geoffrey P. Kramer & Dorean M. Koenig, *Do Jurors Understand Criminal Jury Instructions? Analyzing the Results of the Michigan Juror Comprehension Project*, 23 U. MICH. J.L. REFORM 401 (1990); James Luginbuhl & Julie Howe, *Discretion in Capital Sentencing Instructions: Guided or Misguided?*, 70 IND. L.J. 1161 (1995); Steele & Thornburg, *supra* note 184. See generally Dumas, *supra* note 122, at 721-31 (digesting and explaining important studies); Phoebe C. Ellsworth & Alan Reifman, *Juror Comprehension and Public Policy: Perceived Problems and Proposed Solutions*, 6 PSYCHOL. PUB. POL'Y & L. 788-89 (2000) (listing jury instruction comprehension studies).

193. See, e.g., Charrow & Charrow, *supra* note 8, at 1331-41; Luginbuhl & Howe, *supra* note 192, at 1166-82; Steele & Thornburg, *supra* note 184, at 90-98.

194. See Ellsworth & Reifman, *supra* note 192, at 800 (concluding that "the research record overwhelmingly indicates that judicial instructions are not clear"); Valerie P. Hans, *Jury Decision Making*, in HANDBOOK OF PSYCHOLOGY AND LAW 56, 67 (D.K. Kagehiro & W.S. Laufer eds., 1992) ("Jury researchers are nearly unanimous in the view that jurors have trouble understanding and following the judge's legal instructions."); Christopher N. May, "What Do We Do Now?": *Helping Juries Apply the Instructions*, 28 LOY. L.A. L. REV. 869, 872 (1995) ("Studies literally abound demonstrating the extent to which jurors misapprehend the relevant law.").

195. See, e.g., ELWORK ET AL., *supra* note 8, at 17-24; Charrow & Charrow, *supra* note 8, at 1317-28; Lieberman & Sales, *supra* note 58, at 596-97.

196. See Charrow & Charrow, *supra* note 8, at 1308-11.

197. For example, an instruction intended to refer to a person's *failing to recollect*,

phrases,¹⁹⁸ and the use of double or even triple negatives¹⁹⁹ contributed to poor comprehension levels.²⁰⁰ In their experiment,²⁰¹ Professors Charrow and Charrow sought to determine whether and to what extent these constructions interfered with comprehension and whether the subject instructions, rewritten with improved attention to the connection between linguistic construction and comprehension, would be more easily understood.²⁰² The researchers found that juror comprehension of the pattern instructions was low (less than fifty percent)²⁰³ and that comprehension went up significantly (by as much as ninety-three percent) when jurors were given the rewritten instructions.²⁰⁴

Later studies of various civil and criminal instructions, employing various methodologies,²⁰⁵ all point to the same conclusion: many pattern jury

refers to the “*failure of recollection.*” See *id.* at 1322.

198. Examples provided in the study are “‘credibility,’ ‘proximate cause,’ ‘deem’ and ‘stipulate.’” See *id.* at 1324.

199. The California jury instructions studied contained six instances of double or triple negatives. *Id.* at 1325. Two of these phrases illustrate the point: “‘without which the injury would not have happened;’ ‘innocent misrecollection is not uncommon.’” *Id.*

200. *Id.* at 1317-28. The researchers performed specialized analyses in order to isolate some of the variables that impacted comprehension. They studied instruction complexity, linguistic structure (the use and placement of “as to,” sentence length, misplaced phrases, use of the passive construction, use of long word lists, discourse structure, use of embeddings or subordinate clauses) and demographics (subjects’ education, occupation, legal training, prior jury service, past military service, age, sex, native language and other variables). *Id.* By comparing the subjects’ comprehension of pattern with revised jury instructions, the Charrows were able to study the impact of these variables. *Id.* at 1331-41.

201. As with most social science experiments, the methodology for jury instruction comprehension studies varies with the researcher. In the Charrows’ study pre-recorded instructions were played for groups of randomly selected prospective jurors. See *generally id.* at 1311-14 (providing a detailed description of the experiment). The subjects were then asked to orally paraphrase the instructions. *Id.* The responses were taped for later study by the researchers. The rewritten instructions were similarly tested. *Id.* at 1328-30.

202. *Id.* at 1321, 1328-31.

203. *Id.* at 1314-17.

204. *Id.* at 1331-41. Of course, Part II of the experiment, testing rewritten instructions, was crucial. *Id.* at 1317. The researchers concede that, because their study, by design, did not duplicate the conditions surrounding the actual giving of instructions in a trial setting, the results of the testing of the pattern instructions are not conclusive proof regarding their comprehensibility. *Id.* Nevertheless, by rewriting the instructions to correct for problematic linguistic constructions, the Charrows were able to make reliable findings regarding how comprehension could be greatly improved. *Id.*

205. Steele and Thornburg, like the Charrows, used prospective jurors as subjects and asked them to paraphrase both pattern and revised instructions that were played on audiotape. The subjects’ responses were taped for later analysis. See Steele &

instructions are not properly understood by jurors.²⁰⁶ Most significantly, many of these studies show that artfully rewriting difficult to understand instructions greatly improves comprehension.²⁰⁷

Of greatest importance, and most disturbing, are empirical studies testing the comprehensibility of crucial instructions in death penalty cases.²⁰⁸ Here again, social scientists conclude that instructions are not comprehensible.²⁰⁹ Few

Thornburg, *supra* note 184, at 89-90. Alternative methods of subject selection include: testing actual jurors immediately after their service, *see* Kramer & Koenig, *supra* note 192, at 406; Saxton, *supra* note 184, at 75-77, testing college students, *see* Elwork et al., *supra* note 191, at 170, and testing randomly selected jury-eligible citizens, *see* Shari Seidman Diamond & Judith N. Levi, *Improving Decisions on Death by Revising and Testing Jury Instructions*, 79 JUDICATURE 224, 226 (1996). Alternative testing methods include: showing subjects videotapes of judges delivering instructions, *see* Elwork et al., *supra* note 191, at 170, asking subjects to complete questionnaires designed to test their understanding, *see id.*; Kramer & Koenig, *supra* note 192, at 406-08; Saxton, *supra* note 184, at 77-81, and conducting interviews of subjects to determine comprehension levels, *see* Luginbuhl & Howe, *supra* note 192, at 1161-62.

206. *See, e.g.*, Elwork et al., *supra* note 191, at 175-78 (finding that tested pattern instructions were so difficult to understand that their use was no better than providing no instructions at all); Saxton, *supra* note 184, at 86-102 (finding that jurors did not understand instructions as well as they thought they had but that jurors in criminal cases displayed greater understanding than jurors in civil trials); Steele & Thornburg, *supra* note 184, at 92 (concluding that "comprehension by jurors of the instructions given them is dysfunctionally low").

207. *See, e.g.*, ELWORK ET AL., *supra* note 8, at 43-64; Charrow & Charrow, *supra* note 8, at 1341-58; Steele & Thornburg, *supra* note 184, at 90-94. The fact that pattern instructions can be rewritten to improve comprehension hardly means that they have been. *See* Ellsworth, *supra* note 137, at 216 (arguing that "[i]t appears not that the calls of the social scientists were considered and rejected, but rather that they were simply ignored"); Tanford, *Law Reform*, *supra* note 5, at 164-67 (studying the impact of empirical research on appellate courts, legislatures and commissions and concluding that the research has had little influence on courts or legislatures); *see also* Tiersma, *supra* note 5, at 1085-99 (citing the lack of receptiveness of courts to comprehension research and expressing optimism that reform commissions hold the best hope for improving the language of jury instructions).

208. *See, e.g.*, William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 IND. L.J. 1043 (1995); Diamond & Levi, *supra* note 205; Luginbuhl & Howe, *supra* note 192.

209. *See, e.g.*, Diamond & Levi, *supra* note 205, at 225 (confirming conclusions of Professor Hans Zeisel that instructions in capital cases do not provide adequate guidance); Luginbuhl & Howe, *supra* note 192, at 1166-72 (reporting that test subject jurors had a poor understanding of how to evaluate aggravating and mitigating factors, burdens of proof and unanimity requirements); *see also* Phyllis L. Crocker, *Childhood Abuse and Adult Murder: Implications for the Death Penalty*, 77 N.C. L. REV. 1143, 1202-04 (1999) (arguing that jury instructions do not adequately guide the jury's consideration of childhood abuse as a mitigating factor).

would find the data surprising. Overuse of legal jargon, unfamiliar use of grammar and sentence organization are just a few reasons to question the likelihood that commonly used instructions are understood.

Just as a picture is worth a thousand words, a sample of actual language contained in a penalty phase instruction is worth a thousand descriptions:

“If, from your consideration of the evidence and after your due deliberation, there is at least one of you who finds that there is at least one mitigating factor sufficient to preclude the imposition of the death sentence then you should return a verdict that the Defendant be sentenced to imprisonment. On the other hand, if from your consideration of the evidence and after due deliberation you unanimously find that there are no mitigating factors sufficient to preclude the imposition of the death sentence then you should return a verdict that the Defendant be sentenced to death.” . . .

. . . “If you unanimously find from your consideration of all the evidence that there are no mitigating factors sufficient to preclude imposition of a sentence of death then you should return a verdict imposing a sentence of death. If, on the other hand, you do not unanimously find that there are no mitigating factors sufficient to preclude the imposition of a sentence of death then you should return a verdict that the sentence of death should not be imposed.”²¹⁰

When capital case researchers have rewritten instructions with these shortcomings in mind, they have found a significant improvement in comprehension.²¹¹

Logically speaking, and as the Supreme Court has recognized, whether or not a legal presumption has a rational basis ought, at least in part, be determined by reference to empirical data.²¹² To say the very least, the data does not support the rationality of a presumption that jury instructions are adequately understood. One could persuasively argue that it suggests just the opposite.

210. See *Free v. Peters*, 12 F.3d 700, 704 (7th Cir. 1993) (quoting the trial court’s instruction to the jury regarding their consideration of mitigation in the penalty phase of a capital case). From these words the jurors were meant to understand and apply fairly complicated rules concerning inter alia that they need not find a mitigating factor unanimously before taking it into account. See *Mills v. Maryland*, 486 U.S. 367, 373-75 (1988); see also *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538, 1543 (1998) (presenting findings of the Capital Jury Project that jurors do not correctly understand the unanimity requirements). See generally Bowers, *supra* note 208, at 1044-62 (providing a legal history of penalty phase parameters); Tiersma, *supra* note 70, at 3-10 (outlining the law of mitigation evidence).

211. See, e.g., *Diamond & Levi*, *supra* note 205, at 227-30.

212. See *supra* note 189 and accompanying text.

E. Policy and Practicalities

An oft-cited and noteworthy basis for the presumption is its practical necessity.²¹³ The thinking behind this rationale is that the jury system could not function without a presumption that when jurors are given instructions, they understand and follow them.²¹⁴ This idea accounts for the urgent language accompanying the articulation of the presumption²¹⁵—e.g., “[a] crucial assumption,”²¹⁶ “our system of trial by jury is premised on the assumption,”²¹⁷ and “[w]e also deem it essential . . . to apply the well-recognized presumption”²¹⁸

In the world of evidentiary presumptions, however, practicalities may not replace the required rational connection between the fact proved and the fact presumed.²¹⁹ Arguably the same rule should apply to the jury instruction

213. See, e.g., *Gray v. Maryland*, 523 U.S. 185, 201 (1998) (Scalia, J., dissenting); *Richardson v. Marsh*, 481 U.S. 200, 211 (1987). Professor J. Alexander Tanford postulates that one reason the Supreme Court is unreceptive to psychological evidence regarding jury behavior is that it is at odds with institutional efficiency. See Tanford, *The Limits of Scientific Jurisprudence*, *supra* note 5, at 162.

214. See *Francis v. Franklin*, 471 U.S. 307, 324 n.9 (1985); *Parker v. Randolph*, 442 U.S. 62, 73 (1979), *abrogated by Cruz v. New York*, 481 U.S. 186 (1987).

215. See *supra* note 4 and accompanying text.

216. See *Parker*, 442 U.S. at 73 (emphasis added).

217. See *United States v. Owens*, 167 F.3d 739, 756 (1st Cir. 1999).

218. See *United States v. Brown*, 983 F.2d 201, 202 (11th Cir. 1993).

219. See *Tot v. United States*, 319 U.S. 463, 469-70 (1943). The federal statutory presumption at issue in *Tot* provided that possession of a firearm by a prior offender or fugitive was presumptive evidence that the firearm was shipped, transported or received in interstate or foreign commerce. *Id.* at 464. In invalidating this mandatory presumption the Court rejected the government’s argument of comparative convenience. *Id.* at 467. The fact that it may have been more convenient for the defendant to produce evidence regarding where or how he obtained a particular firearm, was deemed an insufficient justification for a presumption unless there was a rational connection between the proven and presumed facts. *Id.* Relative convenience is, quite often, the motivation behind the creation of an evidentiary presumption. See Harris, *supra* note 39, at 310-11 (“Courts and legislatures create . . . presumptions expressly for the sake of manipulating one of the burdens of proof.”); Laurie A. Briggs, Note, *Presumptive Mens Rea; An Analysis of the Federal Judiciary’s Retreat from Sandstrom v. Montana*, 64 NOTRE DAME L. REV. 367, 368 (1989). For example, presumptions are frequently created to ease the prosecutor’s burden of producing evidence of a defendant’s intent. See, e.g., *Sandstrom v. Montana*, 442 U.S. 510, 524 (1979) (involving an instruction that the law “presumes that a person intends the ordinary consequences of his voluntary acts”); *Barnes v. United States*, 412 U.S. 837, 839-40 (1973) (evaluating presumption of knowledge that property is stolen from proof of possession of stolen property). Barring a confession, it can be difficult to secure proof of an individual’s state of mind. A legislatively created presumption alleviates the prosecutor’s burden of producing such evidence. The prosecutor must

presumption.²²⁰ Since the jury presumption is a somewhat different animal,²²¹ however, the practicalities require closer examination.

Justice Antonin Scalia champions the notion that the effective functioning of the American jury system depends upon the jury instruction presumption.²²² He candidly explains that the presumption governs, not so much because we have confidence in its truth, but because it represents a fair accommodation of the government's interest in efficiency.²²³

As was true for the rational connection analysis,²²⁴ for an analysis of policy concerns, presumptions that jurors understand and that jurors follow instructions should be considered separately. Let us first consider the latter presumption, that jurors follow instructions.²²⁵ On countless occasions jurors are given limiting instructions directing them to disregard pieces of evidence²²⁶ or to consider evidence for limited purposes only.²²⁷ Likewise, when jurors are given important instructions to, for example, refrain from exposure to media coverage of the

merely persuade the jury to find beyond a reasonable doubt, the fact they have been instructed they may presume.

220. The *Tot* Court does appear to restrict its rejection of the convenience argument to mandatory presumptions. See *Tot*, 319 U.S. at 469-70. However, in the next important presumption cases the Court required a rational connection for a permissive presumption as well. See *United States v. Romano*, 382 U.S. 136, 141 (1965); *United States v. Gainey*, 380 U.S. 63, 66-68 (1965) (deferring to the legislative finding of a rational connection between a defendant's unexplained presence at an illegal still and guilt of illegally operating a distilling business); see also *Leary v. United States*, 395 U.S. 6, 35-36 (1969) (declaring unconstitutional a presumption similar to that in *Romano* and *Gainey* because it could not be "said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend"). Nevertheless, the jury instruction presumption, even if rebuttable, is more analogous to mandatory presumptions than it is to permissive presumptions.

221. See *supra* notes 48, 66-69 and accompanying text.

222. See, e.g., *Gray v. Maryland*, 523 U.S. 185, 201 (1998) (Scalia, J., dissenting); *Richardson v. Marsh*, 481 U.S. 200, 211 (1987).

223. See *Richardson*, 481 U.S. at 211. In Justice Scalia's own words:

The rule that juries are presumed to follow their instructions is a pragmatic one, rooted less in the absolute certitude that the presumption is true than in the belief that it represents a reasonable practical accommodation of the interests of the state and the defendant in the criminal justice process.

Id.

224. See *supra* notes 173-88 and accompanying text.

225. Of course this could only apply to the instructions that they understand.

226. See, e.g., *United States v. Magana*, 118 F.3d 1173, 1184 (7th Cir. 1997); *United States v. Butler*, 102 F.3d 1191, 1196 (11th Cir. 1997).

227. See, e.g., *Richardson*, 481 U.S. at 211 (sanctioning a direction to the jury to consider a codefendant's statement against him alone); *United States v. Del Mundo*, No. 95-10403, 1996 WL 534039, at *2 (9th Cir. Aug. 15, 1996) (limiting the relevance of certain evidence to the issue of intent).

case,²²⁸ not discuss the case during the trial,²²⁹ or not consider the question of sentencing,²³⁰ courts presume that these directions will be followed.²³¹ To some extent a presumption that jurors follow instructions is vital to the functioning of the system. Not believing that jurors do their best and are usually successful in following a court's directives could have arguably unacceptable consequences. Evidence could not be received for limited purposes. Perhaps more importantly, if jurors were not trusted to follow cautionary instructions to disregard improperly offered evidence, a mistrial would have to be ordered each time the jurors heard something they should not have heard.

On the other hand, there is far less practical necessity to cling to a presumption that all jury instructions are understood. Instructions can be tested for comprehensibility.²³² Instructions failing these empirical tests can be redrafted and retested.²³³

228. See, e.g., *Raulerson v. Wainwright*, 753 F.2d 869, 874-75 (11th Cir. 1985).

229. See, e.g., *United States v. Brooks*, 161 F.3d 1240, 1247 (10th Cir. 1998).

230. See, e.g., *Shannon v. United States*, 512 U.S. 573, 584 (1994); *United States v. Thigpen*, 4 F.3d 1573, 1577 (11th Cir. 1993).

231. In these types of cases the presumption is rebuttable. Mistrials or appellate reversals remain a possibility if the court receives evidence of a violation of certain cautionary instructions or of jury tampering. See generally *Commonwealth v. Sinnott*, 507 N.E.2d 699, 711-12 (Mass. 1987) (considering claim that jurors were exposed to media reports during course of the trial); *People v. Budzyn*, 566 N.W.2d 229, 234-48 (Mich. 1997) (analyzing claims that defendants' convictions should be reversed because of jury's exposure to extrinsic influences).

232. See *supra* notes 191-92 and accompanying text.

233. See *Diamond & Levi*, *supra* note 205, at 232 (arguing that revised instructions should be pre-tested); William H. Erickson, *Criminal Jury Instructions*, 1993 U. ILL. L. REV. 285, 292-93 (suggesting that both lawyers and judges have the responsibility of composing more comprehensible instructions); Leiberman & Sales, *supra* note 58, at 623-26. See generally *Elwork et al.*, *supra* note 191, at 145-81. In *Gacy v. Welborn*, 994 F.2d 305, 311-12 (7th Cir. 1993), the Seventh Circuit suggested that there are most likely limits on our ability to make instructions understandable. The court hypothesized three reasons for this: that the rules conveyed are too complex, that the concepts used are too complex, and that jurors may be unable to grasp unfamiliar thoughts regardless of the manner in which they are explained. *Id.* at 311. If in fact some legal concepts cannot be understood by lay persons despite all efforts at improving comprehensibility, this can hardly be a justification for continuing the presumption that they can.

IV. TOWARD A SUPPORTABLE PRESUMPTION

Jury system reform has gained momentum in recent years.²³⁴ Without a doubt, instruction on the law is not the only aspect of jury trials that requires attention. For example, reforms have been considered or made to the jury selection process,²³⁵ the question of juror note-taking,²³⁶ and the possibility of case-related juror discussion prior to deliberations.²³⁷ However, few significant changes have been implemented regarding the wording of instructions,²³⁸ with few successful efforts at improving comprehension.²³⁹

234. See, e.g., Steven W. Fisher, *Pattern Instructions for Jurors in Criminal Cases Seek to Explain Fundamental Legal Principles*, 73 N.Y. ST. B.J. 29 (2001); Valerie P. Hans et al., *The Arizona Jury Reform Permitting Civil Jury Trial Discussions: The Views of Trial Participants, Judges, and Jurors*, 32 U. MICH. J.L. REFORM 349, 349 (1999) (stating that “[i]n 1995, the Supreme Court of Arizona approved a sweeping set of changes in the state’s jury system”); J. Clark Kelso, *Final Report of the Blue Ribbon Commission on Jury System Improvement*, 47 HASTINGS L.J. 1433 (1996). See generally Ellsworth & Reifman, *supra* note 192, at 800-17 (describing and evaluating reform efforts); Franklin Stryer, *The Road to Reform: Judges on Juries and Attorneys*, 30 LOY. L.A. L. REV. 1249, 1250-63 (1997) (enumerating reforms and surveying judicial response).

235. See, e.g., *Batson v. Kentucky*, 476 U.S. 79 (1986) (reforming the requirements for establishing discrimination from the use of peremptory challenges); Kelso, *supra* note 234, at 1474-88 (describing California commission’s recommendations for change in jury selection practices).

236. See, e.g., B. Michael Dann & George Logan III, *Jury Reform: The Arizona Experience*, 79 JUDICATURE 280 (1996); Kelso, *supra* note 234, at 1504. See generally Douglas G. Smith, *Structural and Functional Aspects of the Jury: Comparative Analysis and Proposals for Reform*, 48 ALA. L. REV. 441, 567-78 (1997) (analyzing note-taking reform proposals).

237. See Hans et al., *supra* note 234, at 350; Kelso, *supra* note 234, at 1508.

238. Reforms have been considered and implemented regarding the timing of the delivery of instructions. See Dann & Logan, *supra* note 236, at 281; William W. Schwarzer, *Communicating with Juries: Problems and Remedies*, 69 CAL. L. REV. 731, 755-56 (1981). See generally Stryer, *supra* note 234, at 1255-56 (surveying judges regarding preinstruction and discussing evidence supporting it). Traditionally, jurors are instructed on the law after the close of the evidence and the completion of counsel’s closing arguments. Studies have revealed that delivering at least some instructions on the law at the outset of the trial or during critical points in the trial is beneficial. See *id.*; see also LAURENCE H. GELLER & PETER HEMENWAY, *LAST CHANCE FOR JUSTICE: THE JUROR’S LONELY QUEST* 298-300 (1997) (recommending instructions be given pre-trial, during trial and at the trial’s conclusion). See generally Leiberman & Sales, *supra* note 58, at 628-32 (detailing the pros and cons of preinstructions and summarizing relevant empirical studies).

239. See Ellsworth & Reifman, *supra* note 192, at 788; Tiersma, *supra* note 5, at 1085; cf. Fisher, *supra* note 234, at 29-30 (lamenting the difficulties in making New

Despite its lack of grounding, the jury instruction presumption prevails. It should not. There is neither a legal nor a practical rationale for the judiciary's subscription to it. It is both illogical and unfair for our courts to presume that jurors understand that which the evidence shows us they do not. At least for now, the jury instruction presumption should be abandoned.

The desirability of operating from a premise that when instructed, jurors will understand the law, cannot be denied.²⁴⁰ The premise, however, must be trustworthy. Properly rewritten and pre-tested instructions might be worthy of presumed comprehension. Research suggests that this can be accomplished.²⁴¹ These reforms will, no doubt, require the joint efforts of lawyers, jurists, linguists and social scientists. Pre-testing newly revised instructions is key.²⁴² In light of the evidence showing that currently used pattern instructions are overly difficult to understand, to be worthy of a comprehension presumption, new pattern²⁴³ instructions ought to be put to the test.

The value of empirical testing is a bit controversial, as questions have been raised regarding the reliability and significance of the tests.²⁴⁴ Arguments have

York's jury instructions more understandable and calling upon the state legislature to amend statutory definitions of crimes with an eye toward making them more easily understood by jurors); Kelso, *supra* note 234, at 1510-17 (laying out California commission's recommendations on simplifying instructions).

240. Presuming the opposite would be absurd. However, until the comprehensibility of revised instructions can be proven, it would be preferable to make no presumptions and leave room for litigants to offer convincing evidence with regard to the comprehensibility of any given set of instructions. While this may invite time-consuming legal challenges, it is nevertheless more appropriate than clinging to an unfounded presumption.

241. See *supra* notes 207, 211 and accompanying text.

242. See Diamond & Levi, *supra* note 205, at 232. Diamond and Levi highlight the pitfalls in revising instructions but then implementing them without testing their efficacy. *Id.* (arguing that "testing is necessary to assess when an acceptable level of performance has been achieved and to identify where further efforts at improvement should be made"); see also Dumas, *supra* note 122, at 714 (arguing that "[t]esting pattern instructions for comprehensibility could guarantee a higher rate of comprehension than we can guarantee now"). Studies testing instructions that were revised to improve comprehensibility revealed that comprehension improved with the first round of revisions, but improvement levels improved even more after a second rewrite process. See ELWORK ET AL., *supra* note 8, at 45-46.

243. Having pattern or uniform jury instructions is, generally speaking, a good thing. They save the trial court's time, assure consistency and make it less likely that an instruction will be erroneous. See ELWORK ET AL., *supra* note 8, at 7-8; Leiberman & Sales, *supra* note 58, at 590-91.

244. See *Free v. Peters*, 12 F.3d 700, 705-06 (7th Cir. 1993); *Gacy v. Welborn*, 994 F.2d 305, 311 (7th Cir. 1993); ELWORK ET AL., *supra* note 8, at 43-69; Saxton, *supra* note 184, at 75-76.

been made that test subjects, even if chosen from those called for jury duty, do not have the same motivation to make as strong an effort to comprehend instructions as those who know they are sitting in judgment in a real case.²⁴⁵ Some experiments are also criticized for lacking a factual context.²⁴⁶ Those who question the reliability of testing also argue that in a true trial setting comprehension is likely to be enhanced through the deliberative process, i.e., jurors will gain increased understanding by discussing the meaning of instructions amongst themselves.²⁴⁷ Lastly, critics of juror comprehension studies query whether low comprehension results are simply the best that can be expected given the intricacies of the law and legal concepts.²⁴⁸

Perhaps no testing environment can perfectly duplicate the experience of a sworn juror receiving instructions after hearing and seeing live testimony and exhibits. Nevertheless, many, if not all of the questions raised above have been satisfactorily resolved by researchers.²⁴⁹ Many have addressed the motivation concern by surveying jurors' comprehension just after delivering a verdict in a real case.²⁵⁰ This approach serves the added purpose of providing a complete factual context for the test jurors. In other experiments a factual context is provided through the use of videotaped summaries of testimony or written sets of facts.²⁵¹ As to the assertion that deliberations significantly enhance

245. See *Free*, 12 F.3d at 705 (finding comprehension testing flawed because of lack of comparability between the test setting and the courtroom setting). The *Free* court also posited that the test jurors' poor performance might signify nothing more than that they are poor test takers. *Id.* at 705-06.

246. See *ELWORK ET AL.*, *supra* note 8, at 134.

247. See *Free*, 12 F.3d at 705-06; see also *Boyd v. California*, 494 U.S. 370, 381 (1990) (reasoning that any juror confusion may be "thrashed out in the deliberative process, with commonsense understanding of the instructions in the light of all that has taken place at the trial likely to prevail over technical hairsplitting").

248. See *Gacy*, 994 F.2d at 311-12.

249. See generally *ELWORK ET AL.*, *supra* note 8, at 64-69 (explaining why they were satisfied with the representativeness of their testing sessions).

250. See, e.g., Alan Reifman et al., *Real Jurors' Understanding of the Law in Real Cases*, 16 LAW & HUM. BEHAV. 539, 539-54 (1992). Reifman, Spencer Gusick, and Phoebe Ellsworth tested both previously instructed and uninstructed groups and found no difference in comprehension of substantive law between the two. While there was a significant difference in comprehension of procedural law, both groups had a comprehension rate under fifty percent. *Id.*; see also *Kramer & Koenig*, *supra* note 192, at 406; *Saxton*, *supra* note 184, at 76-77 (testing comprehension of jurors immediately after delivering a verdict). It is worth considering that test subjects might, derive motivation from the self-image concerns that could attach from being quizzed on one's understanding of complex concepts. Some subjects will want to impress an interviewer with their intelligence or ability to be a quick study.

251. See, e.g., *Charrow & Charrow*, *supra* note 8, at 1313 (presenting a picture of an automobile accident and written description of the events); *Garvey et al.*, *supra* note

comprehension, researchers find the impact to be minimal.²⁵² Finally, the criticism that poor comprehension of jury instructions may simply be an unavoidable consequence of our complicated set of laws has been answered by studies showing significant gains in comprehension levels when instructions are rewritten.²⁵³ Thus, despite its imperfections, pre-testing new pattern instructions goes a long way toward establishing a basis for a new comprehension presumption.

During their deliberations, juries have the option of sending notes to the court asking for clarification of parts of the court's instructions.²⁵⁴ The questions in these notes document that certain instructions cause more confusion than others.²⁵⁵ When juries send notes to the judge, it is in the context of a real case after the conclusion of both sides' proof and closing argument. Therefore, as a supplement to field or laboratory testing, a study of frequently asked jury questions should supply additional feedback on the effectiveness of revised instructions.

The baseless presumption that jurors understand a judge's responses to the their questions about the law²⁵⁶ is, if anything, even more disturbing than the primary presumption. The second presumption is so troubling because trial judges usually respond by simply rereading, but not re-phrasing or explaining, the instruction.²⁵⁷ Moreover, a presumption of understanding is particularly irrational in this context since the asking of the question seems to rebut the notion that the instruction was understood. To re-instruct the jury using the exact same language and then presume the response was understood is senseless. There ought not be a presumption of understanding until carefully constructed

120, at 633-34 (presenting written summaries of the facts); Laurence J. Severance & Elizabeth F. Loftus, *Improving the Ability of Jurors to Comprehend and Apply Criminal Jury Instructions*, 17 LAW & SOC'Y REV. 154, 161 (1982) (presenting test jurors with videotaped trials).

252. See ELWORK ET AL., *supra* note 8, at 64-69; Diamond & Levi, *supra* note 205, at 230; Phoebe C. Ellsworth, *Are Twelve Heads Better Than One?*, 52 LAW & CONTEMP. PROBS. 205, 218 (1989); Kramer & Koenig, *supra* note 192, at 431-32.

253. See *supra* notes 207-11 and accompanying text.

254. See KALVEN & ZEISEL, *supra* note 77, at 511-12 (revealing data regarding frequency of jury requests and documenting that more than half of all requests in the cases they studied concerned questions on the law).

255. See B. Michael Dann, *From the Bench: Free the Jury*, 23 LITIG., Fall 1996, at 5; Power, *supra* note 168, at 99-103 (stating that the comprehension "problem is particularly severe with respect to the reasonable doubt standard" and discussing studies showing that jurors made frequent requests for clarification of that standard).

256. See *Weeks v. Angelone*, 528 U.S. 225, 234 (2000) (holding that "a jury is presumed to understand a judge's answer to its question").

257. See *United States v. Walker*, 575 F.2d 209, 214 (9th Cir. 1978) (explaining that answers in language similar to that in the question run the risk of favoring one party).

answers to predictable questions are empirically tested.²⁵⁸ No trial court can ever be armed with prepared and tested answers to every question that might be asked. Nevertheless, an examination of frequently asked questions along with consideration of which instructions tend to be complex or confusing should be useful to any body seeking to prepare pattern answers. At the very least, the practice of simply rereading the instructions should be abandoned in favor of furnishing direct answers.²⁵⁹ In the absence of pattern explanations, counsel can be consulted regarding an appropriate and correct response.

V. CONCLUSION AND A NOTE ABOUT THE DEATH PENALTY

New and linguistically superior pattern instructions, empirical tests, revisions and retests can hardly be accomplished overnight. Realistically speaking, even thoughtfully drafted and tested instructions will be imperfect. More to the point, there is no doubt that new, improved and tested instructions will still be challenged as confusing or ambiguous. What should the role of the judiciary be when faced with a claim that a jury instruction was unacceptably confusing? If the response to date—the jury instruction presumption²⁶⁰—is to be discarded, what should take its place?

There should be room in appellate and post-conviction litigation for preserved²⁶¹ claims that particular instructions are incomprehensible.²⁶² Such

258. I do not imply that there can never be acceptable legal presumptions without empirical evidence as to their validity. To the contrary, sound presumptions are often based upon logic, history or perceived experience. *See supra* note 174 and accompanying text. When it comes to pattern jury instructions, however, where history, logic and experience discredit the presumption, it seems eminently reasonable to require empirical proof before re-establishing a presumption of comprehension.

259. *See generally* Lieberman & Sales, *supra* note 58, at 636 (summarizing studies regarding requests for help by deliberating juries and typical responses).

260. *See supra* notes 50-65 and accompanying text.

261. Claims that an instruction is unnecessarily confusing or incomprehensible should first be raised in the trial court. Challenges to anticipated instructions can be made even at the pre-trial stage and claims regarding unanticipated instructions can be raised prior to the commencement of deliberations. Evidence, empirical or otherwise, that instructions are faulty should first be considered by the trial judge who may be persuaded to modify the instruction. This is not significantly different from the routine consideration by trial courts of instructions proffered by a party or of claims that an instruction is erroneous.

262. These claims are, in actuality, claims of federal constitutional violations. Depending upon the particular instruction in question, a jury's inability to understand could deprive a defendant of important rights such as the right to remain silent, *see* 8TH CIR. MODEL JURY INSTR. - CRIM. 4.01 (2003) (instruction regarding the defendant's failure to testify), the right to due process of law, *id.* at 3.09, 3.11 (instructions regarding burden and standard of proof), and the right to have certain forms of evidence considered by the

claims should be fairly considered and should not be dismissed on the grounds that jurors are presumed to understand.²⁶³ For good reasons, fair consideration should include the receipt of empirical evidence gathered by social scientists. Needless to say, such evidence should not be accepted at face value nor should it be deemed conclusive. But the judiciary, assisted by arguments of counsel, is well-equipped to assess the persuasiveness of such evidence.²⁶⁴ Without the benefit of empirical research, judges, most of whom lack expertise in linguistics, are left to make almost instinctual judgments on comprehensibility. Sometimes confusing instructions can be logically identified,²⁶⁵ but other times it is far more difficult.²⁶⁶

jury, *see* *Boyde v. California*, 494 U.S. 370, 377-78 (1990) (reiterating that the Eighth Amendment guarantees capital defendants the right to have a jury consider all relevant mitigating evidence). Moreover all comprehensibility claims involve an alleged interference with a criminal defendant's right to a trial by jury. *See* U.S. CONST. amend. VI.

263. *See* Schwarzer, *supra* note 238, at 758 (arguing that appellate courts should review "even technically correct instructions . . . with an eye to their comprehensibility").

264. *See, e.g.,* *Free v. Peters*, 12 F.3d 700, 705-07 (7th Cir. 1993) (evaluating and rejecting findings of jury comprehension study); *cf.* Tanford, *The Limits of Scientific Jurisprudence*, *supra* note 5, at 144-50, 167-68 (exposing the Supreme Court's almost routine rejection of empirical psychological research regarding juror behavior and discussing possible theories to explain the Court's attitude). *Compare* *Ballew v. Georgia*, 435 U.S. 223, 231-39 (1978) (relying on statistical studies to conclude that juries in criminal trials must have a least six members) *with* *Ballew*, 435 U.S. at 246 (Powell, J., concurring) (criticizing the majority's reliance on statistical studies where "neither the validity nor the methodology employed . . . was subjected to the traditional testing mechanisms of the adversary process").

265. *See, e.g.,* *Kelly v. South Carolina*, 534 U.S. 246, 256 (2002) (deducing that even in the absence of obvious confusion, the law was not made sufficiently clear to the jury); *Penry v. Johnson*, 532 U.S. 782, 798 (2001) (concluding that the instruction could logically be interpreted by the jury in only one of two ways, neither of which was adequate to allow fair consideration of the evidence).

266. *See* *Frey v. Fulcomer*, 132 F.3d 916 (3d Cir. 1997). In *Frey*, the court vacated the defendant's death sentence finding a reasonable probability that instructions delivered during the penalty phase were misunderstood by the jury. *Id.* at 923 (citing *Boyde*, 494 U.S. at 380). What makes this case remarkable is that six years earlier the same court upheld very similar instructions that were challenged on the same grounds. *See* *Zettlemoyer v. Fulcomer*, 923 F.2d 284, 308 (3d Cir. 1991). Both sets of instructions relate to whether or not the jury must be unanimous in finding the existence of a particular mitigating factor before any one juror may consider it in their decision about whether or not to vote for the death penalty. The law says that unanimity is not a prerequisite. *See* *Mills v. Maryland*, 486 U.S. 367, 376 (1988). In my opinion the instructions in *Frey* and *Zettlemoyer* were equally unclear. In any event, the following passages from the *Frey* court's opinion demonstrate the need for linguists:

Perhaps a natural concern is whether judicial receptiveness to empirical evidence on instruction comprehensibility would create a floodgate problem. Some might speculate that, particularly in criminal cases and most especially in capital cases, there would be great motivation to find a researcher who could fashion a study that finds fault with particular instructions. Once the courts become open to these types of claims, will there be any cases in which they will not be asserted?

There are a number of responses to this question. One is that justice demands this investment of judicial resources. Unless and until key²⁶⁷ pattern instructions are revised, those convicted by juries receiving them should have an opportunity to present the claim that the law was presented to the jury in an unintelligible manner. Such claims should be no less justiciable than, for example, claims of ineffective assistance of counsel²⁶⁸ or improprieties in jury selection.²⁶⁹ A second response is that giving fair hearings²⁷⁰ and, when appropriate, relief to defendants aggrieved by the use of incomprehensible instructions might provide impetus for reform.²⁷¹ As problematic instructions are revised and empirically demonstrated to be more easily understood, we should

[T]he relevant portion of the [*Frey*] jury charge emphasizes the importance of a unanimous finding, using the phrase frequently and in close proximity to—within seven words of—the mitigating circumstances clause. . . . [T]he clause is, to the ear and to the mind, one sound bite

This conclusion is not inconsistent with our holding in *Zettlemoyer* (where the separation was by seventeen words, and not one sound bite). . . . [T]he *Zettlemoyer* trial court used the term “unanimously” to modify only the term “agree” in the subsequent phrase “agree and find”. . . . [T]he unanimity language in the *Frey* charge could only modify the term “find,” and hence the jury could reasonably have believed that unanimity was required in *both* its ultimate and interim conclusions, especially given the close proximity we have described.

Frey, 132 F.3d at 923.

267. Quite arguably each and every part of a trial court’s charge is key. One would expect that instructions that are merely superfluous would not be included. Nevertheless, when put in the context of the entire charge, certain portions might be deemed more important or at least relevant to the case at hand.

268. See *Strickland v. Washington*, 466 U.S. 668 (1984).

269. See *Miller-El v. Cockrell*, 537 U.S. 322 (2003); *Batson v. Kentucky*, 476 U.S. 79 (1986); *Taylor v. Louisiana*, 419 U.S. 522 (1975).

270. Without doubt, these hearings would involve scrutiny of any proffered research with both sides presenting evidence and argument.

271. See *Steele & Thornburg*, *supra* note 184, at 108 (arguing that if comprehension were an important issue on appeal, trial judges would make extra efforts to deliver comprehensible instructions and trial lawyers, wanting verdicts to hold up, would propose improved instructions). For a discussion of the current lack of reform in the comprehensibility of instructions, see *supra* note 239 and accompanying text.

expect far fewer opportunities for litigants to provide evidence to the contrary. Third, we have no reason to doubt the abilities or integrity of jury instruction researchers.²⁷² When respected social scientists have input in drafting and a hand in testing revised instructions, we should expect the ready availability of studies confirming comprehensibility—not the opposite.

Perhaps at that point a new jury instruction presumption will be justified. For now, evidence that instructions have been misunderstood in significant numbers should be received and considered by reviewing courts. Such evidence should not be discounted because it runs afoul of an insupportable presumption that it is wrong.

Finally, a note about the death penalty. Many studies of jury instruction comprehensibility involve instructions for the penalty phase of capital cases.²⁷³ This is partly because fairness in the process is nowhere more crucial.²⁷⁴ It is also because the standards for eligibility for the death penalty, and a jury's discretion in imposing it, are complex²⁷⁵ and, consequently, translating the law into understandable jury instructions is challenging. To be sure, however, if our system is willing to continue to tolerate a groundless presumption that pattern instructions are understood, the toleration should not carry over to the death penalty arena.²⁷⁶

272. As is true for any issue for which expert testimony is offered, jury researchers can be cross-examined, *see generally* STEVEN LUBET, *EXPERT TESTIMONY: A GUIDE FOR EXPERT WITNESSES AND THE LAWYERS WHO EXAMINE THEM* (1998) (discussing and prescribing technique for cross-examining expert witnesses), and courts can make credibility judgments regarding the persuasiveness of the research.

273. *See supra* notes 208-11 and accompanying text.

274. *See Lieberman & Sales, supra* note 58, at 613-16 (emphasizing the importance of providing adequate guidance to jurors during the penalty phase of a capital case). *See generally* Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (recognizing that “the penalty of death is qualitatively different from a sentence of imprisonment, however long . . . [T]here is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment”).

275. *See supra* note 180 and accompanying text. *See generally* Bowers, *supra* note 208, at 1044-62 (discussing the constitutional issues that attend capital sentencing, the Supreme Court's response and the delicate complexities involved); Jordan M. Steiker, *The Limits of Legal Language: Decisionmaking in Capital Cases*, 94 MICH. L. REV. 2590, 2603-21 (1996) (explaining the concept of “guided discretion” in capital sentencing and exploring the problems with the instructions aimed at enabling a capital case jury to apply it). *See also* Gacy v. Welborn, 994 F.2d 305, 312 (7th Cir. 1993) (observing that the Supreme Court has “established a set of increasingly reticulated rules for capital sentencing, including shifting burdens, unanimity on some issues but not on others, and consideration of mitigating factors that do not appear in state statutes”).

276. *Cf. Gacy*, 994 F.2d at 312 (concluding in a capital case that juror confusion is the result of a “convoluted set of rules” and is merely “regrettable”).

After the Supreme Court's decision in *Ring v. Arizona*,²⁷⁷ defendants in every capital punishment jurisdiction are entitled to have a jury determine any fact that underlies a determination of whether the defendant is eligible for the death penalty.²⁷⁸ The obvious value placed by the Court on the role of the jury²⁷⁹ is wholly inconsistent with a willingness to overlook evidence that, despite instructions, the jury does not understand the relevant law.²⁸⁰ In addition, a jury

277. 536 U.S. 584 (2002).

278. *Id.* at 589. *Ring* overruled *Walton v. Arizona*, 497 U.S. 639 (1990), which upheld judicial fact-finding in the penalty phase of a capital trial. *Ring*, 536 U.S. at 589. The *Ring* majority believed that *Walton* could not survive the Court's 2000 decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). In *Apprendi*, the Court held that any fact or facts (beyond that the defendant was a recidivist) serving as the basis for the imposition of a sentence harsher than the statutorily authorized maximum, must be decided by a jury upon proof beyond a reasonable doubt. See *Apprendi*, 530 U.S. at 490. The *Ring* Court believed that to be consistent with *Apprendi*, fact-finding that authorized a death sentence must be conducted by a jury. See *Ring*, 536 U.S. at 607.

279. In *Ring* the Court remarked that "[t]he founders of the American Republic were not prepared to leave [the finding of facts necessary to support a death sentence] to the State, which is why the jury-trial guarantee was one of the least controversial provisions of the Bill of Rights." *Ring*, 536 U.S. at 607 (citing *Apprendi*, 530 U.S. at 498 (Scalia, J., concurring)). For an explanation of the significance of the jury trial right, see generally *Williams v. Florida*, 399 U.S. 78, 87 (1970) (recognizing a "long tradition attaching great importance to the concept of relying on a body of one's peers to determine guilt or innocence as a safeguard against arbitrary law enforcement"); and *Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968) (pointing out that the framers of our Constitution included the right to a jury in order to give an accused "an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased or eccentric judge").

280. On February 3, 1997, the American Bar Association's House of Delegates adopted a resolution calling for a moratorium on the imposition of the death penalty in jurisdictions that do not comply with ABA policies concerning capital punishment. See A.B.A., 1997 Midyear Meeting, *Summary of Action of the House of Delegates*, Feb. 3, 1997, at 12. These policies include the appointment of qualified defense counsel, the availability of independent post-conviction review of capital convictions and death sentences, the elimination of racial discrimination in capital sentencing and the prevention of the execution of mentally retarded defendants (the United States Supreme Court later declared that the execution of the mentally ill was unconstitutional as violative of the Eighth Amendment in *Atkins v. Virginia*, 536 U.S. 304, 318-21 (2002)). See A.B.A., *supra*, at 12-13. See generally Kara Thompson, Note, *The ABA's Resolution Calling for a Moratorium on Executions: What Jurisdictions Can Do to Ensure that the Death Penalty Is Imposed Responsibly*, 40 ARIZ. L. REV. 1515 (1998) (detailing the moratorium resolution and discussing potential responses). For an article supporting the ABA Resolution, see Stephen B. Bright, *Death Penalty Moratorium: Fairness, Integrity at Stake, Speaking out in Favor of the ABA's Position*, CRIM. JUSTICE, Summer 1998, at 29. For an article criticizing the Resolution, see Michael D. Wims, *Debating ABA's Death Penalty Resolution: Bad Process, Bad Result*, CRIM. JUSTICE, Fall 1998, at 18.

whose discretion is not guided or at least narrowed by understandable instructions is more susceptible to making a decision driven by improper motives such as racial bias.²⁸¹

There can be no argument that trial before a misinformed or under-informed jury is tantamount to a denial of the jury trial right. The judiciary does not deny this; it simply presumes that juries are well-informed and, thus, all is well. After all, a jury that we presume understands the law will do just fine. However, a baseless presumption is no more than a dangerous pretense. Removing the presumption will not threaten the viability of the jury system. To the contrary, it will provide a genuine chance for a just result.

Cf. Kenneth Williams, *The Death Penalty: Can It Be Fixed?*, 51 CATH. U. L. REV. 1177, 1223 (2002) (arguing against the moratorium movement because it “represents a concession on the part of abolitionists that the death penalty can be ‘fixed’ as long as certain measures have been implemented”). Evidence that jury instructions regarding the imposition of the death penalty are not properly understood by a majority of jurors, *see supra* notes 208-11 and accompanying text, provides additional justification for a moratorium.

281. In *McCleskey v. Kemp*, 481 U.S. 279, 319 (1987), the Supreme Court rejected a claim that Georgia’s capital sentencing process was administered in a racially discriminatory manner. McCleskey’s petition offered the results of a statistical study that demonstrated racial disparity in the imposition of Georgia’s death penalty statute. *Id.* at 286-87 (explaining the “Baldus study” and its findings of racial disparity and Baldus’ conclusion that “black defendants . . . who kill white victims have the greatest likelihood of receiving the death penalty”). While the Court refused to find a constitutional violation based upon this study, the statistics are impressive and disturbing. *See also* David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638 (1998). *See generally* Williams, *supra* note 280, at 1203-23 (proffering reasons for the view that administration of the death penalty is racially discriminatory and arguing that the racial bias will likely continue).