# THE AMERICAN ANTITRUST INSTITUTE

# REPORT ON MODEL JURY INSTRUCTIONS IN CIVIL ANTITRUST CASES

JOSHUA P. DAVIS[1]
SHANNON R. WHEATMAN[2]

## Introduction

Good teachers understand that their success is measured not by the quality of what they say but the quality of what their students learn. A brilliant professor may present profound insights in terms that none of her students can comprehend. While she may succeed as a scholar, she fails as an educator. She might as well speak in a foreign language.

So it goes with jury instructions. Commentators have long recognized that too often drafters of jury instructions design them to withstand appeal rather than to communicate effectively to jurors.[3] Indeed, at times it seems as if the drafters have given up on explaining the law. If so, that is a shame. It bespeaks disrespect for the members of juries. It also undermines the rule of law. Jurors cannot faithfully apply legal doctrine if we do not enable them to understand it.

These problems and others beset private antitrust litigation. The ABA Model Jury Instructions in Civil Antitrust Cases (2005 ed.) provide the most comprehensive effort at guiding courts and litigants in preparing jury instructions for private antitrust litigation. But the ABA instructions could be improved in many ways, including making them clearer to laypersons, increasing their fidelity to the law, and updating them in light of changes in antitrust doctrine in recent years. The American Antitrust Institute ("AAI") undertakes this project to offer an

---

[1] Joshua P. Davis is Associate Dean for Faculty Scholarship, Professor of Law, and Director, Center for Law and Ethics at the University of San Francisco School of Law. He is also a Member of the Advisory Board and a Senior Fellow at the American Antitrust Institute. We are very grateful for insightful comments from Eric L. Cramer, Bert Foer, Andy Gavil, Sali Hama, Phil Nelson, Doug Richards and George Slover at various stages of this effort. Please note that this draft does not yet take into consideration all of their valuable suggestions. All errors remain our own. We are also appreciative of able research assistance provided by Nigel Barrella, Michelle Chowdhury, Jonathan DeVito, Veronica Francis, Ke Li, Tyler Patterson, and Edmond Wybaillie.

[2] Shannon R. Wheatman, Ph.D., is Senior Vice President of Kinsella Media, LLC. Dr. Wheatman is a court-recognized plain language expert. She worked on the team that wrote the model plain language class action notices for the Civil Rules Advisory Committee.

[3] *See, e.g.*, Sara Gordon, *Through the Eyes of Jurors: The Use of Cognitive Psychology in the Application of "Plain Language" Jury Instructions*, __ HAST. L.J. (forthcoming), available at http://ssrn.com/abstract=2133000, at 1-2, nn. 1-3 (discussing the literature on poor juror comprehension of jury instructions) (last visited Nov. 17, 2012).

alternative to some of the ABA instructions and, it hopes, some constructive suggestions to the ABA for enhancing its instructions in the future.

This Report describes the work that the AAI has done to date, explains the considerations it has taken into account, and provides some initial proposed jury instructions and explanations of those instructions. The AAI plans to propose additional jury instructions, as well as to improve the instructions and explanations provided below based on comments it has received and will receive. It also hopes to conduct empirical research to identify opportunities for enhancing its draft instructions (as well as to substantiate that they are more comprehensible than the ABA Model Jury Instructions). Note that the proposed jury instructions address only limited areas of antitrust doctrine and are confined so far to federal antitrust law.

The AAI has undertaken this project because jury instructions can make a great deal of difference. Their most obvious import arises at trial. That is perhaps reason enough to ensure their quality. But trials are rare.[4] If they provided the only context in which jury instructions play a significant role, that would greatly limit their importance. However, the influence of jury instructions is not so narrowly circumscribed.

First, assuming jury instructions affect the probabilities of various outcomes at trial, they should also inform settlement negotiations. To borrow a famous turn of phrase, parties bargain "in the shadow of the law."[5] Predictions about the likely result at trial influence the terms the parties are willing to accept. Jury instructions that favor plaintiffs are likely to cause plaintiffs to demand more and defendants to pay more in settlement and *vice versa*. So jury instructions may matter not only for the rare cases that go to trial but also for the overwhelming majority of cases that settle.

Second, jury instructions define the elements of the claims and defenses at trial, and those elements shape the litigation process. Plaintiffs must make allegations plausibly satisfying the elements of their claims in their complaints and defendants must do the same for the elements of their affirmative defenses in their answers. Moreover, the issues at trial—as ultimately defined by the jury instructions—will inform the bounds of permissible discovery. Of course, the elements of the claims and defenses—not the jury instructions—determine which claims and defenses survive Rule 12 motions and the proper scope of discovery. But jury instructions provide a distilled account of those elements. They may therefore guide decision-making throughout litigation.

---

[4] *See, e.g.*, Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts,* 1 J. OF EMPIRICAL LEGAL STUD. 459 (2004) (noting, *inter alia*, that over 98% of federal cases settle before trial).

[5] The germinal article on the topic is Robert H. Mnookin and Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

Third, a feedback loop may develop at times between antitrust law and jury instructions. In theory, the instructions should be drafted to reflect the law. In practice, courts may turn to jury instructions for guidance in saying what the law is. In *Deutscher Tennis Bund v. ATP Tour, Inc*.,[6] for example, the Third Circuit relied on the ABA Model Jury instructions in holding that "'application of the quick look analysis is a question of law to be determined by the court,' and therefore the concept of 'quick look' has no application to jury inquiry."[7] There is a reasonable argument that the ABA jury instructions—and the Third Circuit opinion following them—departed from existing case law.[8] The jury instructions appeared to influence the Third Circuit's description of existing law, possibly altering how the law has developed. Thus, jury instructions can not only reflect doctrine but they can also inform—even modify—the law.

Jury instructions, then, may matter for various reasons. The next issue is whether the existing instructions suffice. The AAI believes that they do not. In particular, the most influential instructions in civil antitrust cases—the ABA model jury instructions—could improve in various ways. The AAI focuses on several areas of potential concern. The first involves clarity, consistency and coverage. Although the ABA jury instructions make a valuable contribution, they contain various omissions, ambiguities, inconsistencies, and opacities. These imperfections are no doubt inevitable. No effort is flawless. Nevertheless, the AAI believes it has already identified a number of improvements that would correct these deficiencies and hopes to identify others.

The second area of concern is fidelity to the law and to economic theory as it has become embodied in the law. At times, the ABA jury instructions take positions that are not consistent with the best understanding of current doctrine and economic theory. They require, for example, that a plaintiff establish a relevant market even when the plaintiff is going to rely on direct evidence to prove market power or monopoly power. And they imply that the jury should award damages based on the actual harm to the plaintiff, even when the plaintiff is a direct purchaser seeking overcharge damages (in which case any "passing on" of overcharges, for example, is irrelevant as a matter of law).

Another area of concern applies to jury instructions more generally. They are not written in a way that makes them as comprehensible as they might be to the average juror. To be sure, perfect comprehension by jurors is too much to expect, particularly in a complicated and technical area of the law like antitrust.[9] But we should aspire to do better in at least a couple of

[6] 610 F.3d 820 (3d Cir. 2010).
[7] *Id*. at 833 (quoting ABA Section on Antitrust Law, Model Jury Instructions in Civil Antitrust Cases, A-8 n. 2 (2005)).
[8] *See* Andrew I. Gavil, *Moving Beyond Caricature and Characterization: The Modern Rule of Reason in Practice*, 85 U.S.C. L. REV. 733, 779 n. 223 (2012) (criticizing *Deutscher* in this regard and the ABA model jury instruction on which it relied).
[9] *See, e.g.*, DANIEL CRANE, THE INSTITUTIONAL STRUCTURE OF ANTITRUST ENFORCEMENT 109 (2011) (summarizing criticism of the competence of juries in antitrust cases).

ways. First, whenever possible, we can attempt to write jury instructions simply and clearly. A movement in favor of communicating to non-lawyers in plain language has been around for decades and has found significant support.[10] Scholars have developed techniques for writing in a way that maximizes the chances of a layperson understanding the law. The ABA jury instructions do not always comply with these techniques. To be sure, the ABA attempted to make the jury instructions understandable to jurors but they did not succeed in some key ways.

A related point involves the readability of the AAI's proposed instructions and the current ABA instructions. The term "readability" refers to an objective—if imperfect—measure of the level of education necessary to understand written material. It provides a rough proxy for the ability of people to comprehend writing. The AAI's proposed instructions are designed to be understood by people who have attained a high school education. Overall, their readability score is **11.33**,[11] indicating that a person who has approximately an eleventh grade education should be able to understand them. **Eighty-seven percent** of the general public has attained a high school education, whereas only 28% have a four-year college degree.[12] The ABA instructions on the same topics, in contrast, have an overall readability score of **17.13**, suggesting a person would have to complete one year of graduate education to understand them. **Only 10%** of the U.S. population has a graduate degree.[13] Given the limited education of many jurors, the AAI instructions should mark a significant improvement.

Finally, recent scholarship has focused on the notion of "schemas" and their influence on a juror's understanding of the law.[14] The idea is that jurors bring preexisting frameworks for understanding the world— "schemas"—to bear in the task of finding facts. These schemas can play various roles for jurors. Perhaps most obviously, they can shape a juror's beliefs about what is and is not permissible behavior in the marketplace—beliefs that may or may not conform to antitrust doctrine. Schemas can have other effects as well. They can, for example, influence how a juror reads a document, affecting what the juror expects to see and whether the juror is able to understand information provided. Although the task is ambitious, the AAI has taken into account principles of cognitive and educational psychology in structuring its proposed jury

---

[10] *See* Sara Gordon, *Through the Eyes of Jurors: The Use of Cognitive Psychology in the Application of "Plain Language" Jury Instructions*, __ HAST. L.J. (forthcoming), available at http://ssrn.com/abstract=2133000, at 1-2, nn. 1-3 (citing relevant publications) (last visited Nov. 17, 2012).

[11] All readability scores use the Flesch Kincaid Grade Readability Test. *See infra* II for a discussion of readability and this test.

[12] U.S. CENSUS BUREAU, EDUCATIONAL ATTAINMENT IN THE UNITED STATES: 2010, *available at* http://www.census.gov/hhes/socdemo/education/data/cps/2010/tables.html (last visited Nov. 17, 2012).

[13] *Id*.

[14] *See, e.g*., Sara Gordon, *Through the Eyes of Jurors: The Use of Cognitive Psychology in the Application of "Plain Language" Jury Instructions*, __ HAST. L. J. (forthcoming) available at http://ssrn.com/abstract=2133000 (last visited Nov. 17, 2012).

instructions and in attempting to modify jurors' schemas so that they more closely resemble those of experts in antitrust law.

The following jury instructions designed for civil antitrust cases seek to address these issues. They aspire to be internally consistent and systematic, to show fidelity to governing principles of law and economics, to use plain, accessible language, and to take account of schemas. We believe they compare favorably to the ABA model jury instructions. The instructions below are only an initial sample. We intend to continue to develop additional jury instructions over time.

We believe our proposed instructions would improve juror comprehension. However, the ultimate test for the success of jury instructions is what jurors understand, just like the ultimate test for the success of teaching is what students understand. A promising next step, therefore, is to conduct empirical research to gauge how jurors comprehend the proposed jury instructions. As funding permits, we may use focus groups or empirical testing to assess AAI's proposed instructions (*e.g.*, to determine whether they perform better than the ABA's model jury instructions) and to identify potential improvements.

The remainder of this Report is structured as follows: Part I describes the current state of progress of this project and possible ways to contribute. Part II offers a more detailed explanation about the role of plain language and readability in juror comprehension. It also discusses the difference in readability scores for the ABA jury instructions and the AAI's proposed jury instructions. Part III discusses the relevance of schemas to jury instructions. Part IV suggests potential empirical work that could follow this initial effort. Part V contains AAI's current working draft of the proposed model jury instructions and explanations of those instructions, paying particular attention to the way in which the proposed instructions vary from the ABA model jury instructions.

If you have any comments, please communicate them to Prof. Joshua P. Davis at davisj@usfca.edu.

## I. The State of the Jury Instruction Project and Opportunities to Contribute

This document is just an initial, working draft. Although substantial research, writing and revision have gone into preparing this Report and the included jury instructions, they constitute merely a first effort. We expect that the model jury instructions AAI ultimately publishes will be the product of iterated rounds of comment and revision. As discussed in greater detail below, we also hope to conduct experiments—focus groups or empirical testing—that will enable us to refine the instructions and demonstrate their value.

The opportunities for you to participate in the jury instruction project include the following:

### Commenting on Draft Instructions

Comments on the current and future draft instructions are welcome. Any feedback could prove helpful, but the more specific your suggestions are, the better. We would also particularly appreciate your supporting any proposed revisions, as appropriate, with citations to case law, legal scholarship, economic scholarship, or the like. Your comments may be critical—*e.g.*, suggesting corrections or refinements of the proposed instructions—or supportive—*e.g.*, offering additional authorities for the proposed instructions.

### Proposing Additional Instructions

We are also interested in suggestions for additional instructions, either to improve the existing ABA model instructions or to address topics that the ABA instructions do not cover. As with comments on AAI's draft instructions, we would appreciate specificity. If possible, it would be very helpful for you to identify particular flaws in the ABA instructions that should be ameliorated—omissions, internal inconsistencies, conflicts with case law or economic theory, *etc*. Also, comments will prove far more useful if supported by citations to legal authority or legal or economic scholarship.

### Contributing Financially

Financial support is crucial to enhance the breadth and quality of AAI's proposed instructions and to acquire empirical confirmation of their merits. We think focus groups or empirical testing would enable us to improve the instructions and to demonstrate their superiority to the ABA's model jury instructions. Those efforts require money.

### Other Ideas

We remain open to other ideas for improving this project. Please feel free to communicate your thoughts by emailing davisj@usfca.edu.

## II. Plain Language and Readability[15]

Plain language is clear and direct. It relies on principles of clarity, organization, layout, and design. Plain language writers "let their audience concentrate on the message instead of being distracted by complicated language."[16] Thus, plain language communicates effectively with the general public. This is critical because only 28% of U.S. adults have graduated from college.[17] Even more significant, a 2003 literacy study found that less than 15% of U.S. adults were proficient in "integrating, synthesizing, and analyzing multiple pieces of information located in complex documents."[18]

Empirical research has shown that redrafting legal documents into plain language increases reader comprehension and is more persuasive.[19] On the other hand, failure to write in plain language can have serious consequences because if readers cannot understand the content of a document, they will stop reading.[20] In the jury trial context, that means jurors will be forced to rely on their commonsense notion of justice in rendering verdicts.

---

[15] We adapted this section from Shannon R. Wheatman & Terri R. LeClercq, *Majority of Class Action Publication Notices Fail to Satisfy Rule 23 Requirements*, 30 THE REV. OF LITIG. 53, 54-55 (2011).

[16] Robert Eagleson, *Short Definition of Plain Language*, PLAIN LANGUAGE, *available at* http://www.plainlanguage.gov/whatisPL/definitions/eagleson.cfm (last visited Oct. 5, 2012).

[17] U.S. CENSUS BUREAU, EDUCATIONAL ATTAINMENT IN THE UNITED STATES: 2010, *available at* http://www.census.gov/hhes/socdemo/education/data/cps/2010/tables.html (last visited Nov. 17, 2012).

[18] MARK KUTNER, *ET AL.*, NATIONAL CENTER FOR EDUCATIONAL STATISTICS, LITERACY IN EVERYDAY LIFE: RESULTS FROM THE 2003 NATIONAL ASSESSMENT OF ADULT LITERACY 4, 13 (APR. 2007), *available at* www.nces.ed.gov/Pubs2007/2007480.pdf (last visited Nov. 17, 2012) (finding 13% of adults demonstrated ability to perform such skills).

[19] *See* Joseph Kimble, *Answering the Critics of Plain Language*, 5 SCRIBES J. LEGAL WRITING 51, 62-65, 73 (1996) (listing a number of studies conducted on plain language and concluding that plain language is more persuasive and comprehensible to readers than standard legal writing); *see generally* Robert Charrow & Veda Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 COLUM. L. REV. 1306 (1979) (arguing that systematic rewriting of jury instructions can measurably increase reader comprehension); Veda Charrow, *Readability vs. Comprehensibility: A Case Study in Improving a Real Document*, *in* LINGUISTIC COMPLEXITY AND TEXT COMPREHENSION: READABILITY ISSUES RECONSIDERED 85 (Alice Davison & Georgia M. Green eds., 1988) (rewriting automobile recall letters for readability increases comprehension among study sample); Michael Masson & Mary Ann Waldron, *Comprehension of Legal Contracts by Non-experts: Effectiveness of Plain Language Redrafting*, 8 APPLIED COGNITIVE PSYCHOL. 67 (1994) (reporting enhanced comprehension of legal documents after three stages of simplification).

[20] *See* WILLIAM H. DUBAY, THE PRINCIPLES OF READABILITY 1 (Aug. 25, 2004), *available at* www.impact-information.com/impactinfo/readability02.pdf (last visited Nov. 17, 2012) ("When texts exceed the reading ability of readers, they usually stop reading.").

To listen to or read dense, legalistic and highly technical jury instructions, an individual must not only be educated, but also must possess the motivation required to wade through technical and legal jargon. Studies have repeatedly shown that "readers strongly prefer plain language in legal and public documents, they understand it better[,] . . . they find it faster and easier to use, they are more likely to comply with it, and they are much more likely to read it in the first place."[21] Plain language jury instructions provide clear and effective communication of complex and important information to people with basic education. Clear writing and effective presentation can help promote juror understanding and ensure justice is served.

Documents with legal content should not be unnecessarily burdensome reading to their intended audience. Plain language is more than merely simple words; the term considers sentence length, subject/verb order, unambiguous modifiers, and even the active voice. If sentences average more than fifteen words, the legal content may confuse some intended readers. If interrupting clauses separate verbs from their subjects, the lack of unity and clarity may mislead readers. If a sentence is a mish-mash of floating modifiers that do not logically fit next to their antecedents, most readers will be perplexed, particularly when the legal content is already unfamiliar. The passive voice is also a problem: we should tell jurors that they should follow the jury instructions rather than say that the jury instructions should be followed. Jurors who are confused or uncomfortable stop reading, and unnecessarily confusing and complicated jury instructions fail in their purpose of guiding juries.

We conducted a readability analysis on the AAI revised jury instructions and on the ABA jury instructions. We relied on the Flesch-Kincaid readability test to measure readability.[22] This measure of readability indicates the number of years of education that a person needs to understand the text easily on the first reading (a score of 12 means a high school graduate would understand the text; a score greater than 12 requires some college education to understand the text). In general, this test gauges the difficulty of multi-syllable words and long, complex sentences.

The overall readability score of the proposed AAI instructions is **11.33**. In contrast, the overall readability score of the ABA instructions is **17.13**. The differential was yet more significant for some topics. For example, in the context of a monopolization claim, the AAI instruction on relevant product market scored **10.24** whereas the ABA offers two corresponding instructions that score **16.99** and **17.23**. Similarly, although the substance is essentially the same for the proposed AAI instruction and the ABA Instruction on balancing under the rule of reason, the respective readability scores are **12.09** and **18.69**, respectively. All else being equal, this differential suggests that jurors should have a much better chance of understanding the AAI instructions than the ABA instructions.

---

[21] JOSEPH KIMBLE, WRITING FOR DOLLARS, WRITING TO PLEASE: THE CASE FOR PLAIN LANGUAGE IN BUSINESS, GOVERNMENT, AND LAW 105 (2012).

[22] Professional RFP Letters, *Flesch Reading Ease Readability Score*, available at http://rfptemplates.technologyevaluation.com/readability-scores/flesch-reading-ease-readability-score.html (last visited Nov. 17, 2012). The most widely used readability scale is the Flesch-Kincaid Grade Level Readability Test. The formula for calculating Flesch-Kincaid analyzes the average sentence length and the average number of syllables per word.

## III. Schemas

Recent empirical work has shown that even when jury instructions—or other written materials—use plain language, jurors' preexisting knowledge can interfere with faithful application of the law to the facts of a case.[23] A term for such preexisting understandings is a "schema."[24] Jurors may have preexisting notions about the law, including antitrust law. Of course, jurors may never have heard the word "antitrust" or, if they have, may have little or no idea what it means. But they, for example, may well have views—conscious or subconscious—about what behavior is permissible in the marketplace. And their very lack of familiarity with antitrust doctrine will make it difficult for them to develop a proper legal framework over the relatively brief course of a trial.[25]

To some extent, these difficulties may be insurmountable. Jurors are extraordinarily unlikely to acquire the expertise of seasoned practitioners.[26] On the other hand, various practices may increase the chances that jurors understand and, ultimately, apply the law.

### General Purpose

A first step is to raise with the jurors the risk that they will rely on their own views rather than on the law and to urge them to follow the law.[27] AAI's proposed instructions address this issue explicitly.

### Particular Purposes – Organizing Sentences

Given that jurors are (ideally) building a new schema for antitrust law from their existing schemas, it is particularly important to have clear organizing sentences in introducing legal concepts.[28] AAI's proposed instructions adopt this practice, wherever possible explaining in simple terms the reason behind each requirement for a successful antitrust claim. Sometimes such explanations are probably crucial to overcome jurors' schemas. In direct purchaser actions, for example, plaintiffs may recover the full overcharges they pay, even if they are able to "pass on" some of the overcharges to their customers. Jurors may hold the background belief that plaintiffs should be compensated only for their actual losses. The ABA instructions would

---

[23] *See generally* Sara Gordon, *Through the Eyes of Jurors: The Use of Cognitive Psychology in the Application of "Plain Language" Jury Instructions*, __ HAST. L.J. (forthcoming) available at http://ssrn.com/abstract=2133000 (last visited Nov. 17, 2012).
[24] *Id*. at 3.
[25] *Id*. (discussing the difficulty of correcting jurors' errant schemas and of helping them to develop accurate schemas).
[26] *Id*.
[27] *Id*. at 27.
[28] *Id*. at 30.

confirm this background belief and, by so doing, encourage jurors to act on their preexisting views rather than enforce the law. AAI's proposed instruction on damages makes the law on direct purchasers' damages quite explicit, hopefully overcoming any schemas that could lead jurors to err.

**Simple Definitions**

Antitrust doctrine involves obscure terms. Definitions of these terms can play a crucial role for jurors.[29] AAI attempts to define each technical term as simply as possible.

**Simple Examples**

Examples also can prove useful in instructing jurors about how to apply legal rules.[30] AAI, therefore, offers simple examples where possible to illustrate what the law does and does not require.

**Headers to Signal Paragraph Topics**

Jury instructions can easily overwhelm jurors. To make the daunting task of comprehending the instructions as easy as possible, headers can indicate the topic of particular paragraphs or points.[31] AAI uses this technique throughout the instructions.

**Structured Analysis**

Antitrust jury instructions generally must prepare jurors to work through multiple steps in order to reach a reasoned decision. Providing a clear and simple structure should assist jurors in that endeavor.[32] AAI includes explanations of the structure of antitrust doctrine where possible.

**Other Possibilities**

Various other measures might prove useful in overcoming inappropriate schemas and developing appropriate schemas. One possibility is for a judge to provide the jury instructions—orally, in writing, or both—to juries before the trial begins. Another is to offer an overview of the legal issues in anticipation of the trial, perhaps a bit like an introductory class.[33] Yet another would be to allow a jury to review an example of proper application of the relevant law in some detail.[34] While we endorse some of these practices—particularly providing jurors written instructions before as well as after trial—we do not see them as within the scope of this project.

---

[29] *Id*.
[30] *Id*.
[31] *Id*.
[32] *Id*. at 29-30.
[33] *Id*. at 29.
[34] *Id*. at 29, 31.

IV. Potential Empirical Work.

Testing on groups of laypersons would be helpful in refining AAI's jury instructions and in making the case that they should be used by judges. A similar effort proved useful with the drafting of "model" plain language class action notices. The Civil Rules Advisory Committee asked the Federal Judicial Center ("FJC") to draft model notices to fulfill the plain language requirement for Rule 23(b)(3) classes. The FJC redrafted the notices and tested them through focus groups composed of laypersons from diverse backgrounds. Dr. Wheatman participated in this effort, confirming the effectiveness of the plain language model notices by conducting an empirical study comparing the redrafted plain language notice to the original legalistic notice. We propose a similar series of studies.

**Focus Groups**

We recommend recruiting focus-group participants from a wide range of non-legal occupations. Each participant should have at least a high school education and no more than a college degree. Each group might have six to nine participants.

We would ask focus group members to play the role of prospective jurors. Once participants receive the AAI jury instructions, a series of questions would gauge their understanding of the proposed language.

Analysis of focus group reactions and feedback would allow for improvement of the AAI Jury Instructions.

**Empirical Study**

As a further test of whether the AAI jury instructions improve comprehension, we suggest conducting an empirical study. We would compare participants' comprehension of the AAI jury instructions with their comprehension of the corresponding ABA Jury Instructions. The test could involve reading a set of jury instructions and then applying them to a fact pattern. The fact pattern would be designed to give rise to objectively right and wrong answers. We would hope to show that the AAI jury instructions have a significantly higher comprehension rate than the ABA Jury Instructions. Analysis of the results could also allow further modification of the AAI jury instructions.

**Use of the Internet**

One way to conduct this research in an economical manner would be over the Internet using a service like Mechanical Turk on Amazon: https://www.mturk.com/mturk/welcome.

Antitrust Laws – General Purpose

The plaintiff, Plaintiff A, has brought a claim against the defendant, Company X. Plaintiff A claims Company X has violated the federal antitrust laws. The purpose of this law is to protect free competition in the marketplace. The law assumes competition is the best way to produce high quality goods and services. It also assumes that competition will provide those goods and services at the lowest profitable price.

In deciding this case, you, the jurors, must follow the law. You may have your own views about what businesses can and cannot do in the market. However, if the law conflicts with your personal views, you should put them aside. Follow the law.

For example, you may believe that a company that develops a new product should charge reasonable prices. However, generally speaking federal law allows a company to charge whatever prices it wants for its products.

On other hand, you may believe that companies that compete with each other may agree on the prices they will charge. However, generally speaking federal antitrust law does not allow competitors to agree to fix their prices.

You must be guided by the law described in these jury instructions. You should not rely instead on your own personal views of how business should work.

Explanation of Jury Instruction:

Antitrust Laws – General Purpose

The proposed instruction is designed to address the jurors' schemas. Each juror may have his or her own view of what behavior is acceptable in the marketplace. The antitrust laws permit some behavior that jurors may intuitively find inappropriate and prohibit some behaviors that the jurors may intuitively believe to be acceptable. Jury instructions may have a limited ability to reform jurors' views. But this instruction at least makes an attempt to persuade the jurors to follow the law rather than their own intuitions.

The ABA Model Jury Instructions do not include any general statement about the purposes of federal antitrust laws. Model Instruction 1 at page A-2 does provide some guidance about the purpose of the Sherman Act. The proposed instruction borrows from that language, although it attempts to simplify the words used and the concepts expressed. Note, however, that the ABA Model Jury Instruction does not address the jurors' schemas directly. It does not tell them that they must follow the jury instructions rather than their own intuitive sense of what is permissible or impermissible behavior in the marketplace.

Rule of Reason – Overview

You must decide whether the restraint challenged here – [describe it] – is unreasonable. This decision is necessary because the law (Section 1 of the Sherman Act) makes a restraint of trade illegal if it is unreasonable. There are up to four steps in deciding whether a restraint is unreasonable. Note that a restraint can harm competition in some ways and benefit it in others. The steps reflect that possibility

**Steps**

Step 1: Competitive Harm. Has the restraint *harmed* competition?

| | |
|---|---|
| Yes – Go to Step 2 | No – Restraint is *reasonable*.<br><br>STOP |

Step 2: Competitive Benefit. Has the restraint *benefited* competition?

| | |
|---|---|
| Yes – Go to Step 3 | No – Restraint is *unreasonable*.<br><br>STOP |

Step 3: Reasonably Necessary. Was the restraint reasonably *necessary* to achieve the competitive benefit?

| | |
|---|---|
| Yes – Go to Step 4 | No – Restraint is *unreasonable*.<br><br>STOP |

Step 4: Balancing. Does the competitive harm from the restraint substantially *outweigh* its competitive benefit?

| | |
|---|---|
| Yes – Restraint is *unreasonable*.<br><br>STOP | No – Restraint is *unreasonable*.<br><br>STOP |

**Conclusions**

- If you conclude the restraint is unreasonable, you must address the other elements of Plaintiff A's claim.

- If you conclude the restraint is reasonable, plaintiff loses on its claim based on the rule of reason.

I will now review each step of the analysis in more detail.

Explanation of Jury Instruction:

Rule of Reason – Overview

The proposed instruction attempts to set forth a clear framework for a jury to apply the rule of reason. It explains the overall structure of the analysis, and the implications of the various determinations the jury may make.

ABA Model Instruction 3A, pages A-4 and A-5, is somewhat less explicit about the structure of the analysis. It does not make as clear as it might, for example, what conclusion the jury should reach if it does not find competitive harm, or if it finds competitive harm and no competitive benefit. AAI's proposed instruction attempts to remove this vagueness.

Also, ABA Model Instruction 3A, pages A-4 and A-5—especially when read in conjunction with ABA Model Instruction 3B, pages A-6 and A-7—requires plaintiff to prove the existence of a relevant market in all cases. This requirement is contrary to considerable case law and sound economic reasoning. If a plaintiff proves competitive harm through direct evidence—as opposed to through indirect (or circumstantial) evidence—the plaintiff should not be required to prove the existence of a relevant market.

The Supreme Court has long recognized that direct proof of market power is sufficient and obviates the need to define a relevant market. *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 460-61 (1986) (holding that purpose of inquiring into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, so that "proof of actual detrimental effects, such as a reduction of output," can obviate the need for an inquiry into market power, which is but a "surrogate for detrimental effects."); *see also Eastman Kodak v. Image Tech. Servs*., 504 U.S. 451, 477-78 (1992) (holding direct evidence of market power is sufficient). Lower courts have similarly recognized that direct proof of market power is sufficient. *See, e.g., Epicenter Recognition, Inc. v. Jostens, Inc*., 81 Fed. Appx. 910, 910-11 (9th Cir. 2003); *PepsiCo, Inc. v. Coca-Cola Co*., 315 F.3d 101, 107-08 (2d Cir. 2002); *Re/Max Int'l v. Realty One*, 173 F.3d 995, 1019 (6th Cir. 1999); *Rebel Oil Co. v. Atl. Richfield Co.,* 51 F.3d 1421, 1434 (1995).

Moreover, as an economic matter, the logic of *Indiana Federation* is difficult to resist. The point of the inquiry into the relevant market is merely to assess market power, and the point of the inquiry into market power is merely to assess the possibility of anticompetitive effects. Direct proof of anticompetitive effects eliminates the need for either additional inquiry. Demanding evidence of the relevant market would be akin to requiring circumstantial evidence of a murder when there are eye witnesses, a video recording of the defendant committing the act, and a signed confession. Direct evidence is sufficient.

Various key commentators support the view that direct evidence of market power is sufficient. The federal government's 2010 Horizon Merger Guidelines, for example, put new emphasis on the value of direct evidence of market power and recognize that the point of the

inquiry into market power is to determine likely anticompetitive effects.[35] The implication is that direct evidence of anticompetitive effects should be enough. Similarly, Professor Herbert Hovenkamp has argued against requiring market definition in every antitrust case[36] and Professor Louis Kaplow has gone further, contending that there is no way no way to define a relevant market without engaging in question begging.[37] Their arguments suggest that direct evidence of market is superior to circumstantial evidence of market power that relies on a market definition.[38]

[35] U.S. Dep't of Justice & Fed. Trade Commission, Horizontal Merge Guidelines §§ 2, 2.1.1., 2.1.2, 4 (2010), *available at www.ftc.gov/os/2010/08/100819hmg.pdf*.
[36] Herbert Hovenkamp, *Markets in Merger Analysis; Merger Policy, Structuralism, and the Legacy of Brown Shoe* (Oct. 2011), *available at http://papers.ssrn.com/so13/papers.cfm?abstract_id=1945964*.
[37] Louis Kaplow, *Why (Ever) Define Markets?,* 124 HARV. L. REV. 437, 440 (2010).
[38] For additional analyses of this issue see Douglas Richards, *Is Market Definition Necessary in Sherman Act Cases When Anticompetitive Effects Can Be Shown with Direct Evidence?*, 26 ANTITRUST 53 (2012); Eric L. Cramer & Daniel Berger, *The Superiority of Direct Proof of Monopoly Power and Anticompetitive Effects in Antitrust Cases Involving Delayed Entry of Generic Drugs*, 39 U.S.F. L. REV. 81 (2004).

Rule of Reason – Step 1: Competitive Harm

Plaintiff A must prove the challenged restraint is unreasonable. To do so, Plaintiff A must show the restraint has resulted in substantial harm to competition, sometimes called "competitive harm."

**Definitions**

- Competitive Harm. Competitive harm is harm to competition and consumers from *limits* on competition. It is not harm to competitors *from competition*. Competitive harm occurs when a restraint interferes with competition, decreasing some of its benefits. Competitive harm can include higher prices, decreased output, or lower quality.

- Market Power. Market power is the *ability* to cause competitive harm, including by raising prices. You should consider whether the defendants have market power in deciding whether the challenged restraint has caused harm to competition.

**Examples**

- Example 1: Imagine all companies that sell a product agreed to *raise* their prices and did raise their prices. That price-fixing *limits* competition, causing harm to consumers. The companies were able to cause competitive harm. Therefore, they have market power.

- Example 2: Imagine, instead, that some of the companies *lowered* their prices in a competitive market. One of their competitors lost sales because it could not match those low prices. That is not competitive harm because it was caused *by competition*. The companies did not cause competitive harm. They also may not have market power.

**Conclusions**

- If the challenged conduct has *not* resulted in competitive harm, then you should find that the challenged conduct is *reasonable*. Plaintiff has not proven its claim based on the rule of reason.

- If you determine the challenged conduct *has* resulted in competitive harm, you should consider whether it also resulted in a competitive benefit (go to Step 2).

I will now provide you further instructions on how to determine whether the plaintiff has proven that the defendant has market power.

Explanation of Jury Instruction:

Rule of Reason – Step 1: Competitive Harm

The proposed instruction attempts to provide the jury a clear framework for assessing competitive harm, including an explanation of the relevance of market power. It also reaffirms the relevance of competitive harm to the overall structure of the rule of reason standard.

The proposed instruction differs in various ways from ABA Model Instruction 3B, page A-6 to A-9. First, as noted above, a plaintiff need prove the existence of a relevant market only if Plaintiff A relies on indirect (or circumstantial) evidence of market power. However, the ABA Model Instruction would require proof of a relevant market in every case.

The second way in which the proposed instruction deviates from ABA Model Instruction 3B is by making the discussion of competitive harm simpler and clearer. It does this in part by separating out the discussion of market power. The proposed instruction also makes explicit the significance of the jury's finding regarding whether defendant has market power and the related finding of whether the conduct at issue caused competitive harm.

ABA Model Instruction 3B, page A-6 to A-9, addresses indirect proof of market power as part of its discussion of proof of competitive harm. This approach suffers from at least two serious problems. The first is that the plaintiff may attempt to prove market power—and competitive harm—only through direct evidence. If so, much of ABA Model Instruction 3B is irrelevant and likely to confuse the jury. The plaintiff need not prove the existence of a relevant market or offer indirect proof of market power. The instruction includes irrelevant information by suggesting otherwise, irrelevant information that could well lead a jury to reach the wrong conclusion in a case.

The second serious problem is that the ABA's attempt to cover so much ground within a jury instruction on competitive harm has resulted in an incomplete, unsystematic, and confusing instruction on market power. The instruction does not make clear the relationship between market power and competitive harm. Indeed, it seems to conflate the two. It also lists a bunch of considerations relevant to market power—*e.g.*, market share, entry barriers—without explaining their meaning or implications. The instruction, for example, does not explain what an entry barrier is or whether it tends to support or undermine the existence of market power.

Consider the following paragraph from the ABA's Instruction:

> In determining whether the challenged restraint has produced [or is likely to produce] competitive harm, you may look at the following factors: the effect of the restraint on prices, output, product quality and service; the purpose and nature of the restraint; the nature and structure of the relevant market, both before and after the restraint was imposed; the number of the competitors in the relevant market and the level

of competition among them, both before and after the restraint was imposed; and whether the defendant possesses "market power."

The jury is left to guess whether each of these factors supports or undermines a claim of competitive harm. What effects on prices, output, product quality, or services would indicate competitive harm? How does the number of competitors or the level of competition relate to competitive harm? The instruction does not say.

The proposed instruction and the ones that follow are designed to cure these deficiencies.

The proposed instruction also defines competitive harm. The ABA instruction does not do so. The term "competitive harm" may not have an obvious meaning to jurors.

Market Power – Overview (Direct and Indirect Evidence)

Plaintiff A has the burden of proving market power. Company X has market power if it can raise prices above the competitive levels for a substantial period of time. It also has market power if it can exclude competitors. Plaintiff A can prove market power with direct or indirect evidence.

**Direct Evidence**

Plaintiff A may prove market power with *direct* evidence. It can do so by showing Company X **has actually** controlled prices or excluded competition.

- Direct evidence of market power can take different forms. It would include showing Company X profitably raised its prices by a small but significant amount above competitive levels for a substantial period of time.

- Evidence Company X tried but could *not* raise or maintain its prices above competitive levels would suggest it does not have market power.

- To prove market power with direct evidence, Plaintiff A does *not* have to define a relevant market.

**Indirect Evidence**

Plaintiff A may prove market power with *indirect* evidence. It can do so by showing that Company X **is capable** of profitably raising its prices above competitive levels or excluding competition in a relevant market.

- Indirect proof of market power requires Plaintiff A to prove a relevant market.

- Plaintiff A must then provide evidence that the structure of the relevant market gives Company X market power.

**Competitive Levels**

The competitive levels for prices occur when companies compete for sales in a free market.

- Prices are above competitive levels if a restraint allows a company to charge higher prices than it would have charged without the restraint.

- For example, a company may charge prices above the competitive level by agreeing with its competitors about the prices they will all charge.

**Conclusions**

Plaintiff A may prove market power with direct evidence, indirect evidence, or both.

- You may find Plaintiff A has proven market power through direct or indirect evidence. If you find Plaintiff A succeeded in either way, Company X has market power.

- You may find Plaintiff A failed to proved market power through either direct or indirect evidence. If you find Plaintiff A failed at both, Company X does not have market power.

Market Power [Direct Evidence]

Plaintiff A has the burden of proving market power. Company X has market power if it can raise prices above the competitive levels for a substantial period of time or exclude competitors.

Plaintiff A may prove market power with *direct* evidence by showing Company X **has actually** controlled prices or excluded competition.

- Direct evidence of market power can take different forms. It would include showing Company X profitably raised its prices by a small but significant amount above competitive levels for a substantial period of time.

- Evidence Company X tried but could *not* raise or maintain its prices above competitive levels would suggest it does not have market power.

**Competitive Levels**

The competitive levels for prices occur when companies compete in a free market.

- Prices are above competitive levels if a restraint allows a company to charge higher prices than it would have charged without the restraint.

- For example, a company might charge prices above competitive levels by agreeing with its competitors about the prices they will all charge.

**Conclusions**

- You may find Company X *can* raise prices above the competitive levels for a substantial period of time or exclude competitors. If so, Company X has market power.

- You may find Company X *cannot* raise prices above the competitive levels for a substantial period of time or exclude competitors. If not, Company X does not have market power.

Market Power – Overview [Indirect Evidence]

Plaintiff A has the burden of proving market power. It can do so by showing that Company X **is capable** of profitably raising its prices above competitive levels or excluding competition in a relevant market.

- Plaintiff A can prove market power with evidence about the structure of the market.
    - Plaintiff A must prove a relevant market.
    - Plaintiff A must then provide evidence that the structure of the relevant market gives Company X market power.

**Competitive Levels**

The competitive levels for prices occur when companies compete for sales in a free market.

- Prices are above competitive levels if a restraint allows a company to charge higher prices than it would have charged without the restraint.
- For example, a company may charge prices above competitive levels by agreeing with its competitors about the prices they will all charge.

**Conclusions**

- You may find Company X *can* raise prices above the competitive levels for a substantial period of time or exclude competitors. If so, Company X has market power.
- You may find Company X *cannot* raise prices above the competitive levels for a substantial period of time or exclude competitors. If not, Company X does not have market power.

Explanation of Jury Instruction:

Market Power

AAI has provided three versions of the market power jury instruction. Only the first (which begins on page 20) should be used if Plaintiff A attempts to use both direct and indirect evidence to prove market power, only the second (on page 22) should be used if Plaintiff A attempts to use solely direct evidence to prove market power, and only the third (on page 23) should be used if Plaintiff A attempts to use solely indirect evidence to prove market power.

Direct Proof of Market Power.

The proposed instruction attempts to provide a clear and simple explanation of direct proof of market power. If plaintiff can prove that defendant in fact *caused* the kind of harm to competition that the antitrust laws are designed to prevent, plaintiff has shown that defendant is capable of causing that sort of harm (and that it has done so). Greater complexity in the instruction is more likely to confuse than clarify this issue for the jury.

The ABA Model Instructions fail to address direct proof of market power in the context of the Rule of Reason. AAI's proposed instruction cures this deficiency. The ABA Model Instructions do address direct proof of market power in the context of a monopolization claim. This approach is somewhat odd. The support is at least at strong for allowing direct proof of market power under Section 1 of the Sherman Act as for allowing direct proof of monopoly power under Section 2 of the Sherman Act. Direct proof is sufficient. *See supra* p. 17.

The proposed instruction borrows from ABA Instruction 9, C-23, on direct proof of monopoly power but also deviates from it. The ABA Instruction implies—consistent with the express position in ABA Instruction 2, C-4—that monopoly power requires both the ability to control prices *and* the ability to exclude competition. In other words, AAI's proposed instruction uses the disjunctive whereas the ABA instruction uses the conjunctive. The ABA's choice is odd. It acknowledges that a number of courts—all of the legal authorities the ABA cites—use the disjunctive. *See id*. (citing *American Council of Certified Podiatric Phys. & Surgeons*, 323 F.3d, 372 (6th Cir. 2003); *Pepsico, Inc. v. Coca-Cola Co*., 315 F.3d 101-107 [sic] (2d Cir. 2002); *Conwood Co. v. U.S. Tobacco Co*., 290 F.3d 768, 782 (6th Cir. 2002); *United States v. Microsoft Corp*., 253 F.3d 34, 51 (D.C. Cir. 2001)). Scholarly commentary also supports use of the disjunctive approach. For an early discussion see Krattenmaker, Lande & Salop, *Monopoly Power and Market Power in Antitrust Law*, 76 GEORG. L. J. 241 (1987). Even the unusual court that uses the conjunctive in the monopoly power context of Section 2 of the Sherman Act uses the disjunctive in market power context of Section 1 of the Sherman Act. *Compare Reazin v. Blue Cross & Blue Shield, Inc.*, 899 F.2d 951, 966-67 (10th Cir. 1990) (using disjunctive formulation for Section 1) with *Shoppin' Bag of Pueblo, Inc. v. Dillon Cos*., 783 F.2d 159, 163-64 (10th Cir. 1986) (adopting conjunctive formulation in Section 2 context).

Nor is the ABA's explanation of its position sound as a matter of economics or practicalities. The ABA justifies its choice by suggesting that power over price implies the ability to exclude competition and vice versa. As a matter of economics, that means proof of one entails proof of the other. Proof of either should therefore suffice. As a practical matter, a jury may not understand this logical connection and may follow the ABA instruction literally, finding against a plaintiff who has proven defendant's power over price but not made the unnecessary additional showing of exclusion of competition (or vice versa).

Indirect Proof of Market Power

The proposed instruction provides an overview of indirect proof of market power. It focuses the jury on the ultimate purpose of the inquiry: determining whether defendant was capable of causing an anticompetitive effect. It also situates the inquiry into market power within the effort to provide indirect proof of market power.

ABA Instruction 3B, pages A-6 to A-8, fails to separate out indirect proof of market power from direct proof of market power and fails to explain the relationship of market power to competitive effect. The proposed instruction is designed to cure these deficiencies.

ABA Instruction 3B, at page A-6, does refer to the relevant market instructions for monopolization claims located at pages C-7 to C-14. The following instructions borrow from the ABA Instructions 4 through 6 located at pages C-7 to C-14.

In adapting ABA Instruction 2, page C-4, from the monopolization context, the proposed instruction states that proof of the power either to control prices *or* to exclude competition is sufficient to establish market power. As noted above, *see supra* p. 26, the weight of authority is to the contrary and the position adopted by the ABA makes little economic sense. If defendant is able to maintain prices substantially above competitive levels for a significant period, that establishes market power. It may also imply that defendant is able to exclude competitors. But the ABA instructions could confuse a jury into thinking it must find some evidence of the ability to exclude other than defendant's ability to maintain prices above competitive levels. That could cause the jury to rule against a plaintiff who has clearly demonstrated market power.

Direct and Indirect Proof of Market Power

Plaintiff may provide both direct and indirect evidence of market power. The ABA instructions do not make clear how these interrelate. The proposed instruction is designed to clarify the issues the jury should decide. It makes specific note that plaintiff need not prove the existence of a relevant market to prove market power through direct evidence. It instructs the jury that proof of market power either through direct evidence or through indirect evidence is sufficient. It also makes explicit that plaintiff need not prove the existence of a relevant market when offering direct proof of market power.

Competitive Levels

The proposed jury instructions refer to competitive levels. That is not a term jurors will necessarily understand. A definition is likely to prove useful. The ABA Instruction also uses the term "competitive levels." However, it does not define the term. That may cause juror confusion.

Market Power (Indirect Evidence)

Plaintiff A may prove market power by offering evidence about the structure of a relevant market. To do so, Plaintiff A must first define a relevant market. Plaintiff A must then show that Company X has the ability to control prices or exclude competition in that market.

**Considerations**

Evidence relevant to whether Company X has market power in a relevant market can include:

- Market Share. The percentage of the market Company X controls;
- Market Share Trends. Whether Company X's market share is going up or down;
- Barriers to Entry. Difficulties for new companies trying to enter the market;
- Market Entry and Exit. The number of companies entering and leaving the market; and
- Competitors. The number and size of Company X's competitors.

**Next Steps**

I will provide you additional instructions about:

(1) How to define a relevant market.
(2) How to use the above factors to decide if Company X has market power.

Explanation of Jury Instruction:

Market Power (Indirect Evidence)

The parenthetical in the title of this jury instruction should be included only if the plaintiff is attempting to prove market power with both direct and indirect evidence.

The jury instruction should list only the relevant forms of evidence. It should include, for example, market entry and exit only if one of the parties adduces evidence relevant to that consideration.

The proposed instruction provides an overview of indirect proof of market power. It aims to orient the jury to the more detailed instructions that follow.

The proposed instruction deviates in several ways from the most relevant ABA jury instructions. ABA Instruction 3B, at pages A-6 to A-9, provides little guidance to the jury about the structure of the analysis of indirect proof of market power. It notes that plaintiff must prove the existence of a relevant market and then suggests undefined considerations that might be relevant, although it does not explain why or how they are relevant.

ABA Instruction 8, pages C-16 to C-19, does a better job of providing a framework for a jury, although it addresses monopoly power, not market power. The proposed instruction borrows from ABA Instruction 8 but makes two significant modifications. First, it recognizes that a defendant has market power if it can either increase prices or exclude competitors, as opposed to Instruction 8 which implies both are necessary. See the Explanation for Jury Instruction: Market Power *supra* at p. 26 justifying use of the disjunctive rather than conjunctive approach. Second, the proposed instruction confirms that market definition is required only for indirect proof of market power. ABA Instruction 8—much like ABA Instruction 3B—requires proof of the existence of a relevant market for all cases, regardless of whether plaintiff attempts to prove market power through direct or indirect proof. See the Explanation for Jury Instruction: Rule of Reason -- Overview *supra* p. 17 justifying the lack of the need to define a relevant market when relying on direct proof of market power. Similar problems arise elsewhere in the ABA Instructions. *See, e.g.*, Tying Arrangements (Instruction 7, pages B-106 to B-108).

Relevant Market

Plaintiff A must prove that more likely than not Company X has market power. Plaintiff A can prove market power [through indirect evidence][39] based on the structure of the market. If the structure of the market shows Company X *could* control prices or exclude competitors, then Company X has market power.

To prove market power based on the structure of the market, Plaintiff A must properly define a market. Plaintiff A then must show Company X has power in that market based on the market's structure.

**Economic Forces**

In defining the relevant market, you must decide what, if any, economic forces stop Company X from raising its prices or limiting its output for Product X.

- The most important economic force is competition from other companies. The competition may come from actual or potential products.

- A key issue is which competitors, if any, could win sales from Company X if it raised its prices above competitive levels.

**Competitors**

Competitors are in the same market as Company X if the competitors provide similar products that would stop Company X from raising its prices above competitive levels.

- A competitor's products do not need to be identical to Company X's products to be in the same market.

- Competitors are not in the same market as Company X if the competitors' products are too different to stop Company X from raising its prices above competitive levels while maintaining profits.

**Products and Geography**

There are two aspects you must consider in deciding whether the plaintiff has proven a relevant market. The first is the relevant product market. The second is the relevant geographic market.

[39] Include the words in the square brackets only if Plaintiff A attempts to prove market power through both direct and indirect evidence.

Explanation of Jury Instruction:

Relevant Market

As appropriate, the term "services" should be substituted for the word "products" in the proposed instruction.

The proposed instruction makes clear that the relevant market includes products (or services) that prevent the defendant from raising its prices above *competitive* levels.

The proposed AAI instruction deviates from the relevant ABA instruction—Instruction 3, pages C-6—in three ways. First, the ABA instructions simply insert the relevant market instruction borrowed from the monopolization context into the discussion proof of competitive harm under the rule of reason. AAI's proposed instruction offers the jury a clearer and more explicit framework for decision-making.

Second, the ABA instructions assume the plaintiff must always prove a relevant market. That is inconsistent with important case law, including from the Supreme Court, as well as with antitrust economics. See the Explanation for Jury Instruction: Rule of Reason -- Overview *supra* at page 17 justifying the lack of the need to define a relevant market when relying on direct proof of market power.

Third, the ABA instructions invite what has become known as the "cellophane fallacy" or the "cellophane trap." The fallacy or trap occurs if a firm or good is treated as in the relevant market because it restricts a defendant's ability to raise prices above a level that is already supra-competitive as a result of the defendant's exercise of market power. In contrast, under a proper approach, only products capable of forcing the defendant to charge *competitive* prices—not products that discipline defendant's prices once they are already significantly inflated—are in the relevant market. For a recent discussion of this issue see Mark A. Lemley & Mark P. McKenna, *Is Pepsi Really a Substitute for Coke? Market Definition in Antitrust and IP*, 100 GEO. L.J. 2055, 2089 (2012). For case law suggesting that the cellophane fallacy is indeed a legal error see, *e.g.*, *Aegerter v. City of Delafield*, 174, F.3d 886, 892 (7th Cir. 1999) (Wood, J.) (citing RICHARD POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 128 (1976)); *United States v. Eastman Kodak Co*., 63 F.3d 95, 103, 105 (2d Cir. 1995).

ABA Instruction 3 discusses the "economic forces that restrain defendant's freedom to set prices for or restrict . . . output" and suggests all firms and products are in "the relevant market" if they act as a restraint on a "defendant's power to set prices as it pleases." This definition embodies the cellophane fallacy. Products restrain a defendant's freedom to set prices or restrict output if they limit how high above competitive levels the defendant may set its prices. But those products are not in the relevant market if they have such an effect only after the defendant has raised its prices well above competitive levels. As a result, ABA Instruction 3 sets the cellophane trap for a jury.

Relevant Product Market

The basic idea of a relevant product market is that the products within it are reasonable substitutes for each other from the buyer's point of view. The key issue is whether competitors' products would prevent Company X from maintaining prices above *competitive* levels.

**Similarity of Products**

- You should consider what would happen if Company X raised its prices above *competitive* levels.
    - If *enough* consumers would switch to a competitor's products that Company X would take back its price increase, then the products are in the same market. Otherwise, the products are not in the same market.
- Products do not need to be identical to be in the same market.
- Just because *some* consumers would substitute one product for another at some price does not mean they are in the same market.

**Considerations**

In deciding whether competitors' products would prevent Company X from maintaining prices above competitive levels, you may consider:

- Consumers' Views. Consumers may view one product as a substitute for another.
- Industry and Public Opinion. The industry or the public may view products as in the same market.
- The Views of Plaintiff A and Company X. Plaintiff A and Company X may have views about which products are in the same market.
- Relationship of Price and Sales. The volume of sales of Company X's product may affect the price of its competitor's product. Also, the volume of sales of a competitor's product may affect the price of Company X's product. The stronger this relationship, the more likely they are in the same market.
- Customer Groups and Distribution Channels. Company X and its competitors may have similar or different customer groups or distribution channels. The more similar, the more likely products are in the same market.

You may take into account all of these considerations. You may decide how much weight to give each one.

**Potential Products**

In identifying the relevant product market, you should consider not only existing products. You should also consider products that a potential competitor might create to compete with Company X.

**The Parties' Positions**

In this case, Plaintiff A claims the relevant product market is [state plaintiff's contention].

By contrast, Company X claims that Plaintiff A has failed to prove a relevant product market. Company X also argues that [state defendant's contention, if any, about the scope of the relevant product market and/or plaintiff's evidence].

**Conclusions**

You may find Plaintiff A has proven a relevant product market. If so, you must decide whether Plaintiff A has proven a relevant geographic market.

If you may find Plaintiff A has *not* proven a relevant product market. If not, Plaintiff A has not shown market power [by indirect evidence].[40]

[40] Include the words in the square brackets only if Plaintiff A attempts to prove market power through both direct and indirect evidence.

Explanation of Jury Instruction:

Relevant Product Market

As appropriate, the term "services" should be substituted for the word "products" in the proposed instruction.

AAI's proposed instruction attempts to set forth a clear structure for the jury, explaining the ultimate purpose of the inquiry into the product market and how various factors figure in that inquiry. The proposed instruction emphasizes that the relevant market includes products (or services) that prevent the defendant from raising its prices above *competitive* levels.

The relevant ABA instructions—Instructions 4 and 5, pages C-7 to C-12—are inferior in numerous ways. First, they do not provide a clear structure for the jury. They mention, for example, various factors that may figure in assessing reasonably interchangeability, such as consumers' views, the relationship of prices and sales of products, specialized vendors, industry and consumer perceptions, and the like. But they do not explain how these factors all should relate to the ultimate purposes of the inquiry: whether they would prevent a defendant from maintaining prices above competitive levels.

Second, and related, as discussed *supra* p. 32, the ABA instructions invite the cellophane fallacy. Indeed, Instruction 4, at page C-7, offers the reasoning of the cellophane case, *United States v. E.I. du Pont de Nemours & Co*., 351 U.S. 377, 395 (1956), as an example, despite the general view that the reasoning in that case was erroneous (regardless of whether the outcome was correct). The instruction thus would encourage a jury to conclude that a monopolist lacks market power if it charges supra-competitive prices but other products limit its ability to increase its prices even higher.

Finally, ABA Instruction 5 seems to put undue emphasis on potential competitors rather than simply including them in the ordinary relevant product market instruction.

Relevant Geographic Market

The relevant geographic market is the *geographic area* (or location) in which Company X faces competition from other companies. It is the area where customers can reasonably turn to Company X's competitors for purchases.

Plaintiff A must prove that the geographic market it identifies is more likely than not the right one. The geographic market may be very large or very small. It may be include the world or a nation. It may be limited to a single town or part of a single town.

- You should determine whether products in one area would prevent companies from maintaining prices above competitive levels in another area.
    - If so, that tends to show that both areas are in the same geographic market.
    - If not, that tends to show that both areas are not in the same geographic market.

**Considerations**

In defining the relevant geographic market, you may consider the following:

- The geographic area where Company X sells and where its customers are located;
- The effect of changes in prices or product offerings in one area on prices or sales in another area;
- The geographic area where customers have turned or could turn to buy the product;
- The geographic areas that companies view as potential sources of competition; and
- Whether government licensing requirements, taxes, or quotas limit competition in certain areas.

**The Parties' Positions**

In this case, Plaintiff A claims that the relevant geographic market is [state the plaintiff's contention].

By contrast defendant argues that [state the defendant's contention, if any, about the scope of the relevant geographic market and/or Plaintiff A's evidence].

**Conclusions**

You may find Plaintiff A has proven a relevant geographic market. If so, you must decide whether Plaintiff A has shown Company X has market power in the relevant market.

You may find Plaintiff A has failed to prove a relevant geographic market. If not, Plaintiff A has not shown market power [by indirect evidence].[41]

[41] Include the words in the square brackets only if Plaintiff A attempts to prove market power through both direct and indirect evidence.

Explanation of Jury Instruction:

Relevant Geographic Market

The word "services" should be substituted for the word "products" as appropriate.

The proposed jury instruction—as with the other proposed instructions—places emphasis on the ultimate purpose of the inquiry into market power and relevant market, which is to assess whether the defendant's actual and potential competitors could prevent the defendant from raising and maintaining prices above competitive levels.

The relevant ABA instruction—borrowed by reference from the monopolization context, *see* Instruction 3B on page A-6 citing to, *inter alia*, Instruction 6 on pages C-13 to C-14—speaks in terms of "competition" and discusses products "to which customers can reasonably turn for purchases." *See* Instruction 6 at C-13. It also suggests the jury "should consider whether changes in prices or product offerings in one area have substantial effects on prices or sales in another area, which would tend to show both areas are in the same relevant geographic market." *Id*. While these considerations are surely relevant—and are included in AAI's proposed instruction—the ABA instruction fails to state the point of the inquiry. As a result, it could cause a jury to make errors in favor of the plaintiff or the defendant. A jury could conclude that products are in different geographic markets even though the existence of one product could prevent the seller of the other product from raising prices above competitive levels. Similarly, a jury could include in a single market competitors or products that have some effect on the defendant's prices but that are not capable of forcing the defendant to keep its prices down to competitive levels.

Evidence of Market Power in the Relevant Market

Plaintiff A may use evidence about the structure of the relevant market to prove Company X's market power. This evidence can include:

**Market Share**

You should consider Company X's market share.

- Market share is the percentage of the market that consists of Company X's sales. The greater the share of the relevant market, the more likely Company X has market power.

- You should determine Company X's market share as a percentage of the total sales in the market.

**Market Share Trends**

A market share trend indicates whether Company X's share of the relevant market is increasing, decreasing, or staying the same.

- An *increasing* market share tends to suggest market power.

- A *decreasing* market share tends to suggest a lack of market power.

**Difficulties in Entering the Market ("Barriers to Entry")**

The structure of the market may make it hard for a new competitor to enter the market and compete with Company X. These difficulties may be caused by:

- Intellectual Property Rights. For example, Company X may have a patent, which allows Company X to prevent other companies from making similar products.

- Specialized Marketing Practices. For example, Company X may have a large network for selling its products that would be expensive and time-consuming for other companies to develop.

- Reputation or Brand Name Recognition. For example, Company X may have a reputation or brand name recognition that other companies would have a hard time creating.

High barriers to entering the market suggest that Company X has market power. New competitors would have difficulty entering the market and forcing Company X to lower its prices.

Low barriers to entering the market suggest that Company X does not have market power. New competitors would not have difficulty entering the market and forcing Company X to lower its prices.

**Entry and Exit by Other Companies**

- If companies have left the market or failed to enter the market, that may be evidence of market power.

- Entry of new competitors or expansion of existing competitors may be evidence that Company X lacks market power.

**The Number and Size of Defendant's Competitors**

- If Company X has few competitors that may suggest Company X has market power. Company X's competitors may be relatively weak or small or have declining market shares. If so, that also may suggest Company X has market power.

- If Company X has many competitors that may suggest Company X does *not* have market power. Company X's competitors may be relatively large and powerful or have increasing market shares. If so, that also may suggest Company X does *not* have market power.

**Conclusions**

You must consider Plaintiff A's evidence about the structure of the relevant market.

- That evidence may prove that Company X has the power to control prices or exclude competition. If so, Company X has market power. You must then consider the other elements of Plaintiff A's claim.

- That evidence may *not* prove that Company X has the power to control prices or exclude competition. If not, then Plaintiff A has not proven market power [with indirect evidence].[42]

[42] Include the words in the square brackets only if Plaintiff A attempts to prove market power through both direct and indirect evidence.

Explanation of Jury Instruction:

Evidence of Market Power in the Relevant Market

In describing market share, instead of the percentage of sales, the court should substitute the percentage of shipments, production, capacity, reserves, or a different relevant metric as appropriate.

The proposed instruction borrows heavily from the ABA's Instruction 8 at pages C-16 to C-19, an instruction pertaining to monopoly power that ABA Instruction 3B at A-6 incorporates by reference. AAI's proposed jury instruction deviates from ABA Instruction 8 in several ways. First, it deletes the discussion of 50% market share as a benchmark as that applies to monopoly power rather than market power. Second, the AAI instruction defines monopoly power as the power to control prices *or* exclude competition. The ABA Instruction requires both. As discussed above, *supra* p. 26, case law and economic theory support the disjunctive rather than the conjunctive formulation.

Finally, the ABA Instruction indicates that if the plaintiff proves the defendant has the power to control prices and exclude competition, then the jury *may* conclude the defendant has market power. This hedge is likely to prove unnecessarily confusing to the jury. Having met the definition of monopoly power, the jury should find the defendant has market power. AAI's proposed instruction is drafted accordingly.

Rule of Reason – Step 2: Competitive Benefit

You may find Plaintiff A has shown competitive *harm*. Company X may then provide evidence that the restraint also *benefits* competition in other ways.

**Competitive Benefit**

- Competitive benefit includes all of the normal benefits of free competition. Examples include high quality products and services, low prices, and increased output.

- Competitive benefit does *not* include supposed benefits from *restraining* competition. Competitors might claim that agreeing not to compete will allow them to increase their profits and, as a result, to produce higher quality products. That would *not* be a competitive benefit.

**Company X's Position**

In this case, Company X contends that the restraint benefits competition in the following way[s]: [insert description of defendant's contentions].

**Conclusions**

If the restraint caused competitive harm, you must assess Company X's evidence of competitive benefit.

- If Company X has *not* provided evidence of competitive benefit, then the restraint is *unreasonable*. You must address the other elements of Plaintiff A's claim.

- If Company X *has* provided evidence of competitive benefit, then you should consider whether the restraint was reasonably necessary (go to Step 3).

Explanation of Jury Instruction:

Rule of Reason – Step 2: Competitive Benefit

The structure for decision-making under the Rule of Reason is complicated. The proposed instruction attempts to make that structure as clear and simple as possible. It sets forth the steps the jury should take in assessing evidence defendant offers of a procompetitive effect of a restraint on trade.

ABA Instruction 3C, on pages A-10 and A-11, addresses these same issues in a manner that is largely consistent as a matter of substantive law but that omits key points. The ABA instruction does not tell the jury, for example, what to do if it concludes that the challenged restraint does *not* result in competitive benefit.

The ABA instruction also does not define competitive benefit. AAI's proposed instruction does.

Rule of Reason – Step 3: Reasonably Necessary

You may find Company X has provided evidence of competitive benefit. If so, Plaintiff A may show the restraint was not reasonably necessary.

**Reasonably Necessary**

The restraint was not reasonably necessary if Company X could have achieved the same competitive benefit in a way that would have caused substantially less harm to competition.

**Conclusions**

- If the restraint was not reasonably necessary, it was *unreasonable*. You must address the other elements of Plaintiff A's claim.

- If the restraint was reasonably necessary, you must weigh the competitive harm against the competitive benefit (go to Step 4).

Explanation of Jury Instruction:

Rule of Reason – Step 3: Reasonably Necessary

The structure for decision-making under the Rule of Reason is complicated. The proposed instruction attempts to make that structure as clear and simple as possible, in part by separating out each step. The ABA Instruction combines the defendant's burden of showing competitive benefit with the plaintiff's burden of showing the restraint on trade was not reasonably necessary. AAI's proposed instruction breaks the issues into separate steps.

ABA Instruction 3C, on pages A-10 and A-11, addresses these same issues in a manner that is largely consistent as a matter of substantive law but that omits key points. The ABA instruction, for example, does not tell the jury how to resolve the claim if plaintiff proves the restraint was not reasonably necessary. Nor does the ABA instruction make explicit that if defendant makes its showing, and plaintiff does not, then the jury should engage in balancing. AAI's proposed instruction clarifies these points.

Rule of Reason – Step 4: Balancing

You may find that the challenged restraint caused competitive harm and was reasonably necessary to achieve competitive benefit. If so, you must balance the competitive benefit against the competitive harm.

**Conclusions**

- If the competitive harm substantially outweighs the competitive benefit, then the restraint is *unreasonable*. You must address the other elements of Plaintiff A's claim.

- If the competitive harm does not substantially outweigh the competitive benefit, then the restraint is *reasonable*. Plaintiff A has not proven its claim based on the rule of reason.

Explanation of Jury Instruction:

Rule of Reason – Step 4: Balancing

The proposed instruction tries to provide as clear an explanation as possible of the relevant balancing. It is very similar to ABA Instruction 3D, page A-12, although simpler.

Monopolization – General

**Definitions**

- Monopolization means having monopoly power in a market.

- Monopoly power is the power to control prices or exclude competition. A firm has monopoly power if it can profitably raise prices substantially above the competitive level for a significant period of time. It also has monopoly power if it can exclude competitors.

**Elements**

Plaintiff A claims that it was harmed by Company X's unlawful monopolization of the [describe each relevant market at issue]. To win on this claim, Plaintiff A must prove each of the following elements is more likely than not true:

- Company X had monopoly power in that market [in those markets];

- Company X deliberately acquired or maintained monopoly power by engaging in conduct harmful to competition;

- Company X's conduct occurred in or affected interstate (state-to-state) [or foreign] commerce; and

- Plaintiff A was harmed in its business or property because of Company X's conduct.

Explanation of Jury Instruction:

Monopolization – General

Defining a Relevant Market

As the Supreme Court has recognized, the ultimate point of defining a relevant market and establishing market power is to show a defendant's behavior can have anticompetitive effects. Direct evidence of anticompetitive effects should suffice. Proving a valid antitrust market should be necessary only if plaintiff relies on indirect evidence of monopoly power. *See, e.g.*, *Broadcom Corp. v. Qualcomm, Inc*., 501 F.3d 297, 307 (3d Cir.2007); *PepsiCo, Inc. v. Coca-Cola Co*., 315 F.3d 101, 107-08 (2d Cir. 2002); *Toys "R" Us v. FTC*, 221 F.3d 928, 937 (7th Cir. 2000); *Re/Max Int'l v. Realty One*, 173 F.3d 995, 1019 (6th Cir. 1999); *Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1475-76 (9th Cir. 1997); *Coastal Fuels, Inc. v. Caribbean Petroleum Corp.*, 79 F.3d 182, 196-97 (1st Cir. 1996); *Rebel Oil Co. v. Atl. Richfield Co.,* 51 F.3d 1421, 1434 (1995); *Flegel v. Christian Hosp. Northeast-Northwest*, 4 F.3d 682, 688 (8th Cir. 1993); *United States Football League v. National Football League*, 842 F.d 1335, 1362 (2d Cir. 1988). For a further discussion of this issue see *supra* page 17.

Defining Monopoly Power

In adapting ABA Instruction 2, page C-4, the proposed instruction requires proof of the power either to control prices *or* to exclude competition. In other words, the proposed instruction uses the disjunctive whereas the ABA instruction uses the conjunctive. As discussed above in regard to market power, the ABA's choice is odd. *See supra* pages 26 and 27. It acknowledges that a number of courts—indeed, *all* of the legal authorities the ABA cites—use the disjunctive. *See id*. (citing *American Council of Certified Podiatric Phys. & Surgeons*, 323 F.3d, 372 (6th Cir. 2003); *Pepsico, Inc. v. Coca-Cola Co*., 315 F.3d 101-107 [sic] (2d Cir. 2002); *Conwood Co. v. U.S. Tobacco Co*., 290 F.3d 768, 782 (6th Cir. 2002); *United States v. Microsoft Corp*., 253 F.3d 34, 51 (D.C. Cir. 2001)). Nor is the ABA's explanation of its position sound as a matter of economics or practicalities. (It bears noting, however, that in a minority of jurisdictions the conjunctive should be used in addressing monopoly power even though the disjunctive should be used with market power. *See, e.g., Reazin v. Blue Cross & Blue Shield, Inc.*, 899 F.2d 951, 966-67 (10th Cir. 1990). Use of the conjunctive is difficult to defend but it may be the law in the monopolization context in some courts.) The ABA justifies its choice by suggesting that power over price implies the ability to exclude competition and *vice versa*. As a matter of economics, that means proof of one entails proof of the other. Proof of either should therefore suffice. As a practical matter, a jury may not understand this logical connection and may follow the ABA Instruction literally, finding against a plaintiff who has proven defendant's power over price but not made the unnecessary additional showing of exclusion of competition (or *vice versa*).

Monopoly Power – Overview (Direct and Indirect Evidence)

Plaintiff A has the burden of proving monopoly power. Company X has monopoly power if it can raise prices above the competitive levels for a substantial period of time or exclude competitors. Plaintiff A can prove monopoly power with direct or indirect evidence.

**Direct Evidence**

Plaintiff A may prove monopoly power with *direct* evidence. It can do so by showing Company X **has actually** controlled prices or excluded competition.

- Direct evidence of monopoly power can take different forms. It would include showing Company X profitably raised its prices by a small but significant amount above competitive levels for a substantial period of time.

- Evidence Company X tried but could *not* raise or maintain its prices above competitive levels would suggest it does not have monopoly power.

- To prove monopoly power with direct evidence, Plaintiff A does *not* have to define a relevant market.

**Indirect Evidence**

Plaintiff A may prove monopoly power with *indirect* evidence. It can do so by showing that Company X **is capable** of profitably raising its prices above competitive levels or excluding competition in a relevant market.

- Indirect proof of monopoly power requires Plaintiff A to prove a relevant market.

- Plaintiff A must then provide evidence that the structure of the relevant market gives Company X monopoly power.

**Competitive Levels**

The competitive levels for prices occur when companies compete for sales in a free market.

- Prices are above competitive levels if a restraint allows a company to charge higher prices than it would have charged without the restraint.

- For example, a company may charge prices above the competitive level by agreeing with its competitors about the prices they will all charge.

**Conclusions**

Plaintiff A may prove monopoly power with direct evidence, indirect evidence, or both.

- You may find Plaintiff A has proven monopoly power through direct or indirect evidence. If you find Plaintiff A succeeded in either way, Company X has monopoly power.

- You may find Plaintiff A failed to proved monopoly power through either direct or indirect evidence. If you find Plaintiff A failed at both, Company X does not have monopoly power.

Monopoly Power [Direct Evidence]

Plaintiff A has the burden of proving monopoly power. Company X has monopoly power if it can raise prices above the competitive levels for a substantial period of time or exclude competitors.

Plaintiff A may prove monopoly power with *direct* evidence by showing Company X **has actually** controlled prices or excluded competition.

- Direct evidence of monopoly power can take different forms. It would include showing Company X profitably raised its prices by a small but significant amount above competitive levels for a substantial period of time.

- Evidence Company X tried but could *not* raise or maintain its prices above competitive levels would suggest it does not have monopoly power.

**Competitive Levels**

The competitive levels for prices occur when companies compete in a free market.

- Prices are above competitive levels if a restraint allows a company to charge higher prices than it would have charged without the restraint.

- For example, a company may charge prices above the competitive level by agreeing with its competitors about the prices they will all charge.

**Conclusions**

- You may find Company X *can* raise prices above the competitive levels for a substantial period of time or exclude competitors. If so, Company X has monopoly power.

- You may find Company X *cannot* raise prices above the competitive levels for a substantial period of time or exclude competitors. If not, Company X does not have monopoly power.

Monopoly Power – Overview [Indirect Evidence]

Plaintiff A has the burden of proving monopoly power. It can do so by showing that Company X **is capable** of profitably raising its prices above competitive levels or excluding competition in a relevant market.

- Plaintiff A can prove monopoly power with evidence about the structure of the market.
    - Plaintiff A must prove a relevant market.
    - Plaintiff A must then provide evidence that the structure of the relevant market gives Company X monopoly power.

**Competitive Levels**

The competitive levels for prices occur when companies compete for sales in a free market.

- Prices are above competitive levels if a restraint allows a company to charge higher prices than it would have charged without the restraint.
- For example, a company may charge prices above the competitive level by agreeing with its competitors about the prices they will all charge.

**Conclusions**

- You may find Company X *can* raise prices above the competitive levels for a substantial period of time or exclude competitors. If so, Company X has monopoly power.
- You may find Company X *cannot* raise prices above the competitive levels for a substantial period of time or exclude competitors. If not, Company X does not have monopoly power.

Explanation of Jury Instruction:

Monopoly Power

AAI has provided three versions of the monopoly power jury instruction. Only the first should be used if Plaintiff A attempts to use both direct and indirect evidence to prove monopoly power, only the second should be used if Plaintiff A attempts to use solely direct evidence to prove monopoly power, and only the third should be used if Plaintiff A attempts to use solely indirect evidence to prove monopoly power.

Direct Proof of Monopoly power.

The proposed instruction attempts to provide a clear and simple explanation of direct proof of monopoly power. If plaintiff can prove that defendant in fact caused the kind of harm to competition that the antitrust laws are designed to prevent, plaintiff has shown that defendant is capable of causing that sort of harm (and that it has done so). Greater complexity in the instruction is more likely to confuse than clarify this issue for the jury. *See supra* p. 17.

The proposed instruction borrows from ABA Instruction 9, C-23, on direct proof of monopoly power but also deviates from it. The ABA Instruction implies that monopoly power requires both the ability to control prices and the ability to exclude competition. As discussed above at page 25-26, 48, the weight of authority is to the contrary and the position adopted by the ABA makes little economic sense. If defendant is able to maintain prices substantially above competitive levels for a significant period, that establishes monopoly power. It may also imply that defendant is able to exclude competitors. But the ABA Instructions could confuse a jury into thinking it must find some evidence of the ability to exclude other than defendant's ability to maintain prices above competitive levels. That could cause the jury to rule against a plaintiff who has clearly demonstrated monopoly power.

Indirect Proof of Monopoly power

The proposed instruction provides an overview of indirect proof of monopoly power. It focuses the jury on the ultimate purpose of the inquiry: determining whether defendant was capable of causing an anticompetitive effect. It also situates the inquiry into monopoly power within the effort to provide indirect proof of monopoly power.

In adapting ABA Instruction 2, page C-4, the proposed instruction states that proof of the power either to control prices *or* to exclude competition is sufficient to establish monopoly power. For the reasons discussed above, the proposed instruction uses the disjunctive whereas the ABA instruction uses the conjunctive.

Competitive Levels

The proposed jury instructions refer to competitive levels. That is not a term jurors will necessarily understand. A definition is likely to prove useful. The ABA Instruction also uses the term "competitive levels." However, it does not define the term. That may cause juror confusion.

Direct and Indirect Proof of Monopoly Power

Plaintiff may provide both direct and indirect evidence of monopoly power. The ABA instructions do not make clear how these interrelate. The proposed instruction is designed to clarify the issues the jury should decide. It makes specific note that plaintiff need not prove the existence of a relevant monopoly to prove monopoly power through direct evidence. It instructs the jury that proof of monopoly power either through direct evidence or through indirect evidence is sufficient. It also makes explicit that plaintiff need not prove the existence of a relevant market when offering direct proof of monopoly power.

Monopoly Power (Indirect Evidence)

Plaintiff A may prove monopoly power by offering evidence about the structure of a relevant market. To do so, Plaintiff A must first define a relevant market. Plaintiff A must then show that Company X has the ability to control prices or exclude competition in that market.

**Considerations**

Evidence relevant to whether Company X has monopoly power in the relevant market can include:

- Market Share. The percentage of the market Company X controls;
- Market Share Trends. Whether Company X's market share is going up or down;
- Barriers to Entry. Difficulties for new companies trying to enter the market;
- Market Entry and Exit. The number of companies entering and leaving the market; and
- Competitors. The number and size of Company X's competitors.

**Next Steps**

I will provide you additional instructions about:

(3) How to define a relevant market.
(4) How to use the above factors to decide if Company X has monopoly power.

Explanation of Jury Instruction:

Monopoly Power (Indirect Evidence)

The parenthetical in the title of this jury instruction should be included only if the plaintiff is attempting to prove market power with both direct and indirect evidence.

The jury instruction should list only the relevant forms of evidence. It should include, for example, market entry and exit only if one of the parties adduces evidence relevant to that consideration.

The proposed instruction provides an overview of indirect proof of monopoly power. It aims to orient the jury to the more detailed instructions that follow.

The proposed instruction deviates in several ways from the most relevant ABA jury instructions. ABA Instruction 8, pages C-16 to C-19, provides the relevant framework. The proposed instruction borrows from ABA Instruction 8, but it makes two significant modifications. First, it recognizes that defendant has monopoly power if it can either increase prices or exclude competitors, as opposed to Instruction 8 which implies both are necessary. *See supra* p. 26 (justifying use of disjunctive rather than conjunctive approach). Second, the proposed instruction clarifies that market definition is required only for indirect proof of monopoly power. ABA Instruction 8—much like ABA Instruction 3B—requires proof of the existence of a relevant market for all cases, regardless of whether plaintiff attempts to prove monopoly power through direct or indirect proof. *See supra* p. 17 (justifying the lack of the need to define a relevant market when relying on direct proof of monopoly power).

Relevant Market

Plaintiff A must prove that more likely than not Company X has monopoly power. Plaintiff A can prove monopoly power [through indirect evidence][43] based on the structure of the market. If the structure of the market shows Company X could control prices or exclude competitors, then Company X has monopoly power.

To prove monopoly power based on the structure of the market, Plaintiff A must properly define a market. Plaintiff A then must show Company X has monopoly power in that market based on the market's structure.

**Economic Forces**

In defining the relevant market, you must decide what, if any, economic forces stop Company X from raising its prices or limiting its output for Product X.

- The most important economic force is competition from other companies. The competition may come from actual or potential products.

- A key issue is which competitors, if any, could win sales from Company X if it raised its prices above competitive levels.

**Competitors**

Competitors are in the same market as Company X if the competitors provide similar products that would stop Company X from raising its prices above competitive levels.

- A competitor's products do not need to be identical to Company X's products to be in the same market.

- Competitors are not in the same market as Company X if the competitors' products are too different to stop Company X from raising its prices above competitive levels while maintaining profits.

**Products and Geography**

There are two aspects you must consider in deciding whether plaintiff has proven a relevant market. The first is the relevant product market. The second is the relevant geographic market.

[43] Include the words in the square brackets only if Plaintiff A attempts to prove market power through both direct and indirect evidence.

Explanation of Jury Instruction:

Relevant Market

As appropriate, the term "services" should be substituted for the word "products" in the proposed instruction.

The proposed instruction makes clear that the relevant market includes products (or services) that prevent the defendant from raising its prices above *competitive* levels.

The proposed AAI instruction deviates from the relevant ABA instruction—Instruction 3, pages C-6—in two ways. First, the ABA instructions assume the plaintiff must always prove a relevant market. That is inconsistent with important case law, including from the Supreme Court, as well as with antitrust economics. *See supra* p. 49.

Second, the ABA instructions invite what has become known as the "cellophane fallacy" or the "cellophane trap." The fallacy or trap occurs if a firm or good is treated as in the relevant market because it restricts a defendant's ability to raise prices above a level that is already supra-competitive as a result of the defendant's exercise of monopoly power. In contrast, under a proper approach, only products capable of forcing the defendant to charge *competitive* prices—not products that discipline defendant's prices once they are already significantly inflated—are in the relevant market. For a recent discussion of this issue see Mark A. Lemley & Mark P. McKenna, *Is Pepsi Really a Substitute for Coke? Market Definition in Antitrust and IP*, 100 GEO. L.J. 2055, 2089 (2012). For case law suggesting that the cellophane fallacy is indeed a legal error see, *e.g.*, *Aegerter v. City of Delafield*, 174, F.3d 886, 892 (7th Cir. 1999) (Wood, J.) (citing RICHARD POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 128 (1976)); *United States v. Eastman Kodak Co*., 63 F.3d 95, 103, 105 (2d Cir. 1995).

ABA Instruction 3 discusses the "economic forces that restrain defendant's freedom to set prices for or restrict . . . output" and suggests all firms and products are in "the relevant market" if they act as a restraint on a "defendant's power to set prices as it pleases." This definition embodies the cellophane fallacy. Products restrain a defendant's freedom to set prices or restrict output if they limit how high above competitive levels the defendant may set its prices. But those products are not in the relevant market if they have such an effect only after the defendant has raised its prices well above competitive levels. As a result, ABA Instruction 3 sets the cellophane trap for a jury.

Relevant Product Market

The basic idea of a relevant product market is that the products within it are reasonable substitutes for each other from the buyer's point of view. The key issue is whether competitors' products would prevent Company X from maintaining prices above *competitive* levels.

**Similarity of Products**

- You should consider what would happen if Company X raised its prices above *competitive* levels.
    - If *enough* consumers would switch to a competitor's products that Company X would take back its price increase, then the products are in the same market. Otherwise, the products are not in the same market.
- Products do not need to be identical to be in the same market.
- Just because *some* consumers would substitute one product for another at some price does not mean they are in the same market.

**Considerations**

In deciding whether competitors' products would prevent Company X from maintaining prices above competitive levels, you may consider:

- Consumers' Views. Consumers may view one product as a substitute for another.
- Industry and Public Opinion. The industry or the public may view products as in the same market.
- The Views of Plaintiff A and Company X. Plaintiff A and Company X may have views about which products are in the same market.
- Relationship of Price and Sales. The volume of sales of Company X's product may affect the price of its competitor's product. Also, the volume of sales of a competitor's product may affect the price of Company X's product. The stronger this relationship, the more likely they are in the same market.
- Customer Groups and Distribution Channels. Company X and its competitors may have similar or different customer groups or distribution channels. The more similar, the more likely products are in the same market.

You may take into account all of these considerations. You may decide how much weight to give each one.

**Potential Products**

In identifying the relevant product market, you should consider not only existing products. You should also consider products that a potential competitor might create to compete with Company X.

**The Parties' Positions**

In this case, Plaintiff A claims the relevant product market is [state plaintiff's contention].

By contrast, Company X claims that Plaintiff A has failed to prove a relevant product market. Company X also argues that [state defendant's contention, if any, about the scope of the relevant product market and/or plaintiff's evidence].

**Conclusions**

You may find Plaintiff A has proven a relevant product market. If so, you must decide whether Plaintiff A has proven a relevant geographic market.

You may find Plaintiff A has *not* proven a relevant product market. If not, Plaintiff A has not shown monopoly power [by indirect evidence].[44]

[44] Include the words in the square brackets only if Plaintiff A attempts to prove market power through both direct and indirect evidence.

Explanation of Jury Instruction:

Relevant Product Market

As appropriate, the term "services" should be substituted for the word "products" in the proposed instruction.

AAI's proposed instruction attempts to set forth a clear structure for the jury, explaining the ultimate purpose of the inquiry into the product market and how various factors figure in that inquiry. The proposed instruction emphasizes that the relevant market includes products (or services) that prevent defendant from raising its prices above *competitive* levels.

The relevant ABA instructions—Instructions 4 and 5, pages C-7 to C-12—are inferior in numerous ways. First, they do not provide a clear structure for the jury. They mention, for example, various factors that may figure in assessing reasonably interchangeability, such as consumers' views, the relationship of prices and sales of products, specialized vendors, industry and consumer perceptions, and the like. But they do not explain how these factors all should relate to the ultimate purposes of the inquiry: whether they would prevent a defendant from maintaining prices above competitive levels.

Second, and related, as discussed *supra* p. 59, the ABA instructions invite the cellophane fallacy. Indeed, Instruction 4, at page C-7, offers the reasoning of the cellophane case, *United States v. E.I. du Pont de Nemours & Co*., 351 U.S. 377, 395 (1956), as an example, despite the general view that the reasoning in that case was erroneous (regardless of whether the outcome was correct). The instruction thus would encourage a jury to conclude that a monopolist lacks monopoly power if it charges supra-competitive prices but other products limit its ability to increase its prices ever higher.

Finally, ABA Instruction 5 seems to put undue emphasis on potential competitors rather than simply including them in the ordinary relevant product market instruction.

ABA uses SSNIP but then lists a whole bunch of other considerations without saying what role they play.

Relevant Geographic Market

The relevant geographic market is the *geographic area* (or location) in which Company X faces competition from other companies. It is the area where customers can reasonably turn to Company X's competitors for purchases.

Plaintiff A must prove that the geographic market it identifies is more likely than not the right one. The geographic market may be very large or very small. It may be include the world or a nation. It may be limited to a single town or part of a single town.

- You should determine whether product offerings in one area would prevent companies from maintaining prices above competitive levels in another area.
    - If so, that tends to show that both areas are in the same geographic market.
    - If not, that tends to show that both areas are not in the same geographic market.

**Considerations**

In defining the relevant geographic market, you may consider the following:

- The geographic area where Company X sells and where its customers are located;
- The effect of changes in prices or product offerings in one area on prices or sales in another area;
- The geographic area where customers have turned or could turn to buy the product;
- The geographic areas that companies view as potential sources of competition; and
- Whether government licensing requirements, taxes, or quotas limit competition in certain areas.

**The Parties' Positions**

In this case, Plaintiff A claims that the relevant geographic market is [state the plaintiff's contention].

By contrast defendant argues that [state the defendant's contention, if any, about the scope of the relevant geographic market and/or Plaintiff A's evidence].

**Conclusions**

You may find Plaintiff A has proven a relevant geographic market. If so, you must decide whether Plaintiff A has shown Company X has monopoly power in the relevant market.

You may find Plaintiff A has failed to prove a relevant geographic market. If not, Plaintiff A has not shown monopoly power [by indirect evidence].[45]

[45] Include the words in the square brackets only if Plaintiff A attempts to prove market power through both direct and indirect evidence.

Explanation of Jury Instruction:

Relevant Geographic Market

The word "services" should be substituted for the word "products" as appropriate.

AAI's proposed jury instruction on geographic market—as with its other proposed instructions—places emphasis on the ultimate purpose of the inquiry into monopoly power and relevant market, which is to assess whether the defendant's actual and potential competitors could prevent the defendant from raising and maintaining prices above competitive levels.

ABA Instruction 6 on pages C-13 to C-14 speaks in terms of "competition" and discusses products "to which customers can reasonably turn for purchases." *See* Instruction 6 at C-13. It also suggests the jury "should consider whether changes in prices or product offerings in one area have substantial effects on prices or sales in another area, which would tend to show both areas are in the same relevant geographic market." *Id*. While these considerations are surely relevant—and are included in AAI's proposed instruction—the ABA instruction fails to state the point of the inquiry. As a result, it could cause a jury to make errors in favor of the plaintiff or the defendant. A jury could conclude that products are in different geographic markets even though the existence of one product could prevent the seller of the other product from raising prices above competitive levels. Similarly, a jury could include in a single market competitors or products that have some effect on the defendant's prices but that are not capable of forcing the defendant to keep its prices down to competitive levels. By emphasizing the ultimate issue before the jury—whether the defendant can control prices—AAI hopes to prevents these sorts of errors.

Evidence of Monopoly Power in the Relevant Market

Plaintiff A may use evidence about the structure of the relevant market to prove Company X's monopoly power. This evidence can include:

**Market Share**

You should consider Company X's market share.

- Market share is the percentage of the market that consists of Company X's sales. The greater the share of the relevant market, the more likely Company X has monopoly power.

- You should determine Company X's market share as a percentage of the total sales in the market.

- A market share above 50 percent may be sufficient to support a finding that Company X has monopoly power.

- A market share below 50 percent is ordinarily not sufficient to support a finding that defendant has monopoly power.

- The likelihood that a company has monopoly power is stronger the higher the company's share is above 50 percent.

- However, market share is not the sole test of monopoly power. You should also consider market share trends, difficulties in entering the market, entry and exit into the market by other companies, and the number and size of Company X's competitors.

**Market Share Trends**

A market share trend indicates whether Company X's share of the relevant market is increasing, decreasing, or staying the same.

- An *increasing* market share tends to suggest monopoly power.

- A *decreasing* market share tends to suggest a lack of monopoly power.

**Difficulties in Entering the Market ("Barriers to Entry")**

The structure of the market may make it hard for a new competitor to enter the market and compete with Company X. These difficulties may be caused by:

- Intellectual Property Rights. For example, Company X may have a patent, which allows Company X to prevent other companies from making similar products.

- Specialized Marketing Practices. For example, Company X may have a large network for selling its products that would be expensive and time-consuming for other companies to develop.

- Reputation or Brand Name Recognition. For example, Company X may have a reputation or brand name recognition that other companies would have a hard time creating.

High barriers to entering the market suggest that Company X has monopoly power. New competitors would have difficulty entering the market and forcing Company X to lower its prices.

Low barriers to entering the market suggest that Company X does not have monopoly power. New competitors would not have difficulty entering the market and forcing Company X to lower its prices.

**Entry and Exit by Other Companies**

- If companies have left the market or failed to enter the market, that may be evidence of monopoly power.

- Entry of new competitors or expansion of existing competitors may be evidence that Company X lacks monopoly power.

**The Number and Size of Defendant's Competitors**

- If Company X has few competitors that may suggest Company X has monopoly power. Company X's competitors may be relatively weak or small or have declining market shares. If so, that also may suggest Company X has monopoly power.

- If Company X has many competitors that may suggest Company X does *not* have monopoly power. Company X's competitors may be relatively large and powerful or have increasing market shares. If so, that also may suggest Company X does *not* have monopoly power.

**Conclusions**

You must consider Plaintiff A's evidence about the structure of the relevant market.

- That evidence may prove that Company X has the power to control prices or exclude competition. If so, Company X has monopoly power. You must then consider the other elements of Plaintiff A's claim.

- That evidence may *not* prove that Company X has the power to control prices or exclude competition. If not, then Plaintiff A has not proven monopoly power [with indirect evidence].[46]

[46] Include the words in the square brackets only if Plaintiff A attempts to prove monopoly power through both direct and indirect evidence.

Explanation of Jury Instruction:

Evidence of Monopoly Power in the Relevant Market

In describing market share, instead of the percentage of sales the court should substitute the percentage of shipments, production, capacity, reserves, or a different relevant metric as appropriate.

The proposed instruction borrows heavily from the ABA's Instruction 8 at pages C-16 to C-19. AAI's proposed jury instruction deviates from ABA Instruction 8 in a couple of ways ways. First, the AAI instruction defines monopoly power as the power to control prices *or* exclude competition. The ABA Instruction requires both. As discussed above, *see supra* p. 49, case law and economic theory support the disjunctive rather than the conjunctive formulation. However, also as discussed above, *see supra* p. 49, it bears noting that in a minority of jurisdictions the conjunctive should be used in addressing monopoly power even though the disjunctive should be used with monopoly power. Use of the conjunctive is difficult to defend but it may be the law in the monopolization context in some courts.

Second, the ABA instruction indicates that if the plaintiff proves the defendant has the power to control prices and exclude competition, then the jury *may* conclude the defendant has monopoly power. This hedge is likely to prove unnecessarily confusing to the jury. Having met the definition of monopoly power, the jury should find the defendant has monopoly power. AAI's proposed instruction is drafted accordingly.

Overcharge Damages for Direct Purchasers – Individual Litigation

You may find Company X violated the law and that the violation increased the price Plaintiff A paid for Product X. If so, you must calculate Plaintiff A's damages.

"Damages" are the amount of money you should award Plaintiff A because of the violation.

- You must award in damages the extra amount Plaintiff A paid to Company X for Product X because of the violation.

**Example**

- Assume, only as an example, that Plaintiff A paid $10 for each unit of Product X because of the violation.

- Also assume Plaintiff A would have paid $7 for each unit of Product X if there had been no violation.

- You must award Plaintiff A $3 in damages for each unit of Product X that Plaintiff A bought.

**Explanation and Example**

You must not decrease Plaintiff A's damages even if it avoided harm in some way.

- Assume, again only as an example, the violation caused Plaintiff A to pay $10 for Product X instead of $7. Plaintiff A is entitled to $3 in damages for each unit it bought of Product X.

- What if Plaintiff A was able to avoid some of the harm from the violation? What if, for example, it is a reseller and responded to the violation by raising its own prices?

    - You must ignore Plaintiff A's efforts to avoid the harm caused by the violation.

    - You should still award $3 per unit in damages.

    - You must not consider whether Plaintiff A raised its prices in response to the violation.

    - The law requires you to take into account only the difference in price that Company X charged Plaintiff A because of the violation.

Overcharge Damages for Direct Purchasers – Class Litigation

Plaintiff A is seeking to recover damages on behalf of a class of purchasers that includes [class definition]. You may find Company X violated the law and that the violation increased the price the class members paid for Product X. If so, you must calculate their damages.

"Damages" are the amount of money you should award the class members because of the violation.

- You must award in damages the extra amount the class members paid to Company X for Product X because of the violation.

- You may determine the *average* paid by each class member or *estimate* the overcharge paid by each class member.

- The average or estimate does not have to be exact. It just has to be reasonable based on the evidence.

- However, you must not engage in guesswork. If you have to guess the amount of the damages, you must not award damages.

**Example**

- Assume, only as an example, that the class members paid on average $10 for each unit of Product X because of the violation.

- Also assume the class members would have paid on average $7 for each unit of Product X if there had been no violation.

- You must award the class members $3 in damages for each unit of Product X that the class members bought.

**Explanation and Example**

You must not decrease the class members' damages even if they avoided harm in some way.

- Assume, again only as an example, the violation caused the class members to pay on average $10 for Product X instead of $7. The class members are entitled to $3 in damages for each unit they bought of Product X.

- What if the class members were able to avoid some of the harm from the violation? What if, for example, they are resellers and responded to the violation by raising their own prices?

- You must ignore Plaintiff A's efforts to avoid the harm caused by the violation.

- You should still award $3 per unit in damages.

- You must not consider whether Plaintiff A raised its prices in response to the violation.

- The law requires you to take into account only the difference in price that Company X charged Plaintiff A because of the violation.

Explanation of Jury Instruction:

Overcharge Damages for Direct Purchasers – Individual and Class Litigation

Under well-established doctrine, artificial rules apply to which purchasers can recover damages in federal antitrust cases and to what damages they can recover. Generally speaking, only purchasers who buy directly from a defendant may seek damages. *Illinois Brick v. Illinois*, 431 U.S. 720, 730 (1977). Purchasers of the goods or services at issue who receive them through an intermediary cannot recover damages. *Id*. On the other hand, direct purchasers may receive the full overcharges they pay. *Hanover Shoe v. United Shoe Machinery*, 392 U.S. 481, 494 (1968). If purchasers pursue overcharge damages, they do not have to take into account any successful efforts they made to mediate damages, including by increasing the prices they charge at resale. *Id*.

The relevant model ABA jury instruction does not address these artificial rules in a way that is likely to be clear to a jury. Instruction 5 on Damages reads in relevant part:

> Plaintiff claims that it was harmed because it paid higher prices for [*product X*] than it would have paid in the absence of defendants' alleged violation of the antitrust laws. If you have determined that there was an unlawful agreement among competitors to [*fix prices, restrict output, allocate markets*] that caused some injury to plaintiff, you must now consider the extent of plaintiff's damages. A proper method of calculating those damages is to award plaintiff the difference between the prices it actually paid for [*product X*] and the prices it would have paid in the absence of the agreement to [*fix prices, restrict output, allocate markets*].

Model Instruction on Damages, Instruction 5, F-22.

The above instruction does not necessarily provide a technically incorrect statement of the law. It describes the overcharge measure of damages: the difference between the prices plaintiff paid with the antitrust violation and the prices plaintiff would have paid without the antitrust violation. But two aspects of the instruction could easily confuse a jury. First, it asks the jury to consider "the extent of plaintiff's damages." Jurors may read this phrase to require them to award the amount plaintiff was actually harmed rather than the artificial measure of recovery required by the law. Second, Instruction 5 describes the overcharge measure of damages as *a* proper method, not *the* proper method. Jurors could reasonably infer that the overcharge method is proper only if plaintiff was unable to mitigate harm, such as by increasing the prices it charges its customers.

Model Instruction 2, pages F-12 to F-13, significantly exacerbates the latter problem. It specifies in relevant part:

> The purpose of awarding damages in an antitrust action is to put an injured plaintiff as near as possible in the position in which it would have been if the alleged antitrust violation had not occurred. The law does not permit you to award damages to punish the wrongdoer—what we sometimes refer to as punitive damages—or to deter defendant from particular conduct in the future, or to provide a windfall to someone who has been the victim of an antitrust violation. . . . Antitrust damages are compensatory only. In other words, they are designed to compensate a plaintiff for the particular injuries it suffered as a result of the alleged violation of the law.

This instruction is wrong in several important regards when it comes to direct purchaser actions. Damages are not designed to put a plaintiff "as near as possible in the position" as if the antitrust violation had not occurred. Nor is true that it is impermissible for plaintiffs to receive a windfall or that damages are not designed to deter. Direct purchaser plaintiffs may receive a windfall—if, for example, they were able to mitigate damages by passing on some of an overcharge—or they may receive an insufficient recovery to make them whole—if, for example, inflated prices caused a decrease in sales volume and therefore in their profits. And part of the rationale for allowing direct purchasers to recover full overcharge damages in indeed deterrence.

Jurors' schemas are likely to compound these problems. Jurors may well expect that plaintiffs are entitled to recover only the actual harm they suffered as a result of illegal conduct. Without clear direction, it would be surprising if they read the ABA instruction in a way consistent with *Illinois Brick* and *Hanover Shoe*. The AAI therefore recommends that courts use the above jury instructions on damages and that courts not include ABA Model Instruction 2 in direct purchaser actions.

ABA Model Instruction 7, F-26, provides reasonable direction to the jury in class litigation, when used in conjunction with AAI's proposed instruction for direct purchasers. AAI's proposed instruction for class litigation modifies the ABA instruction slightly, specifically noting that multiple plaintiffs may represent a class, and then combines it with the improved version of ABA Model Instruction 5.

AAI's instructions are also written to be simpler and clearer than the ABA instructions.

# Through the Eyes of Jurors: The Use of Cognitive Psychology in the Application of "Plain Language" Jury Instructions

SARA GORDON*

ABSTRACT

*This article examines the social science research on schema theory in order to advance our understanding of how "schemas," or the preexisting notions jurors have about the law, shape jurors' use of jury instructions. "Through the Eyes of Jurors" is the first law journal article to look at all of the major cognitive psychology studies that examine how schemas continue to influence jurors' use of jury instructions, even when those jurors are given "plain-language" instructions.*

*There is, of course, a significant body of legal literature examining jurors' use and understanding of jury instructions, and many scholars have recommended ways to improve juror comprehension of instructions. This article takes that analysis a step further, and argues that even when given "plain-language" jury instructions, jurors will still be influenced by their preconceived ideas of what the "law" is, or in other words, by the preexisting schemas they have for legal concepts. Furthermore, these schemas are often legally incorrect, and findings from the social sciences suggest that, even when given plain-language jury instructions with the correct legal standard, jurors may still apply these legally inappropriate schemas. This article synthesizes the results and underlying theories of those findings in order to examine the impact these schemas have on jury decision-making, and on jurors' use of jury instructions, and to identify ways lawyers and judges can counteract inappropriate existing schemas and activate legally appropriate schemas before jurors are introduced to the facts they are expected to interpret. Specifically, courts should use principles of cognitive and educational psychology to develop jurors' schemas to more closely resemble that of the lawyers and judges in the case.*

* Professor of Lawyering Process, Boyd School of Law, University of Nevada Las Vegas. Thank you to Linda Berger, Jennifer Carr, Linda Edwards, Michael Higdon, Ngai Pindell, Elizabeth Pollman, Terry Pollman, Kathy Stanchi, and Jean Sternlight for their comments and suggestions, and to Chad Schatzle and Ashley Nikkel for their excellent research assistance.

TABLE OF CONTENTS

## INTRODUCTION

"Where you stand depends on where you sit." –Nelson Mandela

Assume that you are serving on a jury deciding a capital case. The defendant, John Smith, is on trial for murder. You are satisfied that the evidence has established guilt, but you must also recommend a sentence. You have two options: the death penalty and life without parole. You know what "death penalty" means, but what about "life without parole"? Does it mean exactly what it says—that under no circumstances will Smith ever be released? Or might he be released anyway, perhaps for demonstrating good behavior in prison or perhaps if the prison becomes overcrowded? The jury instruction does not answer the question, so you are left to your own preexisting understanding. Your answer may be a matter of life or death for Smith because you may think that the only way to protect the public from future danger is to impose the death penalty.

In fact, even if a jury instruction assures you that a sentence of life without parole will insure that Smith will never be freed, cognitive research says that you may still choose death in order to prevent future danger. In other words, you may continue to adhere to your preexisting idea even if a jury instruction clearly and directly sets out a different answer. Thus there is a lot at stake when we study the effectiveness of jury instructions.

In the past several decades, much of the social science research on juries has focused on jurors' ability to remember, understand, and apply the judge's instructions correctly, and studies have almost universally returned results finding low juror comprehension.[1] In one empirical study of juror confusion, researchers tested the extent to which jurors understood pattern jury instructions commonly used in civil and criminal cases and found that the jurors understood less than half the content of the tested instructions.[2] Because of this lack of jury understanding, much of the

[1] *See, e.g.*, David U. Strawn & Raymond W. Buchanan, *Jury Confusion: A Threat to Justice*, 59 JUDICATURE 478 (1976); Amiram Elwork et al., *Juridic Decisions: In Ignorance of the Law or in Light of It?* 1 LAW & HUM. BEHAV. 163 (1977); Phoebe C. Ellsworth & Alan Reifman, *Juror Comprehension and Public Policy: Perceived Problems and Proposed Solutions*, 6 PSYCHOL. PUB. POL'Y & L. 788 (2000).

[2] Walter W. Steele & Elizabeth G. Thornburg, *Jury Instructions: A Persistent Failure to Communicate*, 67 N.C. L. REV. 77, 78 (1988). For an extensive collection of cases documenting juror misunderstanding, *see* Steele & Thornburg, at 79-83. In a study designed to learn the extent to which jurors referred to the instructions during

literature about jury instructions has focused on ways of improving juror comprehension, and, among other suggested reforms, scholars have encouraged the use of psycholinguistic principles to rewrite instructions to improve vocabulary, syntax, and organization, and make them simpler and more comprehensible to jurors.[3]

Less attention has been paid, however, to why jurors are not

---

deliberations, the authors discovered that most jurors try to use the instructions, but are often confused by their meaning. *Id.* at 88. In that study, people called for jury service watched a videotaped reenactment of a murder trial, twenty-five percent of the jurors' deliberations cited material from the instructions and jurors made seven incorrect statements about the meaning of the judge's instructions, only one of which was corrected by other jurors. *Id.* at 84 (*citing* REID HASTIE ET AL., INSIDE THE JURY (Harv. U. Press 1983)). In another study by Strawn and Buchanan, 116 people summoned for jury service but not chosen for a jury were divided into two groups. One group heard a twenty-five minute videotape of instructions in a burglary case. Even after hearing the instructions, however, many of these jurors either misunderstood or did not accept certain instructions. Despite instructions to the contrary, forty-three percent believed that circumstantial evidence was of no value, and twenty-three percent believed that when faced with equal evidence of a defendant's guilt or innocence, the defendant should be convicted. David U. Strawn & Raymond W. Buchanan, *Jury Confusion: A Threat to Justice*, 59 JUDICATURE 478, 481 (1976). Jurors also misunderstood words in the instructions; only 51% understood the word "demeanor." *Id.* at 481-82 (1976).

[3] Psycholinguistics applies the theories of experimental psychology to the problems of language processing and comprehension. Robert P. Charrow & Veda R. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 COLUM. L. REV. 1306, 08 (1979); *see also* Robert D. Charrow, Joel D. Lieberman & Bruce D. Sales, *What Social Science Teaches Us About the Jury Instruction Process*, 3 PSYCHOL. PUB. POL'Y & L. 589, 623-27 (1997); Amiram Elwork et al., *Juridic Decisions: In Ignorance of the Law or in Light of It?* 1 LAW & HUM. BEHAV. 163, 165-69 (1977). Other commonly proposed reforms have focused on encouraging active participation by jurors by allowing jurors to take notes and ask questions of the courts and witnesses. *See, e.g.*, Council for Court Excellence District of Columbia Jury Project. (1998). *Juries for the Year 2000 and Beyond: Proposals to Improve the jury Systems in Washington, DC*. Washington, DC: Council for Court Excellence, Honorable B. Michael Dann, *"Learning Lessons" and "Speaking Rights": Creating Educated and Democratic Juries*. 68 IND. L.J. 1229, 1251-56 (1993). Several studies have examined the impact of allowing jurors to take notes and to ask questions. Jurors will generally take notes when given the opportunity, and one study found that jurors who took notes felt they participated more during deliberation. Victor E. Flango, *Would Jurors Do a Better Job if They Could Take Notes?* 63 JUDICATURE 436, 442 (1980); Larry Heuer & Steven Penrod, *Increasing Jurors' Participation in Trials through Note-Taking and Question-Asking*, 79 JUDICATURE 256, 258 (1996). Jurors who were allowed to ask questions generally asked three or fewer questions, and focused on the definition of key legal terms. Laurence J. Severance & Elizabeth F. Loftus, *Improving the Ability of Jurors to Comprehend and Apply Criminal Jury Instructions*, 17 LAW & SOC'Y REV. 153, 164-65. It is less clear whether note-taking and questions influence juror comprehension of the instructions.

always guided by even the clearest jury instructions.[4] A large part of the answer may be the power of a juror's own "preconstructions, preferred meanings, rhetorical and ideological dimensions."[5] The purpose of this Article, then, is to examine the impact these preconstructions, or "schemas" have on jury decision-making, and on jurors' use of jury instructions, and to identify ways lawyers and judges can counteract inappropriate existing schemas and activate legally appropriate schemas before jurors are introduced to the facts they are expected to interpret.

Specifically, I recommend that courts use principles of cognitive and educational psychology to develop jurors' schemas to more closely resemble that of experts, or of lawyers and judges. This prescription balances the competing goals of maintaining juries that represent a reasonable cross-section of their communities (a "jury of peers"), and of ensuring that those jurors are prepared and competent to analyze the law and facts they will encounter in a trial. Because jurors are legal "novices," they view and interpret both the law and the facts differently than lawyers and judges,[6] and most jury instructions do not do enough to help jurors compensate for this lack of expertise or develop appropriate schemas for legal concepts, especially given the time constraints imposed by a typical trial. Moreover, because instructions are typically drafted by lawyers (or committees of lawyers)[7] who are already legal experts, they are not always drafted with novices in mind, or using principles that will best ensure novices fully comprehend the law.

I propose, then, that the goal of jury instructions should be two-fold: first, to give jurors the applicable law; and second, to help jurors correct existing schemas and develop new and legally correct schemas before they are exposed to the evidence in a trial. Although it would be impossible to bring jurors' legal knowledge to the level of lawyers and judges in such a short period of time, we can use principles of educational psychology to help jurors develop new schemas efficiently, and therefore maximize learning. Moreover, these reworked instructions should be

---

[4] *See* discussion *infra* Part II.

[5] PETER GOODRICH, LEGAL DISCOURSE: STUDIES IN LINGUISTICS, RHETORIC AND LEGAL ANALYSIS, at 204.

[6] *See* Fleurie Nievelstein et al., *Expertise-Related Differences in Conceptual and Ontological Knowledge in the Legal Domain*, 20 EUR. J. COGNITIVE PSYCHOL. 1043 (2008); *see also* discussion *infra* Part IV.A.

[7] Peter Tiersma, *The Rocky Road to Legal Reform: Improving the Language of Jury Instructions*, 66 BROOK. L. REV. 1081, 1088 (2001); 89 C.J.S. Trial § 809.

given to jurors before the introduction of evidence, to help them develop appropriate schemas for the legal concepts before they are asked to apply those concepts to the facts in the trial.

To begin, Part I of this article will first discuss the use of jury instructions, as well as the role of schemas in how people view, interpret, and remember information and, once established, the perseverance of those schemas. This is significant because, once established, schemas influence what information people notice, and how they interpret that information; jurors are therefore unable to separate existing schemas (which may or may not be legally correct) from their use and application of jury instructions.[8] Part II reviews the social science literature on how schemas affect jurors' use of both pattern jury instructions, and instructions rewritten according to psycholinguistic principles. Part III then discusses the importance of the representative jury (a "jury of peers") in the American legal system; this article does not suggest that we should abandon that system in favor of the use of "special juries" of experts, but instead recommends that courts help lay juries become more like special juries of "experts." Finally, Part IV discusses the difference between expert schemas (those held by lawyers and judges) and novice schemas (those typically held by jurors), and recommends ways to correct jurors' existing schemas and develop new schemas to make them more like experts' schemas, which are better organized and more accessible, allowing for more thoughtful judgment and better, more uniform decision-making. Educational psychology principles inform this discussion and help illuminate how to more efficiently teach jurors to use relevant legal concepts and overcome schema perseverance.

## I. JURY INSTRUCTIONS AND SCHEMAS

Jury instructions play an important role in all stages of the trial process. These instructions are generally culled from the applicable statutes and case law, and drafted by attorneys or advisory committees.[9] Instructions tell jurors about the applicable law and give them a mechanism to interpret the facts they have seen in a trial; they are meant to ensure uniformity in verdicts and are typically given at the beginning of a trial, as needed throughout the trial, and at the end of closing arguments.[10]

---

[8] *See generally*, SUSAN T. FISKE & SHELLEY E. TAYLOR, SOCIAL COGNITION 180-81 (Addison-Wesley Publishing Co., Inc. 1984).

[9] Peter Tiersma, *The Rocky Road to Legal Reform: Improving the Language of Jury Instructions*, 66 BROOK. L. REV. 1081, 1088 (2001); 89 C.J.S. Trial § 809.

[10] Different types of instructions address the different things the jury is asked to consider. Some instructions tell jurors how to evaluate evidence and weight the credibility of

The most extensive instructions are generally given at the end of a trial; this is when jurors are told the applicable law, and how it should be applied to the facts they have learned throughout the trial.[11] Instructions, therefore, are the crucial link between how a juror perceives and understands the facts they are told, and how they use those facts to reach a verdict, but jurors do not typically receive these guiding principles until after they have seen the evidence.[12] When jurors do finally receive instructions, they are often full of language taken from statutes and cases that may mean different things to the lawyers who wrote them than they do to the jurors who are being asked to use them, and though they may be written plainly, they do not generally offer much guidance to jurors for applying them to the facts they have just heard and reach a decision.

Several models attempt to explain how jurors use the facts and law to come to a decision. The most prominent of these is the story model of juror decision-making, which suggests that in order to make sense of all of the evidence they are asked to evaluate, jurors construct a story of what they think happened.[13] In this model, jurors use instructions to derive lists of the features of individual crimes or claims; if the story they have constructed shares enough features with the instructions, they will find the

---

witnesses, some explain the burden of proof, and others provide definitions and elements of crimes or claims. NEIL VIDMAR & VALERIE P. HANS, AMERICAN JURIES: THE VERDICT 161 (Prometheus Books 2007).

[11] Although there are few laws regulating the use and timing of instructions, the judge's authority to manage a trial effectively allows for instructions at any point. Neil Cohen, *The Timing of Jury Instructions*, 67 TENN. L. REV. 681, 684 (1999-2000). As Cohen notes, Rule 51 of the FRCP gives the judge discretion to "instruct the jury before or after argument, or both," and Federal Rule of Criminal Procedure Rule 30 allows the court to "instruct the jury before or after the arguments are completed or at both times." *Id.* at 686. Some studies have examined the benefit of providing jurors with instructions at the beginning and the end of a trial, instead of only at the end, in order to provide jurors with a cognitive framework of the law and help them to better retain and understand the evidence. One study showed the timing of the instruction produced modest improvement in juror comprehension but did not improve recall of evidence (424) or affect the jury's verdict. *See* Larry Heuer & Steven D. Penrod, *Instructing Jurors: A Field Experiment with Written and Preliminary Instructions*, 13 LAW & HUM. BEHAV. 409, 424-26 (1989).

[12] Imagine you were asked to make chocolate chip cookies and given a list of ingredients to mix together, and only once you had done that, were you told the precise amount of each ingredients to use, as well as the order in which you should add them to the batter. This is how jurors, ignorant of the precise technicalities of the law and the elements of claims, may experience their role a standard trial. They know generally what the claim or crime is they are being asked to consider, but have not been taught its basic principles, or given any guidance about how to consider the vast amounts of evidence they will hear at the trial.

[13] REID HASTIE ET AL., INSIDE THE JURY (Harvard U. Press 1983).

defendant guilty, and if it is missing too many requirements, they will find the defendant innocent.[14]

Because the rules of evidence generally limit inquiry into the validity of jurors' decision-making processes, however, it can still be difficult to determine precisely how jurors are using jury instructions.[15] As noted above, several studies have shown improved comprehension of plain language jury instructions, but this alone does not tell us the extent to which jurors are now relying on those new instructions, or the extent to which they use some combination of the instructions and other factors in reaching a decision about the facts. Studies suggest it is almost certainly the latter. In addition to the instructions they receive, some jurors might also rely on their opinions of the lawyers,[16] or be swayed by strong opinions voiced by fellow jurors.[17] Others might make a decision based on their "gut." But what all of them are probably doing, whether they know it or not (and most probably do not), is using schemas to interpret and make sense of the information they have heard during the trial, and to help them come to a verdict.

A "schema" is a cognitive framework or concept that helps individuals organize and interpret information.[18] For example, a schema for a party would contain ideas that are true about parties in most cases. Parties are social events where people come together to have fun, and often involve drinking, eating, talking, and dancing. If someone were to attend a party, this schema would be used as a general framework that

---

[14] Peter W. English & Bruce D. Sales, *A Ceiling or Consistency Effect for the Comprehension of Jury Instructions*, 3 PSYCHOL. PUB. POL'Y & L. 381, 382 (1997).

[15] FRE 606(b).

[16] Adam Trahan & Daniel M. Stewart, *Examining Capital Jurors' Impressions of Attorneys' Personal Characteristics and Their Impact on Sentencing Outcomes*, 7 APPLIED PSYCHOL. CRIM. JUST. 93, 99 (2011) (noting that jurors in capital trials form impressions of attorneys based on physical characteristics, such as attractiveness, hygiene, and dress, and that these impressions have some influence on sentencing decisions. "Jurors who formed negative impressions of the defense attorneys were more likely to sentence their clients to death than those who reacted favorably toward the defense counsel." *Id.* at 102.)

[17] MARK COSTANZO, PSYCHOLOGY APPLIED TO LAW 151 (Thomson Learning 2004) (potential jurors judged to be "strong" are often well-educated, articulate, and have high occupational status, relative to other potential jurors); *see also* Samuel H. Solomon, *How Jurors Make Decisions* 5, *at* www.doar.com (last visited Aug. 4, 2012) (noting that jurors often look to other jurors with "perceived or real subject matter expertise," and advising attorneys to explore the backgrounds of jurors who might have such expertise and to address them subtly during the trial.)

[18] *See* discussion *infra* Part I.

would shape their expectations of the event and guide their behavior once they were there.[19] Similarly, while all trees are different from each other and possesses a variety of different characteristics (different colors, shapes, numbers of branches), we can easily recognize a type of tree we have never encountered before as a tree because we have a schema for trees.

Schemas are a type of cognitive shortcut—we rely on them to organize information and our past experiences so we can better, and more efficiently, understand new experiences.[20] Schemas can be quite useful because they allow us to quickly interpret vast amounts of information, and they help us deal with confusing, missing, or unknown information.[21] However, these frameworks can also influence what information we notice (we tend to notice information that fits into existing schemas and ignore that which does not), as well as what information we remember (we similarly tend to remember information that is consistent with established schemas and have more difficulty recalling that which is not).[22] Of course, schemas can also be rigid, or based on incomplete information, and in these circumstances, might require reassessment.[23]

The process of schemas development begins in early childhood; as we encounter things for the first time, we integrate the new information, activity, or concept into our memories by incorporating it into our schemas.[24] A schema, therefore, represents an individual's accumulated knowledge, beliefs, and experiences.

---

[19] MARTHA AUGOUSTINOS & IAIN WALKER, SOCIAL COGNITION: AN INTEGRATED INTRODUCTION 33 (Sage Publications 1995). Definitions for schemas are varied. Susan Fiske and Shelley Taylor describe a schema as "a cognitive structure that represents organized knowledge about a given concept or type of stimulus, FISKE & TAYLOR, at 140, while Reid Hastie defines schemas broadly to include "almost any of the abstract hypotheses, expectations, organizing principles, frames, implicational molecules, scripts, plans, or prototypes that have been proposed as abstract mental organizing systems or memory structures." Reid Hastie, *Schematic Principles in Human Memory*, in THE ONTARIO SYMPOSIUM, 39, 39 (E. Tory Higgins et al. eds., 1981). Moreover, some scholars also use the term "knowledge structures" to refer to schemas. Nievelstein, et al. at 1046.

[20] SINGER & REVENSON, at 17.

[21] AUGOUSTINOS & WALKER, at 32-33.

[22] *See generally* FISKE & TAYLOR, at 180-81

[23] AUGOUSTINOS & WALKER, at 33. A stereotype is a type of schema, in that it organizes information about a particular group. *Id.* at 208; *see also infra* note ___ (on stereotypes).

[24] SINGER & REVENSON, at 17

Once developed, schemas are available for application to new situations and this application process is automatic.[25] We do not see a furry object with four legs and a tail, we see a cat. Furthermore, the cat schema is automatically activated by incoming information. This process happens unintentionally and unconsciously, and the process does not interfere with other mental activity.[26] Schemas therefore allow us to process information efficiently; because we know what to expect, we do not have to approach each person or situation we encounter as completely novel. As Fiske & Taylor note, "the most fundamental principle suggested by schema research is that people simplify reality; they do so in part by interpreting specific instances in light of the general case."[27]

Before one can understand the significant impact that schemas have on jurors' use of jury instruction, it is important to briefly recap the different types of schemas, as well as how people use them to interpret information. People have schemas for everything, including themselves, other people, the roles people play in society, and different types of events or activities.[28] Furthermore, both priming and framing influence which schemas will be activated and applied in any given situation.[29] Finally, once established, schemas persevere, sometimes even in the face of conflicting or contradictory information.[30]

### *A. Different Types of Schemas: Self, Person, Role & Event*

Most social science research focuses on four main categories of schemas: self (information about ones' own personality, appearance, and behavior), person (information about the traits and goals of others), role (information about the role someone plays in society, such as age, race, sex, or profession) and event or scripts (information about what usually happens in a particular setting or event).[31] All of these schemas influence and guide how we perceive, remember, and make inferences about new information.[32]

---

[25] PAUL BREST & LINDA HAMILTON KRIEGER, PROBLEM SOLVING, DECISION MAKING, AND PROFESSIONAL JUDGMENT: A GUIDE FOR LAWYERS AND POLICY MAKERS 18 (Oxford Univ. Press 2010).
[26] BREST & KRIEGER, at 18
[27] FISKE & TAYLOR, at 141.
[28] FISKE & TAYLOR, at 149.
[29] FISKE & TAYLOR, at 181.
[30] FISKE & TAYLOR, at 171.
[31] FISKE & TAYLOR, at 149
[32] FISKE & TAYLOR, at 150.

How a person sees themselves and what they feel their personality is depends on their self-schema—the beliefs and ideas people have about themselves.[33] People are either schematic or aschematic on particular attributes or personality dimensions.[34] If an attribute is important to someone, or they think of themselves as embodying strong components of that trait ("I am very political" or "I am outgoing"), they are said to be schematic as to that attribute. Conversely, if the person does not have a strong view of themselves in regards to a particular trait, or it is less important to them ("Being athletic is not important to me—I don't think about it one way or another."), they are aschematic as to a particular trait. Like other schemas, once formed, self-schemas are resistant to change.

Unlike self-schemas, person schemas organize our knowledge about other people. Person schemas are generally broken down into personality traits and goals, both of which determine what information is relevant to a given person or type of person.[35] For example, a schema for the trait "brave" might include what brave people do (charge into burning buildings) and examples of brave people (police officers, World War II resistance fighters). Goal schemas are a joint function of the goals dictated by a specific situation, and how those possible goals fit the particular person in the situation.[36]

Role schemas organize our knowledge about the roles people play in society and our expectations for appropriate behavior based on those roles.[37] For example, someone would expect her accountant to ask to see a copy of her prior tax returns, but she would be surprised if her doctor made the same request; conversely, she would be shocked if her accountant attempted to take her temperature. The characteristics that shape role schemas can develop through the effort or achievement of the individual (*e.g.*, a person's experience or profession), or through immutable characteristics (*e.g.*, race, sex, or age). All of these characteristics have corresponding role-based expectations for appropriate behavior, organized in the observer's mind as role-schemas.[38]

---

[33] ZIVA KUNDA, SOCIAL COGNITION: MAKING SENSE OF PEOPLE 452 (MIT Press 1999).
[34] KUNDA, at 453.
[35] FISKE & TAYLOR, at 150.
[36] FISKE & TAYLOR, at 150.
[37] FISKE & TAYLOR, at 159.
[38] FISKE & TAYLOR, at 160. A stereotype is a type of role schema, one that comprises our knowledge, beliefs and expectations about a particular social group.[38] David L. Hamilton & Jeffrey W. Sherman, *Stereotypes*, *in* HANDBOOK OF SOCIAL COGNITION 168 (Wyer & Srull eds., 2d ed. Hillsdale, NJ 1994). Social stereotypes exist for all groups, not just

Event schemas, also known as scripts, are structures that describe the appropriate or expected sequence of events in well-known situations like a visit to a doctor's office, to a restaurant, or to a sporting event.[39] These schemas contain beliefs about the sequence of actions and events that typically happen in particular situations; they allow us to abstract procedures and complex sequences of behaviors from our everyday experiences and apply those to our understanding of new experiences.[40] In one study designed to determine if there were widely shared scripts for different types of robberies, subjects were asked to write a list of actions describing a typical act of a robbery of a convenience store.[41] 96% included "enter store," 90% included "look around (once in store)," 90% included "go to the cash register," 99% include "demand money," and 96% included "exit store."[42] A majority of the subjects in the study therefore held similar beliefs about the sequence of actions that typically occurred in a convenience store robbery.

The research on schemas—whether self, person, role, or event—indicate they all affect our perception of new information, our inferences based on that information, and our memories and retrieval of stored information.[43] "Schema guide our information seeking. Not only do schema tell us what to see, but they also tell us where to see it."[44] We do not notice or attend to all of the information we encounter, but only deal with that which is important or useful, and schemas tell us what is important or useful.[45] Next, schemas allow us to draw inferences about what happened in the past, and what is likely to happen in the future.[46] Finally, schemas help determine what we remember about what happens

---

racial minorities, and correspond to the beliefs and expectations we have about that particular group. We have role schemas and stereotypes for teachers, gang members, ball players, religious fundamentalists, and politicians. Once a person is categorized, he or she becomes another example of the schemas, and is assigned the characteristics and traits of others within their same social group. FISKE & TAYLOR, at 161.

[39] JEAN MATTER MANDLER, STORIES, SCRIPTS, AND SCENES: SCHEMA THEORY 75 (Lawrence Erlbaum Associates, Publishers 1984).

[40] MANDLER, at 75.

[41] Valerie Fisher Holst & Kathy Pezdek, *Scripts for Typical Crimes and Their Effects on Memory for Eyewitness Testimony*, 6 APPLIED COGNITIVE PSYCHOL. 573, 578-79 (1992).

[42] Holst & Pezdek, at 578-79.

[43] FISKE & TAYLOR, at 150.

[44] David Rumelhart, *Schemas and the Cognitive System*, *in* HANDBOOK OF SOCIAL COGNITION 161 (Robert S. Wyer, Jr. Thomas K. Srull eds., 1984).

[45] Shelley E. Taylor & Jennifer Crocker, *Schematic Bases of Social Information Processing, in* SOCIAL COGNITION: THE ONTARIO SYMPOSIUM, Volume 1, at 90.

[46] Taylor & Crocker, at 97-98

around us; we are more likely to remember schemas relevant or consistent information and to disregard that which does not fit into an existing schema.[47]

### *B. Schema Activation: Priming and Framing*

Once schemas have developed, they are available for use in new situations; they exist in a sort of resting state, waiting to be cued.[48] But what determines which of the many relevant and available schemas will be activated in a particular situation? When meeting a new co-worker, a person could characterize her as a Southerner, a professor, a woman, or a colleague. Although she may be all of these things, a variety of factors influence the schemas that will be activated and applied when she meets the new co-worker, among them the recency with which a schema has been activated in the past and the frequency with which it has been activated (the *priming effect*),[49] and the way in which the encounter has been *framed*.[50]

Priming has a powerful influence on which schemas are activated in particular situations. Priming refers to the idea that a recently and frequently activated idea will come to mind more easily than those which have not been activated.[51] Similarly, schema activation is determined partly by how recently or frequently a particular schema has been activated in the past.[52] Moreover, once a schema is activated or "primed" for one purpose, it becomes more accessible, and its likelihood of being used in the interpretation and organization of subsequent information is similarly increased.[53]

Exposure to words, people, or physical objects can activate schemas, even without the perceiver's conscious awareness.[54] In one study,

---

[47] Taylor & Crocker, at 98.
[48] FISKE & TAYLOR, at 175.
[49] Thomas K. Sruss & Robert S. Wyer Jr., *The Role of Category Accessibility in the Interpretation of Information About Persons: Some Determinants and Implications*, 37 J. PERSONALITY & SOC. PSYCHOL. 1660, 1661 (1979); *see also* FISKE & TAYLOR, at 181.
[50] FISKE & TAYLOR, at 181.
[51] FISKE & TAYLOR, at 231.
[52] FISKE & TAYLOR, at 181.
[53] Sruss & Wyer, at 1661 (noting that once a schema is activated, "its accessibility, and thus its effect on the interpretation of subsequent information, is likely to decrease over time.")
[54] BREST & KRIEGER, at 315. Of course, listeners can be primed by more than one message. If a listener is more influenced by the first message she hears, this is the result

subjects believed they were participating in a sentence scrambling exercise. Subjects were first told to ask the experimenter for a second task after they had completed the sentence scramble.[55] Researchers then primed the subjects with words associated with being "rude" (*e.g.*, aggressively, disturb, intrude, obnoxious, bluntly), words associated with being "polite" (*e.g.*, respect, unobtrusively, cordially, behave), or neutral words (*e.g.*, send, clear, gives, flawlessly, practiced).[56] Researchers measured how many seconds it took the subjects to interrupt a conversation between the experimenter and a confederate and ask for the second task.[57] The subjects exposed to the rude priming conditions interrupted significantly faster (326 seconds) than the participants in the polite (558 seconds) or neutral (519 seconds) groups.[58] In a similar study, participants exposed to words related to the elderly (e.g. Florida, bingo, retired) were timed walking to the elevator after completing the sentence scramble; subjects exposed to the elderly prime walked more slowly than those exposed to neutral words (e.g. thirsty, clean, private).[59] The words, therefore, activated schemas that in turn actually influenced the behavior of the subjects.

Like priming, the framing of information activates schemas that influence the categories we apply and the inferences and decisions we make. "Framing is the process by which a communication source constructs and defines a social or political issue for its audience."[60] Cognitive linguist George Lakoff's alternate definition of frames is closer

---

of the *primacy effect*; if instead, the listener is more influenced by the second, different, message, this is the result of the *recency effect*. Curtis Haugtvedt & Duane Wegener, *Message Order Effects in Persuasion: An Attitude Strength Perspective*, 21 J. CONSUMER RES. 205, 205 (1994). In studies measuring the point in a trial at which jurors are more influenced by incriminating evidence of the defendant's guilt, the results have been mixed, with some studies finding a larger primacy effect, and others a more significant recency effect. Kristi A. Costabile & Stanley B. Klein, *Finishing Strong: Recency Effects in Juror Judgments*, 27 BASIC & APPLIED SOC. PSYCHOL. 47, 56 (2005). It does seem that the recency effect might slightly outweigh the primacy effect—in other words, jurors are more likely to be influenced by information they hear most recently—though this could be due to the juror's ability to remember that information because they heard it most recently. Costabile & Klein, at 56.

[55] John A. Bargh et al., *Automaticity of Social Behavior: Direct Effects of Trait Construct and Stereotype Activation on Action*, 71 J. PERSONALITY & SOC. PSYCHOL. 230, 234 (1996).

[56] Bargh et al., at 234.

[57] Bargh et al., at 234.

[58] Bargh et al., at 234.

[59] Bargh et al., at 236.

[60] Thomas E. Nelson et al., *Toward a Psychology of Framing Effects*, 19 POL. BEHAVIOR 221, 221(1997).

to a traditional definition of schemas: "the mental structures that allow human beings to understand reality—and sometimes to create what we take to be reality."[61] People use frames to understand the facts they encounter; as Lakoff notes, "facts need a context."[62] Frames help give context to and influence our understanding of everything from social institutions (in a frame for a local school board, there are elected officials who make important decisions about educational policy), to individual words ("pro choice" or "pro life"). The activation of a particular frame can predispose people to particular preferences and decisions.[63]

Frames also help shape and define issues. "An issue defining frame characterizes the problem, assigns blame, and constrains the possible solutions; … [they] block relevant concerns if those concerns are outside of the frame."[64] Is it a "war on terror," or a "war for oil"? Framing played a big role in shaping public opinion over the Obama Administration's proposed rule requiring religious-affiliated organizations' insurance companies to pay for free birth control for those organizations' employees. In one national poll, when asked if employers should be required to offer free birth control to employees, respondents favored the rule by a margin of 53% to 33%.[65] But when the same respondents were asked whether the

---

[61] George Lakoff, *Discussion Essay Frames and Brains, in* THINKING POINTS: COMMUNICATING OUR AMERICAN VALUES AND VISION Ch. 3, p. 1 (Rockridge Institute 2006) *at* http://www.cognitivepolicyworks.com/resource-center/thinking-points/ (last visited Aug. 4, 2012); s*ee also* Danielle Kie Hart, *In A Word*, 41 SW. L. REV. 215, 216 (2012), noting that the definition of the word "framing" is quite varied: "A "frame" is variously defined as: a "structured understanding[] of the way aspects of the world function[;]" "an interpretive schema that "enable[s] individuals 'to locate, perceive, identify, and label' occurrences within their life space and the world at large[;]" "'a central organizing idea for making sense of relevant events and suggesting what is at issue[;]'" and "'a central organizing idea or story line that provides meaning'; it suggests 'what the controversy is about, the essence of the issue[.]'" At its most basic, therefore, a "frame" is a tool that enables people to make sense of the world around them." (internal citations removed).

[62] LAKOFF, THINKING POINTS: COMMUNICATING OUR AMERICAN VALUES AND VISION 10 (Rockridge Institute 2006), *at* http://www.cognitivepolicyworks.com/resource-center/thinking-points/.

[63] James N. Druckman, *The Implications of Framing Effects for Citizen Competence*, 23 POL. BEHAV. 225, 228-29 (2001) (discussing Tversky and Kahneman's experiment, in which subjects changed their preferences for an identical program to combat a disease by 50% depending on whether the program was framed in terms of saving lives or the number of people dying).

[64] Lakoff, *Discussion Essay Frames and Brains* (section on issue framing).

[65] Gerald Seib, *Birth-Control Rule Debate Intensifying (*Mar. 16, 2012), *at* http://online.wsj.com/article/SB10001424052702303717304577279831635250306.html.

government should mandate that the Catholic Church and other religiously affiliated hospitals and colleges offer birth control paid for by the institutions' insurance companies, respondents opposed the rule by a margin on 45% to 38%.[66] In other words, when the issue was framed as one of access to birth control, respondents approved of the rule, but disproved of the same rule when it was framed as one of an attack on religious freedom.[67]

The framing of an issue can constrain people's abilities to solve problems, and jurors are just as susceptible to this effect as anyone else. As Brest & Krieger note, "[a] particular frame inevitably provides only one of a number of possible views of reality and implicitly blocks the consideration of alternative perspectives with other possible solutions."[68] The problem, as the authors describe it, is that the decision-maker thinks they are seeing all sides of the problem because the frame itself "is often invisible."[69] "You have the illusion that you're seeing the world "just as it is," and it is difficult to imagine that there could be another way to view it."[70]

### *C. The Perseverance Effect*

Schemas are resilient; once formed, people's beliefs about themselves, about others, and about the things they see in the world are often unaffected—or only slightly affected—by logical challenges.[71] This is known as the "perseverance effect": schemas help us more efficiently process information, and that benefit would be lost if people changed their schemas to fit every new situation.[72] Once schemas are established, they persist, often even in the face of evidence to the contrary or instructions to disregard them, and there even appears to be a biological basis for this

---

[66] *Id.*
[67] My own use of the words "access" and "attack" in this sentence further frame the issue.
[68] BREST & KRIEGER, at 35.
[69] BREST & KRIEGER, at 35.
[70] BREST & KRIEGER, at 35. In discussing the effect of frames on outcomes, the authors describe an experiment where American college students, Israeli pilots, and their flying instructors played a Prisoner's Dilemma type game, where participants choose whether to participate or defect. Those who were told the exercise was a "Wall Street Game" were more likely to defect than those who were told it was "Community Game." *Id. citing* Varda Liberman et al., *The Name of the Game: Predictive Power of Reputations Versus Situational Labels in Determining Prisoner's Dilemma Game Moves*, 30 PERSONALITY & SOC. PSYCHOL. BULL. 1175-85 (2004).
[71] Craig A. Anderson, *Inoculation and Counterexplanation: Debiasing Techniques in the Perseverance of Social Theories*, 1 SOC. COGNITION, 126, 126 (year?).
[72] FISKE & TAYLOR, at 171.

perseverance effect.

In fact, schemas persevere even when people are told the evidence in support of the schema is false.[73] In a study demonstrating this effect, subjects were asked to review two suicide notes and determine which one was real and which was fake.[74] After completing the task, the subjects were given false feedback; irrespective of actual performance, some were told they had performed much better than average, while others were told they performed the same as, or worse than average.[75] The subjects were then "debriefed," where "it was carefully explained that their putative performance had been determined before they entered the experiment, that they had received feedback unrelated to their actual performance, and that the deception had been necessary in terms of the purported rationale for the study."[76] Despite this thorough debriefing, subjects who were initially told they performed above average in the task continued to believe that their performance had been above average, and that their future performance on a similar task would similarly remain above average.[77] In fact, "the greater the subject's apparent initial success, the higher were the scores she estimated for past and future performances."[78]

Furthermore, when people draw causal connections among pieces of information, the perseverance effect becomes even stronger.[79] In a study on debiasing,[80] subjects were given case histories of two firefighters.[81] Each case history included information about the firefighter's preference for risk and his job performance.[82] Some subjects were led to believe in a positive relationship between risk preference and firefighting ability (those with high risk preference were successful firemen and low risk preference were unsuccessful), while others were led

---

[73] Lee Ross et al., *Perseverance in Self-Perception and Social Perception: Biased Attributional Processes in the Debriefing Paradigm*, 32 J. PERSONALITY & SOC. PSYCHOL. 880 (1975).
[74] Ross et al., at 880.
[75] Ross et al., at 882.
[76] Ross et al., at 884.
[77] Ross et al., at 884.
[78] Ross et al., at 884.
[79] Craig A. Anderson, *Inoculation and Counterexplanation: Debiasing Techniques in the Perseverance of Social Theories*, 1 SOC. COGNITION 126 (year?).
[80] "Debiasing" is the correction or removal of bias. Jonathan St. B.T. Evans et al., *Debiasing by instruction: the case of belief bias*, 6 EUR. J. COGNITIVE PSYCHOL. 263, 264 (1994).
[81] Anderson, at 127.
[82] Anderson, at 127.

to believe in a negative relationship (those with high risk preference were unsuccessful, while those with low risk preference were successful).[83] Subjects then wrote an explanation of the relationship they had learned about.[84]

When later debriefed and told that the case histories were fictitious and there was no relationship between risk preference and success as a firefighter, subjects continued to hold their initial beliefs—those initially told of a positive relationship tended to keep that belief, and those initially told of a negative relationship were more likely to keep that belief, even in the face of disconfirming evidence.[85] More significantly, however, subjects whose explanations referred to causal scenarios (*i.e.*, "firefighting is risky, so people who prefer risk will be better firefighters.") displayed more perseverance in their initial theories then those whose explanation just restated the information in the case history.[86]

This perseverance effect is so strong that when faced with information that might challenge their existing schemas, people tend to ignore those inconsistencies or exceptions,[87] or devote less attention to examining the contradictory information.[88] In other words, "when we come across evidence that supports our desired conclusions, we may accept it at face value. But when we come across comparable evidence that challenges our desired conclusions, we may evaluate it more critically and work hard to refute it."[89] In a study examining this effect, opponents and proponents of capital punishment read about two studies: one suggested that capital punishment was effective as a deterrent, and the other that it was not effective.[90] Both opponents and proponents of capital punishment thought the study that confirmed their beliefs was more

---

[83] Anderson, at 127.
[84] Anderson, at 127.
[85] Anderson, at 127.
[86] Anderson, at 127-28.
[87] Dieter Frey, *Recent Research on Selective Exposure to Information, in* 19 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 41, 41 (Leonard Berkowitz ed. 1986).
[88] Peter H. Ditto & David F. Lopez, *Motivated Skepticism: Use of Differential Decision Criteria for Preferred and Nonpreferred Conclusions,* 63 J. PERSONALITY & SOC. PSYCHOL. 568, 569 (1992).
[89] ZIVA KUNDA, SOCIAL COGNITION: MAKING SENSE OF PEOPLE 230 (MIT Press, 1999).
[90] Charles G. Lord et al., *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. PERSONALITY & SOC. PSYCHOL. 2098, 2100 (1979). Each argument included a description of the design of the study, and was followed by criticisms of the study itself, and rebuttals of those criticisms. *Id.* at 2101.

effective than the study that disconfirmed their beliefs.[91] In a similar study, researchers found that when examining evidence that is incompatible with their prior beliefs, people invest greater effort in evaluating the incompatible evidence than in evaluating any compatible evidence, and that they devote their effort toward refuting arguments challenging their own position.[92]

Furthermore, telling people to disregard schemas, or attempting to prevent schema activation, does not appear to diminish the effect of schemas on decision-making.[93] In a study examining this effect, Vicki Smith attempted to prevent schema application by withholding from jurors the name of the crime with which the defendant was charged.[94] Smith's hope was that without the retrieval cue (the name of the crime), the subjects would not be able to access schemas about that crime and would have to rely on the jury instructions for guidance.[95] The results showed, however, that when jurors were not given the crime name, they simply applied their own crime name and accessed their schema for that crime.[96] In the same study, Smith explicitly told jurors to disregard their preexisting notions of the crime, and only rely on the judge's instructions.[97] This did not work, either. The instruction had no effect on decision-making and subjects relied on their preexisting knowledge of the crime when they heard this instruction as when they did not.[98]

---

[91] Furthermore, "the net effect of exposing proponents and opponents of capital punishment to identical evidence—studies ostensibly offering equivalent levels of support and disconfirmation—was to increase further the gap between their views." Lord et al., at 2105.

[92] Kari Edwards & Edward Smith, *A Disconfirmation Bias in the Evaluation of Arguments*, 71 J. PERSONALITY & SOC. PSYCHOL. 5, 14 (1996). This result is known as the "prior belief effect." *Id.* at 5.

[93] Vicki L. Smith, *When Prior Knowledge and Law Collide: Helping Jurors Use the Law*, 17 LAW & HUM. BEHAV. 507 (1993).

[94] Smith, at 532.

[95] Smith, at 532.

[96] Smith, at 532.

[97] Smith, at 532.

[98] Smith, at 532; *see also* Anderson. In his discussion of the results of the firefighter experiment, discussed *infra* at note _____, Anderson noted that we could try to prevent jurors from creating causal explanations or theories, but,

> [s]uch as suggestion is as undesirable as it is impossible. Many of our theories are quite useful, both as information organizers and as predictive tools. The problem lies not in our propensity to create theories, but in our underestimation of how easy it is to create plausible theories for any particular set of events we wish to explain.

*Id.* at 128.

Finally, it seems that the perseverance effect may be biologically based.[99] In a 2005 study, researchers wanted to determine the extent to which people pay attention to and assimilate evidence that is consistent with their beliefs about the objects under consideration, and the extent to which they treat inconsistent evidence as erroneous.[100] Previous studies in behavioral and cognitive neuroscience indicated that different brain networks are invoked during learning,[101] and during error detection and conflict monitoring.[102] The authors found that when people considered evidence that was consistent with their beliefs, brain regions associated with learning and memory were significantly activated, and when the evidence was inconsistent with people's beliefs, areas associated with error detection and conflict resolution were activated.[103] From this, the authors concluded that people's beliefs and expectations may act as a "biological filter," causing the person to employ learning mechanisms when confronted with evidence consistent with their beliefs, and error detection mechanisms when that evidence is inconsistent.[104]

That jurors do not evaluate evidence in a vacuum will come as no surprise to judges or lawyers, or to anyone who has served on a jury. What is perhaps more surprising is that this inability to separate personal beliefs from evidence is so pervasive and in fact has a neural signature, and that people, therefore, may be *unable* to set aside beliefs and expectations when making decisions or judgments. Furthermore, other findings have

---

[99] Researches have recently been able to expand the scope of the study of decision-making using advanced functional brain imaging techniques, including functional magnetic resonance imaging (fMRI). Using these new techniques, researches can observe first-hand how the brain responds during complex reasoning. Jonathan A. Fugelsang & Kevin N. Dunbar, *A Cognitive Neuroscience Framework for Understanding Causal Reasoning and the Law*, *in* LAW AND THE BRAIN 161 (Semir Zeki & Oliver Goodenough, eds., Oxford Univ. Press 2006). In these studies, subjects typically participate in one task that involves a specific reasoning process (deductive reasoning or analogical reasoning), and a second control task that contains most of the same visual and cognitive stimulation, but not the specific reasoning process. Researchers can then contrast the areas of the brain activated during the specific reasoning task and the control task to measure unique brain activity associated with the specific reasoning task. *Id.* Fugelsang and Dunbar approached their research slightly differently by using fMRI to examine the areas of the brain that are activated when subjects are presented with evidence that is either consistent or inconsistent with their own beliefs. *Id.*

[100] Fugelsang & Dunbar, at 161.

[101] Fugelsang & Dunbar, at 161 (citing various studies).

[102] Fugelsang & Dunbar, at 161 (citing various studies).

[103] Fugelsang & Dunbar, at 162.

[104] Fugelsang & Dunbar, at 162.

demonstrated that people may be similarly unable to measure the extent to which beliefs and expectations influenced their evaluation of statistical evidence.[105]

## II. WHY WE NEED TO GO BEYOND "PLAIN-LANGUAGE" INSTRUCTIONS

Because most jurors have some prior knowledge of the law (and because some may have quite a bit), they approach jury instructions with an established schema in place—though it may not be a legally correct schema—and their interpretation of the instructions they receive is necessarily influenced by that schema. For example, when people in a study were asked to list characteristics of robbery, 75% said that "something of value is taken," 73% said that the "perpetrator is armed," and 31% said that the crime "occurs in a home/apartment."[106] Robbery does involve the taking of property from the victim by force or threat of force, but does not require that the property be valuable, that the perpetrator be armed, or that the location be someone's home.[107] An individual juror might therefore have a schema for robbery that includes an armed perpetrator. Because of the perseverance effect, that schema will influence the facts the juror notices and remembers when she is presented with the evidence, and the schema will not always go away when the juror enters the jury room to make a decision, even if before she begins deliberations, the juror has been given plainly written jury instructions that do not include an armed perpetrator.[108]

Moreover, because the average juror has little experience in "the law," even plain-language instructions can contain unfamiliar terms, or terms used in a way with which the juror has no experience, so the juror has an additional hurdle: she must first familiarize herself with the "official" use of legal language, before she can begin to interpret the plain-language instructions she has been given.[109] This is especially difficult in law because precise language is so important; judges and lawyers share a common language gained through legal education and practice, but jurors often lack that shared understanding, and instead incorporate their everyday knowledge and understanding of concepts into their

---

[105] Fugelsang & Dunbar, at 163.
[106] Vicki L. Smith, *Prototypes in the Courtroom: Lay Representations of Legal Concepts*, 61 J. PERSONALITY & SOC. PSYCHOL. 857, 868 (1991).
[107] Smith, at 861.
[108] *See* Diamond & Casper, *supra* note _____.
[109] Lars Lindahl, *Deduction and Justification in the Law: The Role of Legal Terms and Concepts*, 17 RATIO JURIS. 182, 182 (2004).

interpretation and application of legal rules to the facts of a particular case.[110]

Furthermore, some concepts in the law function as "intermediate" concepts, which means that their meaning is flexible and determined by the situation, or the facts.[111] For example, the legal term "ownership" means different things in the context of ownership of money from an inheritance (which obliges the owner to pay inheritance taxes), and the context of ownership of a bike received as a birthday present (which does not oblige the owner to pay taxes). The context (facts) determine the legal result and corresponding rights and responsibilities. Moreover, the individual juror likely has a schema for ownership that is different than either of these legal definitions. Similarly, because jurors are presented with arguments from all sides of an issue, in an adversarial setting, the language and concepts they are expected to understand is fluid, and can often be interpreted in different ways. Schemas further compound this interpretative problem because they influence the jury at every stage of the trial, from the attention jurors give the evidence and how they interpret the information they see at trial, to the way they interpret and apply the jury instructions to that information.

While rewritten jury instructions have improved juror comprehension, schema theory, and specifically the perseverance effect, tells us that jurors will still apply existing schemas to those rewritten instructions.[112] Interestingly, there is little in the social science literature examining the impact of schemas on jury decision-making when jury instructions have been rewritten and made clearer. In one of the few studies examining schemas and jury instructions, Vicki Smith concluded that poor juror comprehension was not the result of poorly drafted

---

[110] Dan Simon's scholarship on cognitive coherence suggests that when jurors are asked to apply instructions they cannot understand to a set of ambiguous facts, jurors will seek to impose coherence on the complex task in front of them. Dan Simon, *A Third View of the Black Box: Cognitive Coherence in Legal Decision Making*, 71 U. CHI. L. REV. 511, 517 (2004). In doing so, they will reduce the decision to one of two alternatives, one of which is supported by strong considerations and one by weak consideration. *Id.* at 516. "Coherence-based reasoning posits that the mind shuns cognitively complex and difficult decision tasks by reconstructing them into easy ones, yielding strong, confident conclusions." *Id.* at 513. In other words, instead of attempting to decipher confusing and complex instructions, jurors will instead distill the decision into a simpler one, about which they can feel more confident.

[111] Nievelstein et al., at 1047.

[112] *See* Shari Seidman Diamond, *Instruction on Death: Psychologists, Juries, and Judges*, 48 AM. PSYCHOLOGIST 423, 429-30 (1993).

instructions, but the result of the jurors' prior knowledge of the law and preexisting knowledge frameworks (schemas) interfering with those instructions.[113] Jurors did not discard these frameworks when presented with conflicting jury instructions, but instead relied on them in making a decision.[114] That study was later criticized by Peter English and Bruce Sales, who argued that the study presented participants with standard pattern jury instructions, instead of instructions that had been rewritten to increase comprehension. [115] English and Sales concluded that while jurors may rely in part on schemas when given incomprehensible instructions, the study did not show that jurors will do this when given instructions revised according to psycholinguistic principles.[116] In other words, given clear instructions, they concluded, perhaps jurors would be more likely to follow the law rather than their preexisting ideas.[117]

Other researchers have used schemas to explain jury decisions, even though juror comprehension of instructions was not controlled.[118] In one study, mock jurors given "not guilty by reason of insanity" instructions were no more likely to convict or acquit than jurors told to rely on common sense.[119] The authors concluded that this was the result of the jurors' "preconceived constructs or beliefs" (schemas) about sanity and insanity.[120] These constructs, the authors felt, were very strong, and often more powerful than any new information the jurors might learn about through jury instructions. The authors suggested that drafters should pay attention to these constructs and develop a new insanity test that incorporates both psychological and legal definitions of insanity, as well as "commonsense beliefs."[121]

---

[113] Vicki L. Smith, *Prototypes in the Courtroom: Lay Representations of Legal Concepts*, 61 J. PERSONALITY & SOC. PSYCHOL. 857, 868 (1991). Smith argued that jurors have preexisting mental representations of the elements of various crimes, but that those concepts do not include the correct legal definitions of the crimes. *See, e.g.,* robbery example, *supra* note _____.

[114] Smith, at 868.

[115] Peter W. English & Bruce D. Sales, *A Ceiling or Consistency Effect for the Comprehension of Jury Instructions*, 3 PSYCHOL. PUB. POL'Y & L. 381 (1997).

[116] English & Sales, at 390.

[117] English & Sales, at 390.

[118] *See, e.g.*, Norman J. Finkel & Sharon F. Handel, *How Jurors Construe "Insanity,"* 13 LAW & HUM. BEHAV. 41 (1989); Normal J. Finkel & Sharon F. Handel, *Jurors and Insanity: Do Test Instructions Instruct?* 1 FORENSIC REP. 65 (1988).

[119] Finkel & Handel, 1988, at 76-77.

[120] Finkel & Handle, 1988, at 76-77.

[121] Finkel & Handel, 1988 & 1989. In a similar study, James Ogloff attempted to determine whether jurors used preexisting schemas in determining what elements are

Finally, one study suggests that jurors will continue to adhere to preexisting ideas (schemas) even when instructions are written clearly.[122] In that study, researchers compared rates of death sentences when jurors were told that if a defendant were not sentenced to death, he would either spend an unspecified amount of time in prison, or he would receive life without the possibility of parole (LWOP).[123] Although the authors expected to find fewer death sentences in the LWOP condition (because jurors could be certain that defendants would not go free), the frequency of death sentences was almost identical in the two conditions.[124] Data from a manipulation check suggested that the LWOP instruction was clear, but it appeared that jurors who were told the defendant would receive LWOP relied on their preexisting beliefs that LWOP did not really mean a life sentence.[125] This prior belief was so strongly held that jurors discounted even a clear jury instruction to the contrary.[126]

Of course, even rewritten jury instructions have a potential vulnerability. As Smith points out, "[c]olloquial terms carry colloquial baggage, some possibly correct, some incorrect. Wholesale replacement of legal terms with simple language may activate a host of associated

---

important in a determination of legal insanity. James R.P. Ogloff, *A Comparison of Insanity Defense Standards on Juror Decision Making*, 15 LAW & HUM. BEHAV. 509 (1991). Participants were given one of two widely used insanity instructions—the M'Naghten or the broader American Law Institute (ALI) insanity instructions. Both standards had low juror comprehension rates (30.3% for the M'Naghten and 31.4% for the ALI standards). Lieberman & Sales, at 620. The study showed, however, that the standard did not affect the number of guilty versus NGRI verdicts. Ogloff, at 522. Given the low comprehension rate, it appeared that instead of relying on the instructions, jurors used schemas to identify elements important in determining insanity, but like the definition of robbery, those schematic elements did not match the legal definition of insanity. Ogloff, at 524. For example, participants considered "expert psychiatric testimony" and "defendant's intent to harm" as the most important factors. Ogloff, at 521, Table 4. However, neither of these appear in either the M'Naghten or ALI instructions. Furthermore, jurors who were not given any insanity instructions made similar verdict choices to those given either set of instructions. Ogloff, at 523. Ogloff recommended either developing new standards consistent with jurors' schemas about insanity, or rewriting the instructions to make them more clear. Ogloff, at 527.

[122] Shari D. Diamond & Jonathan D. Casper, *Understanding Juries* (1999) (unpublished manuscript, on file with the American Bar Foundation, Chicago, IL), *discussed in* Phoebe C. Ellsworth & Alan Reifman, *Juror Comprehension and Public Policy: Perceived Problems and Proposed Solutions*, 6 PSYCHOL. PUB. POL'Y & L. 788, 800 (2000).

[123] Diamond & Casper *in* Ellsworth & Reifman, at 800.

[124] Diamond & Casper *in* Ellsworth & Reifman, at 800.

[125] Diamond & Casper *in* Ellsworth & Reifman, at 800-01.

[126] Diamond & Casper *in* Ellsworth & Reifman, at 800-01.

concepts that are useful for everyday decision-making but are legally incorrect or irrelevant."[127]

## III. THE IMPORTANCE OF THE REPRESENTATIVE JURY, AND SPECIAL JURIES AND A MODEL FOR IMPROVEMENT

The term "American jury system" of course includes many such systems. Each state, the federal government, and the District of Columbia has its own courts, laws, and practices, with multiple jury systems.[128] Moreover, jury systems differ in criminal cases and civil matters. All of these systems, however, do share some important characteristics. The Sixth Amendment to the Constitution provides that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed."[129] In civil cases in federal court, the right to a jury trial is governed by the Seventh Amendment, which provides that "In Suits at Common Law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved…"[130] This constitutional right to a jury trial in civil cases only applies to federal cases, but most states do afford jury trials in civil matters for cases above the level of the small claims court.[131]

A fundamental feature of the trial by jury is the requirement that the pool of potential jurors should be comprised of a reasonable cross-section of the community, or a "jury of peers." Stemming from the Magna Carta,[132] this ancient notion continues to reverberate today and has many goals, among them improving fact-finding, reducing prejudice, and

---

[127] Vicki L. Smith, *Prototypes in the Courtroom: lay Representations of Legal Concepts*, 61 J. PERSONALITY & SOC. PSYCHOL. 857, 869 (1991). Smith's findings and conclusions were criticized by Peter English and Bruce Sales in their article, *A Ceiling or Consistency Effect for the Comprehension of Jury Instructions*, 3 PSYCHOL. PUB. POL'Y & L 381 (1997), *see supra* notes _____, for discussion of these critiques.

[128] RANDOLPH N. JONAKAIT, THE AMERICAN JURY SYSTEM 1 (Yale Univ. Press 2003).

[129] U.S. CONST. amend VI. The Supreme Court has limited this right by holding that the Sixth Amendment does not guarantee jury trials for "petty" offenses, or those carrying a potential punishment of less than six months' imprisonment. *See Baldwin v. New York*, 399 U.S. 66 (1970). Since 1968 this constitutional right to a jury trial has applied to both state and federal criminal trials. *Duncan v. Louisiana*, 391 U.S. 145 (1968).

[130] U.S. CONST. amend VII.

[131] *See* American Judicature Society, Right to Jury Trial, *at* http://www.ajs.org/jc/juries/jc_right_overview.asp#criminal (last visited July 31, 2012).

[132] The Magna Carta required that charges against barons should be heard by other barons, their "peers," rather than by the king. VIDMAR & HANS, at 66.

promoting the legitimacy of the legal system.[133] In 1968, the Supreme Court noted that, "Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge."[134] In practice, of course, this ideal has often fallen short. Women and minorities have historically been excluded from juries, and only began serving in substantial numbers in the latter half of the twentieth century.[135] Moreover, until the second half of the twentieth century, jury service was limited to land owners, further limiting the number of eligible jurors.[136]

Despite this shaky start, the county eventually moved toward a representative jury, one "drawn from a cross-section of the community."[137] This egalitarian tradition of a jury composed of a cross-section of the community argues against juries with special skills or special qualifications, though there are examples of such "special juries."[138] A special jury is one composed of citizens with relevant specialized knowledge that will help them to more efficiently solve the facts of a case.[139] The earliest known special jury was in 1351, when a jury composed of cooks and fishmongers was called to decide the case of a defendant charged with selling bad food.[140] Another well-known form of the special jury was the "jury of matrons," all-woman juries assembled in cases in which a convicted woman awaiting execution "pleaded her belly," or claimed to be pregnant.[141] The jury of matrons determined the truth of the claim and decided whether the execution should be stayed until the child was born.[142]

The idea of using experts to resolve disputes has an extensive history in the United States. Arbitrators are perhaps the best-known example, but experts also make decisions as administrative judges and in

---

[133] VIDMAR & HANS, 76.
[134] *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968).
[135] VIDMAR & HANS, 71-74.
[136] JAMES C. OLDHAM, TRIAL BY JURY: THE SEVENTH AMENDMENT AND ANGLO-AMERICAN SPECIAL JURIES 176 (New York Univ. 2006).
[137] *Thiel v. S. Pacific Co.*, 328 U.S. 217, 220 (1946).
[138] For an excellent discussion of the historical development and current status of the special jury, *see* JAMES C. OLDHAM, TRIAL BY JURY: THE SEVENTH AMENDMENT AND ANGLO-AMERICAN SPECIAL JURIES (New York Univ. 2006).
[139] VIDMAR & HANS, 68.
[140] VIDMAR & HANS, 68.
[141] VIDMAR & HANS, 68.
[142] VIDMAR & HANS, 68. The use of special juries was fairly common in England in the 1970s, but their use declined and they were abolished in 1949. *Id.*

specialty courts.[143] There is also a large body of legal literature discussing the constitutionality of dispensing with the jury in complex civil litigation and instead employing special juries.[144] Although at one time about half of the states had some form of special jury statute, today only Delaware has a specific statute allowing the use of special juries in complex civil cases, though even there it has become exceedingly rare to call a special jury; many special jury requests are rejected because of "insufficient complexity."[145] Even a Delaware court noted that special juries are "contrary to fundamental concepts of jury trial and would substitute a method of selection which is inconsistent with established principles of justice."[146]

As James Oldham notes, "the idea of drawing exclusive special juries from specialized lists seems to be anachronistic today. Elite special juries surely are antithetical to the hard-fought, long-delayed goal of opening up jury service to everyone."[147] Oldham argues that there is still a place for special juries, however, and that while the cross-section requirement meets the goal of keeping citizens involved "in the business of democracy," the special jury serves equally compelling goals, such as dealing effectively with complex cases.[148] However, he does concede that, for the most part, the argument that a "complexity exception" can be read into the Seventh Amendment has not succeeded.[149]

In addition to the constitutional hurdles, specialized juries composed of experts, and not of lay jurors, goes against our ideals of a

---

[143] OLDHAM, at 196. Neither private arbitrators nor administrative judges must submit questions of fact to a jury, though specialty courts still must do so. *Id.*

[144] *See, e.g.,* Morris S. Arnold, *A Historical Inquiry into the Right to Trial by Jury in Complex Civil Litigation*, 128 U. PA. L. REV. 829 (1980); Patrick Devlin, *Jury Trial of Complex Cases: English Practice at the Time of the Seventh Amendment*, 80 COLUM. L. REV. 43 (1980); Kenneth S. Klein, *The Myth of How to Interpret the Seventh Amendment Right to a Civil Jury Trial*, 53 OHIO ST. L.J. 1005, 1007 (1992).

[145] OLDHAM, at 199.

[146] *Bradley v. A. C. & S. Co., Inc.*, 84C-MY-145, 1989 WL 70834 (Del. Super. May 23, 1989)

[147] OLDHAM, at 177.

[148] OLDHAM, at 177.

[149] OLDHAM, at 196. Of course, the complexity exception is not without its supporters. Notably, Judge Richard Posner has stated that he would favor a complexity exception in certain "complex commercial cases." He continued: "It's unfair really to put people through the task of trying to understand a subject which people of higher education and intellectual attainment spend a lifetime studying with imperfect understanding." *See* Jeffrey Cole, Economics of Law: An Interview with Judge Posner, 22 LITIG. Fall 1995, at 66-67.

representative "jury of peers." The representative jury is based on the premise that the ordinary citizen is capable of sorting out the details of most lawsuits. As Vidmar & Hans note, "the idea of a representative jury is a compelling one. A jury of people with a wide range of backgrounds, life experiences, and world knowledge will promote accurate fact-finding."[150] Diverse groups are likely to hold diverse perspectives on the evidence, and therefore encourage more thorough debate.[151] Moreover, research suggests that diverse juries are better fact-finders.[152]

Abandoning the representative jury system in favor of a system of special juries of experts is an extreme solution, and one that is unlikely to find broad support in the courts. Furthermore, there are great benefits to a representative jury that would be lost in such a system. A compromise position, therefore, is a representative system that attempts to create "experts" out of lay jurors. We can come closer to achieving this ideal by attempting to correct and develop the schemas jurors bring with them to trials in order to make their decision-making process more like that of legal experts.

## IV. RECOMMENDATIONS: HOW TO CORRECT OLD SCHEMAS AND CREATE NEW ONES

Findings in social science suggest that jurors bring with them to trials existing schemas for legal concepts, many of which may be incorrect or undeveloped.[153] Furthermore, jurors are not typically aware of the extent to which these schemas can influence their decision-making. Because—plain or not—jurors cannot separate schemas from their use of jury instructions, the goal of jury instructions should be two-fold: first, to give jurors the applicable law; and second, to help jurors correct existing schemas and develop new and legally correct schemas before jurors are exposed to the evidence in a trial.

We do not—and should not—expect jurors to entirely remove past experience and common sense from the equation when making decisions about verdicts. In fact, we *instruct* jurors to do just that in certain contexts; for example, jurors are told to use common sense in judging the credibility

---

[150] VIDMAR & HANS, 74.
[151] VIDMAR & HANS, 74.
[152] VIDMAR & HANS, 74, citing various studies.
[153] Vicki L. Smith, *Prototypes in the Courtroom: Lay Representations of Legal Concepts*, 61 J. PERSONALITY & SOC. PSYCHOL. 857, 868 (1991).

of witnesses.[154] Moreover, studies of jury behavior indicate that such beliefs often do play a role in the jury deliberation process.[155] "[I]t is naive in the extreme to act on the premise that jurors close their eyes and minds to matters that are commonplace in their lives."[156] However, because many jurors have undeveloped or incorrect schema for legal concepts they will be asked to apply in a trial, we should correct jurors' misunderstandings on the law and create legally appropriate and accurate schemas before jurors are told about the facts of the case. To do this, we need to efficiently train jurors to use the law and facts and educational psychology can help inform this effort. Additionally, we can help jurors overcome the schema perseverance effect and reduce bias by asking them to be aware of their own decision-making process.

### *A. Expert v. Novice Schemas*

In many cases, jurors have little legal knowledge, or limited exposure to legal concepts through television and movies.[157] So while these legal "novices" have schemas as to ideas and concepts they have encountered in the past, they will not typically have appropriate schemas[158] for any of the legal concepts or rules they will hear during a

---

[154] *See, e.g.*, Massachusetts Criminal Model Jury Instructions (Jurors are instructed to "look at all the evidence, drawing on your own common sense and experience of life.") Massachusetts Criminal Model Jury Instructions, Credibility of Witnesses, Instruction 2.260 (Jan. 2009).

[155] In interviews of jurors in 16 civil cases and seven criminal cases, one researcher found that "particularized knowledge or experience" affected the in eight of the 16 civil cases, though not in any of the seven criminal cases. Dale W. Broeder, *Occupational Expertise and Bias as Affecting Juror Behavior: A Preliminary Look,* 40 N.Y.U. L. REV. 1079, 1080 (1965). Moreover, in a study of simulated jurors' deliberations in response to a criminal homicide case, personal experiences were rarely discussed. REID HASTIE ET AL., at 84.

[156] Meyer & Rosenberg, *Questions Juries Ask: Untapped Springs of Insight,* 55 JUDICATURE 105, 108 (1971).

[157] Of course, this is not always the case. In many states, even judges are required to sit on juries when called, though they are sometimes granted hardship exemptions. Jean Guccione, *More Judges Answering Call for Jury Duty,* L.A. TIMES, June 3, 2001, *available at* http://articles.latimes.com/2001/jun/03/local/me-6028. Most notably, Justice Elena Kagan was recently called for jury duty in DC Superior Court, though her number was not called and she was released from service. Keith Alexander, *Elena Kagan Not Selected for Jury Duty*, WASH. POST, Jan. 20, 2011, *available at* http://voices.washingtonpost.com/crime-scene/keith-l-alexander/elena-kagan-reports-for-jury-d.html. This practice raises other issues of "strong" jurors and their impact on juror decision-making that are beyond the scope of this Article.

[158] Though they may have inappropriate schemas gleamed from television and other sources. Much has been made in the law and the media of this "CSI effect." *See, e.g.*,

trial; this is in contrast to the judge and lawyers, and often the parties, who will have more developed schemas for the concepts in the trial. Generally, well-developed schemas (expert schemas) tend to be more complex and better organized, and therefore more accessible, allowing for more thoughtful judgment and better decision-making.[159]

Mature schemas are likely to be more complex and more organized than immature ones.[160] In a study investigating how conceptual knowledge structures (or schemas) differ between novices and experts, researchers compared the approaches of novices (first-year law students) and experts in civil law to two tasks, a card-sorting task and a concept-elaboration task.[161] The card-sorting task, which asked participants to sort different cards into groups based on different legal concepts, was designed to provide insight into "differences in the organization of conceptual knowledge of individuals at different levels of expertise." The concept-elaboration task, which asked participants to list everything they knew about a particular topic in a short amount of time (2-3 minutes), was designed to provide insight into the participant's depth of knowledge about the concepts and associations they made with other concepts.[162]

As expected, the experts' schemas were highly developed and elaborate, which allowed them to "effectively and efficiently interpret information or problems [they were] confronted with.[163] In contrast, the novices, who lacked these developed mental frameworks for the law, employed problem schemas that consisted of "loosely linked, incomplete, and sometimes incorrect knowledge."[164] The novices' schemas were also less easily activated than the experts', and when activated, were less efficient at problem solving.[165] "All other things being equal, greater

---

Simon A. Cole & Rachel Dioso-Villa, *Investigating the "CSI Effect' Effect: Media and Litigation Crisis in Criminal Law*, 61 STAN. L. REV. 1335 (2009); Jeffrey Toobin, *The CSI Effect: The Truth About Forensic Science*, THE NEW YORKER, May 7, 2007, *available at* http:// www.newyorker.com/reporting/2007/05/07/070507fa_fact_toobin.

[159] FISKE & TAYLOR, at 173.

[160] FISKE & TAYLOR, at 173.

[161] Fleurie Nievelstein et al., *Expertise-related differences in conceptual and ontological knowledge in the legal domain*, 20 EUR. J. COGNITIVE PSYCHOL. 1043, 1047 (2008).

[162] *Id.* at 1047-48.

[163] Nievelstein et al., at 1046.

[164] Nievelstein et al., at.1046.

[165] Nievelstein et al., at 1046. As expected, in the card-sorting task, experts used more central concepts when clustering concepts, while novices ordered their concepts more randomly. *Id.* at 1055. In the concept-elaboration task, experts used more legal definitions in their explanations of a particular concept, including examples from cases, while novices used more everyday examples. *Id.* at 1056.

complexity moderates judgment. The more variety one has encountered, the more complex the issues, the less clear-cut it all seems, and the less extreme one's judgment."[166]

Knowledge, therefore, becomes more structured, and more accessible, with increasing expertise.[167] When asked to group similar concepts in the card-sorting task, experts used the same central legal concepts to create clusters, while novices strung concepts together somewhat randomly, and reported no meaningful connections between the concepts.[168] As a result of this better organization, experts notice, recall, and use information that is inconsistent with their schemas more than novices do.[169] The novices' simpler, less developed schemas limit them to more obvious, schemas-consistent material.[170] This allows experts to better moderate inconsistencies, and make more focused judgments and decisions.[171]

### *B. Developing Jurors' Schemas to Make Them More Like Experts*

Part of the goal of jury instructions, then, should be to develop novice jurors' schemas for the legal concepts they are about to apply to the facts during the trial. We can increase efficient learning in several ways, both by giving jurors simple and straightforward explanations of the legal concepts they will be asked to apply, and by allowing jurors to study worked examples of those legal concepts and build new schemas before they are asked to interpret law and facts. In turn, these schemas will be more structured and more accessible to the jurors during the trial and during deliberations, leading to better judgment and better outcomes.

Juror schema development and learning must be efficient both because the nature of a trial does not allow for drawn-out juror education, but also because efficient learning leads to better learning outcomes with less mental effort.[172] All human learning relies on both working memory

---

[166] FISKE & TAYLOR, at 173-74.
[167] Nievelstein et. al., at 1058.
[168] Nievelstein et. al., at 1058. This suggests that the schemas of novices, even when analyzing the same information, are very different from each other. Individuals with greater expertise in law, however, have a more similar knowledge base—and therefore more similar schemas—than those with less expertise. *Id.*
[169] FISKE & TAYLOR, at 174.
[170] FISKE & TAYLOR, at 174.
[171] FISKE & TAYLOR, at 174.
[172] RUTH CLARK ET AL., EFFICIENCY IN LEARNING: EVIDENCE-BASED GUIDELINES TO MANAGE COGNITIVE LOAD 27 (John Wiley & Sons 2006).

and long-term memory.[173] When people are in learning mode, new information is processed in the working memory and forms schemas, which are then stored in long-term memory.[174] Working memory is mainly a storage place for conscious processing; it does not have the capacity to store more than limited amounts of information.[175] If we ask jurors to learn too much too quickly (*i.e.*, all of the law and the facts they are being asked to interpret), we will overwhelm their working memory and shut down new learning.[176] This is especially true because as novices, jurors have fewer developed schemas for the concepts they are learning, and can easily be overwhelmed with the cognitive demands of building new schemas.[177]

To help jurors counteract inappropriate preexisting schemas and activate legally appropriate schemas, we should provide them with pre-trial explanations of the applicable law. Traditionally, the only instruction jurors receive on the applicable law are the jury instructions themselves, and typical instructions are taken from statutes or cases; even pattern jury instructions intended to be clearer and more accessible for the average layperson, are still written by lawyers (experts) in language—even plain language—that makes sense to experts.[178] But experts and novices do not deal with new information or learn in the same way, and when experts serve as instructors, "they often overload their learners by failing to compensate for the much more limited schemas of the learners."[179] Because the novice does not have relevant schemas, the pre-trial explanation should serve the role that schemas would serve for the expert, or the lawyers and judges.[180]

Moreover, this explanation should move beyond the jury instructions themselves and give new jurors a brief, introductory overview of the legal issues. The explanation should incorporate strategies for teaching novice learners, including things like organizing sentences that preview and then review the content; definitions and examples of unfamiliar terms; explicit statements that require minimal inferences; and

---

[173] CLARK ET AL., at 28.
[174] CLARK ET AL., at 28.
[175] CLARK ET AL., at 29.
[176] CLARK ET AL., at 29.
[177] CLARK ET AL., at 32.
[178] Peter Tiersma, *The Rocky Road to Legal Reform: Improving the Language of Jury Instructions*, 66 BROOK. L. REV. 1081, 1088 (2001); 89 C.J.S. Trial § 809.
[179] CLARK ET AL., at 33.
[180] CLARK ET AL., at 251.

headers to signal paragraph topics.[181] These "pre-instructions" will help give jurors an overview of the applicable law and help them redefine and better develop their schemas for the issues they are about to examine during the trial. As a result, jurors' schemas will be more accessible, and jurors will be more flexible in their thinking and less swayed by unconscious bias.

Furthermore, novices will learn more efficiently if they are given worked examples, or a step-by-step-explanation of the solution to a problem, that help them build new schemas.[182] Because novices lack

---

[181] CLARK ET AL., at 259.

[182] CLARK ET AL., at 32, 190. In fact, some states do include examples in some types of jury instructions. For example, the state of Connecticut explains the difference between direct and circumstantial evidence this way:

> Circumstantial evidence of an event is the testimony of witnesses as to the existence of certain facts or evidence or the happening of other events from which you may logically conclude that the event in question did happen. By way of example, let us assume that it is a December night and you're preparing to retire for the evening. You look out the window and you see it is snowing. You wake up the next morning, come to court, and testify that the night before it was snowing in the area of your house. That is direct evidence of the fact that it snowed the night before. You saw it and you came into court and testified to that fact.
>
> Now assume that it is another December night, the weather is clear, there is no snow on the ground, and you retire for the evening. You wake up the next morning, you look out the window and you see snow on the ground and footprints across your lawn. You come into court and you testify to those facts. The evidence that the night before there was no snow on the ground and the next morning there was snow on the ground and footprints across your lawn is direct evidence. That direct evidence, however, is circumstantial evidence of the fact that some time during the night it snowed and that some time thereafter someone walked across your lawn.

State of Connecticut Criminal Jury Instruction 2.4-1, Direct and Circumstantial Evidence, *at* http://www.jud.ct.gov/ji/criminal/part2/2.4-1.htm (last visited Aug. 4, 2012). This is likely to be more helpful to a juror than the Ninth Circuit's Pattern Criminal Jury Instructions, which provide:

> Evidence may be direct or circumstantial. Direct evidence is direct proof of a fact, such as testimony by a witness about what that witness personally saw or heard or did. Circumstantial evidence is proof of one or more facts from which you could find another fact. You should consider both kinds of evidence. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. It is for you to decide how much weight to give to any evidence.

Ninth Circuit Model Criminal Jury Instructions, 3.8 Direct and Circumstantial Evidence, *at*
http://archive.ca9.uscourts.gov/web/sdocuments.nsf/0/daf5c7758d60a2ed882564b400084

schemas for new concepts, they need learning environments that compensate for that deficiency; this type of learning environment would provide schema substitutes by optimizing jurors limited working memories in ways that free working memory for learning. The use of examples is especially helpful for novice learners like the average juror, who knows little about the legal issue she is being asked to analyze, because the examples will help her develop schemas and accelerate expertise.[183] If jurors have a worked example to study just prior to solving a similar problem (i.e. the problem of how the law applies to the particular facts in a trial), this will give them an analogy to use when solving the problem, thus freeing up more working memory capacity for schema development.[184]

Arkansas Model Jury Instruction 501, which contains the pattern jury instruction for "proximate cause" is an example of a pattern jury instruction that could be rewritten to include both an introductory explanation to the legal issue, as well as worked examples of how the law would apply to a particular set of facts. The instruction states: "The law frequently uses the expression "proximate cause," with which you may not be familiar. When I use the expression "proximate cause," I mean a cause which, in a natural and continuous sequence, produces damage and without which the damage would not have occurred."[185]

Of course, "proximate" and "cause" are words that are familiar to most jurors, but the term "proximate cause" has a legal definition that is much different than its common usage. The legal concept of proximate cause is really one of policy, and whether there is enough of a connection between the act and the harm that it is fair to hold the defendant liable for the harm; to satisfy proximate cause, it must have been reasonably foreseeable that the harm would result from the action.[186] Because of this difference between its common usage and its legal usage, jurors will likely

---

4cf?OpenDocument (last visited Aug. 4, 2012). Comments to the pattern jury instruction do note that it may be helpful to include an illustrative example. *Id.*

[183] CLARK ET AL., at 193-94, 201.

[184] CLARK ET AL., at 193.

[185] Arkansas Model Jury Instruction 501, *available at* http://weblinks.westlaw.com/result/default.aspx?cite=UU%28Ib7a9f915053f11db9346b0b8bf67faf0%29&db=155079&findtype=l&fn=_top&pbc=DA010192&rlt=CLID_FQRLT2695744814217&rp=%2FSearch%2Fdefault.wl&rs=WEBL12.04&service=Find&spa=armji-1000&sr=TC&vr=2.0 (last visited Aug. 4, 2012).

[186] *Palsgraf v. Long Island R. Co*., 248 N.Y. 339, 352 (1928) (noting that "because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point.")

need a corrected schema for this term, and examples of how the term plays out in the legal context will be helpful in creating a legally appropriate schema for "proximate cause." Jurors should be told the rule and the reasoning for the proximate cause requirement and given an example of how the rule can be used to solve a specific problem:

> **Rule and reasoning for "proximate cause":** The next requirement for negligence is that the defendant's action be the "proximate cause" of the plaintiff's injury. Proximate cause means that at the time he took the action, the defendant must have been reasonably able to predict that the harm to the plaintiff would result from his action; in other words, the harm must have been reasonably foreseeable. This requirement is in addition to the requirement that the defendant's actions be the "cause in fact" of the plaintiff's injury (see previous instruction on "cause in fact"). We have this requirement because we do not think it is fair to hold people liable for every consequence of their actions, if that consequence is too improbable or far-reaching.
>
> **You should find proximate cause in the following example**: If John throws a book at Steve's head, it is reasonably foreseeable that John's action could proximately cause Steve harm. Furthermore, if John throws a book at Steve's head, but it misses, and knocks an object off of the shelf in back of Steve, which then hits Steve in the head, it is also reasonably foreseeable that John's action could proximately cause Steve harm. Therefore, in both situations, when John threw the book, he proximately caused Steve's harm.
>
> **You should NOT find proximate cause in the following example**: John, driving carelessly, crashes into Steve's car. John didn't know that the car contained a bomb, which exploded when he hit it. Several blocks away, a mother carrying her baby, Betsy, is startled by the explosion and drops Betsy. In this situation, Betsy cannot recover against John because Betsy's injury is so removed from John's action that her harm was not reasonably foreseeable. John's action was not the proximate cause of her injury. Note that in this example John has been negligent (because he was driving carelessly), and his careless driving is the "cause in fact" of Betsy's injury (because if he hadn't been negligent, the crash and the explosion would not have occurred). However, we do not want

> to hold John liable for Betsy's injury because it is so improbable and far-reaching that it would not be fair.[187]

Furthermore, this explanation should be given before the presentation of evidence. Because jury instructions are typically given after the presentation of evidence and just prior to deliberation, jurors have already had the evidence framed for them, and have already been primed to view it in a particular (or several different) ways.[188] These primes and frames activate schemas that, as noted above, may or may not be legally correct and appropriate. In many cases, they are likely activating schemas in jurors that include misconceptions about the law, and once activated, these schemas will persevere throughout the trial and into deliberations. If courts incorporated a more neutral, pre-trial explanation of the law, this neutral and legally correct information would have a priming and framing effect, creating and activating appropriate schemas and allowing jurors to better weigh the evidence from both sides.

Judges have discretion to determine the timing of jury instructions, and some judges do decide to give jurors instructions before the presentation of evidence so that jurors will have some prior understanding of the law they will later be asked to apply.[189] Research on schema theory supports this approach; people are more likely to remember information relevant to schemas,[190] and context affects people's interpretations of new information, as a result of both priming and framing effects.[191] This suggests that hearing the law before the evidence should give jurors

---

[187] *Palsgraf v. Long Island R. Co*., 248 N.Y. 339; *see also* STEVEN L. EMANUEL, EMANUEL LAW OUTLINES: TORTS 148-49 (Wolters Kluwer 8th ed. 2009).

[188] *See* discussion on priming and framing *supra* Part I.B.

[189] 89 C.J.S. Trial § 809. Appellate courts have consistently left decisions about the use and content of pretrial instructions to the discretion of the trial court judge. *See, e.g.*, *United States v. Ruppel*, 666 F.2d 261, 273-74 (5th Cir. 1982); *People v. Valenzuela*, 76 Cal. App. 3d 218, 221 (Ct. App. 1977). Some appellate opinions encourage the use of pretrial instruction. *See People v. Valenzuela*, 76 Cal. App. 3d 218, 222 (Ct. App. 1977) (noting that "we commend the astute judge who tries to give the jury advance notice of the law applicable to the case….[A]s we see it, the purpose of preinstructing jurors is not to avoid the necessity of instructing at the close of argument; rather, it is to give them some advance understanding of the applicable principles of law so that they will not receive the evidence and arguments in a vacuum.). Others advise against it. *See, e.g., People v. Murillo*, 55 Cal. Rptr.2d 21,24 (Ct. App. 1996) (noting that "[t]he preferable, even if not yet the most common, method is to instruct the jury after the close of evidence, but before the summations of counsel," while acknowledging that the trial court has discretion on this matter).

[190] Taylor & Crocker, at 98, supra note ____.

[191] *See generally* Part I.B.

appropriate schemas for processing the evidence and enhance their ability to identify and remember relevant facts.

One study found that subjects who heard the law both before and after trial were better able to apply the law to the facts of the case then other subjects.[192] Furthermore, preinstruction had no apparent downside: "there were no decrements in their abilities to recall the evidence, understand the law, or make verdict decisions. It appears, then, that these benefits of preinstruction may be realized without cost to jurors' information processing or decision making."[193] Moreover, some research suggests that jurors who hear instructions twice—both before and after the presentation of evidence—have better comprehension than jurors who only hear the instructions once.[194] Furthermore, instructions could still be repeated at the close of evidence and jurors could still be given copies of both the written instructions and the pre-trial explanations to take with them into deliberations.

### *C. Helping Jurors Reduce Schema Perseverance*

Jurors should also be explicitly told to consider the evidence from both sides as a means of reducing schema perseverance and bias. Studies have found that while demanding that someone be accurate and fair does not guarantee that a person will follow that instruction, telling people to consider the evidence from both sides might have that effect. For example, one study found that instructions to be "as objective and unbiased as possible" in reviewing studies on capital punishment did not in fact reduce bias.[195] However, when subjects were explicitly told to consider the new evidence from both points of view, bias was reduced.[196] In other words, it seems that when we tell people to think carefully about how they are evaluating evidence and to pay attention to biases—if we ask them to monitor their own cognitive process—we can reduce the impact of schemas on decision-making.[197] Because most jurors are largely unaware

---

[192] The author notes, however, that this result cannot be seen as a pure effect of pretrial instruction because the group that only received pre-instructions (and no post-instructions) did not show this improvement, but the results do indicate that there is benefit in hearing the instructions twice. Vicki L. Smith, *Impact of Pretrial Instruction on Jurors' Information Processing and Decision Making*, 76 J. APPLIED PSYCHOL. 220, 226 (1991).
[193] *Id.*
[194] Elwork et al., at 177-78.
[195] Lord et al., *Consider the Opposite: A Corrective Strategy for Social Judgment*, 47 J. PERSONALITY & SOC. PSYCHOL. 1231, 1237 (1984)
[196] Lord et al., at 1234.
[197] FISKE & TAYLOR, at 172-73.

of the impact of schemas on decision-making, telling jurors about schemas and their potential biasing effects before they evaluate any evidence might also help to ameliorate the effect of schemas on juror decision-making.[198]

Furthermore, by asking people to be more aware of the ways in which schemas, and specifically priming and framing, influence decision-making, we can, through greater awareness of these typically unconscious phenomenon, recognize their effects and reduce their impact on decision-making. For example, although we cannot avoid viewing problems through frames, "with effort you can become aware of how you are framing a situation and whether there are alternatives."[199] To do this, people need to become aware of the origins of their frames, as well as how others in the same situation might be framing the same issue or problem. Similarly, if decision makers become more aware of their own decision-making process, this could have an impact on their susceptibility to primes.[200] Moreover, priming might also be counteracted through instructions that encourage feelings of accountability.[201]

We should also ask jurors, before coming a decision, to try to create plausible explanations for both—or all—sides. This could reduce unwarranted theory perseverance by showing jurors how easily either side might be right, or how either theory might be true.[202] In a follow-up to the firefighter study discussed above,[203] Anderson found that if people are compelled to explain why their theory might be wrong, the perseverance effect was moderated.[204] "Inducing people to create causal explanations of opposite social theories produces more flexible and appropriate responses

---

[198] FISKE & TAYLOR, at 172-73

[199] BREST & KRIEGER, at 36.

[200] Kathryn M. Stanchi, *The Power of Priming in Legal Advocacy: Using the Science of First Impressions to Persuade the Reader*, 89 OR. L. REV. 305, 349 (2010).

[201] Stanchi, at 348-49 (*citing* Jennifer S. Lerner et al., *Sober Second Thought: The Effects of Accountability, Anger, and Authoritarianism on Attributions of Responsibility,* 24 PERSONALITY & SOC. PSYCHOL. BULL 563 (1998)). In the cited study, some subjects in an anger priming experiment were told that an "expert" would interview them at the end of the study to assess their responses and reasoning. Those subjects reported they engaged in a more deliberative decision-making process than those who were not accountable for their reasoning. *Id.* at 571.

[202] Anderson, 129. Anderson warns, however, that these procedures might not be as effective when the theory involved has a strong emotional component, such as a person's beliefs concerning the deterrent effect of capital punishment, because that emotional component might prevent people from considering competing theories, even when explicitly instructed to do so. *Id.* at 136.

[203] *See supra* note ____ and accompanying text.

[204] Anderson, 134.

to challenges to those theories."[205] Subjects who explained both a positive and a negative relationship between firefighting ability and risk preference were significantly less reluctant to abandon their initial theory when told that their case history was fictitious.[206] Asking jurors to describe "potential alternative hypotheses before the presentation of evidence may minimize the influence of specific beliefs on the part of the individual asked to weigh the evidence."[207] In other words, if jurors are asked to articulate theories for both sides before reaching a final decision, theory perseverance and thoughtless schema application could be minimized.

## CONCLUSION

Schemas are powerful, though largely unconscious, frameworks that influence the way people see, interpret, and remember information. Like any other person interpreting a set of facts, jurors cannot help but be influenced by schemas when interpreting facts and applying the law during a trial. Furthermore, although the law has made great strides in improving juror comprehension of jury instructions, even "plain-language" instructions are vulnerable to the interpretive influence of schemas. Jurors' understanding of the law is typically undeveloped, and therefore their schemas for legal concepts is often correspondingly incorrect or undeveloped. Moreover, although they may not be correct in their assumptions about the law, jurors do not come to trials as blank slates; they bring with them existing schemas that shape the way they view both the law and the facts, often garnered from the media and entertainment.

For this reason, existing jury instructions, which are typically given to jurors after the presentation of evidence, do little to counteract or correct jurors' undeveloped or misinformed schemas. Based on findings from the social sciences, lawyers and judges should attempt to develop jurors' schemas to make them more like experts' schemas, which are better organized and more accessible, allowing for more thoughtful judgment and better decision-making. To accomplish this, jurors should be provided with both well-written jury instructions and pre-trial explanations of the applicable law, including examples of how the law applies. We should also help jurors to overcome schema perseverance by asking them to consider the evidence from both sides and to attempt to create plausible explanations for both sides of a case. These steps will help counteract inappropriate preexisting schemas, activate legally appropriate schemas,

---

[205] Anderson 134.
[206] Anderson 134.
[207] Fugelsang & Dunbar, at 163.

and result in better informed decision-making by jurors.