

Death penalty instructions to jurors: still not comprehensible after all these years

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Abstract. *This paper describes and analyzes the unrevised, current state of death penalty pattern jury instructions in the state of Washington. With comparisons to the findings of the Capital Jury Project, this study examines why the death penalty instructions are even more difficult than the ordinary, difficult to understand US pattern jury instructions. The concept of mitigation presents particular problems, with jurors misunderstanding the instruction, misapplying it or ignoring it. As mitigation is the alternative to aggravation and a death penalty verdict, this problem is critical. In addition, as Judith Levi (1993) found in the Illinois death penalty pattern jury instructions, the instructions in general point to a default position for death. Washington's pattern jury instructions for death penalty cases are as difficult to comprehend as both pattern jury instructions in general and death penalty instructions in particular.*

Keywords: *Jury instructions, juror comprehension, death penalty, mitigation, United States, Washington State.*

Resumo. *Este artigo descreve e analisa o estado atual, e não revisado, de modelos de instrução do Júri, em casos de pena de morte, no Estado de Washington. Estabelecendo uma comparação com os resultados do "Capital Jury Project", este estudo analisa porque as instruções fornecidas ao Júri, em casos envolvendo pena de morte, nos Estados Unidos, são ainda mais difíceis de se entender que as normas, que já são difíceis. O conceito de mitigação apresenta problemas específicos, sendo as instruções fornecidas a este respeito mal interpretadas, não aplicadas ou ignoradas. Considerando que a mitigação seja a alternativa ao agravamento e um veredito de pena de morte, este problema é crucial. Além disso, de acordo com os resultados encontrados por Judith Levi (1993), com base nos modelos de instruções fornecidos ao Júri em casos de pena de morte em Illinois, as instruções, de um modo geral, apontam para um posicionamento pré-definido à favor da morte. Os modelos de instruções fornecidas ao Júri em Washington, em casos de pena de morte, são tão difíceis de se compreender quanto as instruções fornecidas ao Júri, em geral, e as instruções relativas à pena de morte, em particular.*

Palavras-chave: *Jury instructions, juror comprehension, death penalty, mitigation, United States, Washington State.*

Introduction

Although linguists have known that jury instructions are difficult if not impossible for most jurors to understand since the publication of the Charrows' (1979) formative and influential article on the comprehension of U.S. jury instructions, most of the judiciary has not been listening. And of all the instructions that ought to be comprehensible to jurors, one would think that those addressing jurors' deciding whether to put a defendant to death should be the easiest to understand¹. Instead, the "death penalty" instructions in the U.S. remain some of the most difficult. Worldwide, the death penalty is disappearing, although Amnesty International reports that the death penalty is still legal in 54 countries. Another 35 countries have not legally banned the death penalty but have had a de facto ban. Eight other countries outlaw the death penalty for "ordinary crimes," Brazil being one of these countries. Ordinary crimes usually means statutory or common law crimes, such as murder. Brazil has not actually executed anyone since 1855. In 2012, the most recent year for which Amnesty International has prepared a report, there were 682 people executed in 21 countries. In this same report, Amnesty International indicated that the United States was the only country in the Americas to carry out executions, and then only in nine states². Most of those U.S. executions were decided by a jury trial and by jurors who heard and perhaps read instructions on the death penalty.

This article focuses on the death penalty instructions in Washington State and finds that the death penalty instructions are extremely difficult, if not impossible, for jurors to understand. In many ways, these instructions are similar to those used nationwide, so Washington can stand as a good representative of the rest. As linguists have found, there are serious problems with comprehension in jury instructions in general. Moreover, there are special problems with death penalty instructions. Lawyer-linguist Peter Tiersma notes that instructions associated with the word *mitigation* are particularly problematic, and linguist Judith Levi found that several factors contributed to the idea that the NORMAL or "default" sense of the instructions was that the death penalty was presumed. In order to display the special problems of death penalty instructions, I start with a review of the Capital Jury Project which used other social science methods to assess jury understanding, including interviews, from 14 states. I turn next to a review of previous research on both jury instructions in general and death penalty instructions in particular. Following that review, I assess the Washington state death penalty instructions and find that not only do they reflect the problems of jury instructions in general but that they also display the particular problems of death penalty instructions³.

The Capital Jury project

In an effort to assess whether juries, post *Furman v. Georgia*, 408 U.S. 238 (1972), had avoided the arbitrariness condemned in that case, the Capital Jury Project, funded by a

¹It should be noted that California is the only state that has completed a full revision of its civil instructions using linguistic information. California also has an alternative set of criminal instructions that have been revised but these are optional. Several other states have experimented and then decided that they would not significantly revise their instructions.

²Amnesty International Publications, *Death Sentences and Executions*, 2012, London: Publications of Amnesty International. p. 6.

³My work on this project was a consultation with a public defenders' group representing Christopher Monfort, who is accused of killing a police officer and was facing the death penalty in Seattle, WA. The Governor of Washington Jay Inslee has declared a moratorium on executions in Washington State. A brief description of the case is included in Appendix B.

National Science Foundation Grant, set out to evaluate that point. The team was multidisciplinary and comprised criminologists, social psychologists and law faculty. Eventually encompassing 14 separate states, the teams examined how jurors made their life or death decisions. They interviewed jurors who had served on death penalty jury panels. The states chosen for analysis had to have had enough jury trials involving the death penalty that it was possible to draw a random sample of jurors who had served. This eliminated some states, such as my own, Washington.

There were initially eight states in the project: California, Florida, Indiana, Kentucky, New Jersey, South Carolina, Texas and Virginia. The project expanded twice, once adding four states, Georgia, Louisiana, North Carolina and Tennessee, and then Alabama and New Jersey.

Although the study initially concentrated on the effects of *Furman*, “guided discretion” capital statutes and the division of trials into guilt and punishment phases, and what were the guidelines for juries to follow in making their decisions, the study also unpacked how and when jurors were making punishment decisions, and whether the jurors understood that they, not the judge, were the ones making the decision for life or death. The study authors identified three general objectives:

1. To examine and systematically describe jurors’ exercise of capital sentencing discretion;
2. To identify the sources and assess the extent of arbitrariness in jurors’ exercise of capital discretion; and
3. To assess the efficacy of the principal forms of capital statutes in controlling arbitrariness in capital sentencing. (1077).

Jurors were randomly selected to be interviewed and the researchers made use of additional materials such as trial transcripts and interviews with judges and attorneys. The interviews with jurors lasted three to four hours. The findings included jurors remembering the jury deliberation more accurately than they did the presentation of trial evidence. The findings also included observations that many of the jurors had started to make punishment decisions before they had even been instructed on punishment. There was also some confusion among the jurors about which specific topics were relevant to the guilt phase and which were relevant to the punishment phase. Half of the jurors in the preliminary sample had made a punishment decision before the guilt stage was concluded (1089). There was extensive misunderstanding of what factors could be considered—ideas about the death penalty being required if, for example, they thought the defendant was likely to be a danger in the future.

One serious misunderstanding emerged in later data analysis, related to the issue of mitigation. Mitigation is the other side of the life-death coin. Jurors are required to consider not only aggravation but also mitigation. But mitigation remained elusive to the jurors. One factor in mitigation is that the burden of proof for the defendant to present mitigation evidence is the civil law standard of the “preponderance of the evidence,” and not the “beyond a reasonable doubt” that the prosecutor must prove in a criminal case. The difference left jurors confused and inaccurate on what they were supposed to consider⁴.

⁴See William J. Bowers and Wanda D. Foglia, (2003) “Still Singularly Agonizing: Law’s Failure to Purge Arbitrariness from Capital Sentencing,” *Criminal Law Bulletin* 39: 51-86, in which the researchers found disparities of understanding and differential application of law to different defendants, including differences by the race of the defendant and race of the jurors.

The CJP data show that nearly half (44.6%) of the jurors failed to understand the constitutional mandate that they be allowed to consider mitigating evidence. Two-thirds (66.5%) failed to realize that they did not have to be unanimous on findings of mitigation. Nearly half (49.2%) of the jurors incorrectly thought they had to be convinced beyond a reasonable doubt on findings of mitigation. (71)

Taking these findings as representative of the detailed and extensive analyses published by the Capital Jury Project, some criminal defense attorneys began to take a second look at jury instructions in death penalty trials. Appellate judges finding error in a trial through a difficult-to-understand jury instruction has had little impact on the outcome of appeals of these cases. At one time, and perhaps still, every state in the United States has case law that indicates that the giving of incomprehensible jury instructions to the jury is not a reversible error. Instead, these state courts indicated in case after case, that if the instructions were an accurate statement of the law, then arguments about its comprehensibility were unwarranted. But the Capital Jury Project seemed to lend new energy to defense attorneys' challenging jury instructions on the basis of their comprehensibility.

The comprehensibility of jury instructions emerged as an issue from the Capital Jury Project for a number of reasons. First, the general results of the various state studies indicated that jurors, sometimes a majority of jurors, misunderstood the instructions themselves, thought that the instructions were a general framework for understanding the trial and not specific directions, or simply ignored what the instructions told them to do and when to do it. Second, the results indicated that there were particular problems with the concept of mitigation. The word itself seems to be very difficult to understand in the context of a trial and set against elements of aggravation of the crime. Third, jurors misunderstood who needed to prove mitigation and under what burden of proof. Collectively, these study results suggested that objections to pattern jury instructions might contribute to jurors not enacting the sentencing discretion that the U.S. Supreme Court presumed.

Some examples of the problems with instructions emerged especially from the interviews with jurors. Because these studies worked with actual jurors who had served on death penalty panels, they avoided the usual problem of jury studies—the lack of an actual trial in which the jurors would make a decision. In these cases, the jurors had made a decision in an actual death penalty case. Recall was one of the problems enumerated by researcher William J. Bowers. Bowers analyzed juror responses to questions about their memory of various stages of the trial. They had strong memories of the jury selection process (67.6% Very Well), hearing evidence about the Defendant's guilt (59.0% Very Well) and jury deliberations about the Defendant's guilt (67.7% Very Well), but the percentage drops to 55.0% answering Very Well when jurors were questioned about their memories of hearing evidence about the defendant's punishment, barely over half⁵. Consequently, juror attention differed considerably when they shifted from the guilt phase of bifurcated trials into the punishment phase. Not as many jurors were paying attention.

The researchers also asked questions about the focus on jury deliberations on specific topics, especially future dangerousness and juror's feelings about the right punishment. It was not clear to the researchers whether this discussion was taking place in the guilt phase or the punishment phase, so there was a follow-up question: "In deciding guilt, did jurors

⁵See Bowers (1995: 1043). Further reports of findings were published for the next ten years and included both general findings as in this article, and specific state responses. These early results on juror understanding were little changed with the inclusion of additional findings.

talk about whether or not the defendant would, or should, get the death penalty?" The collected responses indicated that more than a third of the jurors (37.2%) recalled specific discussions about the death penalty during the portion of the trial to decide guilt. Bowers' conclusion is that "improper consideration of punishment" played an important role in these capital trials (Bowers, 1995: 1088-90).

Although jurors had been instructed not to consider the appropriate punishment until they heard the evidence in the punishment phase of the trial, study results indicated that about half of the jurors had made a decision about punishment before the trial had reached the penalty phase (Bowers, 1995: 1089). Researchers were also concerned with their discovery that jurors thought that the guidelines "required" the death penalty to be imposed when there was a jury finding of aggravation. That information was further broken down into questions about whether the defendant's conduct was heinous, vile, or depraved required the death penalty to be imposed, and 40.9% of the jurors believed that to be true. An additional question was included about whether the defendant would be dangerous in the future. As Bowers indicates, "[t]his misunderstanding of statutory standards obviously biases the sentencing decision in favor of death," to the extent that the jurors had already decided that the crime was heinous, vile, and depraved or that the defendant would be dangerous in the future. Even more directed toward death, 79.8% of the jurors at the end of evidence believed that the defendant's conduct was heinous, vile, or depraved, and 75.6% believed that the defendant would be dangerous in the future (Bowers, 1995: 1091). These numbers suggest that a significant number of jurors mistakenly believed that they were required to vote for the death penalty.

To a linguist, these particular problems are part of the manner in which jury instructions are presented to jurors. Upon hearing instructions that told the jurors that there was no mandatory death penalty with findings of heinousness or future dangerousness, the jurors nonetheless believed that was exactly what the instructions required them to do. The researchers in the Capital Jury Project were primarily social scientists and attorneys, so their attention did not turn to the linguistic construction of the jury instructions, at the same time that they recognized something was going wrong with these results. Another particularly troubling result was the juror's answers to this question: "Would you say the judge's sentencing instructions to the jury simply provided a framework for the decision most jurors had already made?" (Bowers, 1995: 1093). Jurors answering *yes* to this question amounted to 74.1% of the jurors in the study. While most states have instructions telling jurors not to decide until after they begin deliberations, clearly the jurors interviewed in this study began much earlier to make a decision. So once again, we see jurors who are not following the instructions.

In another report of this study, the researchers found that jurors were also confused about mitigation. As William J. Bowers and Wanda D. Foglia noted: "Jurors who believed death is the only acceptable punishment could not have given meaningful consideration of the mitigating evidence, as the law mandates." (Bowers and Foglia, 2003: 51-86). Jurors in the study answered questions about which crimes should receive the death penalty in all circumstances, with a defendant who had a previous murder conviction (71.6%, *yes*) and planned premeditated murder second (57.1%, *yes*) (Bowers and Foglia, 2003: 63). The Capital Jury Project data show that many capital jurors did not understand the instructions that were supposed to guide their deliberations, especially about mitigation. For example, nearly half of the jurors in the study did not realize that they could consider mitigation

factors other than those listed in the instruction, although most of the state instructions explicitly said that they could consider **any** mitigating factor. More than 44% of the study jurors “failed to understand that they were allowed to consider any mitigating evidence.” (Bowers and Foglia, 2003: 67). These study researchers note that these findings about mitigation were “relatively uniform” across 11 of the 13 states (Bowers and Foglia, 2003: 67). Contrary then to what the jury instructions tell them to do, jurors set off on their own path unobstructed by the instructions, because they do not understand them. Jurors also failed to understand in several states “where it is explicitly articulated in the pattern jury instructions” that the standard of proof for mitigation was not “beyond a reasonable doubt,” but the civil standard of “preponderance of the evidence” (Bowers and Foglia, 2003: 69). “Two-thirds of the jurors (66.5%) failed to realize they did not have to be unanimous on findings of mitigation.” (Bowers and Foglia, 2003: 71). Thus, even though jurors had instructions, difficult as they may have been to understand, the jurors simply didn’t apply mitigation in the cases they heard, either because they thought they couldn’t, or didn’t understand the burden of proof for mitigation, or thought they had to be unanimous on mitigation.

The Capital Jury Project had a hand in reopening the question of whether jurors understood the instructions they received from judges in death penalty cases. Jurors in their study not only gave evidence of confusion, but also demonstrated that even when they thought they understood, they were often wrong. Again and again, the Capital Jury Project found that jurors also ignored instructions, applied the wrong standard, or misunderstood especially what mitigation meant.

Linguistic research on jury instructions

Rather than review the extensive and thorough research on jury instructions stretching back over the past 35 years, I summarize here the features that researchers have found in examining jury instructions. I include as Appendix A the list of studies I submitted to the court in the case I described in Footnote 3. Although the Capital Jury Project findings on jury instructions would have been no surprise to the linguists familiar with the area, I list the features for review before I present the analysis of the state of Washington’s pattern death penalty instructions.

Ordering effects:

- Unfamiliar terms may be used before they are defined or alternatively, other terms are used in several instructions but are not explicitly connected in any way.
- The sequence of instructions is not explained to jurors, so the instructions may seem unordered or random.
- The instructions lack explanations or examples.
- The order of the instructions is not typically a chronological first to last structure, or a most important to least important or any other scheme that an ordinary reader might recognize.
- Instead, they are ordered by what James Boyd White called the ‘invisible discourse’ of the law, conventions unavailable to ordinary readers (White, 1984).

Conceptual complexity:

- Often there are terms requiring greater education or familiarity with specialized areas of knowledge.
- Alternatively, jurors are asked to do impossible things such as not beginning to draw conclusions or not to draw on any knowledge not presented in the trial itself.

Technical vocabulary of the law: This issue comes in two parts.

- First, jurors are not familiar with actual legal terms and their legal meanings. This first part would include words and phrases such as *misdemeanant*, *malice aforethought*, *first-degree sexual conduct*, *manslaughter*, or *same elements test*.
- Second, jurors are often not aware that many words have both a common meaning and a specific meaning in the law. This would include words such as aggravation, arrest, search, party or serve. The second set can prove every bit as complicated as the first.

Syntactic or sentence-level issues: Three characteristics of sentences in legal language also affect jury instructions.

- One is the sheer length of sentences. When some observers respond that length alone is not a problem, they are usually discussing the difference between, say, a 10 or 12 word sentence and a twenty-two to twenty-five word sentence. Legal language, however, sometimes produces single sentences that are hundreds of words long. While jury instruction sentences rarely reach that length, instructions quoting statutory language and listing elements necessary to prove a case, can be quite lengthy.
- The other characteristic of sentences in legal language is the tendency to contain multiple embeddings of clauses in the sentences. Not only does processing time increase, but also conceptual struggles may ensue.
- An additional problem may develop with the deletion of relative pronouns and so-called WHIZ-deletions (which is, which are). Although sometime back psycholinguists concluded that these deletions did not affect comprehension, more recent research has found that the deletions most affect readers or auditors who have unfamiliar with the discourse at hand. Thus, an attorney's understanding would not be affected by the deletions, but a layperson's understanding is likely to be affected negatively.

Additional issues: Researchers have examined the effects of negatives in legal language including:

- the use of semi-negatives, such as *barely* or *scarcely*, and negative affixes such as *dis-* or *un-*. Following a series of negatives through a sentence in jury instructions may prove quite difficult.
- In addition to negatives, legal language often uses nominalizations or passivization, and even odd prepositions such as *as to*.

Washington State's death penalty instruction

The State of Washington has a set of pattern criminal jury instructions. There are nine instructions specifically made as part of the complete jury instructions. Those special instructions are listed below:

WPIC 31.01	Advance Oral Instruction
WPIC 31.02.01	Allocution
WPIC 31.03	Introductory Instruction (Capital Cases)
WPIC 31.04	Jurors' Duty To Consult with One Another (Capital Cases)
WPIC 31.05	Burden of Proof—Presumption of Leniency—Reasonable Doubt (Capital Cases)
WPIC 31.06	Question for Jury—Life Without Parole—Definition (Capital Cases)
WPIC 31.07	Mitigating Circumstances—Definition (Capital Cases)
WPIC 31.08	Concluding Instruction (Capital Cases)
WPIC 31.09	Special Verdict Form—Sentencing (Capital Cases).

I examined and analyzed each of these instructions with special attention to WPIC 31.03, WPIC 31.05, WPIC 31.06, WPIC 31.07, and WPIC 31.09. The instructions contained the same problematic features identified in earlier work on jury instruction. In addition, there are particular problems associated with how mitigation is presented and the way in which the final question is phrased, especially the phrase “not sufficient mitigating circumstances to merit leniency.”

WPIC 31.03 shows the problems with **ordering effects**. Throughout this introductory instruction to the jurors about evidence, what evidence consists of, what is excluded from evidence and judgments about witnesses, the listening/reading jurors jumps from what the court considers evidence and law and the requirement that the jurors must follow the court's rules. Then there is a discussion of excluded evidence and then what credibility is. Lawyers' remarks and objections are addressed. Also noted is that order makes no difference. An instruction without ordering effects would begin with a general statement about this instruction being about evidence and the various types of evidence that are included or excluded. Jurors need a structure to follow so that they can organize the material that they are hearing/reading for the first time. The statement made in the instructions that order does not matter is simply impossible cognitively. Order matters in every sort of thinking and “ordering” order away does not change the need for order.

WPIC 31.05 provides good examples of the problems of **conceptual complexity**. First, there is the question of reasonable doubt, about which judges and juries have struggled for a considerable period of time. Added to the conceptual complexity of reasonable doubt is the next concept of “that there are not sufficient mitigating circumstances to merit leniency,” a clause that repeats several times in these instructions. The instruction attempts to inform the jurors that the burden of proof is different for mitigating circumstances. But it does not say so in terms of a burden of proof. Instead, the instruction says that the “defendant is presumed to merit leniency.” Here again, we also find the problem of **ordering effects**. Jurors have been given a definition of reasonable doubt in the Advance Oral Instruction (WPIC 31.01), yet this second definition is different from the first. Moreover, it offers the concept of mitigation as something which can be merited, which most people understand to be “earned,” an odd association for a defendant facing sentencing for a capital offense.

Sentence length is not a significant factor here in interfering with juror comprehension. It appears that sometime in the past that these instructions were shortened. Most of the instructions average between 18 and 20 words per sentence, the level of a high-end public newspaper. Notwithstanding the lack of direct sentence length effects, the reading level of most U.S. newspapers tends toward the 8th grade, while the *New York Times* and the *Washington Post* tend toward the jury instruction averages.

The issue of **deletion of a relative pronoun**, such as *that*, is common in spoken language. So, too, is the deletion of a “which is”. The problem with these deletions in jury instructions is that for lay reader, the pronoun markers are very important to understanding the coming structure. Professionals, by and large, do not notice when those items are missing. An example of a relative pronoun deletion comes in WPIC 31.07 in an optional final statement on mercy: “The appropriateness if the exercise of mercy is itself a mitigating factor [THAT] you may consider in determining whether the state has provide beyond a reasonable doubt that the death penalty is warranted.” The emphasis lost for the lay reader in the missing *that* may make the mercy factor less important.

Technical vocabulary of the law includes a broad territory. Not only do jurors contend with words that have a specific meaning within the law, such as *burden of proof*, they must also contend with words that they know in other ordinary ways but that have special meanings in a legal setting. *Elements* is one of those words with many ordinary meanings, as in parts of something or a chemical element, but in legal texts *elements* refers to specific, statutorily listed parts necessary to prove a particular crime. Both of these terms are found in WPIC 31.01, the Advance Oral Instruction.

Negatives create many problems for jurors processing jury instructions. Worse, as indicated in the Judith Levi study under #9 above, are the words that have subtle negative effects. The question asked of jurors in Washington’s Criminal Jury Instructions for Capital Cases is one that illustrates the enormous problems with negatives. It states:

Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?

When a concept is already complicated, jurors would find it difficult to process the rest of the sentence after the not. The jurors have first been asked to “keep in mind” the defendant’s crime and then asked if they are convinced “beyond a reasonable doubt” that something about “sufficient mitigating circumstances” to “merit leniency.” The prosecution must prove “beyond a reasonable doubt” that the circumstances don’t merit leniency. But the defense needs only to present evidence of mitigating circumstances by a “preponderance of the evidence.” The instruction above gives the prosecutor’s burden but makes no distinction about the defense’s burden. Jurors aren’t being asked if there are “sufficient mitigating circumstances” to “merit leniency.” Instead, they must consider the question as a negative, NOT sufficient circumstances to merit leniency. The juror must contend with 5 concepts: the crime, being convinced, reasonable doubt, sufficient mitigating circumstances and meriting leniency and then turn the whole process into a negative. Having examined the capital trial instructions for the Capital Jury Project states, I think I can say that Washington’s question about mitigation is among the worst possible presentation of the juror’s duty. Moreover, it sounds as if one might somehow earn leniency and given the circumstances that phrase is quite odd. Even worse, the phrase is just plain unusual. In

the 450 million word COCA corpus, there is not a single appearance of the phrase “merit leniency.”

Embeddings, or sentences within sentences, also complicate understanding of this same sentence. I list the clauses below from the sentence discussed above:

1. Having in mind the crime
2. of which the defendant has been found guilty
3. are you convinced beyond a reasonable doubt
4. that there are not sufficient mitigating circumstances
5. to merit leniency?

Embeddings, or sentences within sentences, make processing new information more difficult. Some of the reason seems to relate to George Miller’s original insight that there are limits to our cognitive capacities; some of the reason may relate to changing topics within the full sentence. In this sentence hearer/readers are asked first to think about the crime of which the defendant has been found guilty. That is one topic. But the “real” topic here is mitigation, and the topic of the fourth clause of the sentence, “sufficient mitigating circumstances” to “merit leniency.” First the juror needs to keep the crime in mind, also remembering that the defendant has been found guilty, then drawing in the concept of reasonable doubt, decide if there are “sufficient” mitigating circumstances, not to sentence the defendant to the death penalty, which is not even mentioned in the sentence. Given George Miller’s research and the subsequent research that has confirmed the limitations of cognitive capacity, this sentence is not a reasonable presentation to ordinary jurors. Whatever the reason, readers have more difficult understanding multiply embedded sentences than they do short, simple sentences.

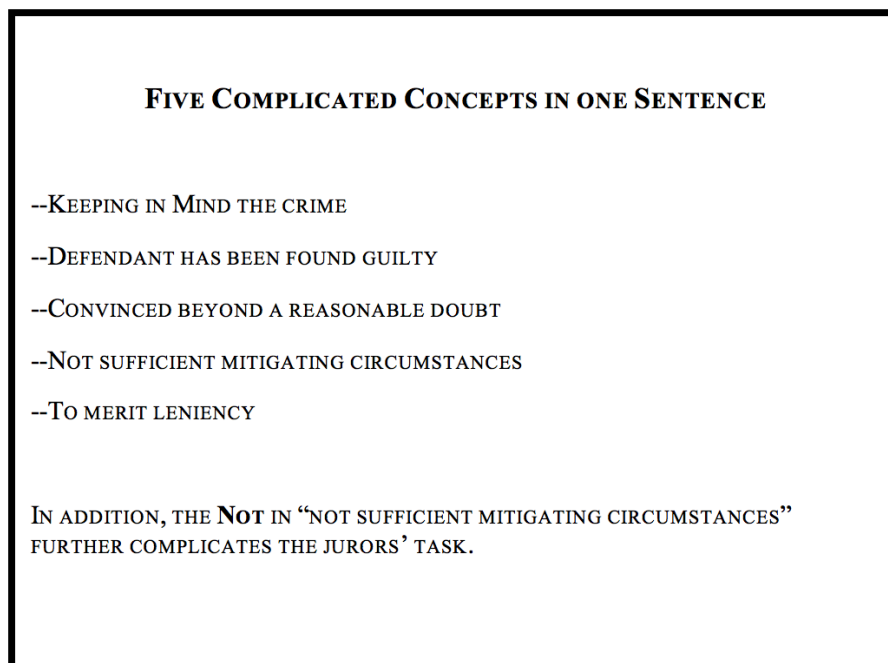


Figure 1. Conceptual Complexity.

Thus, the most critical sentence for jurors in a capital case is presented with serious psycholinguistic barriers: the negative, the semantics of *sufficient*, the five multiple embeddings of the full sentence and it ends with a phrase that cannot be found in the largest

corpus of American English. It is difficult to see the basis on which jurors would make a decision.

Two other factors play a role in complicating jurors' understanding of their task in a death penalty trial. One factor is the difficulty of the word *mitigating*. Peter Tiersma, in "Dictionaries and Death: Do Capital Jurors Understand Mitigation?", indicates that there are "Disturbing indications that jurors do not adequately understand instructions on mitigation in death penalty cases." (Tiersma, 1995: 2). One source of Tiersma's claim is the frequency with which death penalty jurors request a further explanation of the term "mitigating" or "mitigating circumstances." Jury instructions on mitigation do not supply an exhaustive list of possible mitigating factors, so as found in the Capital Jury Project, jurors may limit themselves to considering only those factors listed in the instruction. Additionally, trial judges are wary of giving instructions that go beyond the scope of the pattern instruction, so they are likely to simply reread the instruction to the jury when the jury queries the meaning of mitigation. Mitigation is often paired with aggravation, a term that further complicates the jurors' task because the common use of the word aggravation is not the same as the legal usage. As an absolute number, *mitigating* appears in the *Corpus of Contemporary American English* a little more than once every million words⁶. Its corresponding pair word, *aggravating*, appears even less frequently, less than once every million words. The term itself is not likely to be in the ordinary daily vocabulary of the jurors, so it is no surprise that jurors request further information. But as the Capital Jury Project suggested, juries mostly get it wrong without further support.

Another factor in the death penalty instructions researched first by Hans Zeisel, and expanded and elaborated by linguist Judith Levi, is the strong presumption of death running through the instructions. Her research indicated that "the syntax, semantics, pragmatics, and discourse organization of the instructions all contributed to suggest that a sentence of death was in some way NORMAL or the "default" decision." (Levi, 1993). One way of thinking about how there is a "death default" in instructions is to think of the casual and common life phrase, "life and death." Life comes first. A check in the COCA database finds that "life and death" is commonly associated with words such as "between," "matter of," and "difference of." Entries for "death and life" were almost exclusively associated with Jane Jacobs' book, *The Death and Life of Great American Cities* or some sort of imitation of that title. Thus, when a juror hears or reads "death or life imprisonment," he or she is being told that the usual preference for life is reversed; death is emphasized. In a count on the Washington capital instructions, the "death penalty" was mentioned 11 times, always first when paired with life imprisonment. Some examples from the actual Washington jury instructions may help illustrate below:

WPIC 31.01 whether or not the death penalty should be imposed
 [no life imprisonment alternative given]
 the sentence will be death
 [2 clauses precede] the sentence will be life imprisonment

WPIC 31.02 repetition of above

WPIC 31.02.01 should be sentenced to death
 or which justifies a sentence of less than death

⁶COCA is the widely used, free, 450 million word corpus developed by Mark Davies, Professor at Brigham Young University. <http://http://corpus.byu.edu/coca/>, accessed 09/04/12.

WPIC 31.05 the death penalty will be imposed
leniency . . . which would result in a sentence of life in prison

In each of the above examples, death appears before life. In two contexts above, death is separated from life imprisonment by two interruptive clauses, making the alternative less attached to “option one” death. Even when the instruction allows for life in prison, the instruction is presented in terms of death: “which justifies a sentence of less than death.” Additionally, two other expressions emphasize death first: “other than death” and “sentence less than death.” Thus, jurors are subtly informed that death takes precedence over life.

Conclusion

It is hard to imagine any more important time for jurors to understand their instructions than when they are considering life imprisonment or the death penalty. Yet as with jury instructions in general, there is clear evidence that jurors do not, perhaps cannot, understand how to manage the complexities of capital punishment. With jurors making their decisions on punishment during the guilt portion of the bifurcated trial, or jurors ignoring or misunderstanding what they are being told to do by the instructions, we might think that this would be a priority issue for courts. But clearly it has not been a priority issue. As Peter Tiersma concludes his article on mitigation, he says: “And nowhere is this [communication with the jury] more critical than when a person’s life hangs in the balance.” (Tiersma, 1995: 49). As linguists it may also be time to join forces with other organizations criticizing the death penalty process, so that those organizations also become aware that the instructions are most likely working against the defendant.

References

- Bowers, W. J. (1995). The capital jury: Is it tilted toward death? *Judicature*, 79(5), 220–223.
- Bowers, W. J. and Foglia, W. D. (2003). Still singularly agonizing: Law’s failure to purge arbitrariness from capital sentencing. *Criminal Law Bulletin*, 39, 51–86.
- Charrow, R. P. and Charrow, V. R. (1979). Making legal language understandable: A psycholinguistic study of jury instructions. *Columbia Law Review*, 79(7), 1306–1374.
- Levi, J. N. (1993). Evaluating jury comprehension of illinois capital-sentencing instructions. *American Speech*, 68(1), 20–49.
- Tiersma, P. M. (1995). Dictionaries and death: Do capital jurors understand mitigation? *Utah Law Review*, 1, 1–49.
- White, J. B. (1984). The invisible discourse of the law: Reflections on legal literacy and general education. In R. W. Bailey and R. M. Fosheim, Eds., *Literacy for Life*, 137–150. New York: Modern Language Association.

Appendix A: partial list of linguistic articles and chapters on jury instructions

- Bowers, W. J. (1995-96). The Capital Jury: Is it tilted toward death? *Judicature* 79(5), 220–23.
- Buchanan, R. W., Pryor, B., Taylor, K. P. and Strawn, D. U. (1978). Legal communication: An investigation of juror comprehension of pattern instructions. *Communication Quarterly* 26(4), 31–35.
- Charrow, R. P. and Charrow, V. R. (1979). Making legal language understandable: A psycholinguistic study of jury instructions. *Columbia Law Review* 79, 1306–74.

Stygall, G. - Death penalty instructions to jurors

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Cotterill, J. (2005). 'you do not have to say anything...': Instructing the jury on the defendant's right to silence in the English criminal system. *Multilingua* 24(1-2), 7-24.

Coulthard, M. (2010). Forensic linguistics: The application of language description in legal contexts. *Langage et Societe*, 132, 15-33.

Dumas, B. K. (2000). Jury trials, lay jurors, pattern jury instructions and comprehension issues. *Tennessee Law Review*, 67, 701-42.

Dumas, B. K. (2002). Reasonable doubt about reasonable doubt: Assessing jury instruction adequacy in a capital case. In J. Cotterill, Ed. *Language in the Legal Process*. Houndsmills, UK and New York: Palgrave Macmillan, 246-259.

Dumas, B. K. (2000). U.S. pattern jury instructions: Problems and proposals. *Forensic Linguistics*, 7(1), 49-71.

Elwork, A., Sales, B. D. and Alfini, J. J. (1977). Juridic decisions: In ignorance of the law or in the light of it. *Law and Human Behavior*, 1, 163-190.

Elwork, A., Sales, B. D. and Alfini, J. J. (1982). *Making Jury Instructions Comprehensible*. Charlottesville, VA: Michie.

English, P. W., and Sales, B. D. (1997). A ceiling or consistency effect for the comprehension of jury instructions. *Psychology, Public Policy, and Law*, 3(2/3), 381-401.

Heffer, C. (2006). Beyond 'reasonable doubt': The criminal standard of proof instruction as communicative act. *The International Journal of Speech, Language and the Law*, 13(2), 159-188.

Heffer, C. (2005). Directing the jury and (Re)Viewing the case. In *The Language of Jury Trials: A Corpus-Aided Analysis of Legal-Lay Discourse*. Houndsmills, UK and New York: Palgrave Macmillan, 157-207.

Holland, V. M. and Rose, A. M. (1980). *Understanding Instructions with Complex Conditions*. Document Design Project Technical Report 5. Washington, DC: American Institutes for Research.

Jain, A. and Resnick, P. (2011). Jury instructions regarding death penalty mitigating factors. *Journal of the American Academy of Psychiatry and the Law*, 39(4), 579-580.

Kess, J. F., Hoppe, R. A. and Copeland, A. M. (1985). Formulating jury instructions: Applied linguistics and the law. *Rassegna Italiana Di Linguistica Applicata*, 17(2-3), 243-255.

Levi, J. N. (1993). Evaluating jury comprehension of Illinois capital-sentencing instructions. *American Speech*, 68(1), 20-49.

Luginbuhl, J. (1992). Comprehension of judge's instructions in the penalty phase of a capital trial. *Law and Human Behavior*, 16, 203-218.

Miles, K. S. and Cottle, J. L. (2011). Beyond plain language: A learner-centered approach to pattern jury instructions. *Technical Communication Quarterly*, 20(1), 92-112.

Nicholson, N. S. (2010). Sentencing convicted murderers: Convicted murderers' allocutions or leniency please at sentencing hearings. In M. Coulthard and A. Johnson, Eds. *The Routledge Handbook of Forensic Linguistics*. London and New York: Routledge, 231-248.

Severance, L. J., Greene, E. and Loftus, E. (1984). Toward criminal jury instructions that jurors can understand. *Journal of Criminal Law and Criminology*, 75, 198-233.

Stygall, G. (1994). Text in talk: Preliminary instructions and opening statements and Last words: Final argument and instructions. In *Trial Language: Differential Discourse Process-*

- ing and Discursive Formation*. Amsterdam and Philadelphia: Benjamins, 81–115; 182–190.
- Stygall, G. (1991). Texts in oral contexts: The ‘transmittal’ of jury instructions in an Indiana trial. In C. Bazerman and J. Paradis, Eds., *Textual Dynamics of the Professions*. Madison, WI: U Wisconsin Press, 234–53.
- Tanford, J. A. (1990). The law and psychology of jury instructions. *Nebraska Law Review*, 69, 71–111.
- Tiersma, P. M. (1995). Dictionaries and death: Do capital jurors understand mitigation? *Utah Law Review*, 1–49.
- Tiersma, P. M. (2010). Instructions to jurors: Redrafting california’s jury instructions. In M. Coulthard and A. Johnson, Eds. *The Routledge Handbook of Forensic Linguistics*. London and New York: Routledge, 251–264.
- Tiersma, P. M. (1993). Reforming the language of jury instructions. *Hofstra Law Review*, 22, 37–78.
- Tiersma, P. M. (2001). The rocky road to legal reform: Improving the language of jury instructions. *Brooklyn Law Review*, 66, 1081–1119.
- Vahlenkamp, F. and Jordan, W. J. (1984). A comparative analysis of linguistic complexity in two forms of jury charges. *Journal of Applied Communication Research*, 12(1), 1–16.

Appendix B: summary of *State v. Montfort*

Christopher Montfort, the defendant in this case, was a graduate of the University of Washington’s Law, Society and Justice Program, considered a rigorous political science program. Mr. Montfort wrote his senior thesis on what he considered a battle between police departments and citizens of African American heritage.

Mr. Montfort was accused of killing Seattle Police officer Timothy Brenton, who was ambushed allegedly by Montfort, shooting both Officer Brenton and the trainee he was working with that evening, Brit Sweeney. Sweeney was wounded but not killed.

Some observers speculated that Montfort was extending the conclusions of his senior thesis into action, as Montfort was also accused of vandalism against the police. After graduation, Mr. Montfort had been unable to find a job commensurate with his training and had worked in a collection of jobs, including being a security guard, since graduation.

The Seattle Police Department, upon finding Mr. Montfort’s location, attempted to arrest him. An exchange of gunfire ensued and Mr. Montfort became a paraplegic after suffering wounds to his legs and spine.

At this time, the Governor of the State of Washington has put a hold on all executions in Washington State while he is governor.