Clarity in Death Penalty Jury Instructions:

Ensuring Justice by Explaining the Law to Non-Lawyers

Joseph J. Devney, M.A.
joe@devney.com
510-536-0345

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Abstract

The jury made up of ordinary citizens is an important part of the American justice system. But jurors are not normally people trained in the law, so the laws on which they must base their decisions are explained by the judge using jury instructions, which often consist of standardized texts. This article examines flaws in a jury instruction used in death penalty cases in California, flaws that can lead to misunderstanding of the law on the part of the jurors. The article recommends an approach to creating the instructions that would eliminate these flaws. California's standardized jury instructions were written by a committee made up of judges, lawyers, and law professors. The author argues that the instructions would do their job more effectively if they were written by people whose expertise is in communication rather than in the law, though the information to be communicated must still be provided by judges and other senior members of the legal community.

People are executed in America. The United States is one of the few developed nations that imposes the death penalty. This is an awesome and controversial power that the state reserves to itself. But the American criminal justice system also includes an important safeguard against the state's abuse of this power. Ordinary people, the peers of the person accused, have a place in the process. They make up the jury, and it is the jury, not an agent of the government, that determines whether someone convicted of a capital crime is actually sentenced to death. Juries often choose not to impose the death penalty after they have determined that the accused person is guilty, even if it the option that the prosecutor has argued for.[1] Because the stakes are so high in a capital trial, it is supremely important that the jury members have all the tools they need to do their job well, to make fully informed decisions. But at least in some cases, they don't have these tools. The problem is language: specifically, the language of the jury instructions. The judge's explanation of the law to the jury is not always clear to its intended audience, which is primarily made up of non-lawyers. The process of writing jury instructions needs to include people whose expertise is in communication, rather than law, to help ensure that the information they contain is accessible to lay people.

[1] Dick Burr et al., *An Overview of the Federal Death Pen-alty Process* (2008) Capital Defense Network, http://www.capdefnet.org/fdprc/contents/shared_files/docs/1__overview_of_fed_death_process.asp.

This premise can be illustrated with jury instructions from California that apply to death penalty cases. California revised its jury instructions thoroughly starting in the 1990s. The state had an eight-year project to rewrite both the criminal and civil jury instructions to make them more understandable. The committee that rewrote the instructions consisted primarily of judges, along with lawyers and law professors.

The difficulty with the makeup of this committee is that its members are people immersed in the language of the law in a way that most jurors are not. In 1997, Craig Haney of the University of California, Santa Cruz, and Mona Lynch of Arizona State University researched how well potential jurors comprehended a particular part of the California jury instructions: the list of aggravating and mitigating factors that jurors must consider in deciding whether a defendant convicted in a capital crime should be sentenced to death or to life imprisonment. Haney and Lynch chose this part of the California jury instructions because it seemed to cause people the most difficulty in an earlier study.[2]

One difficulty arises from the use of words that are used exclusively or primarily in legal contexts, and which people who have not gone to law school might not be familiar with. Haney and Lynch tell the following story about an actual capital trial. "In this case, after the jurors had retired to deliberate, the defense attorney attempted to have the judge provide them with a definition of extenuation. The prosecutor opposed this, citing case law indicating that the court was under no obligation to define any terms for the jury. After several minutes of discussion, the judge decided to write to the jurors a note telling them that the words aggravating, mitigating, and extenuating were, as he put it, 'to be understood by their common meaning, period. Further reference, should be made to the instructions.'"[3]

The problem with the judge's solution in this case is that most people—jurors certainly included—need more information than was given in the jury instructions in order to understand the way these terms are meant. The three terms that the judge referred to have little in the way of "common meaning" outside of their legal contexts, and what common meanings they do have might conflict with the meaning that is intended by the legislature and understood by judges and lawyers. Evidence for this can be gleaned by a study of linguistic corpora, large volumes of text annotated for linguistic research purposes. I conducted a search for these three terms in corpora of American English that included both edited text (publications) and spontaneous spoken language. Altogether, the corpora include about five million words. Here are the results for each of the terms that the judge in the case mentioned above refused to define for the jury.

- *Extenuating* appeared only a single time in the five million words, in a sentence that was possibly part of a restaurant review. The sentence read, "This is the only valid, and extenuating, argument that may be advanced in defense of the reprehensible attitude of the common wine waiter."

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[2] Craig Haney & Mona Lynch, *Clarifying Life and Death Matters: An Analysis of Instructional Comprehension and Penalty Phase Closing Arguments* Vol. 21, No. 6, Law and Human Behavior, 575, 576 (1997).
[3] Craig Haney & Mona Lynch, *Clarifying Life and Death Matters: An Analysis of Instructional Comprehension and Penalty Phase Closing Arguments* Vol. 21, No. 6, Law and Human Behavior, 575, 585–586 (1997).

- *Mitigating* appeared five times, and so could possibly have a "common usage" that the jurors could draw on. But on closer inspection, this turned out not to be the case. Four of the five sentences occurred in discussions of jury trials, probably involving the death penalty. In these cases, the speaker or writer seemed to be consciously quoting a phrase from the law, rather than exhibiting knowledge of a "common usage" outside the legal context.
- *Aggravating* does seem to have a meaning in "common usage." But it is not the one the judge probably expected. In the corpus of spoken language, the word "aggravating" was used six times, always in the colloquial sense of "annoying." The legal meaning of the word is closer to "making [something] worse."

Other words in the jury instructions that some percentage of jurors might not feel confident about using correctly include *enormity* (used only once in the corpora) and *gravity* (used almost exclusively in the corpora to refer to the physical attraction between masses, not to mean "seriousness").

This is not an insurmountable problem, however. The jury instructions could have been written in such a way that the jurors would understand words like these, ones that have little existence outside the language of the law. If that had been done, the prosecutor's objection to defining terms for the jury would not have been an issue for the defense attorney. And it is not necessary to "dumb down" the instructions by eliminating these words, so long as the words are explained adequately in the jury instructions. Unfortunately, this doesn't seem to have been done in the instructions that Haney and Lynch wrote about. In their study of these jury instructions, "most subjects offered substantially incorrect definitions of the central terms of the penalty phase instructions. Further, the inaccuracies were greatest for the two terms related to the lessening of sentencing severity—'mitigating' and 'extenuating.'"[4]

So the most obvious difficulty with the instructions is the lexicon, or vocabulary. The legal profession uses words that are not used by most people, or assigns specific meanings to words that are not the meanings that most people attach to those words. But the lexicon is not the only thing that makes these jury instructions hard to understand. Their structure at the sentence level and above can interfere with comprehension, partly because the instructions are read out loud before, or instead of, being given to the jurors on paper. Complex material can be more difficult to understand when presented orally, because the hearer does not have the opportunity to pause and consider one piece of information before the next one comes, or to go back and review sections in order to understand them better.

Haney and Lynch tested how well college student volunteers comprehended the list of aggravating and mitigating factors in California death penalty cases when read aloud. This list has eleven items on it, taken from the statute.[5] Except for the first item, which refers to the circumstances of the crime itself, and the last one, which instructs the jury what to do about any mitigating factors that did not appear in the previous ten items,

[4] Craig Haney & Mona Lynch, *Clarifying Life and Death Matters: An Analysis of Instructional Comprehension and Penalty Phase Closing Arguments* Vol. 21, No. 6, Law and Human Behavior, 575, 579 (1997).
[5] California Penal Code §190.3.

the factors don't seem to be in any particular order, nor are they separated into groups of related items. This lack of organization makes comprehending and remembering the factors more difficult.

The reason for the difficulty is a limitation of the way our brains store information. George Miller of Princeton University identified "the magical number seven," meaning that the human brain can keep track of approximately seven "chunks" of information at a time.[6] The approximation is often given as "seven plus or minus two." If read a list of unrelated items, people can accurately remember five to nine of them. The list of mitigating and aggravating circumstances in the statute is longer than that, and each factor can contain multiple pieces of information.

And the factors themselves seem "wordy," longer than they need to be. This also makes the material hard to digest.

Creating the Current Instructions

The lists of aggravating and mitigating factors in the CALCRIM jury instructions in current use and in the CALJIC instructions that preceded them were created in the same way. In both cases, the factors in the statute titled "Determination of death penalty or life imprisonment; evidence of aggravating and mitigating circumstances; considerations," were copied nearly verbatim into the jury instructions. The authors of the jury instructions eliminated the prefatory material that explained what is allowed and what is to be done by the court, and replaced it with an address by the judge to the members of the jury.

Because they were adapted from the language of the statute using the same procedure, the two sets of instructions are very similar, even though the CALCRIM rewrite was intended to make the instructions more easily understood by jurors. The CALCRIM instructions do have some elements that make them more helpful to the jurors. Most importantly, the CALCRIM instructions include definitions of *aggravating* and *mitigating* for the jurors. The word *extenuating* is not defined, however.

The CALCRIM committee made wording changes to the descriptions of the factors themselves. They changed sentences in the passive voice to the active voice. For example, "the victim was a participant in" became "the victim participated in." This construction cuts down on the number of words the hearer needs to process mentally. In addition, the sentence is easier for people to comprehend when the subject of the sentence is the "doer" of the action, rather than the recipient. (In linguistic terms, the *agent* rather than the *theme*.)

The committee also eliminated words by finding more succinct ways of expressing a concept. For example, "the commission of the offense" was changed to "the murder." And they consistently changed "whether or not" to simply "whether."

Unfortunately, some of the wording changes made by the CALCRIM committee were not improvements. Where the statute referred simply to "the crime," the jury in-

[6] George Miller, *The Magical Number Seven, Plus or Minus Two: Some Limits on Our Capacity for Processing Information*, Vol. 63, Psychological Rev., 81–97 (1956)

structions repeatedly made reference to "the crime of which he was convicted in this case," adding unnecessarily to the overall wordiness. And in item (h), they broke the parallelism that had been included in the original. The statute refers to "mental disease or defect, or the affects of intoxication." The revision instead says, "mental disease, defect, or intoxication." This construction can be interpreted in two different ways, with the adjective *mental* modifying either *disease* alone or to all three nouns, *disease*, *defect*, and *intoxication*. It cannot modify *disease* and *defect* but not *intoxication*, which was the intent of the statute.

Improving on the Current Instructions

The CALCRIM committee took on an ambitious project, and improved the jury instructions in many ways. But I believe the results would have been even more effective if the committee had been organized with a different perspective on the roles of the members. The judges, lawyers, and law professors who made up the committee should be seen as the subject matter experts. They know the law. They know what information has to be imparted to the jurors. But the design and creation of the jury instructions themselves should have been done by one or more specialists whose expertise is in communication, rather than in the law. Unlike a judge or a law professor, the typical juror never went to law school, and probably never even went to college. (Only about one-fourth of Americans over age 25 have college degrees.[7]) As was explained earlier, the implication of this difference in background for understanding legal language is not always appreciated by senior members of the legal profession, because most of them have long since internalized so much technical vocabulary.

Another concern is the way the material is presented. As suggested by the Miller material from *The Psychological Review* referred to above, research has been done on what makes text more or less comprehensible. But this is not usually something that lawyers are aware of, because it is not part of their professional lives. Members of other professions, linguists and technical writers among them, are aware of this research, and can put it to use in projects that aim to improve comprehension of oral or written text. The next sections of this paper explain some of the changes that such people might recommend.

Recommended Lexical Changes

As was shown by Haney and Lynch, the terms *extenuating*, *aggravating*, and *mitigating* are misunderstood by many people. *Extenuating*, or *extenuating circumstances*, can be replaced by paraphrases without much trouble. "Circumstances that make the defendant's behavior more understandable" might be one such replacement for *extenuating*. But the words *aggravating* and *mitigating* are more problematic, because they are tied so closely to the legal reasons for the list. One solution would be to use these terms less frequently. And when they are used, they can be accompanied by a gloss, possibly even contrasted for clarity. For example: "An aggravating factor is one that makes the crime more

[7] U.S. Census Bureau News Release, *High School Graduation Rates Reach All-Time High*, June 4, 2004, http://www.census.gov/Press-Release/www/releases/archives/education/001863.html

serious, and the defendant more deserving of punishment. A mitigating factor is the opposite: it makes the defendant less deserving of punishment."

The CALCRIM instructions also added another problematic word, *enormity*, which means, roughly, "viciousness," or "horrific quality," and that is obviously the meaning intended by the authors. But again, this is not a common word, and it is often taken to refer to size because of its similarity to the word *enormous*. Throughout the instructions, the author should be careful to identify words that might cause confusion, and either eliminate them or make their meaning clear to people who are not trained in the law.

Haney and Lynch noted that factor (e), that the victim participated in his or her own death or consented to the murder, was especially difficult, and was misunderstood by 37 percent of their subjects. This may be because the circumstance it describes is counterintuitive. (It may have been included in the statute to address the issue of assisted suicide.) There is a simple change that might help to improve jurors' understanding of this factor: print the word "victim" in italics. This will serve as an indication to the judge reading the instruction out loud to emphasize the word, and it will also call attention to the word if the jurors receive a printed copy of the instruction to read.

Recommended Sentence-level Changes

The jury instructions reproduce the descriptions of the aggravating and mitigating factors as they appear in the statute, with the minor wording changes identified above. But the rewording could have been more thorough. The descriptions are not sentences, but only parts of sentences. The first one is a noun phrase, and the remainder are *whether*-clauses. And these sentence fragments are not preceded by anything that could be interpreted as the first part of a sentence that would include the phrase that identifies the factor.

This structure puts an unnecessary cognitive load on the hearer. The juror must disregard the apparent beginning of the sentence, and mentally insert "you must determine" before the word *whether* for each factor. Then the juror must reinterpret the result as a question he or she must answer. It would be best to remove this burden from the juror, and replace a construction like "the factor is whether the defendant acted under duress" with the question that is the end result of the mental processing: "Did the defendant act under duress?"

In addition to this overall change to the phrasing of the factor descriptions, individual factors can be reworded to improve comprehension, mostly by eliminating repetitive words and phrases.

Recommended Structural Changes

Six of the eleven aggravating or mitigating factors in the CALCRIM instruction include the phrase "the crimes of which he was convicted in this case." This phrasing is not part of the statutory language, and was apparently added by the committee to avoid ambiguity. But the repetition and wordiness added by this change brings in other comprehension difficulties. To avoid such repetition, the phrase can be removed from the in-

dividual factor descriptions and placed instead at the beginning. That is, preface the list with a sentence like, "When I refer to 'the crimes,' I mean specifically the crimes that you convicted the defendant of in this case." This allows the removal dozens of words from the list itself, without removing any meaning, thus speeding comprehension.

Of course the jurors need to know about all the aggravating and mitigating factors that are identified in the statute. But the order of the factors as they appear in the statute may not be the best way to present them to the jurors. Recall what was mentioned earlier about the human brain's capacity to hold about seven chunks (Miller's word) of information in what might be called "working memory" at one time. A list of seven random items is seven chunks. But a chunk is not a fixed size. For example, people can easily remember a telephone number, seven random digits. Adding an area code brings this up to ten digits, beyond the "seven plus two" limit. But an area code can be seen as just one chunk instead of three, because the digits come as a unit and represent a single thing in the person's brain—perhaps the area code 212 is associated with "New York City." Research cited by Miller has shown that grouping elements in categories can improve people's comprehension and retention of information. This can be accomplished in the case of this jury instructions by finding logical ways to organize the aggravating and mitigating factors. One approach would be, for example, to group all the factors relating to the defendant's mental state together.

If the factors are rearranged, their letter designations will no longer agree with those in the statute. That is not a problem. Even if the letter designations are necessary in the statute, they have little meaning in the jury instruction.

An ordered list, that is, one in which the items are numbered (or lettered, in this case) in sequence, implies that the items themselves have some intrinsic sequence. Steps in a procedure which must be followed in order are numbered. ("1. Turn on device. 2. Insert DVD. 3. Press *Play*.") Priorities can be numbered. (If the President dies, the Vice President is the first in line to become president in his place, and the Speaker of the House is second in line.) But not every list needs to be numbered. There are two logical sequential rankings for District Court, Appellate Court, and Supreme Court (starting or ending with the Supreme Court). But there is none for Judicial Branch, Legislative Branch, and Executive Branch, because they are co-equal.

The aggravating and mitigating factors are in this second category. There no reason for factor (c) to be seen as a prerequisite for factor (d), or more important, or to have any kind of priority over factor (d). The factors are more properly designated by bullets, or simply paragraph breaks, than a letter sequence. They can then be reordered without disrupting any inherent sequence.

Conclusion

The jury system can be seen as a safeguard against abuse of government power. The court's instructions to the jury, explaining how they must apply the law, are an important part of that safeguard. But research suggests that the jury instructions in California, in particular the list of criteria the jurors must use to determine whether to sentence a

convicted murderer to death, do not do their job well. People can listen to the instructions three times (as they did in Haney and Lynch's experiment) and still misunderstand what the instructions say. In this paper I have tried to describe both the problems with the current jury instruction for aggravating and mitigating factors and some potential solutions. The solutions come from the fields of linguistics, psychology, and technical communication.

The problems with jury instructions I have identified and addressed are not limited to California, or even to capital trials. Many states have adopted standardized jury instructions for death penalty cases, as a way to ensure that the sentence is applied consistently. Therefore, states besides California have analogous lists of aggravating and mitigating circumstances, and possibly could use similar reworking to make them more effective. In addition, Haney and Lynch wrote that such comprehension problems plague many standardized jury instructions used in criminal trials, not just death penalty trials, that "their arcane language and convoluted sentence structure sometimes render them incomprehensible except to those trained in law."[8]

If and when a state or the federal government chooses to rewrite its death penalty jury instructions, it would be best for the jurors—and the people whose lives they touch in such a dramatic way—if the job weren't left entirely in the hands of experts in the law, but shared with experts in communication. This change in the current procedure is important to the integrity of the American criminal justice system.

Resources

Burr, Dick, Bruck, David, and McNally, Kevin. "An Overview of the Federal Death Penalty Process." Capital Defense Network.
http://www.capdefnet.org/fdprc/contents/shared_files/docs/1__overview_of_fed_death_process.asp.

Haney, Craig, and Lynch, Mona. "Clarifying Life and Death Matters: An Analysis of Instructional Comprehension and Penalty Phase Closing Arguments." *Law and Human Behavior*, Vol. 21, No. 6, 1997, pp. 575–595.

Miller, George. "The Magical Number Seven, Plus or Minus Two: Some Limits on Our Capacity for Processing Information." *The Psychological Review*, 1956, vol. 63, pp. 81–97.

"High School Graduation Rates Reach All-Time High." U.S. Census News Release, June 4, 2004.
http://www.census.gov/Press-Release/www/releases/archives/education/001863.html

Linguistic Corpora

The Switchboard Corpus
http://www.ldc.upenn.edu/Catalog/readme_files/switchboard.readme.html

[8] Craig Haney & Mona Lynch, *Clarifying Life and Death Matters: An Analysis of Instructional Comprehension and Penalty Phase Closing Arguments* Vol. 21, No. 6, Law and Human Behavior, 575, 576 (1997)

The Brown Corpus
http://icame.uib.no/brown/bcm.html

The Wall Street Journal Corpus
From the Linguistic Data Consortium at the University of Pennsylvania.
http://www.ldc.upenn.edu/