ESSAYS

REGULATING DECISION EFFECTS OF LEGALLY SUFFICIENT JURY INSTRUCTIONS

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INTRODUCTION

This article is in large part a response to the Supreme Court's recent decision in *Weeks v. Angelone*[1] as well as a response to two recent empirical studies that address issues of ineffective jury instructions.[2] These three sources illustrate a long-standing problem: jury instructions can have unintended consequences that undermine their purpose even when their language is formally accurate. Jurors misinterpret charges, sometimes to the point of applying an understanding that contradicts the instruction, despite the fact that courts have approved the instructions as legally sufficient. Yet, as *Weeks* shows, prevailing standards of review ignore this problem.

To illustrate the decision effects of jury instructions, consider the jury that convicted Lonnie Weeks of capital murder and sentenced him to death. During a capital sentencing proceeding, the Constitution requires that

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1. 120 S. Ct. 727 (2000).

2. *See* Stephen P. Garvey, Sheri Lynn Johnson & Paul Marcus, *Correcting Deadly Confusion: Responding to Jury Inquiries in Capital Cases*, 85 CORNELL L. REV. 627 (2000); Lawrence M. Solan, *Refocusing the Burden of Proof in Criminal Cases: Some Doubt About Reasonable Doubt*, 78 TEX. L. REV. 105 (1999).

jurors consider any mitigating evidence that would lead them to recommend a life sentence and that they be informed of their unbounded authority to recommend life based on that evidence.[3] To explain the law on mitigating evidence to the jurors, Weeks' trial judge chose to give a pattern instruction offered by the state[4]—an instruction later held constitutionally adequate by the Supreme Court[5]—rather than a version offered by the defense. During its sentencing deliberations, Weeks' jury told the trial judge that it did not understand the instruction. The judge reread the original instruction, rather than clarifying the instruction in different language. In *Weeks v. Angelone*, the Supreme Court affirmed the Fourth Circuit's holding that the Eighth Amendment requires no more;[6] if a jury expresses confusion about a death penalty instruction, the judge can "clarify" that confusion by simply rereading the same instruction. The Court presumed that a jury would ask for further clarification if it were *still* confused.[7]

The grant of certiorari in *Weeks v. Angelone* raised a puzzle that the decision did not resolve: how can an instruction already held constitutionally adequate ever be inadequate? *Weeks* tells us only that an instruction is not inadequate just because the jury expresses one question about its meaning, as long as a court still considers misunderstanding unlikely.[8] Yet *Weeks* is merely one example of an endemic problem with jury instructions in criminal trials. Judges routinely choose among alternative instructions, but they do so mostly or solely with regard to whether the instruction meets a standard of minimum accuracy. They give little regard to whether an alternative charge is clearer or more likely to be correctly applied by a jury, and they have no legal obligation to do so.[9] One instruction is often better than another, as two recent studies (and

3. *See* Buchanan v. Angelone, 522 U.S. 269, 277 (1998); Mills v. Maryland, 486 U.S. 367, 384 (1988); Hitchcock v. Dugger, 481 U.S. 393, 398–99 (1987); Eddings v. Oklahoma, 455 U.S. 104, 112–14 (1982). In *Buchanan*, unlike *Weeks*, the jury expressed no confusion to the judge about the instruction. *Buchanan* affirmed the constitutionality of the instruction in that context; *Weeks* clarified that the instruction is also adequate when a jury tells the court it does not understand the instruction.

4. Pattern instructions are drafted by pattern jury instruction committees, rather than by parties to litigation.

5. *See Buchanan*, 522 U.S. at 269; *Weeks*, 120 S. Ct. at 732 (2000).

6. 120 S. Ct. at 733–734, *aff'g* 176 F.3d 249, 260 (4th Cir. 1999).

7. *See id.* at 734.

8. After *Weeks*, there is at least a two-question minimum before the Constitution requires a legally accurate capital jury instruction to be rephrased to alleviate juror confusion.

9. *See* Garvey et al., *supra* note 2, at 644 ("the Constitution rarely requires better practice simply because it is better").

much other research) show.[10] Whether an instruction is unclear to juries or misinterpreted by them is largely an empirical question on which we can gather fairly dependable data. Professors Garvey, Johnson, and Marcus ("GJM") recently tested the *Weeks* instruction with mock jurors and found it did not clarify misunderstanding, although a reworded clarifying instruction conveying the same legal rule, based on Weeks' proposed instruction, did.[11] On those findings, they urged the Court to require a clarifying instruction in response to juror questions.[12]

Interestingly, Larry Solan's recent article in the *Texas Law Review* discusses a comparable problem for a different and more common instruction. Solan's topic is the wide variety of instructions used to convey the criminal law's traditional standard of proof—proof beyond a reasonable doubt. Solan persuasively argues, on the basis of empirical jury experiments and linguistic analysis, that some widely employed descriptions of the reasonable-doubt standard mislead jurors. Many reasonable-doubt instructions, when not correctly understood by jurors, prompt jurors to convict more readily in weak cases by leading jurors to hold the government to a lower standard or even to shift the burden of proof to the defendant. Solan's solution is to urge all jurisdictions to adopt New Jersey's reasonable-doubt instruction, which research indicates jurors interpret correctly.[13]

Weeks, the GJM study based on it, and Solan's article all raise two larger issues. Substantively, they reveal the critical gap between the law's current conception of acceptable instructions and those that in fact have a strong probability of fulfilling their constitutional purpose. Less obviously, they raise the procedural issue of how jury instructions are constructed in the first place—how trial judges choose the words that will convey law to juries—and thus how the substantive problem recurs, endemically, in criminal trials. Instructions have effects beyond those that the law currently regulates. Solan shows that these effects sometimes undermine the purpose of legal rules and are unregulated by the constitutional law of instructions. Unfortunately, constitutional law provides no basis for arguing or mandating that courts employ the best, clearest instruction among several options. A means of prompting judges to pay attention to instructions' actual effects on jurors as well as their formal legal accuracy,

10. *See* Solan, *supra* note 2, at 119–31 (citing and describing several jury studies that indicate choices in instruction phrasing significantly affect juror understanding of law).

11. *See id.* at 638.

12. *See id.* at Part III.

13. *See* Solan, *supra* note 2, at 119–31, 144–47.

thereby directing the systemic development of instructions toward the clearest and best statements of law, is necessary.

This Essay proposes a two-pronged systemic response that would improve the *evolution and development* of criminal instructions. It argues for (1) building on established but under-utilized standards of review that stress juror understanding and (2) adopting a new criminal procedure rule requiring trial judges to use the defendant's suggested instruction in a critical subset of jury charges. The article defends these ideas and situates the two recent studies in the larger context of recent scholarship that builds on cognitive science and behavioral theory.

The Essay unfolds in three parts. Part I illustrates the gap between instructions' legal adequacy and real effectiveness. Parts II and III describe alternate means for solving the problem. Part II argues for revising the standard of review for jury instructions, of which the standard in *Weeks* is the most recent, ill-conceived version. Part III, on the assumption that *Weeks* signals that courts will not soon take seriously the effectiveness of jury instructions, offers an alternative route to achieve the same result. It proposes a simple rule of criminal procedure that would apply to a critical subset of jury instructions and govern judges' choices between alternative versions of these instructions.

I. ADEQUACY VERSUS EFFECTIVENESS OF JURY INSTRUCTIONS

A. DIFFERENCES IN EQUALLY ACCURATE INSTRUCTIONS

Weeks is typical of serious criminal trials in that both parties offer competing instructions on key points of law and the trial judge chooses one (or fashions another). Every trial lawyer knows the pro forma nature of charging conferences. For rules on which an instruction has been approved on appeal or by a pattern jury instruction committee, trial judges often will not even hear argument for alternatives. Judges, at trial and on appeal, are concerned mostly with whether the instruction meets the minimum standards of constitutionality (and, sometimes, fidelity with statutes that the instruction describes).[14] Call this the legal sufficiency of instructions.[15]

14. *See, e.g.*, United States v. Sun-Diamond Growers, 526 U.S. 398, 406–12, 414 (1999) (reversing a conviction because jury instructions offered an overly broad explanation of the elements of the statute); United States v. Hassouneh, 199 F.3d 175, 179–82, 184 (4th Cir. 2000) (same).

Yet many different instructions can be legally sufficient to convey the same point of law. Those instructions can vary greatly in their clarity to lay people and whether they actually lead jurors to understand and act upon a rule's purpose. Call this the *decision effect* of instructions.

Trial lawyers are well aware of these decision effects, which is why they litigate over legally equivalent language. Like Weeks' trial counsel, they behave as if seemingly minor differences in legally accurate instruction alternatives are of great consequence.[16] Parties fight over decision effect but are forced to do so largely in terms of legal sufficiency. Yet, when two instructions are both legally sufficient, advocates have no *legal* grounds on which to argue.[17] Decision effect is unregulated by law and is, therefore, left to trial judges' discretion. To make matters worse, trial judges face strong institutional incentives to ignore the decision effects of instructions.[18]

Both the GJM study and Solan's research reveal decision-effect problems. Solan shows that some reasonable-doubt instructions, although constitutional, have decision effects that conflict with a rule's purpose. For instance, the instructions mislead jurors into expecting the defendant to

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15. *See* CHARLES ALAN WRIGHT, 2 FEDERAL PRACTICE AND PROCEDURE § 482, at 688–89 (2d ed. 1982) ("It is enough that the charge adequately and correctly covers the substance of the requested instructions."). Judges are required to express such a charge in no particular language.

16. One typical example is the recent case of *Yarbrough v. Commonwealth*, 519 S.E.2d 602 (Va. 1999). There, the trial judge instructed the jury in the sentencing phase of Yarbrough's capital trial that it could recommend either death or "a life sentence." *Id.* at 611. The jury queried whether life really meant life or some term of years. Even though Virginia law is clear—there is no parole for capital murder—the prosecution strongly resisted the simple clarification that "life means life" (as the defense strongly urged). *Id.* at 606. Both sides knew the implications for the jury's decision of the language choice; death was a stronger possibility under the trial court's language.

17. Various statements of the rule suggest that legal accuracy is a court's only obligation when instructing a jury. *See, e.g.*, United States v. Sheffey, 57 F.3d 1419, 1430 & n.11 (6th Cir. 1995) (Parties are not entitled to instructions in "exact language requested even if they correctly state the law" because "[i]t is enough that the charge adequately and correctly covers the substance of the requested instructions."), *cert. denied*, 516 U.S. 1065 (1996); United States v. Akers, 987 F.2d 507, 513 (8th Cir. 1993) (same); United States v. Ribaste, 905 F.2d 1140, 1143 (8th Cir. 1990) ("A party is not . . . entitled to a specific formulation of an instruction and the district court is given broad discretion in framing the language of an instruction."), *abrogated on other grounds*, United States v. Wells, 519 U.S. 462, 489 (1997); United States v. Lopez, 885 F.2d 1428, 1434 (9th Cir. 1989), *cert. denied*, 493 U.S. 1032 (1990) ("'So long as the instructions fairly and adequately cover the issues presented, the judge's formulation of those instructions or choice of language is a matter of discretion.'" (quoting United States v. Echeverry, 759 F.2d 1451, 1455 (9th Cir. 1985)).

18. Some appellate courts affirmatively discourage trial courts from attempting to explain or clarify instructions. *See, e.g.*, United States v. Blackburn, 992 F.2d 666, 668 (7th Cir. 1993) ("[D]istrict courts should not attempt to define reasonable doubt."); United States v. Adkins, 937 F.2d 947, 950 (4th Cir. 1991) ("This circuit has repeatedly warned against giving the jury definitions of reasonable doubt . . . ."), *cert. denied*, 510 U.S. 949 (1993).

present evidence raising an articulable doubt about guilt. Therefore, the instruction's effect conflicts with the purpose and normative commitments of the rule it describes. The result is a real risk of hidden, sometimes inadvertent, pro-government bias in constitutionally required adjudication rules.[19]

A pro-government bias is Solan's concern, and also Mr. Weeks'. The mitigation-evidence rule seeks to ensure that the jury considers such mitigating evidence and knows of its authority to give a life sentence based on that evidence.[20] The GJM study demonstrates that Mr. Weeks' proffered instruction clearly prevails as the option best conveying that idea.[21] The clearer instruction reduces the odds of the jury misunderstanding its authority to forgo the death penalty on the basis of mitigation evidence. Although two instructions may be fungible in terms of their legal content (both are constitutional and sufficiently describe statutory law), they may nonetheless evoke siguificantly different responses from the jurors who interpret and apply them. Appellate review now assesses only the legal sufficiency of instructions.

The reasonable-doubt standard can be conveyed any number of ways.[22] Solan surveyed an array of constitutionally adequate instructions on reasonable doubt through the lenses of empirical literature and linguistic analysis, and found many of those instructions to be inappropriately biased toward the state. The reasonable doubt instruction used in Wyoming, for instance, leaves nearly a third of Wyoming jurors believing the defendant must prove his innocence once the state offers evidence of guilt.[23] Experiments testing five different constitutional instructions found some led to much higher conviction rates than others in cases predetermined to be weak for the state. Only one instruction—proposed by the Federal Judicial Center and describing reasonable doubt as proof that leaves you "firmly convinced" of the defendant's guilt[24]—led jurors to acquit

19. The reluctance of trial courts such as the one in *Weeks* to adopt a defendant's instruction suggests that the bias is more than inadvertent. By accepting a defendant's proposed instruction, a trial judge denies the defendant a grounds for appeal on that instruction, *see* FED. R. CRIM. P. 30, thereby reducing the risk of reversal. The choice of a state-offered instruction suggests either a pro-government bias or a strong status-quo bias effect.

20. *See* cases cited *supra* note 3.

21. *See* Garvey et al., *supra* note 2, at 638.

22. *See* Solan, *supra* note 2, at 114 (compiling several examples but noting "[t]here are a host of these definitions" and so the "sampling does not cover the entire range" of instructions).

23. *See* Solan, *supra* note 2, at 119–20 (citing Bradley Sexton, *How Well Do Jurors Understand Jury Instructions? A Field Test Using Real Juries and Real Trials in Wyoming*, 33 LAND & WATER L. REV. 59 (1998)).

24. *See* FEDERAL JUDICIAL CTR., PATTERN CRIMINAL JURY INSTRUCTIONS NO. 21, at 28 (1988).

consistently in a case the experimenters viewed as clearly possessing a reasonable doubt.[25] Whether or not the experiment correctly identified an "easy acquittal" scenario, the data clearly support the conclusion that some instructions led jurors to convict more readily than others. Other studies confirm this finding.[26] Despite their constitutional adequacy, some instructions have the real-world decision effect on jurors of easing the prosecution's burden and otherwise misleading the jury. Accurate instructions can serve normative goals in widely varying ways. Through empirical studies, we have a true sense of the very different real-world effects that instructions can have on jurors.

Weeks presented a slightly different problem. The state offered a pattern jury instruction to explain the mitigation standard, the key portion of which read:

> If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt, either of the two alternatives [aggravating factors], and as to that alternative you are unanimous, then you may fix the punishment at death; *or, if you believe from all the evidence that the death penalty is not justified,* then you shall fix the punishment for the defendant at life imprisonment . . . .[27]

The defense offered alternative language to make the same point: "Even if you find that the Commonwealth has proved one or both of the aggravating factors beyond a reasonable doubt, you may give effect to the evidence in mitigation by sentencing the defendant to life in prison."[28]

The federal district court that addressed Wecks' habeas petition noted that the defendant's proposal was not only legally accurate but "certainly a clearer statement of the law than the instruction actually given to the jury."[29] That conclusion was confirmed empirically by the Garvey, Johnson and Marcus study with Virginia jurors.[30] Each instruction is legally sufficient; each conveys the constitutional rule in some minimal

25. *See id.* at 120–22 (citing Irwin A. Horowitz & Laird C. Kirkpatrick, *A Concept in Search of a Definition: The Effects of Reasonable Doubt Instructions on Certainty of Guilt Standards and Jury Verdicts*, 20 LAW & HUM. BEHAV. 655 (1996)).

26. *See id.* at 122–31 (reviewing studies). *See also id.* at 132–44 (linguistic analysis supporting same conclusion).

27. Weeks v. Angelone, 4 F. Supp. 2d 497, 534 (1998) (quoting trial court instruction) (emphasis added), *appeal denied and habeas petition dismissed*, 176 F.3d 249 (4th Cir. 1999), *aff'd*, 120 S. Ct. 727 (2000).

28. *Id.* at 534. *See also* Garvey et al., *supra* note 2, at 629, 635 (employing these instructions with mock jurors).

29. *Weeks*, 4 F. Supp. 2d at 535.

30. *See* Garvey et al., *supra* note 2 at 625–39.

sense. Yet in making the choice between the two, the issue—explicitly on appeal, somewhat implicitly at trial—is never maximum clarity. In the capital murder context at least, the issue is legal accuracy plus whether there was a "reasonable likelihood" the instruction "prevent[ed]" the jury from considering evidence.[31]

The importance of phrasing on comprehension and decisionmaking is clear not only from jury research, but from a wider range of cognitive and behavioral research that in recent years has caught the attention of legal scholars,[32] particularly in contract, tort and administrative law.[33] Behavioral research in recent decades has identified a wide range of cognitive heuristics and patterns of bias that demonstrate *consistent, yet nonrational* decisionmaking patterns.[34] Choices among instructions to convey the same legal rule present the same issues addressed in the decision research on *framing effects*.

Framing effects describe significant changes in choices arising from seemingly insignificant differences in presentation of options. For instance, in one early experiment, two groups of participants considered options for a vaccine program to address an epidemic expected to kill 600 people if no action were taken. Presented with two options, participants consistently chose more readily a vaccine program under which "200 people will be saved," than did a comparable group offered a program under which "400 people will die."[35] Whether the choice was framed positively (people saved) or negatively (people killed) affected decisions, although the language described identical outcomes (a vaccine that would save 200 out of 600).[36] Framing effects also exist in consumer settings. People prefer to forgo a "discount" than to incur a "surcharge," so the credit lobby prefers higher prices for goods purchased by credit card to be

31. Buchanan v. Angelone, 522 U.S. 269, 276 (1998); Boyde v. California, 494 U.S. 370, 380 (1990). Again, in other contexts, the issue can be whether an instruction accurately describes statutory law. *See* cases cited *supra* note 14.

32. *See* Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630, 645 (1999) (describing behavioral research as having "given rise to a cascade of [law review] articles" and predicting this to be "the most significant conceptual development in legal theory since the emergence of law and economics").

33. In contract law, see, e.g., Russell Korobkin, *The Status Quo Bias and Contract Default Rules*, 83 CORNELL L. REV. 608 (1998). In tort law, see, e.g., Hanson & Kysar, *supra* note 32. In corporate law, see, e.g., David Millon, *Default Rules, Wealth Distribution, and Corporate Law Reform: Employment at Will Versus Job Security*, 146 U. PA. L. REV. 975 (1998). In administrative law, see, e.g., Cass Sunstein, *Endogenous Preferences, Environmental Law*, 22 J. LEGAL STUD. 217 (1993).

34. For a recent survey of the literature, see Hanson & Kysar, *supra* note 32, at 643–87.

35. Amos Tversky & Daniel Kahneman, *Rational Choice and the Framing of Decisions*, 59 J. BUS. S251, S260 (1986).

36. *See id.* at S259–60.

labeled cash discounts rather than credit surcharges.[37] These framing effects cause dramatic preference reversals in a range of experimental settings, from negotiations over product prices to medical treatment outcomes.[38] The effects occur equally among lay people and educated professionals such as physicians or statistically savvy business students.[39]

While jury instructions usually do not present classic framing effects problems, they do result in parallel decisionmaking problems. Just as seemingly inconsequential differences in language (compare the "discount"-versus-"surcharge" variation) can yield significantly different decisions because of framing effects, alternative jury instructions, each legally accurate statements of the same rule, raise the same concerns. Two descriptions of rules that are formally equivalent lead decisionmakers to different choices. The choices do not necessarily vary because jurors misunderstand the rule. Rather, one presentation triggers inferences and assumptions that change its effective meaning. Just as the framing-effects example above changes the perception of information by framing it in positive or negative terms, reasonable-doubt instructions change the understanding of the standard by describing it positively, with a focus on the state's burden ("proof that leaves you firmly convinced")[40] or negatively, elaborating on what a reasonable doubt is not ("not a possible doubt, a speculative, imaginary or forced doubt").[41] Juries given one such instruction reach guilty verdicts more often than juries given the legally sufficient alternative, for reasons unrelated to law or facts. The interpretative meaning given to instruction phrases due to framing effects varies as much as perceptions of quantitative options in the vaccine program experiment and consumer settings.

Use of instructions that are legally sufficient but greatly deficient in clarity and positive decision effect is widespread and well documented.[42]

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37. *See id.* at S260–61.

38. *See id.* at S251–62; Korobkin, *supra* note 33, at 625–30. *See also* Hanson & Kysar, *supra* note 32, at 643–44.

39. *See* Tversky & Kahneman, *supra* note 35, at S252, S254–57. *See also* Hanson & Kysar, *supra* note 32, at 684–87; Russell Korobkin & Chris Guthrie, *Psychology, Economics and Settlement: A New Look at the Role of the Lawyer*, 76 TEX. L. REV. 77, 85–86 (1997) (summarizing research).

40. Solan, *supra* note 2, at 116 n.48 (Federal Judicial Center instruction).

41. Solan, *supra* note 2, at 114 (Florida instruction).

42. *See* ARTHUR D. AUSTIN, COMPLEX LITIGATION CONFRONTS THE JURY SYSTEM: A CASE STUDY 60–65 (1984) (noting that the instructions in the case under study were written at a "sixteenth grade level" requiring graduate education to comprehend fully, and averaging 102 words per sentence, while modern American prose averages 21 words); AMIRAM ELWORK, BRUCE D. SALES & JAMES ALFINI, MAKING JURY INSTRUCTIONS UNDERSTANDABLE 3–24, 35–36 (1982) (describing methods for rewriting instructions in "plain language" and supporting the need for such revision with studies

Oddly, studies suggest juror comprehension of capital sentencing instructions is weakest precisely where misunderstanding hurts defendants most: standards of proof and mitigation evidence.[43] Courts give much less care to ensuring that jury charges convey their message than marketers give to language about their products.[44] Courts are well trained to assess legal sufficieucy and have the considerable incentive to do so correctly because they risk sanctions (reversal) if they err. They have little more than hunches, however, by which to assess clarity or decision effect. In the context of capital sentencing, Eighth Amendment regulation of instruction clarity, of which *Weeks* is the latest installment, offers few incentives to choose the clearest or optimally effective instruction. *Weeks* applied the standard of review that the Court adopted a decade earlier in *Boyde v. California*[45] for what was, in essence, one type of decision-effects problem. When a mitigation-evidence instruction is formally accurate but still might be misconstrued by a jury, courts assess "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence."[46] When trial judges adopt that retrospective inquiry as their prospective standard for instruction choices, the standard perpetuates the minimal sufficiency

comparing juror comprehension of ordinary versus legal language); REID HASTIE, STEVEN D. PENROD & NANCY PENNINGTON, INSIDE THE JURY 231 (1983) (describing juror understanding of instruction language based on a large study of mock jury experiments); Raymond W. Buchanan, Bert Pryor, K. Phillip Taylor & David U. Strawn, *Legal Communication: An Investigation into Juror Comprehension of Pattern Instructions*, COMM. Q., Fall 1978, at 31, 32–35 (finding that jurors given pattern instructions show better comprehension of law than uninstructed subjects); Robert P. Charrow & Veda R. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 COLUM. L. REV. 1306 (1979) (finding improved comprehension when instructions are rewritten); Dorothy K. Kagehiro & W. Clark Stanton, *Legal vs. Quantified Definitions of Standards of Proof*, 9 LAW & HUM. BEHAV. 159 (1985) (finding that mock jurors' decisions are affected by changes in burden-of-proof instructions); Vicki L. Smith, *Impact of Pretrial Instructions on Jurors' Information Processing and Decision Making*, 76 J. APPLIED PSYCHOL. 220 (1991) (finding that instructing jurors before as well as after trial improves juror comprehension); Vicki L. Smith, *When Prior Knowledge and Law Collide: Helping Jurors Use the Law*, 17 LAW & HUM. BEHAV. 510, 533 (1993) (reviewing research literature and reporting results of an experiment with a revised instruction that "produced remarkable improvements" in mock jurors' use of legal categories rather than lay conceptions of crime elements).

43. *See, e.g.*, Brandon K. Applegate, *Assessing Juror Understanding of Capital Sentencing Instructions*, 44 CRIME & DELINQ. 412 (1998) (testing Ohio pattern instructions); Michael B. Blankenship, James Luginbuhl, Francis T. Cullen & William Redick, *Juror Comprehension of Sentencing Instructions: A Test of Tennesee's Death Penalty Process*, 14 JUST. Q. 325 (1997); James Luginbuhl, *Comprehension of Judges' Instructions in the Penalty Phase of a Capital Trial*, 16 L. & HUM. BEHAV. 203 (1992) (testing North Carolina pattern instructions).

44. *See* discussion of Hanson and Kysar's enterprise liability proposal, *infra* notes 80–82.

45. 494 U.S. 370 (1990).

46. *Id.* at 380 (1990) (noting the challenged instruction is not "erroneous" but still could be "ambiguous and therefore subject to an erroneous interpretation"), *cited in* Weeks v. Angelone, 120 S. Ct. 727 (2000) and Buchanan v. Angelone, 522 U.S. 269, 276 (1998).

approach to jury instructions. A trial judge need not make a comparative nor an aspirational assessment of instructions. She need only review one proposal and assess the odds that it will be misunderstood. Better instructions, even ones presented by counsel and backed by research or usage in other jurisdictions, often get no hearing. Given the institutional incentives against reform, the standard effectively discourages instruction reform and tolerates decision effects that undermine the instruction's purpose.

B. INCENTIVES AGAINST INSTRUCTION REFORM

There are rational reasons that a judge opts for tested instructions that nonetheless lead to inappropriate decision effects. Trial judges greatly reduce risk of reversal by using instructions previously approved on appeal or offered by a pattern instruction committee, because those instructions are most likely to be held legally sufficient. Yet that alone cannot explain resistance to defendant proffers, because employing a defendant's instrnction similarly reduces risk of reversal. A defendant cannot effectively raise as error on appeal the use of an instruction he requested.[47] As long as the proposed instruction's legal sufficiency can survive plain error analysis,[48] a trial court faces no risk in adopting it.

So what explains trial courts' preference for established instructions? Tested instructions provide *network* and *learning benefits*. Scholars in contract and corporate law have described how default rules (which provide contract terms unless parties otherwise specify) and contract terms gain value, like some products, when widely used by others. A personal computer has some value for one person alone, but much more value if many people use compatible ones.[49] Similarly, contract terms not only have inherent value, but they also become more valuable to parties as others use the terms in unrelated contracts or charters. A widely used term will generate more judicial interpretations of that term, clarifying its legal effect, embedding the judicial interpretation into the contract term, and increasing parties' certainty in the term's meaning across contexts. Lawyers will gain a "network benefit" of familiarity and expertise with the

47. *See* FED. R. CRIM. P. 30.

48. *See* FED. R. CRIM. P. 52(b); United States v. Young, 470 U.S. 1, 16 (1985).

49. Marcel Kahan, *Corporations, Corporate Law, and Networks of Contracts*, 81 VA. L. REV. 757, 772 (1995).

term. Parties garner "learning benefits" when terms have been used in the recent past.[50]

Jury instructions accrue the same benefits for trial judges and parties. Previously used instructions decrease the odds of reversal and wasted resources through retrial. Such instructions also save the trial judge effort in her initial decision because she need not even assess the proposed alternative for legal sufficiency or decision effect if a pre-approved instruction exists. Lawyers know they can offer approved instructions with much success and they need not spend time drafting revisions. Tested instructions provide a safe harbor with regard to legal sufficiency, but often at the cost of impeding reform toward optimal decision effect.

Here is where the distinction between minimal legal acceptability and optimal decision effect of instructions becomes crucial. The learning-benefits rationale (and the resource-conservation goal in particular) is based solely on the instructions' legal sufficiency. An instruction produces learning benefits because judges and parties can spend little time producing an instruction they know appellate courts will approve.

Yet that does not mean that the instruction that has achieved such value by appellate approval *on the basis of constitutional sufficiency* is the optimal one with regard to decision effect. Likewise, under the *Boyde* "reasonable likelihood" test, appellate courts do not assess which instruction *optimally* conveys rules. Thus, a suboptimal but constitutional instruction can become entrenched, restraining legal change toward instructions with better decision effects. Even *rational* learning benefits help entrench suboptimal instructions. The resulting disjuncture skews the evolution of instructions away from increasingly clear statements of a rule

50. *See id.* at 774–89 (discussing network and learning benefits in the context of corporate charters); Marcel Kahan & Michael Klausner, *Standardization and Innovation in Corporate Contracting (Or the Economics of Boilerplate)*, 83 VA. L. REV. 713, 719–33 (1997). Technically, network benefits accrue from contemporaneous use of contract language; learning benefits accrue from use of a term in the recent past. Network benefits are fairly marginal for jury instructions; although judges and lawyers gain some benefit from being able to use an instruction in several similar trials, the greatest benefits—learning benefits—accrue from instructions used in the past. Whereas contract terms endure over time (the life of the contract) and so benefit from judicial interpretations of contemporaneous contracts with similar terms, jury instructions' lives are brief and their use for lawyers and judges won't be much affected by contemporaneous use in other trials. (Jurors themselves, as one-shot interpreters of instructions, accrue no learning or network benefits.) An instruction may need several appellate decisions to confirm its legal sufficiency; its acceptability in one context may not mean it will work in another. But that certainly is likely to be a learning rather than network benefit, arising from prior use of the instruction. (*Weeks* addresses this issue. The *Weeks* instruction had been held constitutional by the Supreme Court in *Buchanan v. Angelone*, 522 U.S. 269 (1998). But *Weeks* employed it in a different context: The jury explicitly announced it did not understand the instruction.)

that serve the rule's purpose effectively. *Weeks*, as well as the work by Solan and GJM, reveals that there is no systemic mechanism for encouraging the use of jury instructions with a decision effect that optimally matches the law's purpose or normative commitments. Even worse, there are systemic pressures against revision.

Systemic incentives are aggravated by *nonrational* decisionmaking patterns identified in decision theory. The relevant cognitive heuristic documented by decision theory is the *status quo bias*. This bias describes people's pronounced preferences for entitlements they possess over those they do not, or for an established practice over an innovative one.[51] Across settings, people prefer the status quo over equal or marginally better alternatives, including brand allegiance, insurance plan choices, voting on political incumbents, marketing techniques and investment options.[52] Russell Korobkin has recently identified the implications of this effect in contract negotiation. He developed evidence suggesting that contracting parties have a bias in favor of any contract language serving as an established reference point for negotiation—whether a legal default rule that parties could contract around, or terms included in form contracts or preliminary drafts.[53] Such terms have far more "staying power than the transaction costs associated with changing the terms, standing alone, would suggest," resulting in a strategic advantage for the term or rule set as a reference point.[54] Korobkin finds evidence of the status quo bias—the preference for existing arrangements over alternatives—even when the transaction costs of changing the status quo are minimal and the change would achieve some clear advantage for the contracting party.[55]

The trial judge's choice between instructions presents a classic status-quo bias problem. For most instructions (particularly routine ones like the standard of proof and capital mitigation evidence instructions), judges have one option that the jurisdiction's high court (or at least a pattern instruction committee) has approved and that the trial judge may have personally used

51. One example is the well-known *endowment effect*, which describes one's insistence on a price to give up something one possesses that is higher than one would pay to acquire it. *See* Elizabeth Hoffman & Matthew L. Spitzer, *Willingness to Pay v. Willingness to Accept: Legal and Economic Implications*, 71 WASH. U. L.Q. 59, 59–84 (1993); Korobkin, *supra* note 33, at 625–30 (summarizing research).

52. *See generally* William Samuelson & Richard Zeckhauser, *Status Quo Bias in Decision Making*, 1 J. RISK. & UNCERTAINTY 7 (1988).

53. *See* Russell Korobkin, *Inertia and Preference in Contract Negotiation: The Psychological Power of Default Rules and Form Terms*, 51 VAND. L. REV. 1583, 1586 (1999).

54. *Id.*

55. *See id.* at 1593.

repeatedly. Even if a proposed alternative seems relatively safe in terms of its legal sufficiency, the established instruction has the status-quo advantage. Research on status-quo bias predicts a nonrational bias for that option. The *Weeks* trial judge is a clear example of these incentives at work. The judge was presented with a concise alternative instruction on mitigation, readily identifiable as the clearest option, and one that raised no hard question as to its legal sufficiency.[56] Yet he refused to use it, despite the fact that employing defendant's proposal would deprive defendant of the ability to complain about it on appeal.[57]

For these reasons, Solan's strategy for solving decision-effect problems—identifying an instruction that best serves a given rule's purpose and urging court acceptance—is likely to run into the *Weeks* problem: at the trial level, judges have an institutional bias against innovations in established instructions.[58] At the appellate level, optimal decision effects are not the issue. The remedy suggested by GJM is similarly limited: whenever juries express confusion about instructions, GJM would require judges to give a clarifying instruction instead of merely repeating the original. Even if defense lawyers adapt GJM or Solan's arguments for the charging conference (as they should), progress will likely be haphazard and limited to individual instructions in discrete cases.[59] Both studies are examples of the larger problem: across the array of legal rules conveyed to juries, the substantive law requires no attention to decision effects, and the procedure of choosing instructions yields at best minimal and haphazard evolutionary improvement in our choices among legally sufficient instructions. We need to change the process by which instructions evolve.

To use an economic metaphor, we can view the problem as a "failure in the market" for jury instructions. In a well-functioning market for consumer goods, the products that offer the best combination of quality and value should prevail, although many are acceptable. The jury instruction "market" has many formulations for conveying any given rule, all of which

56. *See* Weeks v. Angelone, 4 F. Supp. 2d 497, 535 (E.D. Va. 1998).

57. Note that the risk of adopting defendants' proposed instructions, which may be untested on appeal and vary from pattern instructions, is significantly reduced by the defendant's inability to complain on appeal about the court's use of an instruction defendant himself proposed. Such an instruction may at most be reviewed for clear error. *See* FED. R. CRIM. P. 30.

58. Nor do appellate courts often dictate use of a particular instruction. But see *State v. Medina*, 685 A.2d 1242 (N.J. 1996), *cert. denied*, 520 U.S. 1190 (1997), holding that judgment has the effect of freezing in place an instruction instead of permitting improvements.

59. The other likely route for instruction reform—a more systemic one—is also a relatively slow vehicle; pattern jury instruction committees have real influence in shaping trial court practices, but they are traditionally slow to turn their attention to refining legally adequate instructions rather than updating instructions for legal accuracy in the wake of case law developments.

are legally sufficient. But the means used to choose among these options is flawed because the most widely used instruction is not the version that best serves the purposes and normative goals underlying the legal rule and related trial processes. Judges, who choose among the "products," assess alternatives on grounds of legal sufficiency. They can ignore decision effects that may undermine the instruction's purpose, letting an inferior option prevail.

II. REVISING THE STANDARD OF REVIEW FOR INSTRUCTIONS

The legal system delegates to trial courts two quasi-lawmaking tasks in the drafting of jury instructions. First, courts sometimes must define the substantive content of statutes, broadening it to reach more conduct or narrowing it to reach less conduct. In new, unsettled, or infrequently interpreted areas of law, jury instructions are the first instance in which courts define the substantive reach of criminal statutes. Appellate courts engage in common lawmaking[60] by affirming or reversing jury instructions. Last term's *United States v. Sun-Diamond Growers* is one such example.[61] There, the Court rejected the trial court's broad interpretation of a gratuity statute that the trial judge had offered through instructions to the jury.[62] The statute said merely that one who "directly or indirectly gives . . . anything of value to any public official . . . , *for or because of any official act performed or to be performed* by such public official" shall be punished.[63] The trial court read the intent provision, "for or because of any official act," as the government had urged, instructing the jury that "[i]t is sufficient if Sun-Diamond provided [the official] with unauthorized compensation simply because he held public office," and further that "[t]he government need not prove that the alleged gratuity was linked to a specific or identifiable official act or any act at all."[64] The Supreme Court disagreed and held that the statute requires "a link between a thing of value conferred . . . and a specific official act for or because of which it was given."[65] This will therefore be the basis for instructions in future cases.

When law is unsettled, judges are forced to pay close attention to the instruction langnage. They need not necessarily pay attention to clarity and can only guess at decision effects. But at least counsel have judicial

60. *See* Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 S. CT. REV. 345.
61. 526 U.S. 398 (1999).
62. *See id.* at 406–12.
63. 18 U.S.C. § 201(c)(1)(A) (emphasis added).
64. *Sun-Diamond Growers*, 526 U.S. at 413–14 (quoting trial court instructions).
65. *Id.* at 414 (internal quotation marks omitted).

attention focused on instruction language and a clean slate upon which to argue it. After resolving a statute's substantive content, counsel and judge can negotiate structure and phrasing.

Struggles about the language used to convey law once its substantive content is resolved—struggles about decision effects—are a species of lawmaking as well. To the degree that instruction alternatives for the same substantive rule vary enough in their decision effects so that juries give substantively different meanings to the rule, courts have changed the rule's content. Solan's findings on reasonable-doubt instructions are again an example. An instruction that leaves jurors with the expectation that a defendant must present evidence and prove specific bases for doubt in the state's case is a different rule than one from which jurors take the view that only the state carries a burden, and that the burden is a heavy one. Courts are delegated the task of choosing among those formulations. Recognizing the variation in decision effects, we can see it as a substantive choice between rules. Yet courts pay little attention to decision effects. The reasonable-doubt rule may be an extreme example, because it is a concept whose content some concede we have not defined.[66] As a consequence, some appellate courts explicitly eschew this delegated obligation, admonishing trial courts "not [to] attempt to define reasonable doubt."[67] But instructions are not necessarily self-defining, nor is the reasonable-doubt standard one that is defined by community norms in the same way as, say, obscenity rules. Courts that ignore the variation in instructions' effects abdicate the tasks of defining the content of the rule—a difficult task in the case of reasonable doubt, as Solan shows—and reasonably assuring that its intended meaning is conveyed to the jury.

The second category of choices courts confront in describing any rule, as the mitigation-evidence example suggests, entails decisions about emphasis, structure, and clarity. Such decisions change the functional meaning of the instruction in the jury's deliberation. A long, detailed instruction that describes a rule in several sentences rather than in a single one can present a choice that is formally equal in legal accuracy but quite distinct in decision effect, due to emphasis arising from its length. Courts avoid such choices not only for the rational and nonrational reasons noted above (or worse, use it as a means of illicitly manipulating a rule's

66. *See* Shari Seidman Diamond & Jason Schklar, *The Jury: How Does Law Matter?*, *in* HOW DOES LAW MATTER? 191, 211 (Bryant G. Garth & Austin Sarat eds., 1998).

67. United States v. Blackburn, 992 F.2d 666, 668 (7th Cir. 1993), *cert. denied*, 510 U.S. 949 (1993). *See also* United States v. Adkins, 937 F.2d 947, 950 (4th Cir. 1991) ("This circuit has repeatedly warned against giving the jury definitions of reasonable doubt....").

content), but also because they entail difficult normative decisions about what a rule's real content should be. Yet that difficult process of on-going refinement is precisely the common-lawmaking task only courts can do.

The project in its full extent is probably unsolvable by courts. Courts lack the competence to assess fully some of the fine gradations in decision effects, particularly without the assistance of reliable research that may be impractical in many contexts. But the neglect of jury instruction effects is severe enough, and moderate improvement feasible enough, that courts need to carve a path around the neglect that *Weeks* may help foster. Established instructions that are used continually—like the reasonable doubt and mitigation-evidence instructions—are hard to change. But they have the advantage of being widespread and durable enough that we can get a much better sense of their decision effects, through work like Solan's and GJM's, than we can of the instructions at issue in *Sun-Diamond Growers*.

We have a long-standing rule that governs the first lawmaking task, the substantive interpretation of laws. The rule of lenity, with irregular success, governs substantive interpretation of statutes.[68] For the secondary lawmaking task of managing decision effects, however, we have no rule at all. Rather, the *Boyde* standard and Rule 30 of the Federal Rules of Criminal Procedure pay attention only to formal legal sufficiency.[69] Appellate courts typically give trial judges great deference in the wording of instructions so long as the substance is correct.[70] While we cannot precisely regulate decision effects, we can do better. We can require that instructions not only be legally accurate but that they effectively convey their meaning to the jury, so that they are interpreted in accord with the rule's purpose. We can do so with a legal standard for instructions that clearly mandates attention to jury comprehension.

The *Boyde* standard is grounded in the Eighth Amendment's cruel and unusual punishment clause as the vehicle for assessing capital punishment instructions. We can hope that the standard's Eighth Amendment basis explains its limited focus, pursuant to which, after *Weeks*, even a jury's

68. I discuss the lenity rule analogy in more detail in Part III below.

69. *See* WRIGHT, *supra* note 15, § 482 at 688–89 (judges need use no particular language in a charge, but need merely "correctly cover [] the substance").

70. *See, e.g.*, United States v. Yunis, 924 F.2d 1086, 1096 (D.C. Cir. 1991) (deferring judgments about "apt phraseology" of instructions to "the experience of trial judges"); United States v. Myers, 972 F.2d 1566, 1574 (11th Cir. 1992), *reh'g denied*, 980 F.2d 1449 (11th Cir. 1992), *cert. denied*, 507 U.S. 1017 (1993) (giving trial courts "wide discretion" on "style and wording" of instructions); United States v. Streit, 962 F.2d 894, 898 (9th Cir. 1992), *cert. denied*, 506 U.S. 962 (1992) (similar deferential standard).

statement that "we don't understand" is not enough to prove a reasonable likelihood of misunderstanding. Although the standard accords with appellate courts' limited review of instructions in other contexts,[71] the *Boyde* standard is narrower than the standard some courts have long employed to review instructions. Wider use and development of existing formulations that give more attention to jury understanding as well as legal sufficiency would be a good step toward governing decision effects.

For instructions outside the Eighth Amendment context, we need only build on well-established standards of review. Appellate courts typically review instructions for accuracy as part of their inherent supervisory powers over trial court processes.[72] The Tenth Circuit, in civil as well as criminal contexts, requires instructions both to "state the law which governs [the legal sufficiency] *and provide[] the jury with ample understanding* of the issues and standards applicable."[73] Moreover, outside the Eighth Amendment capital sentencing context, the Supreme Court itself has insisted that "[w]hen a jury makes explicit its difficulties" by raising questions about instructions, "a trial judge should clear them away with concrete accuracy."[74] Those formulations stress courts' affirmative duties to employ instructions that are effective, as well as formally accurate, in conveying rules to the jury. They focus attention on the jury's understanding, which moves courts closer to paying attention to decision effects as well as formal accuracy. They affirmatively describe courts' obligation toward instruction clarity—to ensure ample understanding—rather than rely on *Weeks*' negative approach of assessing the likelihood of misunderstanding. We can refine such a standard by requiring a court to employ the clearest of accurate instruction proposals it is offered (unless it

71. *See* WRIGHT, *supra* note 15, § 482, at 688–89. For cases adopting Wright's formulation that instructions need only "adequately and correctly cover the substance" of a rule, see, e.g., United States v. Sheffey, 57 F.3d 1419, 1430 & n.11 (6th Cir. 1995), *cert. denied*, 516 U.S. 1065 (1996) (citing Wright); United States v. Akers, 987 F.2d 507, 513 (8th Cir. 1993) (same); United States v. Ribaste, 905 F.2d 1140, 1143 (8th Cir. 1990) (standard is whether "the charge, taken as a whole and viewed in light of the evidence, fairly and adequately submits the issues in the case to the jury") (citations omitted), *abrogated on other grounds*, United States v. Wells, 519 U.S. 462, 489 (1997); United States v. Lopez, 885 F.2d 1428, 1434 (9th Cir. 1989), *cert. denied*, 493 U.S. 1032 (1990) ("'So long as the instructions fairly and adequately cover the issues presented, the judge's formulation of those instructions or choice of language is a matter of discretion.'").

72. *See, e.g.*, Bollenbach v. United States, 326 U.S. 607, 608 (1946) (finding erroneous instruction implicated "administration of federal criminal justice").

73. United States v. Zimmerman, 943 F.2d 1204, 1213 (10th Cir. 1991) (emphasis added) (internal quotation marks omitted) (quoting United States v. Cardall, 885 F.2d 656, 673 (10th Cir. 1989)).

74. *See* Bollenbach, 326 U.S. at 608, 612–13 (reversing a federal conspiracy conviction because the erroneous response to jury confusion implicated "administration of federal criminal justice").

fashions a clearer one itself), which at least would remedy some easy cases like *Weeks* and stress clarity as well as accuracy.

Decision-effects research reveals that the traditional deference to trial judges' "expertise" in charge drafting is misplaced.[75] Legal training supplies little skill in assessing how lay people interpret legal language. As is clear from the unintended effects of reasonable-doubt charges that elude judges' notice, trial court experience does not add much. Judges' feedback on juror understanding of instructions comes from three sources. First, jurors may ask questions, but the research clearly indicates that they do not ask nearly as often as they are in fact confused reading the law incorrectly.[76] Even so, as *Weeks* shows, jury questions do not prompt judges to reword instructions. Second, judges assess whether verdicts seem correct, but ill-conceived verdicts can arise from many variables besides misconstrued instructions (and plausible verdicts like Weeks' death sentence may arise from undetected misunderstanding). Third, judges may chat with jurors post-trial and learn something about how they understood instructions, but the utility of that data is limited for assessing whether particular phrasing led to confusion. With so little expertise in effective charge drafting, and structural pressures against instruction reform, we need a standard that forces judges' attention more directly on effective communication as well as formal accuracy.

Moreover, research on decision effects suggests that constitutionally required instructions can be rendered so ineffectual or counterproductive by poor drafting that constitutional rights are jeopardized even by formally accurate language. This shortcoming implicates more than the supervisory duty of appellate courts (the source of authority for much instruction review); it raises a due process concern. Courts need to develop standards of "ample understanding" and "concrete accuracy" as a matter of constitutional due process, with a presumption for the clearest version of an instruction trial judges offered. Under that standard, courts could move toward a constitutional recognition that the language in which instructions are phrased can be formally accurate yet ineffective in practice, and that failure to give an *effectively* drafted instruction, especially when one is readily available, denies a constitutional right.

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75. *See, e.g.*, United States v. Myers, 972 F.2d 1566 (11th Cir. 1992), *reh'g denied*, 980 F.2d 1449 (11th Cir. (1992), *cert. denied*, 507 U.S. 1017 (1993); United States v. Yunis, 924 F.2d 1086, 1096 (D.C. Cir. 1991).

76. *See, e.g.*, ELWORK ET AL., *supra* note 42, at 3–24, 35–36; HASTIE ET AL., *supra* note 42, at 231.

III. A PROPOSAL TO REGULATE DECISION EFFECTS

A. THE CHOICE-OF-INSTRUCTION RULE

We need not depend on courts, however, to reinvigorate the doctrinal alternatives to *Weeks* for a mandate to improve decision effects, nor even depend on their ability always to identify clear and effective instructions. The same change could be achieved by an amendment to Rule 30 of the Federal Rules of Criminal Procedure (and its state counterparts). Specifically, we can achieve much systemic improvement with a simple "choice-of-instruction" rule that regulates trial judges' choices among accurate instructions. As a quick, effective route to reform, we could amend Rule 30 and its state counterparts to include a paragraph that reads: Judges, when offered alternative instructions *to convey a constitutional rule designed to protect defendants*, must assess first whether each version is legally sufficient. If the defendant's version is legally sufficient, *judges must use the instruction offered by the defendant.*[77]

The rule puts in action the normative premise that, as long as an instruction is legally sufficient, the decision effect—at least of instructions clearly intended to protect the accused—should favor the defendant.[78] Bias toward the state, as Solan found, should be overt and adopted by explicit revision of the legal rule.[79] Further, this proposal overturns the outdated interpretation of Rule 30 that "it is usually preferable for the court to use its own language in framing instructions," even when offered instructions that "correctly state the law."[80] That tradition iguores crucial variation in

77. In the alternative, a weak version of the rule could require that the instruction be used that best serves the purposes of the legal provision it describes. The strong version has the disadvantage of seeming to be politically one-sided, even though it merely improves the development of jury instructions in accord with law's normative commitments. The weak version has the downside of being a more open-ended standard. Its main virtue is political feasibility, but it should still produce the same salutary evolution of instructions as the strong version, especially for procedural instructions such as standard of proof and the role of mitigation evidence.

78. One concern with the proposal may be that defendants have incentive not to offer merely the *clearest* instruction that aligns decision effect with legal meaning, but instead the version most biased in their favor, skewing decision effect too far against the state. I think that concern is minimal, because legal sufficiency is a check on that sort of bias and the proposal applies only to pro-defendant rules. It is hard to imagine a reasonable-doubt instruction that is legally accurate yet skewed too far in the defendant's favor; so too with a mitigation-evidence instruction. To the extent defendants' wording skews instructions too much against the state, those proposals likely will not be found legally accurate.

79. *See* Solan, *supra* note 2, at 129, 146 (noting studies that find the clear-and-convincing standard is understood by jurors to be a higher burden on the state than some reasonable-doubt instructions).

80. WRIGHT, *supra* note 15, § 482, at 688. *See also* United States v. Sheffey, 57 F.3d 1419, 1430–31 n.11 (6th Cir. 1995) (adopting Wright's view), *cert. denied*, 516 U.S. 1065 (1996).

decision effects, as well as evidence that jurors most often misunderstand instructions that serve defendants' interests.[81] Solan's research shows that judges too often choose legally accurate instructions that ill-serve the rule they state, and that it is not enough "that the charge adequately and correctly cover[] the substance of the requested instructions."[82] Correctly covering substance is legal sufficiency, with no atteution to decision effects. Weeks' trial judge covered the substance; GJM documented the likely results.

Notice the choice-of-instruction rule's distinctions from the standard of review offered above. First, the added judicial task is procedural rather than substantive. That is, judges need not assess differences in decision effects under rubrics of clarity, ample understanding or likelihood of misinterpretation.[83] They merely approve the defendant's version if it is accurate, an assessment courts will now perform with more care. Without forcing judges to consider decision effects, the rule aligns these effects with the substantive law's purpose. In this way, the choice-of-instruction rule improves the evolution and development of the important subset of instructions to which it applies (which tend to be eutrenched instructions).[84] This subset includes standard-of-proof and mitigation-evidence instructions, which jurors most often misunderstand and thus which best exhibit the need for a mechanism to improve charges.[85] The rule accomplishes this without depeuding on judges to rewrite instructions proinpted by a broad, aspirational standard.

Second, as a result of this shift from substantive review, the rule improves the evolutionary process by "privatizing" the development of instructions' decision effects. It makes use of lawyers' ability to gather iuformation about decision effects; such research is now largely privatized. Scholars' proposals for refining instructions, based on research (like Solan's and GJM's work, as well as the Federal Judicial Ceuter instruction

81. *See* Applegate, *supra* note 43; Blankenship et al., *supra* note 43; Luginbuhl, *supra* note 43.

82. WRIGHT, *supra* note 15, § 482 at 688–89.

83. Judges, of course, retain the substantive decision about legal sufficiency. They conceivably can use the legal-sufficiency decision as a means to eliminate instructions they dislike on decision-effects grounds. The risk is real but limited, however, given that judges will need to articulate reasons for an instruction's insufficiency and that the decision will be reviewed on appeal.

84. By entrenched instructions, I simply mean those charges that are well established by practice and appellate approval and therefore that trial judges are reluctant to revise.

85. *See* Applegate, *supra* note 43 (summarizing studies finding that capital juror understanding was lower on standards of proof and mitigation evidence than on other instructions, such as aggravating factors, and confirming those findings with new research); Blankenship et al., *supra* note 43 (similar findings); Luginbuhl, *supra* note 43 (similar findings).

on which Solan builds his proposal),[86] are pushed by trial lawyers. Under the choice-of-instruction rule, judges do not have to assess research, much less become social science experts on decision effects. Defense lawyers, who have incentive to do so, will.

Zealous lawyers currently have *some* incentive to learn about instructions' decision effects and seek their adoption. Yet they know that in many contexts—when an established instruction exists, and perhaps in light of a given court's track record—their effort is unlikely to succeed. Under the choice-of-instruction rule, the odds of success increase greatly. That gives defense lawyers a stronger incentive to develop new instructions (and seek out research on their decision effects), to strengthen arguments for the threshold query of whether the instruction is legally sufficient, and to circulate those developments to other attorneys through practitioner journals, websites, email lists and the like. If research shows that an instruction does not seem to work in practice, defendants will no longer offer it and it will fall from use. Presently, defense attorneys generally have less incentive to seek reform of a relatively entrenched instruction, like the reasonable doubt charge, because trial judges are unlikely to deviate from the established one. Instructions with decision effects that serve legal rules and values will prevail without added judicial expertise.

The rule also gives prosecutors added incentive to scrutinize the legal sufficiency (their only remaining grounds for objection) of new proposals. It bars the state from engaging in the subterfuge of pushing instructions with a pro-prosecutor bias by invoking the ruse of legal sufficiency arguments. Moreover, it gives judges renewed reason to assess the legal accuracy of instructions, the routine lack of which explains much of the current lackluster quality of entrenched instructions. The rule prompts lawyering efforts on both sides that produce important information for courts to consider. Under the current rule, judges need not consider decision effect at all, and they need not assess even the legal sufficiency of a new proposal when an established instruction exists. The choice-of-instruction rule counters any bias of elected trial judges to break "ties" in favor of the prosecution.[87] It overcomes the status quo bias of opting for the safe established instruction when a superior successor appears. Finally, it productively restructures the development of jury instruction law through the appellate process.

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86. *See* Solan, *supra* note 2, at 144–47.

87. *See* Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 694–96, 726–28 (1995).

The choice-of-instruction rule borrows in form and concept from two disparate sources. One is a recent proposal by John Hanson and Douglas Kysar for an enterprise liability rule in products liability. Hanson and Kysar develop the implications of cognitive and behavioral science insights in the context of product marketing.[88] While courts are inept at governing decision effects, commercial players, it turns out, are brilliant. Marketers have become masters of consumers' framing effects and an array of other cognitive biases. They can thereby present, for example, product warning information in a way that leads consumers to underestimate the risks of a product and therefore use it excessively or without caution. Market incentives lead to sub-optimal consumer information and product use. Product makers want consumers to underestimate risks and buy more products.[89] Yet public policy should encourage more accurate risk appreciation, which would reduce accident costs.

Rather than have courts regnlate language across an infinite variety of product marketing and warning contexts, Hanson and Kysar recommend an enterprise liability rule.[90] The rule, making marketers liable for all accident costs, changes marketers' incentives about what decision effects they will manipulate. If marketers face a rule of enterprise liability, the market incentive to encourage consumer underestimation of risk (and so increase product usage) is countered by the incentive to encourage optimal consumer risk assessment, and thereby minimize accidents.[91]

The choice-of-instruction rule works analogously. Although the manipulation of decision effects with regard to instrnctions is not so one-sided, it is far from optimal. Prosecutors seek to manipulate decision effects in their favor, and judges are typically unaware, assuming a pro-prosecutor bias does not exist in elected jurists. The choice-of-instruction rule puts the incentive on defense attorneys to optimize decision effects of instructions in accord with the rule's purpose (since it applies only to instructions explicitly favoring defendants), with the backstop of judicial assessment for legal accuracy. It relieves courts of the task of monitoring and managing decision effects, a task for which they have little competence, by adopting a blanket rule that changes the process and incentives of decision-effect manipulation.

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88. *See* Hanson & Kysar, *supra* note 32.

89. *See id.* at 724–25.

90. *See id.* at 748–49; Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: Some Evidence of Market Manipulation*, 112 HARV. L. REV. 1420 (1999).

91. *See* Hanson & Kysar, *supra* note 32, at 743, 748–49; Hanson & Kysar, *supra* note 90, at 1553–67.

The second model for the choice-of-instruction rule is the traditional, if beleaguered, rule of lenity. Classically, the rule of lenity commands that ambiguities in criminal statutes be construed in favor of the defendant. When statutory language can be read with either of two, equally plausible interpretations, judges must apply the one that favors the defendant. Note that the rule does not force this choice among *all* interpretations of the statute. Judges make a threshold decision of whether the ambiguity is unresolved by legislative intent or other tools of statutory interpretation.[92] Analogously, the choice-of-instruction rule first requires a judicial assessment of the legal sufficiency of proposed instructions. Both rules regulate judges' decisions among competing "accurate" interpretations.

The classic rule of lenity now finds little favor. Federal courts observe the rule haphazardly,[93] and many states have replaced it with a requirement to construe statutes according to their "fair import" so as to further their "special purposes."[94] Yet the analogy holds, because the choice-of-instruction rule is limited to instructions already tilted toward defendants—a subset in which courts should be more inclined to lenity than, say, the substantive statute under which the defendant is charged. Given this limitation, the proposal serves merely the "fair import" goal. It does not cover those delegation scenarios in which courts refine substantive law through instructions and appellate review (avoiding the lenity rule to do so).[95] In its limited reach, the proposal aligus instructions' decision effects with statutory purpose. With established procedural instructions like the standard of proof, that purpose is clear.

The rule's appeal is its simplicity and ease of use compared to a standard of review. The choice-of-instruction rule requires an initial decision about whether the instruction describes the law in a way that intentionally favors defendants. There will be close cases worked out over time, but the important examples are clear. Some rules are neutral, and thus not covered by the rule. Examples include statutes under which

92. *See* NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 59.03 (5th ed. 1992); Lawrence M. Solan, *Law Language and Lenity*, 40 WM. & MARY L. REV. 57, 58 (1998); United States v. R.L.C., 503 U.S. 291, 305–06 (1992); McNally v. United States, 483 U.S. 350, 359–60 (1987).

93. *See* Kahan, *supra* note 60, at 346 (describing federal judicial enforcement of lenity as "notoriously sporadic and unpredictable").

94. MODEL PENAL CODE §1.02(3). The clause provides in pertinent part: "The provisions of this Code shall be construed according to the fair import of their terms but when the language is susceptible of differing constructions it shall be interpreted to further the general purposes stated in this section and the special purposes of the particular provision involved." *See also, e.g.*, CAL. PENAL CODE § 4 (West 1989); N.Y. PENAL LAW § 5.00 (McKinney 1998).

95. *See* Kahan, *supra* note 60 (arguing that federal courts don't follow the lenity rule so that they can engage in delegated lawmaking).

defendants are charged, and an array of evidentiary rules, such as how to assess eyewitness evidence. Procedural rules that are hurdles for the state, such as the burden and standard of proof, presumption of innocence, and mitigation-evidence in capital cases, clearly are governed by the proposal. The hardest category may be substantive defense rules like coercion, entrapment, and self-defense. The question is close, but choices about the content of such rules are too substantive—and play too important a role in defining the scope of criminal law[96]—to avoid the lawmaking process that instructions and appellate review constitute.

The rule nominally adds an issue on appeal. Instead of merely assessing legal sufficiency, appellate courts also review adherence to the choice-of-instruction rule. The rule's simplicity means the real question remains legal sufficiency, but now the focus is the legal sufficiency of a defendant's proposed instruction declined by the trial court. This inquiry should not increase litigation costs much because any increase in appellate issue complexity should be partly offset by the reduced basis for defendants' appeals. Trial judges will employ defense instructions more often, in cases such as *Weeks*. To the degree it does increase judicial workload and reversal rates, it does so by bringing renewed, more careful attention to the legal accuracy of instructions—precisely the effect we need. Over time, this litigation will yield a better set of instructions instead of the current instructions whose legal sufficiency is sometimes so undercut by decision effect as to verge on duplicity.

B. A FINAL SPECULATIVE NOTE

As a final speculation, consider the idea of a broader version of the rule: a court must accept a defendant's proposed instruction *on any point of law* as long as it is legally accurate. This would be a full-fledged rule of lenity for instructions: when law can be stated two or more ways and decision effects of each variation are unknown, courts must apply the defendant's version, which is the version most likely to favor him.

The obvious problem is that the broader version of the rule lacks the normative alignment between the instruction's decision effects and the purpose of the rule it conveys. There is no reason beyond traditional lenity

96. For a great study of the substantive evolution of criminal defenses (although it moves in a troubling direction), see Victoria F. Nourse, *Passion's Progress: Modern Law Reform and the Provocation Defense*, 106 YALE L.J. 1331 (1997).

rationales,[97] which courts now find less than compelling, that any particular substantive law—say, the conspiracy statute—should be phrased to favor the defendant. Defense efforts to structure instructions with decision-effect bias in their favor would not align with each rule's purpose. The defense goal may well be to structure an instruction's effects so as to undermine the rule's purpose, or to leave the rule unclear (as Solan and GJM find in their respective studies of instructions that were not drafted by defendants).

Yet we can't dismiss this broader version completely. With instructions on substantive law, the rule would work with the lenity or fair-import rule to govern a second-order decision. The lenity rule governs the substantive interpretation. But once a court resolves a statute's meaning, the choice-of-instruction rule governs the word choice used to convey that meaning to the jury. Because of judicial suspicion about defendants' posing obfuscatory instructions on unfavorable rules, judges might scrutinize the legal sufficiency of instructions more rigorously than they do now, prompting some improvement in entrenched instructions that are poorly constructed but get little review.

Moreover, the broad version is appealing precisely because it would work as the lenity rule now works—weakly. Courts would find a way around it when it is inappropriate.[98] For courts to get around the choice-of-instruction rule, they must do something they often do not now do: closely scrutinize the legal sufficiency of the defendant's proposed instructions and state why they are less accurate than their competitor's. We could hope, then, that courts would follow the choice-of-instruction rule in core cases (doctrines that protect defendants) and, as with the lenity rule, evade it when stronger policy concerns demand.

Despite these rationales, the broad version provides too little benefit to be worth the struggle for its adoption. While courts would more closely scrutinize defendant's proposals in order to weaken the rule's dictate, there is no guarantee that they would similarly scrutinize—and then revise—entrenched alternatives. We would not likely gain much in an improved evolutionary process for instructions, and we would lose both the normative argument that supports its adoption and the likelihood that the

97. And here, the lenity rule's rationale fit uneasily as an analogy. The lenity rule traditionally is said to serve a goal of fair notice to defendants and preservation of legislative (rather than judicial) power to define the content of criminal law. *See* Kahan, *supra* note 60; Solan, *supra* note 92, at 58. The choice-of-instruction rule serves no comparable separation of powers value; it arguably has a similar fairness-to-defendant function, but mainly governs counterproductive decision effects.

98. *See* Kahan, *supra* note 60; Solan, *supra* note 92, at 60 (taking issue with Kahan's delegation thesis but offering an explanation for the lenity rule's much narrower reach in recent decades).

rule would work as simply and consistently as it should in its narrow form. We are left to rely on a more vigorous standard of review to govern the larger range of instructions.

CONCLUSION

Weeks can be seen as another instance of jury instructions' long history of serving more a function of formal ritual than communication.[99] As Solan suggests with regard to reasonable-doubt instructions, *Weeks* reflects a court relatively little concerned with ensuring juror comprehension and more concerned with affirming a process with outward indicia of legitimacy to serve paramount interests of efficiency and finality. Yet in this context, unlike others, the choice between an effective regime that bolsters fairness and accurate outcomes and one that serves efficiency goals is not stark; it need not be a zero-sum game. With courts' closer attention to clarity and juror understanding, and also a simple revision of a criminal procedure rule, we can improve the means by which we communicate criminal law to its key decisionmakers. We can align instructions with the rules they embody, reducing judicial or litigant manipulation of decision effects, and thereby effecting a small improvement in the quality of criminal justice—an improvement that sometimes makes the difference between prison and liberty, or life and death.

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99. *See* Diamond & Schklar, *supra* note 66, at 212.