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The Silent Criminal Defendant and the Presumption of Innocence: In the Hands of Real Jurors, Is Either of Them Safe

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THE SILENT CRIMINAL DEFENDANT AND THE PRESUMPTION OF INNOCENCE: IN THE HANDS OF REAL JURORS, IS EITHER OF THEM SAFE?

by
 Mitchell J. Frank* & Dr. Dawn Broschard**

This Article uses surveys of actual jurors to analyze jurors' responses to instructions, focusing specifically on whether and how often real jurors, into whose hands our judicial system ultimately entrusts the presumption of innocence and the Fifth Amendment privilege, applied and upheld them. Additionally, it frames these fundamental protections by their histories, purposes, and applications to shed further light on how effectively these jurors upheld this trust. It concludes that the presumption that jurors follow their instruction is fundamentally flawed, and proposes means for insuring that jurors better understand and apply instructions, particularly in the criminal law realm.

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I. INTRODUCTION

I consider trial by jury as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution.¹

Whether or not a prospective juror will accept and follow the Court's instructions of law, if given, that a person accused of a crime is presumed to be innocent; [and] that it is the burden of the State to prove guilt and not the burden of the accused to prove innocence . . . are fundamental areas of inquiry on voir dire examination.

These . . . are the very foundation of our system of justice and if a juror will not affirmatively state under oath his willingness to accept, follow

¹ Favorite Jefferson Quotes, <http://etext.virginia.edu/jefferson/quotations/jeff6.htm> (last visited Feb. 26, 2006).

and be bound by them, how is it possible for any person to receive a fair trial by an impartial jury?²

Many Americans are taught or otherwise exposed early in life to the Fifth Amendment privilege against self-incrimination and the presumption of innocence. Years later, many of us are called to jury duty in criminal cases. It is then that we are given the power over defendants' liberty, and, in some states, their lives. It is then as well that we are given the responsibility of insuring that these basic American values, embodied as the twin pillars of the criminal justice system, are applied and upheld.

In actuality, however, are jurors fulfilling this responsibility? Are they holding the government to these principles of its constitution?³ For if jurors will not "follow and be bound by [their instructions to apply them], how is it possible for any person to receive a fair trial by an impartial jury?"⁴ These were some of the questions the year-long survey of real Florida jurors described in this Article was designed to answer.

Given the power jurors exercise, and the range of matters over which they exercise it, it is not surprising that jury decision making has been the subject of extensive empirical study.⁵ The study of real jurors, however, has made up but a small fraction of this research.⁶ As is true with each of the four primary research methods employed in this field, surveying real jurors has its strengths

² Price v. State, 295 So. 2d 338, 342 (Fla. Dist. Ct. App. 1974) (Rudnick, J., dissenting).

³ Favorite Jefferson Quotes, *supra* note 1.

⁴ Price, 295 So. 2d at 342 (emphasis added).

⁵ It is not the purpose of this Article to survey empirical findings in any one or more areas of jury decision making. That has been amply done, and most comprehensively in Dennis J. Devine et al., *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 PSYCHOL. PUB. POL'Y & L. 622 (2001). The authors there compiled and reviewed all 206 published empirical research studies on jury decision making from 1955 to 1999. *Id.* at 626-27. In the instant Article, various studies may be cited as pertinent to the issues covered herein, but unless otherwise indicated are not intended to be comprehensive.

⁶ Of 206 published studies conducted from 1955 to 1999, mock jury studies were used most frequently. Only 70 of these 206 involved real jurors. Of these, however, 40 were done through archival analysis (typically court files). Of the remaining 30, 14 involved surveys or interviews with ex-jurors, 13 used field studies or experiments with actual jurors, and 3 combined two of these methodologies. *Id.* The largest survey of actual jurors done in the United States appears to be the Los Angeles Jury Survey conducted over a six-month period during 1987-1988, generating 3,830 responses from criminal and civil jurors, and 2,533 from those who were actually selected to serve. See Franklin Strier, *The Educated Jury: A Proposal for Complex Litigation*, 47 DEPAUL L. REV. 49, 67 (1997), and Franklin Delano Strier, *Through the Jurors' Eyes*, 74 A.B.A. J. 79 (1988). Professor Strier has told the author that his survey did not ask about the presumption of innocence. Through a combination of questions, it did ask whether the verdict was influenced by the defendant's decision not to testify and whether or how strongly the jurors considered that to constitute "faulty or improper" decision-making. However, the responses to these questions were not analyzed for publication. See also Shari Seidman Diamond & Neil Vidmar, *Jury Room Ruminations on Forbidden Topics*, 87 VA. L. REV. 1857, 1858 (2001) (discussing results of videotaped deliberations of forty actual civil juries that were collected as part of the authors' Arizona Jury Project).

and weaknesses.⁷ On the one hand, it has been noted, "Surveys or interviews of ex-jurors can serve as a rich source of data on real deliberations," but on the other, "these methods are limited by the cognitive biases and limitations of respondents, which can make it difficult to reconstruct an accurate picture of what happened during deliberations."⁸

In examining whether real jurors are upholding the presumption of innocence and the privilege of a criminal defendant not to testify, it was determined that these limitations were insufficient to outweigh what these jurors brought to their responses. As opposed to mock jurors, real jurors heard actual preliminary instructions, opening statements, closing arguments and final instructions. And, it is only they who sat in trial and observed real defendants for days at a time, noted whether they testified or not, and spent hours or days in deliberations. In the end, it is only real jurors who can bring all of this information and experience to survey responses.

This Article will focus on whether and how often these jurors, into whose hands our judicial system ultimately entrusts the presumption of innocence and the Fifth Amendment privilege, applied and upheld them. Additionally, it will frame these fundamental protections by their histories, purposes, and applications to shed further light on how effectively these jurors upheld this trust.⁹

Central to this analysis will be whether jurors generally understand and follow their instructions at trial, and whether these particular jurors did so. This Article will highlight how the United States Supreme Court has irrebuttably and conclusively presumed that they do; a presumption that is not only factually unproven, but, as the overwhelming weight of empirical research shows, is clearly false. Applying this presumption to criminal defendants at trial, the Court's own precedents show, is a clear violation of the Due Process Clause.

Finally, this Article will discuss the movement toward jury reform, highlighted by recent efforts in Florida and California, and it will suggest where such efforts can best be concentrated.

II. THE JURY SURVEY: ORGANIZATION AND METHODOLOGY

The survey was provided to actual jurors who sat from jury selection through deliberations in civil and criminal trials, from October, 2003 through September, 2004. Alternate jurors, because they did not participate in deliberations, were not surveyed. Three judicial circuits in the central Florida

⁷ See Devine et al., *supra* note 5, at 626.

⁸ See *id.* at 627.

⁹ The presumption of innocence and the Fifth Amendment privilege against self-incrimination have, through analysis instead of empirical research, also been the subject of extensive publication. It is not the purpose of this Article to survey either subject, but rather to cite such scholarship or studies as may illuminate, compare or place in context what these jurors reported.

area, comprised of nine counties,¹⁰ served as the survey site. A total of 955 jurors responded.¹¹

Sponsored by Barry University School of Law in Orlando, Florida, this effort was designed to encompass by far the bulk of all jury trials taking place. It included jurors who sat on criminal felony cases tried in circuit court, misdemeanor cases in county court, and general civil cases in circuit court.¹² There were two exceptions. First, jurors in death penalty trials were not surveyed due to (1) the inapplicability of the survey design to penalty phase proceedings, and (2) the uncertainty of preserving the confidentiality of the responses of death penalty jurors, in the face of anticipated intense efforts to obtain their surveys to seek grounds for appeal after conviction. Second, general civil cases in county court, whose jurisdiction includes claims of \$15,000 or less,¹³ were not surveyed due to the minimal number of civil jury trials taking place there.

The survey was extensive. It was comprised of 204 separate statements in a number of subject areas, on nine double-sided pages, following which jurors were asked in most cases to state whether they strongly disagreed, disagreed, agreed, or agreed strongly with the statement. Discrete sections applied to civil and criminal trials, and jurors responded only as applicable to their type of trial. These areas generally included, but were not limited to: (1) jurors' assessment of the conduct, ability, and demeanor of trial counsel; (2) the jurors' decision-making process in various respects, both before and during deliberations; (3) feelings about all portions of the trial, from jury selection through closing

¹⁰ These were the 9th Circuit (Orange and Osceola counties), the 7th Circuit (Volusia, St. Johns, Flagler, and Putnam counties) and the 18th Circuit (Seminole and Brevard counties). The 5th Circuit (comprised of Lake, Citrus, Sumter, Marion, and Hernando counties) originally was part of the survey as well, with the support of its Chief Judge, the Honorable Victor Musleh, but no surveys were returned due to the apparent unwillingness of its trial judges to participate. The author gratefully acknowledges the support and cooperation of the Chief Judges of the 9th, 7th, and 18th Circuits, respectively the Honorable Belvin Perry, Jr., the Honorable Julianne Piggotte, and the Honorable James E. C. Perry; the trial judges in these Circuits who participated, and whose cooperation and assistance was essential; and the jurors who gave of their time, often immediately after spending days in trial. Finally, this survey would not have been logistically possible without the substantial and able assistance of court administrative personnel. For this the author further gratefully acknowledges Karen Levy in the 9th Circuit, Mark Weinberg in the 7th Circuit, Wendy Witsett in the 18th Circuit, and their staffs.

¹¹ Logistical barriers, including the number of courthouses and judges potentially distributing the survey, coupled with concerns over both case and juror anonymity, did not allow for an actual count of the surveys given to jurors. Calculating from the number of surveys printed, the number retrieved post-survey and those returned by jurors, the survey response rate was not less than 14.9%. This figure in reality is almost certainly much higher, as post-survey comments by court personnel indicate that a significant number not given to jurors were discarded or lost and not returned. The authors' best estimate of the actual response rate, considering these factors, is between 25% and 30%.

¹² See FLA. STAT. § 26.012(2)(a), (c) (2005) (circuit court has jurisdiction, respectively, of felony cases and claims in excess of \$15,000), and FLA. STAT. § 34.01(1)(a), (c) (2005) (county court has jurisdiction, respectively, of misdemeanor cases and claims of not more than \$15,000).

¹³ See FLA. STAT. § 34.01(1)(c) (2005).

argument, and including direct examination, cross-examination, and objections; (4) their assessment of parties and witnesses, both lay and expert; (5) in criminal cases, the presumption of innocence and the effects of defendants testifying or not testifying; (6) the efficacy of various types of evidence, both physical and non-physical, and its impact upon their decision-making process; and (7) for jury instructions, jurors' assessment of them, including whether and how well the jury applied or followed them.

Additional categories asked jurors to provide information concerning (1) demographic information about themselves, as well as what they perceived to be true of parties and trial counsel, and (2) the verdicts they returned, including, in civil case liability, damages and comparative negligence (where applicable). Finally, jurors were given an opportunity to state in writing what they felt would have made their jury service a better experience.

Trial judges were asked to employ the following procedures:¹⁴

1. After the jury returns its verdict, ask jurors to complete the juror survey and return it in its prepaid return envelope to Barry University School of Law.
2. Read the cover letter¹⁵ to jurors or hand it out along with the survey and return envelope.

¹⁴ Undoubtedly, there was variation in how the several dozens of trial judges in these three circuits explained the survey to the jurors.

¹⁵ In the main it stated:

On behalf of the Chief Judge of this Judicial Circuit, I want to thank you for your jury service. I also want to ask for your help in filling out this highly important survey. Its purpose is to educate our Judges and lawyers on your experiences as a jury, so that improvements can be made within the court system both in this Circuit and in Florida. You are in a unique position to help make the jury system better precisely because you have just served as a juror. Through this survey, you are being given the opportunity to express your likes and dislikes about what you saw.

Your responses will be kept **completely anonymous** and your participation is **completely voluntary**. There is nothing in the survey that would call for your name, the case you participated in, or the names of the Judge, attorneys or witnesses. Please **do not** add any such information. You are under no obligation whatsoever to reveal your survey responses to anyone who might ask.

This Circuit is one of only a few in Florida that has been selected to give this feedback. Given the importance of this survey, I ask that you answer the survey with the same seriousness that you devoted to your jury service. And, given that your memory of your jury service is still fresh, I ask that you complete it before you leave the courthouse and then mail it in the postage paid envelope you have been provided. It takes about 20 to 30 minutes to complete. If you cannot complete the survey today, please complete it and mail it by tomorrow or the next day at the very latest. In addition, please attempt to complete the survey prior to speaking with anyone, other than your fellow jurors, or reading or hearing any news about the trial. Once you have finished the survey, please **do not** hand it to any lawyers, court personnel or anyone else; please only return it by mail.

3. Emphasize that all individual responses will be kept confidential and that the survey is anonymous.
4. Tell the jurors their participation is voluntary, however, everyone's participation is essential to the research that is being conducted.
5. Tell the jurors it is preferable for them to complete the survey while they are still in the courthouse, and thank them for their participation.

Jurors were prompt in completing the surveys before mailing: 29.1% did so on the same day, 26% the next day, 23.8% within two to five days, and 12.1% within six to ten days. Only 6.7% took eleven days or more to do so.

III. THE PRESUMPTION OF INNOCENCE: ANCIENT, CRITICAL, AND AT RISK IN THE HANDS OF FLORIDA JURORS

A. *From Antiquity Until Today*

The importance of this presumption is such that the United States Supreme Court has taken pains to discover and relate its earliest beginnings, as well as describe the subsequent chronology of its inclusion in the law. In *Coffin v. United States*,¹⁶ the Court noted that in the opinion of one commentator it could be traced from its inclusion in the common law back as far as Deuteronomy, and its embodiment in the laws of Sparta and Athens.¹⁷ “[T]here [could] be no question,” the Court then stated, “that the Roman law was pervaded with the results of this maxim of criminal administration.”¹⁸ It then related the following conversation, which more than 1,600 years later still vividly serves to describe the importance of the presumption of innocence:

Ammianus Marcellinus relates an anecdote of the Emperor Julian which illustrates the enforcement of this principle in the Roman law. Numerius, the governor of Narbonensis, was on trial before the Emperor, and, contrary to the usage in criminal cases, the trial was public. Numerius contented himself with denying his guilt, and there was not sufficient proof against him. His adversary, Delphidius, a “passionate man,” seeing that the failure of the accusation was inevitable, could not restrain himself, and exclaimed, “Oh, illustrious Cæsar! If it is sufficient to deny, what hereafter will become of the guilty?” to which Julian replied, “If it suffices to accuse, what will become of the innocent?”¹⁹

¹⁶ 156 U.S. 432 (1895).

¹⁷ *Id.* at 454.

¹⁸ *Id.*

¹⁹ *Id.* at 455. It is possible, however, that the presumption of innocence predated the Christian era. The Talmud, which was begun before then and not completed until the sixth century A.D., requires that “The accused [is] presumed innocent until the proof of his guilt [is] demonstrated as a certainty by evidence that [is] exact, consistent in all important respects, and beyond any doubt.” See LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT 433–34 (1968).

B. Critical, but of What Nature?

In *Coffin*, for the first time, the Court considered the nature of the presumption. This issue arose when the trial court refused, despite the defendants' request, to give the following instruction:

The law presumes that persons charged with crime are innocent until they are proven by competent evidence to be guilty. To the benefit of this presumption the defendants are all entitled, and this presumption stands as their sufficient protection unless it has been removed by evidence proving their guilt beyond a reasonable doubt.²⁰

The jury was, however, instructed on the requirement that guilt must be proven beyond a reasonable doubt.²¹ The Court found the issue to be "whether the charge that there cannot be a conviction unless the proof shows guilt beyond a reasonable doubt, so entirely embodies the statement of presumption of innocence as to justify the court in refusing, when requested, to inform the jury concerning the latter."²² It found the nature of the presumption of innocence to be one of evidence, stating that it was "an instrument of proof created by the law in favor of one accused, whereby his innocence is established until sufficient evidence is introduced to overcome the proof which the law has created."²³ As an "instrument of proof," or evidence, the Court held in reversing the convictions, "the failure to instruct [the jury] in regard to it excluded from their minds a *portion of the proof* created by law, and which they were bound to consider."²⁴ This, it ultimately concluded, was a benefit "to which the accused was entitled, and the benefit whereof both the court and the jury were bound to extend him."²⁵

The Court's view in *Coffin* of the presumption of innocence, that it was both evidentiary in nature and separate and distinct from the requirement of proof beyond a reasonable doubt, did not long survive. Only two years later, in *Agnew v. United States*,²⁶ after what the Court later described as "sharp scholarly criticism [which] demonstrated the error of [the holding in *Coffin*],"²⁷ it "retreated from its conclusion that the presumption of innocence is evidence to be weighed by the jury."²⁸ From then forward, as the Court stated in *Taylor v. Kentucky*,²⁹ it was "generally recognized that the 'presumption of evidence' is an inaccurate, shorthand description of the right of the accused to 'remain

²⁰ *Coffin*, 156 U.S. at 452.

²¹ *Id.*

²² *Id.* at 457.

²³ *Id.* at 459.

²⁴ *Id.* at 461 (emphasis added).

²⁵ *Id.*

²⁶ 165 U.S. 36, 51-52 (1897).

²⁷ *Taylor v. Kentucky*, 436 U.S. 478, 483 (1978).

²⁸ *Id.* The Court affirmed a criminal conviction where the trial court refused to give an instruction, based on the holding in *Coffin*, that the presumption was "to be treated by you as evidence giving rise to resulting proof to the full extent of its legal efficacy." *Agnew*, 165 U.S. at 51.

²⁹ *Taylor*, 436 U.S. 478 (1978).

inactive and secure, until the prosecution has taken up its burden and produced evidence and effected persuasion. . . ."³⁰ As evidence, it would have occupied a less important status, one subject to the vagaries of evidence codes and shifting views on admissibility. Once elevated in *Agnew* to a higher status, it far more strongly could support what *Coffin* described as "[t]he principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law."³¹ This principle, as the Court described in *In re Winship*,³² had become "bedrock."³³

Since its earliest days, Florida has held dear the presumption of innocence. In *Dukes v. State*,³⁴ the Florida Supreme Court held that "[i]t is a maxim in the law that innocence is presumed until the contrary is proved."³⁵ In this belief the court has never wavered.³⁶

The Florida Supreme Court first had the occasion to rule on the nature of the presumption in *McDuffee v. State*,³⁷ where the defendant complained of the trial court's refusal to give the *Coffin* instruction that the presumption was "evidence."³⁸ Having the benefit of the decision in *Agnew* eleven years earlier, and relying thereon, the Court affirmed and held:

[We] conclude that the presumption of innocence is not actually described as a presumption of evidence, but that the whole question resolves itself into two parts—upon whom is the affirmative cast and what is the quantum of evidence required to meet that affirmative.³⁹

The method for bringing the presumption to the attention of the jury was, as the court explained subsequently in *McKenna v. State*,⁴⁰ in the hands of the defendant:

The rule is thoroughly established both in the United States and Great Britain that one charged with a criminal offense is in law presumed to be innocent, and that presumption obtains in favor of the accused throughout every stage of the trial until his guilt has been proven to the exclusion of every reasonable doubt. This presumption of law should be explained to

³⁰ *Id.* at 484 (citing 9 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2511 (3d ed. 1940)).

³¹ *Coffin v. United States*, 156 U.S. 432, 453 (1895).

³² 397 U.S. 358 (1970).

³³ *Id.* at 363.

³⁴ 14 Fla. 499 (1874).

³⁵ *Id.* at 522.

³⁶ *See, e.g., Cox v. State*, 555 So. 2d 352, 353 (Fla. 1989) ("This Court has long held that one accused of a crime is presumed innocent until proved guilty beyond and to the exclusion of a reasonable doubt.") (citing *Davis v. State*, 90 So. 2d 629, 631 (Fla. 1956) and *McArthur v. State*, 351 So. 2d 972 (Fla. 1977)). In her dissent in *Hughes v. State*, 901 So. 2d 837, 852 (Fla. 2005), Chief Justice Pariente cited *Coffin* for her belief in the "bedrock 'axiomatic and elementary'" nature of the presumption of innocence.

³⁷ 46 So. 721 (Fla. 1908).

³⁸ *Id.* at 723.

³⁹ *McDuffee*, 46 So. at 724.

⁴⁰ 161 So. 561 (Fla. 1935).

every jury impaneled to try a criminal case, and, if a charge to that effect is requested by the defendant and refused by the court, such refusal would constitute reversible error.⁴¹

While the court reversed the conviction on other grounds,⁴² it rejected the defendant's argument that it was error to fail to instruct the jury on the presumption of innocence when (1) the defendant failed to ask the trial court to do so, and (2) the trial court did instruct on reasonable doubt.⁴³

Florida's intermediate courts have not been lagging in upholding the importance of the presumption. In *Reynolds v. State*,⁴⁴ the jury requested that the trial court repeat various instructions, including one on reasonable doubt. The court did so, but failed over the defendant's objection to repeat the instruction it had previously given on the presumption of innocence.

It did not appear from the opinion that the jury requested reinstruction on the presumption. Moreover, "the jury foreman responded affirmatively to the court's inquiry whether the charges given adequately answered the request for further instructions."⁴⁵ Notwithstanding, the court held that because "[t]he recommended Standard Instructions yoke the presumption with the burden,"⁴⁶ this failure to reinstruct was reversible error. As to the question of what weight it felt should be given to the foreman's understanding, the court held "[w]e do not believe that judgment should be left entirely to jurors whose doubt of what they had heard prompted the request for repeated instructions in the first instance."⁴⁷ In short, the court answered "nil." The importance of the presumption, even to the point of requiring reinstruction, was controlling.

C. *Instructions to the Jury: The Requirements and the Goals*

In 1895 the United States Supreme Court held:

[T]he judge, within his appropriate sphere, is to act by the force of his reason and understanding, and, by the aid of his knowledge of the law and all appropriate means, to adjudge all questions of law, and direct the jury thereon⁴⁸

⁴¹ *Id.* at 562.

⁴² *Id.* at 563 (holding that trial court erred in instructing the jury that it could only find defendant guilty of grand larceny, and not the lesser included charge of petit larceny).

⁴³ *Id.* at 562-63.

⁴⁴ 332 So. 2d 27 (Fla. Dist. Ct. App. 1976); see also *Jordan v. State*, 171 So. 2d 418, 421 (Fla. Dist. Ct. App. 1965) (reiterating the Florida Supreme Court statement from 79 years earlier in *Mann v. State*, 22 Fla. 600 (1886) that "[i]t is a maxim of our law, that every man is presumed to be innocent until he is proved to be guilty. It is characteristic of the humanity of all the English speaking people that you cannot blacken the character of a party who is on trial for alleged crime."); and *Harp v. Hinckley*, 410 So. 2d 619, 622 (Fla. Dist. Ct. App. 1982) ("Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.").

⁴⁵ *Reynolds*, 332 So. 2d at 29.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Sparf v. United States*, 156 U.S. 51, 92 (1895).

With this holding the Court settled, once and forever, the question that had been debated in the lower federal courts for more than one hundred years: whether the jury or the judge was to decide upon the law to be applied.⁴⁹ Today, in framing the law, “[i]t is axiomatic that federal district courts have wide discretion in crafting appropriate jury instructions.”⁵⁰

In describing the requirements of what constitutes an “appropriate” jury instruction in Florida, the Florida Supreme Court has held:

It is an inherent and indispensable requisite of a fair and impartial trial under the protective powers of our Federal and State Constitutions as contained in the due process of law clauses that a defendant be accorded the right to have a Court correctly and intelligently instruct the jury on the essential and material elements of the crime charged and required to be proven by competent evidence. Such protection afforded an accused cannot be treated with impunity under the guise of “harmless error.”⁵¹

The purpose of jury instructions in Florida has been stated as follows:

It is fundamental that the office of jury instructions is to enlighten the jury upon questions of law which are pertinent to the issues of fact submitted to them. The purpose of jury charges is to guide and control the jury in their deliberations so that they may arrive at a verdict which is fairly based on the law and the facts of the case.⁵²

Once having received “appropriate,” “correct,” and “intelligent” instructions, the jury, now fully empowered to decide liberty or life, retires to deliberate and closes the door behind it. It is then that the main goals of jury instruction, that each juror has understood and will apply the law to reach a legally proper decision, are achieved—or not. And, perhaps more importantly, it is then that the exercise of power and right may diverge. As it has been stated, “the jury’s right to return a general verdict in criminal cases gives it a naked power, but not a moral or legal right to determine the law upon its own initiative regardless of the court’s instruction.”⁵³ As this Article and the results of the instant survey show, this is a “naked power” that Florida jurors are in fact exercising—and in violation of the constitutional rights of criminal defendants.

Jurors’ general ability to understand and properly apply their instructions has been the subject of extensive and numerous studies, both by social scientists and legal commentators.⁵⁴ Their results, scientific in nature, have

⁴⁹ Mark DeWolfe Howe, *Juries as Judges of Criminal Law*, 52 HARV. L. REV. 582, 588 (1939).

⁵⁰ United States v. Ervasti, 201 F.3d 1029, 1035 (8th Cir. 2000) (citing United States v. Clapp, 46 F.3d 795, 803 (8th Cir. 1995)).

⁵¹ Gerds v. State, 64 So. 2d 915, 916 (Fla. 1953); see also Farnsworth v. Tampa Electric Co., 57 So. 233, 235 (Fla. 1911) (“Since the jury must take the law from the trial judge and be guided by his utterances, it is of the utmost importance that the trial judge should charge the law applicable to the issues being tried correctly.”).

⁵² Hattaway v. Fla. Power & Light Co., 133 So. 2d 101, 103 (Fla. Dist. Ct. App. 1961).

⁵³ United States v. Hyde, 448 F.2d 815, 862 (5th Cir. 1971) (Rives, J., dissenting).

⁵⁴ See, e.g., Bethany K. Dumas, *Jury Trials, Lay Jurors, Pattern Jury Instructions, and Comprehension Issues*, 67 TENN. L. REV. 701, 702 (2000) (see especially notes 5–6); Phoebe C. Ellsworth & Alan Reifman, *Juror Comprehension and Public Policy: Perceived*

been described in language that bespeaks a grim reality. Among many examples that could be given⁵⁵ are the following:

Legal scholars and social scientists have long thought that jurors have difficulty understanding the instructions of the trial court. However, serious empirical study of juror comprehension by social scientists did not begin until the early 1970s. Since then, findings by many social scientists consistently confirm that lay persons are frequently bewildered by the wording of jury instructions.⁵⁶

Lawyers and judges have suspected for some time, however, that many jurors do not understand their instructions. These suspicions are confirmed by numerous reported cases in which jury confusion peeks through. Recent social science research has demonstrated empirically that juror comprehension of instructions is appallingly low.⁵⁷

One of the findings in this study is that the adage, "innocent until proven guilty," is untrue. For a majority of the jurors, the defendant is guilty until proven innocent.⁵⁸

In regard to jurors' ability to understand the presumption of innocence specifically, unfortunately, and on a subject of instruction not just of statutory, but of constitutional importance,⁵⁹ the results have been dismal.

D. Instructions to the Jury on the Presumption of Innocence: The Hard Reality

The presumption of innocence, "bedrock" in nature, can fairly be said to be a subject of common knowledge. Presumably it is known by most jurors at least to generally exist when they first enter the courthouse. Jurors' increased familiarity with it should, one would hope, allow for greater understanding than one would expect for instructions on less well-known subjects such as the difference between second degree murder and manslaughter. Indeed, almost any instruction in a criminal case should be less familiar to them.

Even with this "leg up," the hard reality is that far too many jurors following this instruction simply do not understand it. And, if they do not, any criminal defendant can be certain that as the trial proceeds, at least some of the

Problems and Proposed Solutions, 6 PSYCH. PUB. POL'Y & L. 788 (2000); Bradley Saxton, *How Well Do Jurors Understand Jury Instructions? A Field Test Using Real Juries and Real Trials in Wyoming*, 33 LAND & WATER L. REV. 59 (1998) (see especially note 12); and numerous additional articles on jury decision making and jury instructions, collected at the website of the National Center for State Courts, found at www.ncsconline.org/WC/Education/JurDecGuide.htm (last visited Aug. 21, 2005).

⁵⁵ See sources collected *supra* note 54. Many of the authors in this field have, in too many ways to cite here, expressed similar opinions based on their empirical studies.

⁵⁶ See Dumas, *supra* note 54, at 702 (internal citations omitted).

⁵⁷ See Walter W. Steele, Jr. & Elizabeth G. Thornburg, *Jury Instructions: A Persistent Failure to Communicate*, 67 N.C. L. REV. 77 (1988).

⁵⁸ See Ann Burnett Pettus, *The Verdict Is In: A Study of Jury Decision Making Factors, Moment of Personal Decision, and Jury Deliberation—From the Jurors' Point of View*, 38 COMM. Q. 83, 93 (1990).

⁵⁹ See discussion *supra* Part III (B).

jurors—and even one should be too many—are at the same time proceeding to strip him or her of this most vital protection.

In a 1976 Florida study,⁶⁰ 116 jurors, summoned for criminal trials but not selected to serve, were shown a twenty-five-minute videotaped set of Florida Standard Jury Instructions as applied to a burglary case. They were then given forty multiple choice and true-false questions to test their understanding of the instructions. On the issue of the presumption of evidence the survey found:

[O]nly 50 per cent of the instructed jurors understood that the defendant did not have to present any evidence of his innocence, and that the state had to establish his guilt, with evidence, beyond any reasonable doubt. 10 per cent were uncertain as to what the presumption of innocence meant, and a small but frightening 2 per cent still maintained the belief that the burden of proof of innocence rested with the defendant.⁶¹

One commentator described these results as “astonishing,”⁶² but has also noted that “[t]his particular experiment could be criticized for its artificial setting, for failing to show the subjects the trial accompanying the jury instructions, and for testing jurors’ knowledge through multiple choice tests rather than through their application of the law.”⁶³

The chief problem with these results as to the presumption of innocence comes from their failure to test *actual* trial jurors:

1. Such jurors, unlike these survey subjects, would have almost certainly been questioned by defense counsel during voir dire (and perhaps by the prosecution as well) as to their understanding of the presumption of innocence. This process, had these subjects participated in it, would have served to educate them on the presumption.
2. The survey subjects were never asked to commit to their enforcement of the presumption, as defense counsel routinely asks of actual jurors in voir dire.
3. These subjects, finally, did not hear about the presumption and how to apply it from defense counsel, and possibly at length, during both opening statement and closing argument.

Compared to actual jurors’ exposure to the presumption during a trial, these subjects’ having heard a single instruction on it among their entire set, which took approximately one minute,⁶⁴ was but a fraction. No criminal

⁶⁰ See David U. Strawn & Raymond W. Buchanan, *Jury Confusion: A Threat to Justice*, 59 JUDICATURE 478, 481 (1976).

⁶¹ *Id.*

⁶² Firoz Dattu, *Illustrated Jury Instructions: A Proposal*, 22 LAW & PSYCHOL. REV. 67, 71 (1998). The author describes himself as a litigation associate at a New York law firm. It is not noted that he has a background in statistics. Nevertheless, when one measures these results against what is desired from juries, his description appears apt.

⁶³ *Id.*

⁶⁴ See *Reynolds v. State*, 332 So. 2d 27, 28–29 (Fla. Dist. Ct. App. 1976). The authors did not cite either the number or the text of the instruction they gave on the presumption of innocence. At the time of the survey, however, the sole standard instruction on this subject

defendant, however, should take heart from this analysis. Even if the survey had been "off" by half, 25% (three jurors out of twelve, or one or two out of six) still did not understand the presumption after instruction.

There is evidence that not only was the survey not "off"; it may have understated the severity of the problem. Steele and Thornburg⁶⁵ played audiotapes of both pattern and rewritten (e.g., simpler and less formal, but still correctly stating the law) instructions on five subjects,⁶⁶ one of which was the presumption of innocence, to potential jurors.⁶⁷ Immediately after hearing the instructions, a tape recorder was turned on, and the jurors were asked to paraphrase them. They were scored on the accuracy of what they related back.

One might expect that of these five subjects, jurors would at least understand the pattern instructions on the presumption of innocence.⁶⁸ If so, one would be greatly mistaken. A striking, and some would say shocking, 82.63% of them did *not* understand the presumption. *Only one in six*, or 17.37%, *did*. And these were jurors who were stating their understanding of it *immediately after* being instructed on it.

The results did not meaningfully improve when jurors paraphrased the rewritten instruction on the presumption. Three out of four, 76.67%, still did not understand. This does not bode well for the use of simplified instructions to achieve meaningful improvement, as has been often suggested.⁶⁹ And it is not that jurors are not working hard at understanding and applying the instructions.

was Florida Standard Jury Instruction 2.11(a), adopted in *In re* Standard Jury Instructions in Criminal Cases, 240 So. 2d 472 (Fla. 1970). It stated *in toto*:

The defendant in every criminal case is presumed to be innocent until his guilt is established by the evidence to the exclusion of and beyond every reasonable doubt.

Before the presumption of innocence leaves the defendant, every material allegation of the information (indictment) must be proved by the evidence to the exclusion of and beyond every reasonable doubt. The presumption accompanies and abides with the defendant as to each and every material allegation in the information (indictment) through each stage of the trial until it has been overcome by the evidence to the exclusion of and beyond a reasonable doubt.

If any of the material allegations of the information (indictment) is not proved to the exclusion of and beyond every reasonable doubt, you must give him the benefit of the doubt and find him not guilty, but if you find from the evidence beyond and to the exclusion of every reasonable doubt that all the material allegations of the charge have been proved then you must find him guilty.

⁶⁵ See Steele & Thornburg *supra* note 57.

⁶⁶ *Id.* at 92. These were, in civil cases: (1) new and independent cause, (2) negligence, and (3) proximate cause. In criminal cases, they were (4) presumption of innocence and (5) accomplice testimony.

⁶⁷ *Id.* at 88. They had been called for jury service in Dallas County, Texas, but were released after not having been selected.

⁶⁸ *Id.* at 92.

⁶⁹ See, e.g., Saxton, *supra* note 54, at 108.

The research shows, as common sense would dictate, that especially in criminal cases where liberty is at stake, they are.⁷⁰

Similarly, one might hope that if jurors generally do not understand their instructions, they would be receptive to admitting it. Again, such is not the case. In a survey of 253 actual Wyoming jurors who served through deliberations on criminal or civil juries,⁷¹ 97% of criminal jurors (and 98.5% of civil jurors) stated they felt they "understood the jury instructions that the judge gave [them]" either "completely" or "pretty well."⁷² Their self-perceived level of understanding, however, did not translate well to *actual* understanding:

Viewed in combination, the data from the three questions about the presumption of innocence and the burden and standard of proof in criminal trials are troubling. While a majority of jurors correctly understood the judges' instructions on these issues, a significant minority of jurors seemed to misinterpret the instructions in fundamental ways. Perhaps more troubling, the manner in which some jurors misunderstood the instructions could conceivably have affected some trial outcomes, if some or many jurors in their deliberations applied an easier standard of proof than the judges had instructed them to apply to the state's cases.⁷³

Not only do jury instructions fail to promote jurors' understanding, but one survey has shown that they actually can have the opposite effect.⁷⁴ In Lansing, Michigan, 600 actual and control (called, but non-selected) jurors completed true-false and open-ended questions seeking to analyze their understanding of their instructions. One of the questions, to which the correct answer was "False," stated, "A reasonable doubt must be based only on the evidence that was presented in the courtroom, on any conclusion that you draw from the evidence."⁷⁵

The survey showed, in a statistically significant manner,⁷⁶ that 48% of those who were *not* instructed during their trials on this subject⁷⁷ answered correctly, while 31.8% who *were* instructed did. Even standing on its own, the latter is distressing, given that in a true-false setting "mere guessing should

⁷⁰ See, e.g., Phoebe C. Ellsworth, *Are Twelve Heads Better Than One?*, 52 LAW & CONTEMP. PROBS. 205 (1989) The author noted that "[t]he criticism that juries approach their task in a frivolous manner receive[d] no support from this study or from any other serious empirical research on the jury." *Id.* at 215.

⁷¹ See Saxton, *supra* note 54, at 78.

⁷² *Id.* at 85.

⁷³ *Id.* at 99.

⁷⁴ See Geoffrey P. Kramer & Doreen M. Koenig, *Do Jurors Understand Criminal Jury Instructions? Analyzing the Results of the Michigan Juror Comprehension Project*, 23 U. MICH. J.L. REFORM 401 (1990).

⁷⁵ *Id.* at 414.

⁷⁶ *Id.* at 413 The p value, implying "that the difference is unlikely to be caused by chance and more likely to be caused by the instructions" was .020, less than the value of .05 that "[s]ocial scientists have traditionally accepted . . . as statistically significant."

⁷⁷ *Id.* at 409 ("Persons who did not serve on a jury comprised the control group for questions concerning reasonable doubt . . . because reasonable doubt . . . instructions are given to all jurors who serve in a criminal trial.").

result in a 50% correct response rate.”⁷⁸ In comparison to the former, the results are even more so.

As the authors noted in conclusion:

Th[e] research supports a growing body of literature suggesting that jury instructions are often lost on jurors, and can sometimes even backfire. [Footnote omitted] The relatively low rate of comprehension for some concepts, both among more- and less-educated jurors, the apparent ineffectiveness of instructions to improve comprehension, and the negative effect of certain instructions, constitute the most striking findings in the present study. Particularly startling are the results of instructions concerning reasonable doubt, defendant impeachment by prior conviction, and some aspects of mixed direct and circumstantial evidence.⁷⁹

Against this veritable flood of empirical evidence that juries do not generally understand, and cannot, therefore, follow their instructions, and with its finger in the equally veritable dike, stands the United States Supreme Court.

E. The Conclusive Presumption of Juror Understanding: Unfounded, Untenable, Irrebuttable, and a Violation of Due Process

In *Weeks v. Angelone*,⁸⁰ a Virginia jury, after finding Weeks guilty of capital murder, asked for clarification regarding two aggravating circumstances urged by the State. It sent the following note to the court:

If we believe that Lonnie Weeks, Jr. is guilty of at least 1 of the alternatives, then is it our duty as a jury to issue the death penalty? Or must we decide (even though he is guilty of one of the alternatives) whether or not to issue the death penalty, or one of the life sentences? What is the Rule? Please clarify?⁸¹

The court responded in writing, telling the jurors to reread the jury instruction the court had already given them—“See second paragraph of Instruction # 2 (Beginning with ‘If you find from . . .’).”⁸² It was the same instruction the jury had clearly failed to understand the first time, as shown by its sending the note (“Please clarify?”).

The jury returned with the death penalty. On appeal, Weeks complained of the instructions regarding aggravation. The Court found them to be legally correct. However, it seemed to feel it necessary to attempt in two ways to justify its holding in light of what had transpired:

Given that petitioner’s jury was adequately instructed, and given that the trial judge responded to the jury’s question by directing its attention to the precise paragraph of the constitutionally adequate instruction that

⁷⁸ *Id.* at 412.

⁷⁹ *Id.* at 428.

⁸⁰ 528 U.S. 225 (2000).

⁸¹ *Id.* at 229.

⁸² *Id.*

answers its inquiry, the question becomes whether the Constitution requires anything more. We hold that it does not.

A jury is presumed to follow its instructions.⁸³

As to the former justification, the Court held that merely pointing the jury again to an instruction that was almost certainly unclear and not understood the first time was sufficient.⁸⁴

As to the latter justification, the Court did several things. First, it presumed a fact that has been universally proven to be untrue.⁸⁵ Second, it affirmed the harshest penalty the law allows based in important part on the presumed fact, that “jurors follow [and therefore must understand] their instructions.”⁸⁶ Third, although it cited to its prior decision in *Richardson*, it did not reiterate *Richardson*’s holding—that this presumption of understanding was more pragmatic than true:

The rule that juries are presumed to follow their instructions is a *pragmatic* one, rooted *less in the absolute certitude that the presumption is true* than in the belief that it represents a reasonable practical accommodation of the interests of the state and the defendant in the criminal justice process.⁸⁷

To say that there is no “absolute certitude” that “the presumption is true” would be an understatement of titanic proportions. The Court’s failure in *Weeks* to acknowledge that its factual finding was likely not factual at all—but instead was “pragmatic”—is telling. This “pragmatism” operated there to deny the defendant in *Weeks* any opportunity to contest whether the jury understood what literally was a “life and death” instruction, thus making the presumption

⁸³ *Id.* at 234 (citing *Richardson v. Marsh*, 481 U.S. 200, 211 (1987)).

⁸⁴ The Court went on to state:

Weeks’ jury did not inform the court that after reading the relevant paragraph of the instruction, it still did not understand its role. (“Had the jury desired further information, they might, and probably would, have signified their desire to the court. The utmost willingness was manifested to gratify them, and it may fairly be presumed that they had nothing further to ask”). To presume otherwise would require reversal every time a jury inquires about a matter of constitutional significance, regardless of the judge’s answer.

Id. at 234.

This finding by the Court, a presumptive one at best, that the jury in *Weeks* understood the instruction, has been criticized. See Stephen P. Garvey et al., *Correcting Deadly Confusion: Responding to Jury Inquiries in Capital Cases*, 85 CORNELL L. REV. 627, 646 (2000) (concluding, after performing a study of mock jurors and using the same instruction in *Weeks*, that “[t]he jurors who sentenced Lonnie Weeks to death did not understand the law. They asked the trial judge for help. Based on our mock study, the answer he gave probably did precious little good. Consequently, when the jurors voted to condemn Weeks, some of them probably still didn’t understand the law and continued to think they *had* to vote for death.”); See also Dumas, *supra* note 54, at 712.

⁸⁵ See Dumas and other authority *supra* note 54, Steele & Thornburg *supra* note 57, Pettus *supra* note 58, Strawn & Buchanan *supra* note 60, and Reynolds v. State, 332 So. 2d 27, 28 (Fla. Dist. Ct. App. 1976).

⁸⁶ *Weeks*, 528 U.S. at 226.

⁸⁷ *Richardson v. Marsh*, 481 U.S. 200, 211 (1987) (emphasis added).

irrebuttable. And, given the language the Court used in regard to it, there is no reason to believe that this presumption is anything other than—and intended to be—permanent.

For the Court to have not only created, but *itself* applied against the defendant this unfounded, irrebuttable, and permanent presumption constituted a practice it had condemned as a clear violation of the Due Process Clause. As the Court held in *Vlandis v. Kline*.⁸⁸

[I]t is forbidden by the Due Process Clause to deny an individual the resident rates on the basis of a permanent and irrebuttable presumption of nonresidence, when that presumption is *not necessarily or universally true in fact*, and when the State has reasonable alternative means of making the crucial determination.⁸⁹

Statutes creating permanent irrebuttable presumptions have long been disfavored under the Due Process Clauses of the Fifth and Fourteenth Amendments.⁹⁰

In *Stanley v. Illinois*,⁹¹ it held that the presumption under Illinois law that unwed fathers were unfit to raise their children denied fathers their due process rights:

Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it *explicitly disdains present realities*⁹² in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand.⁹³

These are not the only occasions on which the Court condemned such presumptions.⁹⁴ And, ironically, its clarified test for their validity in *Usery v. Turner Elkhorn Mining Co.*⁹⁵ only serves to more brightly highlight why its conclusive presumption of juror understanding in *Weeks* and *Richardson* is constitutionally infirm. In *Usery*, the Court considered the constitutionality of statutory conclusive presumptions determining that miners who suffered from

⁸⁸ 412 U.S. 441 (1973).

⁸⁹ *Id.* at 452 (emphasis added).

⁹⁰ *Id.* at 446.

⁹¹ 405 U.S. 645 (1972).

⁹² This is precisely what the Court did in *Weeks* by applying the presumption.

⁹³ *Id.* at 656–57 (emphasis added).

⁹⁴ See, e.g., *Carrington v. Rash*, 380 U.S. 89 (1965) (conclusive irrebuttable presumption that servicemen would never be residents of Texas, thereby not allowing them to vote, violated Equal Protection Clause); *Oyama v. California*, 332 U.S. 633 (1948) (statutory conclusive irrebuttable presumption regarding land conveyance violated Equal Protection Clause); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974) (conclusive irrebuttable presumption that all teachers reaching their fifth or sixth month of pregnancy were physically incapable of teaching violated Due Process Clause). But see, e.g., *Weinberger v. Salfi*, 422 U.S. 749 (1975) (distinguishing *Stanley*, *Vlandis*, and *Cleveland Bd. of Educ.* and applying rational relationship test in assessing validity of conclusive legislative presumption).

⁹⁵ 428 U.S. 1 (1976).

pneumoconiosis were totally disabled due to it, or, if they died, that death was caused by it. Since it was a federal civil statute that created the presumptions, the Court applied the test it had consistently used in civil contexts:

That a legislative presumption of one fact from evidence of another may not constitute a denial of due process of law or a denial of the equal protection of the law *it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed*, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate.⁹⁶

Its conclusive presumption in *Weeks* and *Richardson* fails this test. There is no proof of any fact that jurors understand generally, such that the Court could presume the ultimate fact that they did so specifically in *Weeks*. Moreover, as has been amply demonstrated nationwide,⁹⁷ there is not just a dearth of proof—the proof is uniformly to the contrary. Not only is there no “rational connection”—there is no connection.

The irony of its holding in *Usery* as applied to its presumption in *Weeks* and *Richardson* is enhanced by its further statement therein:

The process of making the determination of rationality is, by its nature, *highly empirical*, and in matters *not within specialized judicial competence* or completely commonplace, significant weight should be accorded the capacity of Congress to amass *the stuff of actual experience and cull conclusions from it*.⁹⁸

First, the Court had no “specialized judicial competence” in determining the factual validity of its presumption regarding juror understanding. It is not a trial court, even assuming *arguendo* simply being one could bestow such knowledge. Second, the only “highly empirical” evidence in existence proved that its presumption was factually wrong. And, the Court failed in *Weeks* or *Richardson* to cite a single study—out of the hundreds available to it—to support it. Finally, if “significant weight” should be accorded Congress to “amass *the stuff of actual experience and cull conclusions from it*,”⁹⁹ the Court had at its fingertips the very same thing from empirical researchers throughout the United States and during the past 50 years. In truth, the Court could not afford to turn there, because to do so would have been to include in these holdings the very reason why its presumption was factually null.

The analysis *supra* tested the presumption in *Weeks* against the holdings in *Vlandis*, *Stanley*, and *Usery*. These, however, are all civil cases. As *Weeks* was a criminal case, one may argue that the conclusive mandatory presumption applied there should be tested under the more rigorous test for such presumptions found in criminal cases. Doing so shows the presumption’s unconstitutionality in this second arena.

⁹⁶ *Usery*, 428 U.S. at 28 (citing *Mobile, Jackson & Kansas City R.R. Co. v. Turnipseed*, 219 U.S. 35, 43 (1910)) (emphasis added).

⁹⁷ See authority referred to *supra* note 85.

⁹⁸ *Usery*, 428 U.S. at 28 (citing *United States v. Gainey*, 380 U.S. 63, 67 (1965)) (emphasis added).

⁹⁹ *Id.* (emphasis added).

This test was enunciated most clearly in *Leary v. United States*.¹⁰⁰ There, the defendant was convicted under a federal statute that created a *permissive* rebuttable presumption that he, as a possessor of marijuana, knew it had been imported illegally. He argued that this denied his due process rights.

After examining the history of cases measuring the validity of statutory presumptions, the Court held:

The upshot of *Tot*,¹⁰¹ *Gainey*,¹⁰² and *Romano*¹⁰³ is, we think, that a criminal statutory presumption must be regarded as "irrational" or "arbitrary," and hence unconstitutional, unless it can at least be said with *substantial assurance* that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend.¹⁰⁴

The Court then noted the *Gainey* requirement that making the determination of rationality, itself a "highly empirical"¹⁰⁵ process, likely required an examination of evidence supporting the "rational connection between the fact proved and the ultimate fact presumed."¹⁰⁶ It then diligently, in fact at great length, conducted this examination. It examined data of marijuana usage nationwide (1) both inside and outside the legislative record, (2) created after the presumption was enacted, (3) in books, reports, handbooks and periodicals, and even (4) in a transcript of a pretrial hearing.¹⁰⁷ Then, using many of these same sources, it went on to examine no fewer than five separate ways in which marijuana possessors could in fact learn that *their* marijuana was imported.¹⁰⁸ It concluded that "the 'knowledge' aspect of the . . . presumption cannot be upheld without making serious incursions into the teachings of *Tot*, *Gainey* and *Romano*,"¹⁰⁹ and further acknowledged that:

Congress, no less than we, is subject to constitutional requirements, and in this instance the legislative record falls even shorter of furnishing an adequate foundation for the 'knowledge' presumption than do the more extensive materials we have examined. We thus cannot escape the duty of setting aside petitioner's conviction . . .¹¹⁰

And, it is important to remember that this analysis led to reversal for merely an improper permissive presumption, not a conclusive one.

The Court will go to great, even extreme, lengths to perform its due diligence in determining the factual validity of a presumption—when it suits its purposes to do so. It will rely on survey statistics from the National Center for

¹⁰⁰ 395 U.S. 6 (1969).

¹⁰¹ *Tot v. United States*, 319 U.S. 463 (1943).

¹⁰² *Gainey*, 380 U.S. 63.

¹⁰³ *United States v. Romano*, 382 U.S. 136 (1965).

¹⁰⁴ *Leary*, 395 U.S. at 36 (emphasis added).

¹⁰⁵ *Gainey*, 380 U.S. at 67.

¹⁰⁶ *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 28 (1976).

¹⁰⁷ *Leary*, 395 U.S. at 39-43.

¹⁰⁸ *Id.* at 47.

¹⁰⁹ *Id.* at 52.

¹¹⁰ *Id.* at 53.

State Courts, as it did in *Carter v. Kentucky*¹¹¹—when it suits its purposes to do so. Yet, it will fail to consider information like that found at the NCSC web site,¹¹² where more than sufficient evidence¹¹³ to show the fallacy of its presumption that jurors understand their instructions is easily found.

In regard to this presumption, it has failed to offer a single piece of evidence—much less even perform the examination it said in *Leary* was required—to support it. And, one must assume that our highest court is now and has been fully aware of the universal findings of the *Gainey*-required “empirical research” on juror understanding. To broach the subject openly, however, could only lead the Court to one conclusion: its presumption is fallacious. It is clearly denying the obvious, such that one can well ask whether any objective observer will cry out that “the emperor has no clothes.”¹¹⁴

The damage is being done. Both district and lower appellate federal courts,¹¹⁵ as well as supreme and intermediate appellate state courts,¹¹⁶ are relying on *Weeks*’ unfounded presumption of juror understanding. It appears that no court, however, has cited *Richardson* and acknowledged that the presumption is pragmatic, not factual.

¹¹¹ 450 U.S. 288, 303 (1981) In support of its holding that a cautionary instruction to the jury on defendant’s right not to testify was required, the Court stated at note 21, “[t]he importance of a no-inference instruction is underscored by a recent national public opinion survey conducted for the National Center for State Courts, revealing that 37% of those interviewed believed that it is the responsibility of the accused to prove his innocence. 64 A.B.A.J. 653 (1978).”

¹¹² See NATIONAL CENTER FOR STATE COURTS, JURY DECISION MAKING, RESOURCE GUIDE, available at <http://www.ncsconline.org/WC/Education/JurDecGuide.htm> (last visited Feb. 26, 2006).

¹¹³ See, e.g., Devine et al., *supra* note 5.

¹¹⁴ *Moore v. City of Harriman*, 272 F.3d 769, 775 (6th Cir. 2001) (Gilman, J., concurring) (“[t]he majority sitting en banc, of course, is perfectly free to abandon the rule in *Wells* (and the dissent does not claim otherwise), but it would be preferable to do so forthrightly. To do otherwise leaves the court open to the criticism that it is denying the obvious until an objective observer cries out that ‘the emperor has no clothes.’ Hans Christian Andersen, *The Emperor’s New Clothes*, in *THE LITTLE MERMAID AND OTHER FAIRY TALES* (1963).”).

¹¹⁵ See *United States v. Betterton*, 417 F.3d 826 (8th Cir. 2005); *McHone v. Polk*, 392 F.3d 691 (4th Cir. 2004); *Wansing v. Hargett*, 341 F.3d 1207 (10th Cir. 2003); *Payton v. Woodford*, 258 F.3d 905 (9th Cir. 2001); *United States v. Grant*, 256 F.3d 1146 (11th Cir. 2001); *Cortez v. Runnels*, No. C-04-674-SI, 2005 U.S. Dist. LEXIS 12482 (N.D. Cal. Jan. 20, 2005); *Funai v. Brownlee*, 369 F. Supp. 2d 1222 (D. Ha. 2004); *Gaines v. Matesanz*, 272 F. Supp. 2d 121 (D. Mass. 2003); *United States v. Battle*, No. 97-40005-01-SAC, 2002 U.S. Dist. LEXIS 25073 (D. Kan. Oct. 24, 2002); *Wigfall v. Hamlet*, No. C-03-04174-SI, 2004 U.S. Dist. LEXIS 22366 (N.D. Cal. May 24, 2004); *United States v. Jansen*, 218 F. Supp. 2d 659 (M.D. Pa. 2002); and *United States ex rel. Rodgers v. McVicar*, No 98-C-7024, 2001 U.S. Dist. LEXIS 14074 (N.D. Ill. Sept. 5, 2001).

¹¹⁶ See *People v. Fritz*, No. H024414, 2003 Cal. App. LEXIS 9660 (Cal. Ct. App. Oct. 10, 2003); *People v. Pulliam*, 794 N.E.2d 214 (Ill. 2002); *Leonard v. State*, 17 P.3d 397 (Nev. 2001); and *Emmett v. Commonwealth*, 569 S.E.2d 39 (Va. 2002); but see, e.g., *State v. Stevenson*, 733 A.2d 253, 272 (Conn. App. Ct. 1999) (relying on prior Connecticut law, not *Weeks*, for holding that “[t]he jury is presumed to follow instructions given by the trial court”).

One Florida court¹¹⁷ has to date relied on *Richardson*, albeit without mentioning its acknowledgement of pragmatism, for the proposition that "it is an invariable assumption of the law that jurors follow their instructions."¹¹⁸ None has relied on *Weeks*. Should a Florida court ever assess the constitutionality of this conclusive presumption, less accurately described as an "invariable assumption," perhaps to avoid due process concerns, it will likely employ the analysis (albeit not in a statutory context) most recently employed in *Recchi America Inc. v. Hall*.¹¹⁹ There, the Florida Supreme Court considered the constitutionality of a statute which mandated that a worker injured while intoxicated or using drugs was conclusively presumed to have been injured as a result thereof. It adopted in its entirety the opinion of the First District Court of Appeal,¹²⁰ which held that "[a] positive confirmation of a drug at the time of the industrial injury does not conclusively establish that the industrial accident was causally related to the intoxication of, or the influence of the drug upon, the employee."¹²¹ Because the claimant was not given an opportunity to challenge the presumption, and the ultimate fact (causation) was not conclusively established by the predicate fact (drug use), the statute violated his due process rights and was unconstitutional.¹²²

Applying this same analysis to the conclusive but factually unfounded presumption of juror understanding would make it difficult for any Florida court, without applying judicial legerdemain, to avoid finding a violation of due process.

Relief for Florida defendants aggrieved by jurors' failure to understand the law may be available in very narrow circumstances, however, thus avoiding the necessity of broadly attacking the presumption. In *Crapps v. Murchek*,¹²³ one day after the defendant was convicted of manslaughter, a deputy clerk "reported to the trial court that a juror had advised that a mistake had been made in the verdict."¹²⁴ The defendant was permitted to take the deposition of this juror, who testified that the jury was confused as between manslaughter and justifiable homicide. At trial, the jury foreman reported a unanimous verdict but said it did not "fit" any of the verdict forms.

The appellate court recited this and other evidence, and concluded that what had happened was that the "unanimous verdict" the jury had reached was "guilty of justifiable homicide." This, the court noted, was why it did not "fit" into any of the verdict forms. The result of such a unanimous finding, of course, should have been to acquit the defendant. Terming this a "unique

¹¹⁷ *Schwarck v. State*, 568 So. 2d 1326 (Fla. Dist. Ct. App. 1990).

¹¹⁸ *Id.* at 1327.

¹¹⁹ 692 So. 2d 153 (Fla. 1997).

¹²⁰ *Hall v. Recchi Am., Inc.*, 671 So. 2d 197 (Fla. Dist. Ct. App. 1996).

¹²¹ *Id.* at 201.

¹²² *Id.* The Florida Supreme Court excised a portion of the statute so as to allow an injured worker to rebut the presumption and to preserve the constitutionality of the remainder. *Recchi Am. Inc.*, 692 So. 2d at 155.

¹²³ 330 So. 2d 173 (Fla. Dist. Ct. App. 1976).

¹²⁴ *Id.* at 175.

situation,”¹²⁵ and perhaps influenced by what it termed “substantial (if not overwhelming) evidence”¹²⁶ showing that the defendant had acted in self defense, the court found inapplicable the general rule barring a juror’s post-verdict testimony as “an impermissible attempt to impeach the jury verdict by matters which essentially inhere in the verdict itself.”¹²⁷ Thus, at least one Florida court has opened the door, albeit only a crack, to challenging a jury’s failure to understand the law.¹²⁸

F. More than One in Five Florida Jurors Admit to Not Believing in the Presumption of Innocence Throughout Trial—Already Disturbing and Significant, but Is the Percentage Even Higher?

The “Preliminary Instruction” the jurors hear at the start of the trial makes no mention of the presumption of innocence.¹²⁹ At the conclusion of the case jurors are instructed as follows:

The defendant has entered a plea of not guilty. This means you must presume or believe the defendant is innocent. The presumption stays with the defendant as to each material allegation in the [information] [indictment] through each stage of the trial unless it has been overcome by the evidence to the exclusion of and beyond a reasonable doubt.

To overcome the defendant’s presumption of innocence, the State has the burden of proving the crime with which the defendant is charged was committed and the defendant is the person who committed the crime.

The defendant is not required to present evidence or prove anything.

Whenever the words “reasonable doubt” are used you must consider the following¹³⁰

Rather than use a series of indirect questions to determine the jurors’ belief in the presumption of innocence, followed by additional statistical analyses to attempt to come to an overall conclusion, the survey confronts the issue directly and puts the issue to jurors plainly. Jurors were asked to respond to this statement only if the defendant testified, as it is in that situation, and not where

¹²⁵ *Id.* at 176.

¹²⁶ *Id.* at 174.

¹²⁷ *Id.* at 175.

¹²⁸ *But see* Robinson v. MacKenzie, 508 So. 2d 1285, 1286 (Fla. Dist. Ct. App. 1987) (reversing defendant’s conviction for first degree murder after state had convinced trial court that verdict jury returned for attempted first-degree murder with a firearm was a “clerical error,” and holding that “[v]erdicts based on the jury’s misapprehension of the law are not subject to collateral attack because matters considered during deliberations inhere in the verdict” (citing State v. Blasi, 411 So. 2d 1320 (Fla. Dist. Ct. App. 1981)).

¹²⁹ See FLA. STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES § 2.1 (2005).

¹³⁰ See FLA. STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES § 3.7 (2005). While no survey question specifically asked jurors if they were instructed on the presumption of innocence, it is reasonably certain that all of them were. Only the most egregious lapse by defense counsel in failing to request it or the court in not giving it could cause it not to have been given.

he or she did not, that jurors' willingness to apply the presumption is most directly tested. Additionally, the issue was presented in the most positive, e.g. legally correct, manner possible, as opposed to something more neutral but less completely correct, such as "I applied the presumption of innocence in the trial." This was done to test jurors' acceptance of the presumption as it is intended to be applied. And, given that at least some and likely many of these jurors at some point had been taught or otherwise learned that one is "presumed innocent until proven guilty," there should have been at least a predisposition for these jurors to "agree strongly" or "agree."

86. I believed throughout the entire trial that the defendant was presumed innocent.

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	STRONGLY DISAGREE	15	1.9	2.7	2.7
	DISAGREE	104	13.3	18.4	21.1
	AGREE	308	39.5	54.6	75.7
	AGREE STRONGLY	137	17.6	24.3	100.0
	Total	564	72.3	100.0	
Missing	System	216	27.7		
Total		780	100.0		

The results were disturbing. Out of 564 responding criminal jurors, more than one in five,¹³¹ 21.1%, disagreed with this most fundamental protection. Of equal importance—some may say it is greater—fewer than one in four jurors, 24.3%, "agreed strongly" with it.

An additional factor may have affected these results, and not toward the positive. Almost certainly there were jurors who had difficulty finally deciding between "agreeing" and "disagreeing," or between "disagreeing" and "strongly disagreeing." The statement as phrased was quite clear. Their likely understanding of it as the expression of a longstanding, strong, or even fundamental American value may have caused them to be hesitant or even unwilling to "challenge" it by selecting the latter, more negative, category in each pairing—even if they did not apply the presumption throughout the trial. In short, some jurors could have felt that giving a negative or even a less positive response was an "admission" that they did not believe in this value.

No defendant in Florida, or inferentially anywhere, will take heart from these results. It is one thing for a defendant to "feel" or even on a non-empirical basis "believe" that jurors think "he must have done something or else he wouldn't be there." It is quite another to *know* that one-fifth of his or her jury—and as noted, it is likely more than that—is stripping away the presumption of innocence as the trial progresses. And, as for defense counsel, they can be fairly assured that their statement in closing argument that "my client is presumed innocent" is falling on a number of deaf ears.

¹³¹ See discussion *supra* note 11. The logistical barriers of the survey, coupled with concerns over both case and juror anonymity, made it highly impractical to determine which responding jurors served together on the same trial.

It should be enough for one to face the full power of the state at trial, without also facing the loss of the most valuable and core protection that our system of justice is intended to provide.

IV. THE PRIVILEGE AGAINST SELF-INCRIMINATION: NO LESS ANCIENT, NO LESS CRITICAL, AND NO LESS AT RISK IN THE HANDS OF THE JURORS

A. *Also from Antiquity, and No Less Critical*

In 1537, when asked during his inquisition whether he had ever been suspected of heresy, John Lambert, before he was burned at the stake, told the Archbishop of Canterbury: "[T]hough I did remember . . . yet were I more than twice a fool to show you thereof; for it is written in your own law, 'No man is bound to bewray [accuse] himself . . . *Nemo tenetur prodere seipsum*.'" ¹³²

The privilege against self-incrimination arose long before the common law in England, however. Its origins are "most fittingly date[d] . . . in the Israel of Biblical times." ¹³³ Prior to reaching the United States it coursed through the common law, ¹³⁴ where during the sixteenth through eighteenth centuries in England it served to protect against "religious intolerance and open-ended fishing expeditions." ¹³⁵ Once across the Atlantic, in the late eighteenth century it "grew legs" as the increasingly wide use of defense lawyers obviated the need for defendants to speak for themselves. ¹³⁶ They could now remain silent.

By the time the Bill of Rights was drafted in 1789, the privilege had already taken strong root in the states. ¹³⁷ Through the efforts of James Madison, whose phrasing of the privilege within the Fifth Amendment as ultimately

¹³² LEVY, *supra* note 19, at 3. More recently, the Supreme Court has stated, "The law will not suffer a prisoner to be made the deluded instrument of his own conviction." *Watts v. Indiana*, 338 U.S. 49, 54 (1949) (citing 2 WILLIAM HAWKINS, A TREATISE ON THE PLEAS OF THE CROWN, ch. 46, § 34 (8th ed., 1824)).

¹³³ LEVY, *supra* note 19, at 433. "Woven into the texture of this criminal procedure of the old Rabbinic courts [found in the Talmud] was the maxim *ein adam meissim atsmo rasha*, the Hebrew equivalent of *nemo tenetur seipsum tenetur*. Literally translated it means, a man cannot represent himself as guilty, or as a transgressor." *Id.* at 434. See also Irene Merker Rosenberg & Yale L. Rosenberg, *In the Beginning: The Talmudic Rule Against Self-Incrimination*, 63 N.Y.U. L. REV. 955 (1988).

¹³⁴ See, e.g., John H. Langbein, *The Historical Origins of the Privilege Against Self-Incrimination at Common Law*, 92 MICH. L. REV. 1047 (1994).

¹³⁵ Akhil Reed Amar & Renée B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857, 896 (1995).

¹³⁶ *Id.* at 897.

¹³⁷ See Michael Edmund O'Neill, *The Fifth Amendment In Congress: Revisiting the Privilege Against Compelled Self-Incrimination*, 90 GEO. L.J. 2445, 2474-79 (2002). The Virginia Declaration of Rights, for example, in language drafted by George Mason, stated that no defendant can "be compelled to give evidence against himself." *Id.* at 2476. See also Albert W. Alschuler, *A Peculiar Privilege In Historical Perspective: The Right to Remain Silent*, 94 MICH. L. REV. 2625, 2651 (1996).

ratified¹³⁸ appears to have gone unquestioned and unchanged,¹³⁹ its journey from antiquity to modernity and federal permanency reached its end.

In Florida, the right not to "be compelled in any criminal matter to be a witness against oneself" has constitutional protection.¹⁴⁰ Since Florida first became a state, it always has.¹⁴¹

The importance of this privilege needs no lengthy elucidation. It is such that the United States Supreme Court has more than once described it as the "essential mainstay" of the American criminal justice system.¹⁴² The Florida Supreme Court, in examining whether a confession was voluntary, stated that "[t]his rule against compulsory self-incrimination is extremely important and should be jealously preserved and fearlessly applied."¹⁴³

Its preservation has taken place in various contexts. At trial, should either the court¹⁴⁴ or the prosecution¹⁴⁵ do so, it is error¹⁴⁶ to comment on the defendant's exercise of this privilege. Similarly, it is error to deny a defendant's request to specifically instruct the jury on this privilege.¹⁴⁷ It is not error to give such an instruction over the defendant's objection,¹⁴⁸ however, because "[t]he

¹³⁸ U.S. CONST. amend. V. (In pertinent part: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself . . ."). See also 18 U.S.C. § 3481 (2000) ("In trial of all persons charged with the commission of offenses against the United States and in all proceedings in . . . any State . . . the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him.").

¹³⁹ O'Neill, *supra* note 139, at 2481.

¹⁴⁰ FLA. CONST. art. I, § 9.

¹⁴¹ FLA. CONST. OF 1838 art. I, § 10 ("That in all criminal prosecutions, the accused . . . shall not be compelled to give evidence against himself.").

¹⁴² See, e.g., *Malloy v. Hogan*, 378 U.S. 1, 7 (1964), and *Miranda v. Arizona*, 384 U.S. 436, 460 (1966).

¹⁴³ *Flowers v. State*, 12 So. 2d 772, 779 (Fla. 1943).

¹⁴⁴ See *Griffin v. California*, 380 U.S. 609 (1965) (conviction reversed where both the court and the prosecution commented on defendant's failure to testify, as permitted by then-existing provision of California constitution).

¹⁴⁵ *Id.* at 611. The prosecution told the jury, in pertinent part, "These things [the defendant] has not seen fit to take the stand and deny or explain. And in the whole world, if anybody would know, this defendant would know. Essie Mae is dead, she can't tell you her side of the story. The defendant won't."; See also *State v. Marshall*, 476 So. 2d 150, 153 (Fla. 1985) ("Any comment on, or which is fairly susceptible of being interpreted as referring to, a defendant's failure to testify is error and is strongly discouraged."), and FLA. R. CRIM. P. 3.250 (2000) ("nor shall any prosecuting attorney be permitted before the jury or court to comment on the failure of the accused to testify in his or her own behalf . . .").

¹⁴⁶ But see *Marshall*, 476 So. 2d at 153 (comment on defendant's failure to testify "should be evaluated according to the harmless error rule, with the state having the burden of showing the comment to have been harmless beyond a reasonable doubt. Only if the state fails to carry this burden should an appellate court reverse an otherwise valid conviction.").

¹⁴⁷ See *Carter v. Kentucky*, 450 U.S. 288, 294 (1981) The defendant there requested the following instruction: "The [defendant] is not compelled to testify and the fact that he does not cannot be used as an inference of guilt and should not prejudice him in any way."

¹⁴⁸ *Id.* at 301. See also *Andrews v. State*, 443 So. 2d 78, 84 (Fla. 1983) and cases cited therein.

salutary purpose of the instruction, 'to remove from the jury's deliberations any influence of unspoken adverse inferences,' [is] deemed so important that it . . . outweigh[s] the defendant's own preferred tactics."¹⁴⁹ Even after conviction, during the penalty phase of the trial, the privilege must be maintained.¹⁵⁰

B. (Do Not) Testify at Your Own Risk

As part of their preliminary instructions at the start of the trial, but only if the defendant requests it, jurors are told the following:

In every criminal proceeding a defendant has the absolute right to remain silent. At no time is it the duty of a defendant to prove [his] [her] innocence. From the exercise of a defendant's right to remain silent, a jury is not permitted to draw any inference of guilt, and the fact that a defendant did not take the witness stand must not influence your verdict in any manner whatsoever.¹⁵¹

At the conclusion of the case, the Court gives either or both of these instructions upon the defendant's request:

The constitution requires the State to prove its accusations against the defendant. It is not necessary for the defendant to disprove anything. Nor is the defendant required to prove [his or her] innocence. It is up to the State to prove the defendant's guilt by evidence.

The defendant exercised a *fundamental* right by choosing not to be a witness in this case. You must not view this as an admission of guilt or be influenced in any way by [his or her] decision. No juror should ever be concerned that the defendant did or did not take the witness stand to give testimony in the case.¹⁵²

Out of criminal jurors responding, 61.4% indicated that defendants did testify in their trials, while more than one in three, 38.6%, said they did not.¹⁵³ When defendants exercised their Fifth Amendment privilege, the survey showed the following:

¹⁴⁹ See *Carter*, 450 U.S. at 301.

¹⁵⁰ See *Estelle v. Smith*, 451 U.S. 454, 462 (1981), and *Burns v. State*, 699 So. 2d 646, 651 (Fla. 1997).

¹⁵¹ FLA. STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES § 2.1 (2005). While the survey did not ask jurors if they received any particular instructions, including this one, it is likely that most defense counsel requested it both (1) due to its hopefully preemptive effect if their clients did not testify, and (2) because they could be more open to claims of ineffective assistance of counsel, or other claims, if they did not.

¹⁵² FLA. STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES § 3.9(d) (2005) (emphasis added).

¹⁵³ For Tables 91, 92, 94, and 95, jurors were told to respond only if theirs was a criminal trial and the defendant did not testify. "Missing System," therefore, with perhaps minor exception, means jurors in whose trials the defendant did testify.

94. The jury discussed the fact that the defendant did not testify.

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	STRONGLY DISAGREE	79	10.1	26.2	26.2
	DISAGREE	107	13.7	35.5	61.8
	AGREE	101	12.9	33.6	95.3
	AGREE STRONGLY	14	1.8	4.7	100.0
	Total	301	38.6	100.0	
Missing	System	479	61.4		
Total		780	100.0		

92. It mattered to the jury in deliberations that the defendant did not testify.

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	STRONGLY DISAGREE	73	9.4	24.0	24.0
	DISAGREE	167	21.4	54.9	78.9
	AGREE	52	6.7	17.1	96.1
	AGREE STRONGLY	12	1.5	3.9	100.0
	Total	304	39.0	100.0	
Missing	System	476	61.0		
Total		780	100.0		

91. I believe the defendant had an obligation to testify.

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	STRONGLY DISAGREE	89	11.4	27.6	27.6
	DISAGREE	176	22.6	54.5	82.0
	AGREE	47	6.0	14.6	96.6
	AGREE STRONGLY	11	1.4	3.4	100.0
	Total	323	41.4	100.0	
Missing	System	457	58.6		
Total		780	100.0		

95. The defendant not testifying made it more likely that he/she would be found guilty.

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	STRONGLY DISAGREE	88	11.3	28.7	28.7
	DISAGREE	169	21.7	55.0	83.7
	AGREE	43	5.5	14.0	97.7
	AGREE STRONGLY	7	.9	2.3	100.0
	Total	307	39.4	100.0	
Missing	System	473	60.6		
Total		780	100.0		

Defendants who exercised their Fifth Amendment privilege were clearly in jeopardy as a result.

Despite jurors' likely having started their deliberations only minutes after receiving their instructions, and having been told that it was the defendant's

“fundamental right”¹⁵⁴ not to testify, more than one third, 38.3%, discussed what they were told they should “[never] be concerned” with.¹⁵⁵ Roughly one in five admitted either that it mattered to the jury that the defendant did not testify (21%), or, worse yet, he or she “had an obligation to testify” (18%). Finally, one in six jurors, 16.3%, went so far as to admit that “the defendant not testifying made it more likely that he/she would be found guilty.” In all of the above, these jurors effectively compelled the defendant at his/her trial to be a witness against himself/herself—the antithesis of the Fifth Amendment—or pay the price in the jury room for not testifying.

Across all criminal trials, and without selecting for effects of a defendant not testifying, jurors reported the following distribution of verdicts:

- 36.9%, not guilty on all charges
- 39.2%, guilty as charged on all charges
- 8.4%, guilty as charged on one or more charges and not guilty on one or more
- 3.7%, guilty of lesser charges on one or more and not guilty on one or more
- 2.6%, guilty as charged on one or more and guilty on one or more lesser charges
- 3%, for all charges, guilty of lesser charges only
- 2.9%, no verdict reached because case settled or otherwise ended before verdict
- 3.3%, no verdict reached because of a hung jury

In verdicts reported by jurors who said the jury discussed the fact that the defendant did not testify (only), the results for defendants were worse: they were found not guilty on all charges by 27.9% of the jurors, and found guilty on all charges by 47.7%.

Among jurors who believed that the defendant had an obligation to testify, defendants paid a still heavier price: 19.1% of jurors found them not guilty on all charges, and 40.4% found them guilty on all. While the ratio of not guilty on all charges to guilty on all charges among all jurors, and without selection for a defendant not testifying was roughly 1:1, the ratio among these jurors was 1:2.

Defendants whose jurors agreed that it mattered to their juries in deliberations that the defendant did not testify suffered similarly: 22.4% found them not guilty on all charges, but 47.8% found them guilty on all.

In front of jurors who agreed or strongly agreed that not testifying made it more likely that their defendants would be found guilty, albeit in a small total sample of thirty-four jurors, defendants were more than three times as likely to be found guilty on all charges (twenty-six) as they were to be found not guilty on all (eight).

These results show these jurors to have nullified the Fifth Amendment, albeit to different degrees—mild (the jury discussed the fact), moderate (the

¹⁵⁴ See FLA. STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES § 3.9(d) (2005).

¹⁵⁵ *Id.*

fact mattered to the jury), strong (they individually felt defendants had an obligation to testify), and strongest (not testifying made a finding of guilt more likely). The first two findings were phrased in terms of what occurred in deliberations by entire juries. The third reflects a more potent effect, as individual jurors feeling that an obligation existed for a defendant to testify would be unlikely to completely fail to share that feeling with their fellow jurors. The most injurious effect, clearly, is the last.

Any violation of the Fifth Amendment, beginning with discussing the failure to testify, strikes at the heart of a defendant's most basic protection. Thus, the words "mild," "moderate," "strong," and "strongest" are used above solely in the comparative sense. Were these results in the low single digits, they would still be unacceptable.

Courts have been confronted with evidence of jurors doing precisely what these jurors did, and refused to grant relief. In *United States v. Rodriguez*,¹⁵⁶ defense counsel's secretary learned from discussions with jurors that "at least one juror" said that the defendant's failure to testify was discussed during deliberations, including that "jurors lament[ed] that he could have 'shed a lot of light on the facts of the allegations against him.'"¹⁵⁷ The defendant sought to take testimony of the jurors to support his claim that the fact that these discussions even occurred violated his Fifth Amendment right not to testify. The trial court refused.

The Eighth Circuit affirmed, holding that such matters were not "extraneous prejudicial information (that) was improperly brought to the jury's attention . . ." as was required by Federal Rule of Evidence 606(b) to allow the taking of their testimony.¹⁵⁸ To the contrary, the court noted:

That Rodriguez did not testify is not a fact the jurors learned through outside contact, communication, or publicity. It did not enter the jury room through an external, prohibited route. It was part of the trial, and was part of the information each juror collected. *It should not have been discussed by the jury, and indeed was the subject of a jury instruction to that effect.* But it was not "extraneous information" and therefore does not fall within the exception outlined in Rule 606(b).¹⁵⁹

The court further noted that Congress, in authoring Rule 606, "specifically rejected a version of the rule that would have allowed jurors to testify about 'objective matters occurring during the jury's deliberation, such as the misconduct of another juror or the reading of a quotient verdict.'"¹⁶⁰

In *United States v. Tran*,¹⁶¹ the defendant sought the same relief as in *Rodriguez*. However, Tran's evidence of jurors' refusal to follow either the Fifth Amendment or their instruction on it was more compelling. He presented affidavits from two jurors themselves:

¹⁵⁶ 116 F.3d 1225 (8th Cir. 1997).

¹⁵⁷ *Id.* at 1226.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 1227 (emphasis added).

¹⁶⁰ *Id.*

¹⁶¹ 122 F.3d 670 (8th Cir. 1997).

One affidavit stated: "The fact that Mr. Tran did not testify was discussed by the jury during our deliberations" and "was one of the major arguments used by some of the jurors to convince the undecided jurors to vote to find Mr. Tran guilty." The other affidavit stated: "During the jury's deliberations, the fact that Mr. Tran did not testify was discussed by at least four members of the jury."¹⁶²

In reliance on *Rodriguez*, the court found the jurors' actions were not "extraneous information" that would have permitted the defendant an evidentiary hearing.¹⁶³

In both cases, jurors ignored the dictates of the Fifth Amendment. In both cases, jurors violated their instructions on the Fifth Amendment. And, in both cases, the Eighth Circuit made no attempt to dispute the factual accuracy of what defendants claimed had taken place in their jury rooms. On the policy basis as embodied in Rule 606(b) that deliberations should not be intruded upon except in narrow circumstances, however, the Constitution was forced to give way.

In practice, the crucial decision for defense counsel is whether their clients should testify. Anecdotal evidence from discussions with defense lawyers indicates the prevailing feeling to be "[k]eep the client off the stand if at all possible."¹⁶⁴ In fact, empirical research indicates it should be a much closer question for defense counsel:

Three studies have examined defendant testimony at trial, and their results are inconclusive. . . . In sum, the scattered research on this topic, and the mixed findings it produced, does not suggest a complex relationship between defendant testimony and jury verdicts. Any relationship is almost certain to involve higher-order interactions between the content of that testimony, the prosecution's strength of evidence, and perhaps other variables as well.¹⁶⁵

¹⁶² *Id.* at 672.

¹⁶³ *Id.* at 673.

¹⁶⁴ This feeling, if it truly reflected a reality of defendants rarely testifying, would be a dramatic change from 50 years ago. One case sample from the 1950s showed that defendants testified in 82% of all cases. See George Fisher, *The Jury's Rise as Lie Detector*, 107 YALE L.J. 575, 584 n.15 (1997) ("Dan Klerman has suggested to me that the doctrine of *Griffin v. California*, 380 U.S. 609, 615 (1965), which bars prosecutorial comment on the defendant's failure to testify, may encourage more silence by defendants today.") (citing HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 33 n.1 (1966)).

¹⁶⁵ Devine et al., *supra* note 5, at 679 (citing Martha A. Meyers, *Rule Departures and Making Law: Juries and Their Verdicts*, 13 LAW & SOC'Y REV. 781 (1978) (defendant testimony associated with a somewhat higher likelihood of conviction)); Carol M. Werner et al., *The Impact of Case Characteristics and Prior Jury Experience on Jury Verdicts*, 15 J. APPLIED SOC. PSYCHOL. 409 (1985) (defendant testimony linked modestly to a lower probability of conviction), and David R. Shaffer & Thomas Case, *On the Decision to Testify in One's Own Behalf: Effects of Withheld Evidence, Defendant's Sexual Preferences, and Juror Dogmatism on Juridic Decisions*, 42 J. PERSONALITY & SOC. PSYCHOL. 335 (1982) (defendant who took the Fifth Amendment before trial or on the witness stand more likely to be found guilty).

The survey showed that in actuality, not only is it not a close question, defense counsel and their clients have substantially resolved the issue. Of criminal jurors responding, 61.4% indicated that the defendant testified in their trials, while roughly one in three, 38.6%, reported that defendants in their trials did not. This indicates that either the anecdotal evidence is incorrect, or, it is not “at all possible” to keep defendants off the stand.

The survey results showed the following:

- Where the defendant did not testify, 10.4% agreed strongly with the statement “I believed the defendant did not testify because his/her testimony would have shown that he/she was guilty”; 33.4% agreed; 40.3% disagreed; and 15.9% disagreed strongly.
- As to the statement, “If the defendant had testified in the trial, I believe the jury would have found him/her innocent of all charges”: 0.5% agreed strongly; 1% agreed, 45% disagreed; and 53.5% strongly disagreed.
- Where the defendant did testify, only 13.9% agreed strongly that “[t]he credibility of the defendant was an important factor in deciding the entire case”; 50.6% agreed; 30.3% disagreed; and 5.1% strongly disagreed.
- Only 3.9% agreed strongly with the statement, “I found the defendant to be credible”; 36.6% agreed; 42.2% disagreed; and 17.3% strongly disagreed.
- For defendants who testified, it appears that their not testifying would not have resulted in full acquittal: only 1% agreed strongly with the statement, “[i]f the defendant had not testified in the trial, I believe the jury would have found him/her innocent of all charges”; 11.3% agreed; 49.8% disagreed; and 37.8% strongly disagreed.
- Short of full acquittal, however, the jurors (but still only a minority) were more likely to believe that “[i]t would have been better for the defendant if he/she had not testified in the trial”: 9.6% agreed strongly; 21.8% agreed; 46.4% disagreed; and 22.2% strongly disagreed.

This last finding may, on the one hand, cast doubt on the anecdotal wisdom of not having defendants testify. On the other hand, it more likely reflects the fact that it is only those defendants who will make an overall favorable impression who do testify. When examined on that basis, these jurors are reporting that one in three defendants made an unwise decision to testify.

In the final analysis, what truly should not be a close question is this: if the Fifth Amendment would be upheld by jurors, and if they would truly follow their instructions, a criminal defendant’s decision to not testify would not be at the peril of such a fundamental constitutional protection.

V. THE PROBLEM AT THE HEART, PERHAPS THE GREATER PROBLEM STILL, AND THE EFFORTS AT REPAIR

A. *The Problem at the Heart*

At the heart of the Sixth Amendment's right to trial¹⁶⁶ lie the jurors. It is they who are required to understand the Court's instructions so they can apply them, thereby fulfilling an "inherent and indispensable requisite of a fair and impartial trial."¹⁶⁷ The Supreme Court has acknowledged that nothing is more important:

The Court presumes that jurors, conscious of the gravity of their task, attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them. . . .

[W]e adhere to the crucial assumption underlying our constitutional system of trial by jury that jurors carefully follow instructions. As Chief Justice Traynor has said: "[We] must assume that juries for the most part understand and faithfully follow instructions. The concept of a fair trial encompasses a decision by a tribunal that has understood and applied the law to all material issues in the case." (citations omitted)¹⁶⁸

Thirty-one years earlier, the Court needed but a single sentence to state it even more forcefully: "Our theory of trial relies upon the ability of a jury to follow instructions."¹⁶⁹

That jurors bring determination to their task is not to be questioned.¹⁷⁰ Their task, however, is difficult. They are asked to correctly apply laws that they may never have heard of, with particular requirements and meanings over which even skilled counsel and judges may disagree, to oftentimes complex fact patterns, and to do so based on instructions that too often are only spoken to them, while jurors are tired from sitting passively in trial for days or weeks, in legalese. A problem with jurors' understanding of and ability to apply the law is, few should argue, one that lies at the heart of our judicial system.

Providing them with written instructions may help, but it is no panacea. Even if jurors are able to refer to them in the jury room, the task will turn from difficult to almost impossible if jurors are fairly described by any of the following:¹⁷¹

- About one in every four Americans (25%) is a high school dropout.

¹⁶⁶ U.S. CONST. amend. VI.

¹⁶⁷ See *Gerds v. State*, 64 So. 2d 915, 916 (Fla. 1953).

¹⁶⁸ *Francis v. Franklin*, 471 U.S. 307, 324 (1985).

¹⁶⁹ *Opfer v. United States*, 348 U.S. 84, 95 (1954).

¹⁷⁰ See Ellsworth, *supra* note 70, at 215.

¹⁷¹ The Informatics Review, Comprehension and Reading Level, <http://www.informatics-review.com/FAQ/reading.html> (last visited Feb. 26, 2006).

- About 20% of the US population are functionally illiterate; for some subsets of our population, that rises to 40%.
- Nearly 50% of Americans cannot read well enough to find a single piece of information in a short publication, nor can they make low level inferences based on what they read.
- The average reading level of American parents of young children is 7th or 8th grade.
- 41.6% of American patients could not comprehend directions for taking medication on an empty stomach.
- 26% were unable to understand information regarding when their next appointment was scheduled.
- 50.5% could not understand a standard informed consent form.
- 75% of adult Americans with chronic health conditions scored in the lowest two literacy levels assessed.
- Research tells us that to communicate effectively with a general audience in the U.S., we need to write at a 6th–8th grade reading level.

Given the confluence of the difficulties of their task and the level of understanding they often bring to the courtroom, one cannot be surprised that jurors generally do not understand their instructions. College graduates could easily have difficulty with instructions in complex cases, such as RICO or conspiracy, much less those jurors who fall in the above categories.

B. Perhaps the Greater Problem Still

The instant survey appears to have revealed a problem that goes beyond jurors' lack of understanding. It is one thing for jurors to nullify a statute they do not like. It is quite another, however, for them to nullify the two most fundamental constitutional protections of our criminal justice system. This appears to be occurring.

These jurors certainly felt they not only understood but strictly followed their instructions:

- 80.3% of all criminal jurors reported that they were given a copy of their instructions to take with them and use during deliberations.
- Including all criminal jurors, and not limited to whether they had written instructions or not, 98.6%, or all but nine out of 747, "agreed" or "agreed strongly" that they understood them.

- 98% “agreed” or “agreed strongly” that they “strictly followed the jury instructions in reaching [the] verdict.”
- A total of 96.1% disagreed (36.8%) or strongly disagreed (59.3%) that “[o]ne or more jurors during deliberations directly, or indirectly, said the jury instructions should be ignored.” Only eight out of 728 (1.1%) agreed strongly, and twenty (2.6%) agreed.
- 95.6% of the total disagreed (36.1%) or strongly disagreed (59.5%) that “[t]he jury partly or totally ignored the jury instructions and did what it felt was the right thing to do.” Only nine out of 728 (1.2%) said they agreed strongly, and twenty-three (3.2%) agreed.

Jury research confirms that jurors’ perceived understanding of and obedience to their instructions does not equate automatically to actual understanding.¹⁷² The instant survey produced similar evidence. Of those jurors who reported that their juries discussed the fact that the defendant did not testify, fully half reported that they carefully went over the instructions and further said that they strictly followed them.

More striking was the following. For those jurors who reported (1) it mattered to their juries that the defendant did not testify, and (2) their juries carefully went over the instructions during deliberations, all those jurors agreed that the jury strictly followed its instructions in reaching its verdicts.

In examining the percentages of those jurors surveyed who stated they understood their instructions, it is reasonably certain that some jurors actually did understand their instructions as they pertained to these two most fundamental protections. And, if they did, the following sequence framing these results also shows that some jurors are nullifying them:

- 21.1% did not believe throughout the entire trial that the defendant was presumed innocent.
- 18% believed the defendant had an obligation to testify.
- 21% believed it mattered to the jury in deliberations that the defendant did not testify.
- 38.3% discussed the fact that the defendant did not testify.
- 16.3% believed that the defendant not testifying made it more likely that he/she would be found guilty.
- 98.8% said they understood their instructions.

¹⁷² See discussion *supra* notes 71–73.

- 98% said they *strictly* followed their instructions in reaching their verdicts.

If these jurors are nullifying these constitutional protections, and the evidence shows at least some are, this presents a much greater problem than their inability to understand their instructions. They are exercising their “naked power” without a “moral or legal right”¹⁷³ to do so. It was not always true, however, that jurors had no such right.

In 1794, the Supreme Court, sitting as the trial court in *Georgia v. Brailsford*¹⁷⁴ to determine whether debts were confiscated by a Georgia statute, gave the following instruction to the jury:

It may not be amiss, here, Gentlemen, to remind you of the good old rule, that on questions of fact, it is the province of the jury, on questions of law, it is the province of the court to decide. But it must be observed that by the same law, which recognizes this reasonable distribution of jurisdiction, you have nevertheless a right to take upon yourselves to judge of both, and to determine the law as well as the fact in controversy. On this, and on every other occasion, however, we have no doubt, you will pay that respect, which is due to the opinion of the court: *For, as on the one hand, it is presumed, that juries are the best judges of facts; it is, on the other hand, presumable, that the court are the best judges of law. But still both objects are lawfully, within your power of decision.*¹⁷⁵

Both the history of jury nullification¹⁷⁶ and its psychological and moral underpinnings¹⁷⁷ have been amply documented. “The tide was turned,” however, toward accepting the idea “that the jury’s function lay in accepting the law given to it by the court and applying that law to the facts,”¹⁷⁸ in 1835.¹⁷⁹ With some “cross-currents”¹⁸⁰ in this tide, from then until today jurors have been expected to follow the law.¹⁸¹ The risks of their not doing so have been noted:

¹⁷³ United States v. Hyde, 448 F.2d 815, 862 (5th Cir. 1971) (Rives, J., dissenting).

¹⁷⁴ 3 U.S. (3 Dall.) 1, 4 (1794).

¹⁷⁵ *Id.* (emphasis added).

¹⁷⁶ See, e.g., R. Alex Morgan, *Jury Nullification Should Be Made a Routine Part of the Criminal Justice System, But It Won't Be*, 29 ARIZ. ST. L.J. 1127 (1997); Irwin A. Horowitz et al., *Jury Nullification: Legal and Psychological Perspectives*, 66 BROOK. L. REV. 1207 (2001); Steven M. Warshawsky, Note, *Opposing Jury Nullification: Law, Policy, and Prosecutorial Strategy*, 85 GEO. L.J. 191 (1996), and Major Bradley J. Huestis, *Jury Nullification: Calling For Candor From The Bench And Bar*, 173 MIL. L. REV. 68 (2002).

¹⁷⁷ See, e.g., John Clark, *The Social Psychology of Jury Nullification*, 24 LAW & PSYCHOL. REV. 39 (2000) and Todd E. Pettys, *Evidentiary Relevance, Morally Reasonable Verdicts, and Jury Nullification*, 86 IOWA L. REV. 467 (2001).

¹⁷⁸ United States v. Dougherty, 473 F.2d 1113, 1132–33 (D.C. Cir. 1972) (rejecting defendants’ claim that the trial court erred in not instructing the jury of its right to acquit without regard to the law or evidence, and, in not allowing defendants to so argue to the jury). This decision also provides an excellent history of jury nullification.

¹⁷⁹ *Id.* at 1132 (citing United States v. Battiste, 24 F. Cas. 1042 (C.C.D. Mass. 1835)).

¹⁸⁰ *Id.* at 1133.

¹⁸¹ See discussion *supra* Part III (C).

To encourage individuals to make their own determinations as to which laws they will obey and which they will permit themselves as a matter of conscience to disobey is to invite chaos. No legal system could long survive if it gave every individual the option of disregarding with impunity any law which by his personal standard was judged morally untenable. Toleration of such conduct would not be democratic, as appellants claim, but inevitably anarchic.¹⁸²

Jurors who understand their instructions on the presumption of innocence and the right of a defendant not to testify without penalty and intentionally do not apply them strike at the heart of the criminal justice system and shake these pillars on which it stands.

C. Efforts at Repair

The necessity of reforming and enhancing the methods by which jurors must come to understand the law has become well known.¹⁸³ The Supreme Court missed a golden opportunity to take the lead in this effort, however.

Justice Sandra Day O'Connor spoke in May, 1999¹⁸⁴ at the National Conference on Public Trust in the Justice System:

[She] received an enthusiastic welcome from an audience of lawyers, judges and court administrators. . . . In the course of her remarks, which went largely unreported, the associate supreme court justice said that jurors were handing down verdicts without a clue as to what was going on.

"Too often, jurors are allowed to do nothing but listen passively to the testimony without any idea what the legal issues are in the case. In many instances, they are not allowed to take notes or participate in any way. Finally, they are usually read a *virtually incomprehensible set of instructions* and sent into the jury room to reach a verdict in a case *they may not understand much better than they did before the trial began.*"¹⁸⁵

Her opinion that day was definite: jurors generally did not, and could not, understand their "incomprehensible" instructions.

¹⁸² See *Dougherty*, 473 F.2d at 1133–34 (citing *United States v. Moylan*, 417 F.2d 1002, 1009 (4th Cir. 1969)).

¹⁸³ See, e.g., B. Michael Dann & Valerie P. Hans, *Recent Evaluative Research on Jury Trial Innovations*, 41 CT. REV. 12 (2004) (noting jury reform efforts in Arizona, Ohio, Tennessee, Massachusetts, Vermont, Colorado, and New Jersey), and Phoebe C. Ellsworth, *Jury Reform at the End of the Century: Real Agreement, Real Changes*, 32 U. MICH. J.L. REFORM 213 (1998).

¹⁸⁴ See Alan Berlow, *A Jury of Your Peers? Only If You're Clueless*, WASH. POST, Aug. 11, 2002, at B1, available at <http://www.washingtonpost.com/ac2/wp-dyn?pagename=article&node=&contentId=A1181-2002Aug9¬found=true> (last visited Feb. 26, 2006).

¹⁸⁵ Dorothy F. Easley, *"Plain English" Jury Instructions: Why They're Still Needed and What the Appellate Community Can Do to Help*, 78 FLA. BAR J. 66, 68 (2004) (emphasis added).

Only seven months later, on December 6, 1999, she heard oral argument in *Weeks*.¹⁸⁶ The defendant urged on both her and the Court that the key issue in this *death penalty* case was that the jury did not understand an important instruction.¹⁸⁷ Justice O'Connor then, in the Court's decision rendered on January 19, 2000, only eight months after she spoke, provided the crucial fifth vote for the majority in affirming the death sentence. She joined in the opinion that effectively held that "pointing the jury again to an instruction that was almost certainly unclear and not understood the first time was sufficient."¹⁸⁸ She joined in upholding the conclusive but factually false presumption that "a jury is presumed to follow its instructions."¹⁸⁹ And, in doing so, she relied on *Richardson*—in which she had been part of a six to three majority—but *without* acknowledging its holding that the presumption of juror understanding was mainly a practical accommodation and not true.¹⁹⁰ Finally, she did not avail herself of one other option—writing an opinion concurring in the result, but expressing views consistent with the clarion call in her speech.

Had Justice O'Connor used her power as the swing vote in *Weeks* to either dispute the presumption, or at least force a *Gainey* or *Leary* investigation of whether it was factually founded, the Court could have finally acknowledged the true state of juror understanding.¹⁹¹ More importantly, in such an opinion the Court could have used its power to promote immediate and serious efforts at curing the problem. Had she said *from* the bench what she said *to* the bench and bar in May 1999, the state of jury reform efforts might today be more advanced. This truly was an opportunity lost.

¹⁸⁶ *Weeks v. Angelone*, 528 U.S. 225 (2000).

¹⁸⁷ See notes 79–83 and accompanying text.

¹⁸⁸ See notes 81–83 and accompanying text.

¹⁸⁹ See notes 82–85 and accompanying text.

¹⁹⁰ *Id.*

¹⁹¹ Justice Stevens, writing in dissent in *Weeks*, responded as follows to the majority concern that to presume contrary to jurors following "would require reversal every time a jury inquires about a matter of constitutional significance, regardless of the judge's answer":

First, a simple, direct answer to the jury's question would have avoided the error. Second, clearly established law requires that the issue be resolved, not on the basis of a presumption that flows from the posing of any single question, but by deciding whether, under all of the circumstances, there was a "reasonable likelihood" that the jury was confused as to the relevance of mitigating evidence in its decision. The Court's fear of constant reversal in this regard is thus vastly overstated.

Weeks v. Angelone, 528 U.S. 225, 243–44 (2000) (Stevens, J., dissenting). He therefore challenged, with the support of three other Justices, whether the presumption was valid in this particular instance. While he did not discuss whether it was true generally, his dissent had already taken him halfway to having that discussion. And, he clearly did *not* find the presumption to be *conclusive*. It is at least a reasonable possibility, if not a probability, that with the urging of Justice O'Connor, he would have taken the next half step toward forcing an examination of whether the presumption was valid generally. She certainly had proven herself to be persuasive on this subject, as evidenced by her remarks at the conference. See Easley, *supra* note 185, at 68.

Efforts in various respects are underway nationwide,¹⁹² however, albeit without the guidance, assistance, or even acknowledgement of the Court.¹⁹³ In addressing the Florida Supreme Court at oral argument on behalf of the Florida Jury Innovations Committee, Judge Robert Shevin stated:

We started out with the premise that, as a nation, we are in the midst of a jury reform revolution. Why? Because the traditional adversarial courtroom model, which views jurors as passive triers of fact, is being correctly challenged. It is antiquated. It does not reflect the way that adults learn and process information. The new learning model treats jurors not as children but as intelligent, informed adults who possess the ability to multitask . . . and should not be bystanders but, rather, full partners in the trial proceedings.¹⁹⁴

The final report of the committee¹⁹⁵ to the court concluded nineteen months of reviewing available jury reform literature, including books, academic journals, monographs, periodicals, and state reports,¹⁹⁶ and resulted in forty-eight recommendations.¹⁹⁷ None specifically concerned improving jurors' understanding of and adherence to the presumption of innocence and the privilege to not testify without penalty. Several likely will have a positive effect, however, and are discussed here as examples of the current efforts at jury reform.

*1. Providing Written Jury Instructions for Jurors' Use During Deliberations.*¹⁹⁸

The committee noted that "[s]tudies have shown that providing jurors with written copies . . . increases their understanding of the instructions, helps to structure and facilitate deliberations, reduces the number of questions about instructions during deliberations, and increases jurors' confidence in their

¹⁹² See Dann & Hans, *supra* note 192. See also Am. Bar Ass'n, *Principles for Juries and Jury Trials*, available at <http://www.abanet.org/juryprojectstandards/principles/pdf> (last visited Feb. 26, 2006). They include Principle 6 ("Courts Should Educate Jurors Regarding the Essential Aspects of a Jury Trial") and Principle 14 ("The Courts Should Instruct the Jury in Plain and Understandable Language Regarding the Applicable Law and the Conduct of Deliberations"). These were adopted unanimously by the 546-member ABA House of Delegates on February 14, 2005. See News Release, Am. Bar Ass'n, ABA House of Delegates Passes New Principles for Juries (Feb. 14, 2004) (available at http://www.abanet.org/media/releases/news021405_2.html (last visited Feb. 26, 2006)).

¹⁹³ See discussion *supra* Part III (E).

¹⁹⁴ Transcript of Oral Argument, In re Final Report of Jury Innovations Committee (Feb. 4, 2002) available at <http://www.wfsu.org/gavel2gavel/transcript/01-1226.htm> (last visited Feb. 26, 2006).

¹⁹⁵ JURY INNOVATIONS COMM., JUDICIAL MGMT COUNCIL, SUP. CT. OF FLA., FINAL REPORT (2001), available at www.flcourts.org/gen_public/pubs/bin/JuryInnovationsFinalReport.pdf (last visited Feb. 26, 2006).

¹⁹⁶ *Id.* at iii, Executive Summary.

¹⁹⁷ *Id.* at 4, Summary of Recommendations; full text of all recommendations is found at 14 *et seq.*

¹⁹⁸ *Id.* at 57, Recommendation 26.

verdict.”¹⁹⁹ The court approved this recommendation and referred it to the Civil and Criminal Procedure Rules Committees for review and preparation of proposed rule, or “[state the] reason [why] no rule is necessary.”²⁰⁰

At present, only jurors in capital cases in Florida are required to be given their instructions in writing as well as orally; otherwise, doing so is within a court’s discretion.²⁰¹ In civil cases, “The court . . . when practicable, shall furnish a copy of its charges to the jury.”²⁰²

2. *All Instructions Should Be as Simple and Clear as Possible.*²⁰³

“The legalese and other technical jargon frequently used by attorneys and judges during trial is lost on most jurors and is a major source of confusion and frustration for them. The high rate of failure of jurors to fully understand legal instructions is well documented.”²⁰⁴ The committee went on to note that this “plain English” rule “has been implemented in various ways, including establishing a committee which includes linguists, communication experts, and former jurors to review all standard instructions.”²⁰⁵ The court approved this as an “aspirational goal” and referred it to the jury instruction committees.²⁰⁶ Since then the court has revised the criminal jury instructions, but only in technical respects as to several offenses, and not to use “plain English.”²⁰⁷

If jurors are to apply the law, as they must, and it is the court that must provide it to them, then no vehicle exists to accomplish this save their instructions. This vehicle, however, is not moving quickly enough. With each passing trial period in each criminal courtroom, jurors are being deprived of a needed, fundamental tool. And, it was 30 years ago that one Florida court noted:

Despite the best efforts of the bench and bar of this state, jury instructions have been difficult to formulate in language which is both readily understandable by the layman and technically sufficient to encompass all of the requirements of law. At the present time an extensive study is being conducted, headed by Circuit Judge David Strawn, to find methods of better communication between the court and jurors on the matter of

¹⁹⁹ *Id.*

²⁰⁰ In re Final Report of the Jury Innovations Comm., Supreme Court of Florida, Admin. Order No. AOSCO3-41 (Fla. 2003) at 8, *available at* http://www.flcourts.org/genpublic/jury/bin/15_aosco3-41.pdf (last visited Feb. 26, 2006).

²⁰¹ FLA. R. CRIM. P. 3.390(b) (2006).

²⁰² FLA. R. CIV. P. 1.470(b) (2006).

²⁰³ See In re Final Report of the Jury Innovations Comm., *supra* note 200, at 56, Recommendation 25.

²⁰⁴ *Id.*

²⁰⁵ *Id.* It also noted there that “This recommendation, or one similar to it, has been adopted in Arizona, California, Colorado, New Hampshire and West Virginia. It is also an ABA Civil Trial Practice Standard.”

²⁰⁶ See In Re: Final Report of the Jury Innovations Comm., *supra* note 200, at 8.

²⁰⁷ Standard Jury Instructions in Criminal Cases, 869 So. 2d 1205 (Fla. 2004) (revising instructions for offenses involving drug abuse, lewd and lascivious conduct, the justifiable use of force by law enforcement, and deleting an obsolete drug abuse instruction).

jury instructions. Hopefully such study will in time be sufficiently productive so as to eliminate the type of confusion and obvious miscarriage of justice as resulted in this case.²⁰⁸

It does not appear that this study, discussed above,²⁰⁹ and despite its having revealed serious problems with jurors' ability to understand their instructions, resulted in any change.

And, "plain English" instructions may not be enough. Research has shown²¹⁰ that jurors will react *against* "prohibitive" instructions "contain[ing] admonishments and imperatives about [the jurors'] duties, responsibilities and obligations,"²¹¹ and refuse to follow them as closely as "informative" instructions, those that "described the criteria that jurors are to consider and pointed out their rights and areas of discretion in a more flexible manner."²¹² This type of reaction, a "'boomerang' effect[]":

... may be explained by Brehm's (1966) theory of psychological reactance. If a person believes that his or her freedom has been taken away, they will react vehemently to reassert this freedom. Judicial instructions that contain admonishments about what jury members may or may not consider in determining the defendant's guilt or innocence may produce reactance among jurors who interpret the instructions as a threat to their capability to evaluate fairly the trial evidence. To reassert a sense of control, jury members may reject such instructions and consider the inadmissible information even more strongly.²¹³

The instructions the survey jurors received were prohibitive:

²⁰⁸ Crapps v. Murckek, 330 So. 2d 173, 176 (Fla. Dist. Ct. App. 1976).

²⁰⁹ See discussion *supra* notes 60–64.

²¹⁰ See, e.g., Jerry I. Shaw & Paul Skolnick, *Effects of Prohibitive and Informative Judicial Instructions on Jury Decisionmaking*, 23 SOC. BEHAVIOR & PERSONALITY 319 (1995); see also Devine et al., *supra* note 5, at 666:

A fundamental assumption underlying the jury system is the belief that juries are willing and able to follow the instructions of the presiding judge. Six studies have examined the impact of targeted instructions concerning what juries should or should not do. In general, limiting instructions have proven to be ineffective and have even been associated with a paradoxical increase in the targeted behavior.

(citations omitted).

²¹¹ Shaw & Skolnick, *supra* note 210, at 322. The authors give as an example, "With regard to your *duty* to apply the law, you *must not* consider the defendant's race, color, nationality, sex, religious affiliation, wealth or poverty, and marital standing when reviewing the evidence. These factors are not evidence, *cannot* be considered as such, and *must be* disregarded." (emphasis added).

²¹² *Id.* In contrast, an informative instruction would be, "With regard to your *application* of the law, you are reminded that the defendant's race, color, nationality, sex, religious affiliation, wealth or poverty, and marital standing are not considered as evidence. These factors are not evidence, *should not* be considered as such, and *should be* disregarded." (emphasis added).

²¹³ *Id.* at 320.

The defendant has entered a plea of not guilty. This means you *must* presume or believe the defendant is innocent²¹⁴

. . . [T]he fact that a defendant did not take the witness stand *must not* influence your verdict in any manner whatsoever.²¹⁵

The defendant exercised a fundamental right by choosing not to be a witness in this case. You *must not* view this as an admission of guilt or be influenced in any way by [his] [her] decision. *No* juror should *ever* be concerned that the defendant did or did not take the witness stand to give testimony in the case.²¹⁶

Those charged with drafting and approving the above instructions, including their “prohibitive” language, undoubtedly did so with the best intentions. Intuition would lead one to believe that telling a jury “DON’T” is not as effective as telling it “I don’t think you should.” As the research shows, doing the former may not only fail to avoid the harm the instruction seeks to avoid, it may cause it. The author had the experience during a civil trial of moving to strike a statement made by a witness, following which the court granted the author’s motion to admonish the jury to disregard the statement. The court did so. Instantly upon the court’s concluding, one juror, who apparently had missed hearing the statement when made, whispered to the juror next to him, “What was it that we’re not supposed to consider?” And, the second juror told him. The first juror then nodded, appreciatively.

California today provides an excellent example of moving positively and aggressively in this area. The Judicial Council of California recently approved²¹⁷ approximately 700 “plain English” criminal jury instructions, to be used beginning January 1, 2006, recommended by its Task Force on Criminal Jury Instructions.²¹⁸ As part of this complete overhaul, by way of example, one instruction was changed from “[i]nnocent misrecollection is not uncommon” to

²¹⁴ See FLA. STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES § 2.1 (2005) (emphasis added).

²¹⁵ See FLA. STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES § 2.1 (2005). (emphasis added).

²¹⁶ See FLA. STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES § 3.9(d) (2005) (emphasis added).

²¹⁷ See David Kravets, *California Jurors to Get Legal Lessons in Plainer Language*, NORTH COUNTY TIMES, Aug. 27, 2005, available at http://www.nctimes.com/articles/2005/08/27/news/state/09_47_488_26_05.txt (last visited Sept. 1, 2005); News Release, Judicial Council of California, *New Criminal Jury Instructions Adopted Today to Improve State Jury System* (Aug. 26, 2005), (available at <http://www.courtinfo.ca.gov/presscenter/newsreleases/NR46-05.PDF>); and Judicial Council of Cal., Minutes of the Aug. 26, 2005 Meeting, available at <http://www.courtinfo.ca.gov/jc/documents/min082605.pdf>.

²¹⁸ See JUDICIAL COUNCIL OF CAL., CRIMINAL JURY INSTRUCTIONS (2005), available at <http://www2.courtinfo.ca.gov/crimjuryinst>. The approved report of the task force, including a table of contents of the instructions as well as the report summary, both dated Aug. 26, 2005, are found at <http://www.courtinfo.ca.gov/courtadmin/jc/documents/reports/0805item4.pdf> (last visited Sept. 1, 2005).

“[p]eople sometimes honestly forget things or make mistakes about what they remember.”²¹⁹ The difference is obvious.

The Council’s Task Force included appellate justices, trial judges, attorneys from various sections of the bar, laypeople, and academics,²²⁰ including at least one linguist.²²¹ In announcing the instructions’ adoption, the chair stated:

Law lives in its language and historically that language has made sense to lawyers, but not to anyone else. It is no longer acceptable to say, ‘Too bad the people don’t understand.’ It is critical that the instructions be clear so that Californians performing this important service reach informed conclusions, grounded in a true understanding of the law.²²²

The now-superseded instructions on presumption of innocence and the defendant’s right to not testify stated:

A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether [his] [her] guilt is satisfactorily shown, [he] [she] is entitled to a verdict of not guilty. This presumption places upon the People the burden of proving [him] [her] guilty beyond a reasonable doubt.²²³

When a witness refuses to testify to any matter, relying on the constitutional privilege against self-incrimination, you must not draw from the exercise of this privilege any inference as to the believability of the witness [or] [whether the defendant is guilty or not guilty] [or] [any other matter at issue in this trial].²²⁴

The new instructions state:

Next, the People will offer their evidence. Evidence usually includes witness testimony and exhibits. After the People present their evidence, the defense may also present evidence but is not required to do so. Because(he/she/they) (is/are) presumed innocent, the defendant[s] (does/do) not have to prove that (he/she/they) (is/are) not guilty.²²⁵

I will now explain the presumption of innocence and the People’s burden of proof. The defendant[s] (has/have) pleaded not guilty to the charge[s]. The fact that a criminal charge has been filed against the defendant[s] is not evidence that the charge is true. You *must not* be biased against the defendant[s] just because (he/she/they) (has/have) been arrested, charged with a crime, or brought to trial.

²¹⁹ *Id.* at 2.

²²⁰ *Id.*

²²¹ See Kravets, *supra* note 217 (identifying Peter Tiersma, a Loyola Law School professor and linguist who helped craft the changes).

²²² Judicial Council of Cal., *supra* note 218, at 2.

²²³ CAL. JURY INSTRUCTIONS, CRIMINAL § 2.9 (2005). “Presumption of Innocence—Reasonable Doubt—Burden of Proof”; omitting, that portion defining “reasonable doubt.”

²²⁴ CAL. JURY INSTRUCTIONS, CRIMINAL § 2.25 (2005). “Refusal of Witness To Testify—Exercise of Privilege Against Self-Incrimination”.

²²⁵ JUDICIAL COUNCIL OF CAL., *supra* note 218, Pretrial Instruction 100.

A defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove each element of a crime [and special allegation] beyond a reasonable doubt. Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt [unless I specifically tell you otherwise].²²⁶

A defendant has an absolute . . . right not to testify. He or she may rely on the state of the evidence and argue that the People have failed to prove the charges beyond a reasonable doubt. *Do not* consider, for any reason at all, the fact that the defendant did not testify. *Do not* discuss that fact during your deliberations or let it influence your decision in any way.²²⁷

The italicized portions highlight the “prohibitive” nature of these instructions. One must hope that they will not provoke psychological resistance, and thereby cause jurors to take the very actions these instructions forbid.²²⁸ While they as a whole are far more understandable, so at the same time are their prohibitive portions. Time, and perhaps empirical research, will tell if California has inadvertently magnified any resistance of its jurors to these key instructions. If, as the Supreme Court has noted, “the inference of guilt for failure to testify as to facts peculiarly within the accused’s knowledge is in any event natural and irresistible,”²²⁹ then thought should be given to amending these instructions to make them informative instead of prohibitive.

3. *Judges Should Be Encouraged to Deliver Their Final Instructions to the Jury Before Closing Arguments.*²³⁰

The court approved this in concept and referred it to the appropriate committees for consideration and recommendation.²³¹ The Jury Innovation Committee’s rationale was persuasive:

States adopting this reform have concluded that jurors will be in a better position to listen to the closing arguments by counsel with a discerning ear, integrating the evidence with the standards of law explained to them before, rather than after, arguments. Jurors also may be less likely to be inappropriately persuaded by closing arguments, using legally correct guidelines in their evaluation of evidence. The jury may spend less time in deliberations trying to understand the instructions if the jury hears them first and then has the lawyers discuss their application to the case. In addition, litigants and trial attorneys will have the benefit of directly

²²⁶ *Id.* at Pretrial Instruction 103 (emphasis added).

²²⁷ *Id.* at Instruction 355 (emphasis added).

²²⁸ See *supra* notes 210–12 and accompanying text.

²²⁹ *Griffin v. California*, 380 U.S. 609, 614 (1965) (citing *People v. Modesto*, 398 P.2d 753, 762–63 (Cal. 1965)).

²³⁰ JURY INNOVATIONS COMM., *supra* note 195, at 63, Recommendation 31. Giving closing argument after jury instructions is already permitted by statute in civil cases. See, FLA. STAT. § 40.50(5) (2005). But see, FLA. R. CIV. P. 1.470(b) (“The court shall orally charge the jury after the arguments are completed . . .”).

²³¹ In re Final Report of the Jury Innovations Comm., *supra* note 200; it was referred to the Civil and Criminal Procedure Rules Committees and Jury Instruction Committees. *Id.* at 9.

referring to the court's instructions in their arguments, thus eliminating the problem of explaining legal issues with which the jury may be unfamiliar or of 'predicting' what instructions the judge will give.²³²

Despite the likely benefits if trial judges were to allow this,²³³ the Criminal Procedure Rules Committee rejected a proposed rule reflecting this recommendation by a fourteen to ten vote.²³⁴ The primary reason given in opposition was "that it is better that the judge has the final word to lessen the risk that the lawyers will mislead jurors during final argument."²³⁵ This reasoning appears flawed. Counsel giving closing argument after jury instructions would risk his or her credibility, a precious commodity at that moment, by attempting to make misleading statements on the law. Moreover, opposing counsel would likely object to any such attempts, thereby magnifying for the jury counsel's attempt to mislead them. Finally, the court, having just given its instructions and with them fresh in its mind, would be in an excellent position to sustain such objection, or, admonish counsel any misstatement of the law.

*4. Trial Judges Should Be as Responsive as Possible and Fully Answer Deliberating Jurors' Questions, Consistent with Applicable Case Law. The Trial Judge, When Possible, Should Not Ask Jurors to Rely on Their "Collective Memory" When the Judge Is Faced with Questions from a Deliberating Jury, but Rather Respond More Directly to Their Inquiries.*²³⁶

This also was approved by the court and referred to committees for further action.²³⁷ This recommendation or one similar to it, the committee noted, had already been adopted in Arizona and Colorado.²³⁸ It further noted that "there is a fear among trial judges that they may cause reversible error by answering jurors' questions."²³⁹ This could be allayed, the committee felt, by answering the questions in a legally correct manner, but in any event was outweighed by the greater problem to be avoided:

The jury's function is to reach an accurate and fair result based on evidence and instructions of law. If the jury asks questions, the questions should be answered to the extent reasonably possible. The failure of too

²³² JURY INNOVATIONS COMM., *supra* note 195, at 63.

²³³ See Dann & Hans, *supra* note 183, at 18. ("Data generated by recent research demonstrate support for this modest change") (citing favorable results from studies in Tennessee and Ohio).

²³⁴ OUT-OF-CYCLE REPORT OF THE FLORIDA BAR CRIMINAL PROCEDURE RULES COMMITTEE ON JURY INNOVATIONS RECOMMENDATIONS, http://www.floridasupremecourt.org/pub_info/summaries/briefs/04/04-2255/04-2255_CriminalOutOfCyclePetition072604.pdf (last visited Feb. 26, 2006).

²³⁵ *Id.*

²³⁶ JURY INNOVATIONS COMM., *supra* note 195, at 65, Recommendation 32.

²³⁷ In re: Final Report of the Jury Innovations Comm., *supra* note 200; it was referred the Rules of Judicial Administration Committee and Jury Instruction Committees.

²³⁸ JURY INNOVATIONS COMM., *supra* note 195, at 65.

²³⁹ *Id.*

many judges to fully and fairly respond to questions and requests from deliberating juries is well documented and is another major source of 'static' in jury comprehension. In one study, researchers found with 'unexpected homogeneity' that judges answered questions that sought clarification of instructions by simply referring the jury to the instructions without further comment, and that questions regarding evidence were similarly dispatched with the jurors merely being told to rely upon their 'collective memories' of the evidence.²⁴⁰

The committee accepted the common sense of the matter,²⁴¹ as the Supreme Court refused to do in *Weeks*,²⁴² that merely re-reading an instruction the jury already does not understand will achieve little or nothing. However, while jurors would benefit if this recommendation were ultimately implemented, such benefits would not be uniform. And, they could be outweighed by other problems that likely would arise.

Jurors' questions are far more likely to seek clarification of the law, or of the application of the law to the facts, than the questions are likely to relate to pure questions of fact. When faced with questions in this last vein, judges easily and correctly will tell jurors that the facts are peculiarly within their province to decide. No problems from implementing this recommendation should arise here.

However, as to the first two areas, not all judges will understand in the same way the legal matters about which jurors may seek clarification. If asked to state these understandings verbally and on the spot, not all judges will respond in the same ways, or, more importantly, with answers that fully and accurately comport with the law. Furthermore, not all responses will jibe perfectly with the instructions as already given. In contrast to standard instructions, which by definition avoid these problems, this will provide fertile ground for appeal.²⁴³

VI. CONCLUSION

There exists today a serious problem at the heart of our judicial system, given that "[o]ur theory of trial relies upon the ability of a jury to follow instructions."²⁴⁴ Jurors cannot, except by accident, follow their instructions unless they first understand them. This Article and its survey results strongly support the twin conclusions that jurors in fact neither understand their instructions generally, nor, as the instructions concern the presumption of innocence and the Fifth Amendment privilege not to testify, specifically.

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² See *supra* notes 80-84 and accompanying text.

²⁴³ See, e.g., *Bollenbach v. United States*, 326 U.S. 607 (1946) (conviction reversed where during deliberations trial court answered jury question regarding knowledge of stolen goods with incorrect statement of the law).

²⁴⁴ See *Opfer v. United States*, 348 U.S. 84, 95 (1954).

There is no panacea. If there were, the extensive empirical research in the field of jury decision-making would have revealed it long ago. This Article highlights various current efforts, particularly among the states, to remedy this problem. This long-overdue tide toward reform is clearly moving forward, and hopefully will sweep through all fifty states and the federal courts as it has in California, Florida, and other states mentioned herein.²⁴⁵ Several points can be made at this time, however.

First, the United States Supreme Court should take the lead in this reform effort. It cannot do so, however, so long as it remains anchored to its irrebuttable, conclusory, and factually false presumption that jurors follow their instructions.²⁴⁶ That such a presumption violates the Due Process Clause²⁴⁷ only makes it more imperative that the Court at least examine and test it in accordance with its own precedents in *Usery*, *Leary*, and *Gainey*. To hide behind its stated fear that questioning this presumption would “require reversal every time a jury inquires about a matter of constitutional significance, regardless of the judge’s answer”²⁴⁸ is to shirk its duty to provide due process. To refuse to test the presumption despite precedents which require it, and then conclusively apply it against all defendants, is unfair. And, to fail in the name of “pragmat[ism]”²⁴⁹ to drop its pretense that the presumption is factually true²⁵⁰ is disingenuous.

This is not to say that the presumption should be replaced by a system permitting routine post-verdict examinations of jurors, in some undetermined fashion, to determine whether they understood their instructions. Reasons this is untenable and unwise are so obvious as to warrant no discussion here. There is, however, a middle ground.

Making the presumption that jurors understand their instructions rebuttable instead of irrebuttable would open the door to defendants who have evidence of jurors’ failure to understand their instructions, clearly a serious matter, to challenge their verdicts. Although he did not frame his dissent in *Weeks*²⁵¹ as seeking to modify the presumption to being rebuttable, that is certainly the substance of what Justice Stevens urged. It is well within the power of the Court to establish the judicial mechanism by which such challenges could take place. Additionally, the Court could recommend that Federal Rule of Evidence 606 be modified to permit jurors to be examined on this subject upon a showing of good cause. In both veins the Court could make the test difficult, as it should be, so long as it allowed relief in those cases which truly required it. This is a far better and more honest alternative than relying, as the Court currently is doing, on a conclusory presumption that is wholly unsupported by fact. If relief

²⁴⁵ As it was not the purpose of this Article to provide a comprehensive catalogue of those states pursuing jury reform, the omission of a state does not indicate it is not.

²⁴⁶ See discussion *supra* Part III(E).

²⁴⁷ See *supra* notes 88–114 and accompanying text.

²⁴⁸ *Weeks v. Angelone*, 528 U.S. 225, 234 (2000).

²⁴⁹ *Richardson v. Marsh*, 481 U.S. 200, 211 (1987).

²⁵⁰ See *supra* notes 85–87 and accompanying text.

²⁵¹ See *Weeks*, 528 U.S. at 243–44 n.5 (Stevens, J., dissenting).

under the law on matters important to criminal defendants must ever be completely barred, let it be for sound and valid reasons only.

Second, while current efforts to change jury instructions to "plain English"²⁵² are commendable, care should be taken to use informative and not prohibitive instructions.²⁵³ Continuing to use the latter, especially once the prohibitive instructions are made more understandable, may "boomerang"²⁵⁴ and cause the very harm—or even greater harm—than current instructions may be causing.

Third, trial judges and defense counsel must do all they can to promote the presumption of innocence and the right of a defendant not to testify, so as to the greatest extent possible cause jurors to uphold and apply them.

As to judges, nothing bars them from explaining these concepts to jurors even before the start of voir dire, and, even before preliminary instructions. Such explanation should be given in an informative, not prohibitive, manner. Furthermore, nothing bars judges from themselves conducting a thorough voir dire on these limited subjects. The following benefits should result: (1) jurors would be exposed to these concepts on two additional occasions, the first during the judge's explanation before voir dire, and the second during voir dire—to be followed by a third (preliminary instructions), a fourth (opening statement), a fifth (closing argument), and a sixth (final instructions); (2) questioning by a judge would likely be perceived as more authoritative and reinforcing of these concepts than questioning by lawyers (which indeed will follow that of the judge); (3) the judge, now actively engaging the jurors in voir dire on these concepts instead of passively observing counsel do it, would be in a better position—and possibly more likely—to grant challenges for cause for jurors who equivocated in their support of either concept.

For defense counsel, it is essential that they urge these concepts at every opportunity. It is not enough, however, to do so by solely or even mainly relying on the tried (but by no means necessarily true) tactic of saying, "The judge will instruct you on the law, and here is what they will tell you . . . and it is the law and you must follow it." Consistent with research showing the benefits of informative instructions and the detrimental effects of prohibitive ones,²⁵⁵ counsel would be well advised to use the former in their communications to the jury on these matters. Counsel would be equally well advised to review the literature on this subject, as old habits of using prohibitive arguments to the jury may be difficult to change.

Fourth, the full range of reforms currently underway²⁵⁶ must be implemented and then empirically examined. Given that they are new, empirical research has not yet widely tested their effectiveness. No specific changes have been conclusively determined to be effective in eliminating jurors' lack of understanding, although evidence exists that some changes, such

²⁵² See *supra* notes 203–29 and accompanying text.

²⁵³ See *supra* notes 210–16 and accompanying text.

²⁵⁴ See *supra* notes 212–13 and accompanying text.

²⁵⁵ See *supra* notes 210–16 and accompanying text.

²⁵⁶ See discussion *supra* Part V (C).

as the use of simplified instructions,²⁵⁷ may not be effective. To determine the effectiveness of these changes, it is real jurors who, with the permission and cooperation of court administration, should be surveyed or otherwise examined.²⁵⁸ If it still appears after sufficient post-reform empirical research is done that substantially the same problems remain, then more far-reaching methods will be needed to cure them.

Finally, it has been stated that, "One reason that the . . . Sixth Amendment's right to a jury trial was so fundamental to our system of justice was that it conceived of the jury as a buffer between the defendant and the government."²⁵⁹

When jurors penalize criminal defendants for exercising their Fifth Amendment right not to testify, or fail to apply the presumption of innocence throughout trial, as the survey results here indicate is occurring, they cease to act as a buffer between defendants and the government. They act, instead, as a conduit.

Whether this is occurring due to jurors being unable to understand their instructions, due to intentional nullification of these constitutional principles, or for other reasons matters little in the final analysis. There can be nothing more detrimental to our system of justice, which has the power to take, and does take, liberty and life, than this. Only the most serious, determined, and immediate efforts to correct it will suffice.

²⁵⁷ See *supra* notes 67–69 and accompanying text.

²⁵⁸ See *supra* notes 5–8 and accompanying text.

²⁵⁹ See NANCY S. MARDER, *THE JURY PROCESS* 55 (2005).