



## ALBANY LAW REVIEW

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Volume 84, Page 579  
Published 2020-21

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Recommended citation:

Michael D. Cicchini, *Criminal Jury Instructions: A Case Study*, 84 ALBANY L. REV. 579 (2020-21)

This article is also available at: <https://www.albanylawreview.org/article/67861-criminal-jury-instructions-a-case-study>

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## CRIMINAL JURY INSTRUCTIONS: A CASE STUDY

*Michael D. Cicchini\**

### INTRODUCTION

Jury instructions can be incredibly important in criminal cases.<sup>1</sup> Among other things, the instructions enumerate the elements of the charged crimes, define key legal terms, guide the jury in evaluating the evidence, and explain the state's burden of proof.<sup>2</sup> Even subtle differences in wording can, in some instances, mean the difference between acquittal and conviction.<sup>3</sup>

Unfortunately, many of Wisconsin's pattern jury instructions are blatantly pro-prosecutor.<sup>4</sup> Defense lawyers frequently seek changes to the pattern instructions, yet courts at all levels of the system typically deny such requests.<sup>5</sup> Courts often do so not on the merits, but rather out of reverence for the "eminently qualified committee of trial judges" that supposedly drafted the instructions.<sup>6</sup> Courts treat the jury-instruction committee's words as gospel, often praising the member-judges for their "highly qualified legal minds."<sup>7</sup>

Recently, however, during the course of a copyright dispute, the state's flagship university revealed that *its employees*, and not the great legal minds on the jury-instruction committee, are solely responsible for "the writing and creating of the jury instructions."<sup>8</sup> For many defense lawyers who have advocated to change these pro-

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<sup>1</sup> See *infra* Part I.

<sup>2</sup> See *infra* Part I (A–D).

<sup>3</sup> See, e.g., *infra* Part I (A–D).

<sup>4</sup> See, e.g., *infra* Part I (A–D).

<sup>5</sup> See *infra* Part II.

<sup>6</sup> *State v. Trammell*, 982 N.W.2d 564, 589 (Wis. 2019) (Dallet, J., concurring) (quoting *State v. Gilbert*, 340 N.W.2d 511, 515 (Wis. 1983)).

<sup>7</sup> *State v. Harvey*, 710 N.W.2d 482, 487 (Wis. Ct. App. 2006); see *infra* Part II.

<sup>8</sup> Letter from Nancy K. Lynch, Assoc. Vice Chancellor for Legal Affairs, U. Wis.-Madison, to Carl Malamud, President, Public.Resource.Org, Inc. (Sept. 1, 2020); see *infra* Part III.

state jury instructions—only to be denied out of reverence for a judicial committee which, it turns out, didn't even write them—this revelation feels scandalous and, in fact, is the motivation for this Article.<sup>9</sup>

Part I explains the importance of jury instructions and gives four examples of how Wisconsin's pattern instructions benefit the prosecutor at the expense of defendants. Part II discusses the jury-instruction committee that was thought to have authored the instructions. Part III explains how a copyright dispute revealed that unidentified state university employees, not the judges on the ballyhooed committee, are the true authors.

Given this new reality, Part IV provides a legal strategy, including a sample written request, for criminal defense lawyers to seek modification of the pattern instructions on a case-by-case basis. Part V anticipates and debunks the likely response of prosecutors seeking to preserve the pro-state instructions as written. Finally, Part VI considers two public policy objectives and proposes badly needed legal reform of the jury-instruction process.

### I. JURY INSTRUCTIONS: WORDS MATTER

Standard or pattern jury instructions are often incredibly important in criminal cases. Among other things, the instructions (a) convey to the jury the elements of the charged crime, (b) define key legal terminology, (c) guide the jury in evaluating the evidence, and especially (d) explain the state's burden of proof.<sup>10</sup> It is therefore not surprising that, in some cases, the wording of even a single instruction could dictate the jury's ultimate verdict.<sup>11</sup>

<sup>9</sup> See *infra* Part IV.

<sup>10</sup> See *How Courts Work*, AM. BAR ASS'N, [https://www.americanbar.org/groups/public\\_education/resources/law\\_related\\_education\\_network/how\\_courts\\_work/juryinstruct/](https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/juryinstruct/) [https://perma.cc/6VP8-7P7V].

<sup>11</sup> See Jeffrey M. Pollock, *Jury Instructions are Critically Important*, N.J. L.J. (Jun. 26, 2017), <https://www.foxrothschild.com/publications/jury-instructions-are-critically-important/#:~:text=Throughout%20trial%2C%20the%20court%20provides%20instructions%20to%20the%20jury.&text=Because%20of%20the%20impact%20that,at%20any%20stage%20of%20trial.> [https://perma.cc/R57E-AKRS]; *Jury Instructions Research Guide: Importance of Jury Instructions*, MARQ. UNIV., <https://libraryguides.law.marquette.edu/c.php?g=318617&p=3774863#:~:text=Jury%20instructions%20are%20an%20important,legal%20principles%20of%20the%20case> [https://perma.cc/6JEQ-7XUN]. On the other hand, many cases are so strong for one of the parties that the instructions make little if any difference in the outcome. For example, when a defendant has clearly demonstrated his or her innocence at trial, the jury instruction on the state's burden of proof could, theoretically, have conveyed a lower burden such as preponderance of the evidence; the jury's ultimate verdict would still be "not guilty." Nonetheless, strength of evidence is not known to the judge ahead of time, and a court's

The impact of jury instructions also runs much deeper and is felt much earlier. Because of their significance at trial, the instructions will influence the defense lawyer's decisions on what evidence to present, which defenses to pursue, and which arguments to make to the jury.<sup>12</sup> Even earlier than that, the jury instructions to be used at trial may impact defense counsel's advice to the defendant on whether even to have a trial (as opposed to accepting a plea offer) in the first place.<sup>13</sup>

Given the importance of jury instructions, they must be accurate and clear—two different legal requirements of equal importance.<sup>14</sup> In Wisconsin, however, the state's pattern criminal jury instructions often fall short of that goal. In many ways, some of the instructions are blatantly anti-defendant. The Sections below provide four examples of this anti-defendant bent within the context of the four purposes of jury instructions discussed above.

### A. *Elements of the Crime*

A primary purpose of criminal jury instructions is to convey the elements of the charged crime. For example, when a defendant in Wisconsin is charged with “exposing a child to harmful material,” such as pornography, the law is clear: in addition to the other elements of the crime, the state must also prove that the defendant “knowingly” exhibited such material to the child.<sup>15</sup>

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obligation is always to instruct the jury accurately and clearly. See Patricia Steele, *Do Jurors Really Follow the Jury Instructions?*, LITIG. INSIGHTS (Jan. 13, 2015), <https://www.litigationinsights.com/jurors-follow-jury-instructions/> [https://perma.cc/6P67-7VRP]; see also *State v. Neumann*, 832 N.W.2d 560, 584 (Wis. 2013) (quoting *State v. Coleman*, 556 N.W.2d 701, 706 (Wis. 1996)) (“A circuit court must, however, exercise its discretion in order ‘to fully and fairly inform the jury of the rules of law applicable to the case and to assist the jury in making a reasonable analysis of the evidence.’”).

<sup>12</sup> See Donald E. Woody, *Developing a Winning Trial Strategy*, ATT'Y EDUC. CTR., <https://www.jameseducationcenter.com/articles/personal-injury-trial-strategies/> [https://perma.cc/4DYR-5VVL].

<sup>13</sup> See *How Courts Work*, ABA (Sept. 9, 2019) [https://www.americanbar.org/groups/public\\_education/resources/law\\_related\\_education\\_network/how\\_courts\\_work/pleabargaining/](https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/pleabargaining/) [https://perma.cc/94DK-STJ2]. Because the jury instructions enumerate the elements of the charged crimes and possible defenses, many defense lawyers will consult them immediately upon opening a case and use them to evaluate potential courses of action throughout the case. See Michael M. Giel, *Avoiding Fundamentally Erroneous Jury Instructions: Pointers for Counsel in Criminal Trials and Appeals*, 81 FLA. B.J. 61 (2007).

<sup>14</sup> See *State v. Gonzalez*, 802 N.W.2d 454, 459 (Wis. 2011) (citing *State v. Burris*, 797 N.W.2d 430, 442 (Wis. 2011)) (“There are two types of challenges to a jury instruction. One challenges the legal accuracy of the instruction. The other asserts that a legally accurate instruction unconstitutionally misleads the jury.”).

<sup>15</sup> *Id.* at 460, 463 (quoting *State v. Thiel*, 515 N.W.2d 847, 859 (Wis. 1994)).

Despite this undisputed element, Wisconsin's pattern jury instruction merely required the state to prove that "[t]he defendant . . . exhibited" harmful material to the child, without any reference to the requisite mental state.<sup>16</sup> Its flaw was serious and obvious: "the jury instruction did not explicitly instruct the jury that the State must prove beyond a reasonable doubt that the defendant *knowingly*, as opposed to accidentally, exhibited the harmful material to the child. The word 'knowingly' does not appear anywhere in the instruction."<sup>17</sup>

Because the jury instruction failed to convey a critical element of the charged crime, and because defense counsel raised a proper and timely objection at trial, *eventually* the state's highest court reversed the defendant's conviction which, the court concluded, the state obtained because of the defective, anti-defendant instruction.<sup>18</sup> "We disagree with the circuit court and court of appeals. . . . [T]he words 'exhibited . . . harmful material to,' which the court of appeals relied upon for the clarity of the [pattern] instruction, are the very words . . . about which the jurors sought clarification."<sup>19</sup>

After this court decision, the pattern instruction was subsequently changed to include the word "knowingly" within the first element of crime.<sup>20</sup>

### *B. Legal Definitions*

Rather than improving over time, other jury instructions regressed and become inaccurate or unclear—often to a defendant's detriment. For example, in order to be convicted of battery by prisoner, the state must prove, in addition to other elements, that the defendant was, at the time of the battery, confined as a *prisoner*.<sup>21</sup> The legal definition of prisoner is critical, as inmates may be incarcerated for a variety of reasons. To be a prisoner, the defendant must have been confined "as a result of a violation of the law."<sup>22</sup> More specifically, "a prisoner is a person confined under authority of law and pursuant to a penological or a correctional objective."<sup>23</sup>

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<sup>16</sup> *Id.* at 462.

<sup>17</sup> *Id.* at 463 (emphasis added).

<sup>18</sup> *See id.* at 464, 471.

<sup>19</sup> *Id.* at 464.

<sup>20</sup> *See* WIS JI-CRIMINAL No. 2142 (2011).

<sup>21</sup> *See* WIS. STAT. § 940.20(1) (2021).

<sup>22</sup> *In re C.D.M.*, 370 N.W.2d 287, 289 (Wis. Ct. App. 1985).

<sup>23</sup> *Id.* (citing *Meyer v. City of Oakland*, 166 Cal. Rptr. 79, 84 (1980)).

Under this definition, if a person had been convicted of a crime, was serving a jail term, and committed a battery, he would be guilty of battery by prisoner. Why? Because he was in jail due to “a violation of the law” and, more specifically, was serving time “pursuant to a . . . correctional objective.”<sup>24</sup> Conversely, if a person was merely accused of a crime, was being held on bail, and committed a battery, he should *not* be found guilty of battery by prisoner. Why not? Because he was confined only because he was unable to post bail. There is no “correctional objective” in holding a person, who is presumed to be innocent, on bail; rather, the sole purpose of bail is to assure the defendant’s appearance at future court hearings.<sup>25</sup>

That is why Wisconsin’s pattern jury instruction, in its 2001 edition, correctly instructed the jury: “Evidence has been received that the defendant was a prisoner . . . *and therefore had been convicted of a crime*. This evidence was received because the defendant’s status as a prisoner is an issue in this case.”<sup>26</sup> This definition of prisoner, i.e., an inmate who “had been convicted of a crime,” was generally accurate and would work in most cases.<sup>27</sup> But then, in 2017 and without explanation, the powers-that-be changed the pattern instruction to *eliminate* that definition to then read: “Evidence has been received that (the defendant) was a prisoner. . . . This evidence was received because the (defendant’s) status as a prisoner is an issue in this case.”<sup>28</sup>

This unfortunate devolution leaves the jury to define prisoner however it wishes and frees the prosecutor to argue, far more expansively than the law permits, that a prisoner is anyone who is held in custody regardless of whether he was confined for a “correctional objective” or merely because, though presumed innocent, and perhaps even actually innocent, he did not have the financial resources to post bail.

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<sup>24</sup> *Id.*

<sup>25</sup> *See id.*; *see also* WIS. STAT. § 969.01(4) (2021) (“If bail is imposed, it shall be only in the amount found necessary to assure the appearance of the defendant.”).

<sup>26</sup> WIS JI-CRIMINAL NO. 312 (2001) (emphasis added). The quote from the instruction is simplified by deleting the name of the penal institution, which is irrelevant for purposes of this Article.

<sup>27</sup> *See id.* To be clearer, the instruction should have specifically indicated that the defendant’s conviction was the reason for his incarceration at the time he was alleged to have committed battery by prisoner. Otherwise, a person who was convicted years ago and who already served his sentence might be back in custody, at the time of the alleged battery by prisoner, but simply because he was unable to post bail in a new case which has nothing to do with the prior conviction. Yet the instruction, in its 2001 version, failed to account for this situation. *See* WIS JI-CRIMINAL No. 312 (2001).

<sup>28</sup> *See* WIS JI-CRIMINAL NO. 312 (2017). The quote from the instruction is simplified by deleting the name of the penal institution, which is irrelevant for purposes of this Article.

*C. Evaluating the Evidence*

Instead of enumerating elements of crimes or defining legal terms, other instructions guide the jury in evaluating the evidence. For example, Wisconsin's jury instruction on the credibility of witnesses provides nine factors for the jury to use when determining the weight to give to a witness's testimony.<sup>29</sup> The instruction also has a paragraph for use when the defendant testifies. Its first sentence reads: "The defendant has testified in this case, and you should not discredit the testimony just because the defendant is charged with a crime."<sup>30</sup> But then the second sentence reads: "Use the *same factors* to determine the credibility and weight of the defendant's testimony that you use to evaluate the testimony of any other witness."<sup>31</sup>

Given this language, prosecutors like to argue to the jury that those "same factors" to be used when evaluating the defendant's testimony include "whether the witness has an *interest . . .* in the result of this trial[.]" or has a "*bias or prejudice . . .*"<sup>32</sup> For example, one prosecutor argued to the jury: "[W]hat's her interest, bias[,] or prejudice? Well, she's the Defendant here, she stands a chance of getting convicted. That's one very large reason she should have of trying to slant her testimony, of trying to shift the blame away. It's not pleasant to be convicted, especially at her age."<sup>33</sup>

And if the defendant happens to be a young male, rather than older female, that canned but effective argument can be modified accordingly. As a different—or perhaps the same—prosecutor argued in another case: "[W]hat is his interest, bias, or prejudice? Well, he's the one on trial here. You recall his testimony. He's a [seventeen-year-old] male attending [high school], getting ready to enter into adulthood. Do you think he'd want to go through the rest of his life with a conviction[?]"<sup>34</sup>

Once again, the flaw in this instruction is obvious: the rights afforded to the defendant in the first sentence (his or her constitutional right to testify and the presumption of innocence) are taken away in the second sentence. That is, the second sentence urges the jury to exactly what the first sentence prohibited: disregard

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<sup>29</sup> See WIS JI-CRIMINAL NO. 300 (2000).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* (emphasis added).

<sup>32</sup> *Id.* (emphasis added).

<sup>33</sup> *People v. Crowder*, 607 N.E.2d 277, 280 (Ill. App. Ct. 1993), *overruled by*, 678 N.E.2d 1038 (Ill. 1997). However, the prosecutorial arguments reviewed in these two cases were different.

<sup>34</sup> *People v. Watts*, 588 N.E.2d 405, 407 (Ill. App. Ct. 1992), *overruled by*, 678 N.E.2d 1038 (Ill. 1997). Again, the prosecutorial arguments under review were quite different.

the defendant's testimony simply because he or she is charged with a crime.<sup>35</sup>

#### *D. Burden of Proof*

Few jury instructions are as important as the burden of proof instruction. Empirical research shows that, without a proper instruction, jurors fail to distinguish between proof beyond a reasonable doubt and the two lower civil burdens of proof.<sup>36</sup> Therefore, states like Arizona and Vermont will contrast the three standards in order to stress the enormity of the state's burden in a criminal case.<sup>37</sup> Similarly, North Carolina concludes its jury instruction as follows: "Proof beyond a reasonable doubt is proof that *fully satisfies or entirely convinces you* of the defendant's guilt."<sup>38</sup>

By contrast, Wisconsin's burden of proof instruction contains several defects that completely eviscerate the prosecutor's burden.<sup>39</sup> First, it equates the jurors' verdict with decision-making in their personal lives,<sup>40</sup> even though such personal decisions (including important ones) "generally involve a heavy element of uncertainty and risk-taking" and are "wholly unlike the decisions jurors ought to make in criminal cases."<sup>41</sup>

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<sup>35</sup> The two examples of prosecutorial argument provided in this Section are from cases decided by an appeals court in Illinois, which found the arguments improper as "they implied that the defendant lied simply because of his" or her "status as a defendant." *Id.*; see *Crowder*, 607 N.E.2d at 280. However, in a subsequent hair-splitting decision, the high court of Illinois relied upon a case that predated both *Watts* and *Crowder* and held that the jury is "not entitled to disregard the accused's testimony merely because he is the defendant in the case, but it may consider his interest in the result of the trial in weighing his testimony." *People v. Barney*, 678 N.E.2d 1038, 1041 (Ill. 1997) (emphasis added) (internal quotations omitted). Similarly, in my experience, Wisconsin courts also permit the argument, relying on the second sentence of the relevant portion of the instruction, *i.e.*, that the jury should "[u]se the same factors" when evaluating the defendant's testimony. WIS. JI-CRIMINAL NO. 300 (2000). However, this approach is nothing more than a form-over-substance tactic to accomplish "indirectly" what a prosecutor or judge "cannot do directly," *i.e.*, "tell the jury that a criminal defendant who testifies has a motive to testify falsely." *United States v. Solano*, 966 F.3d 184, 197 (2d Cir. 2020) (internal quotations omitted) (reversing a conviction because the judge erroneously instructed the jury that "a witness's interest in the outcome of the case creates a motive on the part of the witness to testify falsely").

<sup>36</sup> See Michael D. Cicchini, *Reasonable Doubt and Relativity*, 76 WASH. & LEE L. REV. 1443, 1455–62 (2019).

<sup>37</sup> See ARIZ. CRIM. JURY INSTRUCTIONS No. 5(b)(1) (2016); VERMONT. CRIMINAL JURY INSTRUCTIONS No. 04.101 (VT. TRIAL CT. CRIM. JURY INSTRUCTION COMMITTEE 2005).

<sup>38</sup> N.C.P.I.—CRIM. NO. 101.10 (U. North Carolina 2008) (emphasis added).

<sup>39</sup> See WIS JI-CRIMINAL No. 140 (2019).

<sup>40</sup> *Id.* (analogizing the jury's verdict to decisions "in the most important affairs of life").

<sup>41</sup> PATTERN CRIMINAL JURY INSTRUCTIONS NO. 21 (Fed. Jud. Ctr. 1987).



Second, the instruction focuses the jury on the alternative theories generated by the defense instead of on the strength of the state's case,<sup>42</sup> "thereby shift[ing] the burden of proof to the defendant."<sup>43</sup>

Third, the instruction goes into great detail to warn jurors that, if they have a doubt about the defendant's guilt, it probably isn't a reasonable one and should *not* be used to acquit.<sup>44</sup> Such a warning "conveys a message to the jurors: The judge would not have presented so many ways in which the juror's doubts can be used improperly if this were not the main problem to avoid."<sup>45</sup>

Fourth and most significantly, Wisconsin's jury instruction concludes by telling the jurors "you are *not* to search for doubt. You are to search for the truth."<sup>46</sup> Other courts have found this to be improper. To begin, stating "that the jury should search for truth and not for reasonable doubt both misstates the jury's duty and sweeps aside the State's burden."<sup>47</sup> In fact, what the instruction actually describes is a lower, civil burden of proof: "seeking the truth suggests determining whose version of events is more likely true, the government's or the defendant's, and thereby intimates a preponderance of evidence standard."<sup>48</sup>

Most notably, this truth-not-doubt mandate "impermissibly portray[s] the reasonable doubt standard as a defense tool for hiding the truth[.]"<sup>49</sup> How? "After the defense lawyer argues that there is doubt about guilt, the prosecutor argues (parroting the judge's instruction) that the jury must not search for doubt, but for the truth. The prosecutor then, of course, equates 'truth' with a finding of guilt."<sup>50</sup>

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<sup>42</sup> See WIS JI-CRIMINAL NO. 140 (focusing the jury on "reasonable hypothes[es] consistent with the defendant's innocence").

<sup>43</sup> Lawrence M. Solan, *Refocusing the Burden of Proof in Criminal Cases: Some Doubt About Reasonable Doubt*, 78 TEX. L. REV. 105, 105 (1999).

<sup>44</sup> WIS JI-CRIMINAL NO. 140. The instruction warns that "[a] reasonable doubt is not a doubt which is based on mere guesswork or speculation. A doubt which arises merely from sympathy or from fear to return a verdict of guilt is not a reasonable doubt. A reasonable doubt is not a doubt such as may be used to escape the responsibility of a decision." *Id.* Problems with this language include these: reasonable doubt often is based on speculation; the instruction doesn't warn that conviction out of sympathy for others or fear of acquittal is also prohibited; and, regardless of whether the jury finds reasonable doubt, it must make a decision either way, thus reducing this last warning to pure nonsense. See *id.*; Solan, *supra* note 43, at 142–43.

<sup>45</sup> Solan, *supra* note 43, at 144.

<sup>46</sup> WIS JI-CRIMINAL No. 140 (emphasis added).

<sup>47</sup> *State v. Berube*, 286 P.3d 402, 411 (Wash. Ct. App. 2012).

<sup>48</sup> *United States v. Gonzalez-Balderas*, 11 F.3d 1218, 1223 (5th Cir. 1994) (internal quote marks omitted). See also WIS JI-CRIMINAL No. 140.

<sup>49</sup> *Berube*, 286 P.3d at 411.

<sup>50</sup> Michael D. Cicchini, *Spin Doctors: Prosecutor Sophistry and the Burden of Proof*, 87 U. CIN. L. REV. 489, 517 (2018).

Even without an overeager prosecutor exacerbating the harmful impact of this instruction in closing argument, two controlled experiments tested the impact of this truth-not-doubt mandate on mock juror decision-making. Unsurprisingly, both studies found that the test participants who were instructed “not to search for doubt” but instead “to search for the truth,” all else being equal, convicted at significantly higher rates.<sup>51</sup>

## II. ORIGIN STORY: THE JURY INSTRUCTION COMMITTEE

Where do all of these pro-prosecutor jury instructions come from? In Wisconsin, as in many states,<sup>52</sup> they come from—or at least were thought to have come from—a jury-instruction committee. Operating under the auspices of the Wisconsin Court System, the Judicial Conference created a Criminal Jury Instruction Committee (the “Committee”).<sup>53</sup> The Committee then “[p]repares model criminal jury instructions for circuit [trial court] judges.”<sup>54</sup> The Committee itself is comprised of eleven trial court judges.<sup>55</sup> These judges are given “assistance from” a prosecutor, a defense lawyer, and two reporters.<sup>56</sup> These two reporters are employed by the University of Wisconsin, which then publishes the Committee’s work.<sup>57</sup>

This Committee of eleven trial court judges is given great deference and treated with much reverence by the state’s trial courts, appellate courts, and even the Supreme Court of Wisconsin. When faced with a challenge to the pattern jury instructions, one appellate court stated: “The Criminal Jury Instructions Committee comprises highly qualified legal minds whose goal is to uniformly and accurately state

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<sup>51</sup> Michael D. Cicchini & Lawrence T. White, *Testing the Impact of Criminal Jury Instructions on Verdicts: A Conceptual Replication*, 117 COLUM. L. REV. ONLINE 22, 22–23 (2017) [hereinafter *Testing the Impact of Criminal Jury Instructions on Verdicts*]; Michael D. Cicchini & Lawrence T. White, *Truth or Doubt? An Empirical Test of Criminal Jury Instructions*, 50 U. RICH. L. REV. 1139, 1152–57 (2016) [hereinafter *Truth or Doubt*].

<sup>52</sup> See, e.g., *Criminal Jury Instructions Resource Center*, JUDICIAL COUNCIL OF CAL., <https://www.courts.ca.gov/partners/312.htm> [https://perma.cc/79WX-YSKD]; *Criminal Jury Instructions & Model Colloquies*, N.Y. UNIFIED COURT. SYS., <http://www.nycourts.gov/judges/cji/0-TitlePage/2-History.shtml> [https://perma.cc/XBE4-JYMX]; *Judicial Conference*, WIS. COURT. SYS., <https://www.wicourts.gov/courts/committees/judicialconf.htm> [https://perma.cc/8YBM-25YQ].

<sup>53</sup> WIS. COURT SYS., *supra* note 52.

<sup>54</sup> *Id.*

<sup>55</sup> *Wisconsin Judicial Conference Officers and Standing Committees*, WIS. COURT. SYS. (Sept. 17, 2020), <https://www.wicourts.gov/courts/committees/docs/judconflist.pdf> [https://perma.cc/AN53-JV5B].

<sup>56</sup> WIS JI-CRIMINAL, introductory cmt. (2019).

<sup>57</sup> *Id.*

the law.”<sup>58</sup> Another court, when faced with a similar challenge, wrote that “[a]lthough not binding on us, the committee’s assessment of a proper jury instruction is ‘persuasive.’”<sup>59</sup>

Even the Wisconsin Supreme Court bows to the Committee. In a recent case where a convicted defendant challenged the disastrous burden of proof instruction discussed earlier, a concurring justice wrote that the jury instructions “are the product of painstaking effort of an eminently qualified committee of trial judges” and, therefore, “[t]he majority [decision] rightfully places great weight on the Criminal Jury Instructions Committee’s examination of [the instruction].”<sup>60</sup>

In my own experience as a criminal defense lawyer, I have found that the description of the pattern instructions as “persuasive” and of judges “plac[ing] great weight” on them are gross understatements. Rather, trial courts treat the instructions as gospel. Judges are far more likely to deviate from case law—as legal critic Ambrose Bierce wrote, a case “has whatever force and authority a Judge may choose to give it, thereby greatly simplifying his task of doing as he pleases”<sup>61</sup>—than from the pattern jury instructions. As a practical matter, at least, the instructions are all but carved in stone.

My informed working theory on this phenomenon is this: while trial court judges are willing to distinguish case law on the most insignificant detail in order to rule for the state, the pattern jury instructions are so slanted toward the state to begin with that trial court judges need not, and therefore usually will not, change them in any way.<sup>62</sup>

Despite the praise heaped on the Committee, I have argued that it is not worthy of such reverence.<sup>63</sup> Instead, because it is stacked in favor of prosecutors, the individual trial court judges presiding over actual cases should evaluate the jury instructions on their merits. In

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<sup>58</sup> See *State v. Harvey*, 710 N.W.2d 482, 487 (Wis. Ct. App. 2006) (citing *State v. Gilbert*, 340 N.W.2d 511, 515–16 (Wis. 1983)).

<sup>59</sup> See *State v. Ellington*, 707 N.W.2d 907, 911, 912 (Wis. Ct. App. 2005) (citing *State v. Olson*, 498 N.W.2d 661, 667 n.10 (Wis. 1993)).

<sup>60</sup> See *State v. Trammell*, 928 N.W.2d 564, 589 (Wis. 2019) (Dallet, J., concurring) (internal punctuation and citation omitted).

<sup>61</sup> See AMBROSE BIERCE, *THE DEVIL’S DICTIONARY: PRECEDENT* 102 (1911).

<sup>62</sup> I am only aware of any judge ever changing one pattern instruction: the burden of proof instruction. After a statewide effort by Wisconsin defense lawyers to get trial judges to deviate from the defective pattern instruction discussed in Part I of this Article, twenty-three of Wisconsin’s approximately 250 trial court judges, upon information and belief, have done so—although often with very minimal modification. *Wis. Jury Instruction 140 Resource Page*, CICCHINI LAW OFFICE L.L.C., <https://cicchinilaw.com/ji-140> [<https://perma.cc/7YXA-XRQQ>].

<sup>63</sup> See Cicchini, *supra* note 50, at 512–15.

recent iterations, the Committee has been comprised almost *entirely of former prosecutors*. As I wrote of its 2017 iteration:

Wisconsin’s eleven-member committee is comprised entirely of trial-court judges. Of the eleven members, one has already retired from the bench. Of the remaining ten, *seven are former prosecutors* and two are former counsel for county governments . . . . The remaining committee member is a former trial-level attorney at the Office of the State Public Defender, but his term on the committee expired in 2016.<sup>64</sup>

Similarly, regarding the 2018 edition of the Committee:

The committee, in its 2018 iteration, is comprised of eleven judges. *Eight of the eleven members are former prosecutors*, and many were career-long prosecutors until they took the bench. Four of the committee members each have more than twenty years of experience putting citizens behind bars; another three each boast more than a decade’s worth of such experience. Of the three committee members who haven’t worked as prosecutors, all have worked as government lawyers in other capacities, including quasi-prosecutorial positions. While two of the eleven members have also reported working in “private practice,” it is not clear whether they have ever defended a client against the government.<sup>65</sup>

Along with this appearance of bias there is also evidence of actual bias (in addition to the pro-state jury instructions themselves). In 2016, I wrote to the Committee asking it to modify its pattern instruction on the burden of proof.<sup>66</sup> In addition to out-of-state court decisions condemning the mandate “not to search for doubt” in a “proof beyond a reasonable doubt” jury instruction,<sup>67</sup> another basis for my request was my recent published research demonstrating,

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<sup>64</sup> Michael D. Cicchini, *The Battle Over the Burden of Proof: A Report from the Trenches*, 79 U. PITT. L. REV. 61, 85–86 (2017) (citations omitted) (emphasis added).

<sup>65</sup> Cicchini, *supra* note 50, at 513 (citations omitted) (emphasis added).

<sup>66</sup> Letter from Michael D. Cicchini, Criminal Def. Att’y, Cicchini Law Office, L.L.C., to Wis. Jury Instruction Comm. (June 7, 2016) (on file with author).

<sup>67</sup> *See supra* Part I (D).

quite unsurprisingly, that the mandate “not to search for doubt” diminished the state’s burden.<sup>68</sup> Here is what followed:

[W]hat was surprising was the impenetrable black box in which the jury-instruction committee operated. Impenetrable, that is, to anyone who is not a prosecutor. Since September 2016, prosecutors have been enthusiastically reporting that the committee decided not to modify the instruction. Then, nine months later on June 29, 2017, I received an email from the reporter of the committee, informing me that the committee had, in fact, decided against modification. The reporter was apparently unaware that prosecutors had been spreading the news of this decision since September 2016; he claimed the committee had discussed the matter in October, and did not make its decision until December, of 2016.<sup>69</sup>

In sum, because trial judges are not only charged with, but also quite capable of, using language and logic to evaluate the jury instructions on the merits, they should not blindly defer to a committee of other trial judges—particularly when it is comprised almost entirely of former prosecutors. Second, and perhaps even more significantly, the jury-instruction process was recently illuminated by an unexpected but welcomed light source. It turns out the instructions *aren’t even written by the vaunted Committee* in the first place.

### III. PULLING BACK THE CURTAIN

The University of Wisconsin (“UW”) holds the copyright in the jury instructions that are supposedly drafted by the Committee.<sup>70</sup> How can that be? We lawyers always assumed that, after drafting the jury instructions, the Committee claimed copyright in its own work and then transferred that copyright to UW.<sup>71</sup> The known connection was

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<sup>68</sup> See Michael D. Cicchini, *Instructing Jurors on Reasonable Doubt: It’s All Relative*, 8 CALIF. L. REV. ONLINE 72 (Oct. 2017).

<sup>69</sup> *Id.* (citations omitted).

<sup>70</sup> WIS JI-CRIMINAL, introductory cmt.

<sup>71</sup> This assumes, quite reasonably, that the judges draft the instructions as the Committee says they do and, in fact, as they are mandated to do. See Bylaws of the Judicial Conference of Wisconsin, art. V § 1A (2009), <https://www.wicourts.gov/courts/committees/docs/judconfbylaws.pdf> [<https://perma.cc/B8EN-B8LN>] (“The Criminal Jury Instructions Committee shall study and prepare model criminal jury instructions and related materials.”).

that UW employed the two reporters that “assist” the Committee and ultimately see that the instructions are published in print and on disk.<sup>72</sup> In any case, UW, as copyright holder, then sold the criminal instructions to lawyers for \$445.00 plus annual update fees.<sup>73</sup>

But in 2020, a California-based non-profit group called Public.Resource.Org, Inc. (“Public Resource”) challenged UW’s ability to take copyright in the jury instructions.<sup>74</sup> In fact, a very similar arrangement had been condemned as far back as 1834 when a case reporter named Wheaton claimed to take copyright in judicially-created legal material.<sup>75</sup> The Supreme Court wrote:

Wheaton argued that the Justices were the authors and had assigned their ownership interests to him through a tacit “gift.” The Court unanimously rejected that argument, concluding that “no reporter has or can have any copyright in the written opinions delivered by this court” and that “the judges thereof cannot confer on any reporter any such right.”<sup>76</sup>

Applying this to Wisconsin’s jury instructions, the Committee’s copyright (which we lawyers assumed it took and then promptly transferred to UW) may never have existed to begin with. The test is as follows:

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<sup>72</sup> See WIS JI-CRIMINAL, introductory cmt.; *CLEW Publications, Wisconsin Jury Instructions - Criminal*, UNIV. OF WIS.-MADISON LAW SCH., [https://law.wisc.edu/clew/publications/jury\\_instructions\\_criminal.html](https://law.wisc.edu/clew/publications/jury_instructions_criminal.html) [<https://perma.cc/67VL-78ZA>].

<sup>73</sup> Cicchini, *supra* note 64, at 87 n.138; see *CLEW Publications, Wisconsin Jury Instructions - Criminal*, *supra* note 72. UW sells these jury instructions for \$235.00 for the print version and \$210.00 for the digital version on disk. *CLEW Publications, Wisconsin Jury Instructions - Criminal*, *supra* note 72. As a practical matter, it is necessary for a criminal defense lawyer to purchase both sets for a total of \$445.00, as the print version contains valuable information the digital version does not, yet only the instructions on the digital version can actually be tailored for in-court use in actual trials. See Cicchini, *supra* note 64, at 87 n.138; *CLEW Publications, Wisconsin Jury Instructions - Criminal*, *supra* note 72 (showing civil and juvenile jury instructions sold separately).

<sup>74</sup> Letter from Carl Malamud, President, Pub.Res. Org, Inc., to Honorable Laura Gramling Perez, Chair, Juvenile Jury Instruction Comm., Wis. Judicial Conference; Hon. Michael Schumacher, Chair, Civil Jury Instruction Committee, Wisconsin Judicial Conference; Honorable D. Todd Ehlers, Chair, Criminal Jury Instructions Comm., Wis. Judicial Conference; Bryce Pierson, Dir., Continuing Legal Educ., Univ. of Wis.-Madison Law Sch.; and David E. Schultz, Emeritus Professor of Law, Univ. of Wis.-Madison Law Sch. (June 1, 2020), <https://law.resource.org/pub/us/cfr/regulations.gov.foia/gov.wicourts.20200601.signed.pdf> [<https://perma.cc/Z4MC-PTET>].

<sup>75</sup> See *Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498, 1506 (2020) (citing *Wheaton v. Peters*, 33 U.S. 591, 617 (1834)).

<sup>76</sup> *Id.* (citations omitted).

Instead of examining whether given material carries “the force of law,” we ask only whether the author of the work is a judge or a legislator. If so, then whatever work that judge or legislator produces in the course of his judicial or legislative duties *is not copyrightable*. That is the framework our precedents long ago established, and we adhere to those precedents today.<sup>77</sup>

Given this clear standard, Public Resource informed the Committee and UW that it had purchased the jury instructions and the most recent annual update and intended to make them available to everyone for free by posting them on the Internet.<sup>78</sup> It wrote:

The profuse assertions of copyright throughout the [Wisconsin jury instructions] do not seem compatible with what the U.S. Copyright Office calls a “long-standing public policy” that such materials are *not eligible for registration*. We believe the proper course of action would be for the Wisconsin Judicial Conference to . . . make the [jury instructions] freely available. . . . [Alternatively,] I believe that the edicts of government doctrine would permit (indeed encourage) our right to speak these edicts of government by making them available in different ways and formats, a right which we intend to exercise.<sup>79</sup>

In order to avoid costly litigation, UW agreed to make the instructions publicly available on the State Law Library website.<sup>80</sup> And it has. The instructions are now posted online, not only for lawyers but also for the general public, free of charge.<sup>81</sup> But in the process, UW also vigorously defended and asserted its copyright in the instructions, writing that “the government edicts doctrine does not apply to the Wisconsin Jury Instructions” and “any publication of

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<sup>77</sup> *Id.* at 1513 (emphasis added).

<sup>78</sup> Letter from Carl Malamud, *supra* note 74.

<sup>79</sup> *Id.* (emphasis added) (citations omitted).

<sup>80</sup> Letter from Nancy K. Lynch, Assoc. Vice Chancellor for Legal Affairs, Univ. of Wis.-Madison to Carl Malamud, President, Pub. Res. Org. Inc. (Sept. 1, 2020), <https://law.resource.org/pub/us/cfr/regulations.gov/foia/gov.wicourts.20200901.reply.pdf> [<https://perma.cc/CDD9-7NLH>].

<sup>81</sup> See generally *Wisconsin Jury Instructions*, WIS. STATE LAW LIBRARY, <https://wilawlibrary.gov/jury/> [<https://perma.cc/6W6H-8XSS>] (illustrating general accessibility and lack of paywall).

the Wisconsin Jury Instructions without express permission by the university violates its rights and constitutes copyright infringement . . . .”<sup>82</sup> Further, UW’s jury instructions continue to assert copyright, including on each and every individual instruction.<sup>83</sup>

But on what is this copyright assertion based? If the Committee cannot copyright its own work, how can it pass a nonexistent copyright to UW? The surprising answer is this: the *Committee did not write the jury instructions*. That is, UW was not taking a copyright from the judges; rather, it took its own copyright because it, not the Committee, was writing the instructions.<sup>84</sup> UW explained in its letter:

[T]here is *no agreement of any kind* between the Wisconsin Judicial Conference [which created the Committee] and the University of Wisconsin regarding the jury instructions. . . . Instead, the Wisconsin Jury Instructions are *drafted and authored by employees of the University of Wisconsin*, who also *lead and coordinate the project*. While the Wisconsin Judicial Conference works with our employees on the project, *the writing and creating of the jury instructions is solely performed by the University of Wisconsin and its staff*.<sup>85</sup>

This revelation stands in stark contrast to the Committee’s original purpose and what we lawyers have been told for decades. As for leadership and direction, the original Committee of 1959 “assume[d] that it is desirable *for judges* to take primary responsibility for the program. . . . [T]he giving of instructions is uniquely a judicial function and one about which the judiciary has the most knowledge and experience.”<sup>86</sup> Now, completely contrary to this original mandate, we have learned that UW employees “lead and coordinate the project.”<sup>87</sup>

Even more significantly, with regard to authorship, the commonly accepted and unquestioned belief that the pattern instructions “are the product of painstaking effort of an eminently qualified committee

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<sup>82</sup> Letter from Nancy K. Lynch, *supra* note 80.

<sup>83</sup> See, e.g., WIS JI-CRIMINAL NO. 55 (2000); WIS JI-CRIMINAL NO. 103 (2000); *Wisconsin Jury Instructions*, *supra* note 81.

<sup>84</sup> Letter from Nancy K. Lynch, *supra* note 80.

<sup>85</sup> *Id.* (emphasis added).

<sup>86</sup> David E. Shultz, *History of the Wisconsin Criminal Jury Instructions*, 21(1) GARGOYLE 3, 3 (1991) (emphasis added).

<sup>87</sup> Letter from Nancy K. Lynch, *supra* note 80.



of trial judges”<sup>88</sup> possessing “highly qualified legal minds”<sup>89</sup> has now been debunked. We now know that the instructions are “writ[ten] and creat[ed]” and “drafted and authored” *solely* by UW and its employees.<sup>90</sup>

Although UW did not identify its employee-author(s) by name, some evidence suggests that one of the reporters previously thought merely to be assisting the Committee was actually writing the instructions. More specifically, now that UW has abandoned its revenue stream—it will no longer be able to sell for \$445.00 plus annual update fees that which is posted online for free—the jury-instruction-writer position will be filled by The Office of Judicial Education of the Wisconsin Court System.<sup>91</sup> The advertised position pays between \$56,640 and \$78,000 and requires a “minimum of one year working as a law clerk or attorney[.]”<sup>92</sup> The job description includes, most notably: “*Drafts and revises model jury instructions.*”<sup>93</sup> The job appears to have been filled by one of the Committee’s reporters previously employed by UW.<sup>94</sup>

The judicial halo has now been knocked off the pattern instructions. Fittingly, the instructions, which are now posted on the Wisconsin State Law Library’s website, are far more accurately labeled as mere “models” and “checklists.”<sup>95</sup>

#### IV. A TRIAL STRATEGY FOR THE DEFENSE

For defense lawyers who have sought modification of the pattern instructions—only to be denied not on merit but out of reverence for

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<sup>88</sup> *State v. Trammell*, 928 N.W.2d 564, 589 (Wis. 2019) (Dallet, J., concurring) (quoting *State v. Gilbert*, 340 N.W.2d 511, 515 (Wis. 1983)). The full quote refers to the “painstaking effort of an eminently qualified committee of trial judges, lawyers, and legal scholars”; however, this quote comes from a 1965 case, *State v. Kanzelberger*, 137 N.W.2d 419, 423 (Wis. 1965), and that court was referring to the Committee in its original, or near-original form. See *State v. Kanzelberger*, 137 N.W.2d 419, 423 (Wis. 1965). Like today, the original Committee had eleven members, but only seven were trial judges; the Committee also included one lawyer and three law professors, though these four non-judge members did not have voting rights. See Shultz, *supra* note 86, at 4 (emphasis added).

<sup>89</sup> *State v. Harvey*, 710 N.W.2d 482, 487 (Wis. Ct. App. 2006).

<sup>90</sup> Letter from Nancy K. Lynch, *supra* note 80.

<sup>91</sup> See *Legal Advisor–Jury Instructions, Judicial Education*, WIS. COURT SYS., <https://www.wicourts.gov/courts/employment/docs/legaladvisor.pdf> [<https://perma.cc/G46K-USED>].

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* (emphasis added).

<sup>94</sup> Compare *Wisconsin Jury Instructions*, *supra* note 81 (“For more information . . . contact . . . Bryce Pierson[,] Office of Judicial Education”), with WIS JI-CRIMINAL, introductory cmt (“Prepared . . . by [the] Criminal Jury Instruction Committee . . . with assistance from . . . Bryce Pierson, University of Wisconsin.”).

<sup>95</sup> See *Wisconsin Jury Instructions*, *supra* note 81.

the “eminently qualified committee of trial judges” that supposedly wrote them<sup>96</sup>—this revelation that UW actually authored the instructions feels downright scandalous. But what can a Wisconsin defense lawyer do to combat the use of pro-state jury instructions that were drafted by a university employee yet are treated with more reverence than published case law?

Defense counsel should (a) reevaluate *all instructions*, especially the instruction on the burden of proof, in every case that he or she prepares for trial, (b) strip the instructions of their now-debunked aura of judicial authority, (c) remind presiding trial judges that it is *their obligation* to accurately and clearly instruct the jury on the law, and (d) present the judges with proposed jury instructions—whether modified pattern instructions, favorable out-of-state instructions, or new instructions made out of whole cloth—that accomplish that objective.

The proposal itself can take the form of pretrial *motion in limine* to be submitted before trial, or a written request to be submitted before trial or at least before the judge’s jury-instruction conference near the end of trial. The sample, below, provides a model written request that can be easily modified for any jury instruction.

State v. [Defendant’s name]

[Case No.]

### **Defendant’s Proposed Modifications to Pattern Jury Instructions**

The defendant requests that the Court modify pattern instructions [numbers], as set forth below and pursuant to the following legal authorities.

#### **I. The Pattern Instructions and the Trial Judge’s Discretion**

The pattern jury instructions were thought to be drafted by the judges on the Criminal Jury Instruction Committee (“Committee”) and, therefore, were believed to be “the product of painstaking effort of an eminently qualified committee of trial judges[.]” State v. Trammell, 928 N.W.2d 564, 589 (Wis. 2019) (Dallet, J., Concurring).

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<sup>96</sup> See State v. Trammell, 928 N.W.2d 564, 589 (Wis. 2019) (Dallet, J., concurring) (internal punctuation and citation omitted); see *supra* note 88 and accompanying text.

As another court stated, “[t]he Criminal Jury Instructions Committee comprises highly qualified legal minds whose goal is to uniformly and accurately state the law.” State v. Harvey, 710 N.W.2d 482, 487 (Wis. Ct. App. 2006).

Given these assumptions, courts have traditionally held that, “[a]lthough not binding on us, the committee’s assessment of a proper jury instruction is ‘persuasive.’” State v. Ellington, 707 N.W.2d 907, 912 (Wis. Ct. App. 2005). Even more significantly, the practical result was that trial courts treated the jury instructions with more reverence than case law, and trial courts rarely, if ever, modified the instructions.

However, these claims about the authorship of the instructions have now been debunked. A non-profit organization called Public.Resource.Org, Inc. recently informed the University of Wisconsin (UW) that its copyright in the pattern jury instructions—presumably transferred to UW by the Committee—was invalid. Under the government edicts doctrine, “whatever work [a] judge or legislator produces in the course of his judicial or legislative duties is *not copyrightable*.” Georgia v. Public.Resource.Org. Inc., 140 S. Ct. 1498, 1513 (2020) (emphasis added).

Although UW agreed to post the jury instructions online in order to avoid costly litigation, it vigorously defended itself and its copyright. Surprisingly, UW did not take a copyright from the Committee. The copyright always belonged to UW, as the pattern instructions are *not* “the product of painstaking effort of an eminently qualified committee of trial judges,” as courts have repeatedly told us. Trammell, 928 N.W.2d at 589 (Dallet, J., concurring). Rather:

[T]here is *no agreement of any kind* between the Wisconsin Judicial Conference [which created the Committee] and the [UW] regarding the jury instructions[.] . . . Instead, the Wisconsin Jury Instructions are *drafted and authored by employees of the [UW]*, who also *lead and coordinate the project*. While the Wisconsin Judicial Conference works with our employees on the project, *the writing and creating of the jury instructions is solely performed by the [UW] and its staff*. Letter from Nancy K. Lynch, Assoc. Vice Chancellor for Legal Affairs, Univ. of Wis.-Madison to Carl Malamud, President, Pub. Res. Org. Inc. (Sept. 1, 2020),

<https://law.resource.org/pub/us/cfr/regulations.gov/foia/gov.wi.courts.20200901.reply.pdf> [<https://perma.cc/CDD9-7NLH>]. (emphasis added).

The pattern instructions have been stripped of their judicial halo—the State Law Library which hosts the instructions online even describes them as mere “models” and “checklists.” *Wisconsin Jury Instructions*, Wis. State Law Library, <https://wilawlibrary.gov/jury/> [<https://perma.cc/6W6H-8XSS>]. It is therefore important to remember it is each trial judge’s responsibility to accurately and clearly instruct the jury. “A circuit court must, however, exercise its discretion in order to fully and fairly inform the jury of the rules of law applicable to the case and to assist the jury in making a reasonable analysis of the evidence.” *State v. Neumann*, 832 N.W.2d 560, 584 (Wis. 2013) (internal citations omitted).

And trial judges have tremendous leeway in doing so: “a trial judge may exercise wide discretion in issuing jury instructions. . . . This discretion extends to both choice of language and emphasis.” *State v. Vick*, 312 N.W.2d 489, 495 (Wis. 1981).

In sum, trial courts were never bound by the pattern instructions in the first place, and judicial discretion is even more important today in light of the instructions’ true authorship. In exercising its discretion, this Court should *not* defer to the “employees of the UW” who are “solely” responsible for “the writing and creating of”—and who “drafted and authored”—the pattern instructions. Instead, this Court should rely on its own judgment as well as the persuasive, well-reasoned out-of-state cases that have not been infected with undue reverence for a committee of other trial court judges who, apparently, didn’t even write the instructions.

## II. Wisconsin Pattern Jury Instruction [number]

[*To the reader*: This section should set forth the relevant pattern instruction(s), identify the proposed changes thereto, and if possible cite relevant law—particularly persuasive out-of-state case law—in support of the requested changes. See Part I (B–D) of this Article for examples of jury instructions in desperate need of modification.

[*To the reader*: Defense counsel should also consider proposing out-of-state instructions or even rewriting the instructions from whole

cloth, particularly in place of Wisconsin's disastrous pattern instructions, such as Jury Instruction 140 on the burden of proof. Now that we know the pattern instructions have been drafted by university employees—possibly only one employee in a position that requires only one year of experience as a law clerk or lawyer—defense counsel should not defer to any pattern instruction that is unfavorable to the defendant.]

[Date]

[Signature Block]

## V. THE COUNTER-ARGUMENT

Prosecutors will want trial courts to continue their faithful adherence to the pro-prosecutor pattern jury instructions. Their counterargument to the above request is easy to predict. They will say that this situation is no different than a judicial clerk working for an appellate judge or a legislative assistant working for a legislator. Although the clerk and the assistant take the laboring oar, the prosecutor will argue, the judge and the legislator are the brains behind, and the leaders of, those operations. Therefore, the argument will proceed, this revelation that UW employees actually wrote the instructions does not change the instructions' authoritative status.

Marshalling the previously discussed facts and legal authorities, the response to this counterargument has three parts. First, even if the premises of the counterargument are valid—more on that subject below—this situation is not like the appellate court judge or the elected legislator. Unlike case law and legislation, the jury instructions were never meant to be legally binding and should not be treated as such. With regard to their persuasiveness, the Committee is in no better position than the presiding trial court judge to evaluate the accuracy and clarity of language—the two tests for a jury instruction.<sup>97</sup>

Second—and again, assuming the premises of the counterargument are valid—another reason not to blindly adopt the pattern instructions is that the Committee is comprised almost entirely of former prosecutors (and entirely of former government

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<sup>97</sup> See *State v. Gonzalez*, 802 N.W.2d 454, 459 (Wis. 2011).

lawyers).<sup>98</sup> This is not an *ad hominem* attack. Many former prosecutors are no doubt capable of drafting an accurate and clear instruction. But when an objection is lodged, there is no way to determine whether that is the case unless the presiding trial court judge evaluates the challenged instruction on its merits. Deferring to the Committee is an abdication of the trial court's duty, particularly given the Committee's composition and its apparent infection with groupthink.

Finally, the premises of the counterargument are *not* valid. Unlike an appellate judge or legislator, the judges on the Committee (a) did not write the material in question, and (b) did not even lead or coordinate the effort to produce the material.<sup>99</sup> That is why UW's copyright is not derived from the Committee, but is based on its own work. It is worth repeating that there is "no agreement of any kind" between UW and the Committee; rather, instructions "are drafted and authored by employees of the University of Wisconsin, who also lead and coordinate the project."<sup>100</sup>

UW's Office of Legal Affairs, which defended UW's copyright in its jury instructions, must also know—and, in fact, was specifically informed by Public Resource—that pursuant to the government edicts doctrine, "work produced by judges as part of their official duties is not eligible for copyright."<sup>101</sup> The government edicts doctrine "does *not* apply, however, to works created by . . . private parties[] who lack the authority to make or interpret the law, such as court reporters."<sup>102</sup>

In light of these basic, well-known legal principles, UW continues to assert its copyright not only through UW's Office of Legal Affairs but also on each and every individual jury instruction. UW does this, of course, because its position is that it and its employees, not the judges, are "solely" responsible for "writing and creating" the instructions without any agreement with, or direction from, the Wisconsin Judicial Conference which created the Committee.<sup>103</sup>

This is perhaps why, as the host website indicates, the instructions "are created as models, checklists, or minimum standards."<sup>104</sup> While these jury instructions are sometimes helpful, they certainly are not binding, nor are they persuasive solely because of the status of their

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<sup>98</sup> See *supra* notes 63–65 and accompanying text.

<sup>99</sup> See *supra* Part III.

<sup>100</sup> Letter from Nancy K. Lynch, *supra* note 80.

<sup>101</sup> Letter from Carl Malamud, *supra* note 74.

<sup>102</sup> *Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498, 1507 (2020) (emphasis added).

<sup>103</sup> Letter from Nancy K. Lynch, *supra* note 80.

<sup>104</sup> *Wisconsin Jury Instructions*, *supra* note 81.

authors. This was *always* true, but it is especially important now, as the authors have been revealed to be university employees rather than—as was long believed and repeatedly advertised—the much-heralded Committee.<sup>105</sup>

## VI. PUBLIC POLICY AND LEGAL REFORM

Despite UW's clear claim of authorship, the State Law Library website which now hosts the instructions seems to contradict UW on this point. The host website claims that “[t]he Wisconsin Jury Instructions are created and edited by the Wisconsin Jury Instructions Committees of the Wisconsin Judicial Conference” and “include *contributions from* the University of Wisconsin . . . .”<sup>106</sup>

Although far from clear, this is not necessarily a contradiction. Rather, this statement could be a prospective one. Now that UW has abandoned its revenue stream and therefore has exited the jury instructions business,<sup>107</sup> some person or entity has to claim authorship of any *new* instructions and the *annual updates* to existing instructions. Could this be what the State Law Library meant when it gave creative and editing credit to the Committee and reduced UW to a mere contributor?<sup>108</sup>

In any case, the Committee will have some unspecified role in the process going forward, even if merely placing its rubberstamp of approval on the instructions.<sup>109</sup> Because of this confusion, and regardless of the Committee's actual future role, the Wisconsin jury-instruction process cries out for legal reform—specifically for transparency and, even more importantly, diversity of thought and experience.

With regard to *transparency*, the entire Wisconsin jury-instruction system feels very swampy in the Washington, D.C. sense of the term. Why was UW letting the Committee take credit for UW's work for so long? Why did UW not reveal its true role, i.e., as the sole creator and author of the instructions, until Public Resource challenged its

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<sup>105</sup> See *supra* Part III.

<sup>106</sup> *Wisconsin Jury Instructions*, *supra* note 81 (emphasis added).

<sup>107</sup> See *supra* notes 73–81 and accompanying text; Letter from Nancy K. Lynch, *supra* note 80 (“[UW’s] role cannot be sustained if the university cannot generate funds to support its valuable work.”).

<sup>108</sup> See *Wisconsin Jury Instructions*, *supra* note 81.

<sup>109</sup> See *Wisconsin Jury Instructions Now Available via State Law Library Website*, WIS. CT. SYS. (Jan. 25, 2021), <https://www.wicourts.gov/news/view.jsp?id=1307> [<https://perma.cc/HVJ4-RR8B>] (announcing that the Committee “will carry on with [its] standard schedules and work” on the instructions).

copyright and its revenue stream?<sup>110</sup> In 2016, when I wrote to the Committee and asked it to change Wisconsin’s jury instruction on the burden of proof, why did the state’s prosecutors learn of the Committee’s decision—or, rather, UW’s decision—months before I or anyone else did?<sup>111</sup> Currently, what exactly is the Committee’s role in the process now that UW is out of the jury-instruction business? What is the Committee’s relationship with the Office of Judicial Education’s employee (the former UW reporter) who was hired specifically to draft and update instructions?<sup>112</sup>

With regard to *diversity of thought and experience*, the eleven trial court judges on the Committee constitute a dangerously insular group of likeminded individuals.<sup>113</sup> Worse yet, almost all of these individuals are *also* former prosecutors.<sup>114</sup> This is an unacceptable composition for a committee that is accountable to no one,<sup>115</sup> yet now has some unspecified level of involvement and influence in an arena with so many individual rights and liberties at stake.

Fortunately, the solution to this problem is simple. Painting with a broad brush (as the fine points of such reform are beyond the scope of this Article), Wisconsin should adopt a system where the Committee includes a diverse group of voting members. For example, Michigan’s jury instruction committee includes seven judges and four attorneys “charged with providing trial courts with instructions that are concise, understandable and accurate.”<sup>116</sup> And in the state of Washington, the “pattern instructions are drafted and approved by a committee that includes judges, *law professors*, and *practicing attorneys*.”<sup>117</sup>

Similarly, the composition of Wisconsin’s Committee should include judges at the trial and appellate court levels (only *some* of whom should be former prosecutors), practicing defense lawyers, prosecutors, and law professors who teach criminal law or criminal procedure. Even non-lawyer members with relevant backgrounds,

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<sup>110</sup> See *supra* Part III.

<sup>111</sup> See *supra* Part II.

<sup>112</sup> See *supra* notes 91–94 and accompanying text.

<sup>113</sup> See Cicchini, *supra* note 50, at 513–14 (citations omitted).

<sup>114</sup> See *supra* Part II.

<sup>115</sup> See JUDICIAL CONFERENCE OF WIS., BYLAWS OF THE JUDICIAL CONFERENCE OF WISCONSIN 6 (2009) (“The committee need not submit instructions or related materials to the Judicial Conference for approval.”).

<sup>116</sup> Samuel R. Smith, *Model Criminal Jury Instructions*, MICH. SUPREME COURT ON MODEL CRIMINAL JURY INSTRUCTIONS, <https://courts.michigan.gov/Courts/MichiganSupremeCourt/criminal-jury-instructions/Pages/default.aspx> [https://perma.cc/42BV-W2XG] (emphasis added).

<sup>117</sup> *State v. Bennett*, 165 P.3d 1241, 1243 (Wash. 2007) (emphasis added).



such as linguistics or psychology, could be included. The resulting diversity of thought, experience, and perspective is necessary to ensure fairness and the equally important appearance of fairness.

#### CONCLUSION

The outcomes of criminal cases often turn on the jury instructions that enumerate the elements of the crime, define key legal terminology, guide the jury in evaluating evidence, and explain the burden of proof.<sup>118</sup> Unfortunately, many of Wisconsin's pattern criminal jury instructions are slanted strongly, and in some cases unconstitutionally, toward the state, giving the prosecutor a tremendous advantage at the expense of the defendant's important rights.<sup>119</sup>

Wisconsin defense lawyers have attempted to modify several of Wisconsin's pattern jury instructions, yet their efforts have often been rejected *not* on substantive grounds, but out of the courts' unhealthy reverence for the committee of prosecutor-turned-judges long thought to have drafted the instructions.<sup>120</sup>

However, a recent dispute over whether the committee of judges or the state university can legally claim copyright in the instructions revealed that, contrary to long held and unquestioned beliefs, the university and its employees, *not* the greatly revered committee of judges, are solely responsible for creating and writing the pattern instructions.<sup>121</sup>

For many defense lawyers who have tried to modify Wisconsin's pro-prosecutor jury instructions, only to be denied out of reverence for the "highly qualified legal minds"<sup>122</sup> of the "eminently qualified"<sup>123</sup> judges that supposedly wrote the instructions, this revelation about the true authorship is nothing short of scandalous.

Given that the pattern jury instructions were in fact authored by university employees and not the much-ballyhooed committee of judges, defense lawyers in Wisconsin should consider seeking modification of the pattern instructions on a case-by-case basis.<sup>124</sup> The recent copyright dispute has separated the instructions from the

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<sup>118</sup> See *supra* Part I (A–D).

<sup>119</sup> See *supra* Part I.

<sup>120</sup> See *supra* Part II.

<sup>121</sup> See *supra* Part III.

<sup>122</sup> *State v. Harvey*, 710 N.W.2d 482, 487 (Wis. Ct. App. 2006).

<sup>123</sup> *State v. Gilbert*, 340 N.W.2d 511, 515 (Wis. 1983) (quoting *State v. Kanzelberger*, 137 N.W.2d 419, 422–23 (Wis. 1965)).

<sup>124</sup> See *supra* Part IV.

aura of judicial authority that once surrounded them; defense counsel's chance for success may be greater now than ever.<sup>125</sup>

Toward that end, this Article offers a sample written request to modify a pattern jury instruction; the request can easily be adapted to challenge any of the pattern instructions.<sup>126</sup> This Article also anticipates and rebuts the counter-argument from prosecutors who will attempt to preserve trial judges' blind adherence to the pro-state instructions as written.<sup>127</sup> Finally, given that the jury-instruction committee will have some unspecified role in the instructions moving forward, the need for diversity of thought and experience requires that it be reformed to include defense lawyers, law professors, and possibly non-lawyer professionals with relevant backgrounds.<sup>128</sup>

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<sup>125</sup> See supra Part III.

<sup>126</sup> See supra Part IV.

<sup>127</sup> See supra Part V.

<sup>128</sup> See supra Part VI.