

ARTICLES

EVIDENTIARY INSTRUCTIONS AND THE JURY AS OTHER

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Limiting instructions and instructions to disregard inadmissible evidence are widely believed to be both ineffective and necessary. Courts presume that juries follow evidentiary instructions, but the presumption is almost universally acknowledged to be false, a kind of professional myth. This Article argues that we have it backwards. The real “myth” about evidentiary instructions is not that they work; the real myth is that they are pointless but that we need to rely on them anyway. Both of these ideas about evidentiary instructions are wrong or at best greatly exaggerated. Evidentiary instructions probably do work, although imperfectly and better under some circumstances than others. Furthermore, evidentiary instructions are not an essential part of jury trial, and the legal presumption that they work flawlessly is even less fundamental.

The conventional wisdom about evidentiary instructions—“of course they don’t work, but we have to pretend that they do”—saves us the messy but important task of assessing when evidentiary instructions are most likely to fail, how they can be made more effective, and what should follow from a recognition that they work, at best, imperfectly. It has made it easier, for example, to tolerate evidentiary instructions that are incoherent or senseless. They seem no worse, or less likely to be effective, than evidentiary instructions in general.

The conventional wisdom about evidentiary instructions is part of a broader way of thinking about lay adjudicators that holds deep appeal but that we would do well to jettison: the idea that juries are something other than groups of human beings called together to sit in judgment, that trial by jury is something other than trial by people, that the jury is not a workaday committee but a kind of intuitive, unmethodical, prediscursive oracle—the “voice of the community.” Thinking about juries as groups of people—inherently flawed, just as people are inherently flawed, but capable of reason, just as people are capable of reason—would allow

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us to think more sensibly and more responsibly not only about evidentiary instructions but about adjudication more generally.

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INTRODUCTION

Evidentiary instructions, also called curative instructions, are a familiar feature of American trials. They come in two varieties. An “instruction to disregard” tells jurors to ignore particular evidence to which they have been exposed; it is used when the judge determines that a bit of testimony or an exhibit is inadmissible, but the jury has already heard or seen it. A “limiting instruction” tells jurors not to use a particular piece of evidence to draw a certain inference, although they are free to use the evidence in other ways. Limiting instructions are used when, as is often the case, the rules of evidence make particular testimony or a particular exhibit inadmissible, but only for a particular, forbidden purpose, or only against certain parties and not against others. The hearsay rule, for example, often makes something said outside of court inadmissible, but only if the statement is used to prove the truth of what it asserts, and not if the statement is offered into evidence against the person who uttered it.

There are two well-known facts about evidentiary instructions of both varieties. The first is that our system relies heavily on these instructions. The second is that they do not work. Courts “presume” that juries follow evidentiary instructions, as well as other instructions from the judge. This presumption is often said to be a “premise upon which our jury system is founded.”¹ But the presumption is also widely acknowledged to be false, a kind of professional myth. The most frequently quoted assessment of evidentiary instructions is Justice Jackson’s: “The naive assumption that prejudicial effects can be overcome

1. *Travison v. Jones*, 522 F. Supp. 666, 670 (N.D.N.Y. 1981); see also, e.g., *Opper v. United States*, 348 U.S. 84, 95 (1954) (“Our theory of trial relies upon the ability of a jury to follow instructions.”); Note, *The Limiting Instruction—Its Effectiveness and Effect*, 51 MINN. L. REV. 264, 267 (1966) (noting the common argument “that limiting instructions are one of the expressions of trust that American jurisprudence places in the jury system”).

by instructions to the jury, all practicing lawyers know to be unmitigated fiction.”² Juries are “presumed” to follow evidentiary instructions³ not because we believe that they really do, but because trusting them to do so is a practical necessity.⁴

One is reminded of the cartoon characters who run off cliffs but stay suspended as long as they do not look down—or of the joke at the end of *Annie Hall*, about the man who thinks he is a chicken and whose family keeps it quiet because they need the eggs. We rely on evidentiary instructions, even though we know they are ineffective, because our whole system depends on them. We are in a kind of denial, acting as though if we ignore the uncomfortable truth, it will go away.

All of this is, as I say, well known. But it is also wrong, or at the very best doubtful. There is little reason to assume evidentiary instructions are ineffective, whatever “all practicing lawyers” are thought to know. Nor is faith in the effectiveness of evidentiary instructions an unavoidable imperative of the jury system. We think that the effectiveness of evidentiary instructions is a myth. But we have it backwards. The real myth about evidentiary instructions is the widespread, rarely questioned faith that evidentiary instructions cannot work, but that we must continue to rely on them. The real myth is not a comforting fable. On the contrary, it makes our situation out to be worse than it really is.

Why we would believe a myth like that is an interesting question, to which I will offer a tentative answer. My foremost objectives here, though, are more pragmatic: to cast doubt on the consensus view of evidentiary instructions, and to suggest that it is not just false but harmful. The reality is, first, that evidentiary instructions probably do work, but imperfectly, and better under some conditions than others; and, second, that we probably could get along fine without trusting in evidentiary instructions, and certainly without believing that they work flawlessly. The conventional wisdom about evidentiary instructions—“of course they don’t work, but we have to pretend that they do”—spares us the messy but important task of assessing when evidentiary instructions are most likely to fail, how they can be made more effective, and what should follow from a recognition that they work, at best, imperfectly. It has made it easier, for example, to tolerate evidentiary instructions that are incoherent or senseless. They seem no worse, or less likely to be effective, than evidentiary instructions in general. All of this may help to explain why the conventional wisdom about evidentiary instructions, although far from comforting,

2. *Krulewitch v. United States*, 336 U.S. 440, 453 (1949) (Jackson, J., concurring) (citation omitted), *quoted in, e.g.*, *Bruton v. United States*, 391 U.S. 123, 129 (1968), and *Jackson v. Denno*, 378 U.S. 368, 388 n.15 (1964); *see also, e.g.*, Note, *supra* note 1, at 267 (observing that “many learned jurists and scholars . . . entertain no doubt that limiting instructions are useless”).

3. *Richardson v. Marsh*, 481 U.S. 200, 206-07 (1987).

4. *See, e.g.*, Peter J. Smith, *New Legal Fictions*, 95 GEO. L.J. 1435, 1491-92 (2007); Note, *supra* note 1, at 267.

has stayed conventional. It simplifies things. That will be part of my tentative answer to the “why” question.

More speculatively, I will suggest that the we-need-the-eggs view of evidentiary instructions is part of a broader way of thinking about juries that holds deep appeal but that we would do well to jettison: the notion that juries are something other than groups of human beings called together to sit in judgment, that trial by jury is something other than trial by people, that the jury is not a workaday committee but a kind of intuitive, unmethodical, prediscursive oracle—the “voice of the community.” This almost-mystical picture of the jury allows trials to function in the way that ordeals used to function, as what James Whitman calls “moral comfort procedures”—a means of “spar[ing] human beings the responsibility for judgment.”⁵ But using juries in this way means salvaging our consciences with a fable. Thinking about juries as groups of people—inherently flawed, just as people are inherently flawed, but capable of reason, just as people are capable of reason—would allow us to think more sensibly, and more responsibly, not only about evidentiary instructions but about adjudication more generally.

Part I of this Article will address the effectiveness of evidentiary instructions—the myth of their obvious futility, and what we know about their actual efficacy. Part II will discuss how necessary it is to rely on them and will question the widespread assumption—often repeated, but rarely examined—that faith in the effectiveness of evidentiary instructions is fundamental to our whole system of trial. Part III will describe the costs of continuing to treat evidentiary instructions as measures that obviously do not work but that we need to pretend do work: the important issues that this unduly pessimistic pair of beliefs keeps off the agenda, and the way that these beliefs tie into, and help to reinforce, an unhelpful, quasi-magical view of the jury.

I. THE NAIVE ASSUMPTION REVISITED

The “naive assumption” that Justice Jackson famously criticized—the assumption “that prejudicial effects can be overcome by instructions to the jury”⁶—is an assumption that, in truth, has remarkably little currency. It is not just practicing attorneys who think this assumption transparently false; judges and scholars tend to be equally confident that evidentiary instructions cannot work. Appellate judges frequently invoke the principle that juries follow their instructions, but typically they take care to label it a “presumption,” not an “assumption,” rooted in convenience, not in belief.⁷ And judges have been respon-

5. JAMES Q. WHITMAN, *THE ORIGINS OF REASONABLE DOUBT: THEOLOGICAL ROOTS OF THE CRIMINAL TRIAL* 12-13, 56 (2008) (italics omitted).

6. *Krulewitch*, 336 U.S. at 453.

7. *See, e.g.*, *United States v. Snype*, 441 F.3d 119, 129 (2d Cir. 2006) (“[T]he law recognizes a strong presumption that juries follow limiting instructions.”). Trial judges, who actually administer evidentiary instructions, may have more faith than lawyers or appellate

sible for what are probably the bluntest assessments of the presumption's veracity. Justice Jackson's epithet—"unmitigated fiction"—is far from the harshest thing judges have said about evidentiary instructions. That honor would probably go to "judicial lie," one of the descriptions used by Judge Jerome Frank.⁸ Judge Frank also compared evidentiary instructions to "exorcising phrases intended to drive out evil spirits; . . . no longer believed in, yet an inextricable part of a conventionalized system of observances."⁹ Judge Learned Hand, while resigned to limiting instructions as a practical necessity, thought it plain that they could not work; they asked jurors to perform "a mental gymnastic which is beyond, not only their powers, but anybody's else."¹⁰ That assessment, along with those of Judge Frank and Justice Jackson, has become a familiar piece of jurisprudential lore, often quoted and rarely questioned.¹¹ Scholars invoke these expressions of skepticism almost as often as judges.¹² The predominant view of scholars, both law professors and psychologists, is that evidentiary instructions are exercises in futility. The main title of a frequently cited study—*On the Inefficacy of Limiting Instructions*—nicely captures the consensus.¹³

judges in their efficacy. See Note, *To Take the Stand or Not to Take the Stand: The Dilemma of the Defendant with a Criminal Record*, 4 COLUM. J.L. & SOC. PROBS. 215, 218 (1968).

8. *United States v. Grunewald*, 233 F.2d 556, 574 (2d Cir. 1956) (Frank, J., dissenting in part) (internal quotation marks omitted), *rev'd*, 353 U.S. 391 (1957).

9. JEROME FRANK, *LAW AND THE MODERN MIND* 184 (1930).

10. *Nash v. United States*, 54 F.2d 1006, 1007 (2d Cir. 1932) (Hand, J.); see also, e.g., *United States v. Gottfried*, 165 F.2d 360, 367 (2d Cir. 1948) (Hand, J.) (casting doubt on the effectiveness of limiting instructions).

11. See, e.g., *Kennedy v. Lockyer*, 379 F.3d 1041, 1056 n.19 (9th Cir. 2004); *United States v. Lipscomb*, 702 F.2d 1049, 1062 (D.C. Cir. 1983); *United States v. Taveras*, 584 F. Supp. 2d 535, 540 (E.D.N.Y. 2008); *People v. Rivera*, 661 N.E.2d 429, 434 (Ill. App. Ct. 1996); *State v. Higham*, 865 A.2d 1040, 1046 (R.I. 2004); *Abbott v. State*, 196 S.W.3d 334, 349 n.6 (Tex. App. 2006); *State v. White*, 678 S.E.2d 33, 40 n.6 (W. Va. 2009).

12. See, e.g., Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097, 1144-45 (2001); Craig R. Callen, *Rationality and Relevancy: Conditional Relevancy and Constrained Resources*, 2003 MICH. ST. L. REV. 1243, 1276 n.160; Elizabeth M. DiPardo, Note, *Caught in a Web of Lies: Use of Prior Inconsistent Statements to Impeach Witnesses Before the ICTY*, 31 B.C. INT'L & COMP. L. REV. 277, 297 & nn.162-63 (2008); Paul Varnado, Note, *Books as Weapons: Reading Materials and Unfairly Prejudicial Character Evidence*, 31 WASH. U. J.L. & POL'Y 257, 272 & n.71 (2009).

13. Roselle L. Wissler & Michael J. Saks, *On the Inefficacy of Limiting Instructions: When Jurors Use Prior Conviction Evidence to Decide on Guilt*, 9 LAW & HUM. BEHAV. 37 (1985); see also, e.g., Joel D. Lieberman & Jamie Arndt, *Understanding the Limits of Limiting Instructions: Social Psychological Explanations for the Failures of Instructions to Disregard Pretrial Publicity and Other Inadmissible Evidence*, 6 PSYCHOL. PUB. POL'Y & L. 677, 677 (2000) (concluding from empirical research that limiting instructions are at best "relatively ineffective" and may actually backfire).

What explains this extraordinary confidence that the evidentiary instruction, a staple of our adjudicatory system, is a kind of procedural “placebo”¹⁴—that relying on it amounts to believing a “legal fiction”?¹⁵ Three things. First, it has long seemed obvious that jurors cannot forget or ignore evidence once they have been exposed to it. There is no end to the metaphors judges have used to express this concept: “one cannot unring a bell”;¹⁶ “[a] drop of ink cannot be removed from a glass of milk”;¹⁷ “after the thrust of the saber it is difficult to say forget the wound”;¹⁸ “if you throw a skunk into the jury box, you can’t instruct the jury not to smell it.”¹⁹ The idea is always the same: jurors cannot forget evidence they have seen or heard, and neither can they “fractionate evidence into competent and incompetent segments, using only the former in [their] decision making process.”²⁰ In fact, trying to do so is likely to prove counterproductive, serving only to highlight the evidence—like asking someone not to think of a white elephant.²¹ Second, particularly among scholars, this

14. Another of Learned Hand’s descriptions. See *United States v. Delli Paoli*, 229 F.2d 319, 321 (2d Cir. 1956) (Hand, J.), *aff’d*, 352 U.S. 232 (1957), *overruled by* *Bruton v. United States*, 391 U.S. 123 (1968).

15. Smith, *supra* note 4, at 1450-52.

16. *Dunn v. United States*, 307 F.2d 883, 886 (5th Cir. 1962) (internal quotation marks omitted); see also, e.g., *Shepard v. United States*, 290 U.S. 96, 103-04 (1933) (noting that, even with a limiting instruction, “[t]he reverberating clang” of wrongly admitted hearsay “would drown all weaker sounds”).

17. *Virgin Islands v. Toto*, 529 F.2d 278, 283 (3d Cir. 1976).

18. *Dunn*, 307 F.2d at 886 (internal quotation marks omitted).

19. *Id.* (internal quotation marks omitted).

20. Note, *supra* note 1, at 267; see also, e.g., *Bruton v. United States*, 391 U.S. 123, 130-31 (1968) (“A jury cannot ‘segregate evidence into separate intellectual boxes.’” (quoting *People v. Aranda*, 407 P.2d 265, 271-72 (Cal. 1965) (en banc))); John C. Reinard & Rodney A. Reynolds, *The Effects of Inadmissible Testimony Objections and Rulings on Jury Decisions*, 15 J. AM. FORENSIC ASS’N 91, 91 (1978) (“[F]ew are willing to deny the commonly accepted dictum that it is impossible for an individual to ‘forget’ something which has been comprehended. Hence, it would be difficult to believe that jurors could disregard testimony once heard.”); cf. Mirjan Damaška, *Free Proof and Its Detractors*, 43 AM. J. COMP. L. 343, 352 (1995) (suggesting that rules of evidentiary exclusion often “ring . . . hollow in bench trials” because of “the apparent difficulty for any person—lay or professional—to ‘unbite’ the apple of knowledge”).

21. An analogy drawn repeatedly by Judge Frank. See *United States v. Leviton*, 193 F.2d 848, 865 (2d Cir. 1951) (Frank, J., dissenting); *United States v. Antonelli Fireworks Co.*, 155 F.2d 631, 656 (2d Cir. 1946) (Frank, J., dissenting). Frank attributed the illustration to “the story, by Mark Twain, of the boy told to stand in the corner and not think of a white elephant.” *Antonelli Fireworks*, 155 F.2d at 656; see also *Leviton*, 193 F.2d at 865. But as far as I can tell Twain wrote no such story. Frank appears to have conflated Twain’s short story, *The Stolen White Elephant*, with an anecdote related by Tolstoy, about a game invented by his older brother. The game required one “to stand in a corner and not to think of a white bear”; Tolstoy recalled trying to do so, “but without success.” PAUL BIRUKOFF, *THE LIFE OF TOLSTOY* 15 (trans., Cassell & Co. 1911). Twain’s story has nothing to do with a boy standing in a corner or anyone trying to suppress an idea. See MARK TWAIN, *The Stolen White Elephant*, in *THE COMPLETE SHORT STORIES OF MARK TWAIN* 199 (Charles Neider ed., 1957). Today, the impossibility of intentionally blocking a thought is often illustrated by appealing

common-sense notion that juries cannot wipe their minds of what they have seen or heard has been supplemented and strengthened by a particular set of ideas about how juries operate, the “story model.” This is the theory that juries decide cases by assimilating the evidence and their prior experience into a coherent story, and that the story in turn operates as a cognitive filter, affecting the way individual pieces of evidence are perceived and evaluated.²² The story model has become the orthodox understanding of jury decisionmaking among psychologists and, increasingly, among legal academics;²³ it has even been endorsed, in essentials if not in name, by the United States Supreme Court.²⁴ Because the story model teaches that juries assess evidence holistically, rather than piece by piece, and because the relationship between evidence and stories is thought to be “bidirectional”²⁵—the story is shaped to fit the evidence, but evidence is also processed to cohere with the story—the story model is often taken to suggest that jurors cannot disregard or limit their use of items of proof they have already heard or seen.²⁶ Third and finally, the common-sense and

to the difficulty of following a direction not to think of an elephant, or an elephant of a particular color, but it is hard to say whether this particular trope predates Frank or was accidentally originated by him. See, e.g., GEORGE LAKOFF, DON’T THINK OF AN ELEPHANT!: KNOW YOUR VALUES AND FRAME THE DEBATE 3 (2004); Linda J. Demaine, *In Search of an Anti-Elephant: Confronting the Human Inability to Forget Inadmissible Evidence*, 16 GEO. MASON L. REV. 99, 105 (2008).

22. See REID HASTIE ET AL., INSIDE THE JURY 22-23 (1983); Nancy Pennington & Reid Hastie, *The Story Model for Juror Decision Making*, in INSIDE THE JUROR: THE PSYCHOLOGY OF JUROR DECISION MAKING 192, 192-203 (Reid Hastie ed., 1993); Dan Simon, *A Third View of the Black Box: Cognitive Coherence in Legal Decision Making*, 71 U. CHI. L. REV. 511, 560-61 (2004).

23. See, e.g., Demaine, *supra* note 21, at 133 n.96; Paula L. Hannaford et al., *The Timing of Opinion Formation by Jurors in Civil Cases: An Empirical Examination*, 67 TENN. L. REV. 627, 630 (2000); Sally Lloyd-Bostock, *The Effects on Juries of Hearing About the Defendant’s Previous Criminal Record: A Simulation Study*, 2000 CRIM. L. REV. 734, 737 & n.18; D. Michael Risinger, *John Henry Wigmore, Johnny Lynn Old Chief, and “Legitimate Moral Force”: Keeping the Courtroom Safe for Heartstrings and Gore*, 49 HASTINGS L.J. 403, 440-42 & n.96 (1998); Simon, *supra* note 22, at 563-65; Eleanor Swift, *Narrative Theory, FRE 803(3), and Criminal Defendants’ Post-Crime State of Mind Hearsay*, 38 SETON HALL L. REV. 975, 980-82 (2008); Michael S. Pardo, Comment, *Juridical Proof, Evidence, and Pragmatic Meaning: Toward Evidentiary Holism*, 95 NW. U. L. REV. 399, 404-06 (2000).

24. See *Old Chief v. United States*, 519 U.S. 172, 187-89 (1997); Richard O. Lempert, *Narrative Relevance, Imagined Juries, and a Supreme Court Inspired Agenda for Jury Research*, 21 ST. LOUIS U. PUB. L. REV. 15, 19 (2002); Risinger, *supra* note 23, at 454-57; Swift, *supra* note 23, at 984-85; Pardo, *supra* note 23, at 406-09.

25. Simon, *supra* note 22, at 518, 522; see also, e.g., Richard Lempert, *Telling Tales in Court: Trial Procedure and the Story Model*, 13 CARDOZO L. REV. 559, 559 (1991).

26. See, e.g., Shari Seidman Diamond & Jonathan D. Casper, *Blindfolding the Jury to Verdict Consequences: Damages, Experts, and the Civil Jury*, 26 LAW & SOC’Y REV. 513, 520 (1992) (“[I]nformation-processing models that focus on attribution and the search for coherent stories may explain jurors’ inability to use the information in the prescribed limited fashion.”); Nancy Steblay et al., *The Impact on Juror Verdicts of Judicial Instruction to Disregard Inadmissible Evidence: A Meta-Analysis*, 30 LAW & HUM. BEHAV. 469, 488 (2006)

theoretical reasons for doubting the usefulness of evidentiary instructions have been reinforced by experiments conducted with mock jurors. The results of those experiments, it is generally thought, provide strong support for the view that evidentiary instructions are at best ineffective and at worst counterproductive.²⁷

Common sense, the story model, and empirical evidence all seem to be on Justice Jackson's side. All help to explain why academics as well as judges and scholars have long treated evidentiary instructions as a kind of embarrassment, something that we know cannot really work, no matter how much we rely on it. It turns out, though, that each of these three grounds for skepticism is a good deal weaker than commonly supposed.

A. *Unringing the Bell*

It is true, of course, that we cannot will ourselves to forget. The more one tries to scrub something from memory, the harder it becomes, because the very effort serves to focus one's mind on whatever one is trying to forget. That is the point of the trope about trying not to think about a white elephant. It is a fact painfully apparent to anyone who ever tried to forget a bad movie or an embarrassing conversation. Psychologists have a nice name for the phenomenon: "ironic process."²⁸

But we need to draw two distinctions. The first is between forgetting and not using. No one thinks that jurors can erase their memories of evidence that they have seen or heard. Human minds do not work that way. But jurors generally are not asked to *forget* what they have heard; they are asked to disregard it or to limit their use of it. It is not at all obvious that instructions of this kind are impossible to obey.

In fact, there are reasons to suspect just the opposite. All of law is built on the assumption that people—judges, at least—can put certain facts to one side and base their decisions on other, identified considerations; and that they can give particular, prescribed significance to certain facts, and not treat those facts

("It can be argued that once a coherent story has been generated . . . , instructions to disregard elements of that story may have little impact. Additionally, the more inferences that emerge from a given piece of evidence, the more difficult it will be to negate that effect." (citations omitted)).

27. See, e.g., HASTIE ET AL., *supra* note 22, at 231; Lieberman & Arndt, *supra* note 13, at 703; Aviva Orenstein, *Honoring Margaret Berger with a Sensible Idea: Insisting that Judges Employ a Balancing Test Before Admitting the Accused's Convictions Under Federal Rule of Evidence 609(a)(2)*, 75 BROOK. L. REV. 1291, 1304 n.50 (2010); David A. Sonenshein & Robin Nilon, *Eyewitness Errors and Wrongful Convictions: Let's Give Science a Chance*, 89 OR. L. REV. 263, 290 (2010); J. Alexander Tanford, *Thinking About Elephants: Admonitions, Empirical Research and Legal Policy*, 60 UMKC L. REV. 645, 646 (1992).

28. See, e.g., Daniel M. Wegner, *Ironic Processes of Mental Control*, 101 PSYCHOL. REV. 34, 34 (1994).

as significant in various other ways. This is how all legal rules purport to operate. If human beings were truly incapable of following directions about which facts to rely upon and what significance to give them, it would not just be jury trials that would be in trouble. It would be the very idea of law.

It is possible, of course, that judges—who, after all, are generally trained as lawyers—may be able to engage in this kind of directed reasoning, but not lay jurors. But that is far from obvious, in part because jurors have a significant advantage over judges in this regard. Jurors deliberate: they reason collectively and aloud. That can be a form of self-discipline. It can make it easier to avoid forbidden inferences.²⁹

It is possible, too, that putting facts to one side is easier when making a legal judgment (how a rule applies in a particular set of circumstances, the kind of determination typically made by judges) than when making a factual determination (what the defendant did or did not do).³⁰ But judgments of guilt or innocence, and assessments of civil liability or lack of liability, the bread and butter of jury verdicts, are *not* just factual judgments; they are, in their own way, applications of legal standards—standards of proof, substantive legal rules, and the rules communicated in evidentiary instructions—to the proof presented at trial.

So one important distinction to draw is between directed forgetting, which genuinely does seem hopeless, and directed disregarding, which does not. A second, equally important distinction—and one that will run throughout this Article—is between working perfectly and working at all. It is patently obvious that evidentiary instructions cannot work flawlessly under all circumstances. There are some things that are hard to put out of one's mind at all, and many other things that, even if one consciously disregards them, may influence decisionmaking in subtle, subconscious ways. It is precisely because some things seem particularly hard to disregard that courts refuse to trust evidentiary instructions to cure certain kinds of errors or to address certain kinds of limited admissibility. The Supreme Court ruled in *Jackson v. Denno*, for example, that juries cannot be trusted to ignore confessions later ruled inadmissible.³¹ Later and more famously, in *Bruton v. United States*, the Court held that juries cannot be trusted to apply a confession only against the defendant who made it (as to whom it is admissible) and not against a codefendant (as to whom it is inadmissible).³² The basic notion underlying these decisions makes a certain amount of sense: some things may be particularly difficult for jurors, or anyone else, to

29. Regarding the empirical support for this intuition, see *infra* notes 108-109 and accompanying text.

30. Or maybe not. *Cf. Bruton v. United States*, 391 U.S. 123, 142 (1968) (White, J., dissenting) (“It is a common experience of all men to be informed of ‘facts’ relevant to an issue requiring their judgment, and yet to disregard those ‘facts’ because of sufficient grounds for discrediting their veracity or the reliability of their source.”).

31. 378 U.S. 368, 388-89 (1964).

32. 391 U.S. at 137 (majority opinion).

put out of mind. Which particular things fall into this category is a harder question, and one that has received less attention that it deserves. That is partly because of the widespread sense that *nothing* can be completely put out of mind, and that cases like *Bruton* and *Jackson v. Denno* are simply settings in which the fictions we tell about evidentiary instructions become too transparent to tolerate. But there is a difference between wiping something from one's memory and putting it to one side—between forgetting it and deemphasizing it. The fact that the first is impossible does not mean the second is impossible.

And for many purposes, the second may be enough. It depends in part on *why* we want the jury to disregard a certain piece of evidence or to avoid a particular use of the evidence. Typically the concern is with the accuracy of factfinding. Some evidence is thought to be “more prejudicial than probative”—that is to say, more likely to lead the jury astray than to lead the jury to the truth, either because it will appeal to jurors' emotions, or because they are apt to think it more probative than it really is. Thinking of this kind lies behind the ban on hearsay evidence, for example, and the ban on character evidence. In some cases the thinking may be mistaken: there is little evidence, in particular, that juries overestimate the probative value of hearsay, and some suggestive evidence to the contrary.³³ On the other hand, research on the “fundamental attribution error” may suggest that the legal system has been right to worry that juries will rely too heavily on character evidence.³⁴ But even assuming the theory is sound—assuming that juries are apt to rely too heavily on certain kinds of evidence, or to respond to it emotionally rather than rationally—evidentiary instructions could conceivably remedy the problem even if they do not succeed in wiping all memory of the evidence from the jurors' minds. What we would want from the instructions is a kind of debiasing. We would want the instructions to get jurors to rely less heavily on the evidence or not to react emotionally to it. There is no *a priori* reason to think that instructions cannot perform that work. If anything, the growing body of research on debiasing gives reason to think that evidentiary instructions could do exactly what we want them to do, if what we want them to do is to make it less likely that jurors will overrely on particular kinds of evidence or react emotionally to it.³⁵

Even here, though, we need to distinguish between working perfectly and working well enough. Debiasing of any kind is unlikely to work perfectly. It is unlikely to restore everyone exposed to a potentially biasing piece of infor-

33. See, e.g., David Alan Sklansky, *Hearsay's Last Hurrah*, 2009 SUP. CT. REV. 1, 18.

34. See, e.g., Edward J. Imwinkelried, *Reshaping the “Grotesque” Doctrine of Character Evidence: The Reform Implications of the Most Recent Psychological Research*, 36 SW. U. L. REV. 741, 741-43 (2008); Simon, *supra* note 22, at 568. But see, e.g., Chris William Sanchirico, *Character Evidence and the Object of Trial*, 101 COLUM. L. REV. 1227, 1242-46 (2001) (expressing skepticism).

35. For a helpful summary of this research and a thoughtful discussion of its implications for evidentiary instructions, see Demaine, *supra* note 21. On debiasing and jury decisionmaking more generally, see Simon, *supra* note 22, at 543-44, 548-49, 569-74.

mation to exactly the position he or she was in before the exposure. If jurors are apt to rely too heavily on a particular kind of evidence or to react emotionally to it, it may be difficult for admonitions to counterbalance perfectly the unwanted effects.

But nothing about jury trials operates perfectly. Jurors are human, and so are judges, lawyers, and witnesses. Jury trial is a human institution, inherently and pervasively imperfect. So the relevant question about evidentiary instructions is not whether they work perfectly but whether the errors they introduce are significant against the background imperfections of jury trials more generally.

We are apt to overlook this point because of our tendency to think of the jury in quasi-magical terms: not as a collection of people, or a committee, but as something vaguely oracular, something that operates outside the imperfect world of human reason. “The jury has spoken,” we say—in a way we would never talk about an ordinary, workaday institution. (Imagine someone saying, “The school board has spoken.” Or, “The loan department has spoken.” It would sound comically grandiose, like Professor Marvel invoking the Great Oz.) Magic either works or it doesn’t; when a spell is broken, it is broken. The question becomes how to preserve the purity of the process. Evidentiary instructions are often mocked as a kind of primitive ritual: magic that no one really believes in, “exorcising phrases intended to drive out evil spirits.”³⁶ But magical thinking about the jury may in fact underlie a good deal of the *skepticism* about evidentiary instructions, by raising the bar for how well they must work in order to be taken seriously. Any contamination of the jury’s divination becomes fatal. A wobbly table may suffice for writing, or for holding a committee meeting, but not for operating a Ouija board.

But juries are not Ouija boards. They are groups of people asked to reason their way through factual disputes. Because they are human, they will perform that task imperfectly. There is no pristine process to protect. The question should not be whether evidentiary instructions function perfectly: whether they completely eliminate the effect of inadmissible evidence, or fully guarantee that evidence will not be used in a way that we think is likely to lead jurors astray. The question should be whether evidentiary instructions perform these functions well enough that the errors likely to be introduced by relying on them do not add appreciably to the general, background imperfections of jury trial. The answer to that question is not intuitively obvious. It cannot be deduced by reflecting on the difficulty of intentionally forgetting something we have seen or heard.

All of this assumes, of course, that the point of excluding evidence is to increase the accuracy of verdicts. And that is not necessarily the case. Some evi-

36. FRANK, *supra* note 9, at 184; *see also, e.g.*, Andrew K. Dolan, *Rule 403: The Prejudice Rule in Evidence*, 49 S. CAL. L. REV. 220, 248-49 (1976) (calling evidentiary instructions “talismans”).

dence is excluded to influence the behavior of parties before or after the trial. That is famously true of the Fourth Amendment exclusionary rule in criminal cases, for example. The exclusionary rule is generally not enforced by evidentiary instructions; instead, the evidence is suppressed at a pretrial hearing. But some scholars suggest that other rules of evidence are similarly aimed at encouraging or discouraging particular kinds of behavior outside of court.³⁷ Thus, the ban on character evidence can be understood as a way to improve the deterrence of crimes, by focusing the trial on evidence that a potential defendant can avoid generating by avoiding new criminal behavior.³⁸ The hearsay rule can be understood as tool for encouraging the production of more reliable evidence.³⁹ The rule against proving fault by introducing evidence of subsequent remedial measures can be—and traditionally has been—understood as a way to make sure that parties are not penalized for learning from their mistakes.⁴⁰ Privilege rules, by and large, also do not aim to improve the accuracy of trials; instead, they sacrifice accuracy in the interest of some other value: typically the promotion of some activity or relationship that the risk of disclosure might discourage.⁴¹

To the extent that rules of evidence aim to encourage or discourage conduct outside the courtroom, as opposed to enhancing the accuracy of the jury's factfinding, it should be even clearer that instructions implementing those rules can function effectively even if juries do not follow them with perfect fidelity. No one thinks that the Fourth Amendment exclusionary rule needs to eliminate *all* possibility of the police benefiting from illegal investigatory behavior in order to help discourage such behavior, or that *every* prospect of subsequent remedial conduct redounding to a defendant's detriment must be eliminated if we want defendants to pursue those remedies. The Supreme Court sometimes says that "[a]n uncertain privilege . . . is little better than no privilege at all,"⁴² but that is unconvincing: there is no reason to think that activities requiring confidentiality can be encouraged only by providing an absolute assurance of non-disclosure, nor that any legal rule, no matter how inflexible in theory, could ever provide such an ironclad guarantee in practice. Similarly, if the hearsay rule is aimed at encouraging parties to produce more reliable evidence, and if the

37. See, e.g., John Leubsdorf, *Evidence Law as a System of Incentives*, 95 IOWA L. REV. 1621 (2010).

38. See Sanchirico, *supra* note 34, at 1259-64.

39. See Eleanor Swift, *Abolishing the Hearsay Rule*, 75 CALIF. L. REV. 495, 497, 506 (1987).

40. For a skeptical assessment of this rationale, see Dan M. Kahan, *The Economics—Conventional, Behavioral, and Political—of “Subsequent Remedial Measures” Evidence*, 110 COLUM. L. REV. 1616 (2010).

41. See, e.g., *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 2320-21 (2011) (discussing the purposes of the attorney-client privilege); *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998) (same).

42. *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981); *accord Jaffee v. Redmond*, 518 U.S. 1, 18 (1996) (quoting *Upjohn*, 449 U.S. at 393).

character evidence rule is aimed at focusing the trial on evidence that putative defendants can avoid producing by avoiding criminal conduct, the rules can serve those purposes even if the evidentiary instructions implementing the rules allow some—but not too much—of the prohibited proof to leak through. If we think that parties and putative parties will shape their out-of-court behavior in response to rules of evidence (an assumption that in many cases might well be doubted⁴³), then significantly reducing the value of evidence, by significantly reducing how likely the jury is to rely on it, may be all that is needed. And that means that evidentiary instructions do not need to work perfectly in order to work adequately.

To summarize: One reason that evidentiary instructions are not taken seriously is that it seems intuitively obvious that jurors cannot will themselves to forget something they have seen or heard, or to drive it out of their minds when thinking about certain issues but not about others. But limiting instructions need not and typically do not ask jurors to *forget* evidence. They need only ask, and generally do only ask, jurors to disregard evidence, or to avoid using it in certain ways. And evidentiary instructions may function adequately even if jurors follow them with less than complete fidelity. Regardless of whether evidence is excluded, or its use restricted, to promote the accuracy of factfinding or to provide incentives for out-of-court behavior, the objective can often be accomplished by significantly reducing how likely jurors are to rely on the evidence. Once we recognize that juries are groups of human beings, reasoning together in ways that are inherently and pervasively imperfect, there is no reason to think that evidentiary instructions are failures simply because *they* do not work perfectly.

B. *The Story Model*

Skepticism about evidentiary instructions among legal scholars does not rest solely on the common-sense idea that jurors cannot will themselves to forget or intentionally turn memories on and off. It relies as well on a particular understanding of how juries decide cases: the “story model.” But that reliance, too, turns out to be misplaced.

The “story model” is a detailed theory of jury trial developed in the 1980s and early 1990s, chiefly by psychologists Reid Hastie and Nancy Pennington. In its fullest articulation, the theory proposes that jury reasoning has three components: constructing a story, learning the law, and applying the law to the story. The first component, story construction, involves the creation of a narrative that combines the evidence presented at trial with a juror’s background knowledge of the world and some basic, generic ideas about how to explain and

43. See, e.g., Leubsdorf, *supra* note 37, at 1656-61; William H. Simon, *The Kaye Scholer Affair: The Lawyer’s Duty of Candor and the Bar’s Temptations of Evasion and Apology*, 23 LAW & SOC. INQUIRY 243, 280-81 (1998).

describe human events. Those generic ideas are cognitive schema—abstract expectations about the way that initiating events and physical conditions are linked, through chains of causation, with psychological states, goals, actions, and consequences. There may be alternative stories that can be constructed from and imposed on the evidence; jurors select among these stories by assessing their internal coherence and how well they fit with all the evidence. The second component of jury decisionmaking, learning the law, takes place when the judge provides a formal description of the applicable substantive legal standards—the definitions, say, of murder and manslaughter. The third component involves matching the story that a juror has developed with the formal legal categories provided by the judge—what lawyers would call applying the law to the facts.⁴⁴

The most important of these three components, and the one that does the most to distinguish the story model from its main rivals, is story construction. The story model is in large part a response to and repudiation of a very different idea about how juries assess evidence: the idea that jurors estimate and then combine probabilities, either through some intuitive approximation of Bayes' Theorem or in some other manner.⁴⁵ It is central to the story model that jurors assess evidence holistically rather than atomistically, and that in doing so they rely on preexisting cognitive schema—generic mental frameworks for making sense of the world—not just on the information they receive during trial. The phrase “story model” has come to refer more loosely to this core set of beliefs, plus the view that at least some of the pertinent schema have to do with narrative structure, and the further, critical understanding that the relationship between evidence and stories is “bidirectional”—the narrative is constructed to fit the evidence, but the evidence is also perceived and understood through the filter of the narrative.⁴⁶ And in this looser sense the “story model” has become the orthodox understanding of jury decisionmaking among psychologists and legal scholars.⁴⁷ It makes intuitive sense, and a fair bit of experimental data supports it.⁴⁸

44. See, e.g., Pennington & Hastie, *supra* note 22, at 192-203.

45. See, e.g., Ronald J. Allen, *Factual Ambiguity and a Theory of Evidence*, 88 NW. U. L. REV. 604, 604-05 (1994); John H. Blume et al., *Every Juror Wants a Story: Narrative Relevance, Third Party Guilt and the Right to Present a Defense*, 44 AM. CRIM. L. REV. 1069, 1087 n.115 (2007); Reid Hastie, *Algebraic Models of Juror Decision Processes*, in INSIDE THE JUROR: THE PSYCHOLOGY OF JUROR DECISION MAKING 84, 84 (Reid Hastie ed., 1993); Pennington & Hastie, *supra* note 22, at 213-17; Simon, *supra* note 22, at 559-64.

46. Simon, *supra* note 22, at 518, 522; see also Lempert, *supra* note 25, at 559 (suggesting that if jurors “try to make sense of the evidence they receive by fitting it to some story pattern,” they are also likely to give special weight to “the evidence that best fits [their] preferred story” and to discount or disregard contradictory evidence).

47. See sources cited *supra* note 23. The “relative plausibility theory” developed by Ron Allen, and the set of arguments that Dan Simon has advanced about “coherence-based reasoning” in jury trials, are both versions of the story model in this looser sense, although both depart in certain ways from the ideas of Hastie and Pennington—largely by downplaying the importance of narrative structure and giving relatively greater emphasis to the claim

It is sometimes suggested that the story model, in this broad sense, is inconsistent with any confidence in the ability of juries to follow evidentiary instructions.⁴⁹ It is easy to see why. Evidentiary instructions seem to assume that jurors will assess and combine evidence piece by piece, in an orderly, linear fashion. But in the story model, jurors reason recursively, with each piece of evidence influencing the constructed narrative, and the narrative in turn affecting the weight and meaning ascribed to individual items of proof. How can jurors be expected to isolate, in retrospect, the ramifications that one particular piece of evidence has had on this process, and then to reconstruct the narrative they would have constructed in the absence of that evidence? It seems impossible.

In truth, though, the implications of the story model for the efficacy of evidentiary instructions are far from clear. Even if jurors *do* assess evidence holistically, in just the way the story model describes, they may still be able to exercise control over which pieces of evidence are included in the mix. In theory, at least, it is perfectly possible to make an item-by-item determination of what evidence should be taken into account, and then to assess, as an integrated whole, all the evidence that is not screened out. In fact jurors obviously do *something* along these lines. In order to assess evidence by constructing and imposing a story, jurors need to determine what counts as “evidence”—what the story is supposed to fit with and explain.⁵⁰ The story is not expected to explain, for example, the dreams the jurors had the previous night, or the furniture in the courtroom, or the most recent episode of *America’s Got Talent*. It may be harder, of course, to screen out information that has some obvious pertinence to the factual questions the jury is asked to decide. But not because the evidence that gets past the screen is assessed holistically.

It might be thought that the challenge the story model poses for evidentiary instructions has to do with the difficulty of running an integrative process backwards. In the story model, evidence is not simply added together; each piece of evidence influences, through complicated webs of interaction, how

that jurors assess evidence holistically rather than atomistically. See Allen, *supra* note 45; Simon, *supra* note 22.

48. See, e.g., Pennington & Hastie, *supra* note 22, at 203-17; Simon, *supra* note 22, at 511-13, 562. It can be important to distinguish the story model, which is a descriptive theory of jury decisionmaking, from the philosophical or normative claim that narratives are, at bottom, what trials are really about—that stories are not loose, roundabout ways of getting at the truth, but are themselves the best or only kind of truth we can access. On this broader claim—less common today than fifteen years ago—see, for example, Robert Weisberg, *Proclaiming Trials as Narratives: Premises and Pretenses*, in *LAW’S STORIES: NARRATIVE AND RHETORIC IN THE LAW* 61 (Peter Brooks & Paul Gewirtz eds., 1996).

49. See, e.g., Diamond & Casper, *supra* note 26, at 519-20; Steblay et al., *supra* note 26, at 488.

50. Much as judges or advocates need to select the facts pertinent to a dispute before arguing for a legal outcome. See, e.g., Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 *STAN. L. REV.* 591, 593 (1981).

every other piece of evidence is weighed and understood. It might be thought particularly difficult to undo the effect of an item of evidence when it operates in this way.⁵¹ Obviously this problem will arise only if the jurors process the problematic evidence before they are instructed to disregard it or to use it only for a limited purpose. But that may be the case often or even most of the time, depending on how promptly the evidentiary instruction is administered and how rapidly the jurors incorporate new evidence into the stories they construct.⁵² So it may well be true that complying with an evidentiary instruction will often, or even usually, require the jury to undo a complicated set of interactions between the evidence in question and other evidence in the case.

It sounds hard, but there is no a priori reason to think jurors cannot do it. In fact, jurors probably do something similar throughout the trial: they undo and redo the connections among evidence constantly, as new evidence and arguments are presented and the stories the jurors have constructed are revised. That in any event is what the story model, as generally understood, supposes that they do.⁵³ And if juries are constantly remaking stories and refitting evidence to structures that those stories provide, it is not at all clear why they cannot drop items of proof, or limit their use, at the same time that they incorporate new pieces of evidence.

So much for the story model and instructions to disregard. But what about limiting instructions—instructions that tell jurors that they may use a particular item of proof, but only in a particular way, and not in other, prohibited ways? The story model might seem to throw particular doubt on the efficacy of those kinds of instructions. If the jurors assess evidence holistically, it might be thought, they necessarily are assessing it intuitively, as a gestalt, and they therefore will not be able to consciously regulate the ways in which any particular item of proof affects the stories they create and how plausible and coherent those stories seem at a gut level.

Nothing about the story model, however—notwithstanding the general emphasis it places on nonlinear, unconscious, coherence-based modes of reasoning—requires that jury reasoning be *entirely* nonlinear or unconscious. The

51. See Diamond & Casper, *supra* note 26, at 519 (suggesting that instructions to disregard may be futile because “the encoding and recall of other information are affected by the very testimony that the juror is supposed to ignore”); Andrew J. Wistrich et al., *Can Judges Ignore Inadmissible Information?: The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251, 1269 (2005) (explaining that “[t]he rapid integration of information into a coherent story” creates hindsight bias, making it difficult for juries to disregard their knowledge of an outcome in assessing previous events).

52. Cf. Simon, *supra* note 22, at 551-53 (discussing evidence that jurors process evidence during the trial, before the judge’s legal instructions).

53. See, e.g., Allen, *supra* note 45, at 629-30; Blume et al., *supra* note 45, at 1088; Paul H. Robinson & Barbara A. Spellman, *Sentencing Decisions: Matching the Decisionmaker to the Decision Nature*, 105 COLUM. L. REV. 1124, 1141 (2005); Swift, *supra* note 23, at 981-82; Jessica L. Bregant, Note, *Let’s Give Them Something to Talk About: An Empirical Evaluation of Predeliberation Discussions*, 2009 U. ILL. L. REV. 1213, 1226-27.

empirical evidence for the story model consists of experiments demonstrating that mock jurors organize evidence into stories, that they select among rival stories based on relative plausibility, and that the stories they construct influence the way they understand and assess individual pieces of evidence, especially if the evidence is ambiguous or conflicting.⁵⁴ All of this is consistent with jurors combining coherence-based story construction with some amount of conscious, atomistic reasoning.⁵⁵ In fact, jurors must do something along these lines. In order to assimilate an item of evidence into a story, jurors must have some sense of what the evidence is and what it tends to show. Exculpatory testimony from an alibi witness cannot be treated the same as expert testimony that the defendant's fingerprints were found at the crime scene. And much of this atomistic processing could be subject to conscious control. When comparing how well rival stories fit with a body of evidence, a juror might plausibly constrain the analysis by limiting the kinds of inferences that could be drawn from a particular piece of evidence. For example, a juror might deliberately put to one side the fact that a particular story is contradicted by a hearsay statement that was admitted only for other purposes. No doubt some jurors will find it difficult to constrain their reasoning in this way. Still, there is no reason to assume, a priori, that the difficulties they encounter will be so large that the limiting instructions will do little real work.

Here, again, it is important to distinguish between the transparently implausible claim that evidentiary instructions work perfectly all of the time and the more realistic proposition that they work well enough to be taken seriously and, within limits, relied upon. The story model provides additional reason, if any were needed, to be skeptical of the claim (which no one makes) that limiting instructions and instructions to disregard evidence can entirely eliminate the prejudicial effects of all inadmissible and partially admissible proof. But the model falls far short of justifying the widespread notion that evidentiary instructions are so obviously and thoroughly ineffective that they amount to little more than superstitious incantations.

C. *Mock Jurors*

That stronger kind of skepticism about evidentiary instructions is commonly justified not just by appeal to the common-sense idea that people cannot intentionally forget what they have learned, and not just by the notion that jurors

54. See, e.g., Pennington & Hastie, *supra* note 22, at 203-17; Simon, *supra* note 22, at 520-49.

55. For a helpful discussion, see Lisa Kern Griffin, *Narrative, Truth, and Trial*, 101 GEO. L.J. 281 (2013). Dan Simon is careful to note that "coherence effects have their limits," and that "[c]oherence shifts are mediated by task-specific factors"—for example, the ambiguity of the evidence, and whether jurors are explicitly asked to "take some time to seriously consider the possibility that the opposite side has a better case." Simon, *supra* note 22, at 544, 548 (internal quotation marks omitted).

assess evidence holistically rather than atomistically, but also—and perhaps most importantly—by an appeal to empirical evidence. Over the past few decades, various experiments have been carried out in which mock jurors receive instructions to disregard or to limit their use of particular pieces of evidence. It is widely believed—and repeatedly reported—that these experiments show conclusively, or at least very persuasively, that evidentiary instructions do not and cannot work.⁵⁶

The results of the studies are actually far less clear. If anything, they suggest that evidentiary instructions *do* work, at least in many circumstances, and at least if they are given in a sensible manner.

Here is a list of the thirty-three published studies I have been able to locate on the effects of evidentiary instructions on mock jurors, together with brief summaries of the results.⁵⁷ It is instructive to compare their findings.

56. See, e.g., HASTIE ET AL., *supra* note 22, at 231; Michael T. Nietzel et al., *Juries: The Current State of the Empirical Literature*, in *PSYCHOLOGY AND LAW: THE STATE OF THE DISCIPLINE* 23, 33-34 (Ronald Roesch et al. eds., 1999); Gavin Phillipson, *Trial by Media: The Betrayal of the First Amendment's Purpose*, 71 *LAW & CONTEMP. PROBS.* 15, 25-27 (2008); DiPardo, *supra* note 12, at 297; Varnado, *supra* note 12, at 272-73; sources cited *supra* note 13. There are far fewer studies of the ability of judges to disregard inadmissible evidence. See, e.g., Frederick Schauer, *On the Supposed Jury-Dependence of Evidence Law*, 155 *U. PA. L. REV.* 165, 188-89 (2006); Wistrich et al., *supra* note 51, at 1270.

57. I have excluded studies of the effects of judicial admonitions that do not instruct juries to disregard evidence or to limit its use but instead simply warn them that it may be unreliable or that it should be treated with caution. See, e.g., Eugene Borgida, *Legal Reform of Rape Laws*, 2 *APPLIED SOC. PSYCHOL. ANN.* 211, 228-31 (1981) (reporting that mock jurors were more likely to vote for conviction in a rape trial if cautioned about the use of evidence of complainant's past sexual history); Ann Cavoukian & Ronald J. Heslegrave, *The Admissibility of Polygraph Evidence in Court: Some Empirical Findings*, 4 *LAW & HUM. BEHAV.* 117, 121, 130-31 (1980) (finding that mock jurors gave less weight to polygraph evidence if they received a judicial warning that polygraphs were only 80% accurate and that jurors should be cautious when weighing the evidence); Richard J. Harris, *The Effect of Jury Size and Judge's Instructions on Memory for Pragmatic Implications from Courtroom Testimony*, 11 *BULL. PSYCHONOMIC SOC'Y* 129, 129 (1978) (finding no significant effect of a judicial instruction "about the pitfalls of interpreting implied information as if it were asserted fact"). I have also excluded studies that involved mock jurors instructed to disregard evidence but did not test for, or draw conclusions about, the effect of those instructions. See, e.g., Eugene Borgida & Roger Park, *The Entrapment Defense: Juror Comprehension and Decision Making*, 12 *LAW & HUM. BEHAV.* 19, 19 (1988) (testing combined effect of limiting instruction and alternative substantive instructions on entrapment); Gregory E. Lenehan & Patrick O'Neill, *Reactance and Conflict as Determinants of Judgment in a Mock Jury Experiment*, 11 *J. APPLIED SOC. PSYCHOL.* 231, 231 (1981) (testing the combined effect of evidentiary rulings and biased judicial comments).

- 1 Broeder 1959 Instruction to disregard defendant's insurance in an automobile collision case backfired, leading jurors to award more damages.⁵⁸
- 2 Kline & Jess 1966 Three of four mock juries followed instruction to disregard pretrial news reports, but the fourth relied on the reports in reaching its verdict.⁵⁹
- 3 Simon 1966 Jurors followed an instruction to disregard pretrial publicity.⁶⁰
- 4 Doob & Kirshenbaum 1972 Instruction limiting the use of a prior conviction had no effect.⁶¹
- 5 Cornish & Sealy 1973 Jurors followed instructions to disregard prior convictions.⁶²
- 6 Sue et al. 1973 Instruction to disregard did not eliminate the effect of inadmissible wiretap evidence.⁶³
- 7 Hans & Doob 1976 Instruction to use a prior conviction only for impeachment failed.⁶⁴
- 8 Wolf & Montgomery 1977 Jurors ignored police testimony ruled inadmissible, but only if they were *not* admonished to do so.⁶⁵

58. Dale W. Broeder, *The University of Chicago Jury Project*, 38 NEB. L. REV. 744, 754 (1959).

59. F. Gerald Kline & Paul H. Jess, *Prejudicial Publicity: Its Effect on Law School Mock Juries*, 43 JOURNALISM Q. 113, 114-15 (1966).

60. Rita James Simon, *Murder, Juries, and the Press*, TRANS-ACTION, May-June 1966, at 40, 41-42.

61. A.N. Doob & H.M. Kirshenbaum, *Some Empirical Evidence on the Effect of s. 12 of the Canada Evidence Act Upon an Accused*, 15 CRIM. L.Q. 88, 95 (1972).

62. W.R. Cornish & A.P. Sealy, *Juries and the Rules of Evidence: L.S.E. Jury Project*, 1973 CRIM. L. REV. 208, 222.

63. Stanley Sue et al., *Effects of Inadmissible Evidence on the Decisions of Simulated Jurors: A Moral Dilemma*, 3 J. APPLIED SOC. PSYCHOL. 345, 351 (1973).

64. Valerie P. Hans & Anthony N. Doob, *Section 12 of the Canada Evidence Act and the Deliberations of Simulated Juries*, 18 CRIM. L.Q. 235, 240, 251 (1976).

65. Sharon Wolf & David A. Montgomery, *Effects of Inadmissible Evidence and Level of Judicial Admonishment to Disregard on the Judgments of Mock Jurors*, 7 J. APPLIED SOC. PSYCHOL. 205, 216 (1977).

- 9 Reinard & Reynolds 1978 Sensational evidence biased jury verdicts *only* if an objection was raised or the judge ruled the evidence inadmissible.⁶⁶
- 10 Thompson et al. 1981 Jurors followed instruction to disregard inadmissible prosecution evidence but not instruction to disregard inadmissible defense evidence.⁶⁷
- 11 Tanford & Penrod 1982 Instruction to consider evidence for each charge separately appeared "partially effective."⁶⁸
- 12 Werner et al. 1982 Authoritarian jurors did not follow instruction to disregard inadmissible prosecution evidence.⁶⁹
- 13 Hastie et al. 1983 During deliberations, jurors appeared to follow instructions to disregard inadmissible evidence.⁷⁰
- 14 Carretta & Moreland 1983 Instruction to disregard inadmissible wiretap evidence lessened its use by jurors, especially after deliberation.⁷¹
- 15 Tanford & Penrod 1984 Elaborated instruction to consider evidence for each charge separately had no effect.⁷²
- 16 Greene & Loftus 1985 Instruction to consider evidence for each charge separately had no effect.⁷³

66. Reinard & Reynolds, *supra* note 20, at 101, 105-07.

67. William C. Thompson et al., *Inadmissible Evidence and Juror Verdicts*, 40 J. PERSONALITY & SOC. PSYCHOL. 453, 460 (1981).

68. Sarah Tanford & Steven Penrod, *Biases in Trials Involving Defendants Charged with Multiple Offenses*, 12 J. APPLIED SOC. PSYCHOL. 453, 465 (1982).

69. Carol M. Werner et al., *Conviction Proneness and the Authoritarian Juror: Inability to Disregard Information or Attitudinal Bias?*, 67 J. APPLIED PSYCHOL. 629, 629 (1982).

70. HASTIE ET AL., *supra* note 22, at 231. But the researchers cautioned that "it would be unwise to generalize from these observations to actual jury behavior," because "experimental juries may be abnormally well-behaved when dealing with the inadmissibility issue while under observation by social scientists," and because "research has repeatedly shown that jurors do not or cannot disregard biasing extralegal testimony." *Id.*

71. Thomas R. Carretta & Richard L. Moreland, *The Direct and Indirect Effects of Inadmissible Evidence*, 13 J. APPLIED SOC. PSYCHOL. 291, 305 (1983).

72. Sarah Tanford & Steven Penrod, *Social Inference Processes in Juror Judgments of Multiple-Offense Trials*, 47 J. PERSONALITY & SOC. PSYCHOL. 749, 756 (1984).

73. Edith Greene & Elizabeth F. Loftus, *When Crimes Are Joined at Trial*, 9 LAW & HUM. BEHAV. 193, 205 (1985).

- 17 Tanford et al. 1985 Elaborated instruction to consider evidence for each charge separately reduced conviction rates.⁷⁴
- 18 Wissler & Saks 1985 Jurors violated an instruction to use prior conviction only for impeachment.⁷⁵
- 19 Tanford & Cox 1987 Instruction to use prior conviction only for impeachment backfired, succeeding only in drawing attention to the evidence.⁷⁶
- 20 Tanford & Cox 1988 Jurors did not follow instructions to use impeachment evidence only in assessing civil defendant's credibility.⁷⁷
- 21 Clark 1994 Instruction by judge to ignore inadmissible evidence raised by a dissident juror succeeded only in drawing attention to the evidence.⁷⁸
- 22 Kerwin & Shaffer 1994 Instruction to disregard inadmissible police testimony appeared wholly effective for deliberating jurors but only partially effective for nondeliberating jurors.⁷⁹
- 23 Landsman & Rakos 1994 Jurors violated an instruction to disregard evidence of subsequent remedial conduct.⁸⁰

74. Sarah Tanford et al., *Decision Making in Joined Criminal Trials: The Influence of Charge Similarity, Evidence Similarity, and Limiting Instructions*, 9 LAW & HUM. BEHAV. 319, 335 (1985).

75. Wissler & Saks, *supra* note 13, at 37, 43-44.

76. Sarah Tanford & Michele Cox, *Decision Processes in Civil Cases: The Impact of Impeachment Evidence on Liability and Credibility Judgments*, 2 SOC. BEHAV. 165, 178 (1987).

77. Sarah Tanford & Michele Cox, *The Effects of Impeachment Evidence and Limiting Instructions on Individual and Group Decision Making*, 12 LAW & HUM. BEHAV. 477, 484-89, 494-96 (1988).

78. Russell D. Clark, III, *The Role of Censorship in Minority Influence*, 24 EUR. J. SOC. PSYCHOL. 331, 335-36 (1994).

79. Jeffrey Kerwin & David R. Shaffer, *Mock Jurors Versus Mock Juries: The Role of Deliberations in Reactions to Inadmissible Testimony*, 20 PERSONALITY & SOC. PSYCHOL. BULL. 153, 159-60 (1994).

80. Stephan Landsman & Richard F. Rakos, *A Preliminary Inquiry into the Effect of Potentially Biasing Information on Judges and Jurors in Civil Litigation*, 12 BEHAV. SCI. & L. 113, 122-23 (1994).

- 24 Greene & Dodge 1995 Instruction limiting use of prior conviction had no effect.⁸¹
- 25 Pickel 1995 Jurors followed an instruction to disregard inadmissible hearsay regardless of whether it was accompanied by a legal explanation, but they followed an instruction to disregard inadmissible prior conviction only when a legal explanation was *not* provided.⁸²
- 26 Rind et al. 1995 Jurors followed an instruction to disregard inadmissible wiretap evidence, but only if the charge was serious.⁸³
- 27 Fein et al. 1997 Jurors followed an instruction to disregard inadmissible evidence, but only when they were given reason to be suspicious of the motives underlying its introduction.⁸⁴
- 28 Kassin & Sommers 1997 Jurors followed an instruction to disregard inadmissible wiretap evidence if they were told the evidence was unreliable; they did so less consistently if told the evidence was excluded because it was obtained illegally.⁸⁵
- 29 Kassin & Sukel 1997 Jurors violated an instruction to disregard an inadmissible confession.⁸⁶

81. Edith Greene & Mary Dodge, *The Influence of Prior Record Evidence on Juror Decision Making*, 19 LAW & HUM. BEHAV. 67, 76 (1995).

82. Kerri L. Pickel, *Inducing Jurors to Disregard Inadmissible Evidence: A Legal Explanation Does Not Help*, 19 LAW & HUM. BEHAV. 407, 422 (1995).

83. Bruce Rind et al., *Effect of Crime Seriousness on Simulated Jurors' Use of Inadmissible Evidence*, 135 J. SOC. PSYCHOL. 417, 419-20, 422 (1995).

84. Steven Fein et al., *Can the Jury Disregard That Information? The Use of Suspicion to Reduce the Prejudicial Effects of Pretrial Publicity and Inadmissible Testimony*, 23 PERSONALITY & SOC. PSYCHOL. BULL. 1215, 1223-24 (1997).

85. Saul M. Kassin & Samuel R. Sommers, *Inadmissible Testimony, Instructions to Disregard, and the Jury: Substantive Versus Procedural Considerations*, 23 PERSONALITY & SOC. PSYCHOL. BULL. 1046, 1050 (1997).

86. Saul M. Kassin & Holly Sukel, *Coerced Confessions and the Jury: An Experimental Test of the "Harmless Error" Rule*, 21 LAW & HUM. BEHAV. 27, 44 (1997).

- 30 Freedman et al. 1998 Pretrial publicity did not increase conviction rates, but pretrial publicity plus an admonition to disregard slightly lowered conviction rates.⁸⁷
- 31 Fleming et al. 1999 Jurors followed instruction to disregard illegally obtained evidence.⁸⁸
- 32 Lloyd-Bostock 2000 Jurors violated instructions to use a prior conviction only for impeachment.⁸⁹
- 33 Demaine 2008 Jurors followed an elaborate instruction to disregard inadmissible police testimony but a separate group did not follow a more minimal instruction to do the same.⁹⁰

The most obvious fact about these findings is that they vary. Sometimes evidentiary instructions work, sometimes they fail, and sometimes they backfire. Sometimes the effectiveness of the instruction depends on the seriousness of the charge; sometimes it depends on the personality of the jurors; sometimes it depends on how much stress is put on the instruction or what kind of stress; and sometimes none of that seems to matter. The variation is even greater than the brief summaries indicate: a striking fact about this set of studies is that virtually none of their specific results are ever replicated. Part of the explanation is that experimental psychologists, like scientists more generally, do not spend much time trying to reproduce what other researchers have reported. Most psychologists (and most of their funding agencies and professional journals) find efforts at exact replication less interesting and less valuable than efforts to test the same hypothesis using different methods.⁹¹ So no two of these studies are designed exactly the same way. But that is only part of the explanation. Even when the study designs *do* coincide, the results generally do not.⁹²

87. Jonathan L. Freedman et al., *Pretrial Publicity: Effects of Admonition and Expressing Pretrial Opinions*, 3 LEGAL & CRIMINOLOGICAL PSYCHOL. 255, 267, 269 (1998).

88. Monique A. Fleming et al., *Procedural and Legal Motivations to Correct for Perceived Judicial Biases*, 35 J. EXPERIMENTAL SOC. PSYCHOL. 186, 193, 197-99 (1999).

89. Lloyd-Bostock, *supra* note 23, at 734, 753-54.

90. Demaine, *supra* note 21, at 127.

91. See, e.g., BARRY H. KANTOWITZ ET AL., EXPERIMENTAL PSYCHOLOGY 307-08 (9th ed. 2009); Stefan Schmidt, *Shall We Really Do It Again? The Powerful Concept of Replication Is Neglected in the Social Sciences*, 13 REV. GEN. PSYCHOL. 90, 95-96 (2009).

92. See, e.g., Hans & Doob, *supra* note 64, at 242 (failing to replicate the results of Doob & Kirshenbaum, *supra* note 61); Lloyd-Bostock, *supra* note 23, at 742 (failing to replicate the results of Wissler & Saks, *supra* note 13); Tanford et al., *supra* note 74, at 332, 334-35 (failing to replicate some of the results of Tanford & Penrod, *supra* note 68, and Tanford & Penrod, *supra* note 72); Thompson et al., *supra* note 67, at 454 (noting failure of an unpublished study to duplicate the results of Sue et al., *supra* note 63).

It is difficult to draw any firm conclusions from such divergent results—something the researchers themselves have often acknowledged.⁹³ Just as frequently, though, the experimental evidence is said to show that evidentiary instructions are “generally ineffective.”⁹⁴ This is nearly always the way the studies are described in law reviews, and it is sometimes the way they are described by psychologists, too.⁹⁵

Results pointing in the other direction are often neglected or misrepresented. An early study at the London School of Economics (LSE), for example, found that mock jurors were more likely to find a defendant guilty after hearing evidence that he had a prior conviction, but only if the conviction was for a similar offense—and even then a curative instruction completely eliminated the effect of the prior conviction evidence. This was true in both of the fictional cases used in the LSE study, one involving a rape charge and one involving a theft charge.⁹⁶ The LSE study thus provided evidence that juries can and do follow instructions to disregard evidence, at least under certain conditions. As summarized by the researchers themselves, their results indicated that, “[c]ontrary to common supposition, juries give real weight to an instruction to disregard relevant previous record [evidence] wrongly admitted.”⁹⁷ But that is not how the study has usually been described by later authors—when they have discussed it at all. Sometimes the study is said to have found that a curative instruction worked in the rape case, but not in the theft case;⁹⁸ sometimes the LSE researchers are said to have found only that a curative instruction “slight-

93. See, e.g., Kerwin & Shaffer, *supra* note 79, at 154; Lloyd-Bostock, *supra* note 23, at 734; Reinard & Reynolds, *supra* note 20, at 92; Rind et al., *supra* note 83, at 417-18; Tanford & Cox, *supra* note 77, at 481; Thompson et al., *supra* note 67, at 453; Wistrich et al., *supra* note 51, at 1272-75; Wolf & Montgomery, *supra* note 65, at 207.

94. Greene & Dodge, *supra* note 81, at 70; see also, e.g., HASTIE ET AL., *supra* note 22, at 231; Borgida & Park, *supra* note 57, at 32; Greene & Dodge, *supra* note 81, at 76; Lieberman & Arndt, *supra* note 13, at 677; Nietzel et al., *supra* note 56, at 33-34; Wissler & Saks, *supra* note 13, at 47.

95. See, e.g., Phillipson, *supra* note 56, at 25-26; DiPardo, *supra* note 12, at 297; Lisa Eichhorn, Note, *Social Science Findings and the Jury's Ability to Disregard Evidence Under the Federal Rules of Evidence*, 52 LAW & CONTEMP. PROBS. 341, 342-43 (1989); Varnado, *supra* note 12, at 272-73; cf. Larry Laudan & Ronald J. Allen, *The Devastating Impact of Prior Crimes Evidence and Other Myths of the Criminal Justice Process*, 101 J. CRIM. L. & CRIMINOLOGY 493, 500, 502-03 (2011) (noting that the results of mock jury experiments involving evidence of a defendant's prior conviction “are all over the map,” but nonetheless concluding from those results that “at least among mock jurors, the instruction to draw no conclusions from known priors about a defendant's propensity to crime is flagrantly ignored”).

96. See Cornish & Sealy, *supra* note 62, at 216-18, 222.

97. *Id.* at 222.

98. E.g., Rind et al., *supra* note 83, at 418, 422 (stating that inadmissible evidence influenced the decision in the theft case but not the rape case); Thompson et al., *supra* note 67, at 454 (same); Wissler & Saks, *supra* note 13, at 38 (stating that the LSE study had “mixed results depending upon the crime with which the defendant was charged”). This is also the impression given of the LSE study in Laudan & Allen, *supra* note 95, at 500.

ly”⁹⁹ reduced the prejudicial effect of evidence that the judge had ruled inadmissible; and sometimes the LSE researchers are said to have found no effect at all from curative instructions.¹⁰⁰

I will speculate later about why the mock jury experiments have so often been described as more damning than they really are about the efficacy of evidentiary instructions. For now, it suffices to say that scholars may be no less prone than jurors to the kind of “coherence-based reasoning”¹⁰¹ that assimilates new evidence to preexisting beliefs—and that, on their face, the mock juror experiments offer at best ambiguous support for the view that evidentiary instructions are inherently ineffective.

In fact, the support gets weaker the closer one looks. That is because many of the mock juror studies suffer from design flaws that favor results casting doubt on the effectiveness of evidentiary instructions, and there are reporting and publication biases that probably push in the same direction. I will discuss the design flaws first and then the reporting and publication biases.

Nearly all of these studies take mock jurors, usually but not always college students, and have them watch, listen to, or read about a fictional trial. Evidence is included that the judge rules should be disregarded by the jury, or used only in particular ways and not in others. The jurors are then asked whether they would vote for conviction; jurors are usually asked some other questions as well, which vary from study to study. The other questions may include, for example, how confident the jurors are in their verdict, or whether they think the defendant was a believable witness.

Lawyers and judges are often suspicious of mock juror studies because college students, or random subjects recruited at a science museum, obviously differ in many respects from actual jurors. For one thing, mock jurors know that nothing is really on the line—certainly no one’s life or liberty. But comparisons of decisionmaking by mock jurors and real jurors have consistently failed to uncover any major, consistent differences; both kinds of jurors, for the most part, seem to reason in similar ways.¹⁰² There is no good reason to believe that the use of mock jurors has biased the studies on evidentiary instructions in any particular direction. The design flaws in many of these studies do not pertain to the use of mock jurors, but to four other factors: missing controls, absence of deliberation, weak instructions, and statistical confusion.

99. Theodore Eisenberg & Valerie P. Hans, *Taking a Stand on Taking the Stand: The Effect of a Prior Criminal Record on the Decision to Testify and on Trial Outcomes*, 94 CORNELL L. REV. 1353, 1358-59 (2009).

100. Tanford & Cox, *supra* note 77, at 479, 494.

101. See Simon, *supra* note 22, at 512-13 (“Coherence-based reasoning posits that the mind shuns cognitively complex and difficult decision tasks by reconstructing them into easy ones, yielding strong, confident conclusions.”).

102. See, e.g., Robert J. MacCoun, *Comparing Legal Factfinders: Real and Mock, Amateur and Professional*, 32 FLA. ST. U. L. REV. 511, 512-17 (2005); Robert J. MacCoun, *Experimental Research on Jury Decision-Making*, 244 SCIENCE 1046, 1046 (1989).

Missing controls. Almost all of the mock juror experiments involving evidentiary instructions test the effectiveness of the instructions by examining their influence on the verdict that jurors indicate they would return.¹⁰³ But they often do so in a peculiar way. If you want to measure the efficacy of something—a drug, say—you typically take a group of subjects with the condition the drug is supposed to address, administer the drug to a randomly selected subset of those subjects, and then compare how they fare with what happens to the rest of the subjects, who do not receive the drug. The rest of the subjects are the control group. (In drug studies, the subjects in the control group receive a placebo, or the standard treatment to which the drug in question is being compared, so that physiological effects can be separated from mental and psychosomatic effects.) Analogously, if you want to know how well an evidentiary instruction works, the most obvious way to proceed is to see how jurors who receive the instruction behave, and compare that with how jurors who do not receive the instruction behave. The jurors who do not receive the instruction form the control group. (There is no need for a placebo, because you will be *testing* for psychological effects, not trying to separate them out.) In drug trials, the control group has the same underlying condition as the treatment group, but does not receive the treatment. To test an evidentiary instruction, the control group would be exposed to the evidence but would not receive the instruction.

That is, in fact, how some of the mock jury experiments on evidentiary instructions have proceeded. But not all: some of the experiments compare mock jurors who have been exposed to evidence and given an evidentiary instruction with mock jurors who have not been exposed to the evidence in the first place.¹⁰⁴ And they use a fictional trial that has been purposely constructed and pretested to ensure that, without the evidence in question, the case is more or less a toss-up.¹⁰⁵ This is like testing the efficacy of a drug by administering it to people with a particular condition and then comparing them to people who did not have the condition to begin with. It is a sensible way to test whether the treatment—or the instruction—works *perfectly*, but not a good way to test whether it works at all.

Absence of deliberation. Some of the mock jury experiments on evidentiary instructions assign the subjects to jury panels and have them deliberate before reaching their final decisions. But most do not. Most of the studies involve mock *jurors* but not mock *juries*.¹⁰⁶ The distinction may not matter much for

103. The major exceptions are studies that monitored and analyzed the deliberations of mock juries to see whether jurors discussed and relied on evidence they had been instructed to disregard. *E.g.*, HASTIE ET AL., *supra* note 22, at 51; Kline & Jess, *supra* note 59, at 114.

104. *E.g.*, Hans & Doob, *supra* note 64, at 240; Kline & Jess, *supra* note 59, at 113-14, 116; Lloyd-Bostock, *supra* note 23, at 739-41; Rind et al., *supra* note 83, at 419-20; Wissler & Saks, *supra* note 13, at 39-40.

105. See Laudan & Allen, *supra* note 95, at 502 (discussing this problem).

106. This is true, for example, of Clark, *supra* note 78, at 335; Demaine, *supra* note 21, at 119-20; Doob & Kirshenbaum, *supra* note 61, at 92-93; Fein et al., *supra* note 84, at 1218;

some areas of jury research, because there is a good deal of evidence that jury verdicts tend to track, on average, the views that individual jurors bring into the deliberations.¹⁰⁷ But there are specific reasons to think that evidentiary instructions may be more effective when juries deliberate: when jurors have to reason aloud and to each other, they may find it easier to avoid prohibited inferences and harder to do what the judge has asked them not to do. And, in fact, the experimental results, on the whole, support the conclusion that evidentiary instructions are more effective when juries deliberate. In general, the studies that include deliberation have been more likely to find that limiting instructions work, and studies that have directly compared deliberating and nondeliberating jurors have found that deliberating jurors do better at following limiting instructions.¹⁰⁸ Other studies have examined the deliberations of mock jurors and have found that they “self-monitor”: when inadmissible evidence is mentioned during deliberations, the jurors remind each other to set it aside.¹⁰⁹

Weak instructions. Some of the mock juror studies have stacked the deck against the efficacy of evidentiary instructions by using instructions that are incoherent, or by asking jurors to disregard evidence that is excluded on grounds that seem incomprehensible.¹¹⁰ In one study, for example, mock jurors read a

Fleming et al., *supra* note 88, at 192; Freedman et al., *supra* note 87, at 259; Greene & Dodge, *supra* note 81, at 72; Greene & Loftus, *supra* note 73, at 196; Kassin & Sommers, *supra* note 85, at 1048; Kassin & Sukel, *supra* note 86, at 31; Landsman & Rakos, *supra* note 80, at 122; Pickel, *supra* note 82, at 413; Reinard & Reynolds, *supra* note 20, at 96; Rind et al., *supra* note 83, at 420; Simon, *supra* note 60, at 41; Sue et al., *supra* note 63, at 347; Tanford & Cox, *supra* note 76, at 169; Tanford & Cox, *supra* note 77, at 483; Tanford & Penrod, *supra* note 68, at 460; Tanford et al., *supra* note 74, at 326; Wissler & Saks, *supra* note 13, at 41; and Wolf & Montgomery, *supra* note 65, at 211. *See generally* Steblay et al., *supra* note 26, at 488 (“By far the majority of studies [of the effects of evidentiary instructions on mock jurors] have examined jurors’ predeliberation disposition toward defendant culpability.”).

107. A point made, for example, in Demaine, *supra* note 21, at 120 n.72. Even outside the context of research on evidentiary instructions, though, there is reason to be cautious in extrapolating from studies of mock jurors who do not deliberate to the behavior of actual jurors, who do—notwithstanding the fact that the verdicts of real jurors, like the verdicts of mock jurors, probably track, on average, the inclinations of the jurors going into deliberations. *See, e.g.*, HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 487-89 (1966); Broeder, *supra* note 58, at 747. The problem is that the cases in which we care most deeply about the behavior of juries may be precisely the hard and ambiguous cases where jurors are most apt to change their minds during deliberations.

108. *See* Borgida, *supra* note 57, at 218; Kerwin & Shaffer, *supra* note 79, at 154.

109. *See, e.g.*, Carretta & Moreland, *supra* note 71, at 307. The experimental evidence about deliberation is not uniformly positive. There is evidence that deliberations within a group of jurors or other decisionmakers can lead in some circumstances to “groupthink,” *see, e.g.*, Daniel W. Shuman et al., *The Health Effects of Jury Service*, 18 *LAW & PSYCHOL. REV.* 267, 277-79 (1994) or, alternatively, to a hardening of polarized opinions, *see, e.g.*, DAN SIMON, *IN DOUBT: THE PSYCHOLOGY OF THE CRIMINAL JUSTICE PROCESS* 201-02 (2012). But there is no evidence suggesting that deliberation makes it less likely that evidentiary instructions will be followed.

110. Other studies—for example, Reinard & Reynolds, *supra* note 20—do not report the language of the evidentiary instruction provided to the mock jurors.

summary of a bank robbery case. Some of the jurors were told that the defendant had previously been convicted (or acquitted) of another offense, and some of *those* jurors were told that the result of the earlier trial should be used “only to the extent it helps in determining the identity of the person who committed the bank robbery.”¹¹¹ Unsurprisingly, that instruction had no significant effect on the percentage of jurors who voted to convict. The researchers concluded that limiting instructions are ineffective in controlling the effect of prior record evidence; they speculated that the “jurors simply did not understand that they could use prior record information only to determine identity and not for other purposes.”¹¹² But at best the experiment showed that the effect of prior record evidence was not diminished by a particularly weak limiting instruction—an instruction that, even if followed to the letter, would have allowed the jury to draw precisely the kind of propensity inference that the character evidence rule aims to suppress. Another study tried to determine whether jurors will follow an instruction to keep the evidence for each count separate, but in fact asked the mock jurors to do something different: “treat each offense as a separate crime.”¹¹³ Still another study asked mock jurors to disregard testimony from a police officer about what he witnessed on a stakeout, based on a bizarre objection that the stakeout “did not legally extend to anything [the officer] observed concerning the defendant.”¹¹⁴ The results indicated that an admonishment by the judge to disregard the evidence backfired, apparently succeeding only in drawing the jurors’ attention to the evidence.¹¹⁵ It is hard to generalize from a study like that, though, to situations where jurors are asked to disregard evidence for reasons that make some sense.

In real life, of course, jurors sometimes *are* given evidentiary instructions that are incoherent, and they sometimes *are* asked to disregard evidence that has been excluded for reasons that do not seem to make any sense—at least not to laypeople, and frequently not to lawyers either.¹¹⁶ But experimental results showing that jurors will not follow an incomprehensible or apparently baseless instruction say little about whether jurors are likely to follow instructions that can be followed and that seem reasonable, either on their face or after they are explained to the jury.

Sometimes the problem is not with the judge’s instruction in the fictional trial presented to the mock jurors but with the researchers’ own instructions, and more specifically with how the jurors are asked to imagine their roles. In some of the experiments, the jurors are not asked whether they would vote to convict or acquit, but whether they believe the defendant is guilty or inno-

111. Greene & Dodge, *supra* note 81, at 71.

112. *Id.* at 77.

113. Tanford & Penrod, *supra* note 68, at 459.

114. Wolf & Montgomery, *supra* note 65, at 210-11.

115. *See id.* at 213, 216.

116. I will return to this point in Part III.A.

cent.¹¹⁷ A study directly examining whether this difference in phrasing matters found, not surprisingly, that it did: deliberating jurors changed their verdicts, but not their beliefs or personal preferences, in response to instructions to disregard inadmissible evidence.¹¹⁸ So testing whether evidentiary instructions change the rate at which mock jurors say they *believe* the defendant is guilty is not a good way to test whether evidentiary instructions are likely to influence the likelihood that real jurors will vote to convict.

Statistical confusion. Some of the mock juror studies draw conclusions that are not warranted, statistically, from their results. The most frequent error is in treating the absence of a statistically significant effect as a demonstration that there was, in fact, no effect. The failure to detect a statistically significant effect can mean that there was, in fact, no effect, or it can mean that the experiment was insufficiently sensitive—for example, because the sample size was too small. But when researchers fail to find a statistically significant difference between the percentage of jurors who find the defendant guilty with an evidentiary instruction and without an evidentiary instruction, they sometimes take that as demonstrating that the instruction in fact had no effect.¹¹⁹ (Conversely, at least one study found “some evidence that [a limiting] instruction was partially effective” in the absence of any statistically significant difference between, on the one hand, the behavior of jurors exposed to the evidence and given the instruction and, on the other hand, the behavior of jurors not exposed to the evidence.)¹²⁰

None of these four design limitations—missing controls, absence of deliberation, weak instructions, or statistical confusion—is found in all of the mock juror experiments on evidentiary instructions. Collectively, though, they mean that the empirical work on evidentiary instructions, which on its face falls well short of showing that the instructions are doomed to fail, falls even shorter when examined closely. And that is even without considering the problem of selection bias in the reporting and publication of research findings.

Reporting and publication biases. Researchers in a range of fields have become increasingly sophisticated in recent years about the need to take into account reporting biases when drawing conclusions from published research; the problem has received the most attention, probably, in the fields of medicine and public health.¹²¹ The best documented of these biases is the one in favor of pos-

117. See, e.g., Doob & Kirshenbaum, *supra* note 61, at 93; Wissler & Saks, *supra* note 13, at 41.

118. See Kerwin & Shaffer, *supra* note 79, at 160.

119. See, e.g., Greene & Dodge, *supra* note 81, at 73; Tanford et al., *supra* note 74, at 328.

120. Tanford & Penrod, *supra* note 68, at 465.

121. See, e.g., John P.A. Ioannidis, *Why Most Published Research Findings Are False*, 2 PLOS MED. 696, 696-98 (2005), available at <http://www.plosmedicine.org/article/info:doi/10.1371/journal.pmed.0020124>; Neal S. Young et al., *Why Current Publication Practices*

itive results. Experiments with negative results—experiments that fail to find a statistically significant relationship—are less likely to be submitted to journals and less likely to be accepted for publication.¹²² Studies with results that further the interests of the sponsoring organization, or that confirm the prior beliefs of the researchers, are also more likely to be disseminated.¹²³ In medical research, these two biases tend to overlap, because drug trials are typically sponsored by pharmaceutical companies seeking to document a statistically significant difference in outcomes between patients who receive the drug and those who receive a placebo. In social science, financial bias arising from the interests of the research sponsor is less often a problem, but there is no reason to think the bias against negative results is any less powerful there, and bias arising from the researchers' beliefs and expectations—"ideological bias"—may well operate more powerfully in social science than in medicine.¹²⁴ Moreover, there may be more room for reporting and publication biases to operate in social science, because human behavior is so complex and varied. Lots of things can influence how well a drug works, including variations in human physiology. But behavioral responses generally vary even more than physiological responses, so experimental results in the social sciences can be expected to fluctuate more widely than in medicine.

All of this means that there is at least as much reason to worry about reporting and publication biases in social science as in medicine, and probably more reason. But consumers of social science research, including legal scholars, tend to ignore the problem. In law reviews, as in the popular press, it is common for one or two experimental results to be cited, uncritically, as proof positive of a universal feature of human psychology—like the inability or un-

May Distort Science, 5 PLOS MED. 1418, 1418 (2008), available at <http://www.plosmedicine.org/article/info:doi/10.1371/journal.pmed.0050201>.

122. See, e.g., Anthony N. DeMaria, *Publication Bias and Journals as Policemen*, 44 J. AM. C. CARDIOLOGY 1707, 1707 (2004); Philippa J. Easterbrook et al., *Publication Bias in Clinical Research*, 337 LANCET 867, 870-71 (1991); Fotini K. Kavvoura et al., *Selection in Reported Epidemiological Risks*, 4 PLOS MED. 456, 457 (2007), available at <http://www.plosmedicine.org/article/info%3Adoi%2F10.1371%2Fjournal.pmed.0040079>; Monika K. Krzyzanowska et al., *Factors Associated with Failure to Publish Large Randomized Trials Presented at an Oncology Meeting*, 290 JAMA 495, 495, 499 (2003); Nikolaos P. Polyzos et al., *Publication Bias in Reproductive Medicine: From the European Society of Human Reproduction and Embryology Annual Meeting to Publication*, 26 HUM. REPROD. 1371, 1371 (2011); Lakshmi Sridharan & Philip Greenland, *Editorial Policies and Publication Bias: The Importance of Negative Studies*, 169 ARCHIVES INTERNAL MED. 1022, 1022-23 (2009); Erick H. Turner et al., *Selective Publication of Antidepressant Trials and Its Influence on Apparent Efficacy*, 358 NEW ENG. J. MED. 252, 252 (2008).

123. See, e.g., Ioannidis, *supra* note 121, at 698.

124. See Robert J. MacCoun, *Conflicts of Interest in Public Policy Research*, in CONFLICTS OF INTEREST: CHALLENGES AND SOLUTIONS IN BUSINESS, LAW, MEDICINE, AND PUBLIC POLICY 233, 234 (Don A. Moore et al. eds., 2005); cf. Robert J. MacCoun, *Biases in the Interpretation and Use of Research Results*, 49 ANN. REV. PSYCHOL. 259, 281 (1998).

willingness of jurors to follow instructions to disregard or limit their use of evidence.

Reporting and publication biases probably skew the psychology literature against the efficacy of limiting instructions. It might be thought that the biases would operate the other way, in favor of the positive finding that the instructions actually work. Fundamentally, though, most of the mock jury experiments have been set up to test not the effect of evidentiary instructions, but the effect of inadmissible or partially admissible evidence, with or without an evidentiary instruction. (That is why some of the experiments did not bother to test the effect of the evidence without a limiting instruction, but instead used jurors who were not exposed to the evidence as the control.) A positive finding in this context is a finding of jury bias, not a finding of successful debiasing. Moreover, many of the researchers in this area have made it clear that, based on first principles, they are at a minimum extremely skeptical that evidentiary instructions can work.¹²⁵ That may help to explain why results pointing in the other direction, like the ones reported in the LSE study, tend to get ignored or mischaracterized by later researchers.¹²⁶

Ordinarily, the reporting and publication biases for results confirming the experimenters' expectations—biases that in the aggregate favor the conventional wisdom—are balanced out, to some degree, by biases in favor of results that are novel or interesting. So it might be thought that results showing that evidentiary instructions actually work might be *more* likely to be reported and published, precisely because they go against the conventional wisdom. But psychologists in this field tend to see themselves as battling the conventional wisdom of lawyers and judges, not the conventional wisdom of other psychologists. They tend to see themselves as allied with other psychologists on the side of science, taking arms against the muddled, scientifically illiterate assumptions of the law.¹²⁷ So results showing that evidentiary instructions are ineffective, despite being expected, are also attractively contrarian: they cast doubt on “the law’s rationale.”¹²⁸ It is probably no accident that results showing that evidentiary instructions are effective tend to crop up more often when psychologists think the law *distrusts* them: for example, in the context of pretrial publicity, where courts have tended to worry that juries will not put aside what they have read or heard about a case before trial, and psychologists—or at least some of them—have apparently wanted to defend the freedom of the press.¹²⁹

The upshot is that reporting and publication biases have probably skewed the experimental psychology literature against the effectiveness of evidentiary

125. See, e.g., HASTIE ET AL., *supra* note 22, at 87; Doob & Kirshenbaum, *supra* note 61, at 89, 95-96.

126. See *supra* notes 96-100 and accompanying text.

127. See, e.g., Nietzel et al., *supra* note 56, at 33-34; Tanford et al., *supra* note 74, at 335; Wissler & Saks, *supra* note 13, at 39, 43.

128. Wissler & Saks, *supra* note 13, at 39, 43.

129. See, e.g., Freedman et al., *supra* note 87, at 260; Simon, *supra* note 60, at 41.

instructions. As we saw earlier, design limitations in many mock jury studies have likely skewed the results in the same direction. And even on their face the studies fall well short of suggesting, plainly and consistently, that evidentiary instructions do not and cannot work.

Meta-analysis. What *do* the mock jury experiments indicate about the efficacy of evidentiary instructions? One way to answer that question is by meta-analysis, combining the results of the studies and testing, quantitatively, for effects across all of the data.¹³⁰ Meta-analysis is not a cure-all: reporting and publication biases can still plague the results, and a badly done meta-analysis can, of course, introduce new errors.¹³¹ Properly handled, though, meta-analysis allows researchers to take into account at least some of the design limitations of individual studies and to combine the results in a way that provides greater statistical power than any of the individual studies. It also provides a way to combine results more systematically than the kind of impressionist overview that I offered earlier in this Article.

As it happens, a broad meta-analysis of mock jury experiments on evidentiary instructions was published half a decade ago, consolidating the results of most of the studies I tabulated, as well as some unpublished results I have not discussed.¹³² The researchers expected to find that evidentiary instructions were ineffective and counterproductive, but their conclusions were more nuanced:

[W]hen inadmissible evidence does make a significant impression on jurors, a corrective judicial admonition does not fully eliminate the impact. Both defense-slanted and prosecution-slanted [evidence] retained a significant impact on verdicts even after judicial admonition. This effect, although small, was quite robust. For pro-prosecution [evidence], a stronger effect (i.e., less success of the instruction) was associated with judicial instructions that failed to provide a reason for inadmissibility or justified the admonition with a statement that indicated that the evidence was illegally obtained. Conversely, a smaller effect size was apparent when judicial instruction provided a reason for inadmissibility, for example when the judge explained that the evidence was not reliable, was hearsay, or had “no bearing” on the case. Clearly, jurors respond to specific information they can understand and appreciate. Smaller effect sizes were also associated with the addition of a general charge at the end of the trial that required jurors to disregard any evidence ruled inadmissible. The four tests in which dependent measures were taken after jury deliberation suggest that deliberations may likewise diminish the influence of otherwise damaging inadmissible information.¹³³

130. See, e.g., Lisa A. Bero, *Evaluating Systematic Reviews and Meta-Analyses*, 14 J.L. & POL'Y 569, 570 (2006); Jeremy A. Blumenthal, *Meta-Analysis: A Primer for Legal Scholars*, 80 TEMP. L. REV. 201, 202 (2007).

131. See Bero, *supra* note 130, at 580; Blumenthal, *supra* note 130, at 217-18.

132. See Steblay et al., *supra* note 26, at 469.

133. *Id.* at 486.

In other words, evidentiary instructions work, albeit imperfectly, and they work better when the judge gives the jury a reason to follow them, when they are given at the end of the trial, and when jurors are asked to deliberate before returning a verdict. Averaging across all studies—including the studies where the jurors were not given a reason to follow the instruction, where they received the instruction after hearing the evidence but not at the end of the trial, and where they did not deliberate—evidentiary instructions reduced but did not wholly eliminate the impact of inadmissible and partially admissible evidence. The evidence retained an effect on verdicts even after the instructions were given, but the effect, on average, was modest. And those were the results even given the methodological deficiencies that the meta-analysis could not correct (for example, the widespread weaknesses in the legal instructions and experimental directions given to the mock jurors) and the reporting and publication biases that have likely resulted in a systematic understating of the effect of evidentiary instructions.¹³⁴ The authors of the meta-analysis also noted that some promising possibilities for making evidentiary instructions more effective—admonishing the jury at the beginning of the trial, and asking jurors to promise not to use inadmissible evidence—have received little if any testing with mock jurors.¹³⁵

Meta-analysis thus confirms what our impressionistic review of the mock jury studies suggested: the studies do not show that evidentiary instructions do not work, let alone that they cannot work. What the studies suggest is what we should have expected: that evidentiary instructions work, but imperfectly, and that they work better under some circumstances than others. It makes sense to recognize the limitations of evidentiary instructions and to try to figure out when and how they are likely to work best. It does not make sense to treat them as obviously and inherently ineffective. That kind of easy cynicism clouds our thinking about evidentiary instructions—and, as I will later argue, about jury trial more generally.

134. There are statistical techniques that can allow a meta-analysis to take reporting and publication biases into account, *see* Blumenthal, *supra* note 130, at 217-18, and they were used by Steblay et al. to calculate a “fail-safe N ” for each of the hypotheses they tested—that is, “the number of studies averaging null results . . . that would be needed in order to bring the average probability of a type I error to a desired level of significance, in this case, a value of $p = .05$,” *see* Steblay et al., *supra* note 26, at 475. These calculations produced numbers sufficiently large to suggest that the effects found by the meta-analysis were not spurious, but they do not provide the basis for any straightforward estimate of the extent to which reporting or publication biases may have distorted the size of the effects.

135. *See* Steblay et al., *supra* note 26, at 487 (noting that the impact of the ability of “courts to ‘contract’ with jurors not to use” inadmissible evidence remains untested); *id.* at 488 (stating that “very few [of the studies] address pretrial instruction”). For reasons to think that it may help to give evidentiary instructions at the beginning of the trial, *see* also Simon, *supra* note 22, at 554-58.

II. THE PROCEDURAL IMPERATIVE REEXAMINED

Neither common sense, nor the “story model,” nor the available empirical evidence justifies the widespread view that juries do not and cannot follow instructions to disregard or to limit their use of evidence. Since that view is so widespread though—since it amounts to a kind of orthodox cynicism among lawyers, judges, and scholars—why do we continue to rely on evidentiary instructions? The conventional answer is necessity. We have to pretend that evidentiary instructions work, even though we know that they do not, because our system depends on them.¹³⁶ The Supreme Court has explained:

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.¹³⁷

The need is thought very great: the faith that juries follow their instruction is often said to be “fundamental to our system of justice,”¹³⁸ a “crucial assumption underlying our constitutional system of trial by jury.”¹³⁹

Almost no one, though, ever tries to spell out precisely *how* a belief in the efficacy of jury instructions, and more particularly in the efficacy of *evidentiary* instructions, is “fundamental” or “crucial” to “our system of justice,” or even why it represents “a reasonable practical accommodation” of competing interests. Filling in the blanks proves difficult, for reasons I will explain shortly. At the outset, though, it is worth noting a fact that, on its face, is in some tension with the extravagant claims often made about the necessity of relying on evidentiary instructions: “our system” does not always rely on them. For one thing, they appear to be far less important in civil cases than in criminal cases. Reviewing videotaped jury deliberations from fifty civil trials in Arizona, for example, researchers expected to find, but did not find, evidence of jurors struggling with instructions asking them to perform “mental gymnastics,” like using a criminal record only to assess credibility.¹⁴⁰ Few of the fifty trials involved limiting instructions, and the limiting instructions that were given rarely pertained to anything of importance.¹⁴¹ Even in criminal cases, moreover, courts will not always trust evidentiary instructions. The Supreme Court has

136. See, e.g., Smith, *supra* note 4, at 1491-92.

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

138. United States v. Cardall, 885 F.2d 656, 668 (10th Cir. 1989).

139. Francis v. Franklin, 471 U.S. 307, 325 n.9 (1985).

140. Shari Seidman Diamond et al., *The “Kettleful of Law” in Real Jury Deliberations: Successes, Failures, and Next Steps*, 106 NW. U. L. REV. 1537, 1603-04 (2012).

141. *Id.* at 1605; Conversation with Shari Seidman Diamond (Nov. 1, 2010). Some of the juries received instructions to disregard or to limit their use of evidence of insurance coverage. Those instructions appeared to be only partially effective, but jurors often speculated about insurance even in cases where it was never mentioned during the trial. See Shari Seidman Diamond & Neil Vidmar, *Jury Room Ruminations on Forbidden Topics*, 87 VA. L. REV. 1857, 1875-95 (2001).

barred the use of evidentiary instructions to cure the prejudice from evidence of involuntary confessions¹⁴² and certain “powerfully incriminating” statements by nontestifying codefendants;¹⁴³ in these two contexts, the Court has ruled, evidentiary instructions must be treated as *per se* ineffective. Outside these contexts, courts decide on a case-by-case basis whether evidentiary instructions are adequate to cure prejudice. The answer is usually yes, but not always: sometimes courts conclude that jurors are likely to be unwilling or unable to follow an instruction to disregard or a limiting instruction, because the inference they are asked to avoid seems too natural or attractive, or because the evidence seems too sensational for a juror to put out of mind.¹⁴⁴ Even in criminal cases, therefore, we know it is possible for courts to distrust evidentiary instructions, because they sometimes do so. The question is whether something about our system requires that this category of cases be kept narrow—something other than the long tradition of trusting in the effectiveness of evidentiary instructions.

One way to address that question is through a thought experiment: what would happen if we dispensed with the traditional presumption that juries can be trusted to follow their instructions? What kinds of strains would that likely place on our system of adjudication, and how might those strains be resolved? What if the traditional presumption was not reversed, but only relaxed, and the instructions were assumed to work, but only imperfectly? My strategy for pursuing these questions will be to explore first the consequences of treating jury instructions as wholly ineffective, and then the consequences of treating them as only partially efficacious. For both versions of the thought experiment, I will look first at instructions on substantive law and then at evidentiary instructions. Substantive instructions and evidentiary instructions are often discussed interchangeably, but they raise different considerations.

A. *The Consequences of Inefficacy*

Begin, then, by imagining that we reversed the traditional presumption that jurors can be trusted to follow their instructions. Suppose we assumed instead that, across the board, jurors cannot or will not do what judges tell them to do. What would that mean?

If jurors disregard their *substantive* instructions, it means that they are applying their own norms and standards rather than the ones that judges tell them to apply. It means, in essence, that juries are finding the law as well as the facts. This was once part of their official duties—an aspect of jury trial famously

142. *Jackson v. Denno*, 378 U.S. 368, 382 n.10, 388-89 (1964).

143. *Bruton v. United States*, 391 U.S. 123, 135-36 (1968); *see also* *Gray v. Maryland*, 523 U.S. 185, 192 (1998); *Richardson v. Marsh*, 481 U.S. 200, 211 (1987).

144. *See, e.g.,* *Shepard v. United States*, 290 U.S. 96, 104 (1933); *Schmunk v. State*, 714 P.2d 724, 730 (Wyo. 1986).

celebrated by the American revolutionaries.¹⁴⁵ Everyone agrees that, at least on occasion, juries today still perform this function *de facto*; the debate about jury nullification is largely a debate about how common the practice is, how happy or distraught it should make us, and whether juries have a “right” or merely a “power” to refuse to apply laws that they think are unwise or unjust. There is also debate about whether and to what extent juries wind up applying their own normative standards even when they do not consciously decide to disregard their substantive instructions. What matters for present purposes is this: if juries disregard their legal instructions, the effect is to substitute the jury’s normative standards for the law on the books. It does not threaten or diminish trial by jury; on the contrary, it expands the jury’s role. What it threatens and diminishes is the effectiveness of statutes and case law to control the outcomes of trials. That, in turn, diminishes the roles of legislatures and of judges. It poses obvious challenges, as well, to the consistency and predictability of the law.

We could have a perfectly coherent system of jury trial without believing that juries follow their substantive instructions. It would be a system, though, in which the substantive legal instructions received by juries were largely irrelevant, a system in which jurors applied their own common-sense ideas about justice instead of the technical legal standards prescribed by statutes and case law.¹⁴⁶ There is a respectable body of opinion that this is, in fact, largely the system that we *do* have. Abandoning the presumption that juries follow their substantive instructions would bring us all, essentially, into that camp. It would not mean abandoning the very idea of jury trial, but it would mean reconciling ourselves to a larger role for the jury than the one to which we have grown accustomed, and radically smaller roles for legislatures and judges.

The consequences of suspending our faith in *evidentiary* instructions, though, would be considerably less dramatic.¹⁴⁷ The rules of evidence, unlike

145. See, e.g., AKHIL REED AMAR, *AMERICA’S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* 424-25 (2012); LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 211 (3d ed. 2005); Jonathan Bressler, *Reconstruction and the Transformation of Jury Nullification*, 78 U. CHI. L. REV. 1133, 1133, 1139 (2011); Kenneth A. Krasity, *The Role of the Judge in Jury Trials: The Elimination of Judicial Evaluation of Fact in American State Courts from 1795 to 1913*, 62 U. DET. L. REV. 595, 620 n.185 (1985). *But cf.*, e.g., Stephen C. Yeazell, Book Review, 13 LAW & HIST. REV. 444, 445-46 (1995) (reviewing MARIANNE CONSTABLE, *THE LAW OF THE OTHER: THE MIXED JURY AND CHANGING CONCEPTS OF CITIZENSHIP, LAW, AND KNOWLEDGE* (1994)) (arguing that by the late 1700s, the jury had evolved into “a fact-finding (rather than . . . law-declaring) body,” and that even medieval juries “exercised their lawmaking powers at the margins”).

146. See, e.g., NORMAN J. FINKEL, *COMMONSENSE JUSTICE: JURORS’ NOTIONS OF THE LAW* 319-37 (1995).

147. It might be thought that suspending faith in evidentiary instructions would necessarily mean suspending faith in all jury instructions, including those addressing substantive law—under reasoning that if we cannot believe in the one, we cannot believe in the other. Many discussions of evidentiary instructions seem to proceed on this assumption. The presumption that juries follow evidentiary instructions is often treated as inseparable from the broader presumption that they follow *all* of their instructions. See, e.g., Smith, *supra* note

the substantive law of crimes and civil duties, can typically be applied without the jury's cooperation, and that is how they usually *are* applied. Judges apply rules of evidence by keeping proof from the jury. No instruction is necessary because the jury does not see or hear the evidence in the first place. Evidentiary instructions are required only if (a) the judge decides that evidence that the jury has already seen or heard is inadmissible, or (b) the judge decides that evidence is admissible, but only for particular purposes or against particular parties. These situations occur with some regularity, at least in criminal cases; that is why evidentiary instructions are a familiar feature of American trial practice. But they are not a constant, universal feature of American trial practice. Most evidence law gets applied in jury trials without the use of evidentiary instructions, something that cannot be said about substantive law.

If we assumed that evidentiary instructions do not work, it would not mean abandoning evidence law in jury trials. It would mean accepting two practical limitations on evidence law: first, that wrongly introduced evidence cannot be "un-introduced," and second, that legislatures and judges cannot control how juries use evidence once it has been given to them.

The first limitation would mean that evidence improperly put before the jury would be grounds for a mistrial, unless—as would usually be the case—having the jury consider the evidence satisfied the harmless error standard. Most evidentiary errors *do* qualify as harmless error, even when no curative instruction is given. Either the evidence addresses a tangential issue, it is cumulative, the other side wins anyway, or the rest of the evidence in the case is so strong that the evidence in question is unlikely to matter. In some cases, though, the admission of certain evidence before the jury would be deemed prejudicial error in the absence of a curative instruction. If we stopped presuming that evidentiary instructions worked and instead presumed that they did not work, those would be cases in which the judge would have to declare a mistrial and try the case anew.

Accepting the second limitation—the impossibility of controlling how juries use evidence—would mean abandoning the idea of limited admissibility. That, in turn, would mean changing how we administer rules of evidence that prohibit certain kinds of evidence, but only when introduced for particular, forbidden purposes. The hearsay rule is, of course, the most famous rule of this

4, at 1450-52. But the questions are in fact distinguishable. Some of the arguments for doubting the efficacy of evidentiary instructions apply less strongly, if at all, to substantive instructions. (As we have seen, the arguments are largely unpersuasive even for limiting instructions, but put that to one side for the moment.) The common-sense worries about the impossibility of "unringing the bell" do not apply to substantive instructions. Neither do the concerns about evidentiary instructions supposedly raised by the story model. The efficacy of evidentiary instructions and the efficacy of substantive instructions are separate issues, and nothing requires that they be resolved in the same way. *Cf.* *Gacy v. Welborn*, 994 F.2d 305, 313 (7th Cir. 1993) ("Cases doubting jurors' ability to put out of their minds events vividly described in court have not expressed equivalent doubts about jurors' ability to follow instructions on the law.").

kind, and almost certainly the one most frequently invoked. We ban hearsay only when introduced to prove “the truth of the matter asserted”—that is, only when used as proof of whatever proposition the out-of-court speaker asked his or her listeners to believe. Since out-of-court statements are often useful both for this purpose and for some other purpose, the hearsay rule is often administered through a limiting instruction. If a tort defendant was warned that she was driving too fast, the warning is admissible, but at the defendant’s request the jury will be told that it cannot be used to prove that the defendant was, in fact, driving too fast—only that the issue was called to her attention.¹⁴⁸

If we thought jurors could not or would not follow that instruction, we would have to choose between either excluding the evidence or admitting it for all purposes. Which of these options seemed more attractive would depend on a kind of calculation very familiar to judges and trial lawyers: balancing the value of the evidence against its capacity to cause unfairness or to lead the jury astray.¹⁴⁹ We would face a similar choice when the hearsay rules barred the use of the evidence against one party but not against other parties—which is often the case when the statement in question was made by one of the parties, and is therefore admissible against that party, but only that party, under the traditional hearsay exception for admissions. If we stopped believing that limiting instructions worked, and if we were committed to having a single trial, we would either have to allow the statement to come in against all parties or exclude it altogether. Again, the choice would be all or nothing, and it would be made, probably, by weighing the ways in which the evidence would assist a fair and accurate resolution of the case against the ways in which it might make that kind of resolution less likely.

None of this would radically alter the nature of evidence law, let alone the system of jury trial. Weighing “legitimate probative value” against “capacity for prejudice” is already a staple of evidence law. Nor would it be wholly novel to treat the admissibility of evidence as an all-or-nothing proposition. We already do that, for example, when applying certain hearsay exceptions: if the statement is admissible for certain purposes, we sometimes simplify matters by allowing it in for all purposes.¹⁵⁰ In multiple-defendant criminal cases, more-

148. See FED. R. EVID. 105 (governing limited admissibility of evidence); see also *United States v. Johnson*, 71 F.3d 539, 543 (6th Cir. 1995) (discussing testimony admitted as evidence of knowledge, not for the truth of the matter asserted).

149. See FED. R. EVID. 403 (providing for trial judge’s balancing of evidence’s probative value against its risk of unfair prejudice). On the broad delegation of this balancing to the trial judge under modern evidence law, see Eleanor Swift, *One Hundred Years of Evidence Law Reform: Thayer’s Triumph*, 88 CALIF. L. REV. 2437, 2442-45, 2461-71 (2000).

150. Under federal law, for example, a tort plaintiff who consults a physician for an expert opinion can ask the physician to testify about what the plaintiff told him in the course of the examination. See FED. R. EVID. 803(4). The thinking is that the statement is admissible to explain the basis for the expert’s conclusion, and juries are unlikely to follow an instruction not to use the statement as “substantive evidence” (that is, to prove the truth of what the statement asserts), so the statement might as well be allowed in without limitation. See FED.

over, the *Bruton* doctrine effectively means that many statements by a nontestifying defendant will either be admissible against all defendants or against none.¹⁵¹ It would be a significant change to treat *all* evidentiary questions in this way, eliminating the idea of limited admissibility. Conceivably it would be a change for the worse, although that is far from clear. What it plainly would not be is a change that threatened our whole system of trial by jury, or even the basic nature of our rules of evidence.

B. *The Consequences of Imperfection*

The implications would be even more limited if instead of assuming that jury instructions are *wholly* ineffective we assumed, more realistically, that they sometimes work and sometimes fail. What would it mean to accept that instructions work only imperfectly?

If we made that assumption with regard to *substantive* instructions, it would mean that judges and juries both play a role in determining the law. It would mean, in essence, that the judge still determines the law in the first instance, but that the jury sometimes overrules the judge's determination. Juries almost certainly *do* play this role.¹⁵² It is a significantly larger role than we officially countenance, but not as large a role as juries would play if substantive legal instructions were a completely empty exercise.

Similarly, if we assumed that *evidentiary* instructions sometimes fail, the implications would be more limited than if we assumed they always fail—and more limited, too, than the implications of assuming that *substantive* instructions sometimes fail. It would mean viewing evidentiary instructions as essentially equivalent to a request or a recommendation. An instruction to disregard evidence would be understood to operate, effectively, as a request or recommendation that the jury disregard the evidence. An instruction not to use evidence in a particular way would be understood to operate, effectively, as a request or recommendation that the jury not use the evidence in that manner.

If we understood evidentiary instructions in this way—and we probably should—several things would follow. First, if we want juries to honor the request or follow the recommendation, we should give them reasons for doing so. As we have seen, the mock jury studies on the whole support the intuition that juries are more likely to follow evidentiary instructions when the grounds for

R. EVID. 803 advisory committee's note. California law treats prior statements by a testifying witness in a similar manner. If the statement is inconsistent with the witness's in-court testimony, and therefore admissible for purposes of impeachment, it is also admissible as substantive evidence. See CAL. EVID. CODE § 1235 (Deering 2012). The drafters of the Federal Rules of Evidence proposed a similar rule, but Congress limited its scope to situations involving a prior statement under oath. See FED. R. EVID. 801(d)(1); FED. R. EVID. 801 advisory committee's note; H.R. REP. NO. 93-1597, at 10 (1974) (Conf. Rep.).

151. See *Bruton v. United States*, 391 U.S. 123, 135-37 (1968).

152. See, e.g., KALVEN & ZEISEL, *supra* note 107, at 219-97, 497.

the instruction are explained to them.¹⁵³ Second, regardless of whether jurors are given reasons to follow an evidentiary instruction, we can never be certain that the instruction will in fact be followed. If we want certainty that wrongfully introduced evidence (say, an involuntary confession) will not influence the verdict—because, for example, we think it would violate an important constitutional value (say, the privilege against compulsory self-incrimination)—the only solution is for the judge to declare a mistrial and to start the case over.¹⁵⁴ If we want certainty that evidence will not be used in a particular, forbidden way, the only solution is to exclude it altogether. Third, evidentiary instructions are not meaningless, especially if the judge explains their basis to the jury. If we want the jurors to disregard evidence, or to use it only in a particular way, asking them to do it, and explaining why they are being asked to do it, is a sensible procedure—but not foolproof.

Whether a procedure that is sensible but not foolproof is good enough will depend both on how likely it seems that the instruction will work and how important it is that the instruction work flawlessly. Both factors will vary. The hearsay rule, for example, is usually said to reflect a concern that statements made outside of court and reported secondhand to the jury are likely to be unreliable. That is a concern that jurors can be expected to understand, particularly when it is explained to them.¹⁵⁵ And it is not a concern that, on its face, makes it intolerable for a jury to place *any* reliance on out-of-court statements. (Set aside, for the moment, the special considerations that may arise under the Confrontation Clause when hearsay is introduced against a criminal defendant.) So implementing the hearsay rule through limiting instructions may make good sense. On the other hand, when evidence is excluded because it seems likely to appeal to racial prejudice or to inflame the jury's passions, we may not want to tolerate any chance that the evidence influenced the verdict—and putting evidence of this kind out of mind may be particularly difficult for the jury. So relying on a curative instruction to remedy the wrongful introduction of evidence of this kind may not make much sense. What is called for is a context-specific weighing of the likelihood that an evidentiary instruction will work and the costs of it failing.

That may sound like the blandest, most boring kind of recommendation imaginable: yet another totality-of-the-circumstances balancing test. But this

153. See *supra* note 133 and accompanying text. For similar findings regarding nonevidentiary instructions, see, for example, Diamond & Casper, *supra* note 26, at 534 (reporting that mock jurors deciding a price-fixing case reduced their damage awards when told that the awards would automatically be tripled, despite being admonished not to do so, but that awards were not reduced if the judge explained why the law provided for automatic trebling of damages, and how reducing compensatory damages in light of the trebling would frustrate the purpose behind the statutory provision).

154. Cf. *Jackson v. Denno*, 378 U.S. 368, 388-89 (1964) (discussed *supra* text accompanying note 31).

155. The available evidence tends to support that intuition. See *supra* notes 33, 82, 133, and accompanying text.

kind of approach would be fairly revolutionary for evidentiary instructions. Generally, as we have seen, the likelihood that an evidentiary instruction will fail is taken simultaneously to be zero (when discussing, as sober professionals, what courts will “presume”) and one (when discussing, as hardheaded realists, what “all practicing lawyers know”). And generally it is assumed, without any real reflection, that juries must be assumed to follow their instructions to the letter if our system is to function in a defensible manner. Thinking about evidentiary instructions more realistically, and less categorically, could have significant and largely beneficial consequences.

III. EVIDENTIARY INSTRUCTIONS RECONSIDERED

If we stopped assuming that evidentiary instructions cannot work, but also stopped assuming that our system relies on them working perfectly, what would be the consequences? What if we assumed, instead, that evidentiary instructions can and do work, but not flawlessly, and better under some conditions than others? What would follow if we viewed juries as groups of people, capable of controlling how they reason—but imperfectly, and within limits? The result would be clearer thinking about evidentiary instructions and, possibly, about the jury trial more generally.

A. *Evidentiary Instructions and Rules of Practice*

Start with the implications for how we think about evidentiary instructions. I have already touched on one of these: judges should give jurors reasons to follow evidentiary instructions, since that is likely to make them work better. What if we cannot come up with an explanation for the instruction that will make sense to jurors? Then it may be a good time to reexamine the rule that the instruction attempts to implement. The response should not be what it has too often been: a shrug of the shoulders and the observation that we know evidentiary instructions cannot *really* work—that wanting evidentiary instructions to make sense to jurors, and wanting jurors to actually follow them, is like hoping that Santa Claus will come.

The worst example of this kind of world-weary rationalization is probably the Supreme Court’s decades-old endorsement, in *Michelson v. United States*,¹⁵⁶ of the bizarre practice of impeaching a defendant’s character witnesses by asking whether they have heard rumors about the defendant that are never shown to be true—or even proven to be actual rumors. “You testified that the defendant is honest and law abiding. Have you ever heard that he killed his first wife for the insurance money?” When this practice was challenged in *Michelson*, Justice Rutledge sensibly reasoned that “[t]he very form of the question [is] itself notice of the fact to the jury,” and that impeachment should be based

156. 335 U.S. 469 (1948).

on proof, not on unsupported innuendo.¹⁵⁷ But Justice Rutledge wrote in dissent. The majority opinion, by Justice Jackson, ruled that the practice was acceptable as long as the judge gave adequate limiting instructions, like the ones given by the trial judge in *Michelson*.

Those instructions—there were three of them—were quoted with approval by the Supreme Court, and they are worth quoting here:

[1] “I instruct the jury that what is happening now is this: the defendant has called character witnesses, and the basis for the evidence given by those character witnesses is the reputation of the defendant in the community, and since the defendant tenders the issue of his reputation the prosecution may ask the witness if she has heard of various incidents in his career. I say to you that regardless of her answer you are not to assume that the incidents asked about actually took place. All that is happening is that this witness’ standard of opinion of the reputation of the defendant is being tested. Is that clear?”

.....

[2] “Again I say to the jury there is no proof that Mr. Michelson was arrested for receiving stolen goods in 1920, there isn’t any such proof. All this witness has been asked is whether he had heard of that. There is nothing before you on that issue. Now would you base your decision on the case fairly in spite of the fact that that question has been asked? You would? All right.”

.....

[3] “In connection with the character evidence in the case I permitted a question whether or not the witness knew that in 1920 this defendant had been arrested for receiving stolen goods. I tried to give you the instruction then that that question was permitted only to test the standards of character evidence that these character witnesses seemed to have. There isn’t any proof in the case that could be produced before you legally within the rules of evidence that this defendant was arrested in 1920 for receiving stolen goods, and that fact you are not to hold against him; nor are you to assume what the consequences of that arrest were. You just drive it from your mind so far as he is concerned, and take it into consideration only in weighing the evidence of the character witnesses.”¹⁵⁸

Justice Jackson acknowledged that the jury was likely to have found these instructions “almost unintelligible.”¹⁵⁹ No matter, he reasoned: they were “no more difficult to comprehend or apply than those upon various other subjects.”¹⁶⁰

Well—yes, they were. Each of the defendant’s character witnesses had denied ever hearing that Michelson had been arrested for receiving stolen property. If the jury was not to assume that the arrest took place, what possible assis-

157. *Id.* at 494-95 (Rutledge, J., dissenting).

158. *Id.* at 472 n.3 (majority opinion). The Court also thought it significant that the trial judge had taken “pains to ascertain, out of presence of the jury, that the target of the question was an actual event, which would probably result in some comment among acquaintances if not injury to defendant’s reputation.” *Id.* at 481.

159. *Id.* at 485.

160. *Id.*

tance could the questioning provide “in weighing the evidence of the character witnesses”? Even Justice Jackson seemed confused. At one point he explained that the inquiries permitted by the trial judge were proper “because reports of [Michelson’s] arrest for receiving stolen goods, if admitted, would tend to weaken the assertion that he was known as an honest and law-abiding citizen.”¹⁶¹ Elsewhere Justice Jackson suggested that the point of the question was to “test the sufficiency of [the witness’s] knowledge by asking what stories were circulating concerning events, such as one’s arrest, about which people normally comment and speculate.”¹⁶² Neither theory could explain how the jury was to make use of the questioning when the witnesses denied hearing about the arrest and the jury received no evidence that the arrest had actually occurred.

The instructions in *Michelson* were not simply difficult to apply. They were incoherent.¹⁶³ The Supreme Court defended the instructions by arguing, essentially, that evidentiary instructions *in general* cannot be expected to work. It was the same idea that Justice Jackson was to put forward more forcefully the following year, when he wrote about the “naive assumption” that “all practicing lawyers know to be unmitigated fiction.”¹⁶⁴ It was precisely the dodge I have been arguing against.

The same dodge has long helped to rationalize another rule relating to evidence of the defendant’s character: the rule that a defendant who chooses to testify can be impeached with evidence of his prior criminal convictions. If the defendant stays off the stand, his prior record—like any other evidence of his

161. *Id.* at 484.

162. *Id.* at 479.

163. They were not, alas, unique in this regard. Here is another example. When a witness in a federal trial is impeached with evidence that he or she has a motive to fabricate, a prior consistent statement by the witness can be introduced for purposes of rehabilitation. But unless the statement was made before the motive to fabricate arose, the jury is instructed that the prior statement can be used only for assessing the witness’s credibility, not to prove the truth of what the witness asserts. *See, e.g.*, *United States v. Simonelli*, 237 F.3d 19, 27 (1st Cir. 2001); *United States v. Gluzman*, 154 F.3d 49, 51 (2d Cir. 1998). This has been described, with understatement, as a distinction that “may well be meaningless to jurors.” *Simonelli*, 237 F.3d at 27; *see also, e.g.*, Frank W. Bullock, Jr. & Steven Gardner, *Prior Consistent Statements and the Premotive Rule*, 24 FLA. ST. U. L. REV. 509, 540 (1997). Some state evidence codes avoid this problem by making any prior statement that is admissible for rehabilitation also admissible to prove the truth of what it asserts. *See, e.g.*, CAL. EVID. CODE § 1236 (Deering 2012); MINN. R. EVID. 801(d)(1)(B) (2012). Consideration has also been given to amending the Federal Rules of Evidence so that they would operate similarly. *See* Memorandum from Daniel J. Capra, Reporter, on Possible Amendment to Evidence Rule 801(d)(1)(B) to the Advisory Committee on Evidence Rules (Oct. 1, 2011), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Evidence/EV2011-10%20Meeting.pdf>. Rule 801(d)(1)(B) already provides a hearsay exception for certain prior consistent statements of a testifying witness, but the Supreme Court has interpreted that exception to apply only to statements that were made before the motive to fabricate arose. *See* *Tome v. United States*, 513 U.S. 150, 167 (1995).

164. *Krulwitch v. United States*, 336 U.S. 440, 453 (1949) (Jackson, J., concurring).

bad character—is usually inadmissible, on the ground that jurors are likely to be too swayed by it. When the defendant testifies, he is thought to put his character at issue and therefore to make it fair game—but only one dimension of his character: his truthfulness. So jurors are told that they should consider the defendant's prior convictions only in assessing his credibility as a witness, not for purposes of deciding whether he is likely to have committed the crimes he is alleged to have committed.

Unlike the instruction in *Michelson*, instructions to consider a defendant's prior record only for impeachment are fully coherent. The problem is that the rules they try to implement are difficult to justify. The fact that the defendant has earlier been convicted of a crime (unless, perhaps, it is a crime like perjury) will rarely change the likelihood that, if guilty of the current charge, he would falsely deny it.¹⁶⁵ On the other hand, the defendant's prior convictions often will make it a good deal more likely that he is, in fact, guilty—even if the evidence is not quite as probative on this point as people, including jurors, tend to think. So asking jurors to use the defendant's prior record only for impeachment is asking them to use the evidence for something on which it sheds little light and to ignore its true logical relevance.¹⁶⁶ Judges do not explain to jurors why this makes sense, probably because judges themselves do not know why it makes sense and may doubt that it does.¹⁶⁷ Not surprisingly, the mock juror studies of limiting instructions on this topic are far more consistent than the studies of evidentiary instructions more generally: admonitions to use the defendant's prior record only for impeachment either have no effect or backfire.¹⁶⁸

The result might be only that a rule that makes little sense remains poorly implemented, except that the failure to implement *this* rule means that powerful (and arguably prejudicial) evidence of the defendant's guilt is given to the jury only if the defendant chooses to testify. There is a case to be made for allowing juries to use a defendant's record to assess criminal propensity, and there is a case to be made against it, but it is hard to think of any good arguments for allowing propensity reasoning to be used against defendants who testify but not against those who stay silent. Aside from concerns of fairness, it sets up the

165. See, e.g., Richard Friedman, *Character Impeachment Evidence: Psycho-Bayesian [!?] Analysis and a Proposed Overhaul*, 38 UCLA L. REV. 637, 637, 663-64 (1991).

166. See, e.g., H. Richard Uviller, Essay, *Credence, Character, and the Rules of Evidence: Seeing Through the Liar's Tale*, 42 DUKE L.J. 776, 813-15 (1993); cf. KALVEN & ZEISEL, *supra* note 107, at 128 (calling this instruction "one of [the law's] most heroic").

167. In *Michelson*, the Supreme Court described the whole set of rules governing character evidence as "archaic, paradoxical and full of compromises and compensations by which an irrational advantage to one side is offset by a poorly reasoned counterprivilege to the other"—a view the Court plausibly called "the general opinion of courts, textwriters and the profession." 335 U.S. at 486. The best the Court could say for these rules was that they had "somehow . . . proved a workable even if clumsy system" when administered by "wise and strong" trial judges, and that upsetting the balance might well make things worse. *Id.*

168. See *supra* notes 64, 75-76, 81, 89, and accompanying text.

wrong incentives, discouraging defendants with records from taking the stand. Defendants and defense attorneys respond to those incentives: defendants with records are, in fact, significantly less likely to testify.¹⁶⁹ And almost no one thinks that losing this testimony is a good thing. It deprives the jury of the opportunity to hear the defendant's own story, it filters out the voices and perspectives of defendants from the events documented by the criminal justice system, and it may well undermine the rehabilitative and reintegrative purposes of the criminal process.¹⁷⁰

Recognizing these effects would require acknowledging that limiting instructions in this context are likely to work poorly. That acknowledgment, in turn, has been made more difficult by the sense that evidentiary instructions are fundamental to our system and by the sense that challenging limiting instructions here would mean challenging them everywhere—because once we start asking whether the instructions actually work, defending any of them will prove impossible. That kind of all-or-nothing thinking has been fostered, in part, by the very scholars who have helped to demonstrate that jurors are unlikely to use prior record evidence only for impeachment; as often as not they have taken their work to address the “inefficacy of limiting instructions” more generally.¹⁷¹

If we stopped thinking of evidentiary instructions as obviously ineffective, and we stopped assuming that something fundamental about our system requires us to rely on them, the questions we would want to ask about any particular use of evidentiary instructions would be (1) how effective is this particular instruction likely to be, (2) how effective does it need to be in order to accomplish the purposes of the rule it tries to implement, and (3) if it is unlikely to be effective enough to serve the purposes of the underlying rule, what should be the consequences? Let me say a word or two about each of these questions, recapitulating points I have made earlier.

First, about the effectiveness of instructions: the conventional view of evidentiary instructions—“of course they don't work, but we have to pretend that they do”—has made it unnecessary and pointless to ask what kinds of instructions jurors are apt to follow and what kinds they are apt to violate. But instructions may vary widely in effectiveness, and not just because of the underlying rules they attempt to implement. The timing and phrasing of instructions are likely to matter, too. In theory, judges are supposed to weigh these matters in deciding whether to exclude evidence on grounds of unfair prejudice or admit it

169. See Eisenberg & Hans, *supra* note 99, at 1356-57.

170. See, e.g., Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. REV. 1449, 1449 (2005).

171. Wissler & Saks, *supra* note 13, at 37.

with a limiting instruction.¹⁷² In practice, though, the attention given to these issues is usually perfunctory.

Addressing them seriously is a large undertaking. Intuitions differ about which kinds of instructions, and which manners of instructing, are likely to be more effective, and the experimental results are rarely conclusive. For example, the Supreme Court reasoned in *Bruton* that juries are likely to find it especially difficult, in assessing a defendant's guilt, to disregard an incriminating statement from a nontestifying codefendant.¹⁷³ But Justice White and Justice Harlan argued in dissent that juries "can be told and can understand" that while a defendant's confession may be probative of his own guilt, his statements incriminating his codefendant are likely to be unreliable and for that reason should be disregarded.¹⁷⁴ We are in little better position today than the Court was in 1968 to resolve that dispute. Similarly, there are theoretical reasons—arising out of the story model and related ideas about "coherence-based" decisionmaking—for believing that evidentiary instructions given at the beginning of the trial ("preinstruction"),¹⁷⁵ or right after the evidence in question is presented,¹⁷⁶ are likely to be more effective than instructions given at the end of the trial. But the mock jury studies have rarely tested preinstructions, and on the whole the studies suggest, contrary to expectations, that instructions at the end of the trial are more effective than instructions right after the jury is exposed to the evidence.¹⁷⁷ There are also theoretical reasons for thinking that phrasing evidentiary instructions in particular ways—for example, explicitly asking the jury to take account of the potential biasing effect of inadmissible evidence, rather than asking them to put it out of their minds—might be more effective, but, again, the supposition lacks empirical support.¹⁷⁸ Moreover, the mock jury studies are inconsistent even on the more basic question of whether instructions are more likely to be followed if they are elaborate.¹⁷⁹ On the whole, the mock jury studies do suggest that evidentiary instructions are more apt to be followed if the judge explains the reason for the underlying rule, but even here there are results that point the other way.¹⁸⁰ None of this is good reason to treat all evidentiary instructions the same way or to ignore the experimental results; it just means

172. See FED. R. EVID. 403 advisory committee's note ("In reaching a decision whether to exclude on grounds of unfair prejudice, consideration should be given to the probable effectiveness or lack of effectiveness of a limiting instruction.").

173. *Bruton v. United States*, 391 U.S. 123, 135-37 (1968).

174. *Id.* at 141-43 (White, J., dissenting).

175. Simon, *supra* note 22, at 550-59.

176. See Demaine, *supra* note 21, at 133.

177. See Steblay et al., *supra* note 26, at 486, 488.

178. See Demaine, *supra* note 21, at 117-18, 127-30.

179. Compare Demaine, *supra* note 21, at 127-28 (finding that elaborate instructions are more likely to be followed), and Tanford et al., *supra* note 74, at 333-34 (same), with Tanford & Penrod, *supra* note 72, at 761 (concluding that a "very strong set of judges' instructions designed to eliminate joinder effects had no influence").

180. See, e.g., Pickel, *supra* note 82, at 407.

that thinking sensibly about the effectiveness of evidentiary instructions will require care and discrimination.

Second, about how effective evidentiary instructions need to be: this should depend on the purposes of the underlying rule. If, as will often be the case, the underlying rule is aimed at improving the accuracy of factfinding, perfect compliance with evidentiary instructions may be not only unnecessary but suboptimal; we may be best off if juries heavily discount the evidence in question but do not entirely disregard it. And even if factfinding would be optimized by perfect compliance, a lower degree of compliance may be acceptable if the distortion it introduces into the trial is insignificant against the background imperfections of the jury trial. When evidentiary rules are aimed not at accuracy but at influencing behavior outside of court, it will also often be true that the purposes of the rule can be achieved even if jury compliance with the instruction is far from complete.

Third, about the consequences of deciding that an evidentiary instruction cannot be relied upon: the main point here is that the consequences will typically be less dramatic than is often assumed. Sometimes the consequence should be that the underlying rule is reconsidered and possibly abandoned. At other times, recognizing that an evidentiary instruction is unlikely to work should lead us to rethink how the instruction is given, or to take different steps to accomplish the purposes of the underlying rule—like the rule of evidentiary exclusion the Supreme Court announced in *Bruton* for confessions by a nontestifying defendant that also implicate a codefendant. The point is that we have options.

B. *Jury Trial in the Realm of the Imperfect*

Thinking more sensibly about evidentiary instructions should change not only how we give those instructions and when we rely on them, but also our thinking about the jury trial more broadly. For one thing, the fact that jury instructions are likely to work imperfectly even in the best of circumstances should remind us that the jury trial, like all other forms of trial, is a human institution. It cannot be expected to operate flawlessly or to produce flawless results. The conventional view of evidentiary instructions—that they obviously do not work, but that we must assume that they are strictly followed—reflects, among other things, a discomfort with the middle ground, with the realm of the imperfect. This is the area in which rules applied by humans typically operate, and it is the realm in which juries operate. Recognizing the pervasive fallibility of the jury trial may lead us to tolerate evidentiary instructions that operate only imperfectly, but it should also prompt us to reconsider policies and practices—our strong commitment to the finality of verdicts,¹⁸¹ our continued use of the

181. Regarding the extraordinary obstacles faced by criminal defendants who wish to challenge their convictions based on new evidence, see, for example, Samuel R. Gross,

irreversible sanction of death—that implicitly treat verdicts as more reliable than what a human institution can reasonably be expected to produce.

I want to flag one other possible implication of thinking more sensibly and less categorically about evidentiary instructions. It might, and probably should, lead us to rethink our assumptions about a related category of judicial comments in jury trials: summaries and assessments of the evidence by the trial judge. This is a practice that, while still common in England, has all but vanished in the United States.¹⁸² Some states flatly prohibit it. Elsewhere, and in federal courts, a trial judge who exercises his or her theoretical power to comment on the evidence risks reversal if an appellate court concludes—as they usually do—that the comments were in any way unbalanced or biased. There is a very strong belief among American judges and American trial lawyers that it is inappropriate for the jury to hear what the judge thinks of particular witnesses or the evidence as a whole.

It was not always this way. Two hundred years ago, American trial judges, like their counterparts across the Atlantic, routinely summarized the evidence for jurors and often told jurors which witnesses they found most credible, and why. That practice disappeared throughout the United States in the middle decades of the nineteenth century, the victim—apparently—of populist distrust of judges and an increasingly powerful, increasingly assertive trial bar.¹⁸³ By the early twentieth century, a scholarly consensus began to emerge that the silencing of judges had been a change for the worse.¹⁸⁴ Wigmore, for example, claimed that barring judicial commentary on the evidence had “done more than any other one thing to impair the general efficiency of jury trial as an instrument of justice.”¹⁸⁵ The Supreme Court may have regretted the development as well: as late as 1930 the Court suggested that the phrase “trial by jury,” both at common law and in the Bill of Rights, meant a trial before twelve jurors “in the

Pretrial Incentives, Post-Conviction Review, and Sorting Criminal Prosecutions by Guilt or Innocence, 56 N.Y.L. SCH. L. REV. 1009, 1021 (2011-2012).

182. See, e.g., *United States v. Mundy*, 539 F.3d 154, 158-59 (2d Cir. 2008); Krasity, *supra* note 145, at 595-608; Renée Lettow Lerner, *The Transformation of the American Civil Trial: The Silent Judge*, 42 WM. & MARY L. REV. 195, 197-98 (2000); Jack B. Weinstein, *The Power and Duty of Federal Judges to Marshall and Comment on the Evidence in Jury Trials and Some Suggestions on Charging Juries*, 118 F.R.D. 161, 161 (1988).

183. See JOHN H. LANGBEIN ET AL., *HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS* 431-33, 513-22 (2009); Krasity, *supra* note 145; Lerner, *supra* note 182, at 201-02.

184. See LANGBEIN ET AL., *supra* note 183, at 433; Lerner, *supra* note 182, at 200 n.17.

185. 5 JOHN HENRY WIGMORE, *A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW* § 2551, at 557 (2d ed. 1923). Wigmore’s view was hardly idiosyncratic. See, e.g., Edson R. Sunderland, *The Inefficiency of the American Jury*, 13 MICH. L. REV. 302, 316 (1915) (“[N]o single reform would have so wide-reaching and wholesome an effect in promoting the efficiency of courts and improving the quality of justice obtainable there, as a return to the sensible and effective rule of the common law permitting, and in its spirit requiring, that judges should generously aid juries in reaching just conclusions on matters of fact.”).

presence and under the superintendence of a judge having power to instruct them as to the law and advise them in respect of the facts.”¹⁸⁶ But by then the professional opposition to judicial commentary on the evidence had hardened into orthodoxy.

The justifications commonly provided for this position are, first, that factfinding is the role of the jury, not the judge, and, second, that juries are apt to give too much weight to the judge’s views.¹⁸⁷ The first argument assumes what it seeks to prove: that judges should stay out of factfinding altogether. The second argument is the heart of the matter: the concern is that jurors, “over-awed by the judge’s position of authority,” will just accept the judge’s analysis of the evidence rather than sorting through the testimony and exhibits on their own.¹⁸⁸

There is little if any empirical support for that supposition. Like the prevailing wisdom about evidentiary instructions, it draws strength from a tendency to think about jury reasoning in dichotomous, either/or terms—that is to say, from a tendency to think about juries as something other than groups of people who exercise reason in determining how to respond to what they are told. Allowing a judge to comment on the evidence obviously gives the judge more influence over the verdict, but there is no reason to think that jurors, across the board, will defer uncritically to the judge’s views. Doubtless some jurors will behave that way in some cases. They are more likely to do so if the evidence is close or confusing, if the jurors themselves have no strong feelings about the parties or the allegations, and if the judge seems fair and evenhanded—that is, in precisely those cases where it makes sense for jurors to give heavy weight to the judge’s views.¹⁸⁹

186. *Patton v. United States*, 281 U.S. 276, 288 (1930); see also *id.* at 289 (quoting *Capital Traction Co. v. Hof*, 174 U.S. 1, 13-14 (1899)).

187. See, e.g., Weinstein, *supra* note 182, at 163.

188. *Id.*

189. Based on questionnaires completed by judges after actual trials, the University of Chicago Jury Project found evidence that judicial summarizing or commenting on the evidence dramatically reduced the number of cases in which the judge would have decided the case differently from the jury, but that the effect occurred only in cases where the evidence was clear, not in close cases. See KALVEN & ZEISEL, *supra* note 107, at 426-27. It is hard to know what to make of this finding, though. Kalven and Zeisel thought it showed that when juries departed from the law they did so “under the guise of resolving issues of evidential doubt,” concealing from themselves the role that “sentiment” played in their decision, and that “the momentum of the jury’s revolt is never enough to carry the jury beyond both the evidence and the judge.” *Id.* at 427. But the study relied on the trial judges themselves to assess whether the evidence was “clear” or “close,” and judges may well have provided more emphatic guidance when commenting on the evidence in cases that struck them as clear. Moreover, Kalven and Zeisel assessed the effect of judicial summaries and comments on the evidence by comparing the results obtained by judges who always engaged in one or both of these practices with the results obtained by judges who never did, and it seems likely that the two groups of judges differed in other respects as well. Judges who made use of their power to summarize or comment on the evidence were likely to be judges who took a more active role at trial in many other ways.

Discussions of this subject often proceed on the assumption that jurors should *never* be influenced by how the judge views the evidence, but it is difficult to see any reason for that position, unless it is that jurors simply cannot handle information about the judge's views—that once jurors know, or believe they know, what the judge thinks, they will be unable or unwilling to reason for themselves. That fear seems of a piece with the broad view I have been criticizing: the jury as other, the view that I have suggested underlies and is in turn reinforced by the conventional, we-need-the-eggs story about evidentiary instructions.

CONCLUSION

We think we know the myth about evidentiary instructions: the myth is that they work. But we have it backwards. The myth about evidentiary instructions is that they *don't* work, but that we need to rely on them anyway. Both of these ideas about evidentiary instructions are wrong, or at best greatly exaggerated. Evidentiary instructions probably do work, although imperfectly and better under some circumstances than others. Evidentiary instructions are not an essential part of jury trials, though, and the legal presumption that they work flawlessly is even less fundamental.

The chief objective of this Article has been to defend these descriptive claims rather than to recommend any particular reforms. Nonetheless, I have suggested some prescriptive implications along the way, and it may be helpful to summarize the most important of these now. First, relying on evidentiary instructions will often be sensible, but only if we are willing to accept—as we often should be—that the instruction will work imperfectly. Second, whether we should accept the risk that the instruction will not be followed will depend both on how likely it is that the jury will violate the instruction and on how unfair or otherwise undesirable that would be. Third, assessments of the effectiveness of evidentiary instructions should be informed by what psychologists have to say about juror decisionmaking, but lawyers and judges need to be careful in drawing conclusions from experimental results and discriminating in their use of ideas like the story model. Fourth, juries should be told why they are being asked to disregard evidence or to use it only in a particular way, and when an intelligible explanation of this kind cannot be devised, the rule that the instruction implements should be reconsidered. Fifth, if it is intolerable for a verdict to be influenced to any degree by a particular, prohibited kind of evidence or a particular, forbidden inference, evidentiary instructions should not be relied upon; instead, the evidence should be kept from the jury altogether, and if the evidence reaches the jury, the result should be a mistrial unless the error would be harmless even without a curative instruction. Sixth and finally, juries should never be presumed to follow instructions that are incoherent or that are likely to appear senseless to them. People can reason deliberately, and jurors are people, not oracles or automatons.