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# THE IMPACT OF JUDICIAL COMMENTARY CONCERNING EYEWITNESS IDENTIFICATIONS ON JURY DECISION MAKING

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## I. INTRODUCTION

One of the most significant issues currently confronting the criminal justice system is the development of effective safeguards against unreliable eyewitness identification. In response to this problem, the District of Columbia Court of Appeals in *United States v. Telfaire*<sup>1</sup> proposed a set of model instructions which trial judges may employ in focusing juror attention on the issues surrounding eyewitness testimony. Although these instructions do not describe recent psychological research that documents the numerous factors which limit the accuracy of eyewitnesses,<sup>2</sup> nevertheless they highlight the reasons a juror should evaluate such testimony carefully. Judicial commentary, along with expert witness testimony and defense counsel's cross-examination, represents a potentially important safeguard against false eyewitness testimony.

Since the *Telfaire* decision, several other courts have adopted model instructions for cases involving eyewitness testimony.<sup>3</sup> Unfortunately there is no research investigating the impact of judicial cautionary instructions about eyewitness testimony. Accordingly, this Article begins to clarify the relationship between this form of judicial commentary and the process of jury decision making.

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<sup>1</sup> 469 F.2d 552 (D.C. Cir. 1972).

<sup>2</sup> See E. LOFTUS, EYEWITNESS TESTIMONY (1979); Penrod, Loftus & Winkler, *The Reliability of Eyewitness Testimony*, in THE PSYCHOLOGY OF THE COURTROOM (N. Kerr & R. Bray eds. 1982).

<sup>3</sup> The evidence from a series of recent mock jury experiments indicates that the effect of judicial instructions varies widely, with virtually no assurance that members of the jury will follow them.

## II. PREVIOUS RESEARCH ON JUROR RESPONSE TO JUDICIAL INSTRUCTIONS

Previous research on the impact of judicial instructions on jury behavior has focused on substantive and procedural matters, such as the definition of the criminal charge and the burden of proof, as well as on evidential issues, such as the admissibility of hearsay evidence or the role of the defendant's prior record in determining guilt.<sup>4</sup> Perhaps the limited impact of such instructions can be attributed partly to the difficulty many jury members have in understanding the instructions. For example, jurors find substantive and procedural instructions overly complex and, more often than not, confusing.<sup>5</sup> Furthermore, approximately 45% of the important elements in the recently formulated patterned jury instructions are not understood by jury members.<sup>6</sup>

Another factor which limits the effectiveness of judicial instruction is that they usually are presented at the end of the trial. Studies have shown that jurors are more likely to comprehend instructions on the relevant substantive law if they are presented at the beginning of the trial, as well as at the end.<sup>7</sup> These studies also have found that presenting instructions on the burden of proof before the presentation of the evidence, rather than afterwards, tends to reduce the rate of jury convictions.<sup>8</sup> It is reported that instructing jurors with a stringent reasonable doubt criterion led to the lowest percentage of guilty verdicts, followed, in turn, by no mention of the criterion and a fairly lax definition. Thus, research on the impact of substantive and procedural instructions is inconclusive: in some cases, these instructions are followed; in others, their influence depends on important structural factors; while in still others, they simply are not comprehended.

Researchers have had similar results with the impact of judicial instructions concerning the relevance of certain kinds of evidence.

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<sup>4</sup> See Elwork, Sales & Alfini, *Juridic Decisions: In Ignorance of the Law or in Light of It?*, 1 LAW & HUM. BEHAV. 163 (1977); Strawn & Buchanan, *Jury Confusion: A Thread of Justice*, 59 JUDICATURE 478 (1976).

<sup>5</sup> At the present time, there is considerable uncertainty regarding the efficacy of jury instructions.

<sup>6</sup> See Charrow & Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 COLUM. L. REV. 1306 (1979).

<sup>7</sup> Elwork, Sales & Alfini, *supra* note 4; Kassin & Wrightman, *On the Requirements of Proof: The Timing of Judicial Instruction and Mock Juror Verdicts*, 37 J. PERSONALITY & SOC. PSYCH. 1877 (1979).

<sup>8</sup> See Kerr, Atkin, Stasser, Meek, Holt & Davis, *Guilt Beyond a Reasonable Doubt: Effects of Concept Definition and Assigned Decision Rule on the Judgment of Mock Jurors*, 34 J. PERSONALITY & SOC. PSYCH. 282 (1976).

For example, Simon concluded that a judge's admonitions to disregard damaging pre-trial publicity were effective in modifying jury members' pre-trial beliefs.<sup>9</sup> Also, Cornish and Sealy found that judicial instructions led to fewer guilty verdicts when jurors were told to disregard evidence concerning the defendant's prior conviction record.<sup>10</sup>

On the other hand, another study reported a series of experiments in which jurors who received information about the defendant's prior offenses were more likely to judge the defendant guilty than those who did not have this information, even when they were instructed by the judge to disregard the defendant's prior criminal record.<sup>11</sup> Similarly, Sue, Smith, and Caldwell found that, when a case against the defendant is weak, jury members apparently do not disregard inadmissible evidence concerning an illegal wiretap.<sup>12</sup> Furthermore, Wolf and Montgomery determined that when mock jury members received a strong admonition to disregard inadmissible evidence concerning the testimony of an undercover agent, the biasing effect of that testimony was not eliminated.<sup>13</sup> Thus, the effect of judicial instructions concerning evidential matters is as unclear as the effect of other types of judicial instructions.

Although it is difficult to predict the manner in which cautionary instructions about eyewitness testimony will affect juror behavior, some research suggests that such instructions might have relatively limited impact. They are likely to be presented at the end of the trial, long after the jurors have reached a decision about the defendant's guilt or innocence. The testimony of a confident eyewitness may seem especially compelling to a jury member, thereby making its importance difficult to overcome. Finally, the judge may phrase the cautionary instructions in relatively abstract and technical language that makes it difficult for a jury member to understand. Indeed, Woocher concludes that "given the tremendous impact of eyewitness testimony, it is doubtful that burying a paragraph or two of instructions that focus the juror's attention on the identification

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<sup>9</sup> Simon, *Does the Court's Decision in Nebraska Press Association Fit the Research Evidence on the Impact on Jurors of News Coverage?*, 29 STAN. L. REV. 515 (1977) (study with mock juries).

<sup>10</sup> Cornish & Sealy, *Juries and Rules of Evidence*, 17 CRIM. L. REV. 208 (1973).

<sup>11</sup> See Doob, *Evidence, Procedure and Psychological Research*, in PSYCHOLOGY AND THE LAW (G. Bermant, C. Nemeth & N. Vidmar eds. 1976); Doob & Kirschenbaum, *Some Empirical Evidence of the Effect of Section 12 of the Canada Evidence Act Upon an Accused*, 15 CRIM. LAW Q. 88 (1972).

<sup>12</sup> Sue, Smith & Caldwell, *Effects of Inadmissible Evidence on the Decisions of Simulated Juries: A Moral Dilemma*, J. APPLIED SOC. PSYCH. 344 (1973).

<sup>13</sup> Wolfe & Montgomery, *Effects of Inadmissible Evidence and Level of Judicial Admonishment to Disregard the Judgment*, 7 J. APPLIED PSYCH. 205 (1977).

issue can achieve the desired result of ensuring that the issue receives careful consideration."<sup>14</sup>

### III. METHODOLOGY

The research that documents several conditions under which judicial instructions can be effective suggests the need for a direct experimental test of this claim. Therefore, we exposed mock jury members to a videotape burglary trial in which the eyewitness testimony played a critical role in the prosecution's case. Jury members were asked to determine the guilt or innocence of the defendant following one of three types of judicial instructions. In the first condition, the judge gave the jurors their charge, instructed them about their responsibilities and provided them with a careful explanation of the crime of burglary. In the second condition, the judge gave the jurors these standard instructions plus a recapitulation of the evidence presented by the defense and prosecution counsels. In the third condition, the judge provided the jurors with the standard instructions, a recapitulation of the evidence, and a formal judicial commentary that contained the judge's evaluation of the evidence presented, as well as a cautionary statement about the fallibility of eyewitness identification, which was supported by relevant psychological research.

We measured several features of the jury decision-making process and administered a post-decision questionnaire to gauge the impact of the judicial comments. From an analysis of these measures, this Article will assess the impact of cautionary instructions about eyewitness testimony and clarify their implications for protecting accused individuals against faulty identifications.

One hundred and eight students from Reed College, Portland, Oregon volunteered to participate.<sup>15</sup> Each group of jurors viewed a forty minute video tape of a mock trial in which the defendant was accused of burglarizing a warehouse. A key element in the prosecution's case was the eyewitness testimony of a police officer and an innocent bystander, both of whom claimed that the defendant was the individual they saw fleeing from the scene of the crime.

Following the video tape of the trial, each mock jury heard various portions of an audio presentation of the judge's instructions. The jurors were informed that this audio presentation represented

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<sup>14</sup> Note, *Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification*, 29 STAN. L. REV. 969, 1005 (1977).

<sup>15</sup> Subjects ranged in age from 17-39 and represented a relatively diverse range of backgrounds.

the instructions from the trial transcript that had been inadvertently omitted from the video recording. The jurors were exposed to one of the following three conditions of judicial commentary:

1. *Instruction Only*: Jurors received a standard set of instructions that dealt with such topics as juror responsibility, function and purpose, various types of evidence, an explanation and definition of the first degree burglary charge and the burden of proof required in this case.<sup>16</sup> The jurors then heard the indictment against the defendant.<sup>17</sup>

2. *Instruction + Summation*: In addition to the standard instructions, the subjects in this condition received a judicial recapitulation of the evidence presented during the trial by counsels for the defense and prosecution. The prosecution summation emphasized the eyewitness identification of the defendant. The summation of the case for the defense highlighted the testimony of an individual, convicted earlier of participating in the crime, who testified that the defendant was unknown to him and that he was not his accomplice in the crime. The judicial summation emphasized the defendant's testimony, who claimed he was walking home from a gathering of friends on the night of the burglary.<sup>18</sup>

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<sup>16</sup> See E. DEVITT & C. BLACKMAR, *FEDERAL JURY PRACTICE AND INSTRUCTIONS: CIVIL AND CRIMINAL* (1970).

<sup>17</sup> At approximately 11:30 p.m. on December 1, 1980, the Radio World Warehouse was broken into and an undiscernible amount of money was removed.

The police were summoned to the scene in response to a report of a possible burglary in progress. Upon their arrival, they viewed two men fleeing the scene of the crime. Both men were reported as white and of medium build. One allegedly had brown hair and was wearing a blue denim jacket.

An innocent bystander, Mr. Michael Adams, standing in a restaurant parking lot approximately a block away reportedly viewed and overheard the attempted arrest. He subsequently tackled one of the fleeing criminals whom he released after the individual pleaded innocence of crime. Later that evening, the defendant, Mr. Michael Jackson, was arrested as a suspect in the crime. Mr. Adams subsequently was contacted by the police to view a possible suspect, whereupon he identified Michael Jackson as the individual he had apprehended.

<sup>18</sup> The judicial summation was as follows:

Witnesses for the Prosecution:

Officer Thomas Walters: Officer Walters has testified that on the evening of December 1, 1980, he was summoned in response to a report of a possible burglary in progress at the Radio World Warehouse. Upon arriving, he testified that he observed two white males fleeing from the scene; one with brown hair and a blue denim jacket. He has identified the defendant Michael Jackson as the individual so described with what he testifies as "not absolute, but reasonable certainty."

Mr. Michael Adams: Mr. Adams has testified that on the evening of December 1, he was standing in the parking lot of the Pizza Hut Restaurant, one block from the Radio World Warehouse. He has stated that he saw the squad car, heard voices, and tackled a man fleeing from the scene, releasing him when the man pleaded innocence of any wrongdoing. Mr. Adams later was contacted by the police department to come in and

3. *Instruction + Summation + Commentary*: The jurors in this condition received the same instructions and summation as in the previous group, plus the judge's evaluation of the evidence presented during the trial and his commentary on the fallibility of eyewitness identification. This commentary questioned the eyewitness testimony against the defendant and reviewed some of the psychological issues (e.g., the role of stress, lighting conditions, duration of observation, etc.) generally involved in eyewitness identification.<sup>19</sup>

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view a suspect in this case. At that time, and again here in this courtroom, Mr. Adams has identified the defendant Michael Jackson as the individual he tackled fleeing from the scene of the crime.

Witnesses for the defense:

Mr. Allan James: Mr. James has admitted to being one of the persons involved in the burglary, and has been convicted of the crime so charged. He has testified that he does not know the defendant, Michael Jackson, and that he was not his accomplice in this crime. He has further testified that, on the evening of December 1, 1980, he was not tackled and detained by a bystander while fleeing from the crime.

Mr. Michael Jackson: Mr. Jackson, the defendant in this case, has testified that he is not guilty of this criminal offense, and that on the night of December 1, 1980, he was at Charlie's Bar on the corner of Julie and Kielo Avenues with some friends. He further testified that after leaving the bar at about 7:00, he went to a party where he stayed until 9:00. Between the hours of nine and eleven, he testified that he walked through a nearby park, stopped at a Stop & Go, and shortly after 11:00 left his friends and began to walk and hitch-hike home when he was arrested by the police. Finally, Mr. Jackson has testified that during his walk home, he was not tackled or in any way detained by the witness for the prosecution, Mr. Adams.

<sup>19</sup> The actual judicial commentary included the following remarks:

I would now like to add some of my own comments on this case. I want you to remember though that this is only my opinion and it is up to you to accept or disregard it. First, I will comment on the weight which I feel that evidence in this case should be given.

The first piece of evidence is the denim jacket worn by the defendant, Michael Jackson. It is a rather common piece of outerwear, worn by a good portion of our community. I feel that it is an important point to take into consideration.

Secondly, the prosecution's witness, Michael Adams, testified that he can accurately identify the defendant, yet he viewed the individual he tackled for two to three minutes under poor lighting conditions, and stated that the man he held down "did not have any distinctive features," and had "a normal everyday face."

I will now offer my opinion on some of the psychological issues involved in eyewitness identification.

Eyewitness testimony has long been an issue of considerable psychological debate. Since 1908, studies on perception have repeatedly shown our abilities to perceive, retain, and retrieve information to be amazingly limited even under the most "ideal" of conditions.

Most recent studies have introduced a third element to our understanding of human perception, "stress." It has been repeatedly demonstrated that stressful conditions can further limit our abilities to accurately "perceive" and retain information about perceived events. This is not to say, however, that one should be inalterably antagonistic towards eyewitness testimony. Eyewitness identification has been, and continues to be one of the most powerful forms of evidence introduced in a court of law. It commands respect and we should give our eyewitness our most concentrated attention. But with this attention and consideration, we should be mindful of the inherent limitations in human perception, taking into consideration

Following their exposure to the video trial transcript and the audio judicial instructions, the jurors received a copy of the indictment and made a pre-deliberation decision about the guilt or innocence of the defendant. Then they deliberated as a group until they reached a verdict.<sup>20</sup> Finally, each participant was asked to complete a brief post-deliberation questionnaire and was debriefed thoroughly.

#### IV. RESULTS

##### A. PRE-DELIBERATION VERDICT

Table 1, which indicates the major findings of this study, lists the pre-deliberation verdicts of the individuals in each of the three conditions. The largest number of pre-deliberation guilty verdicts

TABLE 1

MEASURE	CONDITIONS		
	Instruction Only	Instruction plus Summation	Instruction plus Summation plus Commentary
Individual Pre-deliberation Verdict			
Guilty	17	12	7
Not Guilty	43	48	53
Mean Jury Deliberation Time	23 min.	16.5 min.	9.6 min.
Number of Hung Juries	2	1	0
Number of Guilty Verdicts	8	9	10

occurred in the Instruction Only condition, where seventeen individuals reached such a decision before they had a chance to discuss it with the other members of the jury. This was followed by twelve

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all the circumstantial conditions of the eyewitness's perception. Lighting conditions, length of time for the observation, distance and the emotional state to the perceiver must all be considered in our evaluation of the "facts" presented here. Our witness has testified that he is certain of his identification—for all intents and purposes, he has no reason to lie. He is an upstanding young citizen who came to the aid of our police. What is up to you as a jury to determine, with due consideration of the conditions of his perception, is whether his identification (by far the strongest point of evidence presented in this case) is credible enough to convict the defendant, Michael Jackson, of burglary in the first degree.

That is all I will say, but remember that these comments were just my opinion and you are the sole determiners of the facts and of the reliability to be given the witness and the weight of the evidence.

<sup>20</sup> A majority of 5 to 1 was required to reach a verdict in all juries.

pre-deliberation guilty verdicts in the Instruction + Summation condition and only seven in the Instruction + Summation + Commentary group. An overall Chi square test revealed that the differences between these groups were marginally significant ( $\chi^2=4.04$ ,  $p < .10$ ), suggesting a trend of decreasing likelihood of a pre-deliberation judgment of guilt with increasing degrees of information. Pairwise comparisons between the groups indicated that there were significantly fewer pre-deliberation guilty verdicts ( $\chi^2=5.2$ ,  $p < .05$ ) in the Instruction + Summation + Commentary group than in the Instruction Only group. This was the only significant difference between the groups on this measure.

#### B. DELIBERATION TIME

Table 1 lists the mean deliberation time under each condition and indicates that these trends also were reflected in the time it took the juries to reach a verdict. While the Instruction Only group took an average of 23 minutes to reach a verdict, the Instruction + Summation jurors took an average of 16.5 minutes. The mock jury groups exposed to the Instruction + Summation + Commentary spent the least amount of time deliberating, taking an average of only 9.6 minutes to reach a verdict. An analysis of variance of the differences between the groups on this measure was highly significant ( $F=7.68$ ,  $p < .0006$ ). Clearly, the more information the jurors received, the quicker they reached a verdict. Moreover, the Instruction + Summation + Commentary groups took significantly less time to deliberate than both the Instruction Only ( $t=3.54$ ,  $p < .0009$ ) and the Instruction + Summation Group ( $t=3.6$ ,  $p < .0008$ ). The Instruction Only and Instruction + Summation groups did not differ significantly.

#### C. GROUP VERDICT

Table 1 shows that virtually all of the juries concluded that the defendant was innocent of the burglary charge, with 27 of 30 reaching a not guilty verdict. No jury judged the defendant guilty and only three juries were hung, which meant that they were unable to arrive at the 5-1 majority required to reach a verdict. Table 1 indicates that two of the hung juries were exposed to the Instruction Only condition while the remaining one was exposed to the Instruction + Summation condition. There were no hung juries in the Instruction + Summation + Commentary condition. Although the data suggests that an increasing amount of judicial commentary in-

fluenced the juries' final verdicts, there was no significant difference between the groups on this measure.

#### D. QUESTIONNAIRE

Each juror was asked to consider a number of issues connected with the trial on the post-deliberation questionnaire. There were no consistent differences between the groups on any of the questions. For example, individuals in the three conditions evaluated the videotape trial and overall quality of the lawyers' performances in basically the same positive fashion. In addition, the groups could not be distinguished in terms of the significance they attached to several evidential matters, such as the testimony of the previously convicted defense witness, which they considered of minor importance, or to the material connected with the eyewitness identifications, which they uniformly considered much more important. In addition, it is noteworthy that the groups did not differ in terms of the importance they attached to the judge's instructions in guiding their final verdict, although they attached somewhat greater overall importance to this source than they did to their jury peers.

#### V. DISCUSSION

These findings demonstrate that judicial instructions have a significant influence on several dimensions of the jury decision-making process. A set of standard judicial instructions, a statement combining these instructions with a summary of the trial evidence, and one where each of these statements was combined with a comment on eyewitness testimony exerted progressively greater influence on members of the jury. It led them to make fewer and fewer pre-deliberation guilty verdicts, to deliberate for less and less time and to display a trend toward a reduced likelihood of reaching a hung or guilty final verdict.

These findings also indicate that the condition which exerted the greatest influence was the one that included all three sets of judicial instructions. The group that was exposed to the standard set of jury instructions in combination with a summary of the trial evidence did not differ significantly from the group that was exposed to the Instruction Only condition on any of the measures of judicial decision making. In contrast, the group that was exposed to these two sets of instructions, as well as instructions that focused on the psychological factors involved in eyewitness identifications, differed significantly from both other groups in terms of jury deliberation time and from the Instruction Only group in terms of the number of

pre-deliberation guilty verdicts. They were also the only group that always voted to acquit the accused. The current study therefore refutes the claim that embedding such instructions about several issues involved in eyewitness testimony in a long list of other instructions would have very little, if any, impact on juror behavior.<sup>21</sup>

It is important to recognize that these effects were observed in a trial where there was a weak case against the defendant. Forty-three of the sixty subjects (71%) in the Instruction Only condition judged the defendant not guilty prior to the jury deliberation and after deliberating, only two out of ten (20%) of the juries in this condition were hung, and none voted to convict. Judicial commentary might be expected to exert even greater impact in a case with a higher base rate of conviction. Future research should select a case in which at least half, and perhaps an even higher percentage of juries, voted to convict.

These results are similar to recent findings on the effect of discrediting the testimony of an eyewitness.<sup>22</sup> Two of the experiments in that study included a condition where jurors were exposed to judicial cautions about the fallibility of eyewitness identification. In our experiments such an admonition generally lowered the percentage of guilty verdicts. In both experiments, however, this appeared to hold only in the discredited, as distinguished from the credible, eyewitness conditions. Thus, when eyewitness testimony appeared to be reliable, judicial cautionary instructions had no effect on the verdicts rendered by the mock jurors.<sup>23</sup> Future research on judicial admonitions about eyewitness testimony hopefully will help to clarify the basis for the difference between these studies.

The current study also is conceptually similar to recent research on the influence of expert testimony about eyewitness identifications on juror-behavior.<sup>24</sup> Two recent experiments report that the

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<sup>21</sup> See Wolf & Montgomery, *supra* note 13.

<sup>22</sup> See D. SAUNDERS, N. VIDMAR & E. HEWETT, EYEWITNESS TESTIMONY AND THE DISCREDITING EFFECT (S. Lloyd-Bostock & B. Clifford eds. 1983).

<sup>23</sup> The case against the defendant in their simulated trials appeared much stronger than it was in our burglary trial, with a much higher base rate of guilty convictions. Further, their trial materials were presented in written, rather than videotape, format. Their subjects also worked individually and never deliberated as a group. Also, they included a discredited witness condition, whereas we did not. Unfortunately, the absence of any empirical research on eyewitness cautionary instructions makes it impossible to know which of these factors, either alone or in combination, could be responsible for the differences between their credible eyewitness condition and ours.

<sup>24</sup> Expert testimony has the same goal as judicial cautionary instructions. Both are intended to inform jurors about the current research on the fallibility of eyewitnesses and some of the variables that might produce faulty identifications.

presence of expert psychological testimony in mock jury trials reduced the frequency of guilty verdicts and increased jury deliberation time.<sup>25</sup> Thus, expert testimony and judicial admonition have similar effects with respect to diminishing the likelihood of guilty verdicts. They differ, however, in their impact on deliberation time. While expert testimony seems to increase the length of jury deliberation, judicial admonitions reduce it. The limited research in this area makes it difficult to interpret both the reliability and source of this possible discrepancy. Expert testimony may increase jurors' doubt about fallible eyewitness identification and therefore lead them to spend more time discussing this topic. On the other hand, perhaps similar information from the prestigious judge, which is not subject to a critical cross-examination, tends to resolve their doubts. Presently, this issue remains unresolved, but it is surely one which deserves to be explored in greater detail.

Many individuals have voiced concern about the disproportionate influence that an expert witness or judge might have on jurors.<sup>26</sup> Those who make such claims argue that a judicial admonition about eyewitness testimony might too readily lead a juror to conclude that a general statement about the factors governing eyewitness identification implies that the particular identification made in the trial was unreliable.<sup>27</sup> This concern is perhaps the major reason many jurisdictions in this country do not permit the trial judge to summarize evidence, let alone comment or caution jurors in any way about the evidence.<sup>28</sup>

This contrasts with the far more active role that the judiciary plays in Great Britain in cautioning jurors in disputed identity cases. These procedures were instituted following the well-known report of Lord Chief Justice Devlin that concluded that faulty eyewitness identifications were a major source of erroneous convictions and that such miscarriage of justice could be reduced greatly if judges

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<sup>25</sup> Hosch, Beck & McIntyre, *Influence of Expert Testimony Regarding Eyewitness Accuracy on Jury Decisions*, 4 LAW & HUM. BEHAV. 287 (1980); Loftus, *Impact of Expert Psychological Testimony on the Unreliability of Eyewitness Identification*, 65 J. APPLIED PSYCH. 9 (1980).

<sup>26</sup> The commentators fear that a group of relatively uninformed individuals might be unduly swayed by a forceful and articulate expert or judge.

<sup>27</sup> At the same time, these scholars suggest that a group of lay persons might not otherwise reach a conclusion in the absence of such a persuasive and authoritative statement.

<sup>28</sup> *But see* CAL. CONST. art. VI, § 10; CONN. GEN. STAT. ANN. § 52-216 (West Supp. 1984); MICH. COMP. LAWS ANN. § 768.29 (West 1982); N.Y. CRIM. PROC. LAW § 300.10(2) (McKinney 1982); N.C. GEN. STAT. 15A-1232 (1983). *See also* Note, *Removing Temptation: Per se Reversal for Judicial Indication of Belief in the Defendant's Guilt*, 53 FORDHAM L. REV. 1333, 1338 (1985).

warned jurors about this possibility.<sup>29</sup> Accordingly, it delineated the following guidelines for judges to use when cautioning jurors:

First, whenever the case against an accused depended wholly or substantially on the correctness of one or more identifications of the accused which the defense alleged to be mistaken, the judge should warn the jury of the special need for caution before convicting in reliance on the correctness of the identification. In addition, he should . . . make some reference to the possibility that a mistaken witness could be a convincing one and that a number of such witnesses could all be mistaken . . . .

. . . .

Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, e.g., by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long a time had elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given by the witness when first seen by them and his actual appearance?

. . . .

Finally, the judge should remind the jury of any specific weaknesses which had appeared in the identification evidence . . . . [W]ere the courts to judge otherwise, affronts to justice would occur frequently.<sup>30</sup>

These instructions are considerably more forceful and detailed than any currently employed in the American legal system. Even the model instructions set forth in *Telfaire*<sup>31</sup> only generally call the jurors' attention to the issues surrounding eyewitness identification. Even those jurisdictions that permit judicial comment on evidence probably would be reluctant to require such a forceful admonition about the limitations of eyewitness testimony. Kalven and Zeisel note that in those few states that permit the judge to summarize and comment on the evidence, judges do so in only one-third of the trials in which such a procedure is allowed.<sup>32</sup> Thus, in this country, it is still the defense counsel who must assume the major responsibility for focusing the jurors' attention on the identification issue.

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<sup>29</sup> P. DEVLIN, REPORT TO THE SECRETARY OF STATE FOR THE HOME DEPARTMENT OF THE DEPARTMENTAL COMMITTEE ON EVIDENCE OF IDENTIFICATION IN CRIMINAL CASES (Her Majesty's Stationery Office, London) (1976).

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

<sup>31</sup> *Telfaire*, 469 F.2d 552 (D.C. Cir. 1972).

<sup>32</sup> H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* (1966).

## VI. CONCLUSION

The sharp contrast between the British and American approaches to judicial instructions raises a fundamental question as to whether these instructions can provide a genuine safeguard against faulty eyewitness identification. Unfortunately, there is limited research available to help answer this question. This Article demonstrates that information in the form of a judicial summary of evidence and a comment about eyewitness identification can influence jurors. The effects that we observed may reflect a clearer understanding on the part of the jurors of the facts in the case and a more accurate appraisal of their relevance in determining the guilt or innocence of the defendant. On the other hand, these instructions may curtail the kind of critical reasoning that should be undertaken in order to resolve any reasonable doubts about the defendant's guilt. It is important for such comments to enhance the jurors' understanding of the case, without at the same time short-circuiting the normal deliberation process. While judicial admonitions should encourage careful analysis of the relevant issues, judges also should avoid producing an excessively cautious decision-making process. The overall effectiveness of judicial comments in reducing the likelihood of mistaken convictions must be evaluated in terms of their success in striking a balance between these objectives.

Lastly, the impact of judicial instructions varies widely: sometimes they are followed, sometimes they are not, and often they have little or no effect on jury behavior. Therefore, there is no guarantee that a specific judicial comment will play a major role in the jury decision-making process. In the final analysis, that is not its function. Rather, such instructions simply should seek to focus the jurors' attention on certain issues and their relevance to the trial. Once we know if judicial admonitions do accomplish that objective, we will be better able to determine the extent to which they are effective in protecting the innocent.