

JURY INSTRUCTIONS ON EYEWITNESS IDENTIFICATION EVIDENCE: A RE-EVALUATION

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Abstract: *The primary contribution of this paper is to challenge the accepted wisdom that jury instructions are an ineffective safeguard against wrongful conviction caused by mistaken eyewitness identification. It argues that such a conclusion is based on an erroneous interpretation of the available experimental evidence and that, in fact, there are grounds for optimism about the effectiveness of jury instructions in educating jurors about the risks posed by eyewitness identification evidence and sensitising them to the factors relevant to its evaluation. In order to play a useful role in safeguarding against wrongful conviction, however, instructions need to be easily comprehensible; to reflect the relevant scientific findings; and be provided to jurors in writing (or an alternative format for those who would find written instructions inaccessible). The paper also makes a secondary contribution, which is to warn of the dangers of accepting uncritically the findings of mock jury research as the basis for legal policy formation.*

I. INTRODUCTION

It can scarcely be debated these days that mistaken eyewitness identification evidence is one of the major causes—if not *the* major cause—of wrongful conviction.¹ Indeed, the debate has long moved on to focus on the merits of various safeguards that might be put in place to minimize the risk of wrongful conviction occurring. These have included measures targeting the police investigation and the conduct of suspect-identification procedures,² as well as measures aimed at regulating the use of eyewitness identification evidence at trial, such as

[†] The research on which this article is based was financially supported by the Scottish Government as part of Lord Bonomy's Post-Corroborator Safeguards Review, a review of safeguards against wrongful conviction following the abolition of the requirement for corroboration in Scottish criminal law. See *Post-Corroborator Safeguards Review: Report of the Academic Expert Group* (James Chalmers, Fiona Leverick & Alasdair Shaw, eds., 2014). The author would like to express thanks to Alasdair Shaw, who provided invaluable research assistance, the other members of the project team (James Chalmers, Fraser Davidson, Peter Duff, Pamela Ferguson and Findlay Stark) and James Chalmers in particular for helpful feedback on an earlier draft of this article.

1. See *infra* notes 8-27 and accompanying text.
2. See *infra* notes 50-51 and accompanying text.

exclusionary powers,³ expert testimony,⁴ and instructions that alert jurors to the risks associated with eyewitness identification evidence.⁵

It is the last of these that is the concern of this Article. Jury instructions have come to be dismissed by many commentators as an inadequate safeguard against wrongful conviction resulting from mistaken eyewitness identification. As Dufraimont puts it, “a level of scholarly consensus has developed around the notion that jury instructions on eyewitness identification are basically ineffective.”⁶ This Article re-evaluates that claim and argues that those who have dismissed jury instructions as an ineffective safeguard have done so too hastily, as the evidence available from the relevant studies does not lead to that conclusion at all. That is not to say that jury instructions provide a complete solution to the problem of wrongful conviction based on mistaken eyewitness identification evidence; clearly they do not.⁷ The claim made in this Article is that, contrary to the accepted view, there are grounds for optimism about the effectiveness of instructions in helping jurors to evaluate eyewitness testimony appropriately. Indeed, there may even be grounds for some degree of confidence.

As such, the Article proceeds as follows. Part II establishes eyewitness misidentification evidence as a leading cause of wrongful conviction. Part III sets out exactly why it is such a problematic form of evidence. Part IV outlines the various safeguards that might be utilized to reduce the risk of wrongful conviction caused by mistaken eyewitness identification evidence. Part V considers in detail the available experimental evidence on the effectiveness of jury instructions. It concludes that the studies have generally been misinterpreted to suggest that jury instructions are an ineffective safeguard against wrongful conviction but that a careful reading of the studies does not support this conclusion at all. As such, jury instructions may have a more useful role to play than has hitherto been attributed to them. Part VI considers how the effectiveness of jury instructions on eyewitness identification evidence might be maximized. Part VII offers some concluding remarks.

3. See *infra* note 53 and accompanying text.

4. See *infra* note 54 and accompanying text.

5. See *infra* note 55 and accompanying text.

6. Lisa D. Dufraimont, *Regulating Unreliable Evidence: Can Evidence Rules Guide Juries and Prevent Wrongful Convictions?*, 33 *QUEEN'S L.J.* 261, 301 (2008); See also *infra* notes 65-69 and accompanying text.

7. It should be said at the outset that jury instructions can only act as a safeguard in trials involving a jury. The safeguards appropriate to bench trials lie beyond the scope of this Article.

II. EYEWITNESS IDENTIFICATION EVIDENCE AS A CAUSE OF WRONGFUL CONVICTION

It has long been recognized that mistaken eyewitness identification is one of the leading causes of wrongful conviction.⁸ It was one of the causes identified by Borchard's pioneering study of wrongful conviction in 1932,⁹ and has consistently been identified as the leading cause (or one of the leading causes) in studies ever since.¹⁰ The most significant of these are the research projects based on the datasets held by the Innocence Project,¹¹ (founded in 1992 and based at Cardozo Law School¹²) and the National Registry of Exonerations (NRE)¹³ (a joint project of the University of Michigan School of Law and the Center on Wrongful Convictions at Northwestern University School of Law), both of which are based primarily or exclusively on DNA-based exonerations.

The Innocence Project focuses *purely* on DNA-based exoneration and, at the time of writing, had identified 330 such cases.¹⁴ Garrett analyzed the first 250 of these,¹⁵ and found that eyewitness evidence

8. Wrongful conviction is used here to mean the conviction of those who are (in all likelihood) factually innocent. Convictions might be quashed for reasons other than a belief that the appellant is factually innocent, such as a procedural irregularity that casts doubt on the integrity of the criminal justice process. It should also be said that in many cases factual innocence is nearly impossible to establish with 100 percent certainty. See generally Keith A. Findley, *Defining Innocence*, 74 ALB. L. REV. 1157 (2010-2011).

9. Edwin M. Borchard, *CONVICTING THE INNOCENT: ERRORS OF CRIMINAL JUSTICE*, xx (Yale University Press 1932); see generally Marvin Zalman, *WRONGFUL CONVICTIONS AND MISCARRIAGES OF JUSTICE* 329 (C. Ronald Huff & Martin Killias, eds., 2013).

10. See, e.g., JEROME FRANK & BARBARA FRANK, *NOT GUILTY*, 132-48 (Victor Gollancz, 1st ed. 1957) (following a study of 36 cases of wrongful conviction); Edward D. Radin, *THE INNOCENTS* (Morrow, 1964) (who identified single eyewitness identification as a leading cause of 80 cases of wrongful conviction); Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 56 tbl. 6 (1987) (who examined 350 cases of wrongful conviction spanning 1900-1985 and found mistaken eyewitness identification to be implicated in 56 of these); Arye Rattner, *Convicted but Innocent: Wrongful Conviction and the Criminal Justice System*, 12 L. & HUM. BEHAV. 283, 291 (1988) (noting that eyewitness misidentification was present in 100 cases in his study of 205 wrongful convictions).

11. THE INNOCENCE PROJECT, <http://www.innocenceproject.org/> (last visited Feb. 12, 2016).

12. See BARRY SCHECK, PETER NEUFELD & JIM DWYER, *ACTUAL INNOCENCE: WHEN JUSTICE GOES WRONG AND HOW TO MAKE IT RIGHT* (2001) (giving a detailed account of the history of the Innocence Project).

13. THE NATIONAL REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/browse.aspx> (last visited Feb. 12, 2016).

14. THE INNOCENCE PROJECT, <http://www.innocenceproject.org/free-innocent/exonerating-the-innocent> (last visited Oct. 6, 2015).

15. BRANDON L. GARRETT, *CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG* (2011) [hereinafter GARRETT, *CONVICTING THE INNOCENT*]. A shorter summary of his findings can be found in Brandon L. Garrett, *Trial and Error, in WRONGFUL CONVICTIONS AND MISCARRIAGES OF JUSTICE* 77 (C. Ronald Huff & Martin Killias, eds., 2013); Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55

had supported conviction in seventy-six percent of cases,¹⁶ making it the leading contributory factor to wrongful conviction by far.¹⁷ The NRE is a wider dataset because it does not limit itself to DNA-based exoneration¹⁸ and, at the time of writing, contained 1,671 cases.¹⁹ A research project examining the causes of the first 873 exonerations (those registered from January 1989 to February 2012)²⁰ reported that mistaken eyewitness identification was a contributory factor in forty-three percent of these.²¹ In fact, the figure is higher because, unlike Garrett, the researchers attempted to distinguish between genuine mistakes and deliberate misidentifications and classified the latter as perjury (which was a contributory factor in fifty-one percent of cases in the sample).²² Including deliberate misidentifications in the figures adds a further twenty-seven percent of cases to the total.²³

The Innocence Project and the NRE focus on exonerations in the United States, but these findings are not confined to the United States context. Mistaken eyewitness identification was “a major cause of wrongful conviction” identified by the leading study of wrongful conviction in England and Wales.²⁴ It has also been pinpointed as a lead-

(2008) (discussing the first 200 exonerations); see, e.g., Rory K. Little, *Addressing the Evidentiary Sources of Wrongful Convictions: Categorical Exclusion of Evidence in Capital Statutes*, 37 Sw. U. L. Rev. 965 (2008) (providing additional analysis of the Innocence Project data). Brandon Garrett's study is by far the most extensive.

16. GARRETT, CONVICTING THE INNOCENT, *supra* note 15, at 279.

17. Although it should perhaps be noted that Garrett's analysis has been criticised in the respect that merely identifying that a particular type of evidence was led in a trial that resulted in a wrongful conviction does not tell us anything about the degree of influence that this evidence had on the outcome. See SIMON A. COLE & WILLIAM C. THOMPSON, *WRONGFUL CONVICTIONS AND MISCARRIAGES OF JUSTICE* 111 (C. Ronald Huff & Martin Killias, eds., 2013).

18. SAMUEL R. GROSS & MICHAEL SHAFFER, *EXONERATIONS IN THE UNITED STATES, 1989-2012: REPORT BY THE NATIONAL REGISTRY OF EXONERATIONS*, 8 (2012). This report encompasses cases where pardons were granted or where criminal charges were dismissed at the prosecutor's motion after new evidence of innocence emerged, acquittals at retrials, a small number of “certificates of innocence” issued by courts and some posthumous exonerations. *Id.*

19. THE NATIONAL REGISTRY OF EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/browse.aspx> (last visited Oct. 6, 2015).

20. GROSS & SHAFFER, *supra* note 18, at 1.

21. *Id.* at 40 tbl. 13.

22. *Id.* at 50.

23. *Id.* at 52 tbl. 14.

24. RUTH BRANDON & CHRISTIE DAVIES, *WRONGFUL IMPRISONMENT: MISTAKEN CONVICTIONS AND THEIR CONSEQUENCES*, 24 (1973).

ing cause of wrongful conviction in Canada,²⁵ New Zealand,²⁶ and in continental European jurisdictions.²⁷

III. WHY IS EYEWITNESS IDENTIFICATION EVIDENCE SO PROBLEMATIC?

A vast amount of research into eyewitness memory has been undertaken by psychologists,²⁸ and its conclusions are encapsulated by Wells et al., who state that eyewitness testimony is “among the least reliable forms of evidence and yet is persuasive to juries.”²⁹ Most research studies have involved simulations (which vary according to the degree to which they replicate reality),³⁰ which does need to be borne in mind when considering the validity of the findings.³¹ However, eyewitness performance tends to deteriorate the more realistic the experimental conditions are.³² So, if anything, simulations may underestimate the extent of the problem.³³

The psychological literature tells us that mistaken witnesses are often confident when they give evidence at trial, but that such confidence is not correlated with accuracy.³⁴ This is worrying because (perhaps unsurprisingly) mock jury studies³⁵ have shown that jurors place great weight on the degree of confidence that an eyewitness re-

25. FTP HEADS OF PROSECUTIONS SUBCOMMITTEE ON THE PREVENTION OF WRONGFUL CONVICTIONS, *THE PATH TO JUSTICE: PREVENTING WRONGFUL CONVICTIONS* 1-3 (2011).

26. THOMAS THORP, *MISCARRIAGES OF JUSTICE* 53 (2005).

27. Chrisje Brants, *Tunnel Vision, Belief Perseverance and Bias Confirmation: Only Human?*, in *WRONGFUL CONVICTIONS AND MISCARRIAGES OF JUSTICE* 165-71 (C. Ronald Huff & Martin Killias eds., 2013).

28. See BRIAN L. CUTLER & STEVEN D. PENROD, *MISTAKEN IDENTIFICATION: THE EYEWITNESS, PSYCHOLOGY AND THE LAW* (1995) (discussing factors that influence eyewitness accuracy such as perpetrator, event and post-event factors); Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 L. & HUM. BEHAV. 603, 627-36 (1998).

29. Wells et al., *supra* note 28, at 605.

30. Anne Maass, *Logic and Methodology of Experimental Research in Eyewitness Psychology*, *PSYCHOLOGICAL ISSUES IN EYEWITNESS IDENTIFICATION*, 1996, at 279. A useful discussion of the various methods and their limitations can be found in Maass' article. *Id.*

31. ANDREAS KAPARDIS, *PSYCHOLOGY AND THE LAW: A CRITICAL INTRODUCTION* 34-38 (2014); CUTLER & PENROD, *supra* note 28, at 111-12.

32. CUTLER & PENROD, *supra* note 28, at 112.

33. *Id.*

34. Brian L. Cutler, Steven D. Penrod & Hedy Red Dexter, *Juror Sensitivity to Eyewitness Identification Evidence*, 14 L. & HUM. BEHAV. 190 (1990); see also CUTLER & PENROD, *supra* note 28, at 95 (reviewing relevant literature); Wells et al., *supra* note 28, at 620-23.

35. On the utility of mock jury studies: see *infra* notes 71-84 and accompanying text.

ports when giving his or her testimony.³⁶ In Garrett's sample of wrongful conviction caused by mistaken eyewitness testimony, the (mistaken) witnesses were all confident at trial and this is likely to have influenced the jury.³⁷ In ninety-two of his 161 cases of mistaken eyewitness identification (fifty-seven percent), however, the witnesses reported they had been uncertain at an earlier stage.³⁸ In thirty-four of the 161 cases (twenty-one percent), the witnesses even admitted at the trial that they had been uncertain earlier³⁹ but even this clearly did not persuade the juries concerned that the identification was mistaken. Worryingly, almost all of the cases in Garrett's sample involved defendants who looked unlike the person the witnesses first described as the perpetrator.⁴⁰

There is research to suggest that extreme stress has a detrimental effect on the accuracy of eyewitness identification,⁴¹ although this is still subject to some debate,⁴² due in part to the obvious difficulties involved in research design.⁴³ Similarly, the "weapon focus effect" suggests that the presence of a weapon reduces the accuracy of identification.⁴⁴ The vast majority of the 190 mistaken eyewitness identification cases in Garrett's sample (eighty-four percent) were "stranger rapes" and he speculates that the "stress/weapon effect" might have been a factor.⁴⁵

The psychological literature also indicates that cross-racial identifications are particularly problematic in terms of accuracy.⁴⁶ As such,

36. Cutler, Penrod, & Dexter *supra* note 34; *see also* Kenneth A. Deffenbacher & Elizabeth F. Loftus, *Do Jurors Share a Common Understanding Concerning Eyewitness Behavior?*, 6 L. & HUM. BEHAV. 15 (1982) (noting their findings in relation to question 7 of the questionnaire they distributed to study participants).

37. GARRETT, CONVICTING THE INNOCENT, *supra* note 15, at 64.

38. *Id.* at 49.

39. *Id.* at 64.

40. *Id.* at 49.

41. *See* C.A. Morgan III et al., *Accuracy of Eyewitness Memory for Persons Encountered During Exposure to High Intense Stress*, 27 INT'L J. OF L. & PSYCHIATRY 265, 266 (2004) (describing extreme stress such as the stress that might be experienced by the victim of a violent attack); Tim Valentine & Jan Mesout, *Eyewitness Identification Under Stress in the London Dungeon*, 23 APP. COG. PSYCH. 151 (2009); *see also* CUTLER & PENROD, *supra* note 28, at 103.

42. Sven-Ake Christianson, *Emotional Stress and Eyewitness Memory: A Critical Review*, 112 PSYCHOL. BULL. 284 (1992); KAPARDIS, *supra* note 31, at 44-46.

43. Designing a realistic experiment that simulates the extreme stress of a violent attack is difficult to do in a way that meets ethical standards.

44. Elizabeth F. Loftus, Geoffrey R. Loftus & Jane Messo, *Some Facts About 'Weapon Focus'*, 11 L. & HUM. BEHAV. 55 (1987); Nancy M. Steblay, *A Meta-Analytic Review of the Weapon Focus Effect*, 16 L. & HUM. BEHAV. 413 (1992); CUTLER & PENROD, *supra* note 28, at 101; KAPARDIS, *supra* note 31, at 48-49.

45. GARRETT, CONVICTING THE INNOCENT, *supra* note 15, at 51.

46. Christian A. Meissner & John C. Brigham, *Thirty Years of Investigating the Own-Race Bias in Memory for Faces: A Meta-Analytic Review*, 7 PSYCHOL. PUB. POL'Y & L. 3 (2001); Roderick Lindsay & Gary L. Wells, *What Do We Really Know About Cross-*

Garrett found that at least forty-nine percent of the exonerees mis-identified by eyewitnesses involved a cross-racial identification.⁴⁷ Gross and Shaffer found that more than two-thirds of mistaken eyewitness identifications in sexual assault cases involved black defendants and, of these, seventy-two percent (sixty-nine out of ninety-six) involved an identification made by a white victim.⁴⁸

IV. JURY INSTRUCTIONS AS A SAFEGUARD

The evidence presented in the preceding section leads to the conclusion that there is a need for at least some safeguards to operate within the criminal justice system to prevent wrongful conviction based on mistaken eyewitness identification. Various safeguards have been proposed, and they fall broadly into two categories: those that target the investigation and those that target the trial. During the investigation, it is important that suspect identification procedures are conducted in a manner that minimizes the risk of error; various guidelines have been developed in this respect.⁴⁹ It has also been suggested that individuals should not be subjected to a line-up identification procedure at all unless there is at least a reasonable suspicion (based on other evidence) that they committed the offense in question.⁵⁰ While not wishing to neglect the importance of measures targeted at the investigatory stage, the primary focus of this article is on measures that regulate the use of eyewitness identification at trial; there are essentially three main possibilities.⁵¹ The first possibility is to utilize exclusionary powers to exclude entirely any eyewitness iden-

Race Eyewitness Identification?, in *EVALUATING WITNESS EVIDENCE* (Sally M. Lloyd-Bostock & Brian R. Clifford eds., 1983); see also CUTLER & PENROD, *supra* note 28, at 104.

47. GARRETT, *CONVICING THE INNOCENT*, *supra* note 15, at 73.

48. GROSS & SHAFFER, *supra* note 18, at 49.

49. See, e.g., Wells et al., *supra* note 28, at 627-36 (setting out rules on who should conduct the line-up, the instructions that should be given on viewing, the structure of the line-up and obtaining confidence statements from witnesses); Andrew D. Rikard, *How and Why New York Should Enact Mandatory Statewide Eyewitness Identification Procedures*, 74 ALB. L. REV. 1525, 1549-50 (2010-2011) (making recommendations on the composure and conduct of line-ups); Richard A. Wise, Kirsten A. Dauphinais & Martin A. Safer, *A Tripartite Solution to Eyewitness Error*, 97 J. CRIM. L. & CRIMINOLOGY 807, 856-65 (2007) (setting out ten guidelines for the conduct of identification procedures).

50. See generally Gary L. Wells, Yueran Yang & Laura Smalarz, *Eyewitness Identification: Bayesian Information Gain, Base-Rate Effect–Equivalency Curves, and Reasonable Suspicion*, 39 L. & HUM. BEHAV. 99 (2015) (discussing whether there should be reasonable-suspicion basis for beginning the identification procedure).

51. A fourth possibility is to require corroboration of identity in cases involving eyewitness identification. Sandra G. Thompson, *Beyond a Reasonable Doubt? Reconsidering Uncorroborated Eyewitness Identification Testimony*, 41 U.C. DAVIS L. REV. 1487, 1541 (2008) (arguing for “the adoption of a corroboration rule in cases in which eyewitness identification testimony is offered.”).

tification evidence that is particularly weak.⁵² The second is to use expert testimony to educate the jury on the risks associated with eyewitness identification evidence and the factors that might affect the accuracy of such identifications.⁵³ The third is to achieve the same result but by way of an instruction given to the jury by the trial judge.⁵⁴

At this point it might be questioned whether any such measures are necessary, especially if the applicable guidelines on pre-trial identification have been followed. It has sometimes been argued that jurors are capable of using their everyday knowledge and experience to evaluate eyewitness identification evidence in the same way as they evaluate any other testimony and need only be guided by a general instruction about witness credibility.⁵⁵ The difficulty here is that many of the findings of the scientific studies are counter-intuitive and are unlikely to be within the knowledge of the average juror (or indeed the average judge⁵⁶). One might point in particular to the lack of any

52. See, e.g., Angela Baxter, *Identification Evidence in Canada: Problems and a Potential Solution*, 52 CRIM. L.Q. 175, 176 (2007) (suggesting that the trial judge's discretion to exclude weak identification evidence could be a "more effective solution" to the problem of wrongful conviction caused by mistaken eyewitness identification evidence); Margery M. Koosed, *Reforming Eyewitness Identification Law and Practice to Protect the Innocent*, 42 CREIGHTON L. REV. 595, 629 (2009) (arguing for a wider exclusionary power for unreliable eyewitness identification evidence); Kent Roach, *Unreliable Evidence and Wrongful Convictions: The Case for Excluding Tainted Identification Evidence and Jailhouse and Coerced Confessions*, 52 CRIM. L.Q. 210, 216 (2007) (arguing that an exclusionary power "could do much valuable work in excluding evidence that the experience of wrongful convictions suggests can be highly prejudicial"); Eva G. Shell, *A Recipe for Mistaken Convictions: Why Federal Rules of Evidence Should be Used to Exclude Unreliable Eye-Witness Identification Evidence*, 46 SUFFOLK U.L. REV. 263, 285 (2013) (arguing for the use of exclusionary powers "in recognition of the potential for jurors to become unreasonably swayed by this evidence despite substantial unreliability").

53. See, e.g., Koosed, *supra* note 52, at 619 (arguing that "[e]xpert testimony should be permitted in all cases where the perpetrator's identity is a central issue, and there is little or no other independent evidence of the defendant's guilt."); Michael R. Leippe, *The Case for Expert Testimony About Eyewitness Memory*, 1 PSYCHOL. PUB. POL'Y & L. 909, 924 (1995) (arguing that "eyewitness expert testimony is not only appropriate, but needed in certain circumstances to improve the likelihood of a valid jury decision."); Wise, Dauphinais & Safer, *supra* note 49, at 823 (arguing for the admissibility of expert testimony "when the primary or sole evidence against the defendant is eyewitness testimony").

54. See, e.g., Christian Sheehan, *Making the Jurors the Experts: The Case for Eyewitness Identification Jury Instructions*, 52 B.C. L. REV. 651, 683 (2011) (arguing for "a new model instruction to be given at the outset of criminal trials that involve eyewitness identifications."); Dufraimont, *supra* note 6, at 325 (arguing that jury instructions represent the best way to educate juries about the frailties of eyewitness identification evidence in the vast majority of cases).

55. See, e.g., *Nelson v. State*, 362 So. 2d 1017, 1022 (Fla. Dist. Ct. App. 1978); *Le noir v. State*, 72 S.W.3d 899, 903, 905 (Ark. Ct. App. 2002).

56. There is a growing body of evidence to suggest that judges hold incorrect beliefs about the factors affecting the accuracy of eyewitness testimony: see Richard A. Wise &

correlation between the degree of confidence expressed by eyewitnesses at trial and the accuracy of their identifications,⁵⁷ or to the detrimental effect of stress or the presence of a weapon on identification reliability.⁵⁸

If it is accepted that there is a need to regulate the use of eyewitness identification evidence at trial, the next question is how this might best be achieved. A detailed evaluation of the relative merits of exclusionary powers, expert testimony, and jury instructions, lies beyond the scope of this Article. It should be said at the outset that these powers and procedures are not necessarily mutually exclusive. All three may have an important role to play, depending on the circumstances of the case.⁵⁹ The focus here, however, is on the last of the three possibilities—jury instructions.

Most United States courts allow some form of instruction to be given to the jury that warns of the dangers of eyewitness identification evidence.⁶⁰ Most commonly, the instruction given is based on *United States v. Telfaire*,⁶¹ where the court stated that:

In appraising the identification testimony of a witness, you should consider the following:

(1) Are you convinced that the witness had the capacity and an adequate opportunity to observe the offender? Whether the witness had an adequate opportunity to observe the offender at the time of the offense will be affected by such matters as how long or short a time was available, how far or close the witness was, how good were lighting conditions, whether the witness had had occasion to see or know the person in the past

(2) Are you satisfied that the identification made by the witness subsequent to the offense was the product of his own recollection? You may take into account both the strength of the identification and the circumstances under which the identification was made.

Martin A. Safer, *What US Judges Know and Believe About Eyewitness Testimony*, 18 APPLIED COGNITIVE PSYCHOL. 427, 432 (2004); Svein Magnussen et al., *What Judges Know About Eyewitness Testimony: A Comparison of Norwegian and US Judges*, 14 PSYCHOLOGY, CRIME & L. 177, 181 (2008); Richard A. Wise et al., *A Comparison of Chinese Judges' and US Judges' Knowledge and Beliefs About Eyewitness Testimony*, 16 PSYCHOL., CRIME & L. 695, 708 (2010).

57. See *supra* notes 33-37 and accompanying text.

58. See *supra* notes 45-46 and accompanying text.

59. See Koosed, *supra* note 52, at 616-17.

60. See Sheehan, *supra* note 54, at 670-73 (surveying different state practices with regards to jury instructions); Michael Bromby et al., *An Examination of Criminal Jury Directions in Relation to Eyewitness Identification in Commonwealth Jurisdictions*, 36 COMMON L. WORLD REV. 303 (2007) (surveying the approach of other common law jurisdictions).

61. 469 F.2d 552, (D.C. Cir. 1972).

If the identification by the witness may have been influenced by the circumstances under which the defendant was presented to him for identification, you should scrutinize the identification with great care. You may also consider the length of time that lapsed between the occurrence of the crime and the next opportunity of the witness to see the defendant, as a factor bearing on the reliability of the identification

. . . .

[(3)] Finally, you must consider the credibility of each identification witness in the same way as any other witness, consider whether the witness is truthful, and consider whether the witness had the capacity and opportunity to make a reliable observation of the matter covered in his testimony.

I again emphasize that the burden of proof on the prosecutor extends to every element of the crime charged, and this specifically includes the burden of proving beyond a reasonable doubt the identity of the defendant as the perpetrator of the crime with which [the defendant] stands charged. If after examining the testimony, you have a reasonable doubt as to the accuracy of the identification, you must find the defendant not guilty.⁶²

The *Telfaire* instruction is not without its flaws. It has been criticised on the basis that while it lists some of the factors that might contribute to misidentification, it is vague as to the factors' relevance, does not explain the way in which the factors can affect reliability, and appears (erroneously) to associate confidence with identification accuracy.⁶³ As such, some courts have developed more detailed instructions, occasionally going so far as to specifically alert jurors to the risk of a wrongful conviction associated with mistaken eyewitness identification evidence.⁶⁴

In the scholarly literature, a majority view has developed that jury instructions about eyewitness identification evidence are an ineffective safeguard against wrongful conviction. Some have gone as far as to describe this view as a "consensus."⁶⁵ This is perhaps to overstate the case, but it is, at the very least, a widely held belief.⁶⁶ So, for

62. *United States v. Telfaire*, 469 F.2d 552, 558-60 (D.C. Cir. 1972).

63. *See, e.g.*, Dufraimont, *supra* note 6, at 306; Sheehan, *supra* note 54, at 680-81.

64. *See, e.g.*, *State v. Henderson* 27 A.3d 872, 915 (N.J.S.C. 2011); *United States v. Burrous*, 934 F. Supp. 525, 526 (E.D.N.Y. 1996); Evan C. Miller, *Impermissible Instructions: State v. Henderson and the Ebbing Utility of Eyewitness Evidence*, 66 *RUTGERS L. REV.* 803, 832-35 (2014).

65. *See, e.g.*, Dufraimont, *supra* note 6, at 301.

66. Two prominent dissenters are Dufraimont herself, and Sheehan. *See supra* note 55 and accompanying text.

example, in a review of the available evidence undertaken in 1995, Cutler and Penrod state that “we are forced to conclude that the judges’ instructions do not serve as an effective safeguard against mistaken identifications and convictions.”⁶⁷ Roach suggests that jury warnings place “enormous faith in the ability of juries to follow such instructions, despite the fact that social science and common sense suggest that warnings may not always have their desired effect.”⁶⁸ In one of the most comprehensive reviews of safeguards against wrongful conviction based on eyewitness misidentification, Wise et al. reach a similar conclusion to Roach, but argue instead for expert testimony as a more effective alternative.⁶⁹

Those who consider jury instructions ineffective tend to base their conclusions on a body of experimental evidence gained from psychological studies undertaken with mock jurors.⁷⁰ A superficial reading of the relevant studies might well give the impression that jury instructions are an ineffective safeguard. It will be argued here, however, that closer examination of the studies reveals otherwise, and it is to this that the Article now turns.

V. THE EXPERIMENTAL EVIDENCE ON THE EFFECTIVENESS OF JURY INSTRUCTIONS

In this section of the Article, the experimental evidence on the effectiveness of jury instructions about eyewitness identification evidence will be evaluated. Before embarking on a survey of the research, it is necessary to say something about the methods typically used in the studies, all of which involve mock jurors. The Article will then go on to discuss the studies on eyewitness identification instructions before also considering the findings of studies in closely related areas.

A. MOCK JURY STUDIES AND THEIR LIMITATIONS

Mock jury studies can have a number of limitations that potentially affect their “external validity:” the extent to which their findings

67. CUTLER & PENROD, *supra* note 28, at 264.

68. Roach, *supra* note 52, at 213-14.

69. Wise, Dauphinais & Safer, *supra* note 49, at 830-33 (quoting BRIAN L. CUTLER & STEVEN D. PENROD, *MISTAKEN IDENTIFICATION: THE EYEWITNESS, PSYCHOLOGY AND THE LAW* 254 (1995)); see also Jacqueline McMurtrie, *The Role of the Social Sciences in Preventing Wrongful Convictions*, 42 AM. CRIM. L. REV. 1271, 1276 n.20 (2005) (discussing those who consider jury instructions an ineffective safeguard against wrongful conviction); Roger B. Handberg, *Expert Testimony on Eyewitness Identification: A New Pair of Glasses for the Jury*, 32 AM. CRIM. L. REV. 1013, 1062 (1995); Thompson, *supra* note 51, at 1517; Baxter, *supra* note 52, at 182.

70. The relevant studies are discussed in Part V. *infra*.

are generalizable beyond the experimental setting.⁷¹ These include inadequate sampling (especially the use of college students as ‘jurors’); inadequate trial simulation (such as a reliance on a transcript or study pack rather than a video or trial re-enactment); an absence of jury deliberation in the research design; the use of data collection techniques that do not reflect the reality of the juror’s task at trial (such as asking jurors to rate the probability of guilt on a scale); and participants’ awareness that they are role playing and that their decision has no real life consequences.⁷²

The extent to which each of these affects generalizability is contested by psychologists. In a meta-analysis that is unfailingly cited by those using the research methods in question,⁷³ Bornstein argued that the use of student jurors and/or trial transcripts makes very little difference to research results.⁷⁴ Others have questioned his conclusions, suggesting that this depends on the issue being researched.⁷⁵

There is a broader consensus over the lack of deliberation.⁷⁶ As Shaffer and Wheatman put it, “perhaps the greatest limitation of mock-trial simulations is that the vast majority of them attempt to draw inferences from decisions rendered by nondeliberating mock *jurors* rather than deliberating mock *juries*” and the researchers go on to discuss some of the reasons why this might be the case.⁷⁷ The deliberation process, they suggest, potentially irons out any misunderstandings that might be held by individual jurors, and jurors who hold prejudices (or who are disinclined to follow instructions) might not act in this way in a group situation where they have to articulate their reasoning to others. There is also a vast body of social psychological

71. See generally Wayne Weiten and Shari S. Diamond, *A Critical Review of the Jury Simulation Paradigm: The Case of Defendant Characteristics*, 3 L. & HUM. BEHAV. 71 (1979) (displaying the classic exposition of these limitations); Shari S. Diamond, *Illuminations and Shadows from Jury Simulations*, 21 L. & HUM. BEHAV. 561 (1997) (providing an overview of the methodological issues).

72. Weiten & Diamond, *supra* note 71, at 78-81.

73. See, e.g., Helen M. Paterson, David W.M. Anderson & Richard I. Kemp, *Cautioning Jurors Regarding Co-Witness Discussion: The Impact of Judicial Warnings*, 3 PSYCHOL., CRIME & L. 287, 301 (2013).

74. Brian H. Bornstein, *The Ecological Validity of Jury Simulations: Is the Jury Still Out?*, 23 L. & HUM. BEHAV. 75, 78-84 (1999).

75. See, e.g., Richard L. Wiener, Daniel A. Krauss & Joel D. Lieberman, *Mock Jury Research: Where Do We Go From Here?*, 29 BEHAV. SCIS. & THE L. 467, 472 (2011).

76. See, e.g., Dennis J. Devine, Laura D. Clayton, Benjamin B. Dunford, Rasmy Seying & Jennifer Pryce, *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 PSYCHOL. PUB. POL’Y & L. 622, 625 (2001); Narina Nuñez, Sean M. McCrea & Scott E. Culhane, *Jury Decision Making Research: Are Researchers Focusing on the Mouse and not the Elephant in the Room?*, 29 BEHAV. SCIS. & THE L. 439, 443 (2011).

77. David R. Shaffer & Shannon R. Wheatman, *Does Personality Influence Reactions to Judicial Instructions? Some Preliminary Findings and Possible Implications*, 6 PSYCHOL. PUB. POL’Y & L. 655, 657-58 (2000).

literature indicating that group decisions differ from individual decisions⁷⁸ and research with real jurors has shown that deliberation does affect the verdict reached in a small but significant proportion of cases.⁷⁹

Not all mock jury studies suffer equally from the limitations identified above, but as this Article will go on to demonstrate, the concerns noted loom large in the jury instruction studies that are the focus here. Indeed, the majority of them have methodological flaws so serious that little reliance can be placed on them.

B. THE JURY INSTRUCTION STUDIES

An extensive search of legal and psychological databases identified five studies in peer reviewed journals that have assessed the effectiveness of jury instructions about eyewitness identification evidence.⁸⁰ Any evaluation of these studies needs to keep in mind that the desired result of a jury instruction on eyewitness identification evidence is to induce what has been termed “juror sensitivity” and not “juror skepticism,” the latter being a general mistrust of eyewitness identification evidence even when this is not merited.⁸¹ As such, any experimental design that does not vary the strength of the eyewitness identification is unlikely to yield any valuable results.⁸² The usefulness of the study is also dependent on the quality of the jury instruction utilized. If a particular instruction is difficult to comprehend and/or inaccurate, this does not necessarily mean that all jury instructions are ineffective. It is worth noting the majority of studies used the *Telfaire* instruction, which has been criticized for being vague and potentially misleading.⁸³ Finally, it is worth repeating the point, studies vary in the extent to which the experimental design rep-

78. Nuñez, McCrea & Culhane, *supra* note 76, at 443-46.

79. Maria Sandys & Ronald C. Dillehay, *First-Ballot Votes, Predeliberation Dispositions, and Final Verdicts in Jury Trials*, 19 L. & HUM. BEHAV. 175, 176 (1995); HARRY KALVEN & HANS ZEISEL, *THE AMERICAN JURY* (1966). Kalven and Zeisel, in what was then a ground-breaking study, recorded the verdicts of juries in a sample of criminal trials in the 1950s. They found that the verdict preferred by the majority of jurors on the first ballot was *not* the eventual verdict in approximately ten percent of cases.

80. See Brian H. Bornstein & Joseph A. Hamm, *Jury Instructions on Witness Identification*, 48 COURT REVIEW 48 (2012), available at <http://aja.ncsc.dni.us/publications/courtrv/cr48-1-2/CR48-1-2Bornstein.pdf> (discussing the effectiveness of jury instructions in eyewitness identification, however, this study was not published in a peer reviewed journal and it contains such limited details of its research methods that its generalizability is impossible to evaluate.).

81. Kirsty A. Martire & Richard I. Kemp, *Can Experts Help Jurors to Evaluate Eyewitness Evidence? A Review of Eyewitness Expert Effects*, 16 LEGAL & CRIMINOLOGICAL PSYCHOL. 24, 25-26 (2011) [hereinafter Martire & Kemp, *Review of Eyewitness Expert Effects*].

82. *Id.* at 26.

83. See *supra* note 63 and accompanying text.

licated the real life trial setting, and studies that do not include an element of jury deliberation must be regarded with particular caution.

The earliest of the five studies is that of Katzev and Wishart, who asked 108 mock jurors (forming thirty mock juries) to watch a forty-minute mock burglary trial.⁸⁴ The juries were divided into three groups: the first group received only the standard jury instructions with no summary of the evidence in the case or special instructions relating to eyewitness identification evidence; the second group received, in addition to this, a judicial summary of the evidence; the third group received the standard instructions, the judicial summary of the evidence, and a short judicial instruction on eyewitness identification evidence.⁸⁵ Jurors were asked to make a pre-deliberation decision about the guilt or innocence of the defendant, before deliberating in their jury groups and recording a post-deliberation group verdict.⁸⁶ The authors found that providing a judicial instruction on eyewitness identification resulted in a significant increase in not-guilty verdicts pre-deliberation.⁸⁷ Post-deliberation, the number of not-guilty verdicts was also slightly higher among those juries receiving the instruction on eyewitness identification evidence, although the finding was not statistically significant.⁸⁸ There were, however, numerous weaknesses in the experimental design: college student subjects were used; there was no variation of the strength of the identification evidence; and the overall evidence against the accused was very weak, as evidenced by the fact that, post-deliberation, twenty-seven of the thirty juries returned not-guilty verdicts.⁸⁹ As such, little can be usefully taken from the findings.

The next relevant study was carried out by Cutler et al., in which mock jurors were given a *Telfaire* instruction after a videotaped mock robbery trial in which a witness identified the defendant as the perpetrator.⁹⁰ There were two versions of the experiment, in which the ex-

84. Richard D. Katzev & Scott S. Wishart, *The Impact of Judicial Commentary Concerning Eyewitness Identifications on Jury Decision Making*, 76 J. CRIM. L. & CRIMINOLOGY 733, 736 (1985).

85. *Id.* at 737-38; *see also id.* at 737 n.18 (providing instructions for the jury).

86. *Id.* at 739.

87. *Id.*

88. *Id.* at 740-41. It should be noted that table 1 of their paper (at 739) erroneously omits the word "not" from "not guilty" and is therefore a misleading representation of their results.

89. *Id.* at 736, 740; *see also id.* at 737 n.18 (summarizing the evidence given in the judge's charge).

90. Brian L. Cutler, Hedy R. Dexter and Steven D. Penrod, *Nonadversarial Methods for Improving Juror Sensitivity to Eyewitness Evidence*, 20 J. APPLIED SOC. PSYCHOL. 1197 (1990). The study also compared the effectiveness of jury instructions to that of testimony from a court appointed expert and its findings in this respect are discussed below. *See infra* notes 159-161 and accompanying text.

perimenters varied the strength of the identification evidence.⁹¹ In the first version, the defendant wore a hat, while brandishing a handgun, and the eyewitness identified him as the perpetrator fourteen days after the robbery. In the second version, the robber wore no disguise and kept his handgun hidden, and the identification took place two days after the robbery.⁹² The study found some evidence of increased juror sensitivity (as measured by the proportion of guilty verdicts returned) from hearing the instruction, although the effect was small and not statistically significant.⁹³ Once again, however, the research methods used by the study cast a shadow over the usefulness of its findings. The 144 mock jurors were all college students, the experiment did not involve deliberation, and as Cutler, Dexter and Penrod themselves acknowledge, the poor quality of the *Telfaire* instruction may have been to blame for inducing unjustified skepticism in some participants.⁹⁴

A further study was undertaken by Ramirez et al., who conducted two separate experiments, both involving college student subjects watching a video of a mock trial.⁹⁵ The first—the robbery of a liquor store by a lone gunman—used very similar methods to Cutler, Dexter and Penrod, and found that the *Telfaire* instruction caused a significant skepticism effect.⁹⁶ Jurors hearing the instruction were less likely to convict in both the “good” and the “poor” identification conditions.⁹⁷ The second compared the effectiveness of the *Telfaire* instruction with a re-written instruction in which the language was simplified and the content revised to reflect more accurately the relevant experimental research.⁹⁸ They found that there was little difference between the effectiveness of the *Telfaire* instruction and their re-written instruction in terms of the proportion of guilty verdicts returned.⁹⁹ However, this finding must be regarded with caution. Like Cutler, Dexter and Penrod, the mock jurors were college students, the experiment did not involve deliberation, and the evidence against the accused was very weak overall.¹⁰⁰ Even in the “good identification conditions” version of the experiment, the only evidence against the defendant was that of a single eyewitness who viewed him for approxi-

91. Cutler, Penrod & Dexter, *supra* note 34, at 1199.

92. *Id.*

93. *Id.* at 1202.

94. *Id.* at 1205.

95. Gabriella Ramirez, Dennis Zemba & R. Edward Geiselman, *Judge's Cautionary Instructions on Eyewitness Testimony*, 14 AM. J. FORENSIC PSYCHOL. 31, 38 (1996).

96. *Id.* at 41.

97. *Id.*

98. *Id.* at 47. The re-written instruction is re-produced in Appendix B of the paper.

99. *Id.* at 56.

100. *Id.* at 47, 50.

mately twenty seconds while experiencing a traumatic event (the burglary of her house).¹⁰¹ Evidence was also presented at the trial that the defendant had an alibi; a friend testified that at the time of the burglary the two of them were together doing plumbing work in the friend's kitchen.¹⁰² This does suggest that skepticism might, in fact, have been the most appropriate attitude in both the "good" and "poor" identification conditions, bearing in mind that the jurors were given the standard direction that they should convict only if they were convinced beyond reasonable doubt of the defendant's guilt.¹⁰³ It is also worth noting that the revised instruction did result in a significant improvement in recall of the instruction's content and a "modest" increase in juror knowledge about the relevant issues.¹⁰⁴

An improvement in the realism of the experimental conditions can be found in the two experiments undertaken by Edith Greene.¹⁰⁵ Her first experiment involved a videotaped assault trial that was shown to college student "jurors" in which a person drinking in a bar was accused of throwing a bottle that hit and blinded another customer.¹⁰⁶ No one actually saw the defendant throw the bottle, but one of the bar staff testified that the defendant "might have done so."¹⁰⁷ There was no other evidence against the defendant. The strength of the identification evidence given by the witness was varied: in the "strong" version she had an unobstructed view and the bar was well lit; in the "weak" version the bar was dimly lit and her view was partially obstructed. The jurors were given a *Telfaire* instruction and were allowed thirty minutes of deliberation before reaching a verdict.¹⁰⁸ In the second experiment, the conditions were identical, save for the facts that Greene, like Ramirez et al.: used a revised instruction which was rewritten to make it linguistically more comprehensible and to reflect more accurately the findings of relevant

101. This was distinguished from the "poor" identification conditions version by the fact that the perpetrator was viewed for 20 seconds (rather than five), from five feet (rather than 15 feet), in good lighting conditions, and had no gun (as opposed to having a visible gun). The defendant was also identified two hours after the event (as opposed to two weeks) and he was picked out in both a photo ID and a lineup (as opposed to only in the lineup). *Id.* at 49.

102. *Id.* at 48.

103. *Id.*

104. *Id.* at 57.

105. Edith Greene, *Judge's Instruction on Eyewitness Testimony: Evaluation and Revision*, 18 J. APPLIED SOC. PSYCHOL. 252 (1998).

106. *Id.* at 256.

107. *Id.*

108. *Id.* at 257.

psychological research; and used a shadow jury rather than college student subjects.¹⁰⁹

Greene found that the *Telfaire* instruction, when it was given, caused a significant skepticism effect—the conviction rate decreased from 42 percent to 6.5 percent—even for the strong identification evidence version of the experiment.¹¹⁰ It had no effect when the weak identification evidence was used, where the conviction rate was three percent regardless of whether the jury had been given the instruction, but as Cutler and Penrod point out, this was probably because the weak evidence was so weak that it would have been perverse to convict on it.¹¹¹ In Greene’s second experiment, the revised instruction also induced skepticism rather than sensitivity, which resulted in a higher proportion of acquittals in the weak identification evidence condition.¹¹² However, it also resulted in a higher proportion of acquittals in the strong identification evidence condition.¹¹³

Greene’s second experiment is without question the study that has used the most realistic experimental conditions, and comprehensible and accurate jury instruction, and yet this still induced skepticism rather than sensitivity. This might imply that jury instructions on eyewitness identification evidence are of limited usefulness. However, her research design still had important limitations. It was a single experiment involving only 139 jurors where deliberation was limited to thirty minutes, after which jurors were asked to vote individually (rather than reach a collective decision). Most problematically, the eyewitness identification evidence was actually very weak, even in the “strong” version of the experiment, as noted above.¹¹⁴ The only evidence against the defendant was the testimony of a single eyewitness, who, when asked if the defendant was the person who threw the bottle, said only that the defendant “*might* have done so.”¹¹⁵ As such, skepticism was entirely appropriate.¹¹⁶ It is worth noting that Greene’s rewritten instruction was extremely effective in improving juror *understanding* of the factors affecting the accuracy of eyewitness

109. *Id.* at 263-64. A shadow jury involves the use of real life jurors who have been summoned to court but not ultimately selected for trial.

110. *Id.* at 258.

111. *Id.* at 258; see also CUTLER & PENROD *supra* note 28, at 260 (describing the “floor effect”).

112. Greene, *supra* note 105, at 266. Table 4 shows seventy-three percent where a revised instruction was given, compared to forty-two percent where no instruction was given, and forty-one percent where a *Telfaire* instruction was given. *Id.*

113. *Id.* Table 4 shows seventy-five percent where a revised instruction was given, compared to twenty-two percent for no instruction, and thirty-five percent for the *Telfaire* instruction. *Id.*

114. *Id.* at 266.

115. *Id.* at 256 (emphasis added).

116. *Id.* at 264.

identifications.¹¹⁷ Jurors who were given the rewritten instruction scored significantly better on this measure than jurors who were given no instruction or the *Telfaire* instruction.¹¹⁸

Finally, a rather different research method was used in a study undertaken by Martire and Kemp.¹¹⁹ They used what they called a “real eyewitness design” where a first set of study participants acted as “witnesses” who were asked to view a video reconstruction of a robbery and then identify the perpetrator from a line-up.¹²⁰ They then “gave evidence” and a second set of study participants acting as “jurors” were asked whether or not they believed them.¹²¹ This could then be compared to the true accuracy of the identifications. The jurors in the experiment were college students and were divided into six groups where the experimental conditions were varied so that they watched either a “correct” or a “mistaken” witness give evidence and they received either a jury instruction,¹²² a video of expert testimony on eyewitness identification, or no assistance at all. The researchers found that jurors were correct in their assessments 63.6 percent of the time, but that there was no significant difference between the jury instruction group, the expert testimony group, and the control group: “the objective accuracy of the judgments they made were not found to be significantly associated with the type of instruction they heard.”¹²³

But the usefulness of this study is questionable at best. The number of mock jurors who witnessed each of the six possible scenarios was very small and the study design did not include any element of deliberation. In addition, the “witnesses” watched a video reconstruction rather than experiencing a real life event where environmental conditions and stress would most likely have played a part in the accuracy of their identification. Most importantly, the conditions in which the witnesses saw the perpetrator were not varied and therefore the only variables the jurors had to go on in determining accuracy were the witnesses’ reported confidence levels and their demeanour at trial. As such, little can be usefully concluded about the effectiveness of jury instructions on eyewitness identification evidence.

117. *Id.* at 267.

118. *Id.* at 259-60.

119. Kirsty A. Martire & Richard I. Kemp, *The Impact of Eyewitness Expert Evidence and Judicial Instruction on Juror Ability to Evaluate Eyewitness Testimony*, 33 L. & HUM. BEHAV. 225 (2009) [hereinafter Martire & Kemp, *Impact of Eyewitness Expert Evidence and Judicial Instruction*].

120. *Id.* at 227.

121. *Id.* at 230.

122. *Id.*

123. Martire & Kemp, *Impact of Eyewitness Expert Evidence and Judicial Instruction*, *supra* note 119, at 231-33.

To summarise, all that can really be said on the basis of the experimental studies on the effectiveness of jury instructions about eyewitness identification evidence is that they are inconclusive. The studies are, as Dufraimont puts it, “few in number . . . plagued with methodological problems and focus predominantly on the *Telfaire* instruction, which lacks the kind of informational content necessary to educate jurors about the frailties of eyewitness identification.”¹²⁴ The two studies that evaluated the effect of a revised instruction (Greene’s experiment, Ramirez et al.’s experiment) were, frustratingly, both hampered by the fact that the evidence against the defendant was weak even in the version of the experiment where it was supposed to be strong. Thus, while both reported a skepticism effect, *skepticism was an entirely appropriate attitude*. It is worth reiterating that both studies found that rewritten instructions improved juror comprehension of the relevant issues when compared to no instruction at all, or the *Telfaire* instruction.

C. STUDIES IN CLOSELY RELATED AREAS

Given the limited number of studies of jury instructions about eyewitness identification evidence, it is worth turning to some of the experimental evidence in closely related areas. Studies on the effectiveness of jury instructions in helping jurors to evaluate particular types of evidence other than eyewitness identification evidence are few and far between, most likely because few other types of evidence are so inherently problematic. Nonetheless, there are a few studies where the issues being investigated are sufficiently similar, and thus, worth considering.

The first of these is a study by Paterson et al. that examined eyewitness evidence but in a different context.¹²⁵ The researchers examined the impact of a jury instruction about the effect of post-event discussion among eyewitnesses in a dangerous driving case. Mock jurors were given a transcript of a dangerous driving trial where eyewitness evidence was given by two witnesses.¹²⁶ One gave evidence to the effect that she had seen the defendant using a cell phone. She did not mention this to the police in the statement she made to them immediately after the incident, but told them about it later after she had spoken to another witness to the event. The other witness mentioned the mobile phone in both her initial statement and in a later inter-

124. Dufraimont, *supra* note 6, at 306.

125. See Paterson, Anderson & Kemp, *supra* note 73, at 301 (contrasting the study with others before it).

126. *Id.* at 292.

view.¹²⁷ Half of the participants were given a jury instruction that explained that “eyewitness evidence can be unreliable and that reliability might be affected by the circumstances in which the witness observed the event.”¹²⁸ The other half were given the same general warning, but were also given a specific warning about “the possible effect of co-witness discussion on memory.”¹²⁹

In Paterson et al.’s experiment, the specific warning did not induce general skepticism, but instead resulted in a marked sensitivity effect: there was a significant reduction in belief of the testimony of the inconsistent witness when the specific warning was given, compared to the general warning condition.¹³⁰ Such a reduction did not occur in relation to the consistent witness.¹³¹ This did not translate into a change in beliefs about the guilt or innocence of the defendant, but as the researchers suggest, this could be for any multitude of reasons, including the strength of the rest of the evidence in the case.¹³² That said, the findings must be still regarded with some caution. This was not the most realistic of experiments: the mock jurors were 80 college students; it involved a transcript rather than a video reconstruction; and there was no deliberation.

Aside from this single experiment that has focused on eyewitness evidence in a different context, one might also look to studies that have evaluated the effect of jury instructions on other types of witness testimony. Two mock jury studies in particular are worth noting. The first study was undertaken by Bollingmo et al., who evaluated the effectiveness of an instruction aimed at correcting the misconception that the extent to which a witness displays emotion provides a reliable cue to her credibility.¹³³ Participants watched a five-minute video of a mock police interview in which a woman gave an account of a rape.¹³⁴ Experimental conditions were varied, so that: (a) the witness displayed varying degrees of emotion when giving her statement; and (b) the participants were either given an instruction warning of the danger of equating emotional condition with truthfulness or were not.¹³⁵ The instruction was found to be highly effective at correcting any misconceptions held by participants in this respect, with the groups who were given the instruction reporting that they had given less weight to

127. *Id.* at 293.

128. *Id.*

129. *Id.*

130. *Id.* at 297.

131. *Id.* at 299.

132. *Id.* at 300.

133. Guri Bollingmo et al., *The Effect of Biased and Non-biased Information on Judgments of Witness Credibility*, 15 *PSYCHOL., CRIME AND L.* 61 (2009).

134. *Id.* at 63.

135. *Id.* at 64.

non-verbal cues and delivering higher credibility ratings of the witness than the group who were not.¹³⁶ Notwithstanding, it does have to be said that the research methods used were not the most realistic in terms of simulating the trial experience: the 334 subjects were college students; there was no deliberation built into the experiment; and the jury instruction was delivered verbally by the experimenter after the conclusion of the video.¹³⁷ Given that the effect of the jury instruction was positive even in unrealistic conditions, these concerns might be seen as less pressing than in the eyewitness identification evidence experiments, where the less than realistic experimental conditions might well have been the reason why a positive effect was *not* produced.¹³⁸ It does have to be said, though, that the experimental conditions were vastly simplified compared to a real life trial where jurors would be subject to a far greater volume and complexity of information than they were here, so it cannot simply be assumed that any positive effect would be replicated in the real life setting.

The other experiment worth noting was undertaken by Goodman-Delahunty et al., who examined the effectiveness of jury instructions in correcting common misconceptions about child memory of and responses to sexual abuse.¹³⁹ The study participants were asked to read a transcript of evidence given by a child reporting sexual abuse.¹⁴⁰ In the first experimental condition, the transcript included a case summation by the trial judge but no information specifically relating to child witnesses.¹⁴¹ In the second experimental condition, the transcript also contained an instruction setting out the key scientific findings about children's reactions to sexual abuse, their ability to recall experienced events and various other relevant matters.¹⁴² The study concluded that jury instructions significantly increased juror knowledge of the key scientific findings and resulted in an increased likelihood of a guilty verdict.¹⁴³ Here too, as the researchers themselves acknowledge, the research methods used were less than realistic: their subjects were 118 college psychology students; they relied on transcripts, rather than a trial simulation; and there was no deliberation

136. *Id.* at 67.

137. *Id.* at 64.

138. *See supra* notes 91-132 and accompanying text.

139. Jane Goodman-Delahunty, Anne Cossins & Kate O'Brien, *A Comparison of Expert Evidence and Judicial Instructions to Counter Misconceptions in Child Sexual Abuse Trials*, 44 AUSTRALIAN & NEW ZEALAND J. CRIMINOLOGY 196, 208 (2011).

140. *Id.* at 204.

141. *Id.* at 204.

142. *Id.* at 206. There was also a third version of the experiment where the instructions were delivered by an expert witness. *Id.* at 205; *see infra* note 162 and accompanying text.

143. *Id.* at 208, 211.

built into the experiment.¹⁴⁴ The effect of the instruction here was positive, and so the less than realistic conditions cannot be blamed for failing to produce an effect, but as with Bollingmo et al.'s study, it is impossible to know whether the same effect would have been produced in the more complex setting of a real life trial.

The other body of literature to which one might turn is the studies that have evaluated the effectiveness of expert testimony on eyewitness identification evidence. These have vastly outnumbered the studies of jury instructions in this context, as indicated by the fact that there exist several meta-analyses of the latter but none of the former.¹⁴⁵ Martire and Kemp's meta-analysis identified twenty-four experiments reported in peer-reviewed journals, some of which found that expert testimony induced a general skepticism effect, but some of which found that it improved juror sensitivity.¹⁴⁶ This might be seen as a cause for optimism, as the fact that expert testimony is capable of inducing sensitivity (albeit in experimental conditions with all the generalizability caveats that this implies) suggests that appropriate jury instructions might do likewise. This especially, as many of the expert testimony experiments used "court appointed experts" who were not cross-examined, was not dissimilar to that of a jury instruction.¹⁴⁷

This does, of course, raise the question of whether *expert testimony* might be more effective than jury instructions as a safeguard against wrongful conviction based on eyewitness identification evidence. A detailed discussion of the relative merits of these two safeguards lies beyond the scope of this Article.¹⁴⁸ The claim being made here is not that expert testimony is *ineffective* in this context, but that jury instructions *are* effective. Although it should be said that if confidence can be placed in the effectiveness of jury instructions, there are many reasons to prefer them over expert testimony, not least of which is cost, both in terms of time and money.¹⁴⁹ Two experiments have directly compared the effectiveness of jury instructions and expert tes-

144. *Id.* at 204, 213.

145. See, e.g., Martire & Kemp, *Review of Eyewitness Expert Effects*, *supra* note 81; Leippe, *supra* note 53.

146. Martire & Kemp, *Review of Eyewitness Expert Effects*, *supra* note 81, at 25, 30. The findings of the studies are summarised in their paper in tabular form in Table 1. *Id.* at 30.

147. See Leippe, *supra* note 53, at 934-39 (describing the impact of expert testimony in various studies). It should perhaps be said that an expert by virtue of his or her qualifications, might be regarded by jurors as more persuasive than a trial judge.

148. See Sheehan, *supra* note 54, at 674-78 (providing an excellent discussion of the relative merits of expert testimony and jury instruction).

149. Derek Simmons, *Teach Your Jurors Well: Using Jury Instructions to Educate Jurors About Factors Affecting the Accuracy of Eyewitness Testimony*, 70 MD. L. REV. 1044, 1078-85 (2011); cf. Miller, *supra* note 64, at 839.

timony in the context of eyewitness identification evidence, both of which were described above in the context of their findings on jury instructions.¹⁵⁰ Neither found any evidence that expert testimony was a superior method of inducing sensitivity, although as both studies suffered from methodological flaws, this finding does have to be regarded with some caution.¹⁵¹ A comparison of expert testimony and jury instructions in a different context, the study of child witness testimony in sexual abuse trials discussed above, also found both to be equally effective in correcting misconceptions.¹⁵²

D. A SUMMARY SO FAR

As the discussion thus far has indicated, the experimental studies that have examined the effectiveness of jury instructions about eyewitness testimony are inconclusive. The limited number of studies that have been undertaken have mostly shown that jury instructions tend to result in increased skepticism towards all eyewitness identification evidence, regardless of its strength. This conclusion, however, has to be tempered by the fact that every single study—even the most realistic—suffered from serious methodological problems. Support for the effectiveness of jury instructions can be drawn from the expert testimony studies, some of which have been found to induce sensitivity, and from an experiment that examined eyewitness testimony and witness contamination. Finally, there is some cause for optimism in the fact that at least two studies (Greene's experiment and Ramirez et al.'s experiment) have shown that a well-constructed instruction can improve juror *appreciation* of the factors affecting the reliability of eyewitness identification evidence. Furthermore, jury instructions on witness credibility in other contexts (namely the effect of emotion on credibility and the factors affecting the credibility of child sexual abuse complaints) have been effective in improving appreciation of the relevant issues. There are, in summary, grounds for cautious optimism that jury instructions on eyewitness identification can work, a conclusion far removed from the accepted scholarly wisdom that they are entirely ineffective.

Their effectiveness is, however, likely to depend on their content and on the manner in which they are presented. As such, it is worth turning to the broader body of research that has examined the factors that can improve the effectiveness of jury instructions.

150. Cutler, Penrod & Dexter, *supra* note 34; Martire & Kemp, *Impact of Eyewitness Expert Evidence and Judicial Instruction*, *supra* note 119.

151. Cutler, Penrod & Dexter, *supra* note 34, at 1202; Martire & Kemp, *Impact of Eyewitness Expert Evidence and Judicial Instruction*, *supra* note 119, at 231; *see supra* notes 100-105 and accompanying text; *supra* notes 129-132 and accompanying text.

152. Goodman-Delahunty, Cossins & O'Brien, *supra* note 139, at 208, 211.

VI. WHAT CAN BE DONE TO IMPROVE THE EFFECTIVENESS OF JURY INSTRUCTIONS?

What then can be done to maximize the effectiveness of jury instructions about eyewitness identification? Once again it is worth turning to the relevant experimental evidence. Three factors in particular stand out: simplification of language; ensuring that the instructions accurately reflect the relevant considerations; and providing instructions in writing. Each will be examined in turn.

A. SIMPLIFICATION OF LANGUAGE

If jury instructions are to be effective, they need to convey information in a way that jurors can understand and utilize.¹⁵³ Over-complex jury instructions are likely to be ineffective at best and counter-productive at worst.¹⁵⁴ A vast body of experimental research exists that has assessed the extent to which juries comprehend the instructions they are given by trial judges and, as Comiskey puts it, these “have almost unanimously concluded that a jury’s ability to comprehend legal instructions is poor and that there is room for considerable improvement.”¹⁵⁵

To give some examples, Haney and Lynch, in a study of death penalty instructions in California, found that jurors were unable to apply them because they did not know what “mitigating” or “aggravating” meant.¹⁵⁶ Rose and Ogloff tested Canadian mock jurors’ comprehension of an instruction on conspiracy and concluded that it was “abysmally poor.”¹⁵⁷ In research undertaken with forty-eight real life criminal juries for the New Zealand Law Commission, Young et al. asked jurors about the instructions they had received (which included instructions on the ingredients of the offence, the meaning of intent and the meaning of beyond reasonable doubt). They concluded that, “there were widespread misunderstandings about aspects of the law which persisted through to, and significantly influenced, jury deliber-

153. Dufraimont, *supra* note 6, at 297; Sheehan, *supra* note 54, at 687; QUEENSLAND LAW REFORM COMMISSION, A REVIEW OF JURY DIRECTIONS, ¶ 8.25 (2009).

154. NEW SOUTH WALES LAW REFORM COMMISSION, JURY DIRECTIONS, ¶ 1.68 (2012).

155. Marie Comiskey, *Initiating Dialogue About Jury Comprehension of Legal Concepts: Can the ‘Stagnant Pool’ Be Revitalised?*, 35 QUEEN’S L.J. 625, 629 (2010); see, e.g., V. Gordon Rose & James R. Ogloff, *The Comprehension of Judicial Instructions*, in *PSYCHOLOGY AND THE LAW: AN EMPIRICAL PERSPECTIVE* 407 (Neil Brewer & Kipling D. Williams eds., 2005); Nancy S. Marder, *Bringing Jury Instructions Into the Twenty-First Century*, 81 NOTRE DAME L. REV. 449 (2006).

156. Craig Haney & Mona Lynch, *Comprehending Life and Death Matters: A Preliminary Study of California’s Capital Penalty Instructions*, 18 L. & HUM. BEHAV. 411 (1994).

157. V. Gordon Rose & James R. Ogloff, *Evaluating the Comprehensibility of Jury Instructions: A Method and an Example*, 25 L. & HUM. BEHAV. 409, 429 (2001).

ations. Indeed, there were only thirteen of the forty-eight trials in which fairly fundamental misunderstandings of the law at the deliberation stage did not emerge.”¹⁵⁸

In the UK, Thomas was granted access in three English Crown Courts to jurors who had not been selected to sit on a trial.¹⁵⁹ The jurors observed a simulated trial and were given instructions from a practicing trial judge. In one court, jurors were tested on their understanding of an instruction they had received on the law of self-defense. While sixty-eight percent of jurors claimed that they had understood the instruction, when assessed objectively, only thirty-one percent actually had.¹⁶⁰

It has been suggested that there is no reason to be concerned about findings such as these because any difficulty individual jurors have in understanding instructions will be resolved during the deliberation process.¹⁶¹ Deliberation can undoubtedly affect trial outcomes, as noted earlier, and the studies that have examined the effect of deliberation on juror comprehension provide some support for its effectiveness in correcting mistakes.¹⁶² Its curative power should not, however, be over-stated.¹⁶³ Deliberation will be effective in this respect only if, as Diamond puts it, “a significant proportion of the jurors begin deliberations with correct information; otherwise, deliberation may simply reinforce the inaccuracies of the majority.”¹⁶⁴ In Rose and Ogloff’s study of the comprehension of the conspiracy instruction, deliberation made no difference and the inherent complexity of the instruction was the most likely reason why.¹⁶⁵

It might be questioned at this point how much of the preceding discussion is relevant to instructions on eyewitness identification evidence, which are relatively straightforward compared to some of the instructions that have been the subject of research. Juror comprehension levels have been shown to vary depending on the type of instruc-

158. WARREN YOUNG, NEIL CAMERON & YVETTE TINSLEY, JURIES IN CRIMINAL TRIALS PART TWO: A SUMMARY OF THE RESEARCH FINDINGS, ¶ 7.12 (1999); Yvette Tinsley, *Juror Decision-Making: A Look Inside The Jury Room*, 4 BRITISH SOCIETY OF CRIMINOLOGY (2001).

159. CHERYL THOMAS, ARE JURIES FAIR?, 8-9 (2010).

160. *Id.* at 36.

161. *See, e.g.*, YOUNG, CAMERON & TINSLEY, *supra* note 158, at ¶ 7.25.

162. *See supra* notes 83-87 and accompanying text; Diamond, *supra* note 71, at 565; Phoebe C. Ellsworth & Alan Reifman, *Juror Comprehension and Public Policy: Perceived Problems and Proposed Solutions*, 6 PSYCHOL. PUB. POL’Y & L. 788, 806 (2000).

163. Comiskey, *supra* note 155, at 641.

164. Diamond, *supra* note 71, at 565.

165. Rose & Ogloff, *supra* note 157, at 426.

tion, with instructions about procedural law generally being better understood than those about substantive law.¹⁶⁶

Even if this is the case, there is nonetheless no harm in ensuring that jury instructions about eyewitness identification evidence are made as linguistically straightforward as possible, while of course also retaining their legal integrity.¹⁶⁷ This has been recognised in other jurisdictions—the New Zealand Institute of Judicial Studies, for example, has employed editors with expertise in writing plain English in the preparation of the Criminal Jury Trials Bench Book.¹⁶⁸ Indeed, experimental research has demonstrated that comprehension can be substantially improved by the use of simple language and straightforward syntax.¹⁶⁹ Charrow and Charrow, for example, found that juror comprehension improved by between thirty-five and forty-one percent (depending on the measure of comprehension used) when they re-wrote fourteen United States civil jury instructions in simpler language.¹⁷⁰ In the criminal context, other studies have achieved similar results.¹⁷¹ The re-written instructions in all of these studies were approved by trial judges, who checked that the re-write was legally acceptable.

B. THE CONTENT OF THE WARNING

If jury instructions are to be effective, they need to convey accurate information about, for example, the factors that have been shown

166. Comiskey, *supra* note 155, at 642; Alan Reifman, Spencer M. Gusick & Phoebe C. Ellsworth, *Real Jurors' Understanding of the Law in Real Cases*, 16 L. & HUM. BEHAV. 539, 546-50 (1992).

167. See Simonsen, *supra* note 149, at 1086 (stating that a jury instruction should resemble a professor lecturing to students).

168. NEW SOUTH WALES LAW REFORM COMMISSION, *supra* note 154, at ¶ 3.25.

169. See, e.g., Rose & Ogloff, *supra* note 157, at 427-29 (providing that a simple, streamlined technique of giving jury instructions is ideal); Joel D. Lieberman & Bruce D. Sales, *What Social Science Teaches Us About the Jury Instruction Process*, 3 PSYCHOL. PUB. POL'Y & L. 589, 626-27 (1997).

170. Robert P. Charrow & Veda R. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 COLOM. L. REV. 1306, 1331 (1979). The instructions were on issues including causation, witness credibility, expert evidence, and negligence. *Id.* The authors set out a method for improving comprehension, which includes measures such as removing nominalizations, prepositional phrases, technical words, multiple negatives, and embedded phrases. *Id.* at 1321-29.

171. See, e.g., Laurence J. Severance, Edith Greene & Elizabeth F. Loftus, *Toward Criminal Jury Instructions That Jurors Can Understand*, 75 J. CRIM. L. & CRIMINOLOGY 198 (1984) (testing comprehension of instructions on the standard and burden of proof, intent, and the use of prior convictions and achieving significant improvements in comprehension following their re-write); Amiram Elwork, James J. Alfani & Bruce Sales, *Towards Understandable Jury Instructions*, 65 JUDICATURE 432 (1982) (finding that comprehension improved significantly when they re-wrote standard pattern instructions on a variety of issues including the meaning of beyond reasonable doubt, the definition of murder, the definition of insanity and the permitted use of expert evidence).

to influence the accuracy of eyewitness identification.¹⁷² Instructions in some jurisdictions have been criticized on the basis that they either omit important information or are actively misleading (for example by suggesting that the degree of confidence reported by the eyewitness at the time of the trial is an indication of accuracy).¹⁷³

Experimental research has also suggested that juries are more likely to follow instructions if it is explained to them why they are being given.¹⁷⁴ In the present context, this implies that a jury instruction on eyewitness identification evidence ought to explain to the jury that people have been wrongly convicted on the basis of flawed evidence of this nature, or that errors in identification have occurred in the past. However, this type of instruction would have to be carefully drafted so as not to induce undue skepticism.¹⁷⁵

C. PROVIDING WRITTEN JURY INSTRUCTIONS

A final consideration is whether jury instructions should be provided in writing, something that has been advocated by numerous law reform bodies¹⁷⁶ and researchers¹⁷⁷ worldwide. In New Zealand, the jury research project undertaken in 2001 resulted in the extensive use

172. Keith A. Findley, *Judicial Gatekeeping of Suspect Evidence: Due Process and Evidentiary Rules in the Age of Innocence*, 47 GA. L. REV. 723, 773 (2013); David Ormerod, *Sounds Familiar? Voice Identification Evidence*, CRIM. L. REV. 595, 620 (2001) (emphasising the point specifically in relation to voice identification).

173. Sheehan, *supra* note 54, at 679 (citing *Commonwealth v. Santoli*, 680 N.E.2d 1116, 1121 (Mass. 1997)).

174. Nancy K. Steblay et al., *The Impact on Juror Verdicts of Judicial Instruction to Disregard Inadmissible Evidence: A Meta-Analysis*, 30 L. & HUM. BEHAV. 469, 486 (2006); Ellsworth & Reifman, *supra* note 162, at 805; Saul M. Kassin & Samuel R. Sommers, *Inadmissible Testimony, Instructions to Disregard, and the Jury: Substantive Versus Procedural Considerations*, 23 PERSONALITY & SOC. PSYCHOL. BULL. 1046, 1046 (1997).

175. *United States v. Burrous*, 934 F. Supp. 525, 530-33 (E.D.N.Y. 1996). The full instruction is attached as an appendix to the case report and states *inter alia*:

I want to caution you, first, that the kind of identification testimony you heard in this case must be scrutinized carefully. Scientific studies have amply demonstrated the dangers of mistake in human perception and identification. Of course, this does not mean that the identification in this case is incorrect. I merely tell you this so that you understand the importance of carefully evaluating the evidence here.

Burrous, 934 F. Supp. at 530-33.

176. See, e.g., LORD JUSTICE AULD, REVIEW OF THE CRIMINAL COURTS OF ENGLAND AND WALES 533 (2001); NEW SOUTH WALES LAW REFORM COMMISSION, *supra* note 154, at ¶ 6.121; NEW ZEALAND LAW COMMISSION, JURIES IN CRIMINAL TRIALS ¶ 314 (2001); VICTORIAN LAW REFORM COMMISSION, JURY DIRECTIONS (2009) (recommendations 43 and 44 at ¶¶ 6.46-6.60).

177. See Robert F. Forston, *Sense and Non-sense: Jury Trial Communication*, 1975 B.Y.U. L. REV. 601, 619 (1975) (stating, “the advantages of using written instructions are dramatic”); Comiskey, *supra* note 155, at 653; Devine, Clayton, Dunford, Seying & Pryce, *supra* note 77, at 712; B. Michael Dann, *Learning Lessons and Speaking Rights: Creating Educated and Democratic Juries*, 68 IND. L.J. 1229, 1259 (1993).

of written instructions in that jurisdiction¹⁷⁸ and they are increasingly used in Canada¹⁷⁹ and in some United States jurisdictions.¹⁸⁰

It has been argued that written instructions can lead to a number of benefits: improvements in memory;¹⁸¹ improvements in comprehension;¹⁸² better quality deliberations (where more time is spent applying the law);¹⁸³ reduced deliberation time (as juries spend less time trying to recall the instructions and any disputes about their content are quickly and easily resolved);¹⁸⁴ and improvements in juror confidence and satisfaction.¹⁸⁵ In relation to the first of these, Semmler and Brewer make the point that we are asking an awful lot of jurors to retain the information provided by the trial judge—even the simplest charge is likely to run to several pages of instructions—and it may be that at least some barriers to increased comprehension may simply stem from limitations in working memory.¹⁸⁶ Some possible objections to written instructions include: the fear that they might increase deliberation time (because jurors become involved in time consuming arguments over how to interpret them);¹⁸⁷ that they might be time consuming and burdensome for trial judges to produce;¹⁸⁸ or that they assume a level of juror literacy that might not be borne out in practice.¹⁸⁹

The available research suggests that all (or, at worst, most) of the advantages are borne out in practice and that none of the disadvan-

178. William Young, *Summing-Up to Juries in Criminal Cases – What Jury Research Says About Current Rules and Practice*, CRIM. L. REV. 665, 669 (2003); Nic Madge, *Summing Up: A Judge's Perspective*, CRIM. L. REV. 817, 820 (2006). Written instructions were commonly used even prior to the research. See NEW ZEALAND LAW COMMISSION, *supra* note 176, at ¶ 314.

179. Madge, *supra* note 178, at 820.

180. *Id.* at 820; Marder, *supra* note 155, at 451.

181. Marder, *supra* note 155, at 452; Young, *supra* note 178, at 684; Larry Heuer & Steven D. Penrod, *Instructing Jurors: A Field Experiment With Written and Preliminary Instructions*, 13 L. & HUM. BEHAV. 409, 411 (1989); NEW SOUTH WALES LAW REFORM COMMISSION, *supra* note 176, at ¶ 6.119.

182. NEW SOUTH WALES LAW REFORM COMMISSION, JURY DIRECTIONS, ¶ 10.13 (2008); Young, *supra* note 178, at 684.

183. Forston, *supra* note 177, at 619.

184. NEW SOUTH WALES LAW REFORM COMMISSION, *supra* note 176, at ¶ 10.14; Heuer & Penrod, *supra* note 181, at 411.

185. Forston, *supra* note 177, at 620; Heuer and Penrod, *supra* note 181, at 411; NEW SOUTH WALES LAW REFORM COMMISSION, *supra* note 176, at ¶ 10.16.

186. Carolyn Semmler & Neil Brewer, *Using a Flow-Chart To Improve Comprehension of Jury Instructions*, 9 PSYCHIATRY, PSYCHOL. & L. 262, 267 (2002).

187. NEW SOUTH WALES LAW REFORM COMMISSION, *supra* note 154, at ¶ 6.115; William W. Schwarzer, *Communicating With Juries: Problems and Remedies*, 69 CAL. L. REV. 731, 756 (1981); Lieberman & Sales, *supra* note 169, at 626.

188. NEW SOUTH WALES LAW REFORM COMMISSION, *supra* note 154, at ¶ 6.115; Heuer & Penrod, *supra* note 181, at 412.

189. NEW SOUTH WALES LAW REFORM COMMISSION, *supra* note 154, at ¶ 6.115; Forston, *supra* note 177, at 620.

tages transpire. In England and Wales, a trial judge on the criminal circuit adopted the practice of giving written instructions to jurors in all cases for a period of several months. He concluded that this “seems to have almost eliminated requests from juries for reminders or further guidance on the law. Juries also seem to be reaching verdicts more quickly.”¹⁹⁰ Marder notes that a United States judge who has given each juror a written copy of her instructions for more than a decade, described the innovation as “wildly successful” and as “an inexpensive, effective way to virtually guarantee juror understanding of the law.”¹⁹¹ Admittedly these studies are anecdotal, unscientific, and small scale,¹⁹² but their findings are supported by surveys of real life jurors. These have found that jurors who were not provided with written instructions thought that written instructions would have assisted them in their task¹⁹³ and that jurors who did receive written instructions found them useful.¹⁹⁴

The anecdotal evidence is also supported by the findings of experimental research,¹⁹⁵ the most extensive being that of Heuer and Penrod.¹⁹⁶ In their study, twenty-nine judges in Wisconsin randomly assigned their trials so that some juries received written instructions and some did not. After the trial was over, the jurors were asked to complete questionnaires aimed at testing their understanding of the instructions they received.¹⁹⁷ The jurors were also asked a number of questions about their experience of jury service.¹⁹⁸ The researchers also canvassed the views of the judges involved. They found no evidence of any of the potential drawbacks of written instructions. Writ-

190. Madge, *supra* note 178, at 821.

191. Marder, *supra* note 155, at 500 (citing Hon. Jacqueline A. Connor, *Jurors Need to Have Their Own Copies of Instructions*, L.A. DAILY JOURNAL, February 25 2004, at 7).

192. As Madge himself accepts, *see* Madge, *supra* note 178, at 822.

193. Brian L. Cutler & Donna M. Hughes, *Judging Jury Service: Results of the North Carolina Administrative Office of the Courts Jurors Survey*, 19 BEHAV. SCI. & THE L. 305, 313 (2001) (surveying 1478 people who had served as jurors); YOUNG, CAMERON & TINSLEY, *supra* note 158, at ¶ 7.60 (explaining that only twenty-four percent of their sample of serving jurors did not think that written instructions would have been helpful; 62.2 percent thought that they would have been helpful and 13.8 percent gave no response).

194. YOUNG, CAMERON & TINSLEY, *supra* note 158, at ¶ 7.59 (where the jury received written instructions “they were almost invariably appreciative”).

195. *See* Comiskey, *supra* note 155, at 653-56 (providing an overview of the studies); Ellsworth & Reifman, *supra* note 162, at 803-04; Lieberman & Sales, *supra* note 169, at 626-27.

196. Heuer & Penrod, *supra* note 181, at 409.

197. *Id.* at 417. Specifically, those relating to the standard and burden of proof, the presumption of innocence, the evaluation of testimony and exhibits, and procedural issues such as the allocation of responsibility for findings of law and fact. *Id.*

198. *Id.*

ten instructions made no significant difference to deliberation time,¹⁹⁹ and the judges involved reported that providing them was not burdensome or disruptive.²⁰⁰ In terms of the possible advantages, jurors reported that the written instructions were very helpful in settling any disputes that did arise.²⁰¹ The researchers did not, however, find that the written instructions led to any improvement in the comprehension of legal concepts.²⁰² Despite this, the researchers concluded that their results presented “a compelling case” for written instructions and that while they might not have all the advantages claimed, they did have some clear benefits and they had no harmful consequences.²⁰³

Heuer and Penrod are not alone in finding that written instructions did not lead to improvements in comprehension,²⁰⁴ but other studies *have* reported improvements. Kramer and Koenig, for example, found that jurors who received written instructions did score better on “true/false” tests aimed at measuring comprehension of a wide range of criminal jury instructions.²⁰⁵ Thomas’ research in England and Wales found that the proportion of jurors who were able to answer correctly two questions aimed at testing understanding of a self-defense instruction rose from thirty-one percent to forty-eight percent when a written instruction was provided.²⁰⁶ These findings suggest that at least some of the incorrect answers were due to failures of memory and not of comprehension.

In fact, a research design that failed to distinguish between memory and understanding may well account for Heuer and Penrod’s finding that written instructions did not improve comprehension. In their study, the jurors completed comprehension questionnaires some time

199. *Id.* at 421. The mean reported deliberation time was 2.6 hours for written instructions and 2.7 hours for oral instructions. *Id.*

200. *See id.* at 423 (stating that judges do not think that written instructions hurt the jury’s ability to perform their duty.); *see also* Madge, *supra* note 178, at 822; Leonard B. Sand & Steven Alan Reiss, *A Report on Seven Experiments Conducted by District Court Judges in the Second Circuit*, 60 N.Y.U. L. REV. 423, 453-56 (1985) (discussing the effectiveness of written instructions for juries).

201. Heuer & Penrod, *supra* note 181, at 421.

202. *Id.* at 420. Jurors were asked six multiple choice questions aimed at testing their comprehension and the mean correct scores were 6.7 for the written instructions and 6.8 for the oral instructions. *Id.*

203. *Id.* at 429.

204. *See* Reifman, Gusick & Ellsworth, *supra* note 166, at 549 (noting that written instructions did not improve the number of procedural or substantive law questions asked by jurors).

205. Geoffrey P. Kramer & Dorean M. Koenig, *Do Jurors Understand Criminal Jury Instructions? Analyzing the Results of the Michigan Juror Comprehension Project*, 23 U. MICH. J. L. REFORM 401, 428 (1990); *see also* Irene G. Prager, Gerard Deckelbaum & Brian Cutler, *Improving Juror Understanding for Intervening Causation Instructions*, 3 FORENSIC REPORTS 187 (1989). Prager, Deckelbaum & Cutlers’ article was cited by Lieberman & Sales, *supra* note 169, at 627.

206. THOMAS, *supra* note 159, at 38.

after the trial concluded,²⁰⁷ a limitation the researchers themselves acknowledge.²⁰⁸ Compare this to Kramer and Koenig's research, where jurors were surveyed immediately after the conclusion of the trial (and where improvements in comprehension *were* reported). That said, the role that written instructions might play in improving comprehension should not be over-stated. Putting instructions in writing cannot compensate for instructions that are inherently unclear.²⁰⁹ As Lieberman and Sales put it, "presenting participants with written versions of unintelligible instructions cannot be expected to be beneficial. If a person does not speak a foreign language, it will not matter if they are given written or verbal instructions in that foreign tongue."²¹⁰

There are some practical issues. A copy of the written instructions should be given to each individual juror, otherwise there is a danger that the person with the written instructions dominates the discussion.²¹¹ There is the question of whether they should be provided before the oral instructions are given, or afterwards. In favor of the former, this enables jurors to follow them as the charge is being given.²¹² In favor of the latter, there is the danger that the jury will not focus sufficiently on what is being said if they are distracted by the written copy.²¹³ There is also the issue of juror literacy. It cannot be assumed that all jurors will have levels of literacy that would enable them to read a written text, so provision needs to be made in this respect by, for example, the use of recorded verbal or video instructions.

VII. CONCLUSION

The danger of wrongful conviction posed by mistaken eyewitness identification is a very real one, with such evidence being identified as the leading cause of wrongful conviction in the two major studies based on DNA exoneration cases. The need for measures to safeguard against wrongful convictions caused by mistaken eyewitness identification can scarcely be debated. Where there lies more disagreement, however, is in the most appropriate method of doing so.

207. Heuer & Penrod, *supra* note 181, at 417. The questionnaires were sent out by post after the conclusion of the trial. *Id.*

208. *Id.* at 423. To this might be added the issue that the survey was by way of a postal questionnaire to which the response rate was only sixty-nine percent. *Id.* at 418.

209. See Rose & Ogloff, *supra* note 157, at 427 (describing a conspiracy instruction where there was no difference in comprehension between those jurors given the oral and the written version).

210. Lieberman & Sales, *supra* note 169, at 628.

211. Forston, *supra* note 177, at 620.

212. Marder, *supra* note 155, at 499; NEW ZEALAND LAW COMMISSION, *supra* note 176, at ¶ 314.

213. Madge, *supra* note 178, at 821.

Jury instructions warning jurors of the risks of misidentification and alerting them to the factors relevant to evaluating eyewitness testimony have often been dismissed as ineffective. It has been demonstrated here, however, that this conclusion is based on a misreading of the relevant experimental evidence. While all of the studies in this area might purport to demonstrate ineffectiveness, they all have methodological flaws. A more informed reading of the studies (and the evidence from related areas) suggests that jury instructions can be effective in educating jurors about the risks associated with eyewitness identification evidence and in evaluating such evidence sensitively. In order to do so, however, they need: to be expressed in language that jurors can understand; to accurately reflect the relevant scientific evidence; to indicate to jurors why they are being given; and to be provided in writing (or in a suitable alternative form to those who have literacy difficulties).

Two further concluding remarks are in order. First, while the focus here has been specifically on the role of jury instructions, the conclusions reached in this regard should not be taken to suggest that they are the only effective methods of protecting against wrongful conviction caused by mistaken eyewitness identification. The important role played during the initial investigation in ensuring that identification procedures are conducted according to best practice guidelines should not be neglected.²¹⁴ Likewise, in addition to jury instructions, there may also be an important role to be played at trial by exclusionary powers and expert testimony. These three measures should be seen as complementary, not as alternatives.²¹⁵ Exclusion may be appropriate where identification evidence is so weak that no reasonable jury could find it credible.²¹⁶ Allowing expert testimony (whether via a court appointed expert or by allowing both parties to lead their own expert witnesses) may be appropriate to deal with special circumstances (for example where an eyewitness is a child or has a learning disability) or where the findings of experimental research are contested (for example in relation to the effect of stress on the accuracy of identification).

Second, this analysis serves as a warning of the dangers of relying on lawyers' understanding of psychological research as a basis for policy formation. There is a danger that the findings of mock jury research are accepted uncritically and without due consideration of what can *actually* be drawn from them, given the research methodol-

214. See *supra* note 52 and accompanying text.

215. Dufraimont, *supra* note 6, at 325; Koosed, *supra* note 52, at 617.

216. Baxter, *supra* note 52, at 176.

ogy concerned. With some notable exceptions,²¹⁷ the community of legal scholars (and indeed some psychologists) has essentially coalesced around a view about the ineffectiveness of jury instructions that was not supported by a proper reading of the studies. There are lessons for lawyers and psychologists here. While there is undoubtedly much value to be learned about the design of legal processes from experimental psychology, lawyers need to be informed about the potential limitations of mock jury research and to evaluate critically the external validity of studies before relying on them as the basis for policy decisions. At the same time, if psychologists wish to exert an influence outside their own discipline, there is a need to design experiments that reflect legal reality as far as possible and to be sensitive to what their findings imply for real trial processes.

217. *See supra* note 59 and accompanying text.

