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Lisa Dufraimont

Osgoode Hall Law School of York University, ldufraimont@osgoode.yorku.ca

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Regulating Unreliable Evidence: Can Evidence Rules Guide Juries and Prevent Wrongful Convictions?

*Lisa Dufraimont**

Recent years have seen increasing concern over the prevalence of wrongful convictions in Canadian criminal courts. This concern is particularly pronounced in jury trials, as jurors are untrained and often lack the familiarity, experience and knowledge required to evaluate evidence of doubtful reliability. Research has suggested that three forms of evidence — eyewitness identification, confessions and jailhouse-informant testimony — pose particular reliability concerns in jury trials. The special problem, common to all three, is the tendency of jurors to overlook the factors that make them unreliable. Canadian criminal evidence law purports to address this problem, but the author argues that the law has hardened into a rigid set of category-based rules that are not particularly conducive to protecting the innocent. Rules that exclude unreliable evidence, as well as rules providing for cautionary instructions or expert testimony on its frailties, all have a place in controlling the risk of wrongful convictions. The author argues that these options should not be treated as strict alternatives.

This paper begins with a discussion of the existing approach to eyewitness identification, confessions and jailhouse-informant testimony. It then offers a discussion of the two basic choices that underlie these rules, with each choice involving difficult trade-offs. The “method” choice asks whether educating a jury about the dangers of these types of unreliable prosecution evidence is preferred over limiting a jury’s adjudicative freedom. The “knowledge” choice asks whether courts should allow experts to speak to the jury’s misguided beliefs, or whether judges should use their own experiences in instructing and cautioning juries. The author is critical of evidentiary rules that are too rigid, and she suggests a flexible regulatory scheme for dealing with these unreliable forms of evidence. She argues that a blend of educating and limiting strategies, and of expert and judicial knowledge, will bring an effective balance that protects

* Assistant Professor, Queen’s University, Faculty of Law. This article is drawn from my doctoral dissertation, *The Problem of Jury Error in Canadian Criminal Evidence Law*, which was completed in December 2006 in fulfillment of the requirements for the J.S.D. degree from Yale University. I am grateful for the support of Yale Law School and of the Social Sciences and Humanities Research Council of Canada, which funded the research with a Doctoral Fellowship. I would also like to thank my doctoral supervisor, Steven Duke, and others who read and commented on this work, including Mirjan Damaška, Abraham Goldstein, Kate Stith and Don Stuart.

the innocent without unduly hindering prosecutors. The author ultimately proposes three approaches that should ground a spectrum of safeguards against the problem of evidentiary unreliability: judicial exclusion of unreliable evidence, jury education about the frailties of evidence associated with wrongful convictions, and the use of expert evidence when judicial instruction would be inadequate.

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Introduction

Recent years have seen an upsurge of concern about wrongful convictions. Beginning in the 1980s, accelerating through the 1990s, and continuing to the present, a wave of exonerations of the wrongly convicted has shaken public confidence in criminal justice systems throughout the common law world.¹ Fuelling this wave has been the availability since 1989 of forensic DNA testing, which has established the innocence of more than 200 convicted persons in the United States alone.² Scholars and policymakers have probed the causes of these errors,³ while commissions of inquiry have been struck to re-evaluate criminal justice processes and to find out what went wrong in particular

1. In Canada, those exonerated after serving years in prison include Donald Marshall, Jr., David Milgaard, Guy Paul Morin and Thomas Sophonow. In the United Kingdom, the most infamous wrongful convictions are those of the Guildford Four and the Birmingham Six, who were exonerated in 1989 and 1991 after being convicted in terrorist bombings that took place in the mid-1970s.

2. The Innocence Project at Cardozo Law School maintains a list — now more than 200 strong — of individuals exonerated in the US by post-conviction DNA testing. The Innocence Project — Know the Cases, online: Innocence Project <<http://www.innocenceproject.org>>. The exonerated probably represent only a small fraction of the total number of wrongly convicted persons, since DNA evidence is often unavailable and there is frequently no other way to substantiate a claim of innocence. See e.g. David Lazer & Michelle N. Meyer, “DNA and the Criminal Justice System: Consensus and Debate” in David Lazer ed., *DNA and the Criminal Justice System: The Technology of Justice* (Boston: MIT Press, 2004) 357 at 367-68.

3. Among the books and articles dealing with the causes of wrongful convictions are Barry Scheck, Peter Neufeld & Jim Dwyer, *Actual Innocence: When Justice Goes Wrong and How to Make it Right* (New York: Signet, 2001); Sandra D. Westervelt & John A. Humphrey, eds., *Wrongly Convicted: Perspectives on Failed Justice* (New Brunswick, NJ: Rutgers University Press, 2001); C. Ronald Huff, Arye Rattner & Edward Sagarin, *Convicted But Innocent: Wrongful Conviction and Public Policy* (Thousand Oaks, CA: Sage, 1996); Brandon L. Garrett, “Judging Innocence” (2008) 108 Colum. L. Rev. 55; and Hugo Adam Bedau & Michael L. Radelet, “Miscarriages of Justice in Potentially Capital Cases” (1987) 40 Stan. L. Rev. 21. For a report commissioned by an organization of Canadian prosecutors, see Federal, Provincial and Territorial (FPT) Heads of Prosecutions Committee Working Group on the Prevention of Miscarriages of Justice, *Report on the Prevention of Miscarriages of Justice* (Ottawa: Department of Justice, 2004), online: <<http://canada.justice.gc.ca/en/dept/hop/hop/PreventionOfMiscarriagesOfJustice.pdf>>.

cases.⁴ A wealth of recent scholarship sheds light on the systemic factors that tend to produce wrongful convictions.

The research reveals that certain forms of proof are associated with wrongful convictions. Some important causes of wrongful convictions are only indirectly related to questions of evidence — for example, police tunnel vision, prosecutorial misconduct and incompetent defence advocacy.⁵ But a striking proportion of wrongful convictions flow from unreliable prosecution evidence of a few kinds: mistaken eyewitness identification evidence, perjured jailhouse informant testimony, false confessions and “junk” science from untrustworthy forensic experts.⁶ The link between erroneous convictions and these particular forms of proof raises the possibility that verdict errors can be prevented through new or improved evidence

4. On the day the convictions of the Birmingham Six were quashed, a Royal Commission was announced with the broad mandate to review criminal justice processes in England and Wales. See U.K., Royal Commission on Criminal Justice, Cm. 2263, *Report* (London: Her Majesty's Stationery Office, 1993) (Chair: Garry Runciman). Case-specific public inquiries have become the typical response to wrongful convictions in Canada. See Newfoundland and Labrador, Lamer Commission of Inquiry Pertaining to the Cases of: Ronald Dalton, Gregory Parsons, Randy Druken, *Report* (St. John's: Communications and Consultation Branch, 2006), online: <<http://www.justice.gov.nl.ca/just/lamer/>> (Chair: Antonio Lamer) [*Lamer Commission Report*]; Manitoba, The Inquiry Regarding Thomas Sophonow, *Report* (Winnipeg: Manitoba Justice, 2001), online: <<http://www.gov.mb.ca/justice/publications/sophonow/>> (Chair: Peter Cory) [*Sophonow Inquiry Report*]; and Ontario, Kaufman Commission on Proceedings Involving Guy Paul Morin, *Report* (Toronto: Ministry of the Attorney General, 1998), online: <<http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/morin/>> (Chair: Fred Kaufman) [*Kaufman Commission Report*].

5. These factors have been identified as major contributors to wrongful convictions. See e.g. Scheck, Neufeld & Dwyer, *supra* note 3 at 361.

6. Garrett, *supra* note 3 at 76. (calculating that eyewitness mistake, faulty forensic evidence, perjurious informant testimony and false confessions were factors contributing to wrongful convictions in 79%, 57%, 18% and 16%, respectively, of the first 200 DNA exonerations in the US. See also Scheck, Neufeld & Dwyer, *ibid.* at 361; Huff, Rattner & Sagarin, *supra* note 3 at 64; Westervelt & Humphrey, *supra* note 3 at 5-6; Bedau & Radelet, *supra* note 3 at 56-57; and *Report on the Prevention of Miscarriages of Justice*, *supra* note 3 at 3.

rules. The Supreme Court of Canada has recently updated a number of evidentiary rules to respond better to the risk of wrongful convictions.⁷

Worries that innocent people may be convicted on the basis of unreliable evidence are most acute in jury trials. Because jurors are untrained and generally unfamiliar with the justice system, they often lack the experience and knowledge required to evaluate the prosecution's evidence. Forensic experience and social science research have revealed that certain forms of apparently creditworthy evidence are surprisingly unreliable, but lay jurors may overlook these reliability problems. And while their common sense approach to finding facts is in many respects advantageous,⁸ juries can be led astray by common sense beliefs that are misguided. For instance, they may rely too easily on eyewitness identification evidence. Where common sense views of prosecution evidence depart from more sceptical perspectives informed by social science and judicial experience, there is a serious risk of jury error.

This paper weighs the regulatory options and proposes a set of reforms to trial evidence rules intended to mitigate the danger that juries will over-rely on untrustworthy prosecution evidence. Admittedly, trial rules of evidence represent only one — and probably not the most effective — set of safeguards for the innocent. Other avenues of reform, including improvements in pre-trial police procedures, may have more potential to reduce the number of wrongful convictions. However, trial

7. See e.g. *R. v. Handy*, 2002 SCC 56, [2002] 2 S.C.R. 908 at paras. 139-40, 150-52 (accused's prior discreditable conduct); *R. v. Hibbert*, 2002 SCC 39, [2002] 2 S.C.R. 445 at paras. 50-51 [*Hibbert*] (eyewitness identification); *R. v. Starr*, 2000 SCC 40, [2000] 2 S.C.R. 144 at para. 200 (hearsay); *R. v. Oickle*, 2000 SCC 38, [2000] 2 S.C.R. 3 at para. 36 [*Oickle*] (confessions); and *R. v. Brooks*, 2000 SCC 11, [2000] 1 S.C.R. 237 at paras. 81, 127-30 [*Brooks*] (jailhouse informant testimony).

8. As a body of ordinary people charged with applying the law, juries are said to draw on common sense notions of justice and give voice to the conscience of the larger community. See Law Reform Commission of Canada, *The Jury in Criminal Trials* (Ottawa: Law Reform Commission of Canada, 1980) at 8. Moreover it is often argued that common sense normally serves as a trustworthy guide to reasoning from evidence in the search for truth. See L. Jonathan Cohen, "Freedom of Proof" in William Twining, ed., *Facts in Law* (Wiesbaden: Steiner, 1983) 1 at 5.

evidence rules remain the accused's last defence against conviction on the basis of unreliable evidence.

The discussion in this paper focuses on three forms of evidence known to pose reliability problems and to raise a risk of wrongful convictions, especially in jury cases: eyewitness identification evidence, confessions and jailhouse informant testimony. After a brief discussion of the existing Canadian approach to these forms of proof, the second and third parts of the analysis delve into the two basic choices underlying this set of evidence rules. The first choice is one of method. Is it wiser to educate juries about the weaknesses of prosecution evidence or to compensate directly for their tendency to overvalue it by limiting their adjudicative freedom? The second choice is between two sources of knowledge. If jurors' common sense understandings of prosecution evidence are misguided, against whose understanding should their view be measured and corrected? Courts might invite input from psychological experts, or might rely instead on their own experience and knowledge. These choices involve some difficult trade-offs, and the paper closes with a proposal for a flexible regulatory scheme with a richer blend of educating and limiting rules and of expert and judicial knowledge.

I. Fundamentals of the Existing Approach

Eyewitness identification evidence, confessions and jailhouse informant testimony raise common problems: each can offer persuasive, even damning, evidence of guilt; each has proven potentially unreliable and vulnerable to overvaluation by triers of fact; and each is strongly associated with wrongful criminal convictions. In Canada, each is governed by special evidentiary rules, and in all three areas these rules have recently been restated by the Supreme Court.⁹ The rules aim to bridge the gap between juries' common sense understandings and more

9. See *Hibbert*, *supra* note 7 (eyewitness identification evidence); *Brooks*, *supra* note 7 (jailhouse informant testimony); and *Oickle*, *supra* note 7 (confessions).

informed perspectives on the psychology of proof and the causes of adjudicative error.¹⁰

A. Eyewitness Identification Evidence

This gap yawns widest in the area of eyewitness testimony. Witnesses who see the perpetrator of an offence frequently make mistakes when asked to identify that person. Psychologists and lawyers have known for generations that eyewitness identification evidence can be dangerously unreliable.¹¹ But their professional scepticism seems out of step with the views of ordinary people, who tend to find eyewitness testimony highly persuasive and often harbour misconceptions about the factors that predict its accuracy.¹² To take one example, psychological research has shown that an eyewitness' expressed level of confidence in identifying the suspect is the most important factor in persuading a jury to believe the witness.¹³ This attention to eyewitness confidence is misguided: empirical evidence shows that it is only weakly correlated to identification accuracy.¹⁴ Eyewitness certainty not only

10. See Gary T. Trotter, "False Confessions and Wrongful Convictions" (2004) 35 Ottawa L. Rev. 179 at 210 (discussing the "gap in our knowledge" between the judiciary and juries respecting false confessions).

11. See e.g. Edwin M. Borchard, *Convicting the Innocent* (New Haven: Yale University Press, 1932) at viii (detailing 65 wrongful conviction cases and identifying eyewitness misidentification as one of their three main causes).

12. For a recent review of the science, see Gary L. Wells, "Eyewitness Identifications: Specific Status" in David L. Faigman *et al.*, eds., *Modern Scientific Evidence: The Law and Science of Expert Testimony*, vol. 2 (St. Paul: West Group, 2005) c. 20 at Part. II, s. 20:43 [Wells, "Eyewitness Identifications"]. See also Brian L. Cutler & Steven D. Penrod, *Mistaken Identification: The Eyewitness, Psychology, and the Law* (New York: Cambridge University Press, 1995) at 171-209 (reviewing survey research, mock juror experiments and other studies demonstrating that lay people lack knowledge of certain important findings in eyewitness psychology and are insensitive to the factors correlated with identification accuracy); Elizabeth F. Loftus & James M. Doyle, *Eyewitness Testimony: Civil and Criminal*, 3d ed. (Charlottesville: Lexis Law Publishing, 1997) at 6-8 (cataloguing various widespread misconceptions about eyewitness memory).

13. E.g. Wells, "Eyewitness Identifications", *ibid.*, s. 20:39; and Loftus & Doyle, *ibid.* at 328.

14. E.g. Loftus & Doyle, *ibid.* at 328; and Wells, *ibid.*, s. 20:41.

leads jurors to overestimate its significance, but may also lead them to neglect other factors more predictive of accuracy.¹⁵

Much more could be said about the frailties of eyewitness testimony, but for present purposes it suffices to observe that jurors' common sense understandings of identification evidence can be dangerously misguided. Fortunately, Canadian courts have long recognized this problem,¹⁶ and they have not left juries to assess such evidence without assistance. A jury is allowed to convict on the strength of uncorroborated eyewitness testimony,¹⁷ but whenever the prosecution relies on eyewitness identification testimony that is contested by the defence, the trial judge must caution the jury on its frailties.¹⁸ This warning should both alert the jury to the general need for caution in relying on eyewitness evidence and highlight any particular weaknesses of such eyewitness testimony in the case.¹⁹ Canadian eyewitness instructions include numerous propositions drawn from the psychological literature: for example, juries may be told that the link between eyewitness confidence and accuracy is very weak,²⁰ or that witnesses have more difficulty identifying perpetrators of another race than perpetrators who are of their own race.²¹ While the precise terms of the instruction depend on

15. See Brian L. Cutler, Steven D. Penrod & Thomas E. Stuve, "Juror Decision Making in Eyewitness Identification Cases" (1988) 12 *Law & Human Behavior* 41 (reporting a mock juror study in which several factors relevant to eyewitness accuracy were manipulated in the course of a videotaped mock trial: of the factors manipulated, only eyewitness confidence had a measurable effect on verdicts).

16. On eyewitness certainty, see e.g. *R. v. Atfield* (2005), 42 A.R. 294 at para. 3 (C.A.).

17. *R. v. Nikolovski*, [1996] 3 S.C.R. 1197 at 1211 [*Nikolovski*]; Accord *United States v. Telfaire*, 469 F.2d 552 at 554 (D.C. Cir. 1972) [*Telfaire*].

18. *R. v. Mezzo*, [1986] 1 S.C.R. 802 at 845 [*Mezzo*]; *Hibbert*, *supra* note 7 at para. 79, Bastarache J., dissenting; *R. v. Carey* (1996), 113 C.C.C. (3d) 74 at 79-80 (Qc. C.A.); and *R. v. Haughton* (2004), 187 O.A.C. 67.

19. *R. v. Canning*, [1986] 1 S.C.R. 991 [*Canning*]; *Hibbert*, *ibid.* at paras. 53, 81; *R. v. Baltovich* (2004), 73 O.R. (3d) 481 at 504-05 (C.A.); and *R. v. Miller* (1998), 131 C.C.C. (3d) 141 (Ont. C.A.).

20. *Hibbert*, *ibid.* at para. 52 (approving such an instruction).

21. See e.g. Wells, "Eyewitness Identifications", *supra* note 12, s. 15-2.2.2 (reviewing psychological findings on cross-racial identification); and *R. v. Richards* (2004), 70 O.R.

the particular facts, appellate courts have offered extensive guidance and the general practice has been synthesized and regularized through pattern jury instructions.²²

One can, of course, conceive of other trial procedures that could guard against the danger of wrongful convictions based on eyewitness mistake, such as expert evidence and directed acquittals, but Canadian courts rely on cautionary jury instructions to the exclusion of these alternatives. While expert testimony on eyewitness psychology is regularly admitted in the United States and continues to draw support from a majority of legal commentators throughout North America,²³ expert evidence on the general frailties of eyewitness identification is

(3d) 737 (holding that the jury should have been instructed on the frailties of cross-racial identification).

22. See e.g. Gerry A. Ferguson, Michael R. Dambrot & Elizabeth A. Bennett, *CRIMJ: Canadian Criminal Jury Instructions*, 4th ed. (Vancouver: The Continuing Legal Education Society of British Columbia, 2005) s. 4.55; and David Watt, *Ontario Specimen Jury Instructions (Criminal)* (Toronto: Carswell, 2003) at 165-68.

23. Most American jurisdictions afford trial judges discretion to permit experts to testify about the frailties of eyewitness identification. E.g. *State v. Cheatam*, 150 Wn. 2d 626 at 645 (2003): “[A]t this point the significant majority of federal and state courts addressing the question have held that such evidence is admissible under an abuse of discretion standard.” American commentators who have argued in favour of admitting expert evidence on the frailties of eyewitness identification include Richard A. Wise, Kirsten A. Dauphinais & Martin A. Safer, “A Tripartite Solution to Eyewitness Error” (2007) 97 J. Crim. L. & Criminology 807; Roger B. Handberg, “Expert Testimony on Eyewitness Identification: A New Pair of Glasses for the Jury” (1995) 32 Am. Crim. L. Rev. 1013; and Michael R. Leippe, “The Case For Expert Testimony about Eyewitness Memory” (1995) 1 Psychol. Pub. Pol’y & L. 909 [Leippe, “Eyewitness Memory”]. Canadian jurists who have argued in favour of admission include Jill Copeland, “Helping Jurors Recognize the Frailties of Eyewitness Identification Evidence” (2002) 46 Crim. L.Q. 188 at 202, 207; and Dianne L. Martin, “When the Rules are Wrong: Wrongful Convictions and the Rules of Evidence: Lessons from Commissions of Inquiry” (Material prepared for the Criminal Lawyers Association Annual Convention and Education Programme, 12-13 November 1999) [Quicklaw: Ontario Criminal Lawyers Association Papers, OCLARP/1999-020].

inadmissible in Canada.²⁴ Moreover, the Supreme Court has held that a trial judge may not direct an acquittal when the prosecution's case depends on poor quality, unsupported identification evidence.²⁵ Rather, juries are to be permitted to evaluate that evidence after being properly cautioned,²⁶ and any frailties go only to weight and not to admissibility. Commentators have suggested that courts should have the power to direct acquittals or exclude identification evidence in weak eyewitness cases.²⁷ Occasionally, a court agrees; the Ontario Court of Appeal suggested in two recent cases that eyewitnesses could be barred from purporting to identify the accused as the perpetrator for the first time in court.²⁸ However, courts normally admit all identification evidence and leave it to the jury to assess its value.²⁹

B. Confessions

Like eyewitness testimony, confession evidence can be surprisingly unreliable. Ordinary people view confessions as extremely persuasive, often conclusive, evidence of guilt.³⁰ Indeed, social science research

24. See *R. v. McIntosh* (1997), 35 O.R. (3d) 97 at 105 (C.A.) [*McIntosh*], leave to appeal to the S.C.C. refused, [1997] S.C.C.A. No. 610 [*McIntosh*]; *R. v. Fengstad* (1994), 27 C.R. (4th) 383 (B.C.C.A.) [*Fengstad*]; and *R. v. Audy* (No. 2) (1977), 34 C.C.C. (2d) 231 (Ont. C.A.).

25. *Mezzo*, *supra* note 18.

26. *Ibid.* at 845.

27. Kent Roach, "Unreliable Evidence and Wrongful Convictions: The Case for Excluding Tainted Identification Evidence and Jailhouse and Coerced Confessions" (2007) 52 *Crim. L.Q.* 210. *Lamer Commission Report*, *supra* note 4 at 168 (advocating that trial judges be given broader powers to throw out weak cases generally).

28. *R. v. Tebo* (2003), 175 C.C.C. (3d) 116 (Ont. C.A.); and *R. v. Holmes* (2002), 62 O.R. (3d) 146 (C.A.).

29. *E.g. Hibbert*, *supra* note 7 at para. 49 (ruling that in-court identifications were properly admitted, despite an "almost total absence of value as reliable positive identification").

30. *E.g. R. v. Hodgson*, [1998] 2 S.C.R. 449 at para. 14 [*Hodgson*]; and Peter Brooks, *Troubling Confessions: Speaking Guilt in Law and Literature* (Chicago: University of Chicago Press, 2000) at 4. See also Saul M. Kassin & Katherine Neumann, "On the Power of Confession Evidence: An Experimental Test of the Fundamental Difference Hypothesis" (1997) 21 *Law & Human Behavior* 469 (reporting a series of mock juror

suggests the existence of a widely-held belief that only torture could cause an innocent person to confess to a crime.³¹ Canadian courts have acknowledged that the very idea of a false confession may be counter-intuitive to jurors.³² Yet, however improbable it seems, innocent people not infrequently confess guilt and expose themselves to criminal punishment. Many such false confessions are “police-induced” in the sense that they are extracted from reluctant suspects by interrogators.³³ Confessions can be dangerous items of evidence indeed if jurors are inclined to dismiss the very possibility that a person who has confessed might be innocent.³⁴

Even jurors who recognize this danger are unlikely to understand why some suspects confess falsely and to know the features that distinguish false confessions from trustworthy ones.³⁵ It is difficult to see how a fact-finder could properly assess the value of a retracted confession without some grasp of these issues. The psychological

studies in which confession evidence was seen as more important by jurors and had more of an effect on verdicts than other powerful kinds of evidence); and Saul M. Kassin & Holly Sukel, “Coerced Confessions and the Jury: An Experimental Test of the ‘Harmless Error’ Rule” (1997) 21 *Law & Human Behavior* 27 at 44 (“the presence of any confession powerfully increased the conviction rate [in these mock juror studies] — even when it was seen as coerced, even when it was ruled inadmissible, and even when participants claimed it did not affect their verdicts”).

31. E.g. Richard A. Leo & Richard J. Ofshe, “The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation” (1998) 88 *J. Crim. L. & Criminology* 429 at 444. See also Gisli H. Gudjonsson, *The Psychology of Interrogations, Confessions and Testimony* (New York: John Wiley & Sons, 1992) at 234. Empirical support for the existence of this belief derives from two studies in which mock jurors discounted confessions elicited by threats but did not discount the value of confessions elicited by promises of lenient treatment. Saul M. Kassin & Lawrence S. Wrightsman, “Coerced Confessions, Judicial Instructions, and Mock Juror Verdicts” (1981) 11 *J. Applied Soc. Psychol.* 489 [Kassin & Wrightsman, “Coerced Confessions”]; and Saul M. Kassin & Lawrence S. Wrightsman, “Prior Confessions and Mock Juror Verdicts” (1980) 10 *J. Applied Soc. Psychol.* 133.

32. *Oickle*, *supra* note 7 at para. 34; and *R. v. Swanek* (2005), 28 C.R. (6th) 93 at 97 (Ont. C.A.).

33. For case studies and discussion of “police-induced false confessions,” see Leo & Ofshe, *supra* note 31.

34. See *ibid.* at 429.

35. See e.g. Trotter, *supra* note 10 at 188.

literature suggests that two factors contribute to false confessions: the suspect's vulnerabilities and the coercive or manipulative features of the interrogation.³⁶ Vulnerable individuals who are more suggestible or compliant than the average are especially likely to offer false confessions under the pressures of police interrogation — young people, for example, or those suffering from mental illnesses or deficits.³⁷ But even mentally normal adults have been known to confess falsely to serious crimes in the face of prolonged police questioning.³⁸ Modern methods of psychological interrogation use pressure, deceit and manipulation to erode a suspect's will not to confess.³⁹ These techniques are intended for use against guilty suspects, but they can also elicit confessions from the innocent.⁴⁰

Canadian law recognizes the danger of police-induced false confessions. The primary check on unreliable confession evidence is the voluntariness or "confessions rule," which makes an out-of-court statement of an accused to a person in authority inadmissible against the accused unless the prosecution proves beyond a reasonable doubt that the statement was voluntary.⁴¹ Although the touchstone of admissibility is voluntariness, not reliability, the confessions rule is thought to exclude many unreliable confessions.⁴² A confession may be rendered involuntary, among other reasons, if it is elicited through police coercion involving threats of harm or promises of leniency, or if the circumstances of the interrogation are oppressive, as when a suspect is denied sleep, food, clothing or water.⁴³ These same coercive and

36. *E.g.* Gisli H. Gudjonsson & James A.C. MacKeith, "Retracted Confessions: Legal, Psychological and Psychiatric Aspects" (1988) 28 *Med. Sci. & Law* 187 at 191.

37. *E.g.* Christopher Sherrin, "False Confessions and Admissions in Canadian Law" (2005) 30 *Queen's L.J.* 601.

38. *E.g.* Gudjonsson, *supra* note 31 at 234.

39. *Ibid.* at 24, 47.

40. *Ibid.* at 48.

41. *Hodgson*, *supra* note 30 at para. 12; *R. v. Erven*, [1979] 1 S.C.R. 926 at 931; and *R. v. Sabri* (2002), 166 C.C.C. (3d) 179 at 185 (Ont. C.A.).

42. *Oickle*, *supra* note 7.

43. *Ibid.* at paras. 47-62.

oppressive tactics have been known to result in false confessions.⁴⁴ Thus, the confessions rule seems reasonably well-calibrated to exclude some unreliable confessions.

In the leading case of *Oickle*, the Supreme Court recognized that the primary rationale for excluding involuntary confessions is to prevent wrongful convictions.⁴⁵ Drawing heavily on the false confessions literature, the Court accepted that confessions have proven false in “hundreds of cases,” described the different types of false confessions catalogued by researchers and discussed the circumstances in which police are most likely to elicit false confessions.⁴⁶ The Supreme Court has thereby put its imprimatur on the findings of false confessions researchers, but there is currently no way to communicate these findings to jurors who may be called upon to assess the reliability of a retracted confession. Expert evidence on the general phenomenon of false confessions has been admitted in foreign courts but never, to this point, in Canadian trials.⁴⁷ Moreover, judges do not warn juries of the possibility that a confession may be false, or offer them any information bearing on the reliability of retracted confessions. Juries are simply instructed that it is for them to determine whether a confession was made, whether it was true and how much weight to give it.⁴⁸ These skeletal instructions shed no light on the features of psychological

44. *E.g. ibid.*; and Richard J. Ofshe & Richard A. Leo, “The Decision to Confess Falsely: Rational Choice and Irrational Action” (1997) 74 *Denv. U. L. Rev.* 979 at 997-1000.

45. *Oickle*, *supra* note 7 at paras. 32, 68.

46. *Ibid.* at paras. 34-46.

47. Foreign cases approving the use of false confessions expert evidence include *United States v. Hall*, 93 F.3d 1337 at 1345 (7th Cir. 1996) [*Hall*]; and *R. v. Fell*, [2001] EWCA Crim. 696. The leading Canadian cases on this point are *R. v. Osmar* (2007), 44 C.R. (6th) 276 (Ont. C.A.) [*Osmar*] (ruling expert evidence on false confessions inadmissible in the circumstances, but leaving open the possibility that such expert testimony might be admitted in an appropriate case); and *R. v. Warren*, [1995] 3 W.W.R. 371 (N.W.T.S.C.), *aff'd* 117 C.C.C. (3d) 418 (N.W.T.C.A.) [*Warren*] (excluding expert evidence on whether the circumstances in which the accused confessed made the confession unreliable). See also Trotter, *supra* note 10 at 198-200 (discussing and rejecting the use of expert evidence and jury instructions on the general phenomenon of false confessions).

48. *R. v. Mulligan*, [1955] O.R. 240 (C.A.); and *R. v. Rustad*, [1965] S.C.R. 555.

interrogation that result in false confessions, and do little to counteract the common sense belief that innocent suspects do not confess.

C. Jailhouse Informant Testimony

Juries also have difficulty evaluating the testimony of jailhouse informants — that is, inmates who come forward as potential witnesses, claiming to have heard confessions from fellow prisoners while they were incarcerated together.⁴⁹ They can be important prosecution witnesses, often testifying that the accused admitted guilt and volunteered details about the crime. Since few species of evidence are as powerful as an acknowledgement of guilt from the mouth of the accused, jailhouse informant testimony can be highly persuasive. But experience reveals that these witnesses frequently testify to admissions that were never made, and their perjury has been identified as a leading cause of wrongful convictions. Jailhouse informants are often waiting to be tried or sentenced by the same criminal justice system they claim to assist,⁵⁰ and their typical concern is only to advance their own interests.⁵¹

The obvious reliability problems with jailhouse informant testimony have not deterred officials from frequently crediting these witnesses' accounts of jailhouse confessions. Jailhouse informants can often lie to investigators and on the stand with a reassuring combination of fluency, comfort and apparent conviction.⁵² They invent plausible confessions using information patched together from media reports, documentary evidence disclosed by the prosecution and left in the possession of the accused, and case-related discussions with innocent suspects.⁵³ Relying

49. See *Kaufman Commission Report*, *supra* note 4 at 598; *Report on the Prevention of Miscarriages of Justice*, *supra* note 3 at 75; and Christopher Sherrin, "Jailhouse Informants, Part I: Problems with their Use" (1997) 40 *Crim. L.Q.* 106 at 107 [Sherrin, "Jailhouse Informants Part I"].

50. See Sherrin, "Jailhouse Informants Part I", *ibid.* at 107.

51. *Kaufman Commission Report*, *supra* note 4 at 599.

52. See e.g. *Sophonow Inquiry Report*, *supra* note 4 at 70-71.

53. See e.g. *Kaufman Commission Report*, *supra* note 4 at 555, 565.

on such sources and their own ingenuity, these witnesses often convince investigators that their information could only have come from the perpetrator of the offence.⁵⁴ Given the facility with which jailhouse informants have been able to hoodwink criminal justice officials, there is little reason to believe that juries will be skilled at detecting this kind of perjury.⁵⁵ As ordinary citizens, they are likely to be unaware of both the dismal track record of jailhouse informants as a class of witnesses and the ways in which those informants concoct believable testimony.⁵⁶

Canadian courts have bemoaned the role of jailhouse informants in bringing about wrongful convictions,⁵⁷ and they have tried to control the problem through evidentiary regulation. When the prosecution calls a jailhouse informant in a criminal jury trial, the judge normally warns the jury about the perils of relying on the informant's unsupported testimony.⁵⁸ The Supreme Court has held that when the prosecution relies on any "unsavoury" witness whose credibility is seriously in doubt, circumstances may call for "a clear and sharp warning to attract the attention of the juror to the risks of adopting, without more, the evidence of the witness."⁵⁹ The decision to offer such a "*Vetrovec* warning" lies within the discretion of the trial judge and does not depend on the "class" to which the witness belongs.⁶⁰ No particular form of words is required, but the caution should single out the unsavoury witness for careful scrutiny, highlight the reasons why the witness may be untruthful, and alert the jury to the danger of relying

54. See e.g. *Sophonow Inquiry Report*, *supra* note 4 at 71.

55. *Ibid.* at 70; and *Kaufman Commission Report*, *supra* note 4 at 600.

56. Sherrin, "Jailhouse Informants Part I", *supra* note 49 at 117-18.

57. See e.g. *Brooks*, *supra* note 7; and *R. v. Sauvé* (2004), 182 C.C.C. (3d) 321 (Ont. C.A.) [*Sauvé*].

58. See *Brooks*, *ibid.*

59. See *R. v. Vetrovec*, [1982] 1 S.C.R. 811 at 831 [*Vetrovec*].

60. *Ibid.* at 830-32. See also *R. v. Potvin*, [1989] 1 S.C.R. 525 at 557; and *R. v. Campbell* (2002), 163 C.C.C. (3d) 485 at para. 13 [footnotes omitted] [N.S.C.A.] ("The Supreme Court of Canada has rejected a caution based upon categories of witnesses in favour of a principled and subjective approach. The warning may be required for any unsavoury witness. This would include accomplices, jailhouse informants or persons with a lengthy criminal record").

upon his or her testimony unless they find other evidence to support it.⁶¹

Decisions about whether to offer a *Vetrovec* warning, and its precise contents, normally lie within the discretion of trial judges. However, the law mandates a strong *Vetrovec* warning in certain cases, and criminal convictions are regularly overturned on the basis that it was not offered.⁶² In deciding whether such a warning is required as a matter of law, courts weigh the reasons to suspect that the unsavoury witness may be untruthful and the importance of his or her testimony to the prosecution's case: the more untrustworthy the witness and the more crucial the evidence, the more likely that a clear and sharp credibility warning will be required.⁶³ In effect, judges are required to warn juries in accordance with *Vetrovec* when unsavoury witness testimony appears so unreliable, or so basic to the case against the accused, that it would run a clear risk of producing an erroneous conviction.⁶⁴

Moreover, although the law on unsavoury witness warnings does not depend on any rigid categorization of witnesses, certain witnesses continue to be regarded with great suspicion by the courts. Bitter experience has made jailhouse informants an important modern "class" of suspect witnesses, and a clear and sharp warning is normally required when their evidence is important to the prosecution's case.⁶⁵ Given the serious danger of wrongful convictions grounded on jailhouse informant testimony, there have been proposals to severely limit its use,

61. See *Vetrovec*, *ibid.*; *Brooks*, *supra* note 7 at para. 94; and *Sauvé*, *supra* note 57 at 356.

62. *E.g. R. v. Bevan*, [1993] 2 S.C.R. 599 (warning mandatory where two witnesses were disreputable criminal associates of the accused, and one was also an accessory after the fact to the offense being tried); *R. v. Bromley* (2000), 151 C.C.C. (3d) 480 (Nfld. C.A.) (warnings mandatory where complainants all had long criminal records) [*Bromley*]; and *Sauvé*, *ibid.* (warnings mandatory for three witnesses who had lied to police, were career criminals, sought benefits for their testimony, and were heavy drug users).

63. *Brooks*, *supra* note 7.

64. See *e.g. Bromley*, *supra* note 62; *R. v. MacDonald*, 2000 NSCA 60, 184 N.S.R. (2d) 1 at para. 166 [*MacDonald*].

65. *R. v. Chandra* (2005), 198 C.C.C. (3d) 80 (Alta. C.A.). See also *Brooks*, *supra* note 7 at para 130 (Binnie, J., concurring); and *MacDonald*, *ibid.* at para. 166.

65. *Sophonow Inquiry Report*, *supra* note 4 at 72-73.

either by making it generally inadmissible⁶⁶ or by vesting trial judges with the power to exclude it when it does not meet some minimum standard of reliability.⁶⁷ To this point, however, there exists no legislative or common law basis in Canada for trial judges to remove even the most unreliable jailhouse informant testimony from the jury's consideration. Defence attempts to have such testimony excluded have been rebuffed on the strength of the principle that the quality and weight of the evidence are for the jury to decide.⁶⁸

D. A Broad Perspective

The trial evidence rules described in this part can be briefly summarized as follows. Some unreliable confessions are removed from the jury's consideration by the voluntary confessions rule. Research illuminating the nature and causes of police-induced false confessions informs this exclusionary rule but is not considered a proper subject of expert evidence or jury instructions. By contrast, eyewitness identification evidence and jailhouse informant testimony are normally controlled only by judicial warnings to the jury. They cannot be excluded on grounds related to reliability and expert evidence shedding light on the factors affecting their reliability is inadmissible. Of course, there have been dissenting voices. Occasionally a court opines that evidence which would normally be the subject of a cautionary jury instruction should be excluded. Commentators have joined in calls to exclude certain unreliable eyewitness and jailhouse informant testimony, and have decried the exclusion of expert evidence on eyewitness psychology. On the whole, however, the law governing these forms of

66. *Ibid.*

67. *Kaufman Commission Report*, *supra* note 4 at 623; Christopher Sherrin, "Jailhouse Informants in the Canadian Criminal Justice System, Part II: Options for Reform" (1997) 40 *Crim. L.Q.* 157 at 179-84 [Sherrin, "Jailhouse Informants Part II"].

68. *E.g. MacDonald*, *supra* note 64 at paras. 93-97 (holding that judges have no discretion to exclude unreliable jailhouse informant testimony). See also *R. v. Buric* (1996), 28 O.R. (3d) 737 (C.A.), *aff'd* [1997] 1 S.C.R. 535 [*Buric*] (confirming that unreliability does not affect admissibility); and *R. v. Monteleone*, [1987] 2 S.C.R. 154 (holding that the weight of the evidence is for the jury).

evidence remains remarkably simple and consistent: the dangers of eyewitness mistake and jailhouse informant perjury are dealt with through cautionary jury instructions, while the problem of false confessions is controlled through an exclusionary rule.

Considering these three forms of proof together brings into focus two important general principles underlying the existing law. The first might be called the principle of exclusivity: the notion that for each category of unreliable prosecution evidence there should be only one procedural corrective. Under current law, whether jurors will be instructed on the frailties of unreliable evidence or will have that evidence taken away from them altogether depends entirely on the type of evidence at issue. The categories of proof in question (confessions, eyewitness testimony and jailhouse informant testimony) are tightly coupled with particular procedural techniques — exclusion or jury instructions, as the case may be. The exclusivity principle has been endorsed most explicitly in connection with eyewitness expert testimony, which is said to be unnecessary because juries receive the information they need through cautionary instructions.⁶⁹ And while the exclusivity principle is not always clearly stated, it structures the entire set of rules governing unreliable prosecution evidence. In short, Canadian evidence law favours efficiency and abhors redundancy. Courts are generally unwilling to consider introducing a new evidentiary safeguard to address a reliability problem that has already been addressed by an existing rule.

The second key underlying principle might be labeled the principle of precision. These evidentiary rules are intended to precisely target and protect the innocent; they aim to distinguish accurately between innocent and guilty accused, and to safeguard the former but not the latter from conviction. No rule can be perfectly precise in this sense because all defensive safeguards are also “barriers to conviction” that can benefit the guilty as well as the innocent.⁷⁰ To some extent, acquittals of

69. See e.g. *McIntosh*, *supra* note 24 at 105; and *Fengstad*, *supra* note 24.

70. See e.g., Mirjan Damaška, “Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study” (1973) 121 U. Pa. L. Rev. 506 at 508, 576.

the guilty are accepted as the price of preventing wrongful convictions.⁷¹ But courts are reluctant to pay this price, and they prefer safeguards that target the innocent to mere barriers hampering effective prosecution. The law on unreliable prosecution evidence reveals that Canadian courts are profoundly committed to the precision principle, which they seek to uphold by borrowing liberally from social science findings on the psychology of evidence and wrongful convictions. Information on the nature and causes of false confessions has been drawn into the voluntariness rule, while cautionary jury instructions on eyewitness identification have incorporated psychological findings about eyewitness memory. Presumably, courts hope that increased familiarity with these bodies of knowledge is making judges and juries ever more sensitive to the factors affecting reliability, and ever more able to distinguish between accurate and inaccurate evidence and between guilty and innocent accused.

The precision and exclusivity principles represent the warp and woof of the rules on unreliable prosecution evidence. Precision serves the fundamental criminal justice policy of protecting the innocent from wrongful conviction without unduly compromising the basic criminal law goal of identifying and punishing the guilty. Exclusivity permits the procedural law to develop in a way that is streamlined and easy to apply. Connected as it is with the moral foundations of the criminal law, the precision principle should take precedence over the exclusivity principle, which serves the important but secondary goal of efficiency. However, the existing law on unreliable prosecution evidence inverts these priorities. By upholding one-size-fits-all rules that apply to all evidence in a given category but that are not particularly well targeted to prevent wrongful convictions, Canadian courts have adhered to the exclusivity principle at the expense of the precision principle. The analysis that follows will suggest that the best way to protect the innocent would be to develop a fuller spectrum of procedural responses to the problem of unreliable prosecution evidence in criminal jury trials.

71. See e.g. D.J. Galligan, "More Scepticism About Scepticism" (1988) 8 *Oxford J. Legal Stud.* 249 at 259.

II. Two Methods

A jury's tendency to rely too heavily on a given form of evidence can be controlled in two basic ways. First, courts can combat the jury's knowledge deficit with information, sensitizing jurors to reliability problems in hopes that they will place neither too much nor too little weight on the prosecution's evidence. Alternatively, courts can suppress the jury's use of the evidence by restricting its freedom to access or evaluate it. For present purposes, I label these two jury control methods, respectively, educating and limiting the jury. Canadian courts normally educate jurors by giving them cautionary instructions, and limit them by excluding evidence.⁷²

As far back as the nineteenth century, Jeremy Bentham distinguished between evidence rules "addressed to the will" and measures "addressed to the understanding."⁷³ He favoured eliminating mandatory rules, like exclusionary rules, which are addressed to the will and designed to tie the hands of the fact finder,⁷⁴ but he endorsed the use of instructions to enrich the fact finder's understanding of the value of evidence.⁷⁵ Bentham's prescription has not been wholly implemented in any common law jurisdiction: exclusionary rules remain at the centre of the law of evidence. However, his insight that evidentiary regulation can either override or seek to improve the fact finder's view of the evidence is still relevant today, since both limiting and educating rules form a part of modern evidence law. This part of the paper looks at the relative merits of using limiting and educating rules to alleviate the risk of wrongful convictions on the basis of unreliable prosecution evidence.

72. These are not the only possible jury control techniques. Permitting expert testimony on the frailties of unreliable evidence represents another potential method of educating the jury, while corroboration requirements constitute another kind of limiting rule. See Philip McNamara, "The Canons of Evidence — Rules of Exclusion or Rules of Use?" (1985) 10 *Adel. L. Rev.* 341 at 344 (classifying corroboration rules as "rules qualifying or restricting the powers of the tribunal of fact").

73. William Twining, *Theories of Evidence: Bentham and Wigmore* (Stanford: Stanford UP, 1985) at 28.

74. *Ibid.* at 43.

75. *Ibid.* at 28. See also Galligan, *supra* note 71 at 256.

A. Limiting the Jury

Limiting rules bar juries from relying on particular items of evidence. The simplest way to do this is to exclude the evidence. Another kind of limiting rule that has been used in common law jurisdictions is corroboration requirements, which prevent juries from convicting on the basis of certain forms of evidence without extrinsic support. Commentators occasionally advocate strict corroboration rules on unreliable evidence,⁷⁶ but such rules have fallen out of favour and are now essentially unknown to Canadian law. Exclusionary rules, too, have become fewer in number. Like generations of jurists who came before, the Supreme Court of Canada has announced its preference for admitting evidence and permitting the trier of fact to consider any doubts about its weight.⁷⁷ Let there be no mistake, however. The Supreme Court's expressed preferences notwithstanding, rules excluding evidence (from hearsay to coerced confessions) still form the core of Canadian evidence law.

(i) Strengths of Exclusionary Rules

Excluding evidence represents a natural, if extreme, response to the risk that juries may put too much stock in unreliable evidence. Juries cannot over-rely on inadmissible evidence because they cannot rely on it at all. Compelling fact finders to make their decisions without regard to

76. E.g. Alex Stein, "The Refoundation of Evidence Law" (1996) 9 Can. J.L. & Juris. 279 at 333 (advocating corroboration requirements with respect to those "particular kinds of evidence [that] give rise to serious concerns about their creditworthiness," including confessions and eyewitness and accomplice testimony).

77. *Nikolovski*, *supra* note 17 at 1208 citing *R. v. L. (D.O.)*, [1993] 4 S.C.R. 419 at 455, L'Heureux-Dubé J., concurring. The modern court's expressed distaste for exclusion is remarkably similar to Cockburn C.J.'s declaration in 1861: "People were formerly frightened out of their wits about admitting evidence, lest juries should go wrong. In modern times we admit the evidence and discuss its weight." Quoted in John Henry Wigmore, *Wigmore on Evidence*, vol. 1, rev. by Peter Tillers (Boston: Little, Brown & Co., 1983) at s. 10.

certain evidence alleviates the danger that common sense misapprehensions about that evidence may lead juries astray.

a. Effectiveness

Thus, the main advantage of exclusion is that it is a simple and effective safeguard for the innocent. No doubt, for example, the confessions rule prevents some wrongful convictions by catching some of the most unreliable confessions, including those elicited through police coercion or oppression.⁷⁸

b. Restraining Public Officials

Another advantage of exclusionary rules is that, by prohibiting the use of the evidence, they bring consequences when public officials act improperly or violate suspects' rights. Thus, exclusion seems particularly fitting when evidentiary regulation aims both to prevent erroneous convictions and to discourage official misconduct.⁷⁹ Here again, the confessions rule provides an apt example: involuntary confessions are inadmissible under Canadian law because they are unreliable but also, importantly, because they are the products of official coercion.⁸⁰ A special concern with state action is reflected in the fact that the exclusionary rule applies only to statements made to police officers and others involved in investigating or detaining the suspect.⁸¹ Reducing the use of coercive interrogation techniques is an important goal in itself and could also be expected to reduce the number of false confessions obtained from innocent suspects.

78. See *supra* notes 43 and 44 and accompanying text.

79. See e.g. David M. Paciocco, *Charter Principles and Proof in Criminal Cases* (Toronto: Carswell, 1987) at 337 [Paciocco, *Charter Principles*].

80. See *Hodgson*, *supra* note 30 at para. 14; and *R. v. Whittle*, [1994] 2 S.C.R. 914 at 932.

81. *Hodgson*, *ibid.* at para. 24.

(ii) Weaknesses of Exclusionary Rules

The weaknesses of exclusionary rules are the converse of their strengths. Because they are so drastic, exclusionary rules succeed in preventing wrongful convictions and in disciplining public officials. But they impose burdens on the justice system that weigh heavily against them.

a. Cost

An exclusionary rule requires trial judges to devote courtroom resources to deciding the question of admissibility, for example, by holding a *voir dire* to determine the voluntariness of each confession.⁸² However, the most serious potential drawback of exclusion is the cost of missing information. Excluding prosecution evidence hampers efforts to enforce the criminal law and interferes with the search for truth. Ultimately, one cannot separate reliable from unreliable evidence and valuable from misleading information in any universally valid, categorical way. Despite their dangers, eyewitness identification, confessions and jailhouse informant testimony do often amount to powerful evidence of guilt. Any broad rule excluding them would be disastrous; vast amounts of valuable information would be lost and the ensuing acquittals would be a windfall to the guilty.

b. Scope of Protection

Given this high cost, it would seem rational to exclude evidence only where concerns about reliability are most acute. Thus, one might expect that the range of cases where unreliable evidence is actually excluded would be quite narrow and the scope of protection offered by exclusionary rules correspondingly limited. An exclusionary rule directed at preventing juries from over-relying on deceptive prosecution evidence would likely be narrow enough to exclude some

82. *Ibid.* at para. 41.

of the most unreliable evidence but let in some of questionable reliability and value.

This narrowness of scope is a discernable feature of the modern Canadian confessions rule. That rule excludes many of the confessions most likely to be false, but still leaves plenty of room to admit police-induced false confessions. This conclusion is supported on several grounds.

First, even as the Supreme Court grappled in *Oickle* with the problem of false confessions arising out of psychological interrogation, the Court was careful to preserve the freedom of interrogators to put pressure on suspects to confess. During a police interrogation that lasted many hours, Oickle made a series of confessions, acknowledging greater and greater responsibility for a string of arsons. Interrogators repeatedly told him that he had failed a polygraph test, that the polygraph machine does not lie, and that they already knew he was guilty. Police offered him psychological help and threatened to interrogate his fiancée. Despite these and other forms of psychological pressure, a majority of the Supreme Court ruled Oickle's confessions voluntary,⁸³ thereby sanctioning police use of several pressure tactics that raise real reliability concerns. *Oickle* suggests that even a combination of such tactics may not render a confession involuntary,⁸⁴ and subsequent cases confirm that confessions may be ruled voluntary even when police use a number of troubling interrogation strategies.⁸⁵

Another reason to believe that the confessions rule lets in some false confessions is that *Oickle* gives short shrift to the problem of implicit

83. *Oickle*, *supra* note 7 at para. 99.

84. See Don Stuart, "Oickle: The Supreme Court's Recipe for Coercive Interrogation" (2001) 36 C.R. (5th) 188.

85. See e.g. *R. v. Grouse*, 2004 NSCA 108, 226 N.S.R. (2d) 321 (upholding a trial judge's ruling that a confession was voluntary, even though it arose out of an aggressive, often profane interrogation in which a lesser included offence with a lighter penalty was discussed); and *R. v. M.C.*, 2001 NSCA 64, 193 N.S.R. (2d) 183 (upholding a finding of voluntariness in the face of a number of borderline inducements, including suggestions that the suspect might be held responsible for other offences under investigation and a promise that the interrogator would make a telephone call to inquire about having the suspect remanded to a youth facility so he could avoid spending the night in the police cells).

inducements. While the Court affirmed the principle that even implied threats and promises can render a confession involuntary, it seemed blind to the implied inducements offered by the police in *Oickle*'s case. After *Oickle* confessed to setting one fire, an interrogator made several confusing statements to him to the effect that the various fires that he was accused of setting constituted a "bundle."⁸⁶ While a majority of the Supreme Court interpreted these statements as references to the police theory that all the fires were set by the same arsonist, it seems clear that the interrogator probably intended them (and *Oickle* probably understood them) as implied promises that there would be little difference in penal consequences between confessing to one fire or all the fires.⁸⁷ *Oickle* suggests that police can evade the confessions rule by speaking in sentence fragments and non-sequiturs suggestive enough to make suspects believe they have something to gain by confessing, but ambiguous enough that the courts will not be able to find a crystallized threat or promise.⁸⁸

If there was any doubt after *Oickle* that the confessions rule offers only modest protection to the accused, that doubt has been put to rest in *R. v. Spencer*.⁸⁹ In that case, police offered the accused a clear inducement to confess: they refused to allow him to visit his girlfriend until after he confessed his involvement in several robberies. Nevertheless, the Supreme Court held that the statements were voluntary. According to the majority, a confession may be voluntary even if the police hold out an inducement in the form of a *quid pro quo* for confessing. The key consideration in the voluntariness inquiry is "the strength of the inducement, having regard to the particular individual and his or her circumstances."⁹⁰ *Spencer* highlights the nebulous character of the voluntariness standard, which seems to defy

86. Transcript of interrogation quoted in *Oickle*, *supra* note 7 at paras. 129-30, Arbour J., dissenting.

87. See *ibid.* at para. 131, Arbour J., dissenting.

88. See Stuart, *supra* note 84 at 193 (criticizing the Supreme Court for condoning interrogators' use of "deliberately ambiguous remarks about going after friends and relatives").

89. 2007 SCC 11, [2007] 1 S.C.R. 500 [*Spencer*].

90. *Ibid.* at para. 15.

any attempt at analytical rigour. Some police pressure is permitted, but not too much.

It is therefore to be expected that some police-induced false confessions enter into evidence despite the confessions rule. The rule excludes self-incriminatory statements made under clearly coercive circumstances because those are the confessions most likely to be false; however, it operates to admit confessions where the police coercion is less extreme. Given the wide latitude afforded interrogators under the voluntariness rule, claims by the defence that a voluntary confession is false should not be dismissed out of hand,⁹¹ but should be given fair consideration by the jury.

Unfortunately, juries remain ill-equipped to evaluate such claims, and Canadian law offers no guidance. It treats the confessions rule as the exclusive solution to the false confessions problem and provides no way of controlling the use of unreliable confessions that may come before the jury despite the rule. When a confession has been admitted, there is no way to educate jurors about the nature or the causes or even the existence of false confessions. Juries cannot escape the duty to evaluate the reliability of confessions,⁹² but they are left to assess the evidence on the basis of their common sense. The natural tendency to doubt that an innocent suspect would confess falsely raises a grave danger that juries will credit any statement that is admitted as voluntary under the confessions rule.

In sum, since the loss of relevant information places such heavy burdens on the trial system, exclusionary rules tend to be narrow enough to admit evidence in borderline cases. Thus, where an exclusionary rule is the only safeguard, unreliable evidence can be expected to find its way before juries who remain unprepared to assess its value.

91. See e.g. Trotter, *supra* note 10 at 181, 187; and Martin, *supra* note 23 at para. 2.

92. See Trotter, *ibid.* at 200, 210.

B. Educating the Jury

As an alternative to exclusionary rules, jurors can be educated about the weaknesses of potentially unreliable evidence but left free to weigh it for themselves.⁹³ Such educational efforts should not only increase jurors' scepticism about the prosecution's evidence but should also, ideally, give them the analytical tools needed to assess it realistically. In contrast to exclusionary rules, which assume but do not try to correct certain deficiencies in jurors' understandings of prosecution evidence, educating rules aim to remedy those deficiencies by bringing jurors' views of the evidence more into line with educated views.

Of course, jurors can be educated to some extent by adversary argument and cross-examination, the tools through which defence counsel attack the reliability of prosecution evidence and point to frailties in the Crown's case. However, these tools have limited educative potential because they do not allow counsel to put forward facts or general propositions about the psychology and reliability of evidence. If juries are to learn about the track record of jailhouse informants as a class of witnesses or to hear what social science has revealed about the factors that make eyewitness evidence or confessions unreliable, that education must come not from adversary lawyers but from judges or expert witnesses. Skillful cross-examination and argument may reveal the case-specific circumstances that make testimony unreliable, but they are not enough to equip juries to grasp the significance of those circumstances.⁹⁴ Beyond the ordinary adversarial devices of cross-examination and argument, there are two ways of educating the jury about the frailties of unreliable evidence: judicial instructions and expert evidence. This section reviews the strengths and weaknesses of this educative approach.

93. See Galligan, *supra* note 71 at 256.

94. See e.g. Loftus & Doyle, *supra* note 12 at 274-75.

(i) Strengths

The principal advantage of educating rules lies in the light burden they impose on the trial process. Whereas exclusionary rules are costly, both in terms of court resources and amount of relevant information, jurors can be sensitized to the frailties of unreliable prosecution evidence at little cost in either of those respects. Moreover, because the burdens of education are relatively light, jurors can receive some education in a wide range of cases. Educating rules provide some protection against wrongful convictions while interfering only minimally with the process of jury adjudication.

a. Cost

While limiting rules take a heavy toll on the trial process in terms of lost information, educating rules increase the relevant information available to juries. They permit the prosecution's potentially unreliable evidence to go before the jury alongside some contextual information thought to assist the jury in interpreting that evidence. Quite simply, educating rules carry no costs in the form of lost evidence.

The story with respect to courtroom resources is more mixed; here, much depends on the source of the education. Cautionary jury instructions on the frailties of certain types of evidence require only a few minutes of court time.⁹⁵ These instructions can be, and usually are, largely standardized, so judges need not expend much effort framing unique instructions in every case. By contrast, expert evidence requires a substantial investment of courtroom resources. Direct and cross-examination of a defence expert can take a long time, and there is always the possibility that the prosecution will call an expert of its own. Moreover, experts must be sought out, prepared for trial, and paid for their time, normally by the parties themselves.

95. See Steven E. Holtshouser, "Eyewitness Identification Testimony and the Need for Cautionary Jury Instructions in Criminal Cases" (1983) 60 Wash. U.L.Q. 1387 at 1423 (arguing in favour of cautionary eyewitness jury instructions because they protect the innocent at little cost to society).

b. Scope of Protection

As noted above, evidentiary exclusion imposes heavy burdens on the trial system, so evidence is most likely to be excluded in the narrow range of cases where doubts about its reliability are very grave. In contrast, cautionary instructions can be incorporated into the trial process at little cost, so one might expect such instructions to be offered in a wider range of cases, and perhaps even in all cases where the prosecution relies on a particular species of evidence. Indeed, an instruction on the frailties of eyewitness evidence is mandatory in Canadian criminal trials whenever the defence claims mistaken identity. Similarly, in the context of unsavoury witnesses like jailhouse informants, the Supreme Court has held that a trial judge may be required to offer a *Vetrovec* warning even when the defence does not request one.⁹⁶ Cautionary jury instructions are well suited for wide use in cases where the reliability of the prosecution's evidence is in doubt. They are an inexpensive means of sensitizing the jury to the frailties of the evidence.

In comparison, expert evidence could at best protect the innocent from conviction in a much narrower range of cases. Formally, rules permitting expert testimony could be quite broad. For example, existing Canadian law prohibits experts from testifying about the general frailties of eyewitness identification and, in most US jurisdictions, trial judges are simply given the discretion to admit such testimony. One could conceive of a blanket rule permitting the defence to call a psychological expert whenever the case turns on eyewitness identification. But merely permitting the defence to call an expert would not guarantee access to expert services. Even if experts on eyewitness identification or false confessions were permitted to testify, they would rarely take the stand because most accused persons could not afford to hire them.⁹⁷

To be sure, a few indigent accused have been able to retain experts at the state's expense. The U.S. Supreme Court recognized in 1985 that the Constitution entitles some defendants to publicly-funded expert

96. *Brooks*, *supra* note 7 at paras. 84-92, 99-101.

97. See e.g. *People v. Wright*, 729 P.2d 280 at 294 (Cal. Sup. Ct. 1987) [*Wright*].

assistance.⁹⁸ However, whether an expert must be provided is decided on a case-by-case basis and it has never been made clear that this constitutional right covers eyewitness experts.⁹⁹ In Canada, a few cases recognize an analogous right to state-funded expert assistance under the *Canadian Charter of Rights and Freedoms*,¹⁰⁰ but this right is probably very limited in scope.¹⁰¹ Even the constitutional right to state-funded counsel for indigent accused persons — of which the right to state-funded expert assistance is only a poor relation¹⁰² — has rarely been discussed by Canadian courts and has never been specifically affirmed by the Supreme Court of Canada.¹⁰³ The dearth of cases on the *Charter* right to publicly-funded counsel reflects confidence that adequate

98. *Ake v. Oklahoma*, 470 U.S. 68 (1985).

99. See Loftus & Doyle, *supra* note 12 at 282; and Fred Warren Bennett, "Toward Eliminating Bargain Basement Justice: Providing Indigent Defendants with Expert Services and an Adequate Defense" (1995) 58:1 Law & Contemp. Probs. at 95.

100. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

101. In each of the reported cases, the court recognized that indigent defendants hold a qualified *Charter* right to state-funded expert assistance but declined to find that the right had been violated in the circumstances of the particular case: *R. v. Poslowsky*, [1997] B.C.J. No. 2124 (S.C.) (Q.L.) [*Poslowsky*]; *R. c. Chartrand*, [2003] J.Q. 22217 (C.Q. crim & pén.) (Q.L.) [*Chartrand*]; and *R. v. J.J.B.*, 2002 BCPC 50 [J.J.B.].

102. Like the constitutional right to state-funded trial defense counsel, the right to publicly-funded expert assistance is understood as an element of fair trial rights under ss. 7 and 11(d) of the *Charter*, *supra* note 100; See *Chartrand*, *ibid.* at paras. 24-27; and *Poslowsky*, *ibid.* at para. 5.

103. The Supreme Court has, however, recognized a qualified right to state-funded counsel for indigent parents facing custody proceedings where legal representation is needed to ensure that the hearing is fair: *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46. More generally, the Court recently affirmed in *British Columbia (A.G.) v. Christie*, 2007 SCC 21, [2007] 1 S.C.R. 873 at para. 27 that "the text of the Constitution, the jurisprudence and the historical understanding of the rule of law do not foreclose the possibility that a right to counsel may be recognized in specific and varied situations." The leading case on the right to state-funded defense counsel is *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1 at 66 (Ont. C.A.) [*Rowbotham*] ("[I]n cases not falling within provincial legal aid plans, ss. 7 and 11(d) of the *Charter*, which guarantee an accused a fair trial in accordance with the principles of fundamental justice, require funded counsel to be provided if the accused wishes counsel, but cannot pay a lawyer, and representation of the accused is essential to a fair trial").

representation is provided by legal aid organizations serving the public in every part of Canada.¹⁰⁴ This confidence probably extends to the provision of defence experts, which can also be funded through these programs.¹⁰⁵ Obviously, however, not every request for a publicly-funded expert will be granted, and many accused who might benefit from an expert's assistance are likely to find that neither the rules of the legal aid system nor the *Charter* guarantees them access to this service.

Quite apart from the cost of hiring an expert, there are not currently enough qualified experts to make a dent in the mountain of eyewitness and confessions cases that arise each year. Gary Wells has estimated that fewer than 50 psychologists are qualified to testify as eyewitness experts in the United States, while there are more than 77,000 eyewitness cases every year.¹⁰⁶ There is little doubt that the number of experts available to testify in Canadian trials is similarly inadequate. Of course, if eyewitness expert testimony were more widely admissible, more psychologists might come forth to fill the demand. At least for the moment, however, expert evidence does not offer a systemic solution to the danger of error raised by eyewitness mistake.¹⁰⁷ More broadly, any rule permitting expert testimony on the frailties of unreliable prosecution evidence seems likely to succeed in educating juries in only a limited number of cases, but is destined to fail to reach the majority of jurors confronted with these problematic forms of proof.

104. See *Rowbotham, ibid.* at 66.

105. For example, regulations under Ontario's *Legal Aid Services Act*, 1998, S.O. 1998, c. 26 vest legal aid officials with discretion to fund defense experts. O. Reg. 107/99, Sched. 6, s. 1.3. For detail about what expert expenses may be covered by legal aid, see Legal Aid Ontario, *Tariff And Billing Handbook* (2007) at 6-19, online: <http://www.legalaid.on.ca/en/info/pdf/Tariff_Manual.pdf>.

106. Gary L. Wells, "Eyewitness Identification Evidence: Science and Reform" *Champion Magazine* (April 2005) 12, online: <<http://www.nacdl.org/public.nsf/698c98dd101a846085256eb400500c01/49b1b19b6786ffc685256tbd006a4c9b?OpenDocument>> [Wells, "Science and Reform"].

107. See *ibid.*: "The cost of expert testimony, and the arbitrariness with which cases will receive this benefit, make this solution ineffective given the magnitude of the problem."

(ii) Weaknesses

The principal disadvantage of educating rules is that one cannot be sure how well they protect the innocent. Attempts to educate juries about unreliable forms of proof succeed only if they sensitize juries to the frailties of the evidence. Sensitivity is heightened when juries receive full and accurate information about those frailties in a way that improves their ability to assess the evidence.¹⁰⁸ Unfortunately, cautionary instructions and expert evidence sometimes fail to convey the necessary information, or convey it in a way that fails to assist the jury.

a. Quality of the Message

Educating rules are premised on the notion that certain factors bearing on the reliability of prosecution evidence are unknown, if not counterintuitive, to the average juror. Jury instructions and expert evidence can improve jurors' sensitivity to these factors by identifying them and explaining how they affect the reliability of the evidence. These educational efforts aim to provide juries with general propositions drawn from psychological research and judicial experience that can be used as analytical tools to assess testimonial reliability. Their success depends on the correctness and completeness of the factual propositions they contain.

There are two main concerns about the accuracy of the information given by expert witnesses. First, especially in the area of false confessions, courts worry that the science has not developed to the point where experts can be confident about their claims.¹⁰⁹ Second, there is a concern that partisan affiliation may cause expert witnesses to skew

108. Cutler & Penrod, *supra* note 12 at 217 ("We use sensitivity to refer to both knowledge of how a given factor influences eyewitness memory and the ability to render decisions in accordance with that knowledge. Thus, sensitivity contains two components: knowledge and integration").

109. *E.g. People v. Philips*, 692 N.Y.S. 2d 915 at 919 (N.Y. Sup. Ct. 1999); and *Warren*, *supra* note 47. See also *McIntosh*, *supra* note 24 at 102-04 (questioning the scientific status of a psychologist's proposed testimony on eyewitness identification).

their presentation in favour of the defence.¹¹⁰ Nevertheless, if we are to educate the jury about the problems of eyewitness memory or false confessions, psychologists working in those areas are in the best position to explain the state of knowledge.

Graver doubts surround the quality of the educational message of jury instructions. The contents of an eyewitness jury instruction, for example, vary considerably between jurisdictions, and in some forms the instruction is so watered down that it can only be described as a palpably deficient mechanism for sensitizing jurors to the frailties of eyewitness testimony. Several different versions of the American eyewitness jury instruction are catalogued in the literature.¹¹¹ The most rudimentary, known as the “burden of proof” eyewitness jury instruction, simply reminds the jury that the prosecutor must prove the perpetrator’s identity beyond a reasonable doubt.¹¹² This instruction has very limited educational value because it fails to identify, let alone explain, the factors bearing on the reliability of eyewitness identification.¹¹³

Another kind of eyewitness instruction, the most widely used in US state and federal jurisdictions, is the “factors” or “*Telfaire*” instruction,¹¹⁴ so named after the 1972 appeal court decision in which it was first

110. See e.g. Loftus & Doyle, *supra* note 12 at 329. Of course, this criticism applies only to experts called to testify on behalf of the parties. Expert knowledge could come before the courts in other ways, for example by courts appointing independent eyewitness or false confessions experts. This possibility seems promising because court-appointed experts could provide an unbiased explanation of the psychological principles at stake. See e.g. Peter J. Cohen, “How Shall They Be Known? *Daubert v. Merrell Dow Pharmaceuticals* and Eyewitness Identification” (1996) 16 Pace L. Rev. 237 (advocating the use of court-appointed experts on eyewitness identification, who would provide useful information on eyewitness psychology in the form of neutral testimony not slanted by adversary excess). However, because they represent the norm in both Canada and the US, this analysis focuses on partisan experts and leaves a thorough consideration of court-appointed experts to another day.

111. Loftus & Doyle, *ibid.* at 333-38.

112. *Ibid.* at 333.

113. *Ibid.* (describing such instructions as “close to useless”).

114. *Ibid.* at 333-34.

proposed.¹¹⁵ The *Telfaire* instruction highlights a number of the psychological factors affecting eyewitness reliability but stops short of explaining their effects: it emphasizes that the prosecutor must prove identity, and it admonishes the jury to consider the eyewitness' opportunity to observe the perpetrator, the possibility that the identification was influenced by police identification procedures, and other general issues.¹¹⁶ Because the *Telfaire* instruction focuses attention on some of the factors known to affect eyewitness memory and testimony, it has some potential to sensitize jurors to the frailties of the evidence. But it contains little psychological information. Because it fails to explain how the relevant factors bear on eyewitness reliability, it can hardly be expected to teach jurors much about eyewitness testimony, much less to challenge any misapprehensions they may hold.¹¹⁷

A final version of the eyewitness jury instruction, labeled the "expert substitute" instruction, holds more promise from the point of view of the fullness and accuracy of the information conveyed.¹¹⁸ This kind of instruction aims to do just what an expert witness would do: identify and explain the psychological factors that affect eyewitness reliability. In the 1987 case of *Wright*, the California Supreme Court held that the trial judge had committed reversible error by failing to offer instructions that would both caution the jury on the potential unreliability of eyewitness testimony and review the factors bearing on the weight of the identification evidence.¹¹⁹ The court proposed a model instruction that not only identified those factors but also briefly outlined how they worked. The instruction included a number of cautions grounded in psychological research, including these: "people are better at identifying persons they already know than persons with whom they have had no previous contact"; "[s]tudies show that when the witness and the person he is identifying are of different races, and particularly when the witness is white and the offender is black, the identification tends to be less

115. *Telfaire*, *supra* note 17.

116. *Ibid.* at 558-59.

117. See e.g. Cutler & Penrod, *supra* note 12 at 256; and Loftus & Doyle, *supra* note 12 at 334.

118. Loftus & Doyle, *ibid.* at 337.

119. See *Wright*, *supra* note 97.

reliable than if both persons are of the same race”; and “studies show that a witness may subconsciously incorporate into his memory information from other sources, such as descriptions by other witnesses.”¹²⁰

This proposed expert substitute instruction was short-lived, as *People v. Wright* was reversed on rehearing.¹²¹ Indeed, probably because they constitute a kind of judicial comment on the evidence that is disapproved or prohibited in most US jurisdictions,¹²² expert substitute instructions are rarely offered in American courts. Still, their strengths have occasionally been recognized.¹²³ Expert substitute instructions are the only eyewitness jury instructions that contain enough psychological information to challenge misguided views on the reliability of eyewitness testimony.

Reasonable doubt, *Telfaire* and expert substitute eyewitness instructions fall along a spectrum from weak to strong in the depth of psychological information they contain and in the force of their cautionary message. Interestingly, Canadian eyewitness jury instructions lie farther toward the stronger end of that spectrum than any instruction permitted by American courts. The Canadian instruction amounts to an unusually detailed expert substitute instruction, covering (where appropriate) such matters as the weak relationship between eyewitness confidence and accuracy, the risk of mistakenly identifying as the perpetrator one whose face is familiar from another context, and the low value of in-court identifications.¹²⁴ Moreover, whereas American trial judges normally must keep their comments balanced and refrain from pointing out the frailties of particular eyewitnesses’ testimony,¹²⁵

120. *Ibid.* at 296-97.

121. 45 Cal. 3d 1126 (Cal. 1988) (endorsing a *Telfaire* instruction), rev’g *Wright*, *supra* note 97.

122. Loftus & Doyle, *supra* note 12 at 337-38.

123. Cases approving the use of such instructions include e.g. *State v. Hubbard*, 48 P.3d 953 at 961 (Utah Sup. Ct. 2002) [*Hubbard*]; and *United States v. Burrous*, 934 F. Supp. 525 (E.D.N.Y.1996).

124. See e.g. *Hibbert*, *supra* note 7.

125. See e.g. *Wright*, *supra* note 97 at 287-88 (at once proposing an expert substitute instruction and stressing that the trial court should neither highlight the frailties of the

Canadian trial courts are required to instruct the jury in unabashedly non-neutral terms¹²⁶ and to relate that eyewitness instruction to the facts of the case.¹²⁷ The Canadian eyewitness jury instruction is remarkable for its sharply cautionary tone and for the fullness of the information it contains.

The same holds true of the *Vetrovec* warning normally offered on the testimony of jailhouse informants and other unsavoury prosecution witnesses. That “clear and sharp” warning alerts the jury to the danger that the unsavoury witness’ testimony may be unreliable, it explains any special reasons to suspect the witness’ veracity (benefits sought in exchange for testimony, or a history of perjury, for example) and warns the jury that it would be unsafe to rely on that evidence alone.¹²⁸ *Vetrovec* warnings reflect judicial experience with jailhouse informants who have often testified falsely against others in the hope of obtaining some benefit from the authorities. Like eyewitness instructions, they are designed to give juries the benefit of an informed perspective on unreliable prosecution evidence.

To assess realistically the value of these problematic forms of proof, juries need to grasp certain insights from psychology and from forensic experience. Although Canadian courts appear to be adept at framing cautionary instructions that incorporate those insights, some important gaps persist. For example, current published versions of the eyewitness jury instruction fail to discuss the possibility, long recognized by psychologists, that the natural tendency to focus on a perpetrator’s weapon may detract from the witness’ opportunity to observe and

particular identification on the facts of the case nor deliver comments on the evidence that are slanted in favor of the defense).

126. For example, a standard instruction opens with the observation that when the innocent are convicted, eyewitness mistake is often to blame. See *Hibbert*, *supra* note 7 at para. 79; and Ferguson, Dambrot & Bennett, *supra* note 22 at s.4.55.

127. *Canning*, *supra* note 19.

128. *Vetrovec*, *supra* note 59 at 831; and Accord *Dodd v. State*, 993 P.2d 778 at 784 (Okla. Crim. App. 2000) (laying out a model cautionary instruction that is mandatory whenever a jailhouse informant testifies).

remember the perpetrator's face.¹²⁹ Similarly, the standard *Vetrovec* caution fails to warn juries that dishonest jailhouse informants are often able to gather from other sources information that would seem to be available only to the perpetrator.¹³⁰ These omissions are important and need to be corrected. Nevertheless, like expert evidence, jury instructions have the potential to convey the information a jury needs to assess the value of unreliable evidence.

b. Impact on the Jury

To protect the innocent effectively, attempts to educate the jury through instructions or expert evidence must do more than convey the necessary information. They must convey the information in a way that the jury can understand it and use it. Because it is difficult to gauge how well juries grasp and make use of the information they receive, educating rules suffer from a serious weakness: we cannot be sure what impact they have. Expert evidence and cautionary instructions may equip jurors to assess unreliable forms of proof, but they may just as well be ignored, misunderstood or even given undue weight.

The impact of an attempt to educate the jury about the frailties of prosecution evidence depends on a number of variables. The content and language of the communication probably affects whether the jury accepts and acts on the information, as the jury could easily become confused by too much information or by abstruse language. In addition, the influence information has on the jury may depend on its source, which might be the trial judge or a defence expert. Finally, the timing of the communication could affect its impact. Experimental psychologists have conducted research, discussed below, on the impact of expert evidence and jury instructions in the area of eyewitness testimony. But few solid conclusions can be drawn from the existing studies, and ultimately little is known about whether and how juries can be

129. See e.g. Ferguson, Dambrot & Bennett, *supra* note 22 at s.4.55 (presenting a boilerplate instruction that omits this issue); and Copeland, *supra* note 23 at 202-03 (noting this and other lacunae in the standard instruction).

130. See *Sophonow Inquiry Report*, *supra* note 4 at 74.

effectively educated on the frailties of potentially unreliable prosecution evidence.

The uncertainty surrounding this issue is manifested in our incomplete understanding of how the timing of expert evidence and jury instructions affects their impact. Where permitted, expert evidence critiquing the reliability of the prosecution's evidence is admitted as part of the defence case, often long after the prosecution's witnesses have finished testifying. And while judges have some discretion in the timing and form of jury instructions, most often cautionary instructions are offered as a part of the judge's final charge to the jury.¹³¹ Commentators frequently claim that whether it takes the form of expert evidence or a cautionary instruction, the education comes too late.¹³² By the time jurors receive a cautionary message, they have already accepted the evidence in question and incorporated it into a mental "story" of the crime event — a story that, once constructed, is resistant to change.¹³³ The claim that cautionary instructions and defence experts would have more influence on the jury if offered earlier in the trial seems plausible, since jury research has shown that the timing and order of trial elements

131. See *e.g.* *R. v. Ménard*, [1998] 2 S.C.R. 109 at para. 27 (admitting that "long and detailed instructions at the end of a trial may be more confusing than helpful" and holding that the timing and form of the jury charge lie within the discretion of the judge); and *Kaufman Commission Report*, *supra* note 4 at 634 ("The content and timing of the [Vetrovec] caution is within the trial judge's discretion. Indeed, . . . in 34 percent of the 41 cases where a warning was given, it was given both when the evidence was called and in the charge to the jury").

132. See *e.g.* Leippe, "Eyewitness Memory", *supra* note 23 at 944 (suggesting that eyewitness expert evidence that comes before the eyewitness testimony is "worth studying"); Cohen, *supra* note 110 at 272-73 (expressing doubt that an instruction at the end of a long trial can affect the jury's view of eyewitness identification evidence).

133. This claim is based on the "story model" of juror decision-making, a psychological theory positing that jurors decide cases by organizing all the evidence into a story about what happened. See *e.g.* Robert K. Bothwell, "Social Cognition in the Courtroom: Juror Information Processing and Story Construction" in Walter F. Abbott & John Batt, eds., *A Handbook of Jury Research* (Philadelphia, PA: American Law Institute — American Bar Association, 1999) at 17-1.

can change their effects.¹³⁴ Yet no one can be sure how this factor works; evidence and instructions offered early in the proceedings may be more apt to influence jurors' initial belief formation, but information offered late in the trial has an "advantage of recency" in the sense that it may be fresher in jurors' minds as they move into deliberations.¹³⁵ These conflicting considerations preclude any firm conclusions about the optimal time to educate juries. As the content, language and source of the educational message can also vary, it would be dangerous to generalize about the effectiveness of educating rules.

Certain insights can be gained from the studies that have been conducted on the effect of expert testimony in the eyewitness context. Early research suggested that expert testimony reduces jurors' level of belief in eyewitness testimony,¹³⁶ a result that has frequently been replicated.¹³⁷ But the early studies did not clarify whether the expert testimony made jurors more sensitive to the factors that make eyewitness identification unreliable or simply caused them to be more sceptical of eyewitnesses in general.¹³⁸ To confront that question, Brian Cutler, Steven Penrod and Hedy Dexter designed a set of experiments to isolate the sensitivity and scepticism effects of expert testimony.¹³⁹ They reasoned that, ideally, expert evidence should not reduce jurors' overall belief in eyewitness testimony, but should cause them to discriminate more effectively between relatively reliable identifications

134. See *e.g.* Joel D. Lieberman & Bruce D. Sales, "What Social Science Teaches Us About the Jury Instruction Process" (1997) 3 Psychol. Pub. Pol'y & L. 589 at 628-32.

135. Michael R. Leippe *et al.*, "Timing of Eyewitness Expert Testimony, Jurors' Need for Cognition, and Case Strength as Determinants of Trial Verdicts" (2004) 89 Journal of Applied Psychology 524 at 526 (reporting a recent study conducted with college students reading trial transcripts, finding that eyewitness expert evidence offered before the eyewitness testimony had no effect on juror verdicts, while expert testimony given later in the proceedings did influence verdicts).

136. *E.g.* Harmon M. Hosch, "A Comparison of Three Studies of the Influence of Expert Testimony on Jurors" (1980) 4 Law & Human Behavior 297 at 299.

137. See *e.g.* Cutler & Penrod, *supra* note 12 at 223; Leippe, "Eyewitness Memory", *supra* note 23 at 940.

138. Cutler & Penrod, *ibid.* at 218-23.

139. Brian L. Cutler, Steven D. Penrod & Hedy R. Dexter, "The Eyewitness, the Expert Psychologist, and the Jury" (1989) 13 Law and Human Behavior 311.

made in favourable circumstances and relatively unreliable identifications made in unfavourable conditions. Cutler, Penrod and Dexter therefore looked for an interaction between the presence or absence of expert evidence and the quality of the “[w]itnessing and identification conditions.”¹⁴⁰ And they found one: their experiments indicated that hearing expert evidence did not make mock jurors sceptical of all eyewitness testimony. As compared to the mock jurors who did not hear the eyewitness expert, mock jurors who did hear the expert evidence viewed the prosecution’s case as being weaker when the perpetrator was disguised and armed, when the lineup procedures were suggestive, and when the interval between the crime and the identification was long. However, they saw the prosecution’s case as being stronger when these conditions were reversed and were therefore more favourable to an accurate identification. Cutler and Penrod conclude that these experimental findings demonstrate that “expert testimony sensitizes jurors”¹⁴¹ to the factors that make eyewitness identification unreliable and “provide support for the use of expert psychological testimony in eyewitness cases.”¹⁴²

This conclusion requires some qualification. Cutler, Penrod and Dexter’s experiments are alone in demonstrating a sensitization effect,¹⁴³ and other recent research suggests that expert testimony fails to sensitize jurors to the suggestiveness of lineup procedures.¹⁴⁴ Moreover, the fact that the eyewitness expert testimony produced no general scepticism does not necessarily represent a desirable result. Many of the findings of psychological experts — for example, that eyewitnesses have been known to make honest mistakes with high levels of confidence — should lead jurors to hesitate before accepting any eyewitness

140. Cutler & Penrod, *supra* note 12 at 225.

141. *Ibid.* at 229.

142. *Ibid.* at 240.

143. Leippe, “Eyewitness Memory”, *supra* note 23 at 923-24 (calling this showing of sensitivity without scepticism “less than robust”).

144. See Jennifer L. Devenport, Steven D. Penrod & Brian L. Cutler, “Eyewitness Identification Evidence: Evaluating Commonsense Evaluations” (1997) 3 Psychol. Pub. Pol’y & L. 338 at 356-57.

identification.¹⁴⁵ The very reason why the defence calls these experts is to warn jurors against too readily accepting eyewitness identification testimony. Some general scepticism toward this category of proof is a natural and indeed desirable consequence of this kind of expert testimony.¹⁴⁶

These qualifications notwithstanding, the research on eyewitness expert testimony grounds a few important conclusions. There is little doubt that expert testimony affects jurors' views of eyewitness identification evidence and makes them somewhat more reluctant to convict on that basis. The research also provides some support for the view that, instead of simply instilling scepticism, expert testimony improves jurors' abilities to assess the reliability of identification evidence. More broadly, the studies have shown that attitudes about unreliable prosecution evidence are malleable. Jurors can learn during the trial to treat a particular form of evidence with more caution than they might at first have thought necessary. In short, efforts to educate the jury can succeed, at least to a degree.

The existing literature on jury instructions is less encouraging. Indeed, a level of scholarly consensus has developed around the notion that jury instructions on eyewitness identification are basically ineffective.¹⁴⁷ This notion finds superficial support in an impressive

145. Leippe, "Eyewitness Memory", *supra* note 23 at 942.

146. *Ibid.* at 941-42 (discussing the interrelationship between scepticism and sensitivity to eyewitness factors); but see Cutler, Penrod & Dexter, *supra* note 139 at 314 (suggesting that more must be learned about jurors' pre-existing levels of belief in eyewitness identification evidence before it will be possible to determine whether enhancing their scepticism is a good thing).

147. See e.g. Cutler & Penrod, *supra* note 12 at 264 ("On the whole we are forced to conclude that the judges' instructions do not serve as an effective safeguard against mistaken identifications and convictions . . ."); Wise, Dauphinais & Safer, *supra* note 23 at 830-33; Jacqueline McMurtree, "The Role of the Social Sciences in Preventing Wrongful Convictions" (2005) 42 Am. Crim. L. Rev. 1271 at 1276 ("Research over the past thirty years has shown that expert testimony on memory and eyewitness identification is the only legal safeguard that is effective in sensitizing jurors to eyewitness errors" [footnote omitted]); and Handberg, *supra* note 23 at 1062. But see Wells, "Science and Reform", *supra* note 106 at 12 ("[J]udges should consider motions for instructions to juries that warn them against placing too much weight on eyewitness identification evidence");

body of research indicating that judicial instructions to the jury are very often ineffective and poorly understood.¹⁴⁸ However, this literature focuses primarily on legal instructions, on disregard instructions and on limiting instructions.¹⁴⁹ One can hardly be surprised that jurors have trouble grasping complex and esoteric legal rules or concepts when they are explained briefly, orally and in impenetrable language.¹⁵⁰ Nor should

Holtshouser, *supra* note 95 at 1426 (favouring *Telfaire* instructions as a safeguard against wrongful convictions based on mistaken identification); and Michael H. Hoffheimer, "Requiring Jury Instructions on Eyewitness Identification Evidence at Federal Criminal Trials" (1989) 80 J. Crim. L. & Criminology 585 (arguing that US federal circuit courts should mandate cautionary instructions on eyewitness identification).

148. For a review, see Lieberman & Sales, *supra* note 134.

149. See e.g. Valerie P. Hans & Andrea J. Appel, "The Jury on Trial" in Abbott & Batt, *supra* note 133, 3-1 at 3-11 (noting that a wealth of research indicates that jurors have trouble comprehending and applying legal instructions from the judge); Liberman & Sales, *ibid.* at 598-99 (reviewing a large body of research indicating that despite — or because of — judicial instructions, jurors' understandings of the concept of reasonable doubt are inconsistent); and Joel D. Lieberman & Jamie Arndt, "Understanding the Limits of Limiting Instructions: Some Psychological Explanations for the Failures of Instructions to Disregard Pretrial Publicity and Other Inadmissible Evidence" (2000) 6 Psychol. Pub. Pol'y & L. 677 (reviewing research indicating that both limiting and disregarded instructions have been shown to be unsuccessful in controlling jury decision-making).

150. One key difficulty with legal instructions is that the need to state the law correctly often leads courts to use language that jurors find difficult to understand. Lieberman & Sales, *supra* note 134; and Franklin D. Strier, *Reconstructing Justice* (Chicago: The University of Chicago Press, 1996). Two recent Canadian studies confirm that jurors have trouble understanding and following legal instructions. In the first, Canadian undergraduates, law students and citizens summoned to jury duty were exposed to a legal instruction on the co-conspirators' exception to the hearsay rule and asked to apply it to a given set of facts, either alone or working in groups. All groups and individuals performed poorly on the application tests, indicating that jurors cannot understand and apply these instructions. V. Gordon Rose & James R. P. Ogloff, "Evaluating the Comprehensibility of Jury Instructions: A Method and an Example" (2001) 25 Law and Human Behavior 409 at 410. The second study required jury-eligible volunteers to watch a lengthy video trial simulation and deliberate as juries before individually filling out questionnaires. Asked to recall the elements of first degree murder and manslaughter and to explain the concept of reasonable doubt, many participants admitted that they could not remember these legal concepts or simply produced garbled language apparently lifted from American courtroom dramas. One participant referred to "murder without

anyone be shocked to learn that jurors often fail to cleanse their minds of evidence that they have seen or heard but that is technically inadmissible or admissible only for limited purposes.¹⁵¹ In themselves, these facts say nothing about the effectiveness of instructions commenting on the weight and reliability of evidence.¹⁵²

The only way to determine whether cautionary instructions work is to examine their effects specifically. Thus, the claim that eyewitness jury instructions are ineffective is primarily based on the few existing studies that have examined their use. These studies vary in their findings, but they coalesce around the conclusion that eyewitness jury instructions either cause jurors to be somewhat more sceptical of eyewitnesses generally or that such instruction have no effect.

A leading early study is that of Edith Greene, which aimed to measure the effects of the *Telfaire* instruction and a modified version of the factors instruction that Greene herself had drafted.¹⁵³ Her instruction used language and an organizational structure intended to be more comprehensible than the *Telfaire* instruction, and also identified a few psychological factors not mentioned in the *Telfaire* instruction. After viewing videotaped mock trials that included either no eyewitness instruction, the *Telfaire* instruction or Greene's instruction, mock jurors were asked to deliberate in groups and individually fill out questionnaires giving their verdicts. In terms of pre-deliberation verdicts, 45% of mock jurors who had heard no instruction voted to

aforethought," even though the notion of "malice aforethought" is foreign to Canadian law. V. Gordon Rose, *Social Cognition and Section 12 of the Canada Evidence Act: Can Jurors "Properly" Use Criminal Record Evidence?* (Ph.D. dissertation, Simon Fraser University, 2003) at 47-48 [unpublished].

151. For one recent study confirming that Canadian jurors have difficulty understanding and following limiting instructions, see Rose, *ibid.* at 47-48 ("Comprehension levels were very poor . . . specifically for the [limiting] instructions regarding the use of criminal record evidence").

152. See Lieberman & Sales, *supra* note 134 at 593 (reviewing research findings on juror comprehension of various types of jury instructions, and finding that comprehension varies depending on the type of instruction).

153. Edith Greene, "Judge's Instruction on Eyewitness Testimony: Evaluation and Revision" (1988) 18 *Journal of Applied Social Psychology* 252.

convict, while individuals who had heard the *Telfaire* instruction and Greene's own instruction voted to convict 53% and 23% of the time.¹⁵⁴ Greene had hoped to demonstrate that her own instruction would improve juries' sensitivity to eyewitness factors, and she varied the strength of the witnessing conditions such that the eyewitness had either a good or a relatively poor opportunity to view the perpetrator.¹⁵⁵ In the result, however, no sensitivity effect could be shown: the prosecution's case in the mock scenarios was so weak that, post-deliberation, few groups voted to convict in any condition, and none did so where the witnessing conditions were poor.¹⁵⁶

Another early study by Richard Katzev and Scott Wishart examined the effects of eyewitness jury instructions.¹⁵⁷ In this study, the judge offered mock jurors one of three alternative sets of instructions: instructions on the law alone; instructions on the law and a review of the evidence; or both of these, plus a commentary on the frailties of eyewitness identification. Mock jurors' propensity to offer pre-deliberation guilty verdicts varied inversely with the extensiveness of the instructions they were offered. Thus, Katzev and Wishart concluded that jury instructions on eyewitness identification reduced jurors' belief in eyewitness testimony. Unfortunately, as in Greene's study, Katzev and Wishart's stimulus materials involved a very weak prosecution case. No mock jury returned a post-deliberation guilty verdict, and no sensitivity effect could be shown.

Most recently, Gabriella Ramirez, Dennis Zemba and R. Edward Geiselman conducted two mock juror experiments examining the effects of *Telfaire* instruction and of an expert-substitute instruction drafted by

154. *Ibid.* at 265.

155. *Ibid.* at 256.

156. *Ibid.* at 265-66 (reporting that, of 24 juries, 2 voted to convict, 12 voted to acquit and 10 were hung).

157. Richard D. Katzev & Scott S. Wishart, "The Impact of Judicial Commentary Concerning Eyewitness Identifications on Jury Decision Making" (1985) 76 J. Crim. L. & Criminology 733.

the authors.¹⁵⁸ They found that the *Telfaire* instruction reduced mock jurors' sensitivity to the quality of the eyewitness evidence.¹⁵⁹ The expert-substitute instruction did not have this sensitivity-reducing effect, but neither was it shown to increase sensitivity.¹⁶⁰ Once again, however, the weakness of the case against the accused was a complicating factor. The authors acknowledged a possibility that the expert-substitute instructions might have increased sensitivity had the evidence been less favourable to the accused.¹⁶¹ In any event, the authors viewed the expert-substitute instruction as a "promising alternative" because it had an educative effect:¹⁶² subjects who heard it were better able to answer questions about eyewitness factors than those who heard no instructions or the *Telfaire* instruction.¹⁶³

Finally, a 1990 study by Cutler, Dexter and Penrod also failed to show that the *Telfaire* instruction promotes sensitivity. The experiment was designed to test whether the *Telfaire* instruction would have the same sensitizing effect the authors observed in their earlier study of eyewitness expert evidence.¹⁶⁴ They found that incorporating a *Telfaire* instruction into the videotaped mock trial had no impact on jurors, and they concluded that the instruction was ineffective.¹⁶⁵

Taken together, these studies support a general conclusion that the impact of eyewitness jury instructions depends on the form and contents of the instruction. For example, Greene's modifications to the *Telfaire* instruction were relatively minor, but they produced markedly different results. Before deliberating, jurors who heard the standard

158. Gabriella Ramirez, Dennis Zemba & R. Edward Geiselman, "Judges' Cautionary Instructions on Eyewitness Testimony" (1996) 14:1 American Journal of Forensic Psychology 31.

159. *Ibid.* at 41.

160. *Ibid.* at 57.

161. *Ibid.*

162. *Ibid.* at 58.

163. *Ibid.* at 56-58.

164. Brian L. Cutler, Hedy R. Dexter & Steven D. Penrod, "Nonadversarial Methods for Sensitizing Jurors to Eyewitness Evidence" (1990) 20 Journal of Applied Social Psychology 1197.

165. *Ibid.* at 1205.

Telfaire instruction were actually more likely to convict than those who heard no eyewitness instruction, while jurors who heard Greene's instruction were less likely to convict than jurors in either of the other two groups. The Katzev and Wishart study and the Ramirez, Zemba and Geiselman experiments also support the conclusion that the effect of instructions depends on their form and content. In both of these studies, different versions of the instructions had varying effects on juror scepticism and sensitivity toward eyewitness evidence.

Significantly, the existing studies on eyewitness jury instructions have failed to demonstrate that eyewitness jury instructions sensitize jurors to the factors affecting eyewitness reliability. This has led many commentators to conclude that such instructions are essentially ineffective.¹⁶⁶ However, this general conclusion is premature. The existing studies are few in number, are 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. To conclude broadly that jury instructions are ineffective implies that the source of the message (the judge) and not its contents make it ineffective. However, while the source of the message probably does affect its impact,¹⁶⁷ its content seems to be at least as important. Claims by American jurists and social scientists that eyewitness jury instructions do not work are jurisdiction-specific: they refer primarily to *Telfaire* instructions. The Canadian eyewitness jury instruction is more detailed and sharply cautionary. Its impact has never been empirically studied and it might very well differ from that of the more skeletal *Telfaire* instruction.¹⁶⁸

166. For more on this topic see *supra* note 147 and accompanying text.

167. Two existing studies, reported in Cutler, Dexter & Penrod, *supra* note 164, indicate that the source of information about eyewitness testimony can affect its impact on the jury. The first examined the impact of psychological evidence from a court-appointed eyewitness expert, while the second investigated the use of opposing eyewitness experts. Both the court-appointed and opposing experts appeared to promote scepticism but not sensitivity among jurors, whereas an earlier study indicated that defense eyewitness expert testimony generated sensitivity but not scepticism.

168. Thus, American research on the effectiveness of eyewitness jury instructions is of limited help in determining the effectiveness of the Canadian instructions. See

In sum, scholars have devoted considerable attention to the impact of expert evidence and jury instructions on eyewitness identification, but their efforts yield few safe conclusions about the effectiveness of these educational efforts even within the eyewitness context, let alone more broadly with respect to unreliable prosecution evidence. It appears that both expert evidence and cautionary jury instructions can affect verdicts, and that their effects depend on what the jury is told, how and by whom.¹⁶⁹ Exactly how such education affects jurors remains unknown, and it is not even clear what an optimal effect would be.¹⁷⁰ Jurors, we hope, do not simply ignore expert evidence and jury instructions, but neither would it be desirable for their judgment to be

Christopher Sherrin, "Comment on the Report on the Prevention of Miscarriages of Justice" (2007) 52 Crim. L.Q. 140 at 150. Yet, some Canadian commentators have fallen into the trap of assuming that American research casting doubt on the effectiveness of *Telfaire* instructions proves Canadian instructions ineffective. See Copeland, *supra* note 23 at 202, 207 (citing Cutler & Penrod, *supra* note 12 for the proposition that jury instructions on eyewitness identification evidence constitute an ineffective safeguard against wrongful convictions); Trotter, *supra* note 10 at 193 (relying on Copeland, *supra* note 23 on this point).

169. Additional support for these general conclusions can be drawn from studies on the effects of jury instructions on confession evidence. Certain US jurisdictions follow the "Massachusetts rule" for confession evidence, which requires that juries be instructed to determine whether a confession was offered voluntarily and to disregard the evidence if they find that it was given involuntarily. Saul M. Kassin & Lawrence S. Wrightsman, "Confession Evidence" in Saul M. Kassin & Lawrence S. Wrightsman, eds., *The Psychology of Evidence and Trial Procedure* (Beverly Hills: Sage Publications, 1985) 67 at 81 [Kassin & Wrightsman, "Confession Evidence"]. Early research indicated that these instructions had no effect on individual mock juror verdicts: Kassin & Wrightsman, "Coerced Confessions", *supra* note 31 at 494. However, an instruction invented by the researchers stressing both the unfairness and the unreliability of coerced confessions did have an effect on verdicts when mock juries deliberated. Kassin & Wrightsman, "Confession Evidence", *ibid.* at 86-87. Here again, the mock jury research confirms that the impact of an instruction on jury verdicts depends on the contents of that instruction.

170. See Rogers Elliott, "Expert Testimony About Eyewitness Identification: A Critique" (1993) 17 Law & Human Behavior 423 at 433-34 (observing that there is no way to find the "correct" level of belief in eyewitness testimony, and therefore no way to determine whether exposure to expert testimony helps jurors reach that level).

overborne by a judge's or expert's negative appraisal of the prosecution's evidence.¹⁷¹

The essential difference between educating rules and limiting rules is that the former preserve the jury's freedom to evaluate the evidence. This freedom is to be valued where the potentially unreliable evidence also carries some legitimate weight. On the other hand, where the prosecution's evidence is so unreliable that it seems dangerous to leave the jury free to act on it, relying on an educating rule with an uncertain effect would seem unwise. Consider, for example, the self-serving and essentially unsupported testimony of a highly unsavoury jailhouse informant admitted at trial in *R. v. Dhillon*.¹⁷² The Ontario Court of Appeal overturned Dhillon's conviction partly on the basis that, in giving a *Vetrovec* warning, the trial judge had erroneously catalogued for the jury seven items of evidence capable of confirming the informant's story, when in fact only one item was at all confirmatory.¹⁷³ The Court called the witness "a quintessential jailhouse informant"; he had an extensive criminal record, largely for crimes of dishonesty, and had tried to offer information to the authorities in the past.¹⁷⁴ Yet, consistent with Canadian law, the court never entertained a doubt about the admissibility of the informant's testimony. One must question whether a cautionary instruction, however strongly worded, can adequately protect an accused faced with such flagrantly unreliable evidence.

Dangerously unreliable evidence was also admitted in *Hibbert*, where an assault victim and another witness identified the accused as the perpetrator for the first time in court after seeing him being arrested for the assault on the television news.¹⁷⁵ The trial judge delivered a pointed

171. Jurists sometimes recognize a danger that the judge's position of authority in the courtroom or the expert's academic credentials might overwhelm the jury. *E.g. R. v. Mohan*, [1994] 2 S.C.R. 9 at 21 [*Mohan*].

172. (2002), 166 C.C.C. (3d) 262 (Ont. C.A.) [*Dhillon*].

173. *Ibid.* at 272. The one item that could be seen as weakly confirmatory was the consistency of the informant's claim that the accused had confessed to looking through the front window of the victim's home with the verified fact that the victim's home had a front window. *Ibid.* at 271.

174. *Ibid.* at 268.

175. *Hibbert*, *supra* note 7.

and detailed caution on eyewitness testimony, explaining, among other things, that the in-court identification should be given “little weight.”¹⁷⁶ A majority of the Supreme Court of Canada suggested that this warning ought to have been even stronger: the trial judge should have emphasized that Hibbert’s news appearance had irreparably tainted the in-court identification, and should have declared the eyewitness testimony “highly problematic as direct reliable identification of the perpetrator of the offence.”¹⁷⁷ In essence, the suggested instructions would have told jurors that the in-court identifications were unworthy of belief and could not be relied upon.¹⁷⁸ On the facts, one can appreciate why the majority thought this extreme form of jury caution was warranted. However, the suggested instructions could never be effective, because by admitting evidence, the court invites the jury to rely on it. No jury instruction and no defence expert can eliminate the risk of wrongly convicting on the basis of totally unreliable evidence. There is a natural limit to the effectiveness of educating rules as safeguards for the innocent.

III. Two Sources of Knowledge

The rules governing eyewitness identification evidence, confessions and jailhouse informant testimony rest on the premise that jurors’ pre-existing views of the evidence are likely to be misguided. These views, based on common sense, are implicitly measured against a set of ideas thought to be more accurate. But where do these privileged ideas originate? Judges could draw on their own experience and knowledge in arriving at what they see as a correct understanding of the evidence. Or they could permit psychological experts to share their educated views. A basic choice must be made between judges and experts as sources of knowledge.

176. Quoted in *ibid.* at para 82.

177. *Ibid.* at paras. 50-52.

178. As Bastarache J. pointed out in dissent, the majority’s suggested instructions seemed aimed at “effectively remov[ing] the identification evidence] from the jury’s consideration.” *Ibid.* at para. 88.

This part explores the implications of this choice. Some of those implications — specifically those related to cost, accessibility and effectiveness — came to light in my earlier analysis of expert testimony and judicial instructions as alternative means of educating the jury. But many questions remain about the relationship between judicial experience and scientific expertise, questions which transcend the narrow issue of whether to educate the jury through expert testimony or instructions. Even an exclusionary standard, such as the confessions rule, must be based on some accepted view of the evidence, a view informed by knowledge from either experts or judges or from both.

The adversary system requires juries and judges to consider only those facts that are properly before the court. Ordinarily, such facts are led in evidence and are subject to cross-examination, and this norm is followed when an expert witness testifies. In other instances, judges take judicial notice and accept them as true facts not in evidence.¹⁷⁹ The formal rules on the admissibility of expert testimony and the scope of judicial notice in Canada indicate that it should be relatively easy to justify admitting expert evidence on eyewitness identification and even on false confessions, but quite difficult to defend taking judicial notice of the frailties of unreliable prosecution evidence. Yet where eyewitness identification evidence, confessions and jailhouse informant testimony are concerned, the courts exclude expert testimony and rely heavily on judicial notice. Why does the practice of Canadian courts defy expectations in this way? More broadly, what is at stake when courts admit expert evidence or take judicial notice?

A. Experts

In *Mohan*, the Supreme Court of Canada established a four-part test for the admissibility of expert evidence.¹⁸⁰ The evidence must be relevant, necessary to assist the trier of fact, presented by a properly

179. See *R. v. Williams*, [1998] 1 S.C.R. 1128, at para 54 (defining “judicial notice” as “acceptance of a fact without proof”).

180. *Mohan*, *supra* note 171.

qualified expert, and not violative of any other exclusionary rule.¹⁸¹ Normally, the analysis centres on the first two parts of the test: reliability and necessity. Relevance concerns not only logical relevance but also a cost-benefit analysis; because experts can confuse or overwhelm juries with specialized knowledge, their evidence is admissible only when the judge determines that its benefits outweigh its costs.¹⁸² Although the relevance requirement applies to all expert evidence, courts are cautious about excluding defence expert evidence on the basis of this prudential analysis.¹⁸³ The necessity requirement is met when the expert provides information that is both “likely to be outside the experience and knowledge of a judge or jury” and necessary to help the fact finder reach a proper conclusion on some issue.¹⁸⁴ While the credibility of witnesses should be finally decided by the jury and should not be directly commented upon by an expert, experts may give evidence on psychological factors relevant to credibility but outside the jury’s knowledge and experience.¹⁸⁵

(i) Eyewitness Testimony and False Confessions Experts

It is difficult to imagine an expert witness testifying on the weaknesses of jailhouse informant testimony because “expertise” in this area rests with the lawyers and judges who deal with such evidence in court. But psychologists have probed the phenomena of eyewitness misidentification and police-induced false confessions, and it is easy to appreciate how their findings could assist judges and juries. The law on the admissibility of expert evidence seems capable of embracing eyewitness expert testimony, and perhaps even expert evidence on the psychology of false confessions.

The courts have rarely considered whether psychological experts should be permitted to testify on the nature and causes of false

181. *Ibid.* at paras. 20-25.

182. *Ibid.* at para. 21.

183. See e.g. *R. v. J.-L.J.*, 2000 SCC 51, [2000] 2 S.C.R. 600 at para. 29 [J.-L.J.].

184. *Mohan*, *supra* note 171 at 23 (quoting *R. v. Abbey*, [1982] 2 S.C.R. 24 at para. 42).

185. *R. v. Marquard*, [1993] 4 S.C.R. 223. See also *Mohan*, *ibid.* at 24-25.

confessions by psychologically normal individuals. As explained above, the research literature establishes that false confessions do occur, and that certain interrogation techniques are associated with their occurrence.¹⁸⁶ These simple but counterintuitive insights could be of great value to a jury tasked with assessing the value of a retracted confession.¹⁸⁷ Yet when the issue has arisen in Canada, the evidence has been excluded.¹⁸⁸ The psychology of false confessions constitutes a relatively new field of study that lacks the methodological trappings of “hard,” experimental science. Findings have been based primarily on researchers’ retrospective examination of real police interrogations known to have resulted in false confessions.¹⁸⁹ Since Canadian courts tend to be wary of expert testimony based on both “novel” and “soft” sciences,¹⁹⁰ it is not surprising that they have not embraced expertise on false confessions.¹⁹¹

The admissibility of expert testimony on eyewitness identification has been more thoroughly analyzed. The leading authority is *McIntosh*, in which Finlayson J., writing for the Ontario Court of Appeal, offered four reasons for upholding the trial judge’s decision to exclude such

186. See e.g. Trotter, *supra* note 10 at 198-99.

187. See *Hall*, *supra* note 47 at 1341 (finding that a false confessions expert should have been permitted to testify “that false confessions exist, that individuals can be coerced into giving false confessions, and that certain indicia can be identified to show when they are likely to occur”).

188. See *supra* note 47 and accompanying text.

189. See e.g. Leo & Ofshe, *supra* note 31 (presenting case studies and general discussion of false confessions arising from police interrogation); *United States v. Hall*, 974 F. Supp. 1198 at 1205 (US Dist. Ct. III 1997): “While [false confessions researchers] utilize observational, as opposed to experimental, techniques, this is wholly acceptable in the established field of social psychology”).

190. See *J-L.J.*, *supra* note 183 at para. 35 (“[N]ovel science’ is subject to ‘special scrutiny’”); and Steven Skurka & Elsa Renzella, “Misplaced Trust: The Courts’ Reliance on Behavioural Sciences” (1998) 3 Can. Crim. L. Rev. 269 (describing Canadian courts’ cautious attitude toward “soft” sciences).

191. See Trotter, *supra* note 10 at 194 (questioning whether the false confessions science has matured enough to be the subject of expert evidence). See also *supra* note 109 and accompanying text.

evidence.¹⁹² First, Finlayson J. questioned the scientific status of the expert testimony, expressing doubt about whether the study of eyewitness identification was either a science or a recognized branch of psychology.¹⁹³ This initial objection is plainly unconvincing in light of the fact that eyewitness identification had been, even at the time, the subject of a rich and longstanding body of experimental research.¹⁹⁴

Second, Finlayson J. opined that eyewitness expert testimony would reveal only a simple fact that lay within jurors' ordinary experience: "that all witnesses have problems in perception and recall with respect to what occurred during any given circumstance that is brief and stressful."¹⁹⁵ This second objection is as unpersuasive as the first; certainly everyone has had stressful experiences, but this does not mean that everyone understands eyewitness psychology. If jurors already had this understanding, lengthy cautions about the frailties of such evidence would not be needed. Empirical research has long established, and Canadian law has long accepted, that popular ideas about human memory and eyewitness reliability are often misguided.¹⁹⁶ Expert evidence on the subject can hardly be rejected on the basis that jurors know all they need to know about it.

Justice Finlayson's third reason for rejecting eyewitness expert evidence rested on a concern for the integrity of the jury system. In his view, admitting such evidence would call into question the ability of jurors to decide criminal cases where identity is in issue.¹⁹⁷ Although this part of the judgment has been quoted with approval by the

192. *Supra* note 24.

193. *Ibid.* at 102-04.

194. See *Sophonow Inquiry Report*, *supra* note 4 at 33.

195. *McIntosh*, *supra* note 24 at 105.

196. A similar point was made in the false confessions context in *Hall*, *supra* note 47 at 1345 ("The [trial] court indicated that it saw no potential usefulness in the evidence, because it was within the jury's knowledge. This ruling overlooked the utility of valid social science. Even though the jury may have had beliefs about the subject, the question is whether those beliefs were correct. Properly conducted social science research often shows that commonly held beliefs are in error").

197. *McIntosh*, *supra* note 24 at 105.

Supreme Court of Canada,¹⁹⁸ it does not advance a persuasive argument against eyewitness expert testimony. If juries have systematic difficulties assessing eyewitness evidence, this is a problem to be addressed in its own right and not a reason to deny the defence an opportunity to bring evidence. Moreover, since we already recognize that expert evidence is sometimes necessary to assist juries, admitting eyewitness expert testimony represents no radical challenge to the jury system.

Finally, Finlayson J. raised a further objection to eyewitness expert evidence that is not so easily dismissed. He argued that such expert evidence was unnecessary because the information that would be given by the expert could be adequately communicated in the cautionary instruction to the jury. In other words, Canada's standard eyewitness instruction renders eyewitness expert evidence superfluous. This objection merits closer examination.

(ii) The Necessity Problem

Ultimately, recognition that eyewitness expert evidence is not needed where the judge can caution the jury represents the only sound justification for excluding such testimony. This necessity justification reflects the exclusivity principle: expert testimony and jury instructions are understood as mutually exclusive alternative ways to educate the jury. The necessity argument also suggests that Canadian courts may prefer to educate the jury through instructions rather than expert evidence where possible. Such a preference seems sensible given the low cost and universal accessibility of jury instructions and the high cost and limited availability of expert testimony.

The Supreme Court has recently confirmed this preference for instructions over expert testimony.¹⁹⁹ In *D.(D.)*, the Court ruled

198. *J.-L.J.*, *supra* note 183 at para. 26.

199. *R. v. D.(D.)*, 2000 SCC 43, [2000] 2 S.C.R. 275 at para. 67 [*D.(D.)*] ("A jury instruction, in preference to expert opinion, where practicable, has advantages. It saves time and expense. But of greater importance, it is given by an impartial judicial officer, and any risk of superfluous or prejudicial content is eliminated"). For commentary, see

inadmissible expert evidence proffered by the prosecution on the significance of delayed disclosure in a child sexual abuse case. According to Major J.'s majority opinion, the expert's testimony boiled down to a simple proposition: "In diagnosing cases of child sexual abuse, the timing of disclosure, standing alone, signifies nothing."²⁰⁰ In Major J.'s words, this "simple and irrefutable proposition"²⁰¹ lacked any "technical quality . . . necessitat[ing] expert opinion."²⁰² Since cross-examination would add nothing to the proposition, it should have been communicated to the jury in the form of an instruction.²⁰³ *D.(D.)* indicates that experts need not and should not testify to straightforward facts that form the proper subject of a jury instruction. By the same token, the case suggests that expert testimony may be needed to advance propositions that are controversial or technical.

(iii) Adversary Norms

There are two reasons why technical and controversial ideas are more appropriately advanced by an expert witness than by a trial judge. First, an expert can bring to bear specialized knowledge in explaining scientific and technical matters. Second, when an expert is called by a party in the course of a trial, the expert's claims are subjected to adversarial testing.²⁰⁴ Weak or controversial propositions advanced by a partisan expert can be exposed and questioned through cross-examination and argument, or through the testimony of an opposing expert. Thus, permitting experts to testify about the frailties of eyewitness identification and confessions would carry all the benefits and disadvantages of the adversarial process. Such expert testimony

Nicholas Bala, "R. v. D. (D.): The Supreme Court and Filtering of Social Science Knowledge about Children" (2000) 36 C.R. (5th) 283.

200. *D.(D.)*, *ibid.* at para. 59.

201. *Ibid.* at para. 66.

202. *Ibid.* at para. 59.

203. *Ibid.*

204. See e.g. *R. v. Spence*, 2005 SCC 71, [2005] 3 S.C.R. 458 at para. 42 [*Spence*] (explaining that when social science information is presented through an expert witness, this procedure has the advantage of permitting cross-examination).

would be expensive, time-consuming and unavailable to many accused with few resources, and partisan experts might slant their testimony. At the same time, bringing experts into court would permit their claims to be tested in the context of a fair process.²⁰⁵

B. Judges

In the adversary system, the judge enforces procedural rules and controls the flow of the evidence presented by the parties. Judges depart from their normal role when they themselves gather and introduce information. Thus, judicial notice of matters not in evidence is supposed to be confined to a narrow set of circumstances where this departure from adversary norms seems innocuous — that is, to facts “so notorious or generally accepted as not to be the subject of debate among reasonable persons,” or facts “capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy.”²⁰⁶ In other words, judicial notice is limited to facts that cannot reasonably be questioned.²⁰⁷ Canadian courts are freer to take judicial notice of “legislative” or “social” facts which illuminate the background or purpose of a legal rule than “adjudicative facts” which relate to the specific events in dispute between the parties.²⁰⁸ The courts are also freer to take judicial notice of facts that are peripheral to the dispositive issue.²⁰⁹ In all cases, however, facts must be in some sense indisputable or notorious if they are to be the proper subjects of judicial notice.²¹⁰

205. See R.J. Delisle, “Annotation to *R. v. M. (M.A.)*” (1998), 12 C.R. (5th) 207.

206. *R. v. Find*, 2001 SCC 32, [2001] 1 S.C.R. 863 at para. 48 [*Find*].

207. John Sopinka, Sidney N. Lederman & Alan W. Bryant, *The Law of Evidence in Canada*, 2d ed. (Toronto: Butterworths, 1999) at 1056.

208. *Spence*, *supra* note 204 at paras. 61-63.

209. *Ibid.*

210. *E.g. ibid.* at para. 63 (explaining that “[t]here are levels of notoriety and indisputability”).

(i) Judicial Notice and Unreliable Prosecution Evidence

Evidence rules on eyewitness testimony, false confessions and jailhouse informant testimony are rooted in judicial notice of the factors that make these forms of proof unreliable. The standard instruction on eyewitness identification incorporates numerous propositions about eyewitness reliability drawn from the psychological literature and the annals of criminal law.²¹¹ None of these propositions is brought into evidence, and all are put before the jury as matters of judicial notice.²¹² Similarly, the unsavoury witness warning normally offered when jailhouse informants testify relies on judicial notice of why this testimony is unreliable. In its latest restatement of the voluntariness rule, the Supreme Court of Canada took judicial notice of the findings of false confessions researchers, cataloguing the recognized types of false confessions and identifying some of the interrogation methods known to have induced them.²¹³

None of these matters seems on its face to constitute an appropriate subject of judicial notice. Cautionary instructions on eyewitness identification and unsavoury witness testimony warn jurors away from the common sense tendency to rely too heavily on such evidence. They aim to teach jurors something they do not already know about what makes these forms of proof deceptively credible. Equally, driving the modern Canadian confessions rule is the fear that, if exposed to involuntary confessions, jurors might discount the real possibility that they are false. Because the factual propositions informing all of these rules are generally unknown to jurors, they are hardly notorious and would seem to be inappropriate subjects for judicial notice. Unfamiliar

211. See *supra* notes 20 and 21 and accompanying text.

212. See *R. v. M.(B.)* (1998), 130 C.C.C. (3d) 353 at para. 105 (Ont. C.A.); and David M. Paciocco, "Coping With Expert Evidence About Human Behaviour" (1999) 25 Queen's L.J. 305 at 328 [Paciocco, "Expert Evidence"].

213. Gary Trotter, who represented the Attorney General of Ontario as an intervener in *Oickle*, has written that the Supreme Court never "formally" took judicial notice of the false confessions literature in that case. Trotter, *supra* note 10 at 188-89. Nevertheless, the information on the psychology of false confessions, drawn as it was from the research literature, clearly became a subject of judicial notice.

and counterintuitive propositions of this sort would seem to be more appropriate subjects for expert evidence.²¹⁴

(ii) The Trust Problem

When information is brought into evidence and subject to adversarial testing, judges need only supervise the adversarial contest. But when judges introduce information themselves by way of judicial notice, they bear the entire burden of determining its accuracy.²¹⁵ Many commentators question whether judges untrained in social science are qualified to make such determinations about information on human psychology.²¹⁶ The Supreme Court of Canada itself has been roundly criticized for unquestioningly accepting the theory of the “battered woman syndrome” in *R. v. Lavallée*.²¹⁷ Yet, individual trial judges are given the heavy responsibility of digesting social science information whenever they are required to craft case-specific warnings on eyewitness

214. Because facts cannot be both notorious and outside the knowledge and experience of the jury, judicial notice and expert evidence should be strictly mutually exclusive. See *Find*, *supra* note 206 at para. 49 (“Expert evidence is by definition neither notorious nor capable of immediate and accurate demonstration”); and David M. Paciocco, “Judicial Notice in Criminal Cases: Potential and Pitfalls” (1997) 40 *Crim. L.Q.* 35 at 42 [Paciocco, “Judicial Notice”] (“*Ex hypothesi*, if it is something you would let an expert testify to, it cannot be admitted pursuant to the doctrine of judicial notice”).

215. See *Bala*, *supra* note 199 at 286 (observing that when judges instruct juries on delayed disclosure in child sexual abuse cases, “it may be impossible for the accused to refute or even qualify such an instruction”).

216. See *e.g.* Loftus & Doyle, *supra* note 12 at 341 (doubting that judges can legitimately take judicial notice of the special frailties of cross-racial identification); Delisle, *supra* note 205 at 212 (questioning whether judges are scientifically informed enough to take judicial notice of facts pertaining to the psychology of human behavior); and Leippe, “Eyewitness Memory”, *supra* note 23 at 949 (arguing that more research is needed to determine whether expert-substitute eyewitness jury instructions are effective, but expressing concern that judges may not know enough psychology to produce such instructions).

217. *E.g.* Delisle, *ibid.* (critiquing *R. v. Lavallée*, [1990] 1 S.C.R. 852) (suggesting that the theories about battered women of which the Supreme Court took extensive judicial notice were flawed and unsupported); *R. v. Malott*, [1998] 1 S.C.R. 123 (L’Heureux-Dubé, J., concurring) (adopting in part the criticisms of the Supreme Court’s earlier reliance on battered woman syndrome).

identification or apply the confessions rule.²¹⁸ Canadian law places a high level of trust in judges by requiring them to take judicial notice of the weaknesses of unreliable prosecution evidence.

(iii) Institutional Competence and Memory

The expansive view of judicial notice undergirding this area of Canadian law strains against adversary norms. Formally, the law assumes that judges are no more informed about psychological phenomena than jurors. Matters outside the experience and knowledge of the jury are also presumed to lie beyond the ken of the judge, while notorious or indisputable facts are thought to be well known to both judges and juries. In reality, however, judges' experience on the bench, their knowledge of legal proceedings, and their participation in judicial education programs makes them, on the whole, significantly more sensitive than jurors to the frailties of unreliable prosecution evidence.²¹⁹ Consequently, grounding the rules on eyewitness identification, confessions and jailhouse informant testimony on judicial notice acknowledges and builds upon judges' experience and knowledge of these difficult issues.

Canadian law, at least tacitly, and sometimes explicitly, acknowledges the gap between judges' and jurors' knowledge of these evidentiary issues.²²⁰ Judges are recognized as having the institutional competence to accept as true (and even to instruct juries on) facts about

218. See Bala, *supra* note 199 at 289 (noting the challenge facing trial judges who must "filter" social science information and deliver it to juries).

219. For instance, decades of Canadian court decisions have exhibited great sensitivity to the dangers of eyewitness identification. See *e.g.* *R. v. Smierciak* (1946), 87 C.C.C. 175 (Ont. C.A.) (noting that, by showing an eyewitness a photograph of their suspect, the police radically undermined the value of that eyewitness's identification evidence); and *R. v. Miaponoose* (1996), 30 O.R. (3d) 419 (C.A.) [*Miaponoose*] (condemning an unfair and improper show-up identification procedure).

220. See *e.g.* *R. v. Sheppard* (2002), 164 C.C.C. (3d) 141 at para. 46 (Man. Q.B.) (trial judgment commenting that, in light of the judge's experience and training, an eyewitness expert "did not provide [the judge] with information that was outside either [her] experience or knowledge as a trial judge").

the psychology and reliability of evidence that are well known to the courts but unfamiliar to the average person.²²¹ David Paciocco has suggested that courts can legitimately take judicial notice of such psychological propositions on the basis that they are really only matters of common sense, but that explanation is awkward, to say the least, when the courts have acknowledged that ordinary people harbour misapprehensions about these forms of evidence.²²² In truth, Canadian law recognizes and relies on the reality that judges' insights into evidentiary issues go well beyond common sense.

Admittedly, individual trial judges may be more or less sensitive to the reliability issues surrounding eyewitness identification, confessions and jailhouse informant testimony. Judicial notice of these matters is taken primarily by appellate courts, which filter knowledge from social science and forensic experience and disseminate that knowledge, through appeal cases, to the larger judiciary. For example, cautionary jury instructions on eyewitness identification and unsavoury witness testimony have been developed and standardized over many years by appellate courts. Findings from eyewitness psychology and lessons from experience with jailhouse informants have thereby been integrated into Canadian law.²²³ Similarly, insights about the causes and features of false confessions have been received into the law through the Supreme Court's judgment in *Oickle*. Of course, trial judges are expected to apply the voluntariness rule in a way that is sensitive to the danger of false confessions and to tailor case-specific warnings on eyewitness identification and unsavoury witnesses. But trial courts are not expected to reinvent the wheel: they are guided by appellate courts as they grapple with unreliable prosecution evidence.

221. See e.g. Trotter, *supra* note 10 at 210 ("By simply reading and assimilating current legal writing on false confessions and wrongful convictions, the Court has created a gap in knowledge between the judiciary and juries . . .").

222. See Paciocco, "Judicial Notice", *supra* note 214, *passim*; and Paciocco, "Expert Evidence", *supra* note 212 at 328.

223. Paciocco, "Judicial Notice", *ibid.* at 54 (explaining how, through the work of appellate courts, certain psychological propositions have become "incorporated into the fabric of the law").

This weaving of psychological and experiential insights into procedural law permits Canadian courts to develop a kind of institutional memory. If, for example, psychological findings about eyewitness identification could only be introduced at trial by expert witnesses, the same findings would be laboriously contested anew in case after case. The courts' collective knowledge and experience of those issues would go to waste. Canadian law recognizes and seeks to foster the incremental development of the courts' institutional competence in dealing with these evidentiary problems.

IV. Imagining a Spectrum of Safeguards

Having canvassed the strengths and weaknesses of educating and limiting rules, and the advantages and disadvantages of relying on the knowledge of experts and judges, it is time to consider how best to protect the innocent from conviction on the basis of unreliable prosecution evidence. This concluding part proposes a set of reforms to Canadian evidence law. These reforms are proposed not as constitutional requirements based on norms of procedural fairness,²²⁴ but as rational developments of the common law. They represent an attempt to use educating and limiting strategies and judicial and expert knowledge to their fullest advantage, to preserve the appealing simplicity of the Canadian law on unreliable evidence, and to protect the innocent without unduly hindering prosecutors.

A. Exclusion

Trial judges should have discretion to exclude highly unreliable items of prosecution evidence because educating rules cannot adequately protect against wrongful conviction when the prosecution case rests on

224. While these issues are normally dealt with as matters of reliability *per se*, it is occasionally suggested that certain items of unreliable evidence could be excluded on the basis of procedural fairness under the *Charter*. See e.g. *Miaponoose*, *supra* note 219 at para. 33 (*obiter dictum*) (raising the possibility that eyewitness identifications arising from improperly suggestive police procedures could be excluded under the *Charter*).

such an uncertain footing. The confessions rule already operates to identify and exclude the most unreliable confessions, but in other areas trial judges are not currently permitted to exclude even the most dubious evidence on reliability grounds. Reliability concerns, however grave, go only to the weight of the evidence and not to its admissibility.²²⁵ Slavish commitment to this principle has resulted in the admission of eyewitness and jailhouse informant testimony so dubious and unsupported that it adds no legitimate weight to the prosecution's case.²²⁶

For this reason, some have advocated vesting judges with the authority to make a preliminary judgment on the reliability of jailhouse informant testimony and to exclude such evidence where appropriate,²²⁷ and others have advanced the idea of excluding highly unreliable eyewitness evidence.²²⁸ Rather than approaching the problem in this piecemeal fashion, it is submitted that the courts should adopt a general rule empowering judges, at the request of the defence, to pass on the threshold reliability of any particularly dubious item of prosecution evidence. This power to exclude highly unreliable prosecution evidence would best be understood as an element of trial judges' existing discretion to exclude prosecution evidence that is more prejudicial than probative.²²⁹ Excluding the most unreliable items of prosecution evidence would cost the system little in terms of valuable information. The main drawback of permitting an inquiry into the reliability of

225. *E.g. Buric*, *supra* note 68.

226. See Part II.B.(ii).b, above, for discussion of *Hibbert*, *supra* note 7 and *Dhillon*, *supra* note 172.

227. See *Kaufman Commission Report*, *supra* note 4 at 634; and Sherrin, "Jailhouse Informants Part II", *supra* note 67 at 179-84.

228. See Roach, *supra* note 27; and Angela Baxter, "Identification Evidence in Canada: Problems and a Potential Solution" (2007) 52 *Crim. L.Q.* 175.

229. There is already some uncertainty in Canadian law about whether this discretion can be used to exclude evidence on reliability grounds. See *e.g. Buric*, *supra* note 68 (holding that unreliability does not affect the admissibility of evidence); *R. v. Humaid* (2006), 81 O.R. (3d) 456 at para. 57 (C.A.) (holding that, in the context of the judge's discretion to exclude "[t]here may be cases where the credibility of reliability of the narrator is . . . so deficient that it robs the . . . statement of any potential probative value").

prosecution evidence would be the administrative cost of admissibility hearings, but that cost could be justified by the importance of safeguarding the innocent from conviction. Moreover, the cost could be minimized by reserving the exclusionary remedy for truly exceptional cases of evidentiary unreliability, such as those where a jailhouse informant's testimony stands unsupported or an eyewitness's identification has been irreparably contaminated by suggestion. If courts were to exclude only the weakest evidence, defence counsel might be discouraged from litigating the admissibility of evidence that had real value.

B. Education

Because the proposed standard would exclude only the most unreliable prosecution evidence, most items of evidence whose reliability is contested would continue to be admitted, and juries would continue to bear the responsibility of assessing dubious eyewitness identifications, testimony from unsavoury witnesses and retracted confessions. It would therefore seem prudent to try to educate juries about the known frailties of these forms of evidence. Jurors are already educated about eyewitness and jailhouse informant testimony through cautionary instructions, but there is currently no way to educate them about the phenomenon of police-induced false confessions, and they are left to assess the truth of retracted confessions on the basis of their common sense.

Courts should develop a practice of instructing juries on the danger of false confessions. At the very least, a jury confronted with a retracted confession should be warned that innocent suspects have been known to confess to crimes under the pressures of police interrogation — a modest and indisputable proposition that could in itself help to counteract false confidence that a confession represents incontrovertible proof of guilt.²³⁰

230. See Trotter, *supra* note 10 at 198-99 ("The fact that people confess to crimes to which [sic] they did not commit might work well as a cautionary instruction"); Osmar, *supra* note 47 at para. 74 (finding it was not an appropriate case for the trial judge to warn the jury that false confessions have been known to occur, but leaving open the possibility

Depending on the case, it might also be appropriate for the judge to outline the types of false confessions and the circumstances, including coercive interrogation techniques, that contribute to the problem.²³¹ The judge could explain, for example, that innocent suspects occasionally confess to escape the immediate stress of interrogation, to avoid a threatened penalty for remaining silent or gain a promised reward for confessing, or because police have convinced them to doubt their own claims of innocence. Further, the judge could caution the jury that the risk of false confessions is greater when the police interrogate vulnerable suspects, when they confront suspects with fabricated evidence that appears to establish guilt, or when the facts disclosed in the confession do not match the actual facts of the crime. These findings emerge from the false confessions research and have been judicially noticed by the Supreme Court.²³² Even a brief instruction on these matters, which are already accepted as true in Canadian law, could go some distance to alerting jurors to the danger of unreliability and equipping them to evaluate realistically the weight of confession evidence.

C. Expertise

Given the ease with which cautionary jury instructions can be added to the judge's charge at no cost to the accused, Canadian law's preference for such instructions over expert evidence is justified. If jurors are to be educated about the frailties of unreliable prosecution evidence, this should normally be done through judicial instructions. However, courts should not foreclose the possibility that expert testimony might occasionally be needed to illuminate some controversial or technical matter relating to the psychology and reliability of eyewitness testimony or confessions. Interestingly, some

that such an instruction might be offered in another case); and Lisa Dufraimont, "Annotation to *R. v. Osmar*" (2007) 44 C.R. (6th) 278 (discussing this aspect of *Osmar*).

231. But see Trotter, *ibid.* at 193, 199 (doubting whether trial judges are equipped to explain the factors that lead to false confessions).

232. *Oickle*, *supra* note 7 at paras. 34-46.

American jurisdictions permit both expert evidence and jury instructions on the frailties of eyewitness identification evidence, leaving it to the trial judge to decide which safeguard to use.²³³ This flexible approach allows for expert witnesses to be called where especially appropriate, and for jury instructions to be used in other cases. Canadian courts should adopt a similarly flexible practice with respect to both eyewitness identification and confessions.

Conclusion

Canadian courts recognize a special problem common to the three forms of unreliable prosecution evidence discussed in this paper — eyewitness identification evidence, the testimony of unsavoury witnesses like jailhouse informants, and confessions. These forms of evidence raise concerns about wrongful convictions because jurors are apt to overlook the factors that make them unreliable. Canadian law takes this risk seriously and aims to alleviate it through evidentiary regulation. However, the law in this area has hardened into a needlessly rigid set of category-based rules that are not particularly well-targeted to protect the innocent. In the final analysis, there is no persuasive reason why unreliable confessions should always and only be subject to an exclusionary rule, while dubious eyewitness and jailhouse informant testimony are always and only the subjects of cautionary jury instructions.

The analysis in this paper points to a need to loosen the exclusivity principle that underpins Canadian law in this area. Evidentiary exclusion, cautionary instructions and expert evidence are all ways to deal with the unreliability problem, but they need not be treated as strict alternatives. They have very different strengths and they might function better as complements to one another. Exclusion is the only adequate way to deal with extremely unreliable evidence that raises a grave risk of wrongful conviction. Jury instructions represent the best way to educate juries, in a wide range of cases, about the potential

233. See e.g. *Hubbard*, *supra* note 123 at 960.

frailties of evidence whose reliability is in question. Expert testimony is the optimal means of illuminating controversial or technical issues about the psychology of evidence. By recognizing the special role each of these regulatory options can play, Canadian courts could develop a rich and flexible range of safeguards to combat the problem of wrongful convictions based on unreliable prosecution evidence.