Jury Instructions and Trial Judge Discretion

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Introduction

One of the most important parts of the American criminal justice system is the trial by jury. A defendant in a criminal case is guaranteed the right to a trial in front of an impartial jury for any non-petty offense.\(^1\) This right is founded in the U.S. Constitution\(^2\), and has been further extended to apply to defendants in state trials as well.\(^3\) The modern jury system separates the role of finder of fact and ruler of law between the jury and the presiding trial judge.\(^4\) Separating the roles allows for a balanced verdict while helping to maintain the high burden that the government must meet before convicting a defendant, by making the government prove every element to not one, but twelve uninvolved parties. However, juries may only perform their role as the ultimate fact finder effectively and accurately if they are first taught what the law is and how to judge the evidence presented to them against the elements of the alleged charge. At some point during every jury trial, the judge delivers instructions to the jury. However, these instructions often come from sources other than the presiding judge, such as “pattern” committees.\(^5\) When the instructions to the jury have a source other than the judge, is the usually broad discretion of the trial judge hindered? This paper will explore in four parts whether a trial judge’s discretion is reduced by the growing reliance on jury instructions drafted and distributed


\(^2\) USCS CONST. AMEND. 6 (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed...”).

\(^3\) Duncan v. Louisiana, 391 U.S. 145, 149 (1968) (“Because we believe that trial by jury in criminal cases is fundamental to the American scheme of justice, we hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which -- were they to be tried in a federal court -- would come within the Sixth Amendment's guarantee.”).

\(^4\) See infra Part I.

\(^5\) Id.
for use by committees, higher courts and appellate courts, with a focus on Massachusetts and the use of Supreme Judicial Court appointed Study Group for Eyewitness Identifications as an example.

Part one will detail jury instructions and how they are utilized in modern criminal court. This part will consider the history and use of jury instructions in various jurisdictions.

Part two will consider the Massachusetts Supreme Judicial Court’s use of a study group and later standing committee to draft and recommend model jury instructions. By describing the makeup and goals of the appointed Study Group, this part will explore how the SJC utilizes various legal professionals to analyze scientific advancements relating to the evidentiary issue of eyewitness identifications.

Part three will focus on the judge’s role in a trial, with emphasis on the broad discretion that is usually afforded to trial judges to instruct the jury as she sees fit.

Part four will analyze what affect pattern jury instruction committees have on the discretion of the trial judge. This final part will also conclude whether the effect found on the judge’s discretion is helpful or harmful to the jury trial system as a whole.

I. Jury Instructions

A. History

The use of the jury system in trials followed English colonists to America, and was adopted as one of the "the most essential rights and liberties of the colonists" by the First Congress of the American Colonies in 1765. Early American courts gave juries much

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6 Duncan, supra note 3 at 152.
broader discretion than courts of today by allowing juries to rely on their “common sense” as to the law, and not providing any instructions on how to interpret evidence. However, as cases became more complex, it became apparent that the trial judge, the party with the legal education and understanding of complex legal concepts and jargon, should be the one deciding and ruling on matters of law. The modern American restricts the role of the jury to finder of fact, with no influence as to the applicable law. This leaves the presiding trial judge in the position of the sole ruler on matters of law, using his discretion. The Supreme Court in Sparf v. United States held that part of the judge's role as ruler of law includes the duty to instruct jury members on the applicable law in a trial. The holding in Sparf marked the first time the Supreme Court mandated that the jury follow the instructions given by the trial judge as to the law, further highlighting the divide between finder of fact and ruler of law.

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8 Id. at 821 (describing the separation of roles between judge and jury); See also Douglas Smith, Article, The Historical And Constitutional Contexts Of Jury Reform, 25 Hofstra L. Rev. 377, 451 (1996)(explaining how the jury's power to determine matters of law eroded as the legal knowledge of judges increased).

9 See Sparf v. United States, 156 U.S. 51,102 (1895) ("We must hold firmly to the doctrine that in the courts of the United States it is the duty of juries in criminal cases to take the law from the court, and apply that law to the facts as they find them to be from the evidence."). See also Shannon v. United States, 512 U.S. 573, 579 (1994) ("The jury's function is to find the facts and to decide whether, on those facts, the defendant is guilty of the crime charged.")

10 See Sparf, supra note 9 at 102 ("Upon the court rests the responsibility of declaring the law").

11 Id. at 106.

12 See Roger M. Young, Article, Using Social Science to Assess the Need for Jury Reform in South Carolina, 52 S.C. L. Rev. 135, 146-47 (2000). See also Smith, supra note 8 at 452.
B. Types of Jury Instructions

Jury instructions fall into three general categories: informative instructions, evidentiary instructions, and substantive law instructions. Informational (or preliminary) instructions are those usually given before the trial begins. These generally contain basic information about the trial process and each party's role in the process. These instructions also may include admonitions from the judge about not speaking with anyone regarding the case or doing further research into the matter.

Evidentiary instructions provide guidance for the jury members on how to consider the kinds of evidence they heard at trial. The vast, complex rules of evidence used in trials must be clearly explained to the jury to ensure inadmissible information is not considered. Limiting instructions, which tell the jury that they may only use a piece of evidence for a limited use (such as to determine whether the witness is credible), are an example of an evidentiary instruction. Other examples include instructions explaining the burden of proof.

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14 See Erickson, supra note 13 at 287; See also Neil P. Cohen, Communicating With Juries: The Timing of Jury Instructions, 67 TENN. L. REV. 681, 688 (2000) (claiming that instructions given pre-trial are "conceptualized as "orientation" lessons and are designed, in part, to help alleviate jurors' understandable apprehensiveness about their coming duties").

15 See Gregory E. Mize, Paula Hannaford-Agor, & Nicole L. Waters, The State-Of-The-States Survey Of Jury Improvement Efforts: A Compendium Report, NATIONAL CENTER FOR STATE COURTS AND STATE JUSTICE INSTITUTE, at 37 (2007), http://www.academia.edu/832733/The_state-of-the-states_survey_of_jury_improvement_efforts_A_compendium_report (last visited May 6, 2015) (detailing how states that require instruction before the trial include "basic legal principles such as burden of proof and admonitions concerning juror conduct").

16 See Erickson, supra note 13 at 288. See also David Sklansky, Evidentiary Instructions and the Jury as Other, 65 STAN. L. REV. 407, 408 (2013).

17 See Sklanksy, supra note 16 at 408.
proof, missing witness instructions, and expert witness instructions.\textsuperscript{18} Evidentiary instructions should be given at any time during the trial when the evidence at issue is introduced, and may also accompany the substantive law instructions at the end of the trial.\textsuperscript{19}

The final and most significant type of jury instruction is the substantive law instruction. These instructions outline every element of the charge that the government must prove to convict the defendant.\textsuperscript{20} These instructions are given to the jury at the end of the trial, after both the prosecution and defense have had a chance to object to the instructions to be given.\textsuperscript{21} Whether the jury gets physical copies of the instructions to read or only hears them read orally by the judge depends on the criminal procedure rules of the state.\textsuperscript{22} Unlike evidentiary instructions which are only necessary when corresponding evidence is entered into the record\textsuperscript{23}, substantive law instructions must be given in all

\begin{quote}
\textit{\begin{itemize}
  \item See Erickson, supra note 13 at 288.
  \item See Cronan, supra note 13 at 1194; See also Cohen, supra note 14 at 693.
  \item See Cronan, supra note 13 at 1195 ("Substantive law instructions set forth the specific criminal charges, the mens rea necessary for conviction, lesser-included offenses, affirmative defenses, the presumption of innocence, and definitions of other important legal terms that arise in the case."). See also Erickson, supra note 13 at 288 ("in a criminal case, the specific crime charged must be set forth in an elemental instruction explaining to the jurors the acts that constitute the crime.").
  \item See Erickson, supra note 13 at 288.
  \item See Cronan, supra note 13, at 1243 ("Individual states are split on whether to provide written copies of the charge to the jury. The submission of a written instruction is mandatory in some states, but discretionary in others, while it is still prohibited expressly in other states."); See also Elizabeth Tashash, Note, \textit{Mandatory Provision Of Written Copies Of Jury Instructions To Retiring Juries In Criminal Trials In Massachusetts}, 19 \textit{SUFFOLK J. TRIAL & APP. ADV.} 414, 427 (detailing how Massachusetts gives trial judges the discretion whether to provide written instructions or offer them only orally).
  \item See Erickson, supra note 13 at 288.
\end{itemize}}
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cases. Error in the delivery or failure to deliver the substantive instructions can constitute grounds for reversal on appeal.

C. Sources of Jury Instructions

Jury instructions can come from numerous sources. Instructions were first drafted per case and as needed, where the prosecution and the defense would each submit a draft of the instruction they wanted and the judge would pick from the two or draft her own entirely. However, it soon became apparent how time consuming this process became for judges – having to draft new instructions for every particular case. It also became a daunting task for a judge to draft jury instructions that would accurately inform jury members as required by the Constitution, knowing that giving erroneous instructions could mean reversal on appeal. The time commitment coupled with the fear of reversal on appeal led to the expanding use of pre-written instructions. The first accumulation of pre-written instructions came from judges copying standards verbatim from appeals court

24 Id.

25 Id.

26 See Paula L. Hannaford-Agor & Stephanie N. Lassiter, Contemporary Pattern Jury Instruction Committees: A Snapshot of Current Operations and Possible Future Directions, NCSC (NATIONAL CENTER FOR STATE COURTS) CENTER FOR JURY STUDIES, at 1 (April 2008) http://www.ncsc-jurystudies.org/~./media/Microsites/Files/CJS/What%20We%20Do/Contemporary%20Pattern.ashx (last visited May 6, 2015) (“In the past, jury instructions were drafted on a case-by-case basis. The attorneys for each side would submit a version of an instruction they wanted read to the jury. The judge would then choose from those instructions or write an instruction of his or her own.”)

27 See Cronan, supra note 13 at 1216; See also Erickson, supra note 13 at 292 (“The fear of being reversed on appeal frequently determines the instructions given to a jury”).

28 See Erickson, supra note 13 at 292 (explaining how the fear of reversal creates the tendency to rely on pattern instructions); See also Hannaford-Agor & Lassiter, supra note 25 at 1 (explaining how the “time consuming process and the fear of "reversals due to legally inaccurate instructions" led to reliance on pre-approved instructions)
opinions on the sufficiency of previous jury instructions. Soon the drafting of instructions was extended past judges to include committees made up of other legal professionals, though the pressure to draft instructions that avoid reversal on appeal remains intact.

i. Pattern (or Model) Jury Instructions

California was the first state to create a committee charged with the task of drafting jury instructions that could be used in similar cases around the state in 1938. By 1978, use of pattern instructions had spread to thirty-eight jurisdictions. Pattern jury instruction committees are formed by various organizations or courts and given the responsibility of drafting pattern (also known as model) jury instructions that can be assembled and utilized by trial judges in cases across the state. This allows judges to quickly find a premade instruction instead of spending the time drafting her own.


30 This continuing pressure to meet the accuracy concerns of the appellate court has been the target of criticism by authors who believe that the striving toward appellate level accuracy is done at the expense of clarity to jurors with no legal experience, causing harmful confusion for jurors See, e.g. Nancy Marder, Article, Bringing Jury Instructions Into The Twenty-First Century, 81 Notre Dame L. Rev. 449, 460 (2006) (“Although at one level jury instructions are supposed to be written for jurors, in fact, they are written by the legal community for the legal community”); See also, Cronan, supra note 13 at 1216 (explaining how reliance on appellate opinions using “legalese and complex legal phrases” contributes to juror confusion); See also Tashash, supra note 21 at 422-23 (“One explanation for juror confusion is the imbalance between legal accuracy and layperson understanding of legal jargon”).

31 See Marder, supra note 29 at 462 (“The lawyers and/or judges who draft pattern jury instructions share an overriding concern...The drafters of jury instructions write with an eye to such appellate scrutiny”).

32 See Hannaford-Agor & Lassiter, supra note 25 at 1; See also Peter Tiresma Reforming The Language Of Jury Instructions, 22 Hofstra L. Rev. 37, 59-60 (1999).


34 A model jury instruction is defined as “a form jury charge usually approved by a state bar association or similar group regarding matters arising in a typical case.” Black’s Law Dictionary (10th ed. 2014, available at Westlaw BLACKS). The phrase pattern jury instruction is interchangeable with model jury instruction in its definition. Id.
Committees utilize resources like appellate court decisions\textsuperscript{35} and scientific findings\textsuperscript{36} to develop and reform jury instructions for categories of cases. In addition to increasing accuracy as a means of reducing reversals and saving time\textsuperscript{37}, pattern instruction committees also strive to make instructions easier for jury members to understand.\textsuperscript{38}

Today many states create committees made up of attorneys, judges, and law professors to draft and recommend jury instructions.\textsuperscript{39} A 2008 survey by the National Center for State Court’s Center for Jury Studies found that at the time, there were 88 known state pattern jury instruction committees and 9 known federal committees across the nation,\textsuperscript{40} with the vast majority of states utilizing separate committees for civil and criminal trials.\textsuperscript{41} The majority of responding committees had more than 15 members\textsuperscript{42}, most of whom (including committee chairs) were appointed to their positions by the head of an institutional sponsor.\textsuperscript{43} The survey also found that most responding committees

\begin{footnotesize}
\textsuperscript{35} See \textit{supra} notes 29-30 and accompanying text.

\textsuperscript{36} See \textit{infra} Part II.

\textsuperscript{37} See \textit{supra} notes 26-30 and accompanying text.

\textsuperscript{38} See Erickson, \textit{supra} note 13 at 292 (“The development of standard or pattern instructions was supposed to provide understandable and concise statements of the applicable law for a jury.”) (citing Manual of Model Criminal Jury Instructions for the Ninth Circuit introduction (1992)); See also, Hannaford-Agor & Lassiter, \textit{supra} note 25 at 2.

\textsuperscript{39} See Hannaford-Agor & Lassiter, \textit{supra} note 25 at 2.

\textsuperscript{40} The results of this survey were based on the voluntary responses of each organization, with had a thirty-two percent response rate. The authors note that even with the seemingly small response rate, the responding organizations “may reflect the most active, most well organized, and most well supported PJL committees.” \textit{Id.} at 3-4.

\textsuperscript{41} \textit{Id.} at 3.

\textsuperscript{42} \textit{Id.} at 4.

\textsuperscript{43} The Chief Justice or President of the State bar are examples of institutional sponsors who may appoint members to PJL committees. \textit{Id.} at 6.
\end{footnotesize}
consisted of primarily attorneys, though nearly as many committees had a “fairly balanced” mix of attorneys and judges. Though this survey does not encompass all existing pattern jury instruction committees, it provides a helpful snapshot of the makeup of these committees in the states that chose to respond. Committees may be charged with drafting instructions generally, but they may also be appointed specially to recommend instructions on specific legal issues. An example of a specialized study group tasked with making suggestions to jury instructions comes from Massachusetts, where the state’s highest court recently assembled a study group to research and make recommendations regarding eyewitness identifications being used as evidence in trials.

II. Massachusetts Supreme Judicial Court Study Group and Committee

The Supreme Judicial Court (SJC) of Massachusetts, the state’s highest court, recently updated the model jury instructions used by the trial courts regarding eyewitness identification procedures. The court ruling in Commonwealth v. Gomes details the creation of a Supreme Judicial Court Study Group on Eyewitness Evidence (Study Group), tasked with studying “whether existing model jury instructions provide enough guidance to juries in evaluating eyewitness identification testimony”. The Study Group was created in response to the court’s recognition that though eyewitness identifications are the greatest source of wrongful convictions, they are still useful tools to law enforcement in obtaining

44 Id. at 5.


convictions. The Study Group was asked to determine ways to “effectively deter unnecessarily suggestive identification procedures and minimize the risk of a wrongful conviction.” This study group differs from PJI committees tasked with drafting jury instructions for every type of case in that it was created to focus on one evidentiary issue that the courts feel is in need of reform.

The Study Group is made up of 14 professionals in various positions. Six of the members are judges, five are practicing attorneys, one professor of law, and one law enforcement officer. The members are separated into three different subcommittees: The Police Practices Subcommittee, Hearing Subcommittee, and Jury Instructions Subcommittee. The Study Group bases its findings on numerous sources, with the most notable being scientific research and experts in the field. The Jury Instruction Subcommittee relied on the scientific findings of the New Jersey Supreme Court in State v. Henderson and the corresponding Special Master’s report to base recommendations for

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47 Id. (citing Commonwealth v. Walker, 460 Mass. 590, 604 n.16 (2011)).


49 When the group was first initiated it contained 15 members, but one was lost when the attorney left the Attorney General’s office for another position. Id at i.

50 Id.

51 Id. at 1. The focus of this paper is limited to the methodologies and findings of the jury instruction committee specifically. Id

52 Id. at 2 (“In crafting its recommendations, the Study Group reviewed key scientific research, law review articles, the emerging case law, statutes, and police practices nationwide, among other authorities. The Study Group also had the benefit of meeting with Professor Steven Penrod, a well-known expert on eyewitness identification evidence, and of communications from two other experts interested in our work.”).

reforms to the existing Massachusetts jury instructions regarding eyewitness identifications. Support was also found in the recent rulings by the Supreme Courts of Oregon\textsuperscript{55} and Connecticut\textsuperscript{56} relating to eyewitness identifications. The Jury Instruction Subcommittee sought to reform the already existing jury instructions given in cases where an eyewitness identification was entered into evidence.\textsuperscript{57} At the time the Jury Instruction Committee began to draft revisions to the existing instructions, no other jurisdictions utilized jury instructions incorporating social science research on memory and “estimator variables”\textsuperscript{58}.\textsuperscript{59} Even when New Jersey proposed similar instructions based on the scientific findings of \textit{Henderson}, the Jury Instruction Subcommittee still sought to add more detail regarding memory to the instructions drafted for use in Massachusetts.\textsuperscript{60}

The Jury Instruction Subcommittee submitted drafts of proposed jury instructions to the entire Study Group in October 2012, who returned comments.\textsuperscript{61} Provisional drafts of the proposed instructions were made available to judges and attorneys immediately upon

\textsuperscript{54} \textit{REPORT OF THE SPECIAL MASTER, STATE v. HENDERSON, NEW JERSEY SUPREME COURT, DOCKET NO. A-8-08 (JUNE 18, 2010), AT 79.}

\textsuperscript{55} \textit{State v. Lawson, 352 Or. 724 (2012).}

\textsuperscript{56} \textit{State v. Guibert, 306 Conn. 218 (2012).}


\textsuperscript{58} Id. at 2. (“"Estimator variables" are those factors that are inherent in the event -- such as the environmental conditions at the time and the characteristics of the witness and the perpetrator -- over which the criminal justice system has no control but that may have a substantial effect on the reliability of the identification.”).

\textsuperscript{59} Id. at 56.

\textsuperscript{60} Id.

\textsuperscript{61} Id.
their announcement, but an official model adopted by the Supreme Judicial Court won’t be available until after the public has had a chance to make comments on the drafts.\textsuperscript{62} In addition to the substance of the jury instructions, the Subcommittee also focused heavily on the linguistic style and ordering of phrases and paragraphs in an effort to ensure “correct explanations of the science in language that jurors will understand”.\textsuperscript{63} In addition to proposing the actual templates for jury instructions, the Study Group also suggests creating a Standing Committee tasked with continuing to review, make recommendations based on, and educate legal professionals about evolving sciences in eyewitness identification, which the Supreme Judicial Court has recently implemented.\textsuperscript{64}

A. Proposed Jury Instructions

The substantive instructions drafted by the Jury Instruction Subcommittee include parts relating to every part of a trial. “Precharge” instructions are given to jurors before opening statements in a trial, and serve as preliminary or informative instructions, in which the jury is informed of the general nature of memory in order to highlight the deficiencies often found in the memories of witnesses.\textsuperscript{65} These instructions differ from general preliminary or instructional instructions, which usually speak generally about the

\textsuperscript{62} See Anderson, supra note 45.

\textsuperscript{63} See Sup. Jud. Ct. Study Grp. on Eyewitness Identification, supra note 48 at 57.

\textsuperscript{64} Press release, Public Information Office of the Supreme Judicial Court, Supreme Judicial Court Announces New Standing Committee on Eyewitness Identification (January 12, 2015) available at http://www.mass.gov/courts/news-pubs/sjc/sjc-announces-new-standing-committee-on-eyewitness-identification.html (last visited May 6, 2015). The member list of the Standing Committee has some overlap with those in the Study Group, but also includes more professors of law, a judge in the juvenile court, and a law firm associate. Id.

\textsuperscript{65} See Sup. Jud. Ct. Study Grp. on Eyewitness Identification, supra note 48 at 117.
judicial process and rules for individual jury members to follow. The Subcommittee has also proposed instructions for use at the end of the trial, deemed the “final instructions”. These instructions inform the jury about how to consider and what weight to attribute to identifications by eyewitnesses. These serve as evidentiary instructions, and exist to inform the jury members as to how to interpret and utilize evidence presented at trial.

The evidentiary instructions proposed by the subcommittee seek to break down identifications made by eyewitnesses into three separate stages: acquisition of information, storing of information, and formation of memories from the stored information. The instructions further seek to highlight differences in accuracy between the various identification procedures utilized by law enforcement, such as showups, photo arrays and lineups. Where cases include unique factors, such as the use of a weapon by the defendant or use of alcohol by the eyewitness, the Subcommittee proposes supplemental instructions that may accompany the final instructions. These updates represent significant changes in the existing Massachusetts state jury instructions, and are intended to accurately inform juries of the problems with eyewitness identifications.

66 See supra notes 13-15 and accompanying text.
68 Id. (“You must examine the identification testimony of any witness with great care and caution. In evaluating the identification testimony, you must determine whether it is both (1) truthful and (2) accurate.”).
69 See supra, notes 16-19 and accompanying text.
71 Id. at 122-29.
72 Id. at 130-35.
III. Judge’s Role and Discretion

A presiding judge’s discretion over a trial has traditionally been broad in nature.\(^{74}\) A trial judge is given broad discretion regarding procedural and evidentiary admissibility issues that arise during trial.\(^{75}\) In fact, the Federal Rules of Evidence (which have been adopted by the majority of states\(^{76}\)) describe the trial judge as the “gatekeeper” of admissibility for witness testimony, particularly relating to expert testimony.\(^{77}\) The judge has also been given the explicit duty of instructing the jury as to the applicable law by the Supreme Court.\(^{78}\) This broad power finds its source in the trial judge’s unique ability to make judgments as a matter of law; an ability that is lacking in a jury comprised of lay citizens.

The broad discretion given to presiding trial judges also extends to the instructions provided to the jury. A judge may decide to draft her own instructions and point specifically to what she thinks would best assist the jury.\(^{79}\) She may accept versions of the instructions provided by

\(^{74}\) See, e.g. Herron v. Southern Pac. Co., 283 U.S. 91 (1931) (“In a trial by jury in a federal court, the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law”).

\(^{75}\) Fed. R. Evid. 104(a)


\(^{78}\) See Sparf, supra note 9 at 106.

\(^{79}\) See Quercia v. U.S., 289 U.S. 466, 470 (1933) (“In charging the jury, the trial judge is not limited to instructions of an abstract sort. It is within his province, whenever he thinks it necessary, to assist the jury in arriving at a just conclusion by explaining and commenting upon the evidence, by drawing their attention to the parts of it which he thinks important, and he may express his opinion upon the facts, provided he makes it clear to the jury that all matters of fact are submitted to their determination.”).
written by prosecution and defense counsel, and can choose whichever version she finds to be sufficient. She may also decide whether a certain instruction is necessary, and her decision may not be reversed on appeal absent abuse of power.

Though a judge’s discretion regarding jury instructions is usually broad, it is not without limits. A judge may not charge the jury regarding evidence that was not presented. In delivering instructions, a trial judge may not “add to” the facts by providing testimony about the credibility orbelievability of evidence. Regardless of the source of the instruction, the charge selected in the judge’s discretion must instruct the jury as to the law correctly. Judges may also be required to charge the jury as to a defendant’s only defense theory if there is some evidence to support the theory.

Though individual states have placed limitations on a judge’s discretion in instructing the jury, the ultimate responsibility and decisions regarding what version of the law still depend on the trial judge. However, the concern for convenience and fear of

80 See supra note 25 and accompanying text.

81 See Eizember v. State, 164 P.3d 208 (Okla. Crim. App. 2007) (“The determination of which instructions shall be given to the jury is a matter within the discretion of the trial court.”); See also Ngomondjami v. Com., 54 Va. App. 310, 678 S.E.2d 281 (2009).

82 See State v. Volk, 421 N.W.2d 360 (Minn. Ct. App. 1988) (“The trial judge is in the best position to decide which instructions are necessary and the court’s discretion must be respected”); See also Cloutier v. City of Berlin, 907 A.2d 955 (N.H. 2006) (“It is within the sound discretion of the trial court to determine whether or not a particular jury instruction is necessary.”).

83 See People v. Lovejoy, 235 Ill. 2d 97, 151 (2009); See also Delaney & Co. v. City of Bozeman, 2009 MT 441, 354 Mont. 181, 185 (2009).

84 See United States v. Breitling, 61 U.S. (20 How.) 252 (1858) (“It is clearly error in a court to charge a jury upon a supposed or conjectural state of facts, of which no evidence has been offered.”)

85 See Quercia, supra note 79 at 472 (ruling that a trial judge’s comments on the trustworthiness of evidence, “definite concrete assertion of fact”, and addition to the facts in evidence were highly prejudicial errors).


reversal on appeal has pushed many trial judges away from drafting or accepting new instructions and toward using pattern jury instructions in more recent years.\textsuperscript{88} This change from the individual presiding judge’s instructions to those written by another party begs the questions whether the growing reliance on jury instructions with sources other than the presiding trial judge reduce or harm the judge’s usually broad discretion.

\textbf{IV. Analysis}

\textbf{A. Pattern Jury Instructions Take Discretion Away from Trial Judges}

The growing reliance on using premade pattern or model jury instructions does take away discretion from the trial judge presiding over the trial in question. In a trial, the judge has the duty to give the jury instructions that the judge has decided will be most helpful to the jury, and accurately describe the law as the judge understands it.\textsuperscript{89} When an instruction is drafted by the presiding judge, or drafted by a participating attorney and approved or supplemented by the judge, the source of that instruction is the judge’s own legal judgment. What the jury comes to know about the law for its limited use in the trial is a product of the particular drafter of the instruction. This is appropriate because judges are considered the ultimate deciders of law.\textsuperscript{90} The trust that the law will be reflected accurately in a judge’s instruction rests on the designation of the judge as the ruler of law.

When a judge utilizes an instruction that has been drafted by another party, the source of the applicable law is no longer the interpretation of the judge. Especially where

\textsuperscript{88} \textit{See supra}, notes 26-30 and accompanying text.

\textsuperscript{89} \textit{See supra} notes 80-82 and accompanying text.

\textsuperscript{90} \textit{See supra} note 9-10 and accompanying text.
instructions are drafted by committees, the new jury instructions become a culmination of various perspectives on and interpretations of the law. Committees utilizing scientific research also introduce information that is outside of the knowledge of a judge who has no specialized education or background. Committees can include the legal perspectives of attorneys, law enforcement and law professors – none of which have been given the role of ruler of law by the court system. This means that the source of both substantive and procedural law for pattern jury instructions is not the judge, which seems contradictory to the Court’s ruling that the judge is the ultimate ruler of law.⁹¹

Trial judges still maintain the discretion whether to accept the template instructions provided to them by committees. However, allowing a judge to pick between pre-written instructions depletes the judge’s ability to draft instructions that describe their individual interpretations of the applicable law. Even where a judge may supplement or edit instructions, the utilization of instructions like those proposed by the Massachusetts SJC Study Group still contain scientific and expert opinions that a judge has likely no education or background to refute. Where a committee utilizes various sources of law, the judge must choose between instructions that have sources other than the presiding judge, which affects her discretion in the matter.

Though pattern jury instructions do affect a trial judge’s discretion, the reliance on pattern jury instructions is more beneficial to the court system as a whole. Instructions are now being drafted to meet other, arguably more important goals than merely upholding a judge’s discretion, such as increasing jury comprehension and making sure jurors are accurately informed.

⁹¹ See supra note 8 and accompanying text.
B. Outcome

i. Concern for Juror Comprehension

One of the most important requirements of instructions given to juries is that they be able to comprehend them. Relying on judges to be the sole drafters of jury instructions runs the risk of introducing instructions that are replete with complex legalese and abstract concepts. Even pattern jury instruction committees made up of numerous judges and attorneys are likely to draft instructions using language that is above the comprehension of a lay juror. Creating committees that includes professionals like law professors and law enforcement introduces a new perspective to instructions that could possibly resonate better with juries. Critics of pattern jury instruction committees suggest that inclusion of lay people on such committees would contribute positively to jury comprehension.92

One of the goals of the Massachusetts Study Group is to increase juror understanding of instructions by utilizing more plain language.93 In addition to judges and attorneys, committee membership includes the perspectives of law professors, who must regularly explain complex legal concepts and jargon to new law students. It also includes the perspective of law enforcement, the party tasked with making arrests and gathering evidence in accordance with the instructions to the jury. Law enforcement officers may also

92 See, e.g. Marder, supra note 30 at 486-87 (“Even when such committees have the best of intentions to make their instructions understandable, it is difficult for them to write for audiences, such as jurors, who are untrained in the law. One way to address this challenge is to include laypersons, and especially former jurors, on these committees”).

93 See Sup. Jud. Ct. Study Grp. on Eyewitness Identification, supra note 48 at 5 (“Accordingly, the Jury Instructions Subcommittee drafted a detailed set of revised jury instructions on eyewitness memory that are designed to educate jurors, in plain language, in order that they might be better equipped to assess eyewitness evidence.”).
be more tuned to the comprehension of a lay juror than a legally trained attorney or judge, due in part to their regular interactions with the general public. The SJC study group did not include a perspective from a lay person with no legal involvement, which could help to further bolster the group’s goal of drafting comprehensible instructions.

ii. Jurors are Better Informed

The use of pattern jury instructions drafted by committees allows for the jury to get instructions that have basis in more than law. In a system that allows only a judge to draft or amend instructions, what the jury gets is strictly related to the law and what the judge wants the jury to consider. Allowing committees to draft instructions with a focus on scientific research has the effect of allowing an expert who conducts such research to also instruct the jury. This expertise often extends beyond the understanding, education and background of a judge. Committees utilizing scientific research and expertise from a particular field make jurors aware of factors that they would have otherwise been ignorant, giving them a more complete picture and allowing them to make a more informed decision.

The Massachusetts study group relied heavily on scientific research as a basis for updating jury instructions.94 Utilizing the emerging science, the Study Group included in their instructions information about factors such as the fact that the human mind does not work like a video recorder.95 This premise allows jurors in an eyewitness identification case to get a full picture as to how memory works, and therefore they are able to make a more informed decision as to the credibility of presented evidence. If instructions on the

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94 See supra note 52 and accompanying text.
95 Id. at 1 (“Scientists generally agree that "[m]emory does not operate like a videotape" but rather is a "constructive, dynamic, and selective process.”) (citations omitted).
topic were left solely to the presiding judge, it is unlikely that the judge’s interpretation of
the law includes mention of such a fact. Instructions drafted by the SJC Study Group and
committee like it allow judges to instruct juries with information that they themselves
would otherwise be unable to support. These instructions allow for a more complete
picture being presented to the jury, which empowers a jury member to make an informed
decision.

Conclusion

The duty of instructing a jury full of lay people is a daunting task. Judges must worry
about instructing the jury with enough accuracy to avoid reversal by the appellate court,
while also using language and concepts that a lay juror can understand. The nature of the
duty to draft accurate instructions, along with the time needed to draft instructions on a
case-by-case basis pushed judges toward utilizing pattern jury instruction committees, who
draft premade instructions for distribution to judges. These committees often contain
members that are neither judges nor attorneys, and may utilize scientific research and
other resources that are beyond the capabilities of a single judge. A prime example of such
a group is the Jury Instruction Subcommittee of the Massachusetts Supreme Judicial Court
Study Group on Eyewitness Identifications, and its recent proposal templates for
eyewitness identification instructions in Massachusetts.

Reliance on pattern instructions continues to be pervasive, with more and more
state trial judges opting to choose between pattern instructions over drafting their own.
This reliance on instructions with a source other than the presiding judge diminishes the
judge’s usually broad discretion to determine the applicable law and rules of evidence in
the trial. However, the reduction in discretion of the trial judge ends up benefitting other important goals of the jury system, such as making sure juries comprehend the instructions and are able to make informed decisions in criminal trials. While individual presiding judges take a hit in terms of the discretion they may utilize, the reliance on pattern instructions like those drafted by the SJC Study Group is beneficial overall to the jury system, and therefore to the American justice system as a whole.