

# Judges Talking to Jurors in Criminal Cases: Why U.S. Judges Do It so Differently From Just About Everyone Else

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## Abstract:

*Finally, the evidence has all been heard, the lawyers have given closing arguments to the jurors, and now it is up to the trial judge; it is her turn. Of course, she will instruct the jury on the law, no question about that. But this was a very lengthy multiple defendant trial. That experienced, savvy trial judge is no doubt tempted to go beyond stating to the jurors the mere legal rules (the usual jury instructions). She might also prefer to talk with them about the evidence: comment on particular items, summarize the overall evidence and the arguments put forth by the lawyers on both sides. After all, we all want to be certain that these lay people understand just what this case was all about. And who better to tell them about the evidence than the judge? If this judge sits in the United States, she had better resist that temptation. Otherwise, she is very likely to be reversed on appeal, perhaps even disciplined. But, elsewhere in the common law world, that judge would not be at all concerned about going beyond the giving of jury instructions. In fact, if she does not, she is likely to be reversed on appeal, perhaps even disciplined.*



*Why the difference between U.S. judges and judges from other common law based nations, with similar roots in the English criminal justice system? Are Americans really that different from their English-speaking cousins on this point? What explains that*

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\* Haynes Professor of Law, College of William & Mary. With thanks to these kind judges, academics, and practicing lawyers from across the world [Australia, Canada, New Zealand, the United Kingdom, and the United States] for helping to ensure that I am correctly stating both the law and the practice in all the subject nations: David Harvey,

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difference? And which nation gets it right? Those are the questions I attempt to answer in this article.

To do so, I take an unconventional approach. I discuss the well-established legal principles one finds in cases, statutes, and rules in the five focal nations of Australia, Canada, England, New Zealand, and the United States. In my research, however, I sought to go beyond this, to find out the way in which the practice really occurs. In short, I was trying to determine whether the trial judges truly acted so very differently in the various nations. I was in touch with more than eighty individuals in these five nations. Most I knew; all were experienced in the world of criminal justice, as trial or appeals judges (state or federal), prosecution or defense lawyers, or academics who either left the practice or studied it carefully. I met with them, or spoke with them on the phone, or corresponded with them, or exchanged email messages. This article lays out the surprising answers to the questions I asked these individuals on the practice of instructing jurors.

#### **Rezumat:**

În cele din urmă, toate probele au fost administrate, avocații au pus concluziile pe fond în fața juraților, iar acum totul depinde doar de judecător. Este rândul său. Evident, acesta va oferi instrucțiuni juriului cu privire la normele de drept aplicabile. A fost un proces lung, cu multiple apărări formulate. Judecătorul cu experiență va fi, fără îndoială, tentant să treacă dincolo de o simplă prezentare a normelor de drept (instrucțiunile obișnuite oferite juriului). Astfel, el va prefera să discute cu ei despre probe: va comenta anumite aspecte punctuale, va sintetiza probele și argumentele prezentate de avocații ambelor părți. Cu toții dorim ca acești oameni desemnați să înțeleagă despre ce este vorba în acea cauză, nu-i așa? Cine are putea să le explice mai bine probele decât judecătorul? Dacă acest judecător este din Statele Unite, ar trebuie să reziste acestei tentații. Altfel, este foarte probabil ca hotărârea sa să fie modificată în calea de atac și el poate fi chiar supus unei sancțiuni disciplinare. Totuși, în alte sisteme de common-law, judecătorul nu ar fi deloc reținut în a face mai mult decât a oferi juriului simple instrucțiuni. De fapt, dacă nu ar face aceasta, există riscul să fie modificat în calea de atac și, poate, supus el însuși, unei sancțiuni disciplinare.

De ce există această diferență între judecătorii din Statele Unite și judecătorii din alte țări ce folosesc un sistem de common-law, cu rădăcini similare în sistemul de drept penal englezesc? Sunt americanii chiar atât de diferiți din acest punct de vedere față de celelalte "rude" vorbitoare de limbă engleză?

Pentru a verifica acest aspect am folosit o abordare mai puțin convențională. Am avut în vedere principii clare de drept regăsite în jurisprudență și legi din următoarele cinci țări: Australia, Canada, Anglia, Noua Zeelandă și Statele Unite. În studiul meu, am încercat să merg dincolo de acestea, pentru a identifica modalitatea exactă în care lucrurile se petrec în practică. Pe scurt, am încercat să aflu dacă judecătorii acționează, în concret, diferit în aceste cinci țări. În acest scop, am intrat în legătură cu peste optzeci de persoane din aceste cinci țări. Pe mulți îi știam dinainte; toți erau persoane cu experiență în dreptul penal, ca judecători de primă instanță sau de cale de atac, procurori sau avocați ai apărării, cadre universitare care fie au profesat în domeniu sau au avut în vedere studiul acestuia. M-am întâlnit cu aceștia, am vorbit cu ei la telefon, am purtat corespondență și am schimbat email-uri. Articolul scoate în evidență răspunsurile lor surprinzătoare la aceste întrebări pe care le-am adresat, în legătură cu practica instruirii juriului.

**Keywords:** jurors, criminal cases, jury instructions, relation between judges and jurors, common-law

## I. INTRODUCTION

Finally, the evidence has all been heard, the lawyers have given closing arguments to the jurors, and now it is up to you as the trial judge; it is your turn. Of course, you will instruct the jury on the law, no question about that. But this was a twelve-defendant, complicated, time consuming case of conspiracy to commit fraud: there were almost 200 counts in the indictment, laying out more than 300 transactions; the government's exhibit list, running to 178 pages, included over 1000 exhibits that filled many filing cabinets; there were more than 100 witnesses; the

presentation of the evidence took a total of thirty-one trial days.\*\*

Now, experienced, savvy trial judge that you are, are you not tempted - even just a bit - to go beyond stating to the jurors the mere legal rules (the usual jury instructions)? Wouldn't you prefer also to talk with them about the evidence: comment on particular items, summarize the overall evidence and the arguments put forth by the lawyers on both sides? You want to be certain that these lay people understand just what this case was all about. And who better to tell them about the evidence than you? Who, indeed?<sup>281</sup>.

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\*\* The facts here are taken from *United States v. Hill*, 643 F.3d 807, 819 (11th Cir. 2011). Such a prosecution is hardly unique in the United States. For recent examples of other difficult prosecutions, see *United States v. Garcia-Pastrana*, 584 F.3d 351, 366-67 (1st Cir. 2009) (140-count indictment focusing on conspiracy to embezzle a health care benefit program, 7 week trial); *United States v. Perlaza*, 439 F. 3d 1149, 1158 (9th Cir. 2006) (twelve defendants in a three-week trial); *State v. Gunn*, 437 S.E.2d 75, 77 (S.C. 1993) (thirty-three individuals charged in a thirty-count indictment, in a conspiracy alleged to have spanned more than 7 years). See also *United States v. Brooks*, 681 F.3d 678, 687 (5th Cir. 2012) ("The trial lasted from December 4, 2007 to February 7, 2008. During the trial, the government submitted over 1,000 exhibits, including the bidweek surveys sent to *Inside FERC* and *NGI*, internal worksheet versions of those surveys, internal EPME emails, EPME trade tickets recording physical and basis deals, summaries of basis positions, and hundreds of taped telephone calls.").

<sup>281</sup> For those not schooled in the art of summarizing, commenting, or marshaling [terms used, unfortunately, somewhat interchangeably at times, as will be explained below], the best-selling author Jeffrey Archer nicely describes what took place in a fictional trial in the U.K., in *A Prisoner of Birth*:

Mr. Justice Sackville's summary was masterful. He first went over any points of law as they applied to the case. He then proceeded to help the jury sift through the evidence, point by point, trying to make the case coherent, logical and easy for them to follow. He never once exaggerated or showed any bias, only offering a balanced view for the seven men and five women to consider.

He suggested they should take seriously the testimony of three witnesses who had stated

unequivocally that only Mr. Craig had left the bar to go out into the alley, and only then after he'd heard a woman scream. Craig had stated on oath that he had seen the defendant stab Mr. Wilson several times, and had then immediately returned to the bar and called the police.

Miss Wilson, on the other hand, told a different story, claiming that it was Mr. Craig who had drawn her companions into a fight, and it was he who must have stabbed Mr. Wilson. However, she did not witness the murder, but explained it was her brother who told her what had happened before he died. If you accept this version of events, the judge said, you might ask yourselves why Mr. Craig contacted the police, and perhaps more important, when DS Fuller interviewed him in the bar some twenty minutes later why there was no sign of blood on any of the clothes he was wearing.

"Members of the jury," Mr. Justice Sackville continued, "there is nothing in Miss Wilson's past to suggest that she is other than an honest and decent citizen. However, you may feel that her evidence is somewhat colored by her devotion and long-held loyalty to Cartwright, whom she intends to marry should he be found not guilty. But that must not influence you in your decision. You must put aside any natural sympathy you might feel because Miss Wilson is pregnant. Your responsibility is to weigh up the evidence in this case and ignore any irrelevant side issues."

The judge went on to emphasize that Cartwright had no previous criminal record, and that for the past eleven years he had been employed by the same company. He warned the jury not to read too much into the fact that Cartwright had not given evidence. That was his prerogative, he explained, although the jury might be puzzled by the decision, if he had nothing to hide.

JEFFERY ARCHER, *A PRISONER OF BIRTH* 83-84 (2008).

If you are a judge in Detroit, Michigan, in the center of the United States, you had better resist that temptation. Otherwise, you are very likely to be “reversed on appeal, perhaps even disciplined”.<sup>282</sup> But, looking across the Detroit River from that U.S. judge is a judge sitting in Windsor, Ontario, in the center of Canada, a ten-minute drive of a mere 3.28 kilometers.<sup>283</sup> She is not at all concerned about going beyond the giving of jury instructions. In fact, if she does not, she is likely to be reversed on appeal, perhaps even disciplined. And, it is not just that judge in Windsor. A judge in Auckland, one in London, one in Sydney, each would feel no hesitation going beyond a statement of the law and would likely be obliged to do so.

Why the difference between U.S. judges and judges from other common law based nations, with similar roots in the English criminal justice system? After sitting through trials in several different nations over the past few decades, that became a nagging question for me. Are Americans really that different from their

English-speaking cousins on this point?<sup>284</sup> What explains that difference? And which nation gets it right? Those are the questions I intend to answer in this article.

To do so, I take an unconventional approach. Of course, I will briefly discuss the well-established legal principles one finds in cases, statutes, and rules in the five focal nations of Australia, Canada, England, New Zealand, and the United States. In my research, however, I sought to go beyond this, to find out the way in which the practice really occurs. In short, I was trying to determine whether the trial judges truly acted so very differently in the various nations. I was in touch with more than eighty individuals in these five nations.<sup>285</sup> Most I knew; all were experienced in the world of criminal justice, as trial or appeals judges (state or federal), prosecution or defense lawyers, or academics who either left the practice or studied it carefully. I met with them, or spoke with them on the phone, or corresponded with them, or exchanged email. I asked each of them a few simple

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<sup>282</sup> Comment of a U.S. state appellate judge [former trial judge]. Notes for this interview, and for all others herein, are on file with the author.

<sup>283</sup> 2.04 miles.

<sup>284</sup> This is not the only point involving criminal procedure where the common law nations differ. Sharp contrasts can be drawn regarding the role and accessibility of the jury in the criminal trial, rules of exclusion, protections against self-incrimination, double jeopardy, sentencing, and open proceedings. I have - with my friend and colleague Professor Vicki Wayne - twice before addressed such points in looking at Australia and the United States. See generally Paul Marcus & Vicki Wayne, *Australia and the United States: Two Common Criminal Justice Systems Uncommonly at Odds, Part 2*, 18 TUL. J. INT'L & COMP. L. 335 (2010); Paul Marcus & Vicki Wayne, *Australia and the United States: Two Common Criminal Justice Systems Uncommonly at Odds*, 12 TUL. J. INT'L & COMP. L. 27 (2004).

<sup>285</sup> Five from New Zealand (Auckland, Christchurch, and Wellington). New Zealand has a population of roughly 4,327,944 people. CIA WORLD FACT BOOK <https://www.cia.gov/library/>

<https://www.cia.gov/library/publications/the-world-factbook/rankorder/2119rank.html> (estimates as of July 2012) (last visited March 6, 2013). Nine from Canada (Alberta, British Columbia, Ontario, and Saskatchewan). Canada's population is 34,300,083 people. *Id.* Eighteen from Australia (South Australia, Victoria, Western Australia, Queensland, and New South Wales). Australia's population is 22,015,576 people. *Id.* Ten from England (Brighton, Exeter, London, Nottingham, and Sheffield). England has a population of 52,000,000 people. OFFICE OF NATIONAL STATISTICS, <http://populationofengland.co.uk/> (estimates as of June 2010)(last visited March 6, 2013). Forty-one from the United States (Arizona, California, District of Columbia, Florida, Georgia, Illinois, Kansas, Maryland, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, New York, Oregon, Texas, Virginia, and the state of Washington). The U.S. population is 313,847,465 people. CIA World Fact Book, <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2119rank.html> (estimates as of July 2012) (last visited March 6, 2013).

questions relating to the practice of trial judges in criminal cases on communicating with jurors, and the wisdom of the approaches.<sup>286</sup> Their answers were illuminating, to say the least. I share those answers with you below.<sup>287</sup>

## II. THE LEGAL RULES

The law on judges summarizing evidence for jurors is settled and it is reasonably clear. In Australia, Canada,

New Zealand, and England and Wales, the practice is permitted, and may be required. In the United States, with but a few exceptions, the practice is expressly forbidden.

### A. Summarizing evidence in Australia

Throughout Australia, judges are generally required to sum up evidence to the jury.<sup>288</sup> Summing up should be a “clear

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<sup>286</sup> This is a sample letter I wrote to a New Zealand judge. The basic form was used with judges and lawyers in all five nations, whether in writing or in discussions, though the wording for the American judges was - of course - somewhat different, coming from a contrary perspective.

Dear \_\_\_\_\_:

I write to you seeking your help on a project. First, a bit of background.

I have long been intrigued by a discussion I had a while ago with an American friend of mine, a trial judge in state court over here. He had just been overseas and had spent a good deal of time in other common law countries, observing trial procedures. He was expressing to me great surprise about the extent to which judges there not only go far and wide in summarizing evidence to the jury, but often broadly comment on key aspects of the cases presented including laying out the theories of the government and the defense. This led me to contact another friend, a judge in England who wrote to me: “In addition to instructing the jury on matters of law the judge in English and Welsh courts is required to summarise the facts in all but the simplest of cases and, if only in a few sentences, to summarise the case for the prosecution and the defence.” Such thoughts have been repeated to me over the past year by judges and lawyers in Australia, the United Kingdom, and Canada.

I have raised the point with some long time judges and prosecutors here. The comments of the Americans are uniform. This is typical, made to me by a U.S. federal judge: “I cannot imagine using the courts of England and Wales method of summarizing or commenting, or being upheld on appeal. The first time I did this in a criminal jury trial or even a civil trial will be the last time a lawyer would wish to have a jury trial before me, and I would be reversed on appeal.” Here’s what another - experienced state judge - said. “I totally agree that I have never heard of judges in the U.S. summarizing facts or theories to the jury after trial ... I could never imagine judges in the U.S. following the way they do it in those other common law

nations.”

1) In your experience in the New Zealand criminal justice system, is it routine for the trial judge to either summarize evidence to the jurors, or lay out to the jurors their own views as to the strength of the case of the parties?

2) Is this a wise policy?

3) Does it make more sense than the U.S. view of greatly limiting the judge in addressing jurors?

4) Do you see any problems with this sort of involvement of New Zealand judges?

Many thanks for your thoughts.

<sup>287</sup> And, while hardly a scientific sampling, some recent experiences in Canada, Australia, New Zealand, and the United States support the conclusions reached below. At gatherings of non-U.S. judges, practicing lawyers, and law professors where I was discussing differences in criminal justice systems, I asked these two questions of each group (Sydney, March 2012, 100 participants; Auckland, March 2012, 20 participants; Melbourne, March 2012, total of 40 participants):

1. Are you aware of any trial judges in your jurisdiction who feel bound by the rule followed in the U.S. that judges are not permitted to comment on the evidence, or to summarize the evidence for the jury?

2. Are you aware of many trial judges in your jurisdiction who will not comment on the evidence, or summarize the evidence for the jury?

Without a single dissent, the answer to both questions was “no,” though many were careful to distinguish summary practices from those involving comment, as explained below. At a recent gathering of fifty United States District and Circuit judges, every person there indicated that no summary or comment can be given in U.S. trials (Raleigh, N.C., Nov. 2012).

<sup>288</sup> See, e.g., *R v. Mogg* (2000) 112 A Crim R 417, 430, para. 73 (Austl.) (“The consensus of longstanding authority is that the duty to sum up is best discharged by referring to the facts that the jury may find with an indication of the consequences that the law requires on the footing that this or that

and manageable explanation of the issues which are left to the jurors” to decide.<sup>289</sup> A trial judge often reminds the jurors during summing up that they are the sole judges of the facts, and that he or she is there to guide them towards the relevant legal principles as they affect the case.<sup>290</sup>

While summing up, a judge is entitled to express his or her view of the facts:

A judge is always entitled to express his view of the facts, provided that he does so with moderation and provided always that he makes it clear that it is the jury’s function (and not his) to decide the facts and that it is their duty to disregard the view which he has expressed (or which he may appear to hold) if it does not agree with their own independent assessment of the facts.<sup>291</sup>

## B. Summarizing Evidence in Canada

The trial judge in Canada has a positive duty to summarize evidence to the jury.<sup>292</sup> “A trial judge should “review the substantial parts of the evidence and give the jury the theory of the defence, so

that they may appreciate the value and effect of that evidence, and how the law is to be applied to the facts as *they* find them”.<sup>293</sup>

There is no specific procedure for summing up.<sup>294</sup> A judge has “considerable latitude to determine how much or how little of the evidence is to be reviewed in relation to the elements of the charge”.<sup>295</sup> As one experienced judge remarked to me, “[There are] many objectives to be achieved when instructing the jury in Canada. We aim to summarize the evidence as it relates to each issue that the jury must determine”.

While there is no precise model for summing up, one court explained that the “duty of a trial judge is not to undertake an exhaustive review of the evidence,” which may “serve to confuse a jury”.<sup>296</sup> As an example, another court stated that “reading for several continuous hours of extended passages of evidence from the judge’s notes is a practice to be discouraged”.<sup>297</sup> Judges should strive for a concise review, as long as matters that bear directly on the issues juries

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view of the evidence is taken”); *Id.* at para. 54 (“The onerous duties of a trial judge will ordinarily include identifying the issues, relating the issues to the relevant law and the facts of the case and outlining the main arguments of counsel.”); *R v. De’Zilwa* (2002) 133 A Crim R 501, 501, para. 4 (Austl.) (The trial judge must “summarise the evidence and counsel’s arguments and ... relate the facts and issues raised by counsel to the actual charges.”). An exception to this hard rule may be found in New South Wales, where a judge may choose not to summarize the evidence if he or she feels that the a summary is not necessary given the circumstances of the trial and the relatively uncomplicated nature of the evidence presented. See JUDICIAL COMM’N OF NEW SOUTH WALES, CRIMINAL TRIAL COURTS BENCH BOOK § 7-040 n.1 (2012) [hereinafter CRIMINAL TRIAL COURTS BENCH BOOK].

<sup>289</sup> CRIMINAL TRIAL COURTS BENCH BOOK, *supra* note 9, § 7-040, n.3 (citing *R v. Williams* (1990) 50 A Crim R 213, 214 (Austl.)).

<sup>290</sup> See *id.* § 7-020 Suggested Direction - Summing-up (commencement).

<sup>291</sup> *Id.* § 7-040 n.6 (citing *R v. Zorad* (1990) 19 NSWLR 91, 106–07 (Austl.)).

<sup>292</sup> “The judge also has the duty, insofar as it is necessary, to assist the jury by reviewing the evidence as it relates to the issues in the case.” *R v. Gunning*, [2005] 1 S.C.R. 627, para. 27 (Can.). See JUDICIAL STUDIES BD., CROWN COURT BENCH BOOK: DIRECTING THE JURY, 1 (2010) [hereinafter JUDICIAL STUDIES BD.].

<sup>293</sup> *Azoulay v. The Queen* [1952] 2 S.C.R. 495, 498 (Can.). Actually, the judge must give the jury the theory of the Crown and the defense, not just the defense. See JUDICIAL STUDIES BD., *supra* note 13, at 2.

<sup>294</sup> JUDICIAL STUDIES BD., *supra* note 13, at 1 (“There is no model and no template, just good practice learned by the example of others, thought, and preparation.”).

<sup>295</sup> *R. v. Royz* [2009] 1 S.C.R. 423, para. 3 (Can.).

<sup>296</sup> *R. v. Daley* [2007] 3 S.C.R. 523, paras. 56, 76 (Can.).

<sup>297</sup> *R. v. MacKay* [2005] 3 S.C.R. 607, para. 2 (Can.) (“The charge was lengthy - 2.5 days.”).

determine are not omitted.<sup>298</sup> While the extent to which the judge should review the evidence depends on the particular case, “the test [should be] one of fairness”.<sup>299</sup>

During the process of summing up, courts have found that it may be unavoidable that the judge would comment on the evidence.<sup>300</sup> This often involves expressing his or her own opinions on the evidence, while other times it does not.<sup>301</sup> “The judge is... entitled to give an opinion on a question of fact and express it as strongly as the circumstances permit, so long as it is made clear to the jury that the opinion is given as advice and not direction”.<sup>302</sup> This right, though, is not absolute.<sup>303</sup>

### C. Summarizing evidence in New Zealand

Trial judges in New Zealand criminal courts generally offer juries a “summing

up” of the case. Traditionally the summing up consists of a discussion of the role of the judge and jury, an explanation of the ingredients of the offense in question, and a review of evidence and arguments on both sides.<sup>304</sup> Summing up in New Zealand is historically related to the practice that exists in the Crown Courts of England and Wales.<sup>305</sup>

Like the English practice, discussed below, summing up the evidence in New Zealand is not mandated by statute but has become a well-established component of the criminal trial. “A trial according to law” requires adequate direction on the evidence presented.<sup>306</sup> The trial judge must note the facts that are in dispute, offer a balanced account of the prosecution and defense cases, and indicate that factual questions are for the jury to resolve.<sup>307</sup> Neither counsels’ closing speeches nor the fact that jurors took notes may substitute for the judge’s

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<sup>298</sup> See *R. v. Daley* [2007] 3 S.C.R. 523, para. 56 (Can.) (“Brevity in the jury charge is desired.”); JUDICIAL STUDIES BD., *supra* note 13, at 5 (“Brevity is a virtue.”).

<sup>299</sup> See *Daley*, para. 57.

<sup>300</sup> See Michael Hall, *Judicial Comment and the Jury’s Role in the Criminal Trial*, 11 CAN CRIM. L. REV. 247, 268 (2007).

<sup>301</sup> *Id.*

<sup>302</sup> *R. v. Gunning* [2005] 1 S.C.R. 627, para. 27 (Can.).

<sup>303</sup> See *R. v. D’Souza* [2004] 189 O.A.C. 55, paras. 7, 9 (Can. Ont.). Due to the risk of the influence a trial judge can have on jurors in summing up and commenting, some Canadian judges have expressed concern over this process. One wrote that the “Government of Canada ... should ... alter the obligation imposed upon a trial judge to outline the most significant parts of the evidence for a jury.” See FRED KAUFMAN, ONT. MINISTRY OF THE ATT’Y GEN., REPORT OF THE KAUFMAN COMMISSION ON PROCEEDINGS INVOLVING GUY PAUL MORIN: RECOMMENDATIONS 28 (1998) (Recommendation 81), *available at* <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/morin/>. Another made the point forcefully to me that as to expressing an opinion:

It is not so much that the opinion is advice rather than direction. It is not even advice. It is nothing

more than the opinion of the trial judge and can (must!) be disregarded by the jury if their opinion is different. It is for the jury to decide all issues of fact independent of the trial judge’s view (and the views of counsel). Most of us tend to stay far away from opinions, but when we do, we make it clear that they have no binding effect on the jury whatsoever.

<sup>304</sup> See *R v. Fotu* [1995] 3 NZLR 129 (CA), 1995 NZLR LEXIS 763, at \*28 (N.Z.).

<sup>305</sup> See David Wolchover, *Should Judges Sum Up on the Facts?* CRIM. L.R., Nov. 1989, at 783–84; Lord Justice Moses, Annual Law Reform Lecture: Summing Down the Summing-Up 6 (Nov. 23, 2010), *available at* <http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/speech-moses-lj-summing-down-summing-up.pdf>. New Zealand affirmed the laws of England as its own in the English Laws Act 1858. See RICHARD SCRAGG, NEW ZEALAND LEGAL SYSTEM: THE PRINCIPLES OF LEGAL METHOD 2 (2005). There is no doubt that “the English legal system exercised both an institutional and intellectual influence on the legal system[] of New Zealand.” PETER SPILLER ET AL., A NEW ZEALAND LEGAL HISTORY 1 (1995).

<sup>306</sup> *R v. Tavete* [1988] 1 NZLR 428 (CA), 1987 NZLR LEXIS 687, \*12 (N.Z.).

<sup>307</sup> *R v. Keremete*, CA 247/03, para. 18 (Oct. 3, 2003) (N.Z.).

obligation to sum up the facts;<sup>308</sup> the trial judge is obligated to sum up the evidence in all cases, even relatively simple ones.<sup>309</sup> However, the judge need not read the entire record of the facts to the jury.<sup>310</sup> Rather, the trial judge must offer a “succinct but accurate summary of the issues of fact as to which a decision is required,”<sup>311</sup> and it must be tailored to the particular case.<sup>312</sup>

The trial judge must recite the case of the defense to the jury, however.<sup>313</sup> Failure to do so may well result in a reversal and new trial.<sup>314</sup> This is true even when the defense case appears ridiculous or implausible.<sup>315</sup> The judge must present a balanced summary, but there is no obligation to create an “artificial balance”

between the cases.<sup>316</sup> The judge may indicate his or her view of the facts in the course of summing up the evidence.<sup>317</sup> The essential requirement here is that the judge says that the “facts are the province of the jury” and that the jurors are free to disregard the judge’s view.<sup>318</sup>

#### D. Summarizing Evidence in England and Wales

The practice of summing up the evidence in Crown Courts in England and Wales is not specifically authorized or seemingly required by statute or case law. However, summing up the evidence has been endorsed, implicitly and explicitly, by English courts for at least 100 years. Judges in the Crown Courts typically offer

<sup>308</sup> *R v. Shipton* [2007] 2 NZLR 218 (CA), 2006 NZLR LEXIS 61, \*17–18, para. 39 (N.Z.), adopting the view of the English judges in *R v. Amado-Taylor*, [2000] 2 Crim. App. 189, 191, paras. 5–6 (U.K.) discussed *infra* text accompanying note 46.

<sup>309</sup> *Id.* But see *Piwari v. The Queen* [2010] NZCA 19 at para [18] (“[E]ven in a straightforward case there is a duty on the trial Judge to deal with the facts, typically by reference to the arguments of counsel. Often this can be done succinctly, by a brief bullet point summation of the contentions. In other cases the facts will give rise to complexities which require that the Judge provide greater assistance to the jury.”).

<sup>310</sup> *R v. Beazley* [1987] 2 NZLR 760 (CA), 1987 NZLR LEXIS 665, at \*14 (N.Z.). The court held that a trial judge was right to recite a long portion of testimony because of its importance and the selectivity with which counsel had drawn from it in their closing speeches. *Id.* at \*14–15. However, the Court stated that “as a general rule it is undesirable to deal with evidence in this way.” *Id.* at \*15; see also *Keremete*, para. 18 (“[T]here is wide discretion as to the level of detail to which the judge descends ... . Treatment of matters affecting cogency of evidence is not required as a matter of law.” (citation omitted)).

<sup>311</sup> *R v. Fotu* [1995] 3 NZLR 129 (CA), 1995 NZLR LEXIS 763, at \*29 (N.Z.) (quoting *R v. Lawrence* [1982] A.C. 510, 519 (U.K.)).

<sup>312</sup> *R v. Harawira* [1989] 2 NZLR 714 (CA), 1989 NZLR LEXIS 597, at \*40 (N.Z.).

<sup>313</sup> *R v. Shipton* [2007] 2 NZLR 218 (CA), 2006 NZLR LEXIS 61, at \*14, para. 33 (N.Z.) (“The underlying principle is that it is the absolute duty of

a trial Judge to identify and adequately remind the jury of the defence case in relation to each defendant.”).

<sup>314</sup> *Id.* (“It follows that a failure to refer in the summing up to a central line of defence that has been placed before the jury will generally result in the conviction being set aside, and a new trial ordered.”).

<sup>315</sup> See *id.* at \*14, para 34.

These obligations on a trial Judge are not contingent, in any case. They are a fundamental obligation on the Court in relation to a fair trial. As was said in *R v. Marr* (1990) 90 Cr App R 154 at p. 156: “It is ... an inherent principle of our system of trial that however distasteful the offence, however repulsive the defendant, however laughable his defence, he is nevertheless entitled to have his case fairly presented to the jury by counsel and by the judge.”

<sup>316</sup> *R v. Keremete*, CA 247/03, para. 19 (Oct. 3, 2003) (N.Z.).

<sup>317</sup> See *R v. Honey* [1973] 1 NZLR 725 (CA), 1972 NZLR LEXIS 614, at \*5 (N.Z.).

<sup>318</sup> *Id.* “[T]he summing-up as a whole was flavoured by the Judge’s own strong view as to guilt. This was a view which he was entitled to hold, and entitled to express, so long only as in expressing it he plainly directed the jury that they were at liberty to disregard it.” *Id.* at \*15; see also *R v. Hall* [1987] 1 NZLR 616 (CA), 1987 NZLR LEXIS 587, at \* 22–23 (N.Z.) (“The Judge is perfectly entitled to make his own comments on each case provided that he makes it abundantly clear to the jury throughout his summing up, as he did, that questions of fact are for them and for them alone.”).



a summary of both the relevant law and the evidence presented at trial after prosecution and defense counsel have given closing speeches and before the jury retires to consider a verdict.<sup>319</sup> Legal historians suggest that the practice of summing up the facts likely emerged almost 200 years ago in parallel with the right of defense attorneys to address the jury.<sup>320</sup> On this account, judges needed to rehearse the evidence for the jury in order to rectify any distortions that defense counsel may have introduced while presenting the case to the jury.<sup>321</sup>

The practice of summing up the evidence is well established in modern English case law. In 1909 the Court of Criminal Appeal<sup>322</sup> held that “a judge is not only entitled, but ought, to give the jury some assistance on questions of fact

as well as on questions of law”.<sup>323</sup> Seven decades later the Court of Appeals wrote that judges must present a “concise summary of the evidence and arguments on both sides”.<sup>324</sup> Failure to sum up the evidence is a “procedural irregularity” that is likely to result in a quashed conviction.<sup>325</sup> This is particularly true “where there is a significant dispute as to material facts”.<sup>326</sup> In such cases the judge is obligated to “identif[y] succinctly those pieces of evidence which are in conflict.... [in order to] focus the jury’s attention on those factual issues which they must resolve”.<sup>327</sup>

Though trial judges usually must sum up the facts, they are not required or encouraged to merely recite their notes on the evidence presented.<sup>328</sup> Instead, the

<sup>319</sup> See S. H. BAILEY ET AL., *THE MODERN ENGLISH LEGAL SYSTEM* 1057–64 (5th ed. 2007); MICHAEL ZANDER, *CASES AND MATERIALS ON THE ENGLISH LEGAL SYSTEM* 521–23 (11th ed. 2007). Nevertheless, both judges and academics have criticized the practice extensively. See, e.g., Moses, *supra* note 26, at 6 (asserting that summarizing the evidence for jurors serves no useful purpose); Nic Madge, *Summing Up: A Judge’s Perspective*, 2006 CRIM. L.R. 817–27 (arguing for the use of written directions and against the need to summarize evidence for the jury); Wolchover, *supra* note 26, at 791–92 (suggesting that in summing up the evidence judges are more likely to influence the jury than provide a useful, impartial rehearsal of the facts).

<sup>320</sup> Moses, *supra* note 26, at 4; Wolchover, *supra* note 26, at 783.

<sup>321</sup> Wolchover, *supra* note 26, at 783. The author notes that the emergence of cross-examination of witnesses at about the same time required judges to maintain increasingly accurate notes about the trial. As a result, judges were better prepared to offer summations of the facts presented. *Id.* at 782–83.

<sup>322</sup> The Criminal Appeal Act 1907 established the Court of Criminal Appeal, which was superseded by the modern Court of Appeal (Criminal Division) with the passage of the Criminal Appeal Act 1966. D. A. Thomas, *The Criminal Appeal Act*, 30 MODERN L. R. 64, 64 (1967); J. E. Hall Williams, *The Sentencing Policy of the Court of Criminal Appeal*, 10 HOWARD J. CRIM. JUSTICE 201, 201 (2009).

<sup>323</sup> R v. Cohen, [1909] 2 Crim. App. 197, 208 (Eng.).

<sup>324</sup> R v. Lawrence, [1982] A.C. 510 (H.L.) 519 (appeal taken from Eng.); see also R v. Berrada, [1990] 91 Crim. App. 131, 136 (Eng.) (the defendant is entitled to have impartial directions about the evidence presented to the jury). *But see* R v. Atfield, [1961] 45 Crim. App. 309, 313 (Eng.) (“[I]n a complicated and lengthy case it is incumbent on the court to deal with the evidence [in summing up]. Conversely, in a case which has not occupied a great deal of time and in which the issue, guilt or innocence, can be simply and clearly stated, this court is not prepared to hold that it is a fatal defect to the summing-up that the evidence has not been discussed.”) *Id.*

<sup>325</sup> R v. Amado-Taylor, [2000] 2 Crim. App. 189, para. 12 (U.K.). The standard is whether “the jury would inevitably have convicted even if there had been a proper summing-up of the defence case and the facts.” *Id.* para. 20.

<sup>326</sup> *Id.* para. 9.

<sup>327</sup> *Id.*

<sup>328</sup> See, e.g., R v. Charles, [1979] 68 Crim. App. 334, 341 (Eng.). There, after thirty-two days of trial, the judge summarized over three full days. *Id.* at 338. On appeal the judges wrote: “[The judge] had difficulty in deciphering his own notes.” *Id.*

This method of summing up in this kind of case, particularly the reading out of the judge’s note of all the evidence is, in our judgment, unsatisfactory. It is unsatisfactory for a number reasons. In plain language it must bore the jury to sleep; and that is what happened in this case.

*Id.* at 338–39. A juror literally had fallen asleep during the summation. *Id.* at 339.

summing up should draw attention to the relevant factual disputes and guide the jury in applying facts to the law.<sup>329</sup> Trial judges must provide an impartial account of the facts and must lay out the defense for the jury.<sup>330</sup> As in the other nations discussed above, trial judges in England and Wales may comment on the evidence “provided that [they] leave[] the issues of fact to the jury to determine”.<sup>331</sup>

### E. Summarizing Evidence in the United States

Judges in the United States are wary indeed about giving any directions as to the evidence. As one long-time trial lawyer mentioned, “There is a line of cases reversing (or not) trial judges for asking questions of witnesses that the courts find indicate a bias by the trial judge or bringing in evidence not in the record”. Though there are appellate decisions supporting summarizing,<sup>332</sup> and some hint

<sup>329</sup> See *R v. Lawrence*, [1982] A.C. 510 (H.L.) 519 (appeal taken from Eng.). The summing up should include a “succinct but accurate summary of the issues of fact as to which a decision is required ... and a correct statement of the inferences which the jury are entitled to draw from their particular conclusions about the primary facts.” *Id.*

<sup>330</sup> See *R v. Marr*, [1990] 90 Crim. App. 154, 156 (Eng.); *R v. Curtin*, [1996] Crim LR 831, 832 (U.K.). The judge is also entitled to draw the jury’s attention to discrepancies in the defense case. See *R v. Evans*, [1990] 91 Crim. App. 173, 173 (Eng.).

<sup>331</sup> See *R v. O’Donnell*, [1917] 12 Crim. App. 219, 221 (Eng.). Trial judges often use a disclaimer like, “If I appear to express any views or comments about the evidence, do not accept them, unless you agree with them.” Madge, *supra* note 40, at 825. The Judicial Studies Board at one time published specimen directions, on which judges relied, but in the latest edition of the Bench Book has ceased doing so. Instead, the new approach is “to move away from the perceived rigidity of specimen directions towards a fresh emphasis on the responsibility of the individual judge, in an individual case, to draft directions appropriate to that case.” JUDICIAL STUDIES BD., *supra* note 13, at v (foreword by Lord Judge, Lord Chief Justice of England and Wales); see SIMON TONKING & JOHN WAIT, CROWN COURT BENCH BOOK COMPANION iii (2011) (referring to the “now withdrawn ... JSB Specimen Directions”). On previous judicial reliance on specimen directions, see Sally Lloyd-Bostock & Cheryl Thomas, *Decline of the “Little Parliament”: Juries and Jury Reform in England and Wales*, LAW & CONTEMP. PROBS., Spring 1999, at 7, 33.

<sup>332</sup> The case law and favorable commentary are mostly dated. See, e.g., *State v. Pinaggia*, 121 A. 473, 473 (Conn. 1923); *Keller v. United States*, 168 F. 697, 698 (7th Cir. 1909). See generally Lawrence Wolff Gidwitz, *The Right of a Federal Judge to Comment on the Evidence*, 1 U. CHI. L. REV. 335–37 (1933); John Selden Tennant, *Comment by Judge on Evidence*, 30 MICH. L. REV.

1303–11 (1932); Frank Hoyt, *The Judge’s Power to Comment on the Testimony in his Charge to the Jury*, 11 MARQ. L. REV. 67–72 (1927). The only relatively recent positive case law is *United States v. Thayer*, 201 F. 3d 214, 223 (3rd Cir. 1999) (“[A] federal judge is permitted to summarize and comment upon the evidence ... The court’s comments, however, may not confuse or mislead the jury, or become so one-sided as to assume an advocate’s position.”) (citing *Am. Home Assurance Co. v. Sunshine Supermarket, Inc.*, 753 F.2d 321, 327 (3d Cir. 1985)); *United States v. Angulo-Hernandez*, 565 F.3d 2, 10 (1st Cir. 2009) (“[A] trial judge in the federal system retains the common law power to question witnesses and to analyze, dissect, explain, summarize, and comment on the evidence.”) (citing *Logue v. Dore*, 103 F.3d 1040, 1045 (1st Cir. 1997)). A few states appear to allow judges to summarize. The most obvious example is California, which has a state constitutional provision seemingly on point: “The court may make any comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the proper determination of the cause.” CAL. CONST. art. VI, § 10 (West, Westlaw through 2012). None of the California lawyers or judges I questioned could, though, recall a single instance in modern times of a judge summarizing or commenting on the evidence. Moreover, the much more common view in the United States, indeed the overwhelming view, is not to allow judicial summary or commentary. This view can be found reflected in state constitutional provisions, statutes, or court rules. See, e.g., WASH. CONST. art. IV, § 16 (West, Westlaw through Nov. 2012 amendments) (“Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law”); MO. ANN. STAT. § 546.380 (West, Westlaw 2012) (The court shall not, on the trial of the issue in any criminal case, sum up or comment upon the evidence, or charge the jury as to matter of fact ...); MINN. R. CRIM. P. 26.03 subd. 19(6) (2012) (“The court must not comment on evidence or witness credibility ...”).

in various federal rules<sup>333</sup> which would seem to permit such summary, each person with whom I spoke about this matter agreed with one federal district judge: "I'm not aware of anyone who makes it a practice to sum up or comment on the evidence...". The high water mark in support of this position probably came in 1988 when Federal District Judge Jack Weinstein in a talk<sup>334</sup> and an article<sup>335</sup> argued forcefully for judges - who had, as he noted, the authority - to begin to summarize in criminal jury trials. He wrote:

The unwillingness of American judges to comment on the evidence [and to summarize it, ed.] is in some ways unfortunate. There are distinct advantages to this practice, particularly in complex and technically oriented trials which are difficult for juries to follow.... First, a judge's summary and comment on the evidence can increase the jury's ability to understand the proceedings it has attended, and thus increase the accuracy of verdicts.... A second advantage of the power to comment is that it can serve to clarify what may have been distorted by the bias of counsel's arguments. The trial judge is, in effect, the only experienced lawyer in the courtroom who is qualified not only by his experience and training,

but also by disinterest in the outcome, to instruct the jury with an appraisal and summary of the evidence.... Besides helping the jury evaluate witness credibility, the judge may also comment on the evidence by providing the jury with guidelines for assessing its weight and sufficiency....<sup>336</sup>

While noting the concerns as to the impact of summary and comment, Judge Weinstein nonetheless called on his fellow trial judges to recognize that, as he put it, "[t]aking advantage of the power to summarize and comment is one means of keeping jury trials fair, jury verdicts reasonable, and jurors a little less confused".<sup>337</sup>

This strong view has not been heeded throughout the United States. Instead, the language of the court in *United States v. Godwin*, though focusing on the trial judge's interrogation of witnesses, indicates the view that would call for caution by the trial judge in taking this sort of action:

[T]he trial judge must always remember that he occupies a position of preeminence and special persuasiveness in the eyes of the jury, and, because of this, he should take particular care that his participation during trial - whether it takes the form of interrogating witnesses,

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<sup>333</sup> *E.g.*, FED. R. EVID. 103(c) (West, Westlaw 2013) ("The court may make any statement about the character or form of the evidence, the objection made, and the ruling. The court may direct that an offer of proof be made in question-and-answer form."). No recent cases have specifically extended 103(c) to include summaries. Indeed, a few respondents wondered whether summary or conduct by the judge would violate FED. R. EVID. 605 ("The presiding judge may not testify as a witness at the trial." (West, Westlaw 2013) As to whether it would be prudent for a federal judge to begin the practice of summarizing the evidence, one trial judge offered this advice:

I think a district judge would be foolhardy to comment on the evidence in today's environment. A whole generation of lawyers now sitting on the

court of appeals is accustomed to rigid adherence to the respective circuit's model or pattern instructions and has never seen a charge in which the judge commented on the evidence. Any deviation from the norm would be certain to invite critical scrutiny.

<sup>334</sup> See Jack B. Weinstein, *The Power and Duty of Federal Judges to Marshall and Comment on the Evidence in Jury Trials and Some Suggestions on Charging Juries*, 118 F.R.D. 161, 161 n.a (1988) ("This paper is an expansion of remarks by the author to the Eleventh Circuit Judicial Workshop in Destin, Florida, October 28, 1987.").

<sup>335</sup> See generally *id.*

<sup>336</sup> *Id.* at 162, 166, 175.

<sup>337</sup> *Id.* at 188

**To understand better the advantages and the disadvantages of our own system, we will need to learn a good deal more about what some outstanding people are working on elsewhere in the world.**

addressing counsel, or some other conduct - never reach[es] the point at which it appears clear to the jury that the court believes the accused is guilty. Even when the evidence provides the court with a negative impression of the defendant, the judge must refrain from interjecting that perception into the trial. He is always obliged to retain the "general atmosphere of impartiality" required of a fair tribunal, and must not - under any circumstance - become an advocate for the prosecution. In sum, ours is an adversary system, and "[t]he trial of a case [is] a three-legged stool - a judge and two advocates". The obligation of the prosecutor is to prosecute, while that of the defense lawyer is to defend, each in an aggressive and professional manner. And the judge must judge - fairly and impartially.<sup>338</sup>

The prevailing view in the United States was forcefully set out by federal appeals judge Pierre Leval five years ago:

It appears that the giving of a flight instruction is a vestige of the late nineteenth and early twentieth centuries, when it was common practice for judges

to summarize and comment upon the evidence generally. For good reason, that practice has fallen into widespread disfavor, absent special circumstances. Judges cannot marshal the evidence without exercising their own judgment on how evidence should be described, which aspects should be stressed, which aspects ignored. In doing so, courts inescapably influence the jury on decisions which should be in the jury's sole province. Especially in a criminal trial, in which the defendant often declines to present evidence, the court's marshaling of the evidence often amounts substantially to a repetition of the prosecutor's summation. Today, marshaling of evidence is rarely practiced in federal court. A majority of states bar judges from commenting upon the evidence, and a plurality of states bar them from summing up the evidence as well.<sup>339</sup>

### III. IS THERE TRULY A DIFFERENCE AMONG THE NATIONS?

Is there a difference in practice as to summarizing the evidence and commenting on the evidence? Oh yes, a big, big difference among the subject common law nations: Australia, Canada, New Zealand, England and Wales, and the United States.

First, though, some thoughts on the terms being used here. I will attempt to be careful throughout this article to distinguish between judges who *summarize* evidence for juries in connection with jury instructions, and judges who *comment* on the evidence to juries. The focus here is on the former,

<sup>338</sup> 272 F.3d 659, 678-79 (4th Cir. 2001) (citations omitted).

<sup>339</sup> *United States v. Mundy*, 539 F.3d 154, 158-59 (2d Cir. 2008) (citations omitted). This practice became even clearer years ago, as explained by Judge Weinstein, *supra* note 55, at 162-63, when

a proposed federal rule specifically allowing summing up and comment was rejected by Congress. "[T]he proposal was rejected in large part as a result of arguments that judges should not have this power [to summarize and comment] under any circumstances." *Id.* at 163.

not the latter. The task of the trial judge in summarizing evidence was explained concisely in one decision by the English Lord Justice Rose: "To give directions about the relevant law, to refer to the salient pieces of evidence, to identify and focus attention on the issues, and in each

of those respects to do so as succinctly as the case permits".<sup>340</sup>

Summarizing the evidence - as we shall see - is quite common in the subject countries, except the United States. It is not especially controversial in the nations where it is common, and is a well-established practice.<sup>341</sup>

<sup>340</sup> R v. Curtin (1996) Crim LR 831, 832 (U.K.). The judge will usually also offer to the jury her view of the parties' theories of the case. As explained in one English Court Bench Book:

The task . . . in summing up is to present the law and a summary of the evidence in such a way as best to enable the jury to reach a just conclusion. That can be achieved only if the trial judge communicates effectively to the jury the issues which they need to resolve and their legitimate approach to the evidence relevant to those issues...

The trial judge is in the perfect position to form a judgment how best to craft the summing up. How that assistance is achieved is entirely for the trial judge in the circumstances of the individual case. Practice varies. There is no model and no template, just good practice learned by the example of others, thought, and preparation.

JUDICIAL STUDIES BD., *supra* note 13, at 1 (citations omitted).

<sup>341</sup> The Judicial Commission of New South Wales, Australia has a proposed format for summing up:

[7-000] Suggested outline of summing-up (for use as an aide memoire)

Prior to final addresses, it is prudent for the judge to raise with counsel, in the absence of the jury, the specific legal issues which in their submissions have arisen in the trial and which need to be the subject of specific reference in the summing-up.

The following summing-up format is suggested purely as a guide and is not intended to be exhaustive:

1. Burden and standard of proof.
2. Where there is more than one count, each count is to be considered separately.
3. Where there is more than one defendant, each case is to be considered separately.
4. Legal ingredients of each count ...
5. It is generally not good practice to read legislation to a jury ...
6. Any general matters of law which require direction - for assistance in this regard, reference might be conveniently made to the chapters in the Bench Book under the various headings in "Trial Instructions". This will operate as a check list, although it is not suggested that it would be exhaustive.

7. How the Crown seeks to make out its case - this will involve an outline of the nature of the Crown case, by reference to the various counts. Where necessary, the Crown case against separate accused(s) should be distinguished.

8. Defences - this will involve an outline of the defence or defences raised by the accused, distinguishing where necessary between individual accused.

9. Evidence - here reference should be made to the relevant evidence, relating it, where possible, to the legal issues which arise under the particular counts and the defences raised. It will be necessary, of course, to distinguish between direct and circumstantial evidence. A legal direction on circumstantial evidence will already have been given.

10. Summarise arguments of counsel again relating them, if possible, to particular counts and defences and legal issues.

11. Recap any matters where essential.

12. In the absence of the jury, seek submissions from counsel in relation to any factual or legal issues which they contend were not appropriately dealt with in the summing-up...

[7-020] Suggested direction - summing-up (commencement)

...

I propose to commence this summing-up with a number of general directions which, to some extent, are a repetition of those which I gave you at the commencement of the trial...

I am the judge of the law, but you are quite correctly called the judges of the facts. I have nothing to do with those facts or your decisions in relation to them. I have nothing to do with what evidence is to be accepted by you as truthful, or what evidence is to be rejected by you as being untruthful; nor indeed what weight you might give to any one particular part of the evidence which has been given or what inferences you draw from that evidence.

It is for you to assess the various witnesses and decide whether they are telling the truth. You have seen each of the witnesses as they have given their evidence. It is a matter for you entirely as to whether you accept that evidence.

Your ultimate decision as to what evidence you accept and what evidence you reject may be based

Commenting on the evidence involves the judge offering his or her own view of the evidence, and can consist of the judge giving the jury opinions as to the credibility of a witness, the strength of the case of the government or the defense, or the soundness of the lawyers' theory of the case. Commenting is less common, though still generally authorized, in the subject countries, except - once again -

in the United States.<sup>342</sup> A good deal of controversy surrounds such comment, and in many jurisdictions, the practice - as explained by one Canadian judge - "is much less popular than it used to be, really reserved for the unusual case".<sup>343</sup> The practice was set out by the Court of Appeals of New South Wales, Australia:

A judge is always entitled to express his view of the facts, provided that he does

on all manner of things, including what the witness has had to say; the manner in which the witness said it; and the general impression which he or she made upon you when giving evidence.

In relation to accepting the evidence of witnesses, you are not obliged to accept the whole of the evidence of any one witness. You may, if you think fit, accept part and reject part of the same witness' evidence. The fact that you do not accept a portion of the evidence of a witness does not mean that you must necessarily reject the whole of the witness' evidence. It does not mean that you should not accept the remainder of that evidence if you think it is worthy of acceptance.

You have heard addresses from counsel for the Crown and counsel for the accused. You will consider those submissions that have been made in their addresses and give to the submissions such weight as you think fit. In no sense are those submissions evidence in the case.

If I happen to express any views upon questions of fact, you must ignore those views. That is what I mean when I say you are the judges and the sole judges of the facts of the case.

I am, of course, entitled to express a view. I do not, however, propose to try to persuade you one way or the other in the case - that is not my task. I may, when I come to a particular issue, suggest to you that there is no real dispute about it. That of course is my view and it is open to you, if you wish, to reject that view if it does not accord with your own independent assessment of the evidence.

I shall, of course, endeavour (during the summing-up) to focus attention upon those parts of the evidence which seem to me to be the areas in respect of which counsel have devoted most of their attention. Of course, it is necessary for you in deliberating to consider the totality of the evidence and not only the evidence to which I have referred you or to which you have been referred by counsel.

<sup>342</sup> See discussion *supra* Part I. A few states in the United States do indeed authorize comment. The most prominent example, as cited above, is California, where Article VI § 10 of the California Constitution provides: "The court may make any comment on the evidence and the testimony and

credibility of any witness as in its opinion is necessary for the proper determination of the cause." CAL. CONST. art. VI, § 10 (West, Westlaw 2012). But serious concerns exist with such comment even in a state which permits it, and if a trial judge does comment, she must be "extremely careful." *People v. Cook*, 33 Cal.3d 400, 408 (Cal. 1983), *overruled on other grounds by People v. Rodriguez*, 42 Cal.3d 730 (Cal. 1986). The more common practice in the United States is to prohibit such comment, as in Florida where the Evidence Code specifically states: "A judge may not sum up the evidence or comment to the jury upon the weight of the evidence, the credibility of the witnesses, or the guilt of the accused." FLA. STAT. § 90.106 (West, Westlaw 2012). As noted earlier, trial judges in Florida and in the vast majority of states are simply not permitted to make comments on the evidence. The standard American rule was explained in *Hamilton v. State*, 109 So.2d 422, 424-25 (Fla. Dist. Ct. App. 1959):

The dominant position occupied by a judge in the trial of a cause before a jury is such that his remarks or comments, especially as they relate to the proceedings before him, overshadow those of the litigants, witnesses and other court officers. Where such comment expresses or tends to express the judge's view as to the weight of the evidence, the credibility of a witness, or the guilt of an accused, it thereby destroys the impartiality of the trial to which the litigant or accused is entitled.

More to the point, not one of the more than forty U.S. judges and lawyers with whom I was in contact (not even the several from California) could think of a single instance in recent times in which a trial judge had commented on the evidence. And, these individuals came from across the nation, as noted previously.

<sup>343</sup> When a U.S. judge hears such judicial comment he can have a stark reaction, as told to me by a federal trial judge: "[W]hen I watched a murder trial start-to-finish at the Old Bailey [in London] I was dumbstruck by the judge's comment on the evidence ('You heard Witness X whom you can believe if you wish, but you also heard the more credible testimony of Witness Y.')

so with moderation and provided always that he makes it clear that it is the jury's function (and not his) to decide the facts and that it is their duty to disregard the view which he has expressed (or which he may appear to hold) if it does not agree with their own independent assessment of the facts.<sup>344</sup>

In practice it may not be so easy to distinguish comment from summary as it is with the definitions as given above. For instance, in laying out the charge and indicating which witnesses would be important on the issue, say, of the defendant's state of mind, would it be summary or comment to have the judge say:

I believe you heard from Sally Smith, in a powerful and emotional statement, that the defendant, Mr. Jones, seemed to fully understand the document that he signed. You are, of course, entitled to find Ms. Smith not credible and you may reject her statement, but you should think about her statement carefully before you act, as she was the only witness for the government to discuss this point.

This reference by the judge clearly is summarizing an important piece of evidence, but is she also commenting on it in the way in which she has characterized it? Moreover, a judge may even comment on the evidence in actuality, though the record indicates only a summary. One long time Australia barrister put it this way: "The trial judge

can influence the jury, and the record on appeal will never reflect it, with intonations, pauses, and raised eyebrows. We should do away with the whole process".

Difficult matters, surely, but going beyond the scope of this paper. For our purposes, I refer to summary here as that which is found in cases in which the judge does not seem to offer an opinion and merely is laying out the materials - both evidence and views of counsel - which appear relevant to the important issues in the case.

#### **A. The Other Nations Are United in Allowing Judges to Speak Freely to Jurors in Criminal Trials**

This is a relatively short section, examining how judges in the four subject nations summarize evidence for jurors. It is short because, frankly, there is relatively little to say: all four of the nations engage in the practice in similar fashion, and there is relatively little controversy regarding the practice. With that noted, however, it is worth taking a look at the views of the respondents in the respective nations regarding summarizing.

##### **1. Australia**

In recent years I have spent considerable time in Australia as I have attended court proceedings, lectured in several cities [Perth, Adelaide, Sydney, and Melbourne], taught classes in Melbourne, and spoken with judges and

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<sup>344</sup> See CRIMINAL TRIAL COURTS BENCH BOOK, *supra* note 9, § 7-040(6) (citing *R v. Zorad* [1990] 19 NSWLR 91, 106-07 (Austl.)). Still, it is quite certain throughout the common law world that a judge is on far firmer ground to give jurors a summary rather than to comment. The High Court of Australia in *RPS v. The Queen* (2000) 199 CLR 620, para. 42, made this clear:

[I]t has long been held that a trial judge may comment (and comment strongly) on factual issues. But although a trial judge *may* comment on the facts, the judge is not bound to do so except to the extent that the judge's other functions require it. Often,

perhaps much more often than not, the safer course for a trial judge will be to make no comment on the facts beyond reminding the jury, in the course of identifying the issues before them, of the arguments of counsel.

This notion was strongly attested by a New Zealand judge who does not comment: "I saw too many clients sunk by a savage commentary from the Bench on a summing up when I was at the Bar. The problem is that the written record failed to convey the nuances of inflection and emphasis that an oral delivery can bring to bear."

lawyers throughout the nation. It is appropriate, then, that I begin this section "Down Under".

The impact of the summary process in Australia is, perhaps, more clear than in any other common law nation I have observed, especially regarding the time taken to complete the task, as discussed further below. The summary practice occurs regularly, the comment practice less so. As one judge noted, "It is routine to summarize, not unusual to comment but less than it used to be".<sup>345</sup> The same judge explained further:

I also understand that judges in your country do not, as a general rule, seek to summarise the evidence. That makes the task of instructing the jury a good deal easier than it is in Australia. The practice in this country is quite different.... [J]udges are required to summarise the evidence led at the trial, or at least so much of it as relates to the critical issues in the case. Sometimes, this is a lengthy and complex process, particularly when the trial has taken a considerable period of time. Failure adequately to summarise the evidence can constitute a basis upon which an appeal will be allowed.

An experienced prosecutor echoed these ideas:

[T]hroughout Australia judges *do* routinely summarise the evidence in their "summing up" after counsel's addresses. The summing up includes directions on the law and a summary of the evidence together, usually, with some reference to

the arguments put by counsel in the closing addresses. In lengthy or complex cases it is indeed potentially an appellable error if the judge has not reminded the jury of those parts of the evidence that may be relevant to critical issues in the trial, or has not reminded them of the essential aspects of the defence case.

Other statements are similar:

"[I]t is routine in Australia for a judge to be expected to summarise the evidence and to draw the attention of the jury to evidence relevant to important points. This does not mean giving the jury your precise views on the effect of the evidence. Rather it involves telling the jury that they must have in mind such and such on a particular issue and not overlook thinking about such and such".

"Australian judges spend a lot of time and detail on summing up to the jury and there are judicial precedents for this purpose".

"The duty of the judge is to focus the attention of the jury on the issues in the case and relate the evidence to those issues. The judge is not required to recapitulate all that the witnesses have said but to bring to the attention of the jury in a general way now the evidence that has been given that bears on those issues".

"[Australian ]judges summarise the evidence up. Trial judges in NSW [New South Wales, Sydney]... do not have to summarise the evidence if the judge is of the opinion that it is not necessary".<sup>346</sup>

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<sup>345</sup> A judge in the State of Victoria [Melbourne]. He continues: Judges are permitted to comment upon the evidence, or the arguments of counsel, if they wish to do so. They must, however, in such circumstances make it clear that what is being said constitutes 'comment' which is in no way binding on the jury, as distinct from directions of law which do bind them. In my trials, I do not comment. Others do. The practice of commenting is less prevalent now than it once was.

<sup>346</sup> Under the authority of the Criminal

Procedure Act of 1986 (NSW) s. 161, which provides:

(1) At the end of a criminal trial before a jury, a Judge need not summarise the evidence given in the trial if of the opinion that, in all the circumstances of the trial, a summary is not necessary.

(2) This section applies despite any rule of law or practice to the contrary.

(3) Nothing in this section affects any aspect of a Judge's summing up function other than the summary of evidence in a trial



“In all jury trials the Judge sums up the evidence and gives directions of law.... The judge also reminds the jury of submissions by prosecution and defense counsel”.

“Australian judges are required to explain to the jury the law and also summarise the evidence with reference to the law”.

„We do summarise in pretty much all cases, but not every witness or every piece of evidence”.

“We always summarise”.

## 2. Canada

Remarks to me reflect the usual practice of summarizing the evidence - but less use of comment<sup>347</sup> - and surprise with U.S. practices:

“[I]t is routine for trial judges in Canada to summarize evidence for the jury in accordance with the courts of England and Wales model”.

“We [trial judges] are obliged to do so, or it is reversible error”.

“In Canada it is absolutely routine to have judges summarize the cases of the Crown and the defense, and to comment on the evidence. I am very surprised that in the U.S. this is not done. In fact, not doing it here would be reversible error. And, trial judges are given wide latitude on summary and comment, really only in the extreme case will the trial judge have trouble on appeal”.

“[I]t is in fact a legal requirement in Canada that the trial judge explain the respective theories to the jury. It would

be reversible error not to do so except perhaps, in the simplest of cases where there was no doubt about what the issue was and the theory of each party towards it”.<sup>348</sup>

“For at least six decades, the Supreme Court of Canada has emphasized that trial judges must review the substantial parts of the evidence, and give the jury the theory of the defence so that they may appreciate the value and effect of that evidence, and how the law is to be applied to the facts as they find them. In 1997, the Chief Justice of Canada put a finer point on it, observing that the role of a trial judge in charging the jury is to ‘decant and simplify.’”

“In Canada, a trial judge is required to summarize the evidence for the jury and to review it in relation to the theory of both parties. This summary and review must of course be done accurately and fairly. Failure to adequately summarize the evidence or to relate it to the parties’ theory of the case is a fairly common ground of appeal (though it is not often successful)... It might also be worth remembering that the percentage of criminal cases tried by jury in Canada is probably lower than in the United States. Jury trials are normal in murder cases and not unusual in sexual cases, but not so common in other types of cases.

## 3. New Zealand

The practice is widespread, as seen in these comments by New Zealand judges and lawyers:

<sup>347</sup> “We are allowed to comment, but rarely would, for fear of prejudicing the jury.” From two Canadian trial judges. From an academic in Canada:

The trial judge is permitted, but not required, to comment on the strength of the evidence on particular points, as long as he/she makes it clear that it is ultimately up to the jury to decide what the facts are. It is not unusual for a trial judge to comment that it should be easy for the jury to find a particular fact (e.g., that the accused killed the victim

when this has not been formally conceded but not seriously contested); or to comment adversely on the credibility of a particular witness (e.g., a witness with a long criminal record and a strong motive to lie). But I think it would be unusual for the judge to comment directly on the strength of the Crown’s case as a whole because that might threaten to usurp the jury’s role.

<sup>348</sup> This lawyer went on to remark: “Canada is curious among common law jurisdictions in that we actually don’t have that many jury trials ...”

"[I]t is certainly common to summarise evidence, as is a summary of the various arguments made in the case".

"Yes, we do summarize for juries and we are permitted to comment".

"Really, judges in the U.S. do not summarize for jurors, even in complicated cases? I assumed your judges did this, our's certainly do this routinely".

"[I]t would be seen as exceptional - and possibly now impermissible - not to summarise the evidence for the jurors".

One thoughtful barrister explained how summaries occur today in New Zealand: "[I]t has always been the practice in New Zealand for judges to summarise the respective cases in the course of summing up". He explained that in New Zealand, the traditional approach has been that every summing up is made up of three parts:

1) General principles of law [e.g., onus of proof, standard of proof], general evidential directions [e.g., identification, inferences, lies, etc.)

2) Specific legal directions (e.g., elements of the offence).

3) Summary of respective cases (Crown first; defence second).

These summaries can vary from relatively short global propositions to lengthy, detailed summaries of what the respective parties said in their closing addresses to the jury.

This lawyer went on to say that much is changing in New Zealand with increased emphasis on a practice referred to as "fact based question trails".<sup>349</sup> As another put it, "The three stage template is beginning to fade in the face of question trails".<sup>350</sup>

#### 4. England and Wales

The practice of summary by the judge began in England, so best to finish this brief discussion by looking there. Not surprisingly, the practice there remains the norm with relatively few changes in recent years.<sup>351</sup> The English judges, lawyers and academics with whom I was in contact were fully in agreement on this point.

"[T]rial judges in England and Wales<sup>352</sup> routinely summarise for the jury the prosecution and defence cases. Indeed

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<sup>349</sup> The practice is explained in one of the leading Australian newspapers:

James Ogloff, a forensic psychologist . . . [and] expert in jury studies in Australia . . . has been converted to the "Question Trail" method adopted in New Zealand, where judges present a jury with a series of questions, the answers to which require the jurors to basically apply the law.

"What they do now there is the judge summarises the evidence and says in order to find the person guilty you must find X, Y, Z, and the jury goes off just to do their job. It's actually not too messy, because even in very complex cases there really aren't that many questions they need to ask," he says.

Farah Farouque, *Judge and Jury*, THE AGE, Feb. 16, 2012, News Features, at 11, available at <http://www.theage.com.au/victoria/judge-and-jury-20120215-1t6em.html#xzz1xEATECAW>.

<sup>350</sup> More on this to come, in Part VI, *infra*.

<sup>351</sup> Once again, comment is less widespread - and certainly less powerful - than in the past, as

explained by one English analyst: "'Comment' is permitted in so far as judges might suggest possible inferences and problems with certain evidence, but they should not give their personal views about the credibility of witnesses or the weight of evidence."

<sup>352</sup> Scotland has a separate criminal justice system. For a general idea of the differences, see AUDIT SCOTLAND, AN OVERVIEW OF SCOTLAND'S CRIMINAL JUSTICE SYSTEM (2011), available at [http://www.audit-scotland.gov.uk/docs/central/2011/nr\\_110906\\_justice\\_overview.pdf](http://www.audit-scotland.gov.uk/docs/central/2011/nr_110906_justice_overview.pdf); James Wood, Chairman, NSW Law Reform Commission, Summing Up in Criminal Trials: A New Direction?, Conference on Jury Research, Policy and Practice, Sydney, New South Wales, (Dec. 11, 2007), available at [http://www.lawlink.nsw.gov.au/lawlink/lrc/lrc.nsf/vwPrint1/LRC\\_jrtw02](http://www.lawlink.nsw.gov.au/lawlink/lrc/lrc.nsf/vwPrint1/LRC_jrtw02) ("In Scotland, where jury directions are quite brief, even in complex trials, very little reference is made to the evidence beyond that which is necessary to identify the issues and to lay the basis for any appropriate warning.").

judges have a duty to present the defence case fairly to the jury. These summaries will generally include a summary of the evidence”.

“[I]t is absolutely routine practice and the judge will get in trouble if he does not sum up (there would be an appeal by the defence)”.

“[S]umming up is completely routine and unexceptional in England and Wales, and has been for many years”.

“[T]he judge should draw the jury’s attention to items of evidence that may support [the parties’ cases]”.

“[I]n England and Wales, judges *ought* to give juries the benefit of their experience”.

“In addition to directing the jury on matters of law the judge in English and Welsh courts is required to summarise the

facts in all but the simplest of cases and, if only in a few sentences, to summarise the case for the prosecution and the defence”.<sup>353</sup>

“Here the judges give legal directions, and remind the jury of a summary of the evidence. They also may summarise the key issues as they see them on both sides”.

### **B. United States Jurisdictions Generally Do Not Allow Judges to Speak Freely to Jurors in Criminal Trials and Judges Comply**

Speaking with dozens of lawyers and judges throughout the United States [and drawing on my own experience] there was nary a dissent to the view that judges simply never summarize the evidence for jurors.<sup>354</sup> Even in states which seem not

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<sup>353</sup> The experienced judge and former prosecutor explained further:

Even if, rarely, we have a live transcript of the proceedings the Court of Appeal has banned the giving of transcripts to the jury. Of course some jurors take notes. Many do not. The jury has with them exhibits and - often - schedules which have gone in by agreement. As one might perhaps expect there are rarely schedules for the jury of facts which are in dispute.

Typically juries now have in writing a set of questions which has been discussed in advance of their final speeches with counsel the answers to which will take them to their verdicts. Sometimes too they will have directions of law in writing.

<sup>354</sup> Summarize, that is, in the manner in which judges and lawyers in the other nations use the term. As written by one former federal prosecutor, the term has some other specific meaning in the U.S. federal courts [and in some state courts], but the application is quite different.

The federal system is fairly dictatorial with judges. There is a summary at the beginning of every federal trial given by the judge, but that is for the full panel of potential jurors and done as prelude and background for strikes to determine if anyone on the jury panel has a conflict or other bias that would disqualify them from serving. Then with the petit jury, the judge will read, but sometimes summarize, the indictment. You will find a judge summarizing indictments that are essentially “talking” indictments, in that a federal prosecutor writes it as a narrative. A judge will summarize it

because it is long and no one wants to sit and listen to the whole thing. At the conclusion of the trial, the next role for the judge in terms of a summary comes with jury instructions. However, the government and the defendants usually submit proposed instructions, then after the judge picks and chooses from the various proposals, his or her final instructions are also reviewed by the attorneys. At the time, the attorneys get to lodge any objections, but the description of the charges come right out of charging books and manuals, there is very little, if any, ad libbing on the part of the court, in my experience. Some defendants submit instructions which they call their “theory of the case” but these are usually rejected by the court.

Another limited form of summary or comment is common in U.S. trials. With standard instructions, jurors may be cautioned to give special scrutiny to particular types of witnesses and testimony. One example is the instruction given in a number of American jurisdictions on eyewitness identification. The United States Court of Appeals for the Third Circuit has this approved charge on point.

#### **4.15 Eyewitness Identification of the Defendant**

One of the (*most important*) issues in this case is whether (*name of defendant*) is the same person who committed the crime(s) charged in (*Count(s) \_\_\_ of*) the indictment. The government, as I have explained, has the burden of proving every element, including identity, beyond a reasonable doubt. Although it is not essential that a witness testifying about the identification (*himself*)(*herself*) be free from doubt as to the accuracy or correctness of the

to prohibit the practice,<sup>355</sup> one will never encounter summary.<sup>356</sup> A very experienced federal trial judge stated the matter concisely: “I’m not aware of anyone

who makes it a practice to sum up”. All others agreed:

“[Summary] would be grounds for appeal and automatic referral if a judge

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identification, you must be satisfied beyond a reasonable doubt based on all the evidence in the case that (*name of defendant*) is the person who committed the crime(s) charged. If you are not convinced beyond a reasonable doubt that (*name of defendant*) is the person who committed the crime(s) charged in (*Count(s) \_\_\_ of*) the indictment, you must find (*name of defendant*) not guilty.

Identification testimony is, in essence, the expression of an opinion or belief by the witness. The value of the identification depends on the witness’ opportunity to observe the person who committed the crime at the time of the offense and the witness’ ability to make a reliable identification at a later time based on those observations. You must decide whether you believe the witness’ testimony and whether you find beyond a reasonable doubt that the identification is correct. You should evaluate the testimony of a witness who makes an identification in the same manner as you would any other witness. In addition, as you evaluate a witness’ identification testimony you should consider the following questions as well as any other questions you believe are important . . . :

(*First*), you should ask whether the witness was able to observe and had an adequate opportunity to observe the person who committed the crime charged...

(*Second*), you should ask whether the witness is positive in the identification and whether the witness’ testimony remained positive and unqualified after cross-examination. If the witness’ identification testimony is positive and unqualified, you should ask whether the witness’ certainty is well-founded.

(*Third*), you should ask whether the witness’ identification of (*name of defendant*) after the crime was committed was the product of the witness’ own recollection...

(*Fourth*), you should ask whether the witness failed to identify (*name of defendant*) at any time, identified someone other than (*name of defendant*) as the person who committed the crime, or changed his or her mind about the identification at any time.]

If after examining all of the evidence, you have a reasonable doubt as to whether (*name of defendant*) is the individual who committed the crime(s) charged, you must find (*name of defendant*) not guilty.

WILLIAM H. YOHN ET AL., MODEL CRIMINAL JURY INSTRUCTIONS ch. 4, at 26–29 (2013), available at <http://federalevidence.com/pdf/JuryInst/3d.Eyewitness.4.15.pdf>.

It is also quite common to give a cautionary instruction on informant testimony as seen in this direction given in Connecticut.

#### 2.5-3 Informant Testimony

A witness testified in this case as an informant. An informant is someone who is currently incarcerated or is awaiting trial for some crime other than the crime involved in this case and who obtains information from the defendant regarding the crime in this case and agrees to testify for the state. You must look with particular care at the testimony of an informant and scrutinize it very carefully before you accept it. You should determine the credibility of that witness in the light of any motive for testifying falsely and inculcating the accused.

In considering the testimony of this witness, you may consider such things as: the extent to which the informant’s testimony is confirmed by other evidence; the specificity of the testimony; the extent to which the testimony contains details known only by the perpetrator; the extent to which the details of the testimony could be obtained from a source other than the defendant; the informant’s criminal record; any benefits received in exchange for the testimony; whether the informant previously has provided reliable or unreliable information; and the circumstances under which the informant initially provided the information to the police or the prosecutor, including whether the informant was responding to leading questions. Like all other questions of credibility, this is a question you must decide based on all the evidence presented to you.

EDWARD J. MULLARKEY ET AL., CRIMINAL JURY INSTRUCTIONS, instruction 2.5-3 Informant Testimony (4th ed., 2010), <http://www.jud.ct.gov/ji/criminal/part2/2.5-3.htm>.

<sup>355</sup> See *supra* Part II.D.

<sup>356</sup> And commenting on the evidence is utterly unheard of in the United States today. Consider these two statements, the first from a state appeals judge, the second from a federal trial judge:

“A judge should never, ever, ever comment on evidence to the jury. Ever. Our practice goes way, way back. A trial judge should avoid making any statement giving even a hint of his or her view of the case or even of a witness. A judge could be disciplined for such comment and maybe even for giving a summary.”

“American judges - state and federal - are terrified of making any comment on the evidence because of the way the law/fact distinction has developed in the appellate courts ...”

ever did that, in my opinion”. [New Mexico]

“The rule, at least here in Texas, specifically forbids such behavior by judges”.

“[In both Maryland and Virginia] I never once experienced a judge summarizing facts or theories for the jury, and I think everyone in the courtroom (except perhaps the jury) would have fallen over if it happened”.

“I cannot say that I have heard of a U.S. [federal] judge summarizing evidence in the way you describe in modern times”.

“Any judge who summarizes the evidence or theories of the case would be subject to reversal”. [Florida]

“I have never seen or heard of a judge summarizing the facts of a case. I agree with the judges who said they would probably be reversed”. [Illinois]

“I have never heard or seen such a thing here [in New Hampshire]”.

“I have never encountered any judge who [summarized] evidence for jurors or offered his opinions about the strength of the case”. [Illinois]

“[I]n my hundreds of trials here in Massachusetts, I have never heard a judge summarize trial evidence...”.

“I have never heard of judges in the U.S. summarizing facts or theories to the jury after trial”. [Florida]

“I [have] never heard of a judge giving her views on evidence in a jury trial or summarizing the testimony/evidence.... I have certainly never witnessed it”. [Georgia and Kansas]

“In my experience, judges are loathe to summarize the evidence or express

any opinion to the jury. In fact, it could be reversible error”. [California]

“I cannot imagine using the courts of England and Wales method [of summary] or being upheld on appeal”. [federal trial judge]

“I have never experienced [summary] and I have been working in the criminal law field for a pretty good long time now”. [Texas]

“My experience has been similar to that of the other [federal] judges you quoted. If criminal court judges in the U.S. summarize the evidence and/or comment on the case to the jury, I’ve never seen it. It seems to me that would intrude on the role of the jury in our system”.

“Absolutely not, never; there is no summary by the judge”. [federal prosecutor]

One lawyer from Washington stated the matter forcefully:

I have never, in my 100 or so jury trials, ever had a judge summarize the evidence for a jury, much less comment on it. I think the prosecutor and I would probably rush to the bench if one of them even started to do so. It would absolutely be reversible error.

#### **IV. THE RATIONALE AND JUSTIFICATION FOR THE PRACTICES**

##### **A. Allowing Summaries**

The four nations which allow or require judicial summaries to juries do so for one principal reason: a belief that juries need assistance to sort through both the evidence and the lawyers’ theories of their cases.<sup>357</sup>

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<sup>357</sup> One Australian judge explained it in this way: The duty of the judge is to focus the attention of the jury on the issues in the case and relate the evidence to those issues... A judge at a trial occupies a dual position. He is a recorder arranger, and remembrancer of facts, and he is a director with regard to the law affecting the issues on which the jury have to decide, and with regard to the

possible applicator of evidence, and here I think there is something more than mere observation of facts.

Much of the evidence in all five nations points to the diligence shown by jurors, and the genuine ability of them to sort through complicated fact patterns and reach fair results. A New Zealand research project discussed this notion.

"I am just flabbergasted to learn that your judges do not comment or summarize, how are the juries able to handle complex cases?"

"There is purity in the U.S. approach and I like it.... Still, in the odd complicated case I'd like to be able to offer guidance on witnesses and evidence and link all that to key issues..."

"Different views can be expressed on the value of the English practice but in an adversarial system it can be useful for the judge to help the jury to see the wood from the trees and to identify the crucial questions its members need to ask themselves".<sup>358</sup>

"[J]urors frequently need[] assistance in determining the facts and it [is] the responsibility of the judge, where appropriate, to provide that direction".

"It is important to have us help jurors understand the case and the issues, how the evidence fits. Our instructions take longer but it is not horrendous; what might take you an hour takes us 4-5 hours; we respect the jury, but they are 12 lay people and they need guidance, lawyers don't always make their cases as clearly as they should".

"I am surprised that the U.S. judges do not comment or summarize even in

the very complicated lengthy trial, it would be unheard of here. Lawyers and judges in Canada would want to know how the jurors could follow the evidence in such a case".

"[T]here is an advantage in that evidential issues and criminal law issues can be merged together to present the jury with a simple question - e.g., 'Mrs. X said Y and if you believe her you must acquit.'"

"I do not like the U.S. approach, as jurors need guidance. The process [here] is OK so long as the judge makes clear that the ultimate decision is theirs".

"The judge's summary and review of the evidence comes after counsel's addresses to the jury and so can also be an opportunity to correct misstatements by counsel or to provide a corrective to an overly zealous or excessively personalized jury address, usually by Crown counsel".

"I consider our practice, being UK/ common law/statute based, a very wise one. I have witnessed trials [in the U.S.].... Often I have wondered what on earth a U.S. trial judge in fact does apart from trying to control the antics of the attorneys before the court whilst not controlling his/ her own".

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Overall, therefore, jury decision-making was characterised by a very high level of conscientiousness in following the instructions the jurors were given: they endeavoured to understand the law and to apply it to the facts as fairly and as impartially as they could, often methodically working through the elements of the law on the basis of the judge's instructions in order to do so. There was thus little evidence that juries were concerned to temper the rigidities of the law by applying their own "common sense" or by bringing to bear their own brand of justice; rather, they generally endeavoured to follow the judge's instructions even when this led them to a verdict which was against their "gut feeling." With very few exceptions, jurors took their role very seriously, were extremely concerned to ensure that they did the right thing, and as a result often found it stressful and worried about it afterwards.

WARREN YOUNG ET AL., *JURIES IN CRIMINAL TRIALS, PART TWO* 53 (1999) available at [http://www.lawcom.govt.nz/sites/default/files/publications/1999/11/Publication\\_76\\_159\\_PP37Vol2.pdf](http://www.lawcom.govt.nz/sites/default/files/publications/1999/11/Publication_76_159_PP37Vol2.pdf).

Most of the U.S. research here has been conducted with capital cases, utilizing the widely cited and relied upon Capital Jury Project questionnaire. For one take, see Stephen P. Garvey & Paul Marcus, *Virginia's Capital Jurors*, 44 WM. & MARY L. REV. 2063 (2003) (reporting lengthy and intensive interviews conducted with jurors who sat on capital cases in Virginia).

<sup>358</sup> As succinctly written by a well-known English trial judge: "Further, if, as seems likely from . . . [other research] jurors do not recall everything first time round, the judge's summing-up of the evidence may be more important than we think." Madge, *supra* note 40, at 823.

One English barrister stated the matter forcefully:

Jurors are directed by the judge that they are the sole judges of the facts... [and] that the judge is the judge of the law.... I think that in a trial of months, or only a few days, it is essential to remind the jurors of the key parts of the evidence whilst stressing that this can only be a selection by the judge. If they think that he has stressed or omitted something which they believe is important/unimportant then they must have regard to their own views. The U.S. approach is appealing, but I would be concerned about jurors following it all in a complicated case.

An English judge explained in some detail the advantages (and also the disadvantages, see below) of the judge summarizing; not focusing on the inability of the jurors to understand the matter, but rather emphasizing how useful summaries can be:

It is helpful for the jury to have an impartial chronological summary of the evidence.... The closing speeches of counsel may perform a similar function... but the summaries of counsel will be partial. Many of the advisory directions [e.g., hearsay, character evidence, accomplice testimony, etc.] would be all but incomprehensible if not set against the evidence about which the warnings are given.... The proceedings are in public. It may assist the public in understanding the case... to hear such a summary.

### 1. The Concerns

One recurring theme here, even among judges who do summarize, is a serious concern about the length of time used for the jury charge when it includes

a summary.<sup>359</sup> Let me offer an anecdote. During my time in Australia in the spring of 2012, I was speaking at a small meeting of trial judges about differences in criminal justice systems. I was asked about how long it would take to instruct an American jury in a fairly complicated case. This was my response. “Generally this would be done, in my experience, within an hour, perhaps an hour and one half, with real concerns about jurors staying connected and alert if the period goes much beyond that”. Here is the reply from one of the judges, with the others in attendance nodding in agreement: “An hour or two? Why here, that might go for several days”.

The studies done on time for summaries are not wholly conclusive. The best and most recent research comes from Australia and New Zealand.<sup>360</sup> In it, trial judges were asked to “provide an estimate of the range of time they take on average to charge the jury on the law, the evidence and summary of addresses, for trials between five and twenty days”. The numbers given, below, show considerably longer periods of time for the charges than in the United States, but even these relatively modest numbers must be viewed with some pause for a few reasons. First, the study was published in 2006, and the consensus is that the timing problem has gotten almost universally worse in the past five to ten years, in some places significantly worse.<sup>361</sup> Second, many judges did not respond to the survey due to concerns about their inability to generalize. Third, it was clear to some that the length of the trial did not necessarily reflect the complexity of it. Still, this table is a useful view of the difference one sees in practice in the various nations.

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<sup>359</sup> More on this in Part VI, *infra*.

<sup>360</sup> JAMES R. P. OGLOFF ET AL., THE JURY PROJECT: STAGE 1 - A SURVEY OF

AUSTRALIAN AND NEW ZEALAND JUDGES (2006).

<sup>361</sup> 81. As noted, *infra* Part VI.

### Average Estimated Duration of Charge (Minutes)

	STATE				NZ		
	NSW	QLD	SA		TAS	VIC	WA
<b>FIVE-DAY TRIAL*</b>							
Law	52	36	28	58	60	41	24
Evidence	58	41	35	73	63	36	21
Summary of addresses	31	23	21	23	22	18	18
<b>Total</b>	<b>141</b>	<b>100</b>	<b>84</b>	<b>154</b>	<b>145</b>	<b>95</b>	<b>63</b>
<b>TEN-DAY TRIAL</b>							
Law	64	46	35	73	83	43	24
Evidence	115	68	64	100	131	48	28
Summary of addresses	38	33	28	47	41	25	24
<b>Total</b>	<b>217</b>	<b>147</b>	<b>127</b>	<b>220</b>	<b>255</b>	<b>116</b>	<b>76</b>
<b>TWENTY-DAY TRIAL</b>							
Law	74	65	47	77	104	45	33
Evidence	231	114	112	180	188	72	43
Summary of addresses	57	53	35	60	47	38	32
<b>Total</b>	<b>362</b>	<b>232</b>	<b>194</b>	<b>317</b>	<b>349</b>	<b>155</b>	<b>108</b>

Source: OGLOFF, *supra* note 81, at 27.

The abbreviations are: New South Wales (NSW), Queensland (QLD), South Australia (SA), Tasmania (TAS), Victoria (VIC), Western Australia (WA), and New Zealand (NZ).

Repeatedly, I heard from judges and lawyers (mainly, but not entirely, from Australia) that the charge can take “many hours and sometimes days”. One academic commentator put it this way:

The rationale is that the judge must assist the jury in performing their task of applying the law to the facts by summarising in this way. However, this

relatively innocuous (from our perspective) statement has now resulted in the situation that the evidence is often summarised at considerable length. This has made directions to the jury longer and longer. The judge’s charge (as we call it in Victoria) can go for hours (sometimes days!) You can imagine the impact on the jury.<sup>8362</sup>

<sup>362</sup> The English view is similar:

Judges’ legal directions ought to be short, clear and simple. As recently as 1979, Lord Devlin was able to write that “the judge should *briefly* explain the law.” In an ideal world, directions would be given in language easily understood by all lay people and comprise no more than the burden and standard of proof and the legal ingredients of the offence charged. This might even be as simple as:

What the prosecution witnesses described was an assault occasioning actual bodily harm. What the defendant described was lawful self defence. If you are sure that the prosecution evidence is true, the defendant is guilty. If you think that what the defendant said may be true, he is not guilty.

But life in the Crown Court is not so simple. The legal directions which have to be given have become increasingly complex. Sir Robin Auld has described the legal element of summing up as “a long and burdensome journey for judge and jury alike.” Guidance from the Court of Appeal and the ever increasing number of criminal statutes has added to the length and intricacy of directions on the law. Sir Robin Auld referred to them as: “highly technical and detailed propositions of law... Many are prolix and complicated, often subject to qualifications and in some instances barely comprehensible to criminal practitioners never mind those who have never heard them before.”

Madge, *supra* note 40, at 818–19.



But it is not simply the time involved which creates difficulties. Research on the ability of individuals to retain a sharp attention span makes clear that going on for an extended period of lecture or discussion runs a serious risk of losing the attention of the audience, in this case the jurors. Consider, for instance, research conducted on college students (considerably younger than most jurors). One recent study contains sobering information:

[Our] data suggest that students do not pay attention continuously for 10-20 minutes during a lecture. Instead, their attention alternates between being engaged and nonengaged in ever-shortening cycles throughout a lecture segment...

Students report attention lapses as early as the first 30 seconds of a lecture, with the next lapses occurring approximately 4.5 minutes into a lecture and again at shorter and shorter cycles throughout the lecture segment.<sup>363</sup>

The time problem may be especially acute in jurisdictions in which the summary gets into great detail.<sup>364</sup> Still more disturbing, the research indicates that the worst lapses in attention occur during the periods in which students are simply listening and not participating (the jury instruction process, anyone?).<sup>365</sup> And especially noteworthy are those research projects which found that as the length of a lecture increased, the proportion of material retained by students decreased.<sup>366</sup>

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<sup>363</sup> OGLOFF ET AL., *supra* note 81, at 27. Such research results are hardly limited to studies done with students. See generally Madge, *supra* note 40, at 819–20.

<sup>364</sup> As Justice Mark Weinberg said in his Brett Memorial Lecture at Melbourne Law School:

In the Charge Book, the bench notes regarding warnings to be given in relation to propensity evidence now take up 11 full pages. Although trial judges are repeatedly encouraged to avoid slavish adherence to the language of the model charge contained in the Charge Book, there is always a risk that significant departure from the terms of the warnings set out therein may lead to a conviction having to be quashed. It is hardly surprising, in those circumstances, that most trial judges are cautious, and follow the language of the model charge closely, even to the point of directing the jury about matters that are not really in issue. It is hardly surprising, in such circumstances, that jurors are left mystified.

Mark Weinberg, *The Criminal Law: A "Mildly Vituperative" Critique*. The Peter Brett Memorial Lecture, Melbourne Law School 27 (Aug. 10, 2011), available at <http://www.austlii.edu.au/au/journals/VicJSchol/2011/21.pdf>. Justice Weinberg sits on the Court of Appeal, Supreme Court of Victoria. He has been one of the moving forces in the reforms currently being considered in the area throughout Australia.

<sup>365</sup> Diane M. Bunce et al., *How Long Can Students Pay Attention in Class? A Study of Student Attention Decline Using Clickers*, 87 J. OF CHEMICAL EDUC. 1438, 1438 (2010).

<sup>366</sup> See Karen Wilson & James H. Korn, *Attention During Lectures: Beyond Ten Minutes*, 34 TEACHING OF PSYCHOL. 85, 86–87 (2007).

There is considerable research on point. One study found that maximum levels of concentration during a class lecture are achieved between ten and fifteen minutes from the start of the lecture. John Stuart & R.J.D. Rutherford, *Medical Student Concentration During Lectures*, 312 THE LANCET 514, 515 (1978). After that, concentration levels fell steadily, leading to the conclusion that the optimum length of a lecture may be thirty minutes. *Id.* Another study analyzed twelve independent lectures to calculate breaks in attention, which they defined as "a period of general lack of concentration involving the majority of the class, and not merely isolated individuals." See Wilson & Korn, *supra* note 87, at 86. Their results indicated there was a low level of attention at the start of the lecture, with the next lapse occurring ten to eighteen minutes later. *Id.* Another study measured student attentiveness during a lecture by recording breaks in student attention through observations of the students. Bunce et al., *supra* note 86, at 1438. Lapses began occurring with increasing frequency ten to eighteen minutes into the lecture, and by the end of the lecture, they occurred every three to four minutes. *Id.* The researchers wrote that "student attention lapses occur in ever-shortening cycles as the lecture proceeds." *Id.* at 1442. In another study, students in the class listened to a 45-minute lecture and were tested at the end to recall the information. Wilson & Korn, *supra* note 87, at 86–87. Students who listened to only 15 minutes of the lecture were able to recall approximately 41% of the material, students who listened to 30 minutes of the lecture were able to recall approximately 25%, and students who listened to 40 minutes retained only 20% of the material. *Id.*

Another concern expressed with some regularity was the ability of the judge in summarizing to remain truly neutral, to not influence the jury, to not indicate the judge's own view of the evidence.

"Summary is really bad, the judge can influence the jury [in subtle ways]".<sup>367</sup>

I don't believe this at all helps jurors. I prefer the U.S. system, leave it all to the lawyers and the jurors".

"But clearly judges may go too far, though they often say that they can't afford to be too emphatic as the jury will probably react against it.... There is jury research that suggests jurors want to do what the judge thinks is right and try to get a hint from the summing up".<sup>368</sup>

Not all agreed with this concern, as noted to me on several occasions. One distinguished Australian judge wrote to me: "Done in [a neutral way] I think the [summarizing] process does not impinge

on the right of the jury to determine the facts".

Still, one senses a growing frustration by some judges with the summary process. As said by one well known Australian judge, "I just don't think we need summaries and I have tried cases abroad without them. The cases went well.... Jury directions are far too complex, and take much too long". Another pointed out that the jury instruction process "is causing quite a problem in Australia because of the ever increasing complexity of what a Judge is being required to say to the Jury".

### B. Not Allowing Summaries

The U.S. view which does not allow judicial summaries to juries is also based upon one principal reason, though a very different one from that seen earlier from the Australians, Canadians, New

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<sup>367</sup> And in not so subtle ways. The English trial judge's summary in *R v. Bentley* (Derek William (Deceased) [2001] 1 Crim. App. R. 21, para. 51 contained the following:

[T]he police officers that night, and those three officers in particular, showed the highest gallantry and resolution; they were conspicuously brave. Are you going to say they are conspicuous liars? . . . Do you believe that those three officers have come into the box and sworn what is deliberately untrue - those three officers who on that night showed a devotion to duty for which they are entitled to the thanks of the community?

This point of influencing the jury was made repeatedly in interviews with those who do not have a legal education and are not involved with the criminal justice system. As one non-lawyer friend in California remarked:

Summarizing is just not the judge's job. I think most jurors consider the judge to be the highest authority, and jurors will really be influenced by anything the judge says about the case, or even hints at. I would have been influenced as a juror, and I served recently in two cases.

<sup>368</sup> This English academic illustrated the point with two famous instances. The first, is Judge Cantley's "direct to acquit" at the trial of Jeremy Thorpe (then leader of the Liberal Party) *et alii* for conspiracy to murder male model Norman Scott. (The judge's summing up was satirized by Peter

Cook in one of the Secret Policeman's Ball shows, only slightly exaggerating what Canter said. The prosecution witnesses had been made to admit that they stood to gain from newspaper articles, and more, if he were convicted. Cook hilarious in mock direction to the jury, "But of course, it is a matter for you." For background and clips of this performance, see <http://www.youtube.com/watch?v=jUrnTTJQQYg>; For more on the Secret Policeman's Ball, see [http://wn.com/secret\\_policemans\\_ball](http://wn.com/secret_policemans_ball)).

The second instance is the incredible disparagement by Judge Bridge, at the trial of Birmingham Six, of a prison doctor who had testified that the accused were battered before they arrived at the prison (and thus by the police). See Kent Roach & Gary Trotter, *Miscarriages of Justice in the War Against Terror*, 109 PENN ST. L. REV. 967, 987 (2005).

Of course, as another English academic pointed out to me, "if the summing up is excessively one-sided or unfair to the defence, then the Court of Appeal may conclude that a conviction is unsafe -and over the years there have been many such cases ...". Moreover, as one judge in the United Kingdom remarked, "It is also customary for judges to include at the beginning of their summing-up the mantra, 'If I appear to express any views or comments about the evidence, do not accept them, unless you agree with them.'" Madge, *supra* note 40, at 825.

Zealanders and English: it is the job of the lawyers to explain the theories of their cases, and it is the job of the jurors to sort through the evidence. Anything more by the judge would invade the province of the jury. This part of the article is also brief, as the U.S. respondents were just about all in agreement, and for them, the points were fairly obvious.

“I would never think about summarizing or commenting on the evidence. That would intrude upon the jurors. It is not my job. My job is to focus the jurors, to make sure they can follow the evidence as it is presented. With careful jury instructions, allowing the jurors to ask questions and take notes, I think they have no difficulty”.

“I believe it is highly inappropriate for a judge to summarize the facts for the jury. This conduct invades the responsibility of the jury as fact finders, as judges of the facts”.

“[C]ourts have no role in determining the facts of the case. That is the exclusive province of the jury. If a court started to give his or her version of what they think happened or was proven in the trial, then the court would be invading a function that our system has deliberately taken from them. In fact, when jurors ask in a jury note during deliberations that a portion of someone’s testimony be read to them, the courts I’ve been before refuse, and tell the jury that they must determine collectively what they remember”.

“A judge is called upon to be an impartial arbiter of the law during trial. We even have a jury instruction that says to the jury: You are the judges - judges of the facts.... It would be totally shocking if any judge followed the model you describe”.

“Any judge who summarizes the evidence or theories of the case would be subject to reversal. That role is reserved to the parties in the case”.<sup>369</sup>

“I truly believe that juries can sort out evidence without our comment”.

Other reasons were also given for avoiding summaries, really the flip-side of what is seen in the other common law nations discussed above: I have so much influence on the jurors... I would not want to summarize. We can’t take too long in instructing the jury; they forget and it is unfair to both the defendant and the government. I really believe that commenting on the evidence is evidence of black robe disease and not appropriate for a trial judge.

### 1. The Concerns

Few concerns were offered by the judges and lawyers from the United States. They viewed the judge’s role as more of a referee, or umpire, as famously stated by the U.S. Chief Justice in another setting.<sup>370</sup> They did not focus on the jurors’ inability to understand the cases as presented. Instead, they focused on their experience in finding that the jurors

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<sup>369</sup> This federal district judge went on to say, “I do believe it is proper in selecting the jury to inform them of the allegations of the indictment to ascertain whether they have prior knowledge of the case. Otherwise, the judge should leave articulation of theories to the counsel for the parties.” For some good thoughts on the reluctance of U.S. judges to summarize, see Dennis Turner & Solomon Fulero, *Can Civility Return to the Courtroom? Will American Jurors Like It?* 58 OHIO ST. L.J. 131, 166–68 (1997).

<sup>370</sup> Chief Justice John Roberts at his

confirmation hearings before the United States Senate stated: “Judges are like umpires. Umpires don’t make the rules; they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules. But it is a limited role. Nobody ever went to a ball game to see the umpire.” *Confirmation Hearing on the Nomination of John G. Roberts, Jr. To Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, S. Hrg. 109-158, 109th Cong. 55 (2005) (statement of John G. Roberts, Jr., nominee to be Chief Justice of the United States).

generally “got it right” and reached appropriate conclusions.<sup>371</sup>

The English judge who nicely laid out the advantages of the summary action also discussed the disadvantages, which echoes the points made consistently by the Americans:

Although the judge will tell the jury at the outset of the summing up that that is all they will get... it is their view and not his/hers which prevails, there is a danger that the judge however fair-minded may unduly influence their thinking.... It can take a long time and, since it is one voice, be hard for a jury to concentrate.... In a case which has only lasted a day or even a few days - what's the point?

#### V. WHY THE DIFFERENCE?

“And how do we keep our balance? That I can tell you in one word... Tradition”.<sup>372</sup>

As we have seen, the difference as to summarizing evidence by the trial judge

in criminal jury trials between Australia, Canada, England and Wales, and New Zealand on the one hand, and the United States on the other hand, is stark. The difference has existed for a long time, and few major changes seem to be at hand. The reality is clear, the reason, however, that is considerably more murky. Is it simply tradition, as noted by Tevya in *Fiddler on the Roof*? Certainly, that is a part of it.<sup>373</sup> But it is not all of it. Let me now offer some thoughts on why the nations have parted company so strikingly here, though not with respect to some other fundamental aspects of the criminal trial.<sup>374</sup>

One must necessarily begin with the notion that Americans just view their relationship, as citizens, to the government from a very different perspective than citizens do in other nations. The point was made nicely in a recent column by *New York Times* writer Thomas Friedman:

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<sup>371</sup> For proponents of the U.S. practice, these views are confirmed - as they see it - almost every time a juror speaks publicly of his or her experience in a case and discusses the evidence and the issues. Such instances are routinely found in the U.S. system. Some of the most widely reported involved defendants Rajat Glovin (see Patricia Hurtado & David Glovin, *In Rajat Gupta Case, Jurors Explain Why They Convicted*, WASH. POST (June 16, 2012), <http://newstalktv24.com/in-rajat-gupta-case-jurors-explain-why-they-convicted-washington-post/>), Casey Anthony (see Mary Kate Burke et al., *Casey Anthony Juror: “Sick to Our Stomachs” Over Not Guilty Verdict*, ABC NEWS (July 6, 2011), [http://abcnews.go.com/US/casey\\_anthony\\_trial/casey-anthony-juror-jury-sick-stomach-guilty-verdict/story?id=14005609#.T9n38JhWL4s](http://abcnews.go.com/US/casey_anthony_trial/casey-anthony-juror-jury-sick-stomach-guilty-verdict/story?id=14005609#.T9n38JhWL4s)), O.J. Simpson (Patricia Holt, *O.J. Simpson Jurors Speak Out, Reasoning Behind Verdict Detailed*, S.F. CHRON. (Jan. 23, 1996 4:00 AM), <http://www.sfgate.com/entertainment/article/BOOKS-O-J-Simpson-Jurors-Speak-Out-2996621.php>), and former Illinois Governor Rod Blagojevich (Lark Turner et al., *Juror: Rod Blagojevich Proved He Was Guilty*, CHI. SUN TIMES (May 9, 2012 9:36 AM), [\[doubt-that-he-was-guilty.html\]\(http://doubt-that-he-was-guilty.html\)\). And, of course, one does not hear from jurors in the other subject nations; such comments are expressly prohibited. See generally the sources listed \*infra\* in note 143.](http://www.suntimes.com/news/6212466-418/juror-blagojevich-proved-beyond-a-reasonable-</a></p></div><div data-bbox=)

<sup>372</sup> FIDDLER ON THE ROOF (United Artists 1971).

<sup>373</sup> Lord Moses stated the matter a bit differently: There is one other major impediment to reform in this and in many other areas of the law: a combination of the belief in humbug and a belief in fairy tales. The repetition of meaningless but well-established phrases to the jury is the *ostinato* of the traditional summing-up. The references to “you may think” and “it is a matter for you” were described by Sir John Dyson (*Goodison*) as no more than formulaic expressions which did not mend an unfair summing-up. Sir John recognized a judicial riff when he saw one and that riff justice is rough justice.

Must we repeat the unhelpful reminder that they have seen and heard the witness, that misleading suggestion that a jury can unerringly assess the truth of witnesses by seeing and hearing the manner in which they give their evidence? Moses, *supra* note 26, at 12.

<sup>374</sup> I refer here to the burden of proof, the standard of proof, and the notion of appeal, among other key features

Frank Fukuyama,... author of *The End of History and the Last Man* [said,] “When Americans think about the problem of government, it is always about constraining the government and limiting its scope”. That dates back to our founding political culture. The rule of law, regular democratic rotations in power and human rights protections were all put in place to create obstacles to overbearing, overly centralized government.<sup>375</sup>

The jury, in the U.S. view, can properly be seen as a bulwark against overly aggressive government behavior.<sup>376</sup> As such, the Americans will place it on a very high plane indeed. This point was made to me repeatedly both in the United States and abroad, as these three comments illustrate:

“Generally, law in the United States is more concerned about the autonomy of the jury’s decision making process regarding the facts than it appears to be the case in England and Wales”. [California trial lawyer]

“You Americans hold the jury to be sacred, we Australians do not”. [Queensland, Australia trial lawyer]

“[Summary] is one of a number of respects in which England treats the jury as a less precious institution than does the U.S.; so, for example, we have majority verdicts here (the jury can decide 10:2), we don’t have initial jury selection, we don’t have juries in the vast majority of civil trials”. [English law professor]

It is not simply the level of regard for the jury as an institution at play here, however. It could also be that faith in the jury process, and in the judge’s role, matters a good deal. As one U.S. federal

judge put it to me, “Perhaps we have more faith in jurors than do the Commonwealth countries”. Contrast the conversations I had with two experienced state court judges, one in New South Wales and the other in Virginia.

Sydney: [I cannot accept the U.S. practice of not having summary] and let me tell you why. Do you like sausages? I do, but I don’t want to know how they are made, what is in them, how they are processed. And, that is how I feel about the jury process. The jurors may be able to get it right, but how can we be sure?

Richmond: I have not encountered many instances involving a judge summarizing the evidence as part of his/her instructing the jury.... I personally consider the practice to be an improper comment on the evidence which our case law prohibits. Such a practice also seems to me to reflect a lack of trust in juries. As a practical matter, it seems impossible that such a summary or comment could be anything other than, in some way, even if small, reflective of his/her view of the case.

Is the faith of the U.S. lawyers and judges in the jurors justified? The Americans certainly believed that to be the case. One federal judge explained it this way: “[A]fter most jury trials, I invite jurors back to my chambers and we talk about the case. I am always struck by how perceptive they are, how much more - frankly - they pick up with witness testimony and lawyer arguments than I do. They do not need my assistance to understand what the case is all about”. This view was echoed at a luncheon for state trial judges: “We [judges] always talk

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<sup>375</sup> Thomas L. Friedman, *Down With Everything*, N.Y. TIMES, April 22, 2012, at SR11, available at <http://www.nytimes.com/2012/04/22/opinion/sunday/friedman-down-with->

[everything.html?\\_r=0http://www.nytimes.com/](http://www.nytimes.com/everything.html?_r=0)

<sup>376</sup> Vicky Waye and I explored this theme in two articles contrasting the Australian and U.S. criminal justice systems. See *supra*, note 5.

to jurors afterwards, they get it; they don't get confused at all. If they do, it's my fault or the fault of the lawyers".<sup>377</sup> There is, of course, one other noteworthy feature of the U.S. system, and that is the constitutional basis for the jury. The Sixth Amendment to the constitution expressly refers to the right,<sup>378</sup> and there is quite a lot of jurisprudence which discusses the reach of the provision.<sup>379</sup> This was a notion picked up by a number of respondents, most especially by one Australian judge:

As you can see, the duties of a judge in our system are onerous with respect to the facts - a situation which I have noted from conversations with American judges is not the case in the U.S. As I understand it, the prohibition on the judge commenting on the facts in the U.S. arises from considerations derived from the U.S. Constitution. There are no such restraints either in England or in Australia and the courts have not taken the view that

comments by a judge, appropriately made, offend any notion of a fair trial or a failure to accord natural justice.

The American faith in juries may be higher than that of others when it comes to believing that lay people can understand the evidence and couple it with the legal directions. It is, however, considerably lower than that of others when it comes to believing that lay people will not be swayed or affected by otherwise appropriate summary by the learned judge at trial. Once again, the contrast in views is sharp. Two U.S. respondents [one a trial lawyer, one a trial judge, from different parts of the nation]:

"[W]hy have a jury in the first place... ? Because that [summary] is going to have a lot of sway you would imagine with the way the jury goes".

"I have so much influence on [the jurors], that is another reason I would not want to summarize".<sup>380</sup>

An English observer shared those concerns: "But the possibility of

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<sup>377</sup> Other explanations, too, are offered as to why the U.S. criminal justice system appears to elevate the jury in a way the other systems do not. As one English lawyer wrote to me:

I personally think that quite a lot of the difference between the U.S. and E & W [England and Wales] may be because in E & W, though the prosecution will set out in opening speeches what they expect (hope) witnesses will say and how it fits together in their case, they may not do so entirely and witnesses may not do what they expect. There is "no comment" by anyone whilst witnesses are giving evidence or between witnesses. Evidence which is "agreed" between prosecution and defence is normally read out without live witnesses. Hence it can be very unclear (if the offence is other than a really simply matter) as to what a conviction would require, who may have provided what evidence, etc. Legal points and discussions are taken without the jury present. We have no equivalent of the "object" and "ignore this" elements. So without a judicial "summing up" I just don't know how any jury would understand what they have to decide upon.

<sup>378</sup> The language is clear: "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 ..." U.S. CONST. amend. VI. The right is also mentioned one other time in the constitution. Article III of the U.S. Constitution states, in part, that "[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed." U.S. CONST. art. III, § 2, cl. 3. This venue provision provides a defendant with the right to be tried before a jury for a crime in the district where the crime occurred. These constitutional bases were mentioned to me by several lawyers and judges in the various nations. See *infra*.

<sup>379</sup> See PAUL MARCUS ET AL., THE RIGHTS OF THE ACCUSED UNDER THE SIXTH AMENDMENT, ch. 3 (2012).

<sup>380</sup> This is not to suggest that all U.S. judges and lawyers would choose not to have judges summarize. Not at all, as two judges - one state, one federal - wished that the opposite was the prevailing view: "I would have loved to comment in so many cases, but I simply could not." "[In the U.S.] we require judges to be potted plants." Still, of the more than forty U.S. lawyers and judges with whom I was in contact, only these two took this view.

inappropriate judicial influence cannot be denied, and doubtless occurs from time to time". A similar thought was offered by a New Zealand lawyer: "It is now infrequent for a judge to give any view about their own assessment of the strength of the case although, as I am sure is the case in your own jurisdiction, a judge can still disclose their personal preferences with subtlety and understatement, often unintentionally". An Australian judge disagreed:

[I]t is routine in Australia for a judge to be expected to summarise the evidence and to draw the attention of the jury to evidence relevant to important points. This does not mean giving the jury your precise views on the effect of the evidence. Rather it involves telling the jury that they must have in mind such and such on a particular issue and not overlook thinking about such and such. Some judges may advance things a little more strongly if they feel that the evidence is overwhelming on a particular point. They would need to be confident of the evidence before strengthening their views in this way. Done in the way I have described I think the practice does not impinge on the right of the jury to determine the facts.

Stated more succinctly by a Canadian judge, summarizing is not influencing, it is just that these "lay people need guidance and lawyers aren't always... as clear as they should be".

#### VI. A BETTER WAY?

There are very clear advantages to each of the systems involving judges speaking to jurors, and the advantages are both obvious and substantial.

#### A. Summarizing

The judges in Perth, Toronto, Wellington, Nottingham all are allowed [or required] to summarize and they can therefore guide jurors - all, of course, lay people - through the evidence and the legal requirements. They can tie in the evidence heard, the testimony and the exhibits, they can highlight the arguments made by counsel. These are all, it seems to me and to the proponents of the system, great pluses designed to help jurors reach intelligent and just verdicts.

The disadvantages of the system are just as substantial and just as obvious. Even with summarizing, the language in many of the instructions used in these jurisdictions remains far from clear to a non-lawyer. Also, there is the very real risk that the trial judges will - purposefully or not - improperly influence jurors in reaching their verdict, as we have seen. After all, it is the judge - the ultimate authority in the matter - who is emphasizing particular bits of evidence and theories of the case. His or her views may matter, they may matter a great deal. This point was made forcefully by one former U.S. prosecutor:

Once a court goes down the road of giving a longwinded summary of what he or she believes was proven at trial it would appear to be insufficient to try and diminish the impact of it by then saying to the jury "but of course, it is up to you to decide what happened and whether you agree with what I have just said or not". A judge has such an influential position, that one could assume the average juror would be loathe to disagree with him or her. There, the judge would be doing the juror's job, which would equate to plain error.<sup>381</sup>

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<sup>381</sup> This critique is not much different from that laid out in the courts of England and Wales.

Let us no longer pretend that judges can assist a jury's recollection by a recitation of the facts. In a short case, AP Herbert's Swallow J said it all: "gentleman of the jury, the facts of this distressing

*and important case have already been put before you some four or five times, twice by prosecuting counsel, twice by counsel for the defence, and once at least by each of the various witnesses . . . but so low is my opinion of your understanding that I think it is necessary, in the simplest language, to tell you*

The timing question has become increasingly difficult, with many concerned about how long it takes to give summaries to jurors. Let me emphasize this last point, as it has become a matter of great concern for lawyers and judges in the subject nations. The time difference for cases with summaries by judges in comparison with cases where there are no summaries is very substantial, as seen by any observer attending trials in the various nations. Precise numbers are hard to come by. Still, the difference is obvious. Justice Mark Weinberg of the Court of Appeal [for the State of Victoria] says:

[J]ury directions have evolved in Victoria to be more complex than in other

Australian states, and compare unfavourably with those overseas. In Scotland, for example, a standard jury direction takes about 15 to 18 minutes, and in the US most directions in criminal trials are in a standard formulation and take about half an hour. In Victoria, jury directions typically take hours, if not days to deliver.<sup>382</sup>

Two recent very high-profile American prosecutions offer good illustrations of the limited times in the United States. The first involved Jerry Sandusky, former assistant football coach at Pennsylvania State University.<sup>383</sup> In a twenty-three-page indictment, he was charged with fifty-two counts of child sexual abuse, with conduct

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*the facts again*". If it is a long trial the judge's recitation of part of his note merely deflects the jury from their task. The jury returns to the jury-room wracking their brains, not as to the resolution of the issues they have to decide, but as to what the judge told them . . . and they may be faced with that task days, weeks, months after they heard the relevant evidence, after counsel has harangued them and after the judge has stunned their senses with his lecture on the law.

Moses, *supra* note 26, at 7.

The impact on the jurors may not, according to one New Zealand study, be quite as great as some believe, however still of concern:

In summary, while it cannot be concluded from the data that the judge's summary of the evidence serves no purpose, it does assume rather less significance than is often imagined. Moreover, there are two dangers with such summaries which need to be borne in mind. The first is that jurors will sometimes - indeed, probably usually - search for signs for the judge's view and as a result interpret innocuous or routine comments as lending support to their own assessment of the case. The second is that, where a majority of the jury share the same perception of the judge's preference, they are likely to use this as a lever to persuade dissenting jurors, thus significantly increasing the pressure for them to agree on a verdict notwithstanding their personal view.

YOUNG ET AL., *supra* note 78, at 56, para. 7.29.

One federal judge wondered whether it would be "worth the candle" even if judges in the U.S.

were allowed to summarize: "If the case is off-the-shelf involving a two or three day trial, it would seem to be unnecessary; and if the case is a complicated one, so would be the task of summing up without an enhanced likelihood of genuine error. Besides, what are the lawyers for anyway?"

<sup>382</sup> Farouque, *supra* note 71. For a broad critique here, see Wood, *supra* note 73.

A real question arises as to whether the kind of lengthy summary of the evidence that commonly occurs achieves anything in circumstances where the jury have heard the evidence themselves, have received the benefit of addresses from counsel, and potentially have access to the transcript or sound or video recording of the evidence if they wish to check some aspect of it. There is a risk that undue emphasis on this part of the trial will swamp the more helpful areas of guidance which could be contained in a short and well-focused summing-up or, alternatively, will cause a bored and tired jury to switch off. Certainly, the tedious and wholly unnecessary exercise sometimes encountered that involves a summary of the evidence of each witness in turn, without any attempt to marshal it in relation to the critical issues, is to be avoided and discouraged by appeal courts at all costs. *Id.* (citing *R v. Zorad* (1990) NSWLR 91, 105; *Piazza v. The Queen* (1997) 94 A Crim R 459).

<sup>383</sup> See *Information, Commonwealth v. Sandusky*, No. CP-14-CR-2421-2011, 2011 WL 7267660 (Pa. Centre Cty. Ct. Com. Pl. Jun. 25, 2012).



extending over a fifteen-year period with eight boys.<sup>384</sup>

The testimony took seven days. Fifty witnesses testified.<sup>385</sup> The full charge to the jury took less than forty minutes for the judge to complete.<sup>386</sup>

The 2012 John Edwards prosecution

is another good example. The former candidate for President was accused of violating federal campaign finance laws for not reporting over \$1,000,000 given to him and spent by him covering up an affair and the birth of a child fathered by Edwards.<sup>387</sup> The case was difficult and

<sup>384</sup> See Press Release, Pa. Attorney Gen., Child Sex Charges Filed Against Jerry Sandusky; ... (Nov. 5, 2011), available at <http://www.attorneygeneral.gov/press.aspx?id=6270>; Verdict Slip, Commonwealth v. Sandusky, No. CP-14-CR-2421-2011, 2012 WL 2369494 (Pa. Centre Cty. Ct. Com. Pl. 2012); Verdict Slip, Commonwealth v. Sandusky, No. CP-14-CR-2422-2011, 2012 WL 2369494 (Pa. Centre Cty. Ct. Com. Pl. 2012); *What are the Charges Against Jerry Sandusky?*, CNN (June 21, 2012, 10:17 PM), <http://www.cnn.com/2012/06/21/justice/pennsylvania-sandusky-charges/index.html>. The Findings of Fact in the indictment give the background for the case:

Findings of Fact

The Grand Jury conducted an investigation into reported sexual assaults of minor male children by Gerald A. Sandusky ("Sandusky") over a period of years, both while Sandusky was a football coach for the Pennsylvania State University ("Penn State") football team and after he retired from coaching. Widely known as Jerry Sandusky, the subject of this investigation founded The Second Mile, a charity initially devoted to helping troubled young boys. It was within The Second Mile program that Sandusky found his victims.

Sandusky was employed by Penn State for 23 years as the defensive coordinator of its Division 1 collegiate football program. Sandusky played football for four years at Penn State and coached a total of 32 years. While coaching, Sandusky started "The Second Mile" in State College, Pennsylvania, in 1977. It began as a group foster home dedicated to helping troubled boys. It grew into a charity dedicated to helping children with absent or dysfunctional families. It is now a statewide, three region charity and Sandusky has been its primary fundraiser. The Second Mile raises millions of dollars through fundraising appeals and special events. The mission of the program is to "help children who need additional support and would benefit from positive human interaction." Through the Second Mile, Sandusky had access to hundreds of boys, many of whom were vulnerable due to their social situations. Indictment at 1, Commonwealth v. Sandusky, No. CP-14-CR-2421-2011, available at <http://www.freep.com/assets/freep/pdf/C4181508116.PDF>; see also Information, Commonwealth v. Sandusky, No. CP-14-CR-2421-2011, 2011 WL 7267660 (Pa. Centre Cty. Ct. Com. Pl. Jun. 25, 2012); Amended Information, Commonwealth v. Sandusky, No. CP-14-CR-2422-2011, (Pa. Centre Cty. Ct. Com. Pl. Jun. 25, 2012). Prior to the conclusion of the trial, four counts were dismissed. See *What are the Charges Against Jerry Sandusky?*, CNN (Jun. 21, 2012, 10:17

PM), <http://www.cnn.com/2012/06/21/justice/pennsylvania-sandusky-charges/index.html> ("There originally were 52 charges against Sandusky. On Thursday, Judge John Cleland announced that three of the counts were dropped, and earlier this week a fourth charge was withdrawn by prosecutors, bringing the total number of charges to 48.").

<sup>385</sup> Twenty-two for the government, twenty-eight for the defense. See generally Transcript of Proceedings, Commonwealth v. Sandusky, Nos. CP-14-CR-2421-2011, CP-14-CR-2422-2011 (Pa. Centre Cty. Ct. Com. Pl. Jun. 25, 2012), available at [http://wearecentralpa.com/sanduskytrial\\_documents](http://wearecentralpa.com/sanduskytrial_documents).

<sup>386</sup> For the transcripts of the judge's charges, see Transcript of Proceedings, Commonwealth v. Sandusky, Nos. CP-14-CR-2421-2011, CP-14-CR-2422-2011 (Day 8) 7-33, 158-162 (Pa. Centre Cty. Ct. Com. Pl. Jun. 25, 2012), available at [http://wearecentralpa.com/images/Multi\\_Media/wearecentralpa/nxd\\_media/dox/pdf/2012\\_09/JuryTrialDay8.pdf](http://wearecentralpa.com/images/Multi_Media/wearecentralpa/nxd_media/dox/pdf/2012_09/JuryTrialDay8.pdf) (especially at 160-61 on the jury's role as finder of fact). In the morning, the lawyers gave closing arguments and the judge instructed the jurors. They began deliberations that afternoon. Because of the broad interest in the case, and the complexity of it, the state government - months before the trial - established a "Media Page" to provide information on the case. On the eve of the trial, the page contained links to more than 100 motions and orders relating to a range of matters such as change of venue, bill of particulars, scheduling, bail, motions in limine, and orders regarding pre-trial discovery. See CENTRE CTY. PA., MEDIA INFORMATION, <http://centrecountypa.gov/index.aspx?NID=506> (last visited March 7, 2013).

<sup>387</sup> As stated in the indictment:

The purpose of the conspiracy was to protect and advance EDWARDS' candidacy for President of the United States by secretly obtaining and using hundreds of thousands of dollars in contributions ... well in excess of the Election Act's limit, to conceal EDWARDS' extramarital affair with Person B and Person B's pregnancy with his child. EDWARDS knew that public revelation of the affair and pregnancy would destroy his candidacy by, among other things, undermining EDWARDS' presentation of himself as a family man and by forcing his campaign to divert personnel and resources away from other campaign activities to respond to criticism and media scrutiny regarding the affair and pregnancy.

Indictment at 6, para. 15, United States v. Edwards, 2012 WL 1119875 (M.D.N.C. 2012) (No. 1:11 CR161-1), 2011 WL 2162889.

complicated. The nineteen-page indictment contained six counts. Complex statutory schemes were involved including the Federal Election Campaign Act of 1971,<sup>388</sup> a broad statute criminalizing false statements,<sup>389</sup> and a statute criminalizing conspiracy against the United States.<sup>390</sup> For the conspiracy count alone, the period in question was more than six years, and over three dozen overt acts were alleged. The testimony took seventeen days. The number of exhibits for government was 190, and the number of exhibits for the defense was twenty-nine; many of the exhibits were voluminous phone and financial records. More than thirty witnesses testified. Two hours were allotted to each side for closing arguments. The full charge to the jury took about an hour and fifteen minutes for the judge to complete.<sup>391</sup> But even the time periods in these two cases are somewhat exceptional with the U.S. practices.<sup>392</sup> To be sure, at a meeting with

a group of four state judges, the U.S. jurists were asked this question: "What is the norm for you in terms of the time for jury instructions in standard cases, or with complex cases?" They all agreed with the statement of one of the judges: "With instructions for us, the time goes at most to an hour or an hour and a half, even in complicated cases. More than that, we lose them, and that time is sufficient to lay out the legal principles the jurors need".<sup>393</sup>

### B. Not Summarizing

The judges in Portland, Tucson, Springfield, Miami, and Boston can keep their charges short and to the point. As noted twenty years ago by a prominent Canadian judge, "American instructions to the jury are more succinct, less lengthy and far less academic than those in Canada. That tends to keep their delivery time within the attention span of the average juror.... [The instructions] provide

<sup>388</sup> 2 U.S.C. §§ 431–455 (West, Westlaw 2002).

<sup>389</sup> 18 U.S.C. § 1001 (West, Westlaw 2012).

<sup>390</sup> 18 U.S.C. § 371 (West, Westlaw 2012).

<sup>391</sup> The closing arguments ended in the afternoon, the judge instructed the jurors that same day, and they began their deliberations the next morning. The jurors' deliberations took fifty hours over several days. They acquitted Edwards on one charge, and deadlocked on the other others. *Feds Drop Remaining Edwards Charges*, CNN (June 14, 2012 5:36 AM), <http://www.cnn.com/2012/06/13/justice/edwards-charges-dismissed/index.html>. The judge ultimately declared a mistrial and then the government decided to drop the case. *Id.* In the Sandusky case, the jury deliberated for twenty-one hours over two days. *Ex-Penn St. Assistant Sandusky Convicted of Abuse*, FOXNEWS.COM, Jun. 23, 2012, <http://www.foxnews.com/us/2012/06/22/sandusky-trial-deliberations-enter-2nd-day/>. The defendant was found guilty on 45 of 48 counts. *Id.* One juror, on a national television show the day following the verdict, described the jurors' reactions to the evidence and their view of the credibility of key witnesses. *Jerry Sandusky Trial Juror: Sandusky "Knew it was True" as Guilty Verdict was Read*, THE PATRIOT-NEWS (June 23, 2012 7:23PM), [http://www.pennlive.com/midstate/index.ssf/2012/06/jerry\\_sandusky\\_trial\\_juror.html](http://www.pennlive.com/midstate/index.ssf/2012/06/jerry_sandusky_trial_juror.html)

(video recording of interview with Sandusky juror Joshua Harper). The issues for the jurors in both the Sandusky and Edwards cases, as they later indicated, concerned the sufficiency of the evidence offered by the government, not the instructions read to them. Joe Drape & Nate Taylor, *Little Debate or Doubt About Sandusky's Guilt, Juror Says*, N.Y. TIMES, June 24, 2012, at SP5; *U.S. News: Edwards Jury Saw Guilt, but Lack of Proof*, WALL ST. J., June 2, 2012, at A2. The Edwards and Sandusky cases are also instructive on another issue, accessibility of jurors. Just after the verdict was given in the two, as noted above, members of the juries spoke with the media. They explained their views as to the evidence offered by both sides and the legal issues presented. Such public comments by jurors would be unthinkable - indeed illegal - in the other four nations. See *infra* note 143.

<sup>392</sup> I told numerous judges from other nations about the time needed for the charges in the Edwards and Sandusky cases. The reaction was consistent, as expressed by one experienced Australian trial judge: "We can only think of this as amazing!"

<sup>393</sup> Meeting in Spring 2012, in a large midwestern state.

<sup>394</sup> John C. Bouck, *Criminal Jury Trials: Pattern*

a clear and simple base for instructing the jury”.<sup>394</sup>

The U.S. system also requires or encourages the active involvement by the lawyers in the instruction process. This is true at the drafting stage,<sup>395</sup> it is especially true at the closing argument stage where counsel will seek to tie in the evidence and theory of the case with the instructions the jurors will soon hear from the judge. As that learned Canadian judge wrote, in praising the U.S. system:

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*Instructions and Rules of Procedure*, 72 CANADIAN BAR REV. 129, 143, 151 (1993). Judge Bouck lamented the changing nature of the practice in his country: “In earlier times, a jury charge seldom lasted much longer than ten or thirty minutes. Now it may often take hours or, in some cases, even days.” *Id.* at 139. The experience in Canada may well be considerably more moderate in terms of time than some of the other common law nations. Many in the United States have been less enthusiastic about the approach there, as Judge Bouck acknowledged by indicating that two major criticisms of so-called pattern instructions in the United States have been brought repeatedly: “(1) They are too abstract,” and “(2) They discourage flexibility: because they are regarded as error proof, particularly when prepared by a committee of the state Supreme Court, trial judges are rarely willing to allow even minor modifications.” *Id.* at 152.

<sup>395</sup> Trial counsel in the United States would routinely be involved in the preparation of jury instructions. This occurs at the federal, state and local levels. See, e.g., Federal Rule of Criminal Procedure 30, Jury Instructions:

(a) In General. Any party may request in writing that the court instruct the jury on the law as specified in the request. The request must be made at the close of the evidence or at any earlier time that the court reasonably sets. When the request is made, the requesting party must furnish a copy to every other party.

(b) Ruling on a Request. The court must inform the parties before closing arguments how it intends to rule on the requested instructions.

(c) Time for Giving Instructions. The court may instruct the jury before or after the arguments are completed, or at both times.

(d) Objections to Instructions. A party who objects to any portion of the instructions or to a failure to give a requested instruction must inform the court of the specific objection and the grounds for the objection before the jury retires to deliberate. An opportunity must be given to object out of the

[I]t is counsel who know about the evidence long before the trial begins. Counsel acquire a detailed familiarity with the evidence before the trial through the discovery process and the Preliminary Hearing. On the other hand, the evidence is only revealed to the judge for the first time, as it is presented in the court room.<sup>396</sup>

These are very real advantages, but there are serious disadvantages as well. First, and foremost, is the difficulty with

jury’s hearing and, on request, out of the jury’s presence. Failure to object in accordance with this rule precludes appellate review, except as permitted under Rule 52(b).

FED. R. CRIM. P. 30.

Rule 42.02 of the West Virginia Trial Court Rules (T.C.R.) (1999) Presentation of Jury Instructions reads:

Each counsel shall prepare jury instructions, indicating citations and authorities, and if the court directs, verdict forms and special interrogatories, and present them to the presiding judicial officer and serve them on opposing counsel not less than three (3) business days before the day set for trial or at such other times as the presiding judicial officer may order.

W.VA. TRIAL CT. R. 42.02 available at <http://www.courtswv.gov/legal-community/court-rules/trial-court/chapter-3.html>.

Whatcom County, Washington Jury Instructions provide:

(a) Proposed jury instructions must be submitted by the beginning of the trial in the following form: ... (b) In criminal cases, the prosecuting attorney will furnish the proposed instructions for the case; defense counsel need only furnish additional instructions felt to be applicable to the case.

WHATCOM CNTY., WASH., SUP. CT. LOCAL R. 51.

<sup>396</sup> Bouck, *supra* note 115, at 156. An experienced U.S. trial lawyer made the same point:

I have never seen or heard of a judge summarizing the facts of a case. I agree with the judges who said they would probably be reversed. For one thing, the judge rarely know enough about a case to summarize it before it starts and in the end, there are jury instructions which are becoming more and more reliant on the “pattern” instructions. They may not even be privy to the theories of the case until after opening statement, and perhaps even not then, depending on what the defense chooses to say.

the sort of charge in which the judge simply uses a standard pattern instruction.<sup>397</sup> Is it possible that a lay person[or perhaps even

a law school graduate] would truly understand one of the directions laid out in the footnote below?<sup>398</sup> And, even if that

<sup>397</sup> Certainly there was good reason for the development of, and push for, the pattern charge.

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 own. This was a time-consuming process which often resulted in instructions which were argumentative, confusing, or did not accurately state the law.

ELLEN CHILTON & PATRICIA HENLEY, IMPROVING THE JURY SYSTEM, JURY INSTRUCTIONS: HELPING JURORS UNDERSTAND THE EVIDENCE AND THE LAW 11 (2004), available at <http://gov.uchastings.edu/public-law/docs/plri/juryinst.pdf>. And appellate courts refused to correct verdicts in cases in which the instructions were misunderstood. *Id.* at 13; see, e.g., *John B. Gunn Law Corp. v. Maynard*, 235 Cal. Rptr. 180, 183 (Cal. App. 1987) (“[I]t has never been held error in California to instruct in terms of [a pattern jury instruction] due to lack of intelligibility.”).

<sup>398</sup> Here are three charges that, while not the most abstract out there, are representative of some of those which have been used.

#### 2.02 BRINGING IN ALIENS

Title 8, United States Code, Section 1324(a)(1)(A)(i) makes it a crime for anyone knowingly to bring [attempt to bring] an alien into the United States at a place other than a designated port of entry.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

*First:* That the defendant brought [attempted to bring] an alien into the United States;

*Second:* That entry was [attempted] at a place other than at a designated port of entry;

*Third:* That the defendant knew that the person was an alien; and

*Fourth:* That the defendant intended to commit a criminal act by bringing an alien into the United States at a place other than a designated port of entry.

An alien is any person who is not a natural-born or naturalized citizen, or a national of the United States. The term “national of the United States” includes not only a citizen, but also a person who, though not a citizen of the United States, owes permanent allegiance to the United States.

COMM. ON PATTERN JURY INSTRUCTIONS, DISTRICT JUDGES ASS'N, FIFTH CIRCUIT, PATTERN JURY INSTRUCTION (CRIMINAL CASES) 65 (2012).

#### T.P.I. - CRIM. 5.01: VIOLATION OF RICO ACT

Any person who violates the Racketeer Influenced and Corrupt Organization Act of 1989 is

guilty of a crime. For you to find the defendant guilty of this offense, the state must have proven beyond a reasonable doubt the existence of the following essential elements:

[Part A:

(1) that the defendant is a person who intentionally, knowingly or recklessly received proceeds derived directly or indirectly [from a pattern of racketeering activity] [through the collection of an unlawful debt]; and

(2) that the defendant [used] [invested] [any part of such proceeds] [the proceeds derived from the use or investments of such proceeds] in the [acquisition of any (title to) (right in) (interest in) (equity in) real or personal property] [establishment or operation of any enterprise]; and

(3) that the defendant acted with criminal intent.]

or

[Part B: (1) that the defendant is a person who intentionally, knowingly or recklessly [acquired] [maintained], directly or indirectly, an [interest in] [control of] any enterprise of real or personal property; and

(2) that the enterprise was [acquired] [maintained] [through a pattern of racketeering activity] [through the collection of an unlawful debt]

... .

TENNESSEE CRIMINAL PATTERN JURY INSTRUCTION § 5.01, available at [http://www.tncrimlaw.com/TPI\\_Crim/05\\_01.htm](http://www.tncrimlaw.com/TPI_Crim/05_01.htm). Here is the direction given recently in a state trial court action in Northern California:

Facts may be proved by direct or circumstantial evidence, or a combination of both. Direct evidence can prove a fact by itself. For example, if a witness testifies he saw it raining outside before he came into the courthouse, that evidence is direct evidence that it was raining. Circumstantial evidence also may be called indirect evidence. Circumstantial evidence does not directly prove the facts to be decided, but it is evidence of another fact or group of facts from which you may logically and reasonably conclude the truth of the fact in question. For example, if a witness testifies that he saw someone come inside wearing a raincoat covered with drops of water, that testimony is circumstantial evidence because it may support a conclusion that it was raining outside. Both direct and circumstantial evidence are acceptable types of evidence to prove or disprove the elements of a charge, including intent and mental state, and acts necessary to a conviction, and neither is necessarily more reliable than the other. Neither is entitled to any greater weight than the other. You must decide whether a fact ... in issue has been proved based on all of the evidence.

*People v. Jayubo*, H035996, 2012 WL 2023824, \*8 (Cal. Ct. App. 2012).

person could appreciate the principle there, could she apply it to the facts in anything other than the most simple of cases?<sup>399</sup>

## VII. MOVING IN THE RIGHT DIRECTION

In each of the subject nations, there has been real movement toward change, or at least a push to getting greater information on how to deal with perceived difficulties. Everyone with whom I was in contact made clear that - unlike in the past - "it is [not] necessarily [the judge's] responsibility to express the law in

language that an average juror might understand".<sup>400</sup> A sustained effort is occurring in Australia. There, serious attempts are being made to determine the time involved with summarizing and there is movement toward a cost-benefit analysis to determine how to go forward.<sup>401</sup>

An interesting development is occurring throughout the common law world - apart from the United States - with juries receiving so-called question, route-to-verdict, or decision trails. This approach is being used regularly in England and Wales<sup>402</sup> and

<sup>399</sup> As one English commentator wrote to me, "Meaningful directions explaining how the law could apply to the instant facts are superior to technical legal boilerplate, which must sound like gibberish to many jurors." The criticism against such instructions has been blistering for many decades - probably since the earliest such charges, as in California in the 1930s and with the publication two decades later of the first edition of Devitt and Blackmar, *FEDERAL JURY PRACTICE AND INSTRUCTIONS*. EDWARD JAMES DEVITT ET AL., *FEDERAL JURY PRACTICE AND INSTRUCTIONS* (1950). An especially powerful argument was made by Walter W. Steele Jr. & Elizabeth J. Thornburg, *Jury Instructions: A Persistent Failure to Communicate*, 67 N.C. L. REV. 77, 78-79 (1988). The authors there analyzed some standard charges, and attempted to rewrite them so that they would be more understandable to jurors. *Id.* at 110-15. The task was daunting. Some pattern jury instructions were badly organized, presenting the jury with information in a sequence that was difficult to process. Others used complex sentence structure, making the instruction difficult for a lawyer or a layperson to follow. All of the instructions used legal terms of art and other difficult vocabulary. The translation of these concepts out of lawyerese into simple English sometimes required explanations which were themselves hard to understand by virtue of their length.

Judges promoting the modern versions of the pattern instruction materials generally make clear that the directions there are guides, but are not to be used without alteration. See, *infra*. As written in *United States v. Wolak*, 923 F. 2d 1193, 1198 (6th Cir. 1991): "Although [pattern] instructions have their place, they should not be used without careful consideration being given to their applicability to the facts and theories of the specific case being tried."

<sup>400</sup> Bouck, *supra* note 115, at 137 ("Appeal courts do not usually see their role as providing any sort of precise guidance to the trial judges on the delivery of jury instructions. Nor do they believe it is necessarily their responsibility to express the law in language that an average juror might understand.").

<sup>401</sup> See MARK WEINBERG ET AL., *SIMPLIFICATION OF JURY DIRECTIONS PROJECT: A REPORT TO JURY DIRECTIONS ADVISORY GROUP* (2012), available at <http://www.supremecourt.vic.gov.au/resources/9a599f16-d55f-4940-ae05-3ccce98700fd/juryreport.pdf>

<sup>402</sup> As explained to me by one English judge: In order to assist the jury I often give them - after consultation with counsel - a list of key questions in lay language which they will want to have in mind when they listen to the evidence and so that if counsel seems to be going off at a tangent to ask him/her to explain which of the questions in the jury's list this line of questioning is aimed at. I believe it assists the lay novice to know at the beginning of the trial the sort of questions which in due course he/she will have to answer at the end of the trial. Of course the questions may change, be modified or be added to during the trial and in the end be replaced by the steps to verdict document.

These route-to-verdict instructions in the courts of England and Wales are a "logical sequence of questions, couched in words which address the essential legal issues, to be answered by the jury in order to arrive at their verdict(s)." JUDICIAL STUDIES BD., *supra* note 13, at 3. The directions are structured like a flowchart in which a decision on a question of fact leads to either a verdict or a new question of fact. In a case on self-defense, for example, the instructions might ask, "Did the defendant honestly believe that he needed to use

Canada.<sup>403</sup> In response to research on jurors' ability to understand and apply the law to evidence presented at trial, judges in New Zealand criminal courts

increasingly provide juries with written "question trail" instructions to aid deliberations. A question trail is a written document that a judge gives to a jury that

force to defend himself from an imminent attack?" and give the jury two options. *Id.* at 304. The jurors could determine that "the defendant did not honestly believe that he needed to defend himself," in which case they would be directed to inquire into the defendant's intentions, and if they found the defendant intended serious injury, would find him guilty. *Id.* at 305. But if the jurors determined that "the defendant may honestly have believed that he needed to defend himself," they would be directed to consider whether that belief was mistaken. *Id.* at 304. In this way, route-to-verdict instructions break down the deliberative process into a series of very basic decisions about questions of fact presented during the trial. Academic research into jury deliberations and the efficacy of summing up in the United Kingdom has been greatly limited by the Contempt of Court Act of 1981. Section 8 forbids anyone to "to obtain, disclose or solicit any particulars of statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations in any legal proceedings." Contempt of Court Act, 1981, c. 49, § 8 (U.K.). Still, commentators in the United Kingdom seem to believe that route-to-verdict instructions offer jurors a point of reference about key determinations and also help them navigate complex points of law. See generally CHERYL THOMAS, ARE JURIES FAIR? 35–38 (2010), available at <http://www.justice.gov.uk/downloads/publications/research-and-analysis/moj-research/are-juries-fair-research.pdf>.

Much of the impetus for this move can be traced directly to Lord Justice Auld's hotly debated recommendations.

Auld makes a number of recommendations for the end of the trial. Counsel and the judge already should discuss how he should direct the jury on the law ... and if those directions are to be given in writing, then they should be shown to counsel.

But that does not go nearly far enough ... the factual issues should be debated in court by counsel, resolved by the judge and the issues in the form of questions written down before speeches to the jury. Auld recommends that the judge should devise and put to the jury a series of factual questions, the answers to which lead logically to a verdict of guilty or not guilty. The questions would correspond to the updated case and issues summary and tailored [sic] to the law, the issues and the evidence. He recommended that the jury should announce their answers in open court.

Moses, *supra* note 26, at 9, referring to Lord Justice Auld, *A Review of the Criminal Courts of*

*England and Wales* (2001), available at <http://webarchive.nationalarchives.gov.uk/+http://www.criminal-courts-review.org.uk/auldconts.htm>. For a critique of the Auld position, see MICHAEL ZANDER, LORD JUSTICE AULD'S REVIEW OF THE CRIMINAL COURTS: A RESPONSE (2001), available at [http://www.lse.ac.uk/collections/law/staff%20publications%20full%20text/zander/auld\\_response\\_web.pdf](http://www.lse.ac.uk/collections/law/staff%20publications%20full%20text/zander/auld_response_web.pdf).

<sup>403</sup> The practice has become quite widespread in Canada. See *R. v. Croom*, 2012 MPBC 4, 2012 CarswellMan 39 (Can. Man. Prov. Ct.) (WL); *R. v. Almarales*, 2008 ONCA 692, 2008 CarswellOnt 5924, paras. 56, 85–90 (Can. Ont. C.A.) (WL); *R. v. Foti*, 2002 MBCA 122, 2002 CarswellMan 408, paras. 31, 46–51, 56 (Can. Man. C.A.); *R. v. Sheard*, 2002 MBCA 22, 2002 CarswellMan 86, para. 8–16 (Can. Man. C.A.). A recent high profile case focused on the questions, as noted in several news commentaries. See, e.g., Sandie Benitah, *Rafferty Trial: How the Jury Made Their Decision*, CP24.COM (May 11, 2012, 10:57 PM), <http://www.cp24.com/rafferty-trial-how-the-jury-made-their-decision-1.808848>.

The jurors presiding over the Tori Stafford murder trial were given "decision trees" before they began their deliberations - a tool meant to help them along a path to a verdict in the first-degree murder charge against the accused Michael Rafferty. There are two decision trees, each providing the juror with a different murder scenario. Each page contains simple yes or no questions and depending on their answer, they are instructed to follow an arrow to a following question until they reach a verdict. One of the trees - called "aider and abettor" is to be used if the juror believes that it was Rafferty's co-accused Terri-Lynne McClintic who wielded the hammer blows that killed Tori. This tree will help jurors decide the exact role Rafferty played and how liable he is for the murder. The other tree is to be used if the jury believes it was Rafferty who killed the child... . If the jury believes McClintic's initial version that Rafferty murdered the child, they must ask themselves the following questions under the "principal" tree:

Has the Crown proven that:  
Rafferty caused death of deceased [sic]?  
Death of deceased caused [sic] by unlawful act?  
That [sic] either Rafferty  
Meant to cause Tori's death [or]?  
Meant to cause Tori harm that would likely kill her,? whether she died or not[.]

“reduces the issues in a case to a series of fact-based questions”.<sup>404</sup> When question trail instructions are used, they are offered to the jury at the time of summing up, and present jurors with factual questions to resolve. The answers to these factual questions logically lead jurors through the relevant law and to a verdict.<sup>405</sup>

The directions are typically structured like a flowchart or decision-tree in which a decision on a question of fact leads to either a verdict or a new question of fact (see flow chart below). For example, in a criminal trial where the defendant was charged with kidnapping, a judge might present the jury with a decision tree that asked:

Are you sure that Mr Doe:

(a) took Ms Evans to a place different from the place she had told him she wanted to go to; and/or

(b) locked the doors of the car while driving; and/or

(c) drove at speed and failed to stop traffic lights so as to prevent Ms Evans leaving the car?<sup>406</sup>

If the jury answers “no” to any of these factual questions, the defendant should be found not guilty. However, if the jurors answer “yes” to any of the questions, they will proceed to another question that leads logically toward the verdict. In this case, the question might be, “Are you sure that Ms Evans did not consent to being in the car as Mr Doe drove to Wimbledon Reserve?”<sup>407</sup> Again, if the jury finds that the answer is “no,” then it should find the defendant not guilty. If the answer is “yes,” however, the jury will continue on toward a verdict. As such, the document “distill[s] the issues for the jury and provide[s] an agenda for their deliberations”.<sup>408</sup> The exact form of the question trail is left to the individual judge’s discretion. The question trail may appear as a flowchart or as a series of sequential questions.<sup>409</sup>

If the jury answers no to these questions, they are asked to move on to the “aider and abettor” tree... Here they must answer the question, “Has the Crown proven that Rafferty did something to help or encourage McClintic to kill the deceased?” If the jurors answer no to this question then the arrow points them to a final verdict of “not guilty.” If, during the first question on the “principal” tree, the jury answered “yes” to the question, the jury is then asked to consider whether Rafferty is guilty of first or second degree murder.

In order to be found guilty of first-degree murder, the jury must believe that the Crown proved beyond a reasonable doubt that:

a) the murder was both planned and deliberate or

b) that [sic] Rafferty did something substantial and essential to the killing

c) that [sic] Rafferty committed kidnapping and sexual assault

d) that [sic] the kidnapping or sexual assault and the murder of the child occurred as part of the same series of events.

If jurors answer no to these questions then they must find Rafferty guilty of second-degree murder.

*Id.*

<sup>404</sup> NEIL REES, ET AL., VICTORIAN LAW REFORM COMM’N, JURY DIRECTIONS: FINAL REPORT 121 (2009) [hereinafter VLRC, JURY DIRECTIONS], available at [http://www.lawreform.vic.gov.au/sites/default/files/VLRC\\_JuryDirections\\_FinalReport.pdf](http://www.lawreform.vic.gov.au/sites/default/files/VLRC_JuryDirections_FinalReport.pdf). In practice, question-trail instructions in New Zealand seem to

function much like “route-to-verdict” instructions in criminal courts of England and Wales. See NEW ZEALAND LAW COMMISSION, JURIES IN CRIMINAL TRIALS 121 (2001) [hereinafter NZLC, 2001 REPORT].

<sup>405</sup> The lawyers with whom I spoke were enthusiastic about the practice. One judge told me: “The question trail keeps jurors focused and when appropriate I will use a Powerpoint presentation - mainly to focus attention on legal definitions or elements of a charge. The question trail aids engagement and I encourage jurors to take notes.”

<sup>406</sup> VLRC, JURY DIRECTIONS, *supra* note 125, at 171. This model question trail was prepared by Justice Robert Chambers of the New Zealand Court of Appeal as a teaching tool. *Id.* at 169.

<sup>407</sup> *Id.* at 171

<sup>408</sup> *Rameka v. R* [2011] NZCA 75, at para. 51.

<sup>409</sup> See NZLC, 2001 REPORT, *supra* note 125, at 121. Jury interrogatories serve a similar function in U.S. civil cases. The interrogatories ask the jury to conduct step-by-step findings to reach a verdict. The verdict may be reached at several points in the jury deliberations. The interrogatories are common in civil actions in the United States. See, e.g., Interrogatory 1–Interrogatory 13, *Marston v. Donley Ford of Galion, Inc.* (Crawford Cnty., Ohio, 2011) (No. 10-CV-0193), available at <http://www.ftc.gov/os/comments/motorvehicleroundtable/00080-82721.pdf>; *Cradle of Liberty Council, Inc. v. Phila.*, 851 F.Supp.2d 936, 954–55 (E.D.Pa. 2012). Such jury interrogatories are, though, rarely used in American criminal trials.

Drafts of the document generally are given to counsel for review whenever question trails are to be distributed to jurors.<sup>410</sup>

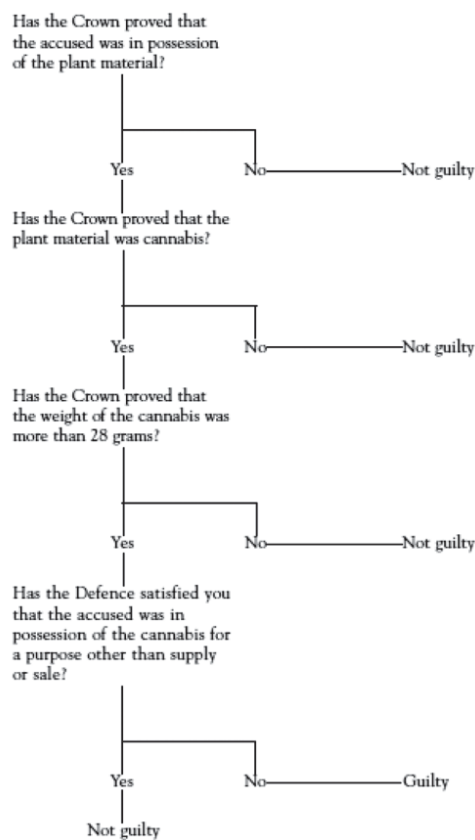
The use of question trails has become more common recently with almost one half of the judges polled indicating that in criminal trials they provide juries with “flow charts, decision trees, or lists of questions to assist them in reaching their verdict”.<sup>411</sup> Of course, with that practice - as pointed

out to me by an Auckland judge:

[E]ssentially the question trail would not work UNLESS one was allowed to address the facts. The way that I do it is to take the question and then identify the witnesses who have given evidence on the point and summarise what they say. That has the effect of focusing jury attention upon the material that is relevant to the issue.

Model Flowchart

An example of a flow chart



<sup>410</sup> CRIMINAL PRACTICE COMM., MINISTRY OF JUSTICE, GUIDE TO JURY TRIAL PRACTICE 24, para. 64 (2003), available at <http://www.courtsofnz.govt.nz/business/practice-directions/Guide-to-Jury-Trial-Practice.PDF>.

<sup>411</sup> See James R. P. Ogloff et al., *Enhancing Communication with Australian and New Zealand Juries: A Survey of Judges*, 16 J. JUD. ADMIN. 235, 250 (2007). Moreover, the practice enjoys the

support of the Court of Appeal, which considers the use of question trails to be a “best practice,” *Rameka v. R* [2011] NZCA 75 at para. 51 (N.Z.), and has announced that “there is no doubt that fact-based question trails significantly assist juries in their task.” *R v. Fraser* [2009] NZCA 520 at para 36 (N.Z.). In addition, the President of the Court of Appeal trains judges in the development and use of question-trail instructions. See VLRC, JURY DIRECTIONS, *supra* note 120, at 121, para. 6.67.



NEW ZEALAND LAW COMMISSION,  
JURIES IN CRIMINAL TRIALS 122  
(2001).

In the United States too, much has been done in recent years to improve the jury instruction process and to ensure that jurors understand what they are expected

to do. It began years ago with efforts to rewrite instructions by “reorganizing them, minimizing sentence length and complexity, using the active voice, avoiding jargon and uncommon words, and using concrete rather than abstract words”.<sup>412</sup> Many such projects are ongoing.<sup>413</sup> The early and sustained

<sup>412</sup> Steele & Thornburg, *supra* note 120, at 87. Numerous thoughtful suggestions have been made by many, including Judge Weinstein, *supra* note 55, at 172–76, for decades. See, e.g., Christopher N. May, *What Do We Do Now?: Helping Juries Apply the Instructions*, 28 LOY. L.A. L. REV. 869, 870 (1995). Suggestions range from note taking to flow charts to - yes, truly - summarizing evidence. The point at which directions are given has also been discussed, with much support for at least some of the instructions coming before the end of the trial.

The instructions are designed for use at the end of trial. However, this should not be interpreted as a recommendation against using preliminary instructions before the trial begins. To the contrary, the Committee believes that preliminary instructions are helpful.

COMM. ON PATTERN CRIMINAL JURY INSTRUCTIONS, DISTRICT JUDGES ASS'N, SIXTH CIRCUIT, at Introduction (current through June 10, 2011), available at [http://www.ca6.uscourts.gov/internet/crim\\_jury\\_insts/pdf/crmpattjur\\_full.pdf](http://www.ca6.uscourts.gov/internet/crim_jury_insts/pdf/crmpattjur_full.pdf).

One of the early efforts here was the work of the group appointed by the Chief Justice of the United States in 1982, and then again, in 1987, to draft model instructions for use in federal criminal cases. See FED. JUDICIAL CTR., PATTERN CRIMINAL JURY INSTRUCTIONS ix–xi (1987), available at [http://federalevidence.com/pdf/JuryInst/FJC\\_Crim\\_1987.pdf](http://federalevidence.com/pdf/JuryInst/FJC_Crim_1987.pdf). A non-lawyer participated in the process, and strong attempts were made to simplify and utilize non-technical language. *Id.* at xiii.

As written in the introduction to the 1982 edition:

The distinguishing feature of these instructions, we believe, is their comprehensibility to laymen. How much attention jurors give to even the most lucid instructions is a question that may never be answered. But surely we judges have an obligation to communicate as well as we know how.

The importance of communicating well with lay jurors is widely acknowledged by drafters of pattern instructions. It is nevertheless clear that most pattern instructions do not do it very well. It is all too easy for the lawyers and judges who engage in the drafting process to forget how much of their vocabulary and language style was acquired in law school. The principal barrier to effective communication is probably not the inherent complexity of the subject matter, but our inability to put ourselves in the position of those not legally trained.

Our committee has tried to overcome this obstacle by including in our deliberations a distinguished journalist who is not legally trained and by following some drafting rules derived from research on juror understanding of instructions. We believe that comparison of these pattern instructions with others in common use will reveal that a substantial simplification of vocabulary and syntax has been achieved.

It is our view that instructions should often contain references to the subject matter of the evidence and the names of the parties and witnesses, and we have made no effort to produce instructions that can be used without being tailored to fit the particular case.

The view that instructions should be tailored also explains our decision to use the masculine singular pronoun and singular verbs in the pattern instructions. We contemplate that, when the instructions are delivered to the jury, each pronoun will be masculine or feminine, and each pronoun and verb singular or plural, as the circumstances of the particular case demand.

*Id.* at xiii–xiv. The writer was the reporter for the Judicial Conference project.

<sup>413</sup> The approach in Michigan is most interesting. In 2011 the Michigan Court Rules were amended by the state supreme court, on an interim basis (their permanency will be determined in 2014). MICHIGAN SUPREME COURT, AMENDMENT OF RULES 2.512, 2.513, 2.514, 2.515, 2.516, AND 6.414 OF THE MICHIGAN COURT RULES, ADM File No. 2005-19 (June 29, 2011), available at [http://sbmblog.typepad.com/files/2005-19\\_06-29-11\\_order.pdf](http://sbmblog.typepad.com/files/2005-19_06-29-11_order.pdf). The changes there include: 1) Having the judge instruct the jury before the evidence is presented to give the jury a framework for listening to the testimony. *Id.* at 4 (Rule 2.513(A)). 2) Giving each juror a set of the instructions in writing for reference during the trial. *Id.* (Rule 2.513(A)). 3) And, most striking, offering the trial court the discretion to “fairly and impartially sum up the evidence if it also instructs the jury that it is to determine for itself the weight of the evidence and the credit to be given to the witnesses and that the jurors are not bound by the court’s summation.” *Id.* at 7 (Rule 2.513(M)). According to one experienced judge, however, no Michigan judge has summarized in a criminal case since the adoption of the rule.

approach as to these so-called pattern instructions is especially important. These standardized jury instructions are usually drafted by state or federal jury instruction committees.<sup>414</sup> Pattern instructions have several key advantages: they save time by minimizing the amount of research necessary to prepare instructions, they offer uniform explanations to lay people, and they lessen the risk of reversible error. Despite these advantages, there can be significant concerns in the creation and use of pattern instructions.

Many issues surrounding the creation of pattern jury instructions tie closely to the uneven quality and efficacy of their content. One study reports that there are eighty-eight state, and nine federal, known pattern jury instruction committees developing and promulgating pattern instructions, each usually composed of some blend of attorneys and judges.<sup>415</sup> The composition and resources of these authorities contribute to writing instructions that may be difficult for jurors to understand and apply correctly.<sup>416</sup>

One obstacle to clarity is that pattern jury instruction committee members are legal professionals. They have significant training and practice in understanding the law, and may quote opinion or statutory language in the pattern instructions, failing to see how that phrasing might cause confusion for a lay person juror. Further compounding the problems created by this communicative gap, committees' financial resources are often insufficient to permit hiring linguistic experts who could better assess the comprehensibility of these instructions, recognize deficiencies, and assist with revision.<sup>417</sup> Another prominent criticism of pattern instructions is that they contribute to a false perception that a given instruction is "error proof" if it was used in other affirmed cases. Judges have a duty to ensure that instructions are appropriate to the case; however, some judges may avoid altering or tailoring instructions because of the presumption that appellate courts will not overturn a case if the judge charges the jury with the standard pattern instructions.

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<sup>414</sup> See generally PAULA L. HANNAFORD-AGOR & STEPHANIE N. LASSITER, CONTEMPORARY PATTERN JURY INSTRUCTION COMMITTEES: A SNAPSHOT OF CURRENT OPERATIONS AND POSSIBLE FUTURE DIRECTIONS (Apr. 2008), <http://www.ncsc-jurystudies.org/What-We-Do/~media/Microsites/Files/CJS/What%20We%20Do/Contemporary%20Pattern.ashx>.

<sup>415</sup> *Id.* at 3, 5.

<sup>416</sup> See generally Judith L. Ritter, *Your Lips Are Moving ... but the Words Aren't Clear: Dissecting the Presumption That Jurors Understand Instructions*, 69 MO. L. REV. 163 (2004) (criticizing the assumption that lay jury members can understand and follow court instructions); Bradley Saxton, *How Well Do Jurors Understand Jury Instructions? A Field Test Using Real Juries and Real Trials in Wyoming*, 33 LAND & WATER L. REV. 59 (1998).

<sup>417</sup> See HANNAFORD-AGOR & LASSITER, *supra* note 135, at 14. See generally Jeannine Turgeon & Elizabeth A. Francis, *Improving Pennsylvania's Justice System Through Jury System Innovations*, 18 WIDENER L.J. 419 (2009).

Many states have moved toward a focus on comprehensible instructions for lay people. See, e.g., ROBERT POLLEY, ET AL., ALASKA CRIMINAL PATTERN JURY INSTRUCTIONS, available at <http://www.courts.alaska.gov/crimins.htm>; JUDICIAL COUNCIL OF CALIFORNIA, CRIMINAL JURY INSTRUCTIONS (2013), available at [http://www.courts.ca.gov/partners/documents/calcrim\\_juryins.pdf](http://www.courts.ca.gov/partners/documents/calcrim_juryins.pdf); MISS. JUDICIAL COLLEGE, MISSISSIPPI MODEL JURY INSTRUCTIONS - CIVIL (2d ed., 2012), available at <http://store.westlaw.com/mississippi-model-jury-instructions-civil-2d-practice-series/3308/22081545/productdetail>; THE PATTERN JURY INSTRUCTION COMM., NORTH CAROLINA PATTERN JURY INSTRUCTIONS, available at <http://www.sog.unc.edu/programs/ncpjil/>.

The work of the National Center for State Courts in this area is especially noteworthy. See *Jury Management: State Links*, NAT'L CTR. FOR STATE COURTS, <http://www.ncsc.org/topics/jury/jury-management/state-links.aspx?cat=Model%20Jury%20Instructions> (last visited Feb. 3, 2012) (providing links to various states' model jury instructions).

Tailoring jury instructions to a case may help provide a solution. As pointed out in one research work, instructions should generally be “case-specific. Rather than repeating verbatim pattern instructions, the judge should tailor the instructions to fit the individual case. The instructions should contain the names of parties, actual fact issues and examples from the case”.<sup>418</sup> As explained by one California trial lawyer:

I wonder if the distinction in practice may not be as clear cut as it may seem. For instance, we do have “pinpoint” instructions which tie evidence from the trial to particular issues of law (in California they are authorized by the *Sears* case, hence called *Sears* instructions). Although the lawyers have input into the instruction process and pinpoints are supposed to be fair, they do highlight evidence to an extent.

### VIII. CONCLUSION

The systems in England and Wales, New Zealand, Canada and Australia are markedly different from what one finds in the United States. In the large group - while there are some differences - generally trial judges summarize evidence for the jurors. In the United States, trial judges do not. Yet, as different

as the systems are, increasingly criminal justice professionals are repeating the comment made to me by a noted English criminal justice scholar. “[J]udge and jury try the case together but the jury has the final say whether guilt has been proved”. In all five systems under review here, professionals are asking how best to effectively promote that partnership between judge and juror. All this is to the better. In two areas, however, considerably more needs to be done before that partnership will become a reality.

First, the Americans must learn more about how the criminal trial process works in other English speaking common law nations. I was continually struck by how little U.S. judges and lawyers knew about some key features of the process in these other nations. Other than for those who had seen trials in operation there and were somewhat shocked by the practices,<sup>419</sup> virtually all those savvy and thoughtful individuals with whom I was in contact assumed that the practice in the United States mirrored that promoted elsewhere. To understand better the advantages and the disadvantages of our own system, we will need to learn a good deal more about what some outstanding people are working on elsewhere in the world.<sup>420</sup>

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<sup>418</sup> Chilton & Henley, *supra* note 118, at 11. Tailoring is recommended in numerous states such as California (see JUDICIAL COUNCIL OF CALIF., CRIMINAL JURY INSTRUCTIONS: CALCRIM 2013, at xxv), Connecticut (State v. Santaniello, 902 A.2d 1, 8-9, 9 n.3 (Conn. App. 2006)), and West Virginia (W.VA. CRIMINAL LAW RESEARCH CTR., CRIMINAL JURY INSTRUCTIONS, at Introduction to 6th edition (6th ed., 2003)). Other changes, too, have been made. Many U.S. judges, for instance, routinely give written instructions to jurors, and allow note taking. For a call to expand these practices in and beyond the United States, see Madge, *supra* note 40, at 820. United States trial judges repeatedly are told that they “enjoy substantial latitude in formulating a jury charge.” See, e.g., United States v. Brooks, 681 F.3d 678, 697 (5th Cir. 2012) (citations omitted). See generally Boles by

McKinney v. Milwaukee Cnty., 443 N.W.2d 679, 683 (Wis. App. 1989) (“Generally, a trial court possesses a wide discretion in formulating and presenting the jury instructions.”) (citation omitted).

<sup>419</sup> One U.S. judge wrote, “I had no idea that the system was so different [from] the U.S.” A former prosecutor labeled the summarizing process as “insane” in comparison with the American practice

<sup>420</sup> Almost to a person, the forty or so professionals outside the United States were reasonably knowledgeable about the U.S. system. Several of the respondents explained to me that more research is done in their nations on the U.S. process than seems to be done in the United States on their processes; and, not surprisingly, the influence of U.S. motion pictures and television is great, and much of what is shown elsewhere looks to the American criminal justice system for inspiration.

Second, in the other four nations it is striking how little is known about how well actual jurors understand the system and the statements of law given to them. There is a wealth of such information in the United States.<sup>421</sup> With some notable exceptions,<sup>422</sup> however, that information is simply not available in the other four nations. One significant reason for this is clear. It is, generally, against the law in those nations for researchers and others to ask the sorts of penetrating questions of jurors necessary to get a clear understanding of needed reforms.<sup>423</sup> One English judge, in explaining the legal basis for the rule, wrote that it “has largely

prevented academic research into the way juries work and the effectiveness (or otherwise) of judges’ summings-up”. Some sort of accommodation must occur there if professionals in those nations are to conduct careful reviews of their own systems.

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<sup>421</sup> Much, though not all, of the work involving jury understanding of instructions and the basic process have been seen through the lens of capital prosecutions. See generally Stephen P. Garvey et al., *Correcting Deadly Confusion: Responding to Jury Inquiries in Capital Cases*, 85 **CORNELL L. REV.** 627 (2000); SCOTT E. SUNDBY, *A LIFE AND DEATH DECISION: A JURY WEIGHS THE DEATH PENALTY* (2005).

<sup>422</sup> There are some highly instructive research works that are most useful. See, for instance, NZLC, 2001 REPORT, *supra* note 125; OGLOFF, ET AL.,

*supra* note 81; Zander & Henderson, *supra* note 84. These, however, are not the norm by any means.

<sup>423</sup> As noted in the New Zealand Law Commission Report, “New South Wales, Victoria, Canada and England have all legislated to make it a criminal offense to disclose jury deliberations.” NZLC, 2001 REPORT, *supra* note 125, at 170 (citations omitted). In New Zealand, it “is a contempt of court for the media to approach a juror to elicit comment on what happened during the deliberations, or to broadcast such information.” *Id.*