Articles

Friendly Limiting Instructions

By Annie Soo Yeon Ahn*

WHEN EVIDENCE IS admissible for one purpose but inadmissible for another purpose, the judge may instruct the jury to consider the evidence only for a limited purpose and not for any other purpose[1]—an instruction that can be difficult to follow.[2] For example, in *Flaminio v. Honda Motor Co.*, plaintiff Forrest Flaminio was riding a motorcycle after a few drinks when he felt a vibration from the front of the motorcycle and leaned over to observe the problem.[3] The motorcycle then began to wobble and then crashed, severely injuring Flaminio.[4] Flaminio sued the manufacturer and distributor of the motorcycle for design defect and lack of adequate warning about the wobble, but did not recover, and appealed.[5] An important issue on appeal was

* Attorney, Shin & Kim. J.D. 2015, University of Minnesota Law School; B.A. 2012, Ewha Womans University. I am grateful to the Honorable Richard H. Kyle and everyone at chambers for the wonderful experience after graduation from law school.

1. Fed. R. Evid. 105; Manual of Model Civil Jury Instructions for the District Courts of the Eighth Circuit, Instruction 2.09 (2017) [hereinafter Eighth Circuit Model Civil Jury Instructions] ("The evidence [(you are about to hear) (you have just heard)] may be considered by you only on the [(issue) (question)] _____. It may not be considered for any other purpose."); *see also* Federal Civil Jury Instructions of the Seventh Circuit, Instruction 1.09 (2017) [hereinafter Seventh Circuit Model Civil Jury Instructions]; Ninth Circuit Jury Instructions Comm., Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit, Instruction 1.11 (2017) [hereinafter Ninth Circuit Model Civil Jury Instructions].

2. *See* Krulewitch v. United States, 336 U.S. 440, 453 (1949) (Jackson, J., concurring) (citing Blumenthal v. United States, 332 U.S. 539, 559 (1947)) ("The naive assumption that prejudicial effects can be overcome by instructions to the jury, all practicing lawyers know to be unmitigated fiction." (citation omitted)). *See generally* David Alan Sklansky, *Evidentiary Instructions and the Jury as Other*, 65 Stan. L. Rev. 407, 409 (2013) ("The reality is, first, that evidentiary instructions probably do work, but imperfectly, and better under some conditions than others . . . .").

3. 733 F.2d 463, 465 (7th Cir. 1984).

4. *Id.*

5. *Id.* at 465–66. In *Flaminio*, the jury found that the manufacturer was not liable but found that the distributor's negligence had contributed 30% to the accident. *Id.* at 465. However, Wisconsin law denied recovery to plaintiffs unless their contributory negligence

whether the district court erred in excluding evidence of subsequent remedial measures—blueprints allegedly showing that, after the accident, the defendant thickened the struts that connected the handlebars to the front wheels to reduce the wobble.[6] To prevent the jury from viewing subsequent remedial measures as an admission of fault and to encourage individuals to take measures to improve product safety, Federal Rule of Evidence (hereinafter "Rule") 407 prohibits use of evidence of subsequent remedial measures to prove "negligence; culpable conduct; a defect in a product or its design; or a need for a warning or instruction."[7] In *Flaminio*, the United States Court of Appeals for the Seventh Circuit held that Rule 407 barred the evidence of subsequent remedial measures and affirmed the decision of the district court.[8]

However, if an exception to Rule 407 had applied[9] or if the case had been heard in a particular state court that admits evidence of subsequent remedial measures in a case based on strict liability,[10] the trial judge might have admitted the evidence for a limited purpose with limiting instructions.[11] Regarding this possibility, the Seventh Circuit noted that where a case is based on both strict liability and negligence as in *Flaminio*, it might be too prejudicial to admit evidence of subsequent remedial measures even if the court provides limiting instructions to consider the evidence only with respect to strict liability.[12] Nevertheless, the Seventh Circuit further stated, "The exceptions in Rule 407 imply that the framers thought juries capable of limiting their consideration of evidence of subsequent remedial measures to issues other than the defendant's culpability."[13]

Studies on the effectiveness of jury instructions report varying results; some studies report instances where the jury followed instructions, while others report instances where the jury did not.[14]

was not greater than the defendant's negligence. *Id.* Since the jury found Flaminio's negligence had contributed 70% to the accident, he could not recover. *Id.* at 465–66.

6. *Id.* at 468 (stating allegation of the plaintiff).

7. FED. R. EVID. 407; FED. R. EVID. 407 advisory committee's notes on proposed rules.

8. *Flaminio*, 733 F.2d at 469–73.

9. *See* FED. R. EVID. 407 ("But the court may admit this evidence for another purpose, such as impeachment or—if disputed—proving ownership, control, or the feasibility of precautionary measures.").

10. *See, e.g.*, Ault v. Int'l Harvester Co., 528 P.2d 1148, 1149–50 (Cal. 1974) (allowing admission of evidence of subsequent remedial measures in strict liability cases).

11. *See* FED. R. EVID. 105; FED. R. EVID. 407.

12. *Flaminio*, 733 F.2d at 469.

13. *Id.*

14. *See, e.g.*, Sklansky, *supra* note 2, at 424–29 (summarizing the findings of thirty-three studies on the effectiveness of jury instructions). R

Accordingly, scholars have offered a number of suggestions for improving jury instructions, including the use of pattern jury instructions, the use of written jury instructions, and the repetition of jury instructions.[15] To improve limiting instructions, scholars have suggested providing the jury with an explanation of the rationale behind the limiting instruction to help the jury understand why it must sometimes consider the evidence presented only for limited purposes.[16]

This Article proposes two ways to improve limiting instructions through model jury instructions. Part I introduces basic evidence rules and limiting instructions used in courts today. Part II discusses the importance of clear limiting instructions. Part III proposes how to improve limiting instructions. First, model limiting instructions could inform the jury how the evidence may and may not be used. For instance, courts in the Third Circuit use model limiting instructions that expressly recommend relaying such information to the jury.[17] Second, model limiting instructions could direct parties and attorneys to consider on a case-by-case basis whether to ask the judge to explain to the jury the rationale behind the limiting instruction. This type of explanation may help the jury to follow the limiting instruction when the evidence at issue is difficult to disregard and the rationale behind the limiting instruction is not readily apparent. The proposals in this

15. Robert F. Forston, *Sense and Non-Sense: Jury Trial Communication*, 1975 BYU L. REV. 601, 618–23 (2013).

16. *See* Sklansky, *supra* note 2, at 456 ("Fourth, juries should be told why they are being asked to disregard evidence or to use it only in a particular way, and when an intelligible explanation of this kind cannot be devised, the rule that the instruction implements should be reconsidered."); Lisa Eichhorn, Note, *Social Science Findings and the Jury's Ability to Disregard Evidence Under the Federal Rules of Evidence*, 52 LAW & CONTEMP. PROBS. 341, 353 (1989) ("In addition, an explanation of underlying policy would eliminate most feelings of reactance or resentment toward the judicial system because jurors would view the procedures to be followed as less arbitrary and more reasonable."); *see also* Shari S. Diamond & Jonathan D. Casper, *Blindfolding the Jury to Verdict Consequences: Damages, Experts, and the Civil Jury*, 26 LAW & SOC'Y REV. 513, 534 (1992); Joel D. Lieberman & Jamie Arndt, *Understanding the Limits of Limiting Instructions: Social Psychological Explanations for the Failures of Instructions to Disregard Pretrial Publicity and Other Inadmissible Evidence*, 6 PSYCHOL., PUB. POL'Y & L. 677, 704 (2000); Saul M. Kassin & Samuel R. Sommers, *Inadmissible Testimony, Instructions to Disregard, and the Jury: Substantive Versus Procedural Considerations*, 23 PERSONALITY & SOC. PSYCHOL. BULL. 1046, 1053 (1997). R

17. MODEL CIVIL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE THIRD CIRCUIT, Instruction 2.10 cmt. (2017) [hereinafter THIRD CIRCUIT MODEL CIVIL JURY INSTRUCTIONS] ("The Third Circuit has expressed a preference for an instruction that tells the jury both how the evidence can be used and how it must not be used."); MODEL CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE THIRD CIRCUIT, Instruction 2.11 (2016) [hereinafter THIRD CIRCUIT MODEL CRIMINAL JURY INSTRUCTIONS].

Article seek to help the jury follow jury instructions, which would promote fair and consistent application of the law.

I. Evidence Rules and Limiting Instructions

This first Part introduces basic Federal Rules of Evidence affecting whether evidence is admissible, inadmissible, or admissible for a limited purpose. It also introduces limiting instructions that courts use in jury trials. Section A discusses evidence rules in terms of the "relevance," "reliability," and "rightness" of using evidence for a specific purpose.[18] Section B reviews the content and timing of limiting instructions.

A. Evidence: Admissible, Inadmissible, or Admissible for a Limited Purpose

As limiting instructions help the jury to make decisions that are in accordance with the law, Section A begins with an overview of the jury system. In a criminal case not involving a petty offense,[19] trial by jury is protected by Article III and the Sixth Amendment of the United States Constitution.[20] Section 2 of Article III provides, "The trial of all crimes, except in cases of impeachment, shall be by jury."[21] Under the Sixth Amendment, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial

18. THOMAS A. MAUET & WARREN D. WOLFSON, TRIAL EVIDENCE 2 (Erwin Chemerinsky et al. eds., 6th ed. 2016) ("Our approach can best be summarized in terms of relevance, reliability, and rightness—in short, three 'Rs.'").

19. *See* Dist. of Columbia v. Clawans, 300 U.S. 617, 624 (1937) ("[T]he right of trial by jury, thus secured, does not extend to every criminal proceeding. At the time of the adoption of the Constitution there were numerous offenses, commonly described as 'petty,' which were tried summarily without a jury . . . ."); Schick v. United States, 195 U.S. 65, 68 (1904) ("[T]his particular violation of the statute is only a petty offense. In such a case there is no constitutional requirement of a jury.").

20. U.S. CONST. art. III, § 2; U.S. CONST. amend. VI; *see* FED. R. CRIM. P. 23(a) ("If the defendant is entitled to a jury trial, the trial must be by jury unless: (1) the defendant waives a jury trial in writing; (2) the government consents; and (3) the court approves."). *See generally* Patton v. United States, 281 U.S. 276, 312 (1930) ("In affirming the power of the defendant in any criminal case to waive a trial by a constitutional jury and submit to trial by a jury of less than twelve persons, or by the court, we do not mean to hold that the waiver must be put into effect at all events."); Akhil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. DAVIS L. REV. 1169, 1170–72 (1995) (explaining how each amendment in the Bill of Rights protects the jury system, with the Fifth, Sixth, and Seventh Amendments being "only the most visible tip of the jury iceberg").

21. U.S. CONST. art. III, § 2, cl. 3. *See generally* U.S. CONST. amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger . . . .").

jury."[22] The right to a trial by jury in a criminal case not for a petty offense applies in both federal and state courts.[23]

In a civil case in federal court, trial by jury is protected by the Seventh Amendment, which provides, "In suits at common law,[24] where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."[25] In civil cases in state court, although the Seventh Amendment does not apply,[26] most states provide the right to trial by jury in their constitutions.[27] Courts preside over the

22. U.S. CONST. amend. VI. *See generally* FED. R. CRIM. P. 23(b)(1) ("A jury consists of 12 persons unless this rule provides otherwise."); FED. R. CRIM. P. 23(b)(2) ("At any time before the verdict, the parties may, with the court's approval, stipulate in writing that: (A) the jury may consist of fewer than 12 persons; or (B) a jury of fewer than 12 persons may return a verdict if the court finds it necessary to excuse a juror . . . ."); FED. R. CRIM. P. 31(a) ("The verdict must be unanimous."); Ballew v. Georgia, 435 U.S. 223, 245 (1978) (holding that a criminal trial before a five-member jury was a violation of the defendant's right to a trial by jury); Apodaca v. Oregon, 406 U.S. 404, 406 (1972) (holding that the Sixth Amendment, which applies to the States through the Fourteenth Amendment, does not require unanimous jury verdicts in state criminal trials); SANFORD H. KADISH ET AL., CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 51 n.38 (9th ed. 2012) ("In Burch v. Louisiana, 441 U.S. 130 (1979), the Court held that a 5-1 vote did not satisfy constitutional requirements. Thus, where states elect to use a 6-person jury, the verdict must be unanimous.").

23. *Cf.* Duncan v. Louisiana, 391 U.S. 145, 159 (1968) ("It is doubtless true that there is a category of petty crimes or offenses which is not subject to the Sixth Amendment jury trial provision and should not be subject to the Fourteenth Amendment jury trial requirement here applied to the States.").

24. *See* Chauffeurs Local No. 391 v. Terry, 494 U.S. 558, 565 (1990) ("To determine whether a particular action will resolve legal rights, we examine both the nature of the issues involved and the remedy sought."); Ross v. Bernhard, 396 U.S. 531, 537–38 (1970) ("[W]here equitable and legal claims are joined in the same action, there is a right to jury trial on the legal claims which must not be infringed either by trying the legal issues as incidental to the equitable ones or by a court trial of a common issue existing between the claims.").

25. U.S. CONST. amend. VII. *See generally* FED. R. CIV. P. 38(d) ("A party waives a jury trial unless its demand is properly served and filed. A proper demand may be withdrawn only if the parties consent."); FED. R. CIV. P. 48(a) ("A jury must begin with at least 6 and no more than 12 members, and each juror must participate in the verdict unless excused under Rule 47(c)."); FED. R. CIV. P. 48(b) ("Unless the parties stipulate otherwise, the verdict must be unanimous and must be returned by a jury of at least 6 members."); Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 355 (1998) ("[W]e hold that the Seventh Amendment provides a right to a jury trial on all issues pertinent to an award of statutory damages under § 504(c) of the Copyright Act, including the amount itself.").

26. McDonald v. City of Chicago, 561 U.S. 742, 784 n.30 (2010) ("[C]ases that predate the era of selective incorporation held that the . . . Seventh Amendment's civil jury requirement do not apply to the States.").

27. Fleming James, Jr., *Trial by Jury and the New Federal Rules of Procedure*, 45 YALE L.J. 1022, 1022 (1936). *See generally In re* County of Orange, 784 F.3d 520, 523 (9th Cir. 2015) ("Under California law, pre-dispute jury trial waivers are invalid unless expressly authorized by statute.").

jury selection process,[28] including voir dire[29] and use of peremptory challenges.[30] Courts also preside over the provision of jury instructions to help impanel[31] an impartial and competent jury[32] "free from ethnic, racial, or political prejudice, or predisposition about the defendant's culpability"[33] and "capable and willing to decide the case

28. *See* FED. R. CIV. P. 47 (describing the process for jury selection in a civil case in federal court); FED. R. CRIM. P. 24 (describing the process for jury selection in a criminal case in federal court).

29. *See* FED. R. CIV. P. 47(a) ("The court may permit the parties or their attorneys to examine prospective jurors or may itself do so. If the court examines the jurors, it must permit the parties or their attorneys to make any further inquiry it considers proper, or must itself ask any of their additional questions it considers proper."); FED. R. CRIM. P. 24(a)(2) ("If the court examines the jurors, it must permit the attorneys for the parties to: (A) ask further questions that the court considers proper; or (B) submit further questions that the court may ask if it considers them proper."). *See generally* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA: LOCAL RULES, Local Rule 39.2(b)(1) (2013) ("Unless the court orders otherwise, the court will conduct voir dire examination of jurors. A party may submit proposed voir dire questions to the court."); James J. Gobert, *In Search of the Impartial Jury*, 79 J. CRIM. L. & CRIMINOLOGY 269, 317 (1988) ("Realistically, except in the most blatant cases, it is naive to expect to determine impartiality from voir dire . . . . Persons who are unaware of their subconscious biases will deny them when questioned. Those who are aware may not admit their bias, because of either an unwillingness to confess publicly this perceived character flaw or an overriding desire to serve on the jury.").

30. *See* FED. R. CIV. P. 47(b); FED. R. CRIM. P. 24(b); Edmonson v. Leesville Concrete Co., 500 U.S. 614, 616, 620–30 (1991) (holding that a private party cannot use peremptory strikes based on race); Batson v. Kentucky, 476 U.S. 79, 85–86 (1986) (quoting Strauder v. West Virginia, 100 U.S. 303, 305 (1880) ("In holding that racial discrimination in jury selection offends the Equal Protection Clause, the Court in *Strauder* recognized, however, that a defendant has no right to a 'petit jury composed in whole or in part of persons of his own race.' . . . But the defendant does have the right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria.").

31. *See generally* Taylor v. Louisiana, 419 U.S. 522, 538 (1975) ("It should also be emphasized that in holding that petit juries must be drawn from a source fai[r]ly representative of the community we impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population.").

32. Jordan v. Massachusetts, 225 U.S. 167, 176 (1912) ("Due process implies a tribunal both impartial and mentally competent to afford a hearing.").

33. Powers v. Ohio, 499 U.S. 400, 411–12 (1991) (citations omitted) (quoting Gomez v. United States, 490 U.S. 858, 873 (1989)).

solely on the evidence before it."[34] In a jury trial today,[35] the judge decides questions of law, and the jury decides questions of fact.[36]

In a jury trial, the judge also determines whether evidence is admissible in court for the jury to consider.[37] Evidence presented to the jury may include witness testimony, documents and exhibits, facts that parties have agreed to as true, and facts that the judge instructs the jury to accept as true.[38] The jury weighs the persuasiveness of the evidence in deciding the facts and applying the law to the facts.[39] The following section discusses federal rules of evidence related to the "rel-

34. Smith v. Phillips, 455 U.S. 209, 217 (1982) ("The safeguards of juror impartiality, such as *voir dire* and protective instructions from the trial judge, are not infallible . . . . Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen."); Turner v. Louisiana, 379 U.S. 466, 472 (1965) ("The requirement that a jury's verdict 'must be based upon the evidence developed at the trial' goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury.").

35. *See generally* Joan L. Larsen, *Ancient Juries and Modern Judges: Originalism's Uneasy Relationship with the Jury*, 71 OHIO ST. L.J. 959, 968 (2010) ("[T]he jury of the founding generation had powers and rights that went beyond the fact-finding power of the modern jury. The Founders' jury also had the right to judge the law, a right that criminal juries would not lose until well into the nineteenth century.").

36. Dimick v. Schiedt, 293 U.S. 474, 486 (1935) (explaining that the court has the power to "determine the law" and the jury has the power to "determine the facts"); *cf.* Fleming James, Jr., *Functions of Judge and Jury in Negligence Cases*, 58 YALE L.J. 667, 667–68, 676 (1949) (noting the roles may be "elastic"). *See generally* FED. R. CIV. P. 52(a)(1) ("In an action tried on the facts without a jury or with an advisory jury, the court must find the facts specially and state its conclusion of law separately."); FED. R. CRIM. P. 23(c) ("In a case tried without a jury, the court must find the defendant guilty or not guilty. If a party requests before the finding of guilty or not guilty, the court must state its specific findings of fact in open court or in a written decision or opinion.").

37. FED. R. EVID. 104(a) ("The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege."); James, Jr., *supra* note 36, at 669. *See generally* Jennifer L. Mnookin, *Atomism, Holism, and the Judicial Assessment of Evidence*, 60 UCLA L. REV. 1524, 1527 (2013) (discussing Rule 403 and the "atomism" approach, where the judge "consider[s] the prejudice and probative value of that item, taken by itself," and the "holism" approach, where the judge "evaluate[s] both prejudice and probative value within a broader context . . . taking into consideration the other evidence adduced in the case that might affect the item's incremental probative value or prejudice"). R

38. EIGHTH CIRCUIT MODEL CIVIL JURY INSTRUCTIONS, *supra* note 1, at Instruction 1.4 (describing what is and is not evidence). R

39. MAUET & WOLFSON, *supra* note 18, at 9. *See generally* Edson R. Sunderland, *Findings of Fact and Conclusions of Law in Cases Where Juries Are Waived*, 4 U. CHI. L. REV. 218, 218– 19 (1937) (noting that in a special verdict, the judge applies the law, but that in a general verdict, the jury applies the law). R

evance," "reliability," and "rightness" of using evidence for specific purposes, which are requirements for the admission of evidence.[40]

First, Rule 401 provides, "Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action."[41] Under Rule 402, "Relevant evidence is admissible unless any of the following provides otherwise: the United States Constitution; a federal statute; these rules; or other rules prescribed by the Supreme Court. Irrelevant evidence is not admissible."[42]

Next, evidence rules related to reliability govern the competency of witnesses, opinion testimony,[43] hearsay, authentication and identification of the evidence, contents of the evidence, and questioning of witnesses.[44] For example, evidence may be unreliable when it is considered hearsay[45] and is not saved by an exception to the hearsay rule.[46] Hearsay is considered unreliable because the fact finder is not

40. MAUET & WOLFSON, *supra* note 18, at 2. R

41. FED. R. EVID. 401.

42. FED. R. EVID. 402. For example, Rule 404(b)(1) prohibits using evidence of other crime, wrong, or other act to "prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." FED. R. EVID. 404(b)(1). *See generally* Edward J. Imwinkelried, *The Second Coming of* Res Gestae*: A Procedural Approach to Untangling the "Inextricably Intertwined" Theory for Admitting Evidence of an Accused's Uncharged Misconduct*, 59 CATH. U. L. REV. 719, 721 (2010) ("In most Rule 404(b) battles, the decisive question is whether the prosecution can articulate a noncharacter theory of logical relevance that is tenable on the facts.").

43. *See generally* Kumho Tire Co. v. Carmichael, 526 U.S. 137, 141 (1999) (holding that the "gatekeeping" role of the trial judge covers testimony based on "technical" and "other specialized" knowledge in addition to "scientific knowledge"); Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 589 (1993) ("[T]he trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable."); Bogosian v. Mercedes-Benz of N. Am., Inc., 104 F.3d 472, 476 (1st Cir. 1997) (quoting United States v. Sepulveda, 15 F.3d 1161, 1183 (1st Cir. 1993) ("Because gauging an expert witness's usefulness is almost always a case-specific inquiry, the law affords trial judges substantial discretion in connection with the admission or exclusion of opinion evidence.").

44. MAUET & WOLFSON, *supra* note 18, at 3. R

45. *See* FED. R. EVID. 801(c) ("'Hearsay' means a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement."). Statements that are not intended as assertions are not hearsay, and statements that are not offered for the truth of the matter asserted are not hearsay. *See also* MAUET & WOLFSON, *supra* note 18, at 131–35 (listing as examples of statements that are not offered for the truth of the matter asserted, statements with "independent legal significance," "prior inconsistent statements used as impeachment," and statements offered to show its "effect on the listener's state of mind"). Statements that meet the requirements of Rule 801(d)(1) and party admissions that meet the requirements of Rule 801(d)(2) are not hearsay. FED. R. EVID. 801(d)(1); FED. R. EVID. 801(d)(2). R

46. *See* MAUET & WOLFSON, *supra* note 18, at 125–27. *See generally* Margaret Bull Kovera, Roger C. Park & Steven D. Penrod, *Jurors' Perceptions of Eyewitness and Hearsay Evi-* R

present when the hearsay statement is made, hearsay is usually not made under oath, and there is generally a lack of cross-examination of the declarant.[47] Hearsay is not admissible unless provided otherwise by "a federal statute; these rules; or other rules prescribed by the Supreme Court."[48] Unreliable evidence is excluded.[49]

Even if evidence is both relevant and reliable, however, the court may still exclude the evidence based on considerations about the rightness of using the evidence.[50] The judge may exclude evidence obtained in violation of the United States Constitution or state constitutions, evidence excludable under Rule 403, and evidence specifically excluded by evidence rules, which may be for public policy reasons.[51] For example, the court may exclude evidence obtained in violation of the Fourth Amendment,[52] the Fifth Amendment,[53] and

dence, 76 MINN. L. REV. 703, 722 (1992) ("[T]his study's results suggest that, in general, jurors are skeptical of the quality and usefulness of hearsay testimony.").

47. MAUET & WOLFSON, *supra* note 18, at 126. R

48. FED. R. EVID. 802. Hearsay exceptions are listed in Rule 803, Rule 804, and Rule 807. FED. R. EVID. 803; FED. R. EVID. 804; FED. R. EVID. 807. "Hearsay exceptions generally are based on two interrelated concepts. First, some out-of-courts statements, because of the circumstances under which they are made, are inherently reliable. Second, sometimes the choice is between evidence that bears some risk of unreliability and no evidence at all." MAUET & WOLFSON, *supra* note 18, at 164. R

49. MAUET & WOLFSON, *supra* note 18, at 3. R

50. *Id.* at 3–4.

51. *Id.* at 4.

52. U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."); *see* Hudson v. Michigan, 547 U.S. 586, 591–93 (2006) (quoting Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 363 (1998) (noting that the exclusionary rule in the context of a Fourth Amendment violation applies only "where its deterrence benefits outweigh its 'substantial social costs'"); United States v. Leon, 468 U.S. 897, 913 (1984) ("[O]ur evaluation of the costs and benefits of suppressing reliable physical evidence seized by officers reasonably relying on a warrant issued by a detached and neutral magistrate leads to the conclusion that such evidence should be admissible in the prosecution's case in chief."); Illinois v. Gates, 462 U.S. 213, 223 (1983) ("The question whether the exclusionary rule's remedy is appropriate in a particular context has long been regarded as an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct."); Mapp v. Ohio, 367 U.S. 643, 655 (1961) (holding that evidence obtained through unlawful searches and seizures may not be used in state court); Weeks v. United States, 232 U.S. 383, 389, 392, 398 (1914) (holding that it was prejudicial error to permit the use of evidence in trial that was obtained in violation of the Fourth Amendment).

53. U.S. CONST. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . ."); *see* Miranda v. Arizona, 384 U.S. 436, 478–79 (1966) ("[W]hen an individual is taken into custody . . . and is subject to questioning, . . . [h]e must be warned prior

the Sixth Amendment[54] of the United States Constitution.[55] Even if evidence is obtained unlawfully, however, it may be introduced at trial if an exception applies, such as using the evidence to impeach a defendant.[56] In addition, under Rule 403, "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."[57]

Specific rules may also exclude certain evidence based on "social and political" reasons.[58] For example, as previously discussed, Rule

to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him.").

54. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."); *see* Crawford v. Washington, 541 U.S. 36, 61 (2004) ("To be sure, the [Confrontation] Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination."); Massiah v. United States, 377 U.S. 201, 206 (1964) (holding that use at trial of self-incriminating words "deliberately elicited" by federal agents from the petitioner after indictment and in absence of counsel was a violation of the Sixth Amendment).

55. MAUET & WOLFSON, *supra* note 18, at 4. **R**

56. *See* Kansas v. Ventris, 556 U.S. 586, 594 (2009) (holding that an informant's testimony, even if obtained in violation of the Sixth Amendment, is admissible to impeach defendant's "inconsistent testimony at trial"); Harris v. New York, 401 U.S. 222, 224 (1971) ("It does not follow from *Miranda* that evidence inadmissible against an accused in the prosecution's case in chief is barred for all purposes, provided of course that the trustworthiness of the evidence satisfies legal standards."); Walder v. United States, 347 U.S. 62, 65 (1954) ("It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths. Such an extension of the Weeks doctrine would be a perversion of the Fourth Amendment.").

57. FED. R. EVID. 403; *see* FED. R. EVID. 403 advisory committee's notes on proposed rules ("'Unfair prejudice' within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one."). *See generally* FED. R. EVID. 102 (providing that the Federal Rules of Evidence "should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination").

58. MAUET & WOLFSON, *supra* note 18, at 4. **R**

407 prohibits the use of evidence of subsequent remedial measures to prove "negligence; culpable conduct; a defect in a product or its design; or a need for a warning or instruction."[59] Evidence of subsequent remedial measures need not be excluded when the evidence is offered "for another purpose, such as impeachment or—if disputed—proving ownership, control, or the feasibility of precautionary measures."[60] Rule 407 seeks to keep the jury from automatically inferring that a defendant was negligent or that a product is defective simply because subsequent remedial measures were taken.[61] The fact that additional safety measures were taken or there was an accident involving the product does not necessarily mean that a defendant was negligent or that a product is defective.[62] Rule 407 also seeks to encourage individuals to take measures to improve product safety without concern that those measures will be used later as evidence of culpability.[63] Other evidence that may be excluded for social and political reasons includes evidence of compromise offers and negotiations under Rule 408, evidence of offers to pay medical and similar expenses under Rule 409, evidence of pleas, plea discussions, and related statements under Rule 410, evidence of liability insurance under Rule 411, evidence of a victim's sexual behavior or predisposition in a sexual misconduct case under Rule 412, and some privileged communications.[64]

Parties and their attorneys may present arguments to the judge in a motion *in limine*[65] or during sidebar[66] about whether evidence should be admitted, excluded, or admitted with limiting instructions. Rule 103 governs preservation of claims of error for rulings of the judge that admit or exclude evidence.[67] If evidence that should have been excluded entirely is introduced, the judge may give instructions to disregard the evidence completely[68] or may grant a motion for mis-

59. FED. R. EVID. 407.

60. *Id.*

61. *See* FED. R. EVID. 407 advisory committee's notes on proposed rules.

62. *Id.*

63. *Id.*

64. MAUET & WOLFSON, *supra* note 18, at 4; *see* FED. R. EVID. 408–412, 501. R

65. *See generally* FED. R. EVID. 104(a) ("The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege.").

66. *See* FED. R. EVID. 103(d) ("To the extent practicable, the court must conduct a jury trial so that inadmissible evidence is not suggested to the jury by any means.").

67. FED. R. EVID. 103; *see also* FED. R. EVID. 103 advisory committee's notes on proposed rules.

68. *See* EIGHTH CIRCUIT MODEL CIVIL JURY INSTRUCTIONS, *supra* note 1, at Instruction 1.04. R

trial and a new trial,[69] depending on the circumstances and whether or not the errors affect a party's "substantial rights."[70] When evidence is admitted for a limited purpose, the attorneys may ask the judge to give limiting instructions,[71] discussed in the next Section.

B. Jury Instructions and Limiting Instructions: Content and Timing

This Section introduces limiting instructions, which are part of a larger set of jury instructions. Courts have noted that the trial court "must formulate jury instructions so that they fairly and adequately cover the issues presented, correctly state the law, and are not misleading."[72] Specifically, Section B.1 discusses preliminary jury instructions given at the commencement of trial. Next, Section B.2 discusses limiting instructions given during trial. Finally, Section B.3 discusses jury instructions given at the close of trial.

69. *See* FED. R. CIV. P. 59(a)(1) ("The court may, on motion, grant a new trial on all or some of the issues—and to any party—as follows: (A) after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court . . . ."); FED. R. CRIM. P. 33(a) ("Upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires."); Bogosian v. Mercedes-Benz of N. Am., 104 F.3d 472, 482 (1st Cir. 1997) ("We review for abuse of discretion the denial of a Rule 59 motion for new trial. A new trial is warranted 'only if the verdict, though rationally based on the evidence, was so clearly against the weight of the evidence as to amount to a manifest miscarriage of justice.'" (citations omitted)).

70. *See* FED. R. CIV. P. 61 ("At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights."); FED. R. CRIM. P. 52 (noting that any error not affecting substantial rights "must be disregarded" and that a plain error affecting substantial rights "may be considered even though it was not brought to the court's attention"). *See generally* Chapman v. California, 386 U.S. 18, 24 (1967) ("There is little, if any, difference between our statement in Fahy v. State of Connecticut about 'whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction' and requiring the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained . . . . [B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt."); Petree v. Victor Fluid Power, Inc., 887 F.2d 34, 41 (3d Cir. 1989) ("Our standard of review of a district court's nonconstitutional error in a civil suit requires that we find such error harmless only if it is highly probable that the error did not affect the outcome of the case."); Martha A. Field, *Assessing the Harmlessness of Federal Constitutional Error—A Process in Need of a Rationale*, 125 U. PA. L. REV. 15, 42 (1976) ("Before finding that tainted evidence is merely cumulative with untainted evidence, one could require that the untainted evidence harm the defendant in the same way, and also that it be of the same kind; and one can define those terms as well narrowly . . . .").

71. *See* FED. R. EVID. 105.

72. *See, e.g.*, Abromson v. Am. Pac. Corp., 114 F.3d 898, 902 (9th Cir. 1997).

1. Preliminary Instructions at the Commencement of Trial

Limiting instructions are part of a larger set of instructions given to the jury throughout trial.[73] The presentation of jury instructions varies depending on the judge and the court administering the instructions.[74] Generally, the judge instructs the jury at the commencement of trial, during trial, and at the close of trial.[75]

At the commencement of trial, the preliminary instructions read to the jury[76] generally inform the jury about its duty,[77] explain what may be considered as evidence,[78] instruct the jury not to discuss the case with people other than the jurors during deliberations and not to conduct outside research about the case,[79] and outline how the trial will proceed.[80] For example, the *Eighth Circuit Model Civil Jury Instructions* describe the duty of the jury as follows:

> After you have decided what the facts are, you will have to apply those facts to the law that I give you in these and in my other instructions. That is how you will reach your verdict. Only you will decide what the facts are. However, you must follow my instructions, whether you agree with them or not. You have taken an oath to follow the law that I give you in my instructions.[81]

Preliminary instructions emphasize the importance of following the judge's instructions.[82] The instructions may also allude to limiting instructions that could be given later during trial: for example, "I might tell you that you can consider a piece of evidence for one purpose only, and not for any other purpose. If that happens, I will tell you what purpose you can consider the evidence for and what you are not

73. *See* FED. R. CIV. P. 51; FED. R. CRIM. P. 30.

74. *See* Nancy S. Marder, *Bringing Jury Instructions Into the Twenty-First Century*, 81 NOTRE DAME L. REV. 449, 451–52 (2006).

75. *See, e.g.*, EIGHTH CIRCUIT MODEL CIVIL JURY INSTRUCTIONS, *supra* note 1, at 1–44. R

76. *See e.g.*, *id.* at Instruction 1.00.

77. *See id.* at Instruction 1.03.

78. *See id.* at Instruction 1.04.

79. *See id.* at Instruction 1.08.

80. *See id.* at Instruction 1.09.

81. *Id.* at Instruction 1.03; NINTH CIRCUIT MODEL CIVIL JURY INSTRUCTIONS, *supra* note 1, at Instruction 1.2 ("You must follow the law as I give it to you whether you agree with it or not."); SEVENTH CIRCUIT MODEL CIVIL JURY INSTRUCTIONS, *supra* note 1, at Instruction 1.01 ("You must follow these instructions, even if you disagree with them."). R R

82. *See* EIGHTH CIRCUIT MODEL CIVIL JURY INSTRUCTIONS, *supra* note 1, at Instruction 1.03; *see also* Kevin K. Washburn, *Restoring the Grand Jury*, 76 FORDHAM L. REV. 2333, 2359 (2008) ("It is the trial jury that is supposed to accept the law as it is written and yet engage in a very rigorous review of the facts. . . . The purpose of the grand jury, in contrast, is sometimes to insure that a guilty person is not convicted, at least if the local community disagrees with the content or application of the laws."). R

allowed to consider it for."[83] The preliminary jury instructions thus inform the jury about its duties and the trial process.

2. Jury Instructions During Trial and Limiting Instructions

During trial, when evidence is admitted for a limited purpose, the judge will give limiting instructions to the jury.[84] Rule 105 provides, "If the court admits evidence that is admissible against a party or for a purpose—but not against another party or for another purpose—the court, on timely request, must restrict the evidence to its proper scope and instruct the jury accordingly."[85] Model limiting instructions are often worded as follows: "The evidence [(you are about to hear) (you have just heard)] may be considered by you only on the [(issue) (question)] _____. It may not be considered for any other purpose."[86]

The limiting instruction in the *Third Circuit Model Civil Jury Instructions* goes one step further and is more specific[87]:

> You [have heard] [will now hear] evidence that was received for [a] particular limited purpose[s]. [This evidence can be considered by you as evidence that (describe limited purpose)]. It may not be used for any other purpose. [*For example, you cannot use it as proof that (discuss specific prohibited purpose)*].[88]

The model limiting instruction used by courts in the Third Circuit tells the jury both how the evidence may and *may not be used.*[89]

The committee on model jury instructions for the Eighth Circuit recognizes that there can be pros and cons to the Third Circuit's approach.[90] Under Rule 404(b) for example, evidence of crimes, wrongs, or other past acts may not be used to prove a person's character to demonstrate a person acted in accordance with that character at

83. EIGHTH CIRCUIT MODEL CIVIL JURY INSTRUCTIONS, *supra* note 1, at Instruction 1.04. R

84. FED. R. EVID. 105.

85. *Id.*

86. EIGHTH CIRCUIT MODEL CIVIL JURY INSTRUCTIONS, *supra* note 1, at Instruction 2.09. R The *Ninth Circuit Model Civil Jury Instructions* and the *Seventh Circuit Model Civil Jury Instructions* suggest similar limiting instructions. NINTH CIRCUIT MODEL CIVIL JURY INSTRUCTIONS, *supra* note 1, at Instruction 1.11 ("When I instruct you that an item of evidence has been R admitted only for a limited purpose, you must consider it only for that limited purpose and not for any other purpose."); SEVENTH CIRCUIT MODEL CIVIL JURY INSTRUCTIONS, *supra* note 1, Instruction 1.09. R

87. THIRD CIRCUIT MODEL CIVIL JURY INSTRUCTIONS, *supra* note 17, at Instruction 2.10 R cmt.

88. *Id.* at Instruction 2.10 (emphasis added).

89. *Id.* at Instruction 2.10 cmt.

90. MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE EIGHTH CIRCUIT, Instruction 2.08 (2014) [hereinafter EIGHTH CIRCUIT MODEL CRIMINAL JURY INSTRUCTIONS].

a specific time,[91] but it may be admissible to show "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident."[92] There are also exceptions to Rule 404(b) in Rule 413(a), Rule 414(a), Rule 415(a),[93] and when evidence of prior conviction may be used to challenge a witness's character for truthfulness under Rule 609.[94]

When evidence of other crimes or wrongs is admitted for a limited purpose, the *Eighth Circuit Model Criminal Jury Instructions* provide as follows:

> Remember, even if you find that the defendant may have committed [a] similar [act] [acts] in the past, this is not evidence that [he] [she] committed such an act in this case. You may not convict a person simply because you believe [he] [she] may have committed similar acts in the past. The defendant is on trial only for the crime[s] charged, and you may consider the evidence of prior acts only on the issues[s] stated above.[95]

The notes section in the instructions explains that while the defendant may want the jury to be instructed that evidence of prior similar acts is not admissible to prove propensity to commit a crime, there could be a "trade-off" between the explanation and repeated reference to prior acts, and thus the paragraph above should be given to the jury only if requested by the defendant.[96] The content of the limiting instruction will therefore differ based on strategic decisions and requests made by parties and attorneys and based on the judge's acceptance of those requests after considering the circumstances.[97] As

91. FED. R. EVID. 404(b)(1).

92. FED. R. EVID. 404(b)(2).

93. FED. R. EVID. 413(a) ("In a criminal case in which a defendant is accused of a sexual assault, the court may admit evidence that the defendant committed any other sexual assault."); FED. R. EVID. 414(a) ("In a criminal case in which a defendant is accused of child molestation, the court may admit evidence that the defendant committed any other child molestation."); FED. R. EVID. 415(a) ("In a civil case involving a claim for relief based on a party's alleged sexual assault or child molestation, the court may admit evidence that the party committed any other sexual assault or child molestation.").

94. FED. R. EVID. 609. *See generally* Mauet & Wolfson, *supra* note 18, at 389 ("Any implication that a prior conviction admitted under FRE 609 can be used to show the defendant is not law-abiding or is the kind of person who is likely to commit a crime is a misuse of the rule."). R

95. EIGHTH CIRCUIT MODEL CRIMINAL JURY INSTRUCTIONS, *supra* note 90, at Instruction 2.08. R

96. *Id.* at Instruction 2.08 notes on use.

97. *See generally id.* at Introduction ("[The Manual is] not intended to be treated as the only method of properly instructing a jury.").

for the timing of the limiting instructions, Rule 105 requires that the request for the instruction be timely.[98]

3. Final Instructions at the Close of Trial

Final instructions are provided to the jury at the close of trial,[99] sometimes in written form.[100] Parties and attorneys can request that the judge give specific jury instructions at the close of the evidence or at any earlier reasonable time the court sets.[101] According to the *Eighth Circuit Model Civil Jury Instructions*, jury instructions given during trial are usually not submitted to the jury in written form with the final instructions at the close of trial, but they may be submitted to the jury at the close of trial when the judge deems it appropriate.[102] There is research showing "dramatic" benefits to using written jury instructions.[103] As explained above, jury instructions, which include limiting instructions, guide the jury from the beginning to the end of trial. The jury's reliance on instructions makes their clarity important, but ensuring clarity can be complex.

II. Importance and Complexity of Limiting Instructions

In this Part, Section A explains the importance of clear limiting instructions, which help the jury to better understand and follow the instructions. The importance of clear limiting instructions is highlighted when considering the difficulty of detecting and correcting errors in the application of jury instructions. To further demonstrate the need for clarity, Section B discusses how courts have analyzed the admissibility of evidence of subsequent remedial measures, as an example of the complexity of limiting instructions.

98. FED. R. EVID. 105. *See generally* NINTH CIRCUIT MODEL CIVIL JURY INSTRUCTIONS, *supra* note 1, at Instruction 1.11 cmt. (noting that a court need not give limiting instructions *sua sponte*). R

99. *See* EIGHTH CIRCUIT MODEL CIVIL JURY INSTRUCTIONS, *supra* note 1, at Instruction 3. R

100. *See id.* at Instruction 3.01 notes on use (recommending that a written copy of the final instructions be sent to the jury room).

101. FED. R. CIV. P. 51; FED. R. CRIM. P. 30.

102. EIGHTH CIRCUIT MODEL CIVIL JURY INSTRUCTIONS, *supra* note 1, at Instruction 2.00. R *See generally id.* at Instruction 3.01 ("Remember, you have to follow all instructions, no matter when I give them, whether or not you have written copies.").

103. Forston, *supra* note 15, at 611 n. 20, 619–20. R

A. Importance of Clear Limiting Instructions

The jury system protects against the concentration and arbitrary exercise of power,[104] promotes democracy, and gives people the chance to participate in,[105] and learn about, the legal system.[106] Jury instructions, including limiting instructions, are an important part of the jury system. Although courts presume that juries follow instructions,[107] there are studies reporting that juries sometimes disregard them.[108] In addition, although judges instruct juries to keep an open mind throughout trial,[109] and although deliberations may help with

104. *See* William G. Young, *A Lament for What Was Once and Yet Can Be*, 32 B.C. INT'L & COMP. L. REV. 305, 310 (2009) ("Yet in a government of the people, the justice of the many cannot be left to the judgment of the few."); *see also* Powers v. Ohio, 499 U.S. 400, 406 (1991) (noting that one of the "greatest benefits" of the jury system is "the security it gives the people that they, as jurors actual or possible, being part of the judicial system of the country can prevent its arbitrary use or abuse" (quoting Balzac v. Porto Rico, 258 U.S. 298, 310 (1922))); Duncan v. Louisiana, 391 U.S. 145, 156 (1968) ("Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge."); *Criminal Law – Joint Trials – Nevada Supreme Court Reverses Conviction on the Basis of Spillover Prejudice. –* Stewart v. State*, No. 53100, 2010 WL 4226456 (Nev. Oct. 22, 2010)*, 124 HARV. L. REV. 1596, 1603 (2011) ("[T]he jury system has come to represent the democratic ideal . . . .").

105. *See* Joe S. Cecil, Valerie P. Hans & Elizabeth C. Wiggins, *Citizen Comprehension of Difficult Issues: Lessons from Civil Jury Trials*, 40 AM. U. L. REV. 727, 728 (1991) ("Lay participation in debates concerning public policies is a touchstone of a democracy. The Constitution enshrines this value not only by providing for a system of elected representatives, but also by recognizing the right to trial by jury."). *See generally* Paul D. Carrington, *The Civil Jury and American Democracy*, 13 DUKE J. COMP. & INT'L L. 79, 85 ("Because the jury is numerous and transitory, it is almost invulnerable to bribery or intimidation.").

106. *See* 2 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 117 (Eduardo Nolla ed., James T. Schleifer trans., Liberty Fund, Inc. 2010) (1835) ("The jury serves unbelievably to form the judgment and to augment the natural enlightenment of the people."); *cf.* Andrew Guthrie Ferguson, *Jury Instructions As Constitutional Education*, 84 U. COLO. L. REV. 233, 237–38 (2013) (noting that jury instructions can educate the jury).

107. Francis v. Franklin, 471 U.S. 307, 324 n.9 (1985) ("The Court presumes that jurors, conscious of the gravity of their task, attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them."); *see also* Weeks v. Angelone, 528 U.S. 225, 234 (2000) ("A jury is presumed to follow its instructions."). *See generally In re* U.S. Fin. Sec. Litig., 609 F.2d 411, 430 (9th Cir. 1979), *cert. denied*, 446 U.S. 929 (1980) ("Jurors, if properly instructed and treated with deserved respect, bring collective intelligence, wisdom, and dedication to their tasks, which is rarely equalled in other areas of public service.").

108. *See* Sklansky, *supra* note 2, at 424–29. R

109. *See* EIGHTH CIRCUIT MODEL CIVIL JURY INSTRUCTIONS, *supra* note 1, at Instruction 1.08 ("[D]o not make up your mind during the trial about what your verdict should be. Keep an open mind until after you and your fellow jurors have discussed all the evidence."). R

understanding of the jury instructions,[110] some studies show that jurors form ideas about how they might vote early on during the trial rather than during the jury deliberation.[111] When juries do not follow limiting instructions and consider evidence for a prohibited purpose, it affects parties' right to a fair trial.[112] On the other hand, when juries follow jury instructions, the law is likely to be applied more consistently and predictably. Consistent application of the law promotes fairness because it reduces disparities in legal consequences for actions that are the same or similar.[113] Predictable application of the law can help people refine their behavior to be in accordance with the law and can help attorneys shape their trial strategies to help protect clients' rights.[114] The following reasons further highlight the need for clear limiting instructions that are easy to understand and follow.

First, limiting instructions ask the jury to perform a complex task—consider certain evidence for one purpose but not for another purpose. Clear limiting instructions can help the jury understand their duty better. While there are studies indicating that juries are intellectually competent and capable of carrying out their duties,[115]

110. *See generally* Shari S. Diamond, Beth Murphy & Mary R. Rose, *The "Kettleful of Law" in Real Jury Deliberations: Successes, Failures, and Next Steps*, 106 NW. U. L. REV. 1537, 1553 (2012) (noting how jurors read instructions aloud during deliberations in the Arizona Jury Project).

111. Robert J. MacCoun, *Experimental Research on Jury Decision-Making*, 30 JURIMETRICS J. 223, 225 (1990).

112. EIGHTH CIRCUIT MODEL CIVIL JURY INSTRUCTIONS, *supra* note 1, at Instruction 1.08 ("If you decide a case based on information not admitted in court, you will deny the parties a fair trial. You will deny them justice."). R

113. *See generally* Jay Tidmarsh, *Unattainable Justice: The Form of Complex Litigation and the Limits of Judicial Power*, 60 GEO. WASH. L. REV. 1683, 1752 (1992) ("[T]he assumption of inter-transactional neutrality, which posits that legally similar transactions should receive the same set of procedures, is, at least in part, a necessary component of the form of adjudication.").

114. *See* Boddie v. Connecticut, 401 U.S. 371, 374 (1971) (noting that a "fundamental" characteristic of an "organized and cohesive society" is a "system of rules defining the various rights and duties of its members, enabling them to govern their affairs and definitively settle their differences in an orderly, predictable manner"). *See generally* Alexandra D. Lahav, *The Roles of Litigation in American Democracy*, 65 EMORY L.J. 1657, 1659 (2016) (proposing that litigation can be understood "as a process in which litigants perform self-government").

115. Harry Kalven, Jr., *The Dignity of the Civil Jury*, 50 U. VA. L. REV. 1055, 1062–67 (1964) (reporting agreement between judges and juries on the issue of liability in seventy-nine percent of cases in a study of thousands of personal injury cases by the University of Chicago Jury Project and concluding juries understand "well enough for its purposes"); *see also* VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 129, 163 (1986) ("Yet, the data from studies of hundreds of jury trials and jury simulations suggest that actual incompetence is a rare phenomenon. Juries do differ sometimes from the way judges would have decided, but it is on grounds other than incompetence.").

there are also studies suggesting that it is difficult for jurors to understand nuanced instructions.[116] When the rationale supporting the limiting instruction is not readily apparent or when there are reasons for and against admitting the evidence in court, following the limiting instruction may be especially difficult because it may not intuitively and immediately seem appropriate to do so. For example, some scholars have posited that the difficulty of following limiting instructions may be explained in part by the reactance theory.[117]

According to the reactance theory, when people believe their freedom is at risk, people may act to reestablish their freedom; thus, when jurors see a risk where their ability to freely consider the evidence is restricted, they may act to reestablish their freedom by not following limiting instructions that are difficult to understand and that do not seem to be supported by a convincing rationale.[118] The jury also needs to understand the limiting instruction quickly because, even though the jury is instructed to keep an open mind throughout trial,[119] just one piece of evidence could affect the jury's perception of the rest of the evidence.

Second, members of the jury are generally prohibited from testifying about statements made during jury deliberations,[120] and this makes it difficult to determine whether the jury erred in following jury

116. KADISH ET AL., *supra* note 22, at 30–31; Walter W. Steele, Jr. & Elizabeth G. Thornburg, *Jury Instructions: A Persistent Failure to Communicate*, 67 N.C. L. REV. 77, 94 (1988); *see* Alan Reifman, Spencer M. Gusick & Phoebe C. Ellsworth, *Real Jurors' Understanding of the Law in Real Cases*, 16 LAW & HUM. BEHAV. 539, 539 (1992) ("[T]his study found that actual jurors understand fewer than half of the instructions they receive at trial."). R

117. *See, e.g.*, Lieberman & Arndt, *supra* note 16, at 693–703. R

118. SHARON S. BREHM & JACK W. BREHM, PSYCHOLOGICAL REACTANCE: A THEORY OF FREEDOM AND CONTROL 4 (1981) ("In general, the theory holds that a threat to or loss of a freedom motivates the individual to restore that freedom."); Lieberman & Arndt, *supra* note 16, at 693–97. *See generally* Kerri L. Pickel, *Inducing Jurors to Disregard Inadmissible Evidence: A Legal Explanation Does Not Help*, 19 LAW & HUM. BEHAV. 407, 422 (1995) ("[I]f they decide that it is not necessarily unfair to consider the evidence, then they probably will be unwilling to ignore it completely, thus producing the backfire effect."). R

119. *See* EIGHTH CIRCUIT MODEL CIVIL JURY INSTRUCTIONS, *supra* note 1, at Instruction 1.08. R

120. *See, e.g.*, FED. R. EVID. 606(b); United States v. Tran, 122 F.3d 670, 672–73 (8th Cir. 1997) (holding, in a case where the jury allegedly discussed the defendant's failure to take the stand, against jury instructions, that jury members could not testify about their deliberations and thus it was not an error for the district court to deny a new trial or an evidentiary hearing); *see also* United States v. Rutherford, 371 F.3d 634, 640 (9th Cir. 2004) ("Under these circumstances, the district court did not err in concluding that testimony regarding Mrs. Rutherford's absence from the witness stand is inadmissible under Rule 606(b) because, as in *Falsia*, it does not concern facts bearing on extraneous or outside influences on the deliberation.").

instructions and whether the court must fix the error.[121] In federal courts, Rule 606(b)(1) provides, "During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury deliberations . . . . The court may not receive a juror's affidavit or evidence of a juror's statement on these matters."[122] The advisory committee's notes for Rule 606 explain that the rule seeks to preserve "freedom of deliberation, stability and finality of verdicts, and protection of jurors against annoyance and embarrassment."[123] Although there are exceptions to this rule,[124] since it may still be difficult to detect a jury's errors in the application of instructions,[125] it is best to convince the jury at the outset to follow jury instructions. The instructions should help the jury comprehend exactly what they are being asked to do or not do. Admittedly, deliberations later may help the jury to follow instructions because jurors can remind each other when certain evidence should not be considered.[126] On the other hand, if the instructions are confusing and nuanced, one juror's misunderstanding can affect the understanding of other jurors.[127]

121. *See* Peter Meijes Tiersma, *Reforming the Language of Jury Instructions*, 22 HOFSTRA L. REV. 37, 56 (1993).

122. FED. R. EVID. 606(b)(1).

123. FED. R. EVID. 606 advisory committee's notes on proposed rules; *see* McDonald v. Pless, 238 U.S. 264, 267 (1915); Tanner v. United States, 483 U.S. 107, 120–21 (1987) ("[F]ull and frank discussion in the jury room, jurors' willingness to return an unpopular verdict, and the community's trust in a system that relies on the decisions of laypeople would all be undermined by a barrage of postverdict scrutiny of juror conduct.").

124. FED. R. EVID. 606(b)(2) ("A juror may testify about whether (A) extraneous prejudicial information was improperly brought to the jury's attention; (B) an outside influence was improperly brought to bear on any juror; or (C) a mistake was made in entering the verdict on the verdict form."); *see McDonald*, 238 U.S. at 268–69 ("[T]here might be instances in which such testimony of the juror could not be excluded without 'violating the plainest principles of justice.' This might occur in the gravest and most important cases . . . ."). *See generally* Petition for Writ of Certiorari at 8–9, 14, 20, Peña-Rodriguez v. Colorado, 137 S. Ct. 855 (2017) (No. 15-606), 2015 WL 7008801 (arguing that, under the Sixth Amendment, courts should consider the testimony of jurors when offered to prove that racial bias "infected jury deliberations").

125. Tiersma, *supra* note 121, at 56–59; *see* Petition for Writ of Certiorari, *supra* note 124, at 21–28 (explaining that safeguards mentioned in *Tanner* do not sufficiently protect a party where racially biased assertions affect jury deliberations). R

126. *See* Shari S. Diamond & Neil Vidmar, *Jury Room Ruminations on Forbidden Topics*, 87 VA. L. REV. 1857, 1887–88 (2001).

127. *See* Gobert, *supra* note 29, at 280 ("The goal in theory is an impartial jury, not necessarily a jury of impartial jurors. . . . [T]he non-impartial juror threatens to undermine the impartiality of the jury. Accordingly, the search for an impartial jury becomes in practice the search for impartial jurors."). R

Third, it may be difficult to have a decision reversed based on reasons related to errors or lack of clarity in jury instructions.[128] In federal courts, Federal Rule of Civil Procedure 51 and Federal Rule of Criminal Procedure 30 govern requests for jury instructions, objections, and the preservation of claims of error.[129] To preserve a claim of error "in the jury instructions, 'a party must make a specific objection that distinctly states the matter objected to and the grounds for the objection.'"[130] In a civil case, in considering "whether the jury instructions, taken as a whole, fairly and adequately represent the evidence and applicable law," if a claim of alleged error in jury instructions is preserved, the court may apply an abuse of discretion standard.[131] If a claim of alleged error in the jury instructions is not preserved however, the court may apply a plain error standard, which requires a "miscarriage of justice" for reversal.[132] Courts "will not reverse an error in instructing the jury in a civil case if it is more probably than not harmless."[133]

Trial courts have much discretion in instructing the jury, and courts have stated that "It is not grounds for reversal that the charge might have been differently, or even better, worded; a district court has wide discretion on choice of language, and we will not find that discretion abused when the instructions as a whole accurately and adequately state the relevant law."[134] Scholars have likewise noted that appellate courts reviewing jury instructions often focus on the accuracy of the instructions and not necessarily the comprehensibility.[135]

128. Tiersma, *supra* note 121, at 52–59. *But see* Laurence J. Severance & Elizabeth F. Loftus, *Improving the Ability of Jurors to Comprehend and Apply Criminal Jury Instructions*, 17 LAW & SOC'Y REV. 153, 154 (1982) ("[S]eemingly minor changes in wording have been the basis for successful appeals . . . .") R

129. FED. R. CIV. P. 51; FED. R. CRIM. P. 30.

130. Lopez v. Tyson Foods, Inc., 690 F.3d 869, 875–76 (8th Cir. 2012); *see* FED. R. CIV. P. 51; FED. R. CRIM. P. 30.

131. *Lopez*, 690 F.3d at 876.

132. *Id. See generally* Csiszer v. Wren, 614 F.3d 866, 871 (8th Cir. 2010) (noting that under the plain error standard, a court may correct a "clear or obvious error" affecting substantial rights that "seriously affected the integrity, fairness, or public reputation of judicial proceedings"); Abromson v. Am. Pac. Corp., 114 F.3d 898, 902 (9th Cir. 1997).

133. *Abromson*, 114 F.3d at 902.

134. United States v. Kabat, 797 F.2d 580, 588 (8th Cir. 1986); *see also* Hardy v. Chemetron Corp., 870 F.2d 1007, 1009 (5th Cir. 1989) ("Acknowledging both our respect for the local judge's superior knowledge of the trial scene and the importance of enabling the trial judge to keep the trial on course, we accord considerable deference to the trial judge's evidentiary rulings.").

135. Tiersma, *supra* note 121, at 52–53 ("The legal standard for jury instructions remains, primarily, that they must accurately state the law, or that they must not mislead the jury. Indeed, courts at times still remark that failure of the jury to understand an instruc- R

Additionally, "In a civil case, the court may set aside the verdict . . . upon the ground that it is contrary to the law as given by the court;[136] but in a criminal case, if the verdict is one of acquittal, the court has no power to set it aside."[137] Considering the potential difficulty of remedying misunderstandings about jury instructions, it is important to help the jury understand and follow the instructions from the moment the instructions are given. However, as discussed in the following Section, providing easily understandable jury instructions can be complex.

B. The Complexity of Limiting Instructions and the Evidence of Subsequent Remedial Measures Example

This Section discusses evidence of subsequent remedial measures to demonstrate the complexity of following limiting instructions and the need for clear limiting instructions. Evidence of subsequent remedial measures is a good example because the reasons for admitting evidence of subsequent remedial measures only for a limited purpose may not be clear to the jury. The rationale may not be clear when the evidence rule related to the limiting instruction seeks to influence out-of-court behavior for public policy reasons in addition to increasing accuracy in fact-finding.[138] This is because people may not always agree on the best way to promote public policy. Where the rationale

tion is legally irrelevant."); *see* Biegler v. Kirby, 574 P.2d 1127, 1130 (Or. 1978) ("Confusion or misunderstanding of instructions is not misconduct justifying a mistrial."); Hoffman v. Deck Masters, Inc., 662 S.W.2d 438, 443 (Tex. Ct. App. 1983) ("A unanimous clerical error in recording the verdict will support a motion for new trial; however, a unanimous misconstruction of the language of the charge will not."). *But see* People v. Miller, 6 N.Y.2d 152, 155–56 (N.Y. 1959) (noting that the defendant was prejudiced when the trial court did not adequately answer questions from the jury about the elements of the crimes at issue in the case and that therefore a reversal is needed).

136. Sparf v. United States, 156 U.S. 51, 105 (1895) (quoting United States v. Taylor, 11 F. 470 (C.C.D. Kan. 1882)). *See generally* FED. R. CIV. P. 50 (motion for judgment as a matter of law); FED. R. CIV. P. 59 (motion for a new trial); FED. R. CIV. P. 60 (motion to vacate); FED. R. CRIM. P. 29 (motion for a judgment of acquittal); FED. R. CRIM. P. 33 (motion for a new trial); Bogosian v. Mercedes-Benz of N. Am., Inc., 104 F.3d 472, 482 (1st Cir. 1997) (noting that the abuse of discretion standard applies when reviewing a denial of a Rule 59 motion).

137. *Sparf*, 156 U.S at 105; *see also* Larsen, *supra* note 35, at 967 ("Although jurors retain the *power* to render verdicts in conflict with the judge's instructions on the law, modern juries lack the *right* to acquit against the evidence; and it is likely many jurors never even know of their nullification power—we never tell them."). *See generally* Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 37 (2003) (noting that the general verdict serves as a check on the government and can help correct "overinclusive general criminal laws"). R

138. *See generally* David P. Leonard, *In Defense of the Character Evidence Prohibition: Foundations of the Rule Against Trial by Character*, 73 IND. L.J. 1161, 1186 (1998) ("First, and most

behind the limiting instruction is not clear, an explanation may help the jury to understand and follow the instructions better. Section B.1 introduces the concept of strict liability. Section B.2 explains Rule 407, which prescribes the exclusion of evidence of subsequent remedial measures, although there are exceptions. Section B.3 discusses *Ault v. International Harvester Co.*, where the California Supreme Court took an approach contrary to that of Rule 407.[139]

1. Strict Liability

Federal and state courts generally agree about excluding evidence of subsequent remedial measures in negligence cases, but there is a split of opinion in strict liability cases.[140] Strict liability does not require a plaintiff to prove a defendant's negligence for tort liability.[141] While negligence focuses on the conduct of the defendant, strict liability focuses on "the dangerousness of the product regardless of the defendant's conduct."[142] Both the *Restatement (Second) of Torts*[143]

frequently, evidence rules can facilitate the adjudication process itself. Second, rules of evidence can be designed to promote or effectuate a substantive policy of the law.").

139. 528 P.2d 1148, 1150 (Cal. 1974).

140. *Compare* FED. R. EVID. 407, Hallmark v. Allied Prods. Corp., 646 P.2d 319, 326 (Ariz. Ct. App. 1982) ("We hold that the exclusionary rule of Rule 407 applies to actions based on strict products liability."), Kallio v. Ford Motor Co., 407 N.W.2d 92, 97–98 (Minn. 1987) ("We decline to follow *Ault*."), Rix v. General Motors Corp., 723 P.2d 195, 203 (Mont. 1986), Cover v. Cohen, 61 N.Y.2d 261, 270 (N.Y. 1984) (permitting the introduction of evidence of subsequent remedial measures "in a strict products liability case based upon a manufacturing defect" but proscribing use of the evidence "to establish fault in a strict products liability case based upon a defect in design or the failure to warn or adequately instruct"), Krause v. Am. Aerolights, Inc., 762 P.2d 1011, 1013 (Or. 1988), Duchess v. Langston Corp., 769 A.2d 1131, 1142 (Pa. 2001) ("Having considered the arguments on both sides of the question, we conclude that the federal approach . . . represents the better view."), *and* Hyjek v. Anthony Indus., 944 P.2d 1036, 1040 (Wash. 1997) ("We . . . apply[ ] the exclusionary rule to actions brought under a theory of strict products liability."), *with Ault*, 528 P.2d at 1150, Forma Scientific, Inc. v. BioSera, Inc., 960 P.2d 108, 109 (Colo. 1998), *and* D.L. v. Huebner, 329 N.W.2d 890, 905 (Wis. 1983).

141. JAMES A. HENDERSON, JR. & AARON D. TWERSKI, PRODUCTS LIABILITY: PROBLEMS AND PROCESS 14 (Vicki Been et al. eds., 7th ed. 2011). A court considers the following factors when deciding whether or not a defendant was negligent: (1) the probability that the defendant's conduct would lead to the injury or "P"; (2) the degree of harm that is likely to result from the defendant's conduct or "L"; (3) and the burden of precautions needed to avoid or minimize the injury or "B." United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947). "[L]iability depends upon whether B is less than L multiplied by P." *Id.*

142. Flaminio v. Honda Motor Co., 733 F.2d 463, 469 (7th Cir. 1984). Strict liability developed so that manufacturers selling defective products would bear the costs of injuries. Greenman v. Yuba Power Prods., Inc., 377 P.2d 897, 901 (Cal. 1962). Manufacturers could distribute the costs of accidents and injuries by passing on the costs to purchasers. Roger C. Henderson, *Product Liability and Admissibility of Subsequent Remedial Measures: Resolving the Conflict by Recognizing the Difference Between Negligence and Strict Tort Liability*, 64 NEB. L. REV.

and the *Restatement (Third) of Torts: Products Liability*[144] address the concept of strict liability. States differ on whether to use the *Restatements*, and if they do use them, differ on the version and extent of the *Restatements* that they choose to use.[145]

Section 402A of the *Restatement (Second) of Torts* imposes liability for physical harm caused by a "product in a defective condition unreasonably dangerous to the user or consumer or to his property" if the seller is "engaged in the business of selling such a product" and the product is "expected to and does reach the user or consumer without substantial change in the condition in which it is sold."[146] In applying Section 402A to design defect cases, courts have utilized the risk-utility balancing test,[147] the consumer expectations test,[148] or both.[149] As for the *Restatement (Third) of Torts: Products Liability*, Section 1 provides, "One engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for harm to persons or property caused by the defect."[150] Under Section 2, a product is considered defective if there is a manufactur-

1, 7 (1985). Courts and scholars also believed strict liability would encourage manufacturers to improve their products. *Id.* (citing Phillips v. Kimwood Mach. Co., 525 P.2d 955, 962–63 (Or. 1976)). Additionally, the public lacked information about the manufacturing process, making it difficult for plaintiffs to prove negligence. *Id.* (citing Phipps v. Gen. Motors Corp., 363 A.2d 955, 963 (Md. 1976)).

143. *See* RESTATEMENT (SECOND) OF TORTS § 402A (AM. LAW. INST. 1965).

144. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY §§ 1, 2 (AM. LAW. INST. 1998).

145. S*ee, e.g.*, Tincher v. Omega Flex, Inc., 104 A.3d 328, 399 (Pa. 2013) (deciding to use the *Restatement (Second) of Torts* Section 402A rather than the *Restatement (Third) of Torts*); Ruiz-Guzman v. Amvac Chem. Corp., 7 P.3d 795, 799–80 (Wash. 2000).

146. RESTATEMENT (SECOND) OF TORTS § 402A.

147. Factors considered in the risk-utility balancing test include "usefulness and desirability of the product," "safety aspects of the product," "availability of a substitute product which would meet the same need and not be as unsafe," "manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility," "user's ability to avoid danger by the exercise of care," "user's anticipated awareness of the dangers inherent in the product and their avoidability," and "feasibility . . . of spreading the loss." O'Brien v. Muskin Corp., 463 A.2d 298, 304–05 (N.J. 1983).

148. The consumer expectations test "recognizes that the failure of the product to perform safely may be viewed as a violation of the reasonable expectations of the consumer." *Id.* at 304; *see* RESTATEMENT (SECOND) OF TORTS § 402A cmt. i.

149. VICTOR E. SCHWARTZ, KATHRYN KELLY & DAVID F. PARTLETT, PROSSER, WADE AND SCHWARTZ'S TORTS: CASES AND MATERIALS 783 (Robert C. Clark et al. eds., 12th ed. 2010) (noting that when courts use both tests, consumer expectations may be a factor in the risk-utility balancing test).

150. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 1 (AM. LAW. INST. 1998).

ing defect,[151] a design defect,[152] or a defect from inadequate instructions or warnings at the time of sale or distribution.[153]

The analysis for strict liability under both the *Restatement (Second) of Torts* in Section 402A and the *Restatement (Third) of Torts: Products Liability* may involve considering the benefit and utility of a product along with the risks and harms posed by the product when determining whether the product is unreasonably dangerous and defective.[154] Courts and scholars have noted that although there are some differences, the balancing test used in strict liability cases is similar to the balancing test used in negligence cases,[155] especially in design defect cases and cases involving inadequate warnings and instructions.[156] The similarity of law has led some courts to determine that evidence of subsequent remedial measures should be excluded in both strict liability and negligence cases.[157]

151. *Id.* § 2(a) (stating that a manufacturing defect exists "when the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product").

152. For example, the *Restatement (Third) of Torts: Products Liability* states a design defect exists where "foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe." *Id.* § 2(b). Thus, many state legislatures and courts require that for a plaintiff to make out a prima facie case, the plaintiff must prove a reasonable alternative design in design defect cases. HENDERSON & TWERSKI, *supra* note 141, at 199.

153. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(c) (stating that a defect from inadequate instructions or warnings exists "when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the instructions or warnings renders the product not reasonably safe").

154. Flaminio v. Honda Motor Co., 733 F.2d 463, 467 (7th Cir. 1984). The comment section of the *Restatement (Third) of Torts* Section 2 explains that courts should engage in risk-utility balancing when analyzing claims for design defects and inadequate instructions or warnings. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. a. The comment section also lists factors that courts may consider, including the degree and probability of foreseeable risk of harm and consumer expectations. *Id.* § 2 cmt. f.

155. *E.g.*, *Flaminio*, 733 F.2d at 467; Kallio v. Ford Motor Co., 407 N.W.2d 92, 98 (Minn. 1987).

156. *Flaminio*, 733 F.2d at 466 ("[T]he strict liability duty to warn, as usually formulated . . . is hard to distinguish in practice from the duty to warn imposed by a negligence standard. This is because the defendant, to be held strictly liable, must have been able to foresee that the product would be unreasonably dangerous unless there was a warning." (citations omitted)); HENDERSON & TWERSKI, *supra* note 141, at 226. R

157. *See, e.g.*, *Flaminio*, 733 F.2d at 469; *Kallio*, 407 N.W.2d at 98.

2. Federal Rule of Evidence 407

Product liability cases based on strict liability and negligence may involve evidence of subsequent remedial measures. In federal courts, one reason that Rule 407 excludes evidence of subsequent remedial measures is to prevent the jury from viewing changes and improvements as an admission of fault.[158] As the Supreme Court explained in *Columbia & Puget Sound R.R. Co. v. Hawthorne*, "A person may have exercised all the care which the law required, and yet, in the light of his new experience, after an unexpected accident has occurred, and as a measure of extreme caution, he may adopt additional safeguards."[159] The fact that a product can be made safer or that an accident involving the product occurred does not necessarily mean that a defendant was negligent or that a product is defective, but the jury may easily believe so without careful consideration when presented with evidence of subsequent remedial measures.[160] Rule 407 also seeks to encourage individuals to take measures to improve product safety, and it was amended in 1997 and 2011 as follows:

> When measures are taken that would have made an earlier injury or harm less likely to occur,[161] evidence of the subsequent measures is not admissible to prove:
>
> negligence;
> culpable conduct;
> a defect in a product or its design; or
> a need for a warning or instruction.
>
> But the court may admit this evidence for another purpose, such as impeachment or—if disputed—proving ownership, control, or the feasibility of precautionary measures.[162]

158. *See* FED. R. EVID. 407 advisory committee's notes on proposed rules ("[T]he rule rejects the notion that 'because the world gets wiser at it gets older, therefore it was foolish before.'" (citing Hart v. Lancashire & Yorkshire Ry. Co., 21 L.T.R. N.S. 261, 263 (1869))); HENDERSON & TWERSKI, *supra* note 141, at 221. *See generally* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(b) (defining design defect). R

159. 144 U.S. 202, 208 (1892) ("The more careful a person is, the more regard he has for the lives of others, the more likely he would be to [adopt additional safeguards]; and it would seem unjust that he could not do so without being liable to have such acts construed as an admission of prior negligence.").

160. *Id.*; *see also* FED. R. EVID. 407 advisory committee's notes on proposed rules.

161. *See* Benitez-Allende v. Alcan Aluminio Do Brasil, S.A., 857 F.2d 26, 33 (1st Cir. 1988) (holding that Rule 407 did not apply to a report about defective cookers commissioned before the accident and used to plan a recall because the report itself would not have made the accident "less likely to occur"); Rocky Mountain Helicopters, Inc. v. Bell Helicopters Textron, 805 F.2d 907, 918 (10th Cir. 1986) (holding that a post-event study omitting and blacking out parts related to redesigns was admissible).

162. FED. R. EVID. 407. *See generally* Guido Calabresi, *The Decision for Accidents: An Approach to Nonfault Allocation of Costs*, 78 HARV. L. REV. 713, 718 (1965) ("[O]ne of the func-

This amendment to Rule 407 in 1997 made two important changes.[163] The first change clarified that Rule 407 only applies to changes the defendant makes "after the occurrence that produced the damages giving rise to the action" and not simply to any change made post-sale or post-distribution.[164] The second change specified that evidence of subsequent remedial measures is not admissible to prove a defect in a product or its design or a need for a warning or instruction, making it clear that Rule 407 applies to strict liability actions.[165]

A plaintiff may, however, try to introduce evidence of subsequent remedial measures through the Rule 407 exceptions.[166] One exception applies when a defendant disputes the feasibility of precautionary measures.[167] Thus, a plaintiff may try to ask a manufacturer's expert witness during cross-examination whether it was "feasible" or "reasonable" to include other features and measures that would have made a product safer to use.[168] If the expert witness denies that additional features would have been feasible or reasonable, the plaintiff can try to introduce evidence of subsequent remedial measures on grounds that the expert witness controverted and disputed feasibility.[169] Courts differ on how broadly they will construe the term "feasibility,"[170] and

tions of accident law is to reduce the cost of accidents, by reducing those activities that are accident prone.").

163. FED. R. EVID. 407 advisory committee's notes on 1997 amendment. The 2011 amendments to Rule 407 were "intended to be stylistic only." FED. R. EVID. 407 advisory committee's notes on 2011 amendment.

164. FED. R. EVID. 407 advisory committee's notes on 1997 amendment; *see* Bogosian v. Mercedes-Benz of N. Am., Inc., 104 F.3d 472, 481 (1st Cir. 1997) (noting that Rule 407 "does not apply where, as here, the modification took place before the accident that precipitated the suit"); Raymond v. Raymond Corp., 938 F.2d 1518, 1523 (1st Cir. 1991) ("The term 'event' refers to the accident that precipitated the suit."). Before the changes in the 2011 Amendment to Rule 407, the 1997 Amendment to Rule 407 began with "When, after an injury or harm allegedly caused by an *event*, measures are taken that . . . ." H.R. DOC. NO. 105-69, at 2 (1997) (emphasis added).

165. FED. R. EVID. 407 advisory committee's notes on 1997 amendment ("This amendment adopts the view of a majority of the circuits that have interpreted Rule 407 to apply to products liability actions."); HENDERSON & TWERSKI, *supra* note 141, at 222 (noting that Rule 407 "exclude[s] evidence of subsequent remedial measures in products liability cases regardless of whether plaintiff proceeds under negligence or strict liability").

166. *See* Dan M. Kahan, *The Economics—Conventional, Behavioral, and Political—of "Subsequent Remedial Measures" Evidence*, 110 COLUM. L. REV. 1616, 1626 (2010).

167. FED. R. EVID. 407.

168. Kahan, *supra* note 166, at 1626.

169. *Id.*; *see* Anderson v. Malloy, 700 F.2d 1208, 1213–14 (8th Cir. 1983) (finding that defendant controverted feasibility by testifying that addition of peepholes and chain locks on doors would provide only a false sense of security for the lodging).

170. This affects how easily a response will be deemed as disputing feasibility and thus opening the door to introduction of evidence of subsequent remedial measures at trial. *Compare Anderson*, 700 F.2d at 1213–14 (noting that feasibility "means not only 'possible,'

courts also differ in determining when a defendant is considered to have "disputed" feasibility.[171] Another Rule 407 exception is use of the evidence for impeachment.[172] If an expert witness in a product liability case says that the likelihood of an accident was too low or that a particular harm was not reasonably foreseeable to justify additional features or measures to a product, the plaintiff could try to introduce evidence of subsequent remedial measures on impeachment grounds.[173]

but also means 'capable of being . . . utilized, or dealt with successfully'" and thus determining that the defendant disputed the feasibility of adding peep holes and chain locks on doors because the defendant "in effect testified that these devices were not 'capable of being utilized or dealt with successfully'" (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 831 (unabridged ed. 1967)) (citing BLACK'S LAW DICTIONARY 549 (5th ed. 1979))), *with* Flaminio v. Honda Motor Co., 733 F.2d 463, 468 (7th Cir. 1984) (stating that defendants did not dispute feasibility by arguing that the design injuring the plaintiff was chosen over another design that defendants determined was of "greater danger").

171. *Compare* Ross v. Black & Decker, Inc., 977 F.2d 1178, 1185 (7th Cir. 1992) ("The defendant could have stipulated to the feasibility, or included the admission as an uncontested fact in the pretrial memorandum submitted by the parties, or in a pretrial motion accompanying the submission of the memorandum. It did not, nor did it make any objection when the district court ruled that the post-remedial measures would be admitted because the defendant contested feasibility. Because B & D made what has evolved into a tactical trial error by not stipulating to feasibility, this ruling was proper."), *and* Meller v. Heil Co., 745 F.2d 1297, 1300 n.7 (10th Cir. 1984) ("[U]nder these circumstances, the feasibility of an alternative design is deemed controverted unless the defendant makes an unequivocal admission of feasibility."), *with* McPadden v. Armstrong World Indus., Inc. (*In re* Joint E. Dist. & S. Dist. Asbestos Litig.), 995 F.2d 343, 346 (2d Cir. 1993) (deciding that feasibility was not a disputed issue where defendant "at no point argued that it was unable to issue a warning" and rather "vigorously denied that its product required a warning or was defective without a warning"), *and* Werner v. Upjohn Co., 628 F.2d 848, 854–55 (4th Cir. 1980) (rejecting plaintiff's argument that feasibility was controverted because defendant did not make a concession about feasibility).

172. FED. R. EVID. 407; Muzyka v. Remington Arms Co., 774 F.2d 1309, 1313–14 (5th Cir. 1985) (concluding it was error to exclude evidence of a redesign to a rifle offered for impeachment where the rifle that caused the accident was described as "the premier rifle, *the* best and *the* safest rifle of its kind on the market"); *Anderson*, 700 F.2d at 1213–14 (holding that where the defendant testified that adding peep holes and chain locks to doors would provide a false sense of security, plaintiffs could "show affirmatively that these devices were feasible, and furthermore . . . impeach the credibility of the defendants by showing that, although the defendants testified that they had done everything necessary for a secure motel, and that chain locks and peep holes would not be successful, they in fact took further security measures after"); Patrick v. S. Cent. Bell Tel. Co., 641 F.2d 1192, 1197 (6th Cir. 1980) ("We hold that the district court was not in error in admitting evidence of subsequent remedial repairs in order to rebut the suggestions made by South Central Bell's witnesses that the cables were within the eighteen feet statutory minimum at the time of the accident.").

173. Kahan, *supra* note 166, at 1626; *see* Petree v. Victor Fluid Power, Inc., 887 F.2d 34, 37, 42 (3d Cir. 1989) (holding that it was proper to impeach a defendant's expert witness who opined that a third party's alterations of the defendant's product "were not a reasonably foreseeable use when . . . sold by the manufacturer"). Courts analyze application of the R

A party may try to acknowledge technical feasibility but not practical feasibility of precautionary measures to keep out unwanted evidence of subsequent remedial measures.[174] Courts have suggested that if a party argues that certain remedial measures were not adopted because they were not cost-effective, this does not place feasibility in dispute and therefore does not trigger the Rule 407 exception.[175] Another way that a party may try to keep out evidence of subsequent remedial measures is to stipulate to the feasibility of remedial measures.[176] Of course, even if Rule 407 does not apply, Rule 403 may still

impeachment exception in Rule 407 carefully to prevent the exception from taking over the rule. *See* Hardy v. Chemetron Corp., 870 F.2d 1007, 1010–11 (5th Cir. 1989) ("[Plaintiff] first maintains that she should have been allowed to impeach [Defendant's] 'trial position' that negligent wiring had not caused her injury, which, minus a double negative, amounts to saying that she should have been allowed to adduce evidence of the rewiring to prove [Defendant's] negligence. This is precisely what Rule 407 was designed to prevent."); *Flaminio*, 733 F.2d at 468 ("Although any evidence of subsequent remedial measures might be thought to contradict and so in a sense impeach a defendant's testimony that he was using due care at the time of the accident, if this counted as 'impeachment' the exception would swallow the rule."). Some courts, however, have even permitted introduction of evidence of subsequent remedial measures to impeach an adverse witness called by plaintiff. *See* Daggett v. Atchison, Topeka & Santa Fe Ry. Co., 313 P.2d 557, 560–63 (Cal. 1957); Malcolm E. McLorg, Note, *Exceptions to the Subsequent Remedial Conduct Rule*, 18 HASTINGS L.J. 677, 679 (1967). *But cf. Petree*, 887 F.2d at 39 ("Wright explains that 'it is doubtful that the plaintiff, at common law, could have called the defendant to the stand, asked him if he thought he had been negligent, and impeached him with evidence of subsequent repairs if he answered "no."'" (quoting CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., 23 FEDERAL PRACTICE AND PROCEDURE 145 (1980))). In addition, noting the possibility that the accident may have "revealed the utility of the measures," some courts have held that evidence of subsequent remedial measures may not be used to impeach an expert who says certain measures at issue were not adopted because they were considered unreasonable because the utility of the measures may have become apparent through the occurrence of the accident at issue. Kahan, *supra* note 166, at 1627; *see* Kelly v. Crown Equip. Co., 970 F.2d 1273, 1278 (3d Cir. 1992) ("Dr. Watkins did not make a statement that the forklift's design was the best or the only one possible. He said only that it was an excellent and proper design. Thus, evidence of subsequent changes cannot serve to impeach his statements.").

174. HENDERSON & TWERSKI, *supra* note 141, at 224.

175. *See, e.g.*, Tuer v. McDonald, 701 A.2d 1101, 1109–10 (Md. 1997) ("Courts [that have construed the feasibility exception narrowly] have concluded that feasibility is not controverted—and thus subsequent remedial evidence is not admissible under the Rule—when a defendant contends that the design or practice complained of was chosen because of its perceived comparative advantage over the alternative design or practice; or when the defendant merely asserts that the instructions or warnings given with a product were acceptable or adequate and does not suggest that additional or different instructions or warnings could not have been given; or when the defendant urges that the alternative would not have been effective to prevent the kind of accident that occurred." (citations omitted)).

176. Bogosian v. Mercedes-Benz of N. Am., Inc., 104 F.3d 472, 481 (1st Cir. 1997).

bar certain evidence on grounds that its probative value is substantially outweighed by its unfairly prejudicial effect.[177]

3. *Ault v. International Harvester Co.*

Not all state courts follow the approach taken by federal courts for admissibility of evidence of subsequent remedial measures.[178] In 1974, the California Supreme Court heard *Ault v. International Harvester Co.,* a case in which the plaintiff was injured in an accident allegedly caused by a design defect in the gearbox of a motor vehicle.[179] After the accident, the gearbox was found broken, and the parties disagreed about whether the broken gearbox caused the accident, or whether the gearbox broke due to the driver's negligent driving or a roadway collapse.[180] The plaintiff alleged strict liability, breach of warranty, and negligence.[181] An important issue for the court was whether the trial court erred by admitting evidence that the defendant changed the design of the gear box after the accident by switching from using aluminum 380 to using a more durable and malleable iron.[182] The court first noted that in a strict liability case where a product is defective, the plaintiff was not required to show the defendant breached a duty of care.[183] The court then decided that evidence of subsequent remedial or precautionary measures should be excluded only "when such evidence is offered to prove negligence or culpable conduct."[184] Thus, the court held in *Ault* that evidence of subsequent remedial measures should not be barred in an action based on strict liability.[185] The court reasoned that a mass producer of goods is unlikely to refuse to improve its products because of the risk of continuous lawsuits and harm to its reputation.[186]

177. FED. R. EVID. 403; *see* Stecyk v. Bell Helicopter Textron, Inc., 295 F.3d 408, 415–16 (3d Cir. 2002) (noting that a trial court has broad power to prevent evidence of subsequent remedial measures from being improperly admitted "under the guise of the impeachment exception" through the use of Rule 407 and Rule 403); *see also* Edward J. Imwinkelried, *The Meaning of Probative Value and Prejudice in Federal Rule of Evidence 403: Can Rule 403 Be Used to Resurrect the Common Law of Evidence?*, 41 VAND. L. REV. 879, 895–96 (1988).

178. *See* HENDERSON & TWERSKI, *supra* note 141, at 222.

179. 528 P.2d 1148, 1149 (Cal. 1974).

180. *Id.* at 1150.

181. *Id.* at 1149.

182. *Id.* at 1149–50.

183. *Id.* at 1150.

184. *Id.*

185. *Id.*

186. *Id.* at 1152.

As competing policies behind Rule 407 demonstrate, it may not be easy for the jury to understand why it must limit its consideration of certain evidence.[187] An explanation, in the right circumstances, can help the jury to understand why it must follow the limiting instruction. Of course, the parties, the attorneys, and the judge would have to be mindful of the need to mitigate any potential side effects.

III. Specifying Both How the Evidence May and May Not be Used and Explaining the Rationale Behind the Limiting Instruction

This Part proposes ways to improve limiting instructions. Section A suggests using limiting instructions that specify both how the evidence may and may not be used, consistent with the approach of the model jury instructions currently used by courts in the Third Circuit. Section B suggests providing the jury with an explanation of the rationale behind the limiting instruction and also considers potential side effects.

A. Informing the Jury about How Evidence May and May Not be Used

In trial, parties and their attorneys try to keep out evidence that is unfavorable to their positions. Even if unfavorable evidence is admitted only for a limited purpose, its effect on the audience may be significant. The United States Supreme Court has recognized that there are "some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored."[188] Therefore, in a product liability case, a defendant may try to keep out unfavorable evidence of subsequent remedial measures by acknowledging technical feasibility, but not practical feasibility, of an alternative design in an attempt to prevent the feasibility exception in Rule 407 from being triggered and the court ruling the evidence admissible.[189] In a criminal case where the prosecution seeks to introduce evidence of prior convictions under

187. Pickel, *supra* note 118, at 422 (listing types of evidence that mock jurors seem to believe may be considered but actually are generally excluded by evidence rules). R

188. Bruton v. United States, 391 U.S. 123, 135 (1968).

189. HENDERSON & TWERSKI, *supra* note 141, at 224.

the exceptions in Rule 404(b)(2),[190] the defendant may try to stipulate to certain elements of a crime, may choose not to dispute certain elements at trial and concede those elements are proven, or may try to argue that the evidence is unfairly prejudicial under Rule 403 to exclude the evidence.[191] To reduce the possibility that the prosecution will introduce evidence of prior convictions to attack the defendant's character for truthfulness under Rule 609, the defendant may decide not to take the stand.[192]

However, if, despite such efforts, the court decides unfavorable evidence should be admitted for a limited purpose, the parties and their attorneys should consider asking the judge to provide the jury with limiting instructions that specify both how the evidence may and may not be used.[193] As explained earlier in Section I.B.2, the model limiting instructions used by courts in the Third Circuit tell the jury both how the evidence may and may not be used.[194] The model limiting instruction in the *Third Circuit Model Civil Jury Instructions* provides, "[This evidence can be considered by you as evidence that (describe limited purpose)]. It may not be used for any other purpose. [For

190. FED. R. EVID. 404(b)(2) (stating that evidence of a crime, wrong, or other act "may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident").

191. Hannah J. Goldman, Note, *Prejudicial Character Evidence: How the Circuits Apply* Old Chief *to Federal Rule of Evidence 403*, 84 FORDHAM L. REV. 281, 287 (2015). *See generally* Kevin Flynn, *Comment on The Prior Convictions Exception: Examining the Continuing Viability of* Almendarez-Torres *Under* Alleyne, 72 WASH. & LEE L. REV. 467, 470 (2015) ("Defendants do not want their juries to find out bad things about them if they do not have to."); Deena Greenberg, Note, *Closing Pandora's Box: Limiting the Use of 404(b) to Introduce Prior Convictions in Drug Prosecutions*, 50 HARV. C.R.-C.L. L. REV. 519, 522–23 (2015) ("[T]he possibility of introducing a prior conviction at trial informs the content of a plea bargain. . . . Thus, a prior conviction plays a significant role not only in the cases that go to trial, but also those that end with a plea.").

192. *See* FED. R. EVID. 404(b); FED. R. EVID. 609; Greenberg, *supra* note 191, at 524. R

193. *See* Linda J. Demaine, *In Search of an Anti-Elephant: Confronting the Human Inability to Forget Inadmissible Evidence*, 16 GEO. MASON L. REV. 99, 106–07, 121–22 (2008) (reporting a study where "Elaborate Forget Instructions," based on the idea that inadmissible evidence should be emphasized to motivate jurors to follow instructions, were more effective than "Minimal Forget Instructions," which are based on the idea that inadmissible evidence should not be emphasized); *cf.* Goldman, *supra* note 191, at 324 (suggesting that limiting instructions should "directly reference[ ] the prohibition on using any evidence to make inferences about one's character or that the defendant acted in character in the currently alleged crime"). *See generally* Laurence J. Severance, Edith Greene & Elizabeth F. Loftus, *Toward Criminal Jury Instructions that Jurors Can Understand*, 75 J. CRIM. L. & CRIMINOLOGY 198, 201 (1984) ("Ideally, jury instructions should be both legally accurate and understandable to the jurors who hear them."); *see* THIRD CIRCUIT MODEL CIVIL JURY INSTRUCTIONS, *supra* note 17, at Instruction 2.10. R R

194. THIRD CIRCUIT MODEL CIVIL JURY INSTRUCTIONS, *supra* note 17, at Instruction 2.10 cmt. R

example, you cannot use it as proof that (discuss specific prohibited purpose)].”[195] Another example of limiting instructions that specify how evidence may not be used is the instruction for use when a defendant’s prior similar act is used to prove an issue not concerning identity. The *Eighth Circuit Model Criminal Jury Instructions* state in part, “Remember, even if you find that the defendant may have committed [a] similar [act] [acts] in the past, this is not evidence that [he] [she] committed such an act in this case. . . . [Y]ou may consider the evidence of prior acts only on the issues[s] stated above.”[196]

Other versions of model limiting instructions could be updated to show that the parties can request, and the jury can be given, specification about how evidence may and may not be used. The Third Circuit model limiting instruction above uses “for example.” Since there may be multiple purposes for which certain evidence may not be considered when evidence is admitted for a limited purpose, the language “for example” could be used along with a description of one or a few specific prohibited purposes for which the jury is most likely to inadvertently consider the evidence.[197] The model limiting instruction in the *Third Circuit Model Criminal Jury Instructions* does not contain the specific phrase “for example,” but it still provides an example of a specific prohibited purpose, stating “You may not, however, use (name of declarant)’s statement as evidence that (name of victim) actually was looking for Defendant or that (name of victim) actually had a gun.”[198] If the language in the *Third Circuit Model Civil Jury Instructions* were adopted by courts, limiting instructions could provide similar to the following:

> (1) You [have heard] [will now hear] evidence that was received for [a] particular limited purpose[s]. This evidence can be considered by you as evidence that [describe limited purpose for which the evidence may be considered].
>
> (2) It may not be considered for any other purpose. [For example,] you cannot use it as proof that [describe prohibited purpose for which the evidence may not be considered].

195. *Id.* at Instruction 2.10.

196. EIGHTH CIRCUIT MODEL CRIMINAL JURY INSTRUCTIONS, *supra* note 90, at Instruction 2.08. R

197. THIRD CIRCUIT MODEL CIVIL JURY INSTRUCTIONS, *supra* note 17, at Instruction 2.10. R *See generally* PETER M. TIERSMA, COMMUNICATING WITH JURIES: HOW TO DRAFT MORE UNDERSTANDABLE JURY INSTRUCTIONS 15 (Nat’l Ctr. for State Courts, 2005–2006) (“An example or illustration is often essential to explaining something clearly.”).

198. THIRD CIRCUIT MODEL CRIMINAL JURY INSTRUCTIONS, *supra* note 17, at Instruction 2.11. R

> (3) Our legal system prohibits you, the jury, from considering this evidence for [insert prohibited purpose] because [insert explanation of the rationale behind the limiting instruction].[199]

The attorney requesting the limiting instruction could suggest which prohibited purpose the jury should be specifically warned about, and the judge could grant the request if appropriate. Additionally, the instruction could include an explanation about the reason why certain evidence may be considered only for a limited purpose as shown in section (3) of the limiting instructions provided above. For example, where Rule 407 applies, the explanation could state that a defendant taking subsequent remedial measures out of precaution does not necessarily mean the defendant was negligent before the accident. Furthermore, the limiting instruction could state that the evidence rule prohibiting consideration of evidence of subsequent remedial measures for certain purposes encourages defendants, such as product manufacturers, to improve product safety.

In some instances, one side might want to prevent the jury instructions from being clear because that side wants evidence to be considered broadly, even for a prohibited purpose.[200] However, courts should be wary of parties trying to win by confusing the jury. For example, if the court's instructions tell the jury that the presented evidence of subsequent remedial measures may be considered to determine the feasibility of precautionary measures, but that the evidence cannot be considered for any other purpose, it may not be immediately clear that the jury may not consider the evidence as proof of negligence.[201] Specifying a prohibited purpose can make the limiting instruction easier to follow because the instruction could reduce the inferential steps in the process of following instructions.

199. *See* THIRD CIRCUIT MODEL CIVIL JURY INSTRUCTIONS, *supra* note 17, at Instruction 2.10. The language above is based on Third Circuit Model Civil Jury Instruction 2.10 and contains additional suggestions by the author. **R**

200. Harvey S. Perlman, *Pattern Jury Instructions: The Application of Social Science Research*, 65 NEB. L. REV. 520, 538 (1986) ("Whatever the style of the instructions, they will inevitably emerge from an adversary process in which two lawyers seek to have the instructions read to favor their respective clients. Lawyers may believe it is in their best interest to resist simplified instructions.").

201. *See* FED. R. EVID. 407.

B. Explaining the Rationale Behind Limiting Instructions and Considering Potential Side Effects

Scholars have suggested that courts provide the jury with an explanation of the rationale behind the limiting instructions.[202] This suggestion is supported by studies reporting that the jury's perception of the fairness of a rule may affect whether or not the jury follows the rule.[203] An example that supports this theory is an experiment by Professor Shari Seidman Diamond and Professor Jonathan D. Casper where jurors were shown a video of a simulated price-fixing case.[204] A group of jurors was given an explanation of trebling damages and the rationale that such damages existed because Congress wanted to punish and prevent violations of the law.[205] A second group of jurors was also told about trebling damages with an admonition that this should not affect the size of the damages awarded, but without a Congressional rationale.[206] A third group of jurors was told about trebling damages without any explanation. Of the three, the first group of jurors who had been given an explanation and rationale awarded the highest damages.[207] The rationale behind limiting instructions may not be immediately clear to the jury when certain evidence is introduced at trial only for limited purposes and often for public policy reasons.[208] A jury's lack of awareness of the public policy underlying

202. Sklansky, *supra* note 2, at 456; *see also* Lieberman & Arndt, *supra* note 16, at 704; Eichhorn, *supra* note 16, at 353. *See generally* STEPHEN N. SUBRIN ET AL., CIVIL PROCEDURE: DOCTRINE, PRACTICE, AND CONTEXT 495 (4th ed. 2012) (listing modifications suggested by scholars to the jury system). R R

203. *See, e.g.*, Diamond & Casper, *supra* note 16, at 521–24, 534; Pickel, *supra* note 118, at 422 ("After careful consideration, if participants come to the conclusion, based on their sense of what is just, that it would be unfair to use the evidence to determine guilt, then they will disregard the evidence."). For example, Professor Kerri L. Pickel noted in her study that explanations help the jury to scrutinize the evidence with more care. *Id.* The study also found that whether or not mock jurors believe it was fair to use a piece of evidence in determining guilt influenced their decisions to follow instructions. *Id.* After hearing the explanation, if the mock jurors did not think it was unfair to consider the evidence, they were likely to disregard the instructions and consider the evidence, creating a "backfire effect." *Id.* R

204. Diamond & Casper, *supra* note 16, at 521–24, 534. R

205. *Id.*

206. *Id.*

207. *Id.*

208. *See generally* the advisory committee's notes describing the public policy rationale behind the rule. FED. R. EVID. 407, FED. R. EVID. 408, and FED. R. EVID. 411; Frederick Schauer, *On the Supposed Jury-Dependence of Evidence Law*, 155 U. PA. L. REV. 165, 168 (2006) (stating there are evidence rules that are "designed to create the proper incentives for socially desirable out-of-court conduct").

the limiting instructions may be one reason why it is not easy for the jury to follow the limiting instruction.

There are strong reasons both for and against admitting evidence of subsequent remedial measures in strict liability cases, and courts do not agree whether to admit or exclude such evidence.[209] On the one hand, courts seek to prevent the jury from viewing a change or improvement as an admission of fault and seek to encourage improvements to product safety.[210] On the other hand, some courts posit that a manufacturer will improve product safety regardless of evidence admissibility to avoid lawsuits and to preserve their reputation.[211] When presented with evidence involving strong competing policies concerning admissibility, the jury might question why it must consider evidence that seems so relevant only for a limited purpose. An explanation tells the jury why. This can be helpful because when a jury is presented with limiting instructions, they will likely have to make a conscious effort not to consider the evidence for prohibited purposes,[212] even though scholars have noted it is not easy to "dissect" evidence and consider it only for limited purposes.[213]

After hearing the explanation, regardless of whether the jury agrees with the rationale, the jury may feel more comfortable following the limiting instructions because it knows there are at least reasonable grounds for why it must consider the evidence only for certain purposes and not for prohibited purposes.[214] If a juror does not find the given rationale convincing, that juror should nevertheless recognize the importance of it applying the law consistently, not on the unpredictable basis of individual juror beliefs. An explanation of the rationale behind the limiting instruction can thus help mitigate the likelihood that the jury will consider the evidence for prohibited purposes and help the jury to follow limiting instructions.

209. *See supra* Part II.B.

210. *See* FED. R. EVID. 407 advisory committee's notes on proposed rules; *see also* Columbia & Puget Sound R. R. Co. v. Hawthorne, 144 U.S. 202, 208 (1892).

211. *See, e.g.*, Ault v. Int'l Harvester Co., 528 P.2d 1148, 1152 (Cal. 1974).

212. *See* Daniel M. Wegner, *Ironic Processes of Mental Control*, 101 PSYCHOL. REV. 34, 39 (1994) ("The occurrence of both intentional and counterintentional effects of mental control are dependent on an important precondition: The person must be attempting control.").

213. *See* Angela Paglia & Regina A. Schuller, *Jurors' Use of Hearsay Evidence: The Effects of Type and Timing of Instructions*, 22 LAW & HUM. BEHAV. 501, 504 (1998) ("For instance, Loh (1984) asserts that jurors would find limiting the use of information 'more intellectually challenging than disregarding evidence in its entirety' (p. 351), because of the greater cognitive activity required to compartmentalize and dissect the evidence." (citing WALLACE D. LOH, SOCIAL RESEARCH IN THE JUDICIAL PROCESS 351 (1984))).

214. Eichhorn, *supra* note 16, at 353. R

As shown in Part III.A earlier and as reproduced in paragraph (3) of the quote below, model limiting instructions and the accompanying committee notes could inform parties and their attorneys that they may ask the judge to provide the jury with a concise explanation of the rationale behind the limiting instruction:

> (1) You [have heard] [will now hear] evidence that was received for [a] particular limited purpose[s]. This evidence can be considered by you as evidence that [describe limited purpose for which the evidence may be considered].
> (2) It may not be considered for any other purpose. [For example,] you cannot use it as proof that [describe prohibited purpose for which the evidence may not be considered].
> (3) Our legal system prohibits you, the jury, from considering this evidence for [insert prohibited purpose] because [insert explanation of the rationale behind the limiting instruction].[215]

Although the trial judge already has wide discretion to comment on evidence,[216] and though wording showing that an explanation is available upon request may seem unnecessary, an express provision may help to remove hesitation. A party, or the attorney representing a party, may benefit from the explanation, but absent an express provision, hesitate to ask the judge to provide it. If the explanation or its wording seems likely to have a negative effect on a party's interest, the party or the attorney could object.

Judges would make final decisions as to what explanatory language to include in limiting instructions by considering how to present the jury with an accurate, fair, and easily understandable statement of the reasons supporting why the limiting instruction should be followed, without favoring one side. To provide as neutral an explanation as possible, judges could use as reference, among other things, the advisory committee's notes in evidence rules that usually contain a concise explanation of the rationale behind the evidence rule. Judges could also consult case law.

Courts should, however, carefully consider whether providing an explanation of the rationale behind limiting instructions would be beneficial for the jury on a case-by-case basis because potential side effects may exist. One potential side effect is that the jury may focus

215. *See* THIRD CIRCUIT MODEL CIVIL JURY INSTRUCTIONS, *supra* note 17, at Instruction 2.10. The language above is based on Third Circuit Model Civil Jury Instruction 2.10 and contains additional suggestions by the author. R

216. *See, e.g.*, United States v. Kabat, 797 F.2d 580, 588 (8th Cir. 1986); Jack B. Weinstein, *Improving Expert Testimony*, 20 U. RICH. L. REV. 473, 494 (1986) ("Federal judges, and some state judges, have extensive power to comment on the evidence. This power is seldom used.").

more on negative information due to the explanation. The *Eighth Circuit Model Criminal Jury Instructions* recognize the need to balance the benefits of an explanation with the repetition of negative information.[217] Accordingly, the committee notes of the *Eighth Circuit Model Criminal Jury Instructions* recommend that additional instructions, such as "You may not convict a person simply because you believe [he] [she] may have committed similar acts in the past," should be given only if requested by the defendant.[218] The committee explains that this explanation should be provided only if requested by the defendant, noting "The trade-off between explanation and repetition should be made by the defendant in the first instance."[219] Likewise, the parties, the attorneys, and the judge should carefully consider when it would be appropriate to provide the explanation. The explanation may be helpful when the evidence is prejudicial enough so that the jury is likely to consider the evidence for prohibited purposes despite limiting instructions and when the rationale behind the limiting instruction is not clear.

Another potential side effect of providing an explanation is the possibility that the jury will focus more on evaluating whether they agree with the rationale and less on their duty to follow the limiting instruction. Specifically, the jury might not be persuaded by the explanation especially when there are strong reasons both for and against admitting the evidence. If the jury is unconvinced by the explanation, it might not follow the instruction[220] and instead focus on whether the explanation is convincing enough to support the rule, even though that is not the duty of the jury.[221] Thus, while an explanation may help the jury to follow limiting instructions in some cases, the

217. EIGHTH CIRCUIT MODEL CRIMINAL JURY INSTRUCTIONS, *supra* note 90, at Instruction 2.08 notes on use. R

218. *Id.*

219. *Id.*

220. *See* Pickel, *supra* note 118, at 422. *See generally* Monique A. Fleming, Duane T. Wegener & Richard E. Petty, *Procedural and Legal Motivations to Correct for Perceived Judicial Biases*, 35 J. EXPERIMENTAL SOC. PSYCHOL. 186, 196–99 (1999) (noting that jurors' decisions are affected by legal motivation, defined in the study as "following the judge's precise instruction to correct or not regardless of one's personal beliefs," and motivated by procedural motivations, defined in the study as "correcting when told to because of the judge's instruction and not correcting when the information was ruled admissible because of personal beliefs that the procedural error was not severe enough to warrant correction if not required by law"). R

221. *See* William W. Schwarzer, *Communicating with Juries: Problems and Remedies*, 69 CALIF. L. REV. 731, 735 (1981) ("Justice Story and other members of the judiciary made clear to jurors that . . . it had no moral right to [decide questions of law] because the parties to an action were entitled to consistent application of the law.").

court should determine carefully when it would be helpful on a case-by-case basis because there can be unintended consequences.[222]

If the jury is provided with a limiting instruction and explained the rationale behind the limiting instruction, the judge could then consider reminding the jury immediately afterwards that the jury must follow the limiting instruction, regardless of whether the jury agrees with the rule or not. For example, the instructions given to the jury at the beginning of trial according to the *Ninth Circuit Model Civil Jury Instructions* contain the following language: "You must follow the law as I give it to you whether you agree with it or not."[223] The reminder tells the jury it should not focus on whether the reasons supporting the rule behind the limiting instruction are sufficiently convincing and could reduce potential confusion about the role of the jury.

The reminder should also be mild enough so that it does not trigger application of the reactance theory.[224] For example, one study reported that a simple admonition that "the testimony . . . was ruled inadmissible" did not produce a negative effect, but an overly strong admonition that evidence was ruled inadmissible and "Therefore, it must play no role in your consideration of the case. You have no choice but to disregard it" produced a negative effect.[225] Perhaps the reminder is currently not included in model limiting instructions because it is already included in model preliminary instructions and may seem unnecessarily repetitive. However, reminders and repetitions increase the possibility that the jury will follow instructions.[226] Attorneys may feel more comfortable if the reminder is included either in the model limiting instructions or the comments section of the model jury instructions.

222. *See* Pickel, *supra* note 118, at 422. **R**

223. NINTH CIRCUIT MODEL CIVIL JURY INSTRUCTIONS, *supra* note 1, at Instruction 1.3. **R**

224. *Cf.* Lieberman & Arndt, *supra* note 16, at 695 ("Reactance theory would predict that the greater the threat jurors perceive to exist, the greater the likelihood that they will be influenced by inadmissible evidence."). **R**

225. *See id.* (referring to the effect as "biasing effect" and explaining the results of a study published in Sharon Wolf & David A. Montgomery, *Effects of Inadmissible Evidence and Level of Judicial Admonishment to Disregard on the Judgments of Mock Jurors*, 7 J. APPLIED SOC. PSYCHOL. 205, 211(1977)).

226. *See* J. Alexander Tanford, *The Law and Psychology of Jury Instructions*, 69 NEB. L. REV. 71, 84–85 (1990) ("The one point upon which all researchers . . . agreed is that repeating the instructions two or more times aids comprehension and improves the accuracy of verdicts.").

Conclusion

The proposals in this Article seek to help the jury to follow limiting instructions, and thus promote the consistent application of the law. Considering the importance of the jury system and society's reliance on the jury following instructions,[227] it is important to provide the jury with instructions that are accurate, fair, and easily understandable.[228] This Article proposes two ways to improve limiting instructions. First, model limiting instructions could inform the jury specifically both how the evidence may and may not be used. Second, model limiting instructions could direct the parties and the attorneys to consider, on a case-by-case basis, whether to ask the judge to provide the jury with an explanation of the rationale behind the limiting instruction. An explanation could help the jury follow instructions when the jury would otherwise be likely to consider evidence for a prohibited purpose. Explanations can inform jurors of the rationale behind the limiting instruction when it is not clear so that it becomes clear why consideration of evidence that seems very relevant must nevertheless be limited. If the jury is provided with a limiting instruction and an explanation of the rationale behind the limiting instruction, a reminder immediately afterwards that the jury must follow the instructions, whether they agree with the rule or not, could also be helpful.

227. *See* Francis v. Franklin, 471 U.S. 307, 324 n.9 (1985); *see also* Greer v. Miller, 483 U.S. 756, 766 n.8 (1987) ("We normally presume that a jury will follow an instruction to disregard inadmissible evidence inadvertently presented to it, unless there is an 'overwhelming probability' that the jury will be unable to follow the court's instructions, and a strong likelihood that the effect of the evidence would be 'devastating' to the defendant." (citations omitted)).

228. *Cf. In re* U.S. Fin. Sec. Litig., 609 F.2d 411, 426–27 (9th Cir. 1979), *cert. denied*, 446 U.S. 929 (1980) (asserting that an attorney must prepare, organize, and present information in a form "understandable to the uninitiated").