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ADMONISHING JURORS TO DISREGARD WHAT THEY HAVEN'T HEARD

*Paul Bergman**

I. INTRODUCTION

Items of proffered evidence typically resemble people who aspire to be patrons of the latest popular nightclub. For each, the source of the difficulty is likely to be "getting in." Would-be nightclub denizens often face physical barriers such as armed guards and sawhorses. Potential evidence faces more abstract, but no less real, barriers—for example, that its probative value is substantially outweighed by its undue prejudicial impact,¹ or that it is inadmissible character evidence.²

Once through the door, however, there seem to be few controls on the behavior of either nightclub patrons or evidentiary items. The riotous behavior of wild nightclub patrons is frequently recounted in the popular press. The penchant of jurors to draw unwarranted inferences from evidence only occasionally leaks into public view, when someone confesses to a crime of which someone else was convicted years earlier. More often, jurors' analytical peccadilloes are the target of scholarly attack.³

The subtle measures by which popular nightclubs attempt to control the behavior of their patrons are beyond the scope of this Essay. But what measures do trial judges employ in an effort to control the inferential impact of evidence? One primary measure is the jury admonition. Through admonitions, judges attempt to prevent jurors from doing anything they please with evidence.

But just as nightclubs attempt to control only those patrons who get through the front door, so too are admonitions given only with respect to information that makes its way to the jury.⁴ This Essay explores the

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1. FED. R. EVID. 403.

2. FED. R. EVID. 404.

3. See, e.g., Richard D. Friedman, *Generalized Inferences, Individual Merits, and Jury Discretion*, 66 B.U. L. REV. 509, 509-12 (1986) (arguing that courts broadly tolerate juries' disregard of instructions); Adrian A.S. Zuckerman, *Law, Fact or Justice?*, 66 B.U. L. REV. 487, 494-98 (1986) (suggesting that social biases and discretion of juries afford them considerable opportunity to disregard law).

4. See 1 STEPHEN A. SALTZBURG & HARVEY S. PERLMAN, *FEDERAL CRIMINAL JURY*

advisability of also admonishing jurors to disregard information that is never presented to them. It raises the issue of whether jurors' unfamiliarity with the rules of evidence limits the accuracy of the factfinding process.

II. TWO KINDS OF ADMONITIONS

Admonitions given to jurors are either of the "prohibitory" or the "limiting" variety.⁵ A judge gives a prohibitory admonition when jurors have heard information that they may not legally use in arriving at a verdict. A prohibitory admonition instructs the jurors to disregard the inadmissible information.⁶ A common type of prohibitory admonition reads as follows: "You have seen exhibit [3]. It is now clear that the law does not allow it to be used as evidence in this case. Therefore, you must decide this case as if you had never seen the exhibit. You must completely ignore it in your deliberations."⁷

Limiting admonitions are necessary when jurors can legally use information in arriving at a verdict, but only for certain purposes. Evidence is often admissible for one purpose but inadmissible for another. A limiting admonition instructs the jurors to confine themselves to the admissible purpose.⁸ A common type of limiting admonition is the following:

You heard evidence about [other bank robberies] that the defendant [committed]. You may use this evidence to help you decide [whether the similarities between the other bank robberies and the one charged in this case suggests that the same person committed all of them]. This is the only use you may make of the evidence. The law does not allow you to convict a defendant or to punish him simply because he has done things, even bad things, not specifically charged as crimes in this case.⁹

INSTRUCTIONS § 1.18 (1985) for a broadly-worded admonition warning jurors not to draw inferences from excluded evidence. However, even that admonition applies only to information that jurors hear or see during a trial. It does not squarely address the more subtle problem of warning jurors against drawing inferences from evidence that they never hear or see at all.

5. See J. Alexander Tanford, *The Law and Psychology of Jury Instructions*, 69 NEB. L. REV. 71, 76 (1990).

6. *Id.* at 77; see 1 SALTZBURG & PERLMAN, *supra* note 4, § 2.04.

7. 1 SALTZBURG & PERLMAN, *supra* note 4, § 2.06.

8. See, e.g., 1 *id.* § 3.46.

9. 1 *id.* § 3.28B; see also FED. R. EVID. 404(b) (barring evidence of prior bad acts to show that defendant committed crime in question).

III. INFERENCES DRAWN FROM THE ABSENCE OF EVIDENCE

The effectiveness of admonitions to control juror behavior is open to question.¹⁰ With one exception, however, admonitions do not purport to instruct jurors with regard to information that has *not* been presented to them. The one exception concerns a criminal defendant's failure to take the stand and testify in his or her own defense.¹¹ When a criminal defendant does not testify, jurors are typically instructed that the defendant has a constitutional right not to testify,¹² and that the jurors are not to infer guilt from the exercise of that right.¹³

This instruction emanated from *Griffin v. California*,¹⁴ in which the United States Supreme Court held that a prosecutor's suggestion that jurors could infer guilt from a defendant's failure to testify violated the Fifth Amendment privilege against self-incrimination.¹⁵ In theory, however, *Griffin* could be satisfied if nothing at all were said about the defendant's failure to testify. That jurors are admonished not to infer guilt from silence reflects a fear that jurors are likely to draw such an inference unless they are specifically instructed not to. The fear is undoubtedly a reasonable one. Based on everyday experience outside the courtroom, most of us expect that if someone is wrongly accused, that person will speak up in his or her own defense. We regard failure to do so as a tacit admission of wrongdoing.

Why, however, should admonitions concerning information not presented to jurors be limited to a defendant's failure to testify? In a variety of situations, evidentiary rules bar the admission of evidence which, based on their social experiences, jurors might expect to exist if a party's claims are true.¹⁶ Just as socially-derived expectations might lead jurors to infer guilt from a criminal defendant's failure to testify, so might those expectations lead jurors to draw an adverse inference from a party's failure to offer other types of evidence.

10. See Tanford, *supra* note 5, at 86-87, 95, 106 (discussing experiments that suggest that neither instructions to disregard nor limiting instructions were effective, but rather provoked opposite of intended effect).

11. One could, of course, argue that jurors perceive a defendant's failure to testify similarly to the way they perceive other information that they are admonished to ignore. If one takes that position, then without exception admonitions are given only to warn jurors against using information actually presented to them but determined to be inadmissible.

12. See U.S. CONST. amend. V.

13. It has been suggested that this commonly given instruction may serve only to emphasize the defendant's silence, and that it should not be given over the objection of defense counsel. See Tanford, *supra* note 5, at 107.

14. 380 U.S. 609 (1965).

15. *Id.* at 613.

16. See, e.g., *infra* notes 19-24 and accompanying text.

If a party has no proof that evidence which a juror might expect it to offer exists, or if the party does have proof but chooses not to offer it, the jurors' drawing an adverse inference is not troubling. Quite the contrary, jurors are commonly told that they may draw an adverse inference from a party's failure to produce evidence.¹⁷ But when jurors expect a party to offer certain evidence, and the party would offer the evidence but for the existence of an exclusionary rule,¹⁸ a danger exists that an adverse inference will be unfairly drawn against the party who is unable to offer the evidence. Ironically, the adverse inference is likely to be exactly the opposite of the feared inference which gave rise to the exclusionary rule in the first place. The legitimate question, then, is how to prevent jurors' unfamiliarity with exclusionary rules of evidence from prejudicing parties who have available, but who cannot offer, evidence barred by an exclusionary rule.

Examine some common situations in which a party might be unfairly victimized by its inability to offer evidence because of an exclusionary rule. One of the settled aspects of the rules relating to character evidence law is that the prosecution is not allowed to offer evidence that a defendant has been previously convicted of a crime to prove that the defendant committed the crime with which he or she is presently charged.¹⁹ For example, if the defendant is charged with bank robbery, the prosecution cannot bolster its affirmative case by offering evidence that the defendant has previously been convicted of bank robbery and sexual assault.²⁰

However, everyday experience may lead jurors to believe that most people who commit serious crimes have previously committed crimes.²¹ Ignorant of exclusionary rules, jurors may well think that if evidence of the defendant's criminal past existed, the prosecution would surely offer it. As a result, the jurors might infer from the absence of evidence of a

17. See, e.g., 1 CALIFORNIA JURY INSTRUCTIONS: CIVIL (BAJI) No. 2.02 (7th ed. 1986) ("If weaker and less satisfactory evidence is offered by a party, when it was within his [or her] power to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust.").

18. See, e.g., FED. R. EVID. 404 (barring use of character evidence); FED. R. EVID. 802 (barring use of hearsay).

19. FED. R. EVID. 404(b) ("Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith."); see *supra* note 9 and accompanying text.

20. See FED. R. EVID. 404(b).

21. JAN M. CHAIKEN & MARCIA R. CHAIKEN, THE NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, VARIETIES OF CRIMINAL BEHAVIOR 55 (Rand Corp. 1982) (Study R-2814-N1J) ("The violent predators not only commit three or more types of crimes, but they do so at high rates.").

defendant's criminal past that the defendant is innocent. For example, in the bank robbery case a lay juror might reason as follows:

Based on what I've read and heard, I think that most people who commit serious crimes have engaged in a life of crime. But I haven't heard a thing about this defendant's past—so it must be pretty spotless. That inclines me to think that this defendant is not guilty.²²

Note that the inference produced by the exclusion of expected evidence (not guilty) is exactly the opposite of the guilty inference that might be drawn if the unduly prejudicial evidence of prior convictions were admitted.

The risk of fallacious reasoning based on the exclusion of expected evidence is not confined to the prosecution in criminal cases, nor even to criminal cases generally. Consider, for example, a civil suit in which the owner of a commercial building is sued for negligent maintenance of an escalator which resulted in injuries to the plaintiff. Though the defense contests the allegation of negligence, the defendant did in fact make certain alterations to the escalator following the plaintiff's accident. Evidence of those alterations, of course, is likely to be barred by the "subsequent repairs" exclusionary rule.²³

But in this context also, jurors' everyday experiences may well lead them to expect the excluded evidence to be offered and to draw adverse inferences from its absence. Here, jurors might reason as follows:

Plaintiff insists that there was something wrong with that escalator. But that's a building that people use all the time. I can't believe that if something were wrong with the escalator, the owner wouldn't fix it. Otherwise, the owner would be sued all the time. We didn't hear anything about the owner's fixing up the escalator, which leads me to think that there was nothing really wrong with it.

As before, the inference drawn from the exclusion of the expected evidence—lack of negligence—is the opposite of the inference that it is

22. This reasoning is more than a theoretical possibility. In their oft-cited work, *The American Jury*, Professors Kalven and Zeisel recount a case in which the judge stated: "[The] [p]rosecutor did not know [of the] defendant's prior conviction for [a] similar offense [and therefore failed to bring it out] and the jury concluded the defendant had no previous record and decided to acquit him." HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 128 (1966) (last alteration in original) (citation omitted).

23. FED. R. EVID. 407 ("When, after an event, measures are taken which, if taken previously would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event.").

feared would be drawn were the evidence of subsequent repairs admitted.²⁴

The risk that jurors will use socially-derived experiences to draw inferences from the absence of evidence reflects a tension within the jury system itself. On the one hand, we tell jurors to base their verdicts only on evidence, which consists of "the testimony and the exhibits in the case and nothing else."²⁵ On the other, we want and expect them to "consider the evidence in light of [their] own observations and experiences in everyday life."²⁶ Jurors might be forgiven for not understanding where in this continuum their expectations with regard to evidence which is not presented falls. Are those expectations a reasonable use of knowledge drawn from everyday life, or are they impermissible efforts to base verdicts on non-evidence?

Note that it is only when jurors' socially-based *expectations* are combined with their ignorance of exclusionary rules that a party may be prejudiced by its inability to offer excluded evidence.²⁷ If jurors do not expect an item of evidence to be offered, they will draw no inference from its exclusion. For example, assume that in the escalator case, the plaintiff tried to offer the out-of-court statement of a bystander: "That escalator has not been serviced in well over a month." The statement would almost surely be excluded as hearsay,²⁸ no exception coming readily to mind. Would that exclusion be likely to produce unwarranted inferences? Almost certainly not. Jurors have no expectations regarding hearsay statements made by bystanders at escalator sites. Thus, in the absence of juror expectations, exclusionary rules perform their function quite nicely.

24. The rationale for the rule is two-fold: (1) The conduct is equally consistent with injury by mere accident or through contributory negligence; and (2) admission of such evidence to show liability may discourage people from taking steps in furtherance of added safety. FED. R. EVID. 407 advisory committee's note.

25. 1 SALTZBURG & PERLMAN, *supra* note 4, § 3.03.

26. 1 *id.* § 1.05.

27. This assumes that the jurors in fact hear nothing about the excluded item of evidence. That is, either a motion *in limine* barring reference to the evidence has been sustained, or the attorney individually recognizes the inadmissibility of the evidence and does not even attempt to offer it. However, when reference *is* made to an item of evidence that is then excluded, judges typically admonish jurors to disregard it. This brings a number of other factors into play. See Tanford, *supra* note 5, at 86 ("Admonitions . . . are difficult for jurors to understand. . . . Admonishing jurors often provokes the opposite of the intended effect.")

28. FED. R. EVID. 802.

IV. RECOMMENDATIONS—POSSIBLE ADMONITIONS TO DISREGARD UNHEARD EVIDENCE

The question thus becomes whether it makes sense to admonish jurors not to draw adverse inferences from a party's failure to offer evidence in situations where (1) a party has the evidence available but is barred from presenting it, and (2) jurors are likely to expect the party to offer the evidence.²⁹ Any such admonition would have to be carefully worded, lest it suggest the existence of the excluded evidence.

One possible warning against the use of evidence not presented could inform jurors of the specific exclusionary rule which barred evidence in the particular case before them, and instruct them not to draw any inference from the absence of such evidence. This would not require a mini law school course. For example, in a criminal case in which the prosecution is excluded from offering evidence of a defendant's prior conviction, a judge might issue an admonition such as the following: "As a matter of law, any evidence that the defendant has previously been convicted of a crime must be excluded. You are not to draw any inference from the absence of evidence of a prior conviction."³⁰

However, the giving of such an admonition is inconceivable, as it would greatly undermine the policies which gave rise to the exclusionary rule in the first place. Regardless of the specific wording, jurors could not help but interpret the admonition as a disguised method of telling them that the defendant has been previously convicted. And like the person who is told not to think of pink elephants, a juror hearing such an admonition might think of little besides the defendant's criminal past.

A second possibility, then, might be to instruct jurors about all the exclusionary rules. For example, jurors might be told in all cases, civil and criminal, that as a matter of law, various classes of evidence are excluded including hearsay,³¹ past convictions,³² subsequent repairs,³³ in-

29. The question is akin to one that Professors Kalven and Zeisel raised some time ago: "[Bringing jurors' common knowledge to bear on their deliberations] raises the interesting problem of how the legal system expects the jurors to confine their deliberations to the trial record on the one hand, and yet on the other to bring into their deliberations their common experience with life." KALVEN & ZEISEL, *supra* note 22, at 132.

30. Note that such an admonition would not be given when, as under Federal Rule of Evidence 609, a prior conviction was admitted for impeachment purposes. FED. R. EVID. 609. Only the limiting admonition would be given, warning jurors to limit use of the conviction to credibility.

31. FED. R. EVID. 802.

32. FED. R. EVID. 404(b).

33. FED. R. EVID. 407.

surance³⁴ and settlement offers,³⁵ and that they are not to draw inferences from their possible exclusion.

In contrast to the first possibility, the wording of this admonition seems less likely to suggest the existence of excluded evidence. Because it refers to a variety of exclusionary rules, jurors may not link the admonition to the particular case they are hearing. Just as people told not to think about elephants, lions, tigers and bears may not think about any of them, so too might jurors told about a number of classes of excluded evidence put all of them out of their minds.

Yet these advantages may well be illusory. For one thing, given the extent to which jurors already find instructions confusing,³⁶ reference to a series of irrelevant rules is unlikely to promote accurate factfinding. Moreover, jurors trying one type of case may pay little attention to exclusionary rules not intended for that type of case. For instance, jurors hearing a criminal case may pay little heed to the instruction that subsequent repair evidence is excluded. The jurors may attend only to the remark about past convictions. If that is the case, the scope of the second instruction may be functionally no greater than that of the first.

A final possibility is for judges to make a generic admonition against drawing inferences from evidence never presented in court. For example, a judge might say the following:

There may be items of evidence to which reference was never made during this trial because of various exclusionary rules. These rules are designed to carry out important social policies. I instruct you not to speculate about what evidence may have been excluded, and to draw no inference whatsoever based on evidence that was not presented to you.

The biggest distinction between the third admonition and the first two is that the third one does not refer to any individual exclusionary rule. Hence, it seemingly escapes the criticism that it is nothing more than a winking suggestion that a particular type of excluded evidence does indeed exist. Furthermore, it does not stockpile a number of irrelevant exclusionary rules on an already overburdened jury. Finally, the

34. FED. R. EVID. 411.

35. FED. R. EVID. 408.

36. AMIRAM ELWORK ET AL., MAKING JURY INSTRUCTIONS UNDERSTANDABLE 12, 45-47 (1982); see, e.g., Robert P. Charrow & Veda R. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 COLUM. L. REV. 1306 (1979) (arguing that specific linguistic constructions used in jury instructions rather than legal complexity of case are responsible for juror incomprehension).

reference to "important social policies," though vague, at least gives jurors some explanation for the existence of exclusionary rules.

Perhaps the biggest criticism that can be directed against the third admonition is that it is so general that jurors will simply ignore it. However, avenues do exist for reinforcing its principles. First, the judge may secure the jurors' commitment not to speculate about evidence that is never presented to them as early as *voir dire*. Such public commitment is likely to increase the chances that the jurors will not speculate.³⁷ Second, if the admonition is given at the outset of a case, before jurors develop expectations about excluded evidence, it is likely to be more effective.³⁸

V. CONCLUSION

Everyday experience is a powerful and necessary part of jurors' reasoning. However, that experience may lead jurors to expect to hear evidence which evidence rules exclude. They may in turn draw adverse inferences from a party's failure to offer excluded evidence. Thus, rather than merely "evening up" the playing field, exclusionary rules may simply shift the prejudice from one party to the other. The generic admonition described above may help ensure that excluded evidence has no impact on juror decision-making.

37. See Tanford, *supra* note 5, at 108.

38. *Id.*

