

# BEYOND ADMISSIBILITY: A PRACTICAL LOOK AT THE USE OF EYEWITNESS EXPERT TESTIMONY IN THE FEDERAL COURTS

JENNIFER L. OVERBECK\*

*Eyewitness testimony is an important, persuasive, and often pivotal element in American trials. Jurors are strongly inclined to believe eyewitnesses, even in the face of other contradictory evidence, such as fingerprints. However, thirty years of psychological research into the workings of human memory have revealed that eyewitness accounts are frequently flawed, either because the witness's original perception of the event was flawed, or because the memory was subconsciously altered prior to testifying at trial. This, combined with jurors' inclination to trust eyewitnesses, leads juries to overcredit eyewitness testimony, resulting in false convictions. To help avoid such erroneous outcomes, the legal system must find a way to close the gap between eyewitness accuracy and juror belief in eyewitness accuracy. One controversial option is the use of expert psychological testimony to educate the jury about eyewitness fallibility. In this Note, Jennifer L. Overbeck draws on recent psychological research indicating that while expert testimony may be the best way of educating the jury, it is not successful in all circumstances. The Note argues that lawyers must harness psychological research to determine the circumstances that contribute to effective eyewitness expert testimony and incorporate this into their trial strategies. The Note concludes by suggesting some concrete ways of doing so.*

## INTRODUCTION

Few kinds of evidence are as compelling, or as damning, as eyewitness testimony: A human being, frequently a victim, takes the stand, looks at the defendant, and says, "He did it." Eyewitness testimony is a staple element of criminal cases. In 1999, eyewitness identifications led to 75,000 prosecutions in the United States.<sup>1</sup> Unfortunately, juries' acceptance of faulty eyewitness identifications

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<sup>1</sup> The Innocence Project, Mistaken I.D., <http://www.innocenceproject.org/causes/mistakenid.php> (last visited Feb. 20, 2005); see also Alvin G. Goldstein et al., *Frequency of Eyewitness Identification in Criminal Cases: A Survey of Prosecutors*, 27 BULL. PSYCHOLOGICAL SOC'Y 71, 72-73 (1989) (determining based on surveys of prosecutors that three percent of felony cases involve crucial eyewitness evidence).

is also a leading cause—possibly *the* leading cause—of wrongful convictions.<sup>2</sup>

In the 1970s, psychological experts discovered substantial and controversial evidence regarding the accuracy of eyewitness testimony. This evidence indicates that this testimony is frequently inaccurate and, perhaps more importantly, that juries overestimate eyewitness accuracy. In response to this problem, defense attorneys frequently offer—and judges sometimes allow—expert psychological testimony to assist the jury in assessing eyewitness credibility. These experts explain to the jury the potential fallibility of eyewitness identification, in the hope that this information will balance the jury's tendency to "overbelieve" eyewitnesses.<sup>3</sup>

Recent psychological studies indicate, however, that expert testimony about eyewitness accuracy is not effective in all circumstances. For those who fight to have experts admitted, it will be extremely disconcerting to realize that those experts may have no effect on the jury, depending upon how the expert's testimony is presented. It is essential for lawyers to learn the circumstances in which eyewitness experts will be effective. Psychological studies can provide the answers.

This Note suggests concrete ways of harnessing psychological research to formulate effective trial strategies. Part I of this Note will explain the role of eyewitness testimony in the courtroom, the psychological research indicating that such testimony is frequently inaccurate, and, most crucially, that juries are unaware of the weaknesses in eyewitness testimony. Part II will outline the justice system's response to this troubling phenomenon, with a focus on the admission of expert psychological testimony. Part III will highlight a new body of psychological studies suggesting that eyewitness expert testimony can be effective, but not in all circumstances. The Note concludes with a recommendation that legal practitioners look beyond the battle over

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<sup>2</sup> Many factors contribute to false convictions, but one of the most prominent is inaccurate eyewitness identification. In recent years, DNA testing has thrown some light on how frequently mistaken identification actually occurs. In more than two-thirds of the exoneration cases to date, conviction was based at least in part on faulty eyewitness identifications. Edmund S. Higgins & Bruce S. Skinner, *Establishing the Relevance of Expert Testimony Regarding Eyewitness Identification: Comparing Forty Recent Cases with the Psychological Studies*, 30 N. KY. L. REV. 471, 474 (2003) (discussing role of faulty eyewitness identifications in criminal convictions); see also Arye Rattner, *Convicted but Innocent: Wrongful Conviction and the Criminal Justice System*, 12 LAW & HUM. BEHAV. 283, 289 (1988) (estimating that mistaken identifications contributed to fifty-two percent of wrongful convictions); The Innocence Project, <http://www.innocenceproject.org/index.php> (follow "Causes & Remedies" hyperlink) (last visited Feb. 20, 2005) (discussing factors contributing to known wrongful convictions).

<sup>3</sup> See *infra* Part I.C.

admissibility to the important question of how expert psychological testimony may be most effectively used after admission.

## I

### EYEWITNESSES IN THE COURTROOM

From a jury's perspective, eyewitness testimony is one of the most persuasive forms of evidence. Nevertheless, psychological studies have indicated that even the most sincere eyewitnesses are frequently inaccurate. Various factors, such as the passage of time, the introduction of new information, and the identification procedures used by the police, can influence the accuracy of eyewitness accounts. Many jurors are unaware of the weaknesses of eyewitness testimony, and thus routinely overcredit it, which can lead to wrongful convictions.

#### A. *Juror Reliance on Eyewitnesses*

Eyewitness testimony can be extremely persuasive in the courtroom, particularly in criminal trials. In an experimental setting, the introduction of eyewitness testimony has been shown to increase conviction rates dramatically.<sup>4</sup> In mock trials conducted by Elizabeth Loftus,<sup>5</sup> jurors were four times more likely to convict when they heard eyewitness testimony than when they did not. Even when a defense attorney attacked the witness's credibility on cross-examination, conviction rates remained very high.<sup>6</sup>

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<sup>4</sup> See ELIZABETH F. LOFTUS, EYEWITNESS TESTIMONY 9–11 (1996) [hereinafter LOFTUS, EYEWITNESS TESTIMONY].

<sup>5</sup> Professor Loftus is the leading psychological authority in the field of eyewitness testimony. Her work spans thirty years and includes more than a dozen books and over 150 articles on the topic of memory. She has been a consultant for the Federal Bureau of Investigations, the United States Secret Service, the Internal Revenue Service, and the Department of Justice. She has received four honorary doctorates, some of the most prestigious awards in the field of psychology, and was recently named one of the top 100 most eminent psychologists of the twentieth century. *Elizabeth F. Loftus: Award for Distinguished Scientific Applications of Psychology*, 58 AM. PSYCHOL. 864, 864–66 (2003). Loftus's work provides the basis for many of the psychological theories I describe in this Note.

<sup>6</sup> See LOFTUS, EYEWITNESS TESTIMONY, *supra* note 4, at 9–11. One hundred and fifty subjects were asked to act as jurors. The jurors were divided into three groups. The researchers gave the jurors details about a hypothetical robbery, as well as several pieces of evidence supporting both the prosecution's and the defense's counterarguments. One group also heard an eyewitness testify that he saw the defendant commit the crime. Another group heard the eyewitness testimony, but also heard the defense cross-examination, which revealed that the witness was not wearing his glasses, although his vision was very poor. The remaining group did not hear any eyewitness testimony.

Hearing eyewitness testimony dramatically affected the outcome of the mock trials. Of the jurors who did not hear any eyewitness testimony, eighteen percent voted to find the defendant guilty. Once the eyewitness testimony was introduced, the percentage increased dramatically. Of the jurors who heard the eyewitness testimony (without cross-

This study indicates that jurors place substantial weight on eyewitness identification.<sup>7</sup> In fact, jurors place more weight on eyewitness testimony than on many other types of evidence, including fingerprint evidence.<sup>8</sup> Therefore, it is of paramount importance that witnesses are accurate, or at least that jurors are able to detect when they are inaccurate. Unfortunately, neither occurs often.

### *B. Eyewitnesses are Frequently Inaccurate*

Lawyers and judges have long been concerned with eyewitness accuracy. In an oft-cited passage from *United States v. Wade*, the Supreme Court noted that “the vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification.”<sup>9</sup> Since the 1970s, a growing body of psychological research has been available to add to the debate. Some of the major psychological findings are outlined below.

#### *1. Accuracy of Memories Over Time*

One factor that can influence eyewitness accuracy is the simple passage of time. Memory does not diminish at a uniform rate. Rather, we forget at a rapid rate immediately following an event, and the rate of forgetting then diminishes over time. This is called the “forgetting curve.”<sup>10</sup> Thus, even if an eyewitness testifies shortly after an event, her memory may already be substantially diminished.

Furthermore, what happens in the time between the observation and the recall of an event can influence, and even change, a person’s

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examination), seventy-two percent voted guilty. The defense cross-examination mitigated this effect, but only minimally: sixty-eight percent of the jurors who heard the eyewitness identification and the cross-examination voted guilty. *Id.*

<sup>7</sup> *Id.* at 11. For a similar study, see Amos Tversky & Daniel Kahneman, *Causal Schemas in Judgments Under Uncertainty*, in 1 *PROGRESS IN SOC. PSYCHOL.* 49, 70–71 (Martin Fishbein ed., 1980) (finding that decisionmakers are reluctant to revise existing interpretations of facts when new facts that undermine those interpretations come to light).

<sup>8</sup> See ELIZABETH F. LOFTUS & JAMES M. DOYLE, *EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL* § 1.05 (2d ed. 1992) (noting that jurors were more likely to convict based on eyewitness testimony than on fingerprint, handwriting, or polygraph evidence).

<sup>9</sup> 388 U.S. 218, 228 (1967). For more on *United States v. Wade*, see *infra* Part II.B.

<sup>10</sup> LOFTUS, *EYEWITNESS TESTIMONY*, *supra* note 4, at 53. H.E. Ebbinghaus first plotted the “forgetting curve” in 1885. His conclusions have been reaffirmed in many subsequent studies throughout the twentieth century. *Id.* at 53–54. See also Douglas J. Narby et al., *The Effects of Witness, Target, and Situational Factors on Eyewitness Identifications*, in *PSYCHOLOGICAL ISSUES IN EYEWITNESS IDENTIFICATION* 43 (Siegfried L. Sporer et al. eds., 1996) (noting that studies demonstrate that both recall and retention accuracy of human memory decline over time).

memory of it.<sup>11</sup> Witnesses frequently encounter new information after they experience an event. This information can come from other witnesses, investigators, attorneys, or any number of other sources.<sup>12</sup> Post-event information can enhance or compromise a witness's memory.<sup>13</sup> For example, suggesting a fact, such as the presence of a stop sign at the scene of an accident, greatly increases a witness's chances of remembering it, whether it was there or not.<sup>14</sup>

If witnesses encounter additional information that conflicts with their memory of an event, and therefore cannot be easily assimilated into the existing memory, they will compromise between the new information and the information they remember, creating a new memory.<sup>15</sup> Sometimes compromise is impossible, such as when a witness sees a stop sign but is later told it was a yield sign. Witnesses will then frequently "adjust" their memories to be consistent with the subsequent information, rather than with what they originally perceived.<sup>16</sup>

## 2. *Stress, Violence, and Weapon Focus*

Stress can affect a witness's original perception of an event as well as her subsequent recall of the event. Stress and other forms of emotional provocation can improve perception to some extent, but when stress levels get too high, they can impair a witness's ability to

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<sup>11</sup> See Narby et al., *supra* note 10, at 44–46 (noting that production of verbal statements, use of suggestive interrogation techniques, and use of mug shots and police sketches can influence witness memory).

<sup>12</sup> See LOFTUS, EYEWITNESS TESTIMONY, *supra* note 4, at 54; Narby et al., *supra* note 10, at 44–46.

<sup>13</sup> See LOFTUS, EYEWITNESS TESTIMONY, *supra* note 4, at 55–58; Narby et al., *supra* note 10, at 44–46.

<sup>14</sup> See LOFTUS, EYEWITNESS TESTIMONY, *supra* note 4, at 55–56. In one experiment, witnesses saw a car accident in which one car drove through a stop sign. Half of the witnesses were asked, "How fast was car A going when it ran the stop sign?" Of these witnesses, fifty-three percent later recalled seeing a stop sign. The other half of the witnesses were asked, "How fast was car A going when it turned right?" Only thirty-five percent of these witnesses later remembered seeing a stop sign. Simply mentioning the stop sign greatly increased the likelihood that the witness would remember it. *Id.*; see also Narby et al., *supra* note 10, at 44–46 (describing how post-event questioning can distort witnesses' memories).

<sup>15</sup> See LOFTUS, EYEWITNESS TESTIMONY, *supra* note 4, at 56. For example, when witnesses saw a group of eight demonstrators, and later read that there were either twelve or four demonstrators, the witnesses adjusted their memories accordingly. The witnesses who read that there were twelve demonstrators subsequently recalled an average of 8.9 people. The witnesses who read that there were four demonstrators recalled 6.4 people. *Id.* at 56–57.

<sup>16</sup> See *id.* at 56–58.

assess the situation accurately.<sup>17</sup> Violence is one major factor that causes stress for eyewitnesses of crimes, particularly victims. Researchers have found that both men and women recall violent events with much less accuracy than non-violent ones.<sup>18</sup> The presence of a weapon further undermines a witness's ability to remember events.<sup>19</sup> Witnesses focus on the weapon more frequently and for longer periods than other objects in the scene. This phenomenon is called "weapon focus."<sup>20</sup> As a result of weapon focus, witnesses spend less time focusing on other details of the crime, including the appearance of the assailant.<sup>21</sup> This may result in less accurate eyewitness identifications.<sup>22</sup>

### 3. *Witness Confidence*

Common sense may suggest that the more confident a witness is, the more likely it is that her memory is accurate. However, psychological research has shown little or no correlation between eyewitness confidence and accuracy.<sup>23</sup> In some studies, researchers asked eyewitnesses how confident they were in their ability to make a positive identification before viewing a lineup.<sup>24</sup> This pre-identification confidence proved to be a poor predictor of the witnesses's actual ability to identify the correct suspect in the lineup.<sup>25</sup> Other studies asked eyewitnesses about their confidence levels *after* they had viewed a lineup

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<sup>17</sup> See *id.* at 33 (citing Yerkes-Dodson law, first developed from studies of mice in 1908, and subsequently shown to apply to humans as well).

<sup>18</sup> See *id.* at 31 & fig.3.1 (citing Clifford and Scott study).

<sup>19</sup> See Narby et al., *supra* note 10, at 37-38 (discussing weapon focus).

<sup>20</sup> See BRIAN L. CUTLER & STEVEN D. PENROD, *MISTAKEN IDENTIFICATION: THE EYEWITNESS, PSYCHOLOGY, AND THE LAW* 101-02 (1995) [hereinafter CUTLER & PENROD, *MISTAKEN IDENTIFICATION*] (discussing studies of weapon focus phenomenon).

<sup>21</sup> See CUTLER & PENROD, *MISTAKEN IDENTIFICATION*, *supra* note 20, at 102; LOFTUS, *EYEWITNESS TESTIMONY*, *supra* note 4, at 35.

<sup>22</sup> CUTLER & PENROD, *MISTAKEN IDENTIFICATION*, *supra* note 20, at 102; LOFTUS, *EYEWITNESS TESTIMONY*, *supra* note 4, at 35. In one study, witnesses viewed one of two videotapes of a crime. One of the videotapes showed a robber holding a gun, and the other showed the robber hiding the gun in his pocket. Twenty-six percent of the witnesses who viewed the "brandished weapon" videotape made a correct identification, compared with forty-six percent of those who saw the "weapon concealed" videotape. CUTLER & PENROD, *MISTAKEN IDENTIFICATION*, *supra* note 20, at 102.

<sup>23</sup> See *id.* at 95. See also LOFTUS & DOYLE, *supra* note 8, § 1.03 (discussing common belief in correlation between confidence and accuracy). For further background, see Robert K. Bothwell et al., *Correlation of Eyewitness Accuracy and Confidence: Optimality Hypothesis Revisited*, 72 J. APPLIED PSYCHOL. 691 (1987).

<sup>24</sup> See CUTLER & PENROD, *MISTAKEN IDENTIFICATION*, *supra* note 20, at 95.

<sup>25</sup> See *id.* In nine such studies, the correlation coefficient between confidence and accuracy ranged from .00 to .20. A correlation coefficient of 1.00 indicates a precise linear relationship between two variables, while a correlation coefficient of .00 indicates no linear relationship between them. See *id.* at 77, 95.

and made an identification.<sup>26</sup> The correlation between post-identification confidence and accuracy was only slightly higher than that for pre-identification confidence.<sup>27</sup> Some studies have shown no relationship at all between confidence and accuracy, and some even suggest a negative correlation—that witnesses can be more confident when they are inaccurate than when they are accurate.<sup>28</sup>

In addition, witness confidence is subject to outside influences. Witnesses who are questioned repeatedly become more confident in their accounts, regardless of accuracy.<sup>29</sup> Those who are told they have identified the “correct” suspect also become more confident.<sup>30</sup> Similarly, briefing eyewitnesses about cross-examination—including the likelihood that opposing counsel will attempt to discredit them—increases eyewitness confidence, accuracy notwithstanding.<sup>31</sup> Furthermore, if a witness believes that she is not the only eyewitness, information about another witness’s identification can have a dramatic effect on her confidence.<sup>32</sup>

Taken together, this research indicates that although juries often consider eyewitness confidence in weighing credibility, confidence is an unreliable indicator of accuracy, and can be influenced by factors bearing no relation to the accuracy of a witness’s identification.<sup>33</sup>

#### 4. *Unconscious Transference*

The phenomenon of unconscious transference occurs when a witness has seen an individual in one situation, and then incorrectly

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<sup>26</sup> See *id.* at 95.

<sup>27</sup> See *id.* In nearly forty tests of the relationship between post-identification confidence and identification accuracy, the average correlation coefficient between the two factors was .25. *Id.* See *supra* note 25 for the definition of a correlation coefficient.

<sup>28</sup> See CUTLER & PENROD, MISTAKEN IDENTIFICATION, *supra* note 20, at 101.

<sup>29</sup> *Id.* at 186 (noting one other study with contrary findings). See generally Gary L. Wells et al., *The Tractability of Eyewitness Confidence and Its Implications for Triers of Fact*, 66 J. APPLIED SOC. PSYCHOL. 688 (1981) (discussing relationship between confidence and accuracy).

<sup>30</sup> See Gary L. Wells & Amy L. Bradfield, “Good, You Identified the Suspect”: *Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience*, 83 J. APPLIED PSYCHOL. 360, 374 (1998).

<sup>31</sup> See CUTLER & PENROD, MISTAKEN IDENTIFICATION, *supra* note 20, at 186–87.

<sup>32</sup> See *id.* at 188–89. Witnesses who were told that another witness had made the same identification were more confident in their own identification than witnesses who were told nothing about the other witness. Even witnesses who were told that the other witness had initially made the same choice, although later withdrew that choice, became more confident. On the other hand, witnesses who were told that the other witness originally chose someone else, but then changed to the same person as the witness had identified, were less confident than the control group. *Id.*

<sup>33</sup> See *id.* at 195–96 (summarizing numerous studies on confidence-accuracy relationship).

recalls seeing that person in a second situation.<sup>34</sup> For example, a person in a lineup may look familiar to the witness, and the witness may unconsciously interpret this familiarity as stemming from the crime. The familiar person may, however, only have been an innocent bystander, someone the witness saw just prior to the crime, or even someone the witness saw at an entirely different time from the crime.<sup>35</sup> An illustration of this point from an early study involved a railroad ticket agent who identified a sailor as the person who held him up at gunpoint. The sailor had an airtight alibi. It turned out that the sailor was stationed at a base near the railroad, and the ticket agent had sold him tickets on several prior occasions. The ticket agent recognized his face, and remembered him as the perpetrator.<sup>36</sup> This could happen in any eyewitness identification situation, but is particularly likely in situations where witnesses view more than one photo array or lineup. An eyewitness may see someone for the first time in an initial lineup, but if that same person is present in a second lineup, the witness could “unconsciously transfer his or her visualization of the subject . . . and incorrectly identify the subject in the second lineup.”<sup>37</sup>

##### 5. *Cross-Racial Identifications*

People are generally better at recognizing the faces of people who are the same race as they are.<sup>38</sup> Witnesses identify same-race

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<sup>34</sup> LOFTUS, EYEWITNESS TESTIMONY, *supra* note 4, at 142 (explaining unconscious transference).

<sup>35</sup> *See id.* at 142–43. In one experiment, a group of fifty students were told a story with six characters, one of whom was a criminal. The students were shown pictures of each character, who were generally similar in appearance. Three days later, the students were asked to choose the criminal from the story out of a photo array. In the photo arrays that did not include the criminal’s picture, sixty percent of the students chose someone else from the story who had a familiar face but was not the correct man. *See id.* at 143. For more on the phenomenon of unconscious transference, see generally John C. Brigham et al., *Disputed Eyewitness Identification Evidence: Important Legal and Scientific Issues*, 36 CT. REV. 12, 14 (1999); Read et al., *The Unconscious Transference Effect: Are Innocent Bystanders Ever Misidentified?*, 4 APPLIED COGNITIVE PSYCHOL. 3 (1990).

<sup>36</sup> LOFTUS, EYEWITNESS TESTIMONY, *supra* note 4, at 142.

<sup>37</sup> 4 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN’S FEDERAL EVIDENCE § 702.06[1][c] (Joseph M. McLaughlin ed., Matthew Bender 2d ed. 1997); *see also* Brigham et al., *supra* note 35, at 14 (indicating that incorrectly identifying individual in lineup will increase likelihood individual will be identified in future lineups or in-court identifications); Gabriel W. Gorenstein & Phoebe C. Ellsworth, *Effect of Choosing an Incorrect Photograph on a Later Identification by an Eyewitness*, 65 J. APPLIED PSYCHOL. 616, 620–21 (1980) (finding experimental subjects more likely to select individuals they had previously identified).

<sup>38</sup> LOFTUS, EYEWITNESS TESTIMONY, *supra* note 4, at 136–37. *See generally* Special Theme: *The Other-Race Effect and Contemporary Criminal Justice: Eyewitness Identification and Jury Decision Making*, 7 PSYCHOL. PUB. POL’Y & L. 3 (2001) (featuring several

faces correctly more often, and falsely identify them less often.<sup>39</sup> There is substantial psychological research to support the existence of this phenomenon, but there is little indication of *why* this is the case.<sup>40</sup> One theory is that people have more experience with their own race, and therefore are better able to recognize same-race faces than different-race faces. However, numerous studies have shown that witnesses with substantial exposure to another race were no better at recognizing different-race faces.<sup>41</sup> Another theory is that racial prejudice may influence eyewitness identification of different-race faces, but psychological research has found that racial attitudes have no impact on accuracy.<sup>42</sup> Regardless of the cause, reduced accuracy in cross-race identifications is highly relevant in any trial involving an eyewitness of a different race than the defendant.

### C. *Juries Do Not Know that Eyewitnesses Are Inaccurate*

Perhaps most importantly, psychological studies also illustrate that most people do not have a good understanding of the factors that influence the accuracy of eyewitness identifications. A number of studies have focused on potential jurors' understanding—or misunderstanding—of these factors.<sup>43</sup> These studies, conducted across different populations, indicate that potential jurors generally do not understand the influence these factors have. For example, only slightly more than half of the Americans surveyed were aware that people have more difficulty identifying people of other races than people of their own race.<sup>44</sup> Potential jurors are similarly unaware that viewing a person's picture in a photo array will increase the chances of

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articles on topic); John P. Rutledge, *They All Look Alike: The Inaccuracy of Cross-Racial Identifications*, 28 AM. J. CRIM. L. 207 (2001) (discussing cross-racial identifications).

<sup>39</sup> See CUTLER & PENROD, MISTAKEN IDENTIFICATION, *supra* note 20, at 104. In one experiment, the researchers assembled seventy-two photographs of black and white males and females. Each subject viewed twenty-four of the slides, chosen at random. After a five minute break, the subject viewed all seventy-two photographs in random order, and was asked to identify the faces she had seen before. Both blacks and whites were significantly better at recalling faces of their own race. See LOFTUS, EYEWITNESS TESTIMONY, *supra* note 4, at 139.

<sup>40</sup> See LOFTUS, EYEWITNESS TESTIMONY, *supra* note 4, at 139.

<sup>41</sup> See *id.* at 137–38.

<sup>42</sup> See *id.* at 139.

<sup>43</sup> See CUTLER & PENROD, MISTAKEN IDENTIFICATION, *supra* note 20, at 173–74. Several have used a single Knowledge of Eyewitness Behavior Questionnaire (KEBQ) across different populations. The KEBQ has fourteen questions, eight of which pertain to lay opinions of eyewitness identification. In the United States, researchers conducted the survey in Omaha and Seattle. *Id.*

<sup>44</sup> *Id.* at 174. Individuals in the United Kingdom and Australia were somewhat more likely to realize that cross-racial identifications were more likely to be inaccurate. *Id.*

picking that person out of a lineup.<sup>45</sup> Furthermore, many people surveyed grossly overestimated a witness's ability to retain memories.<sup>46</sup> These results offer a glimpse into lay misperception about eyewitness accuracy.

Rather than focusing on awareness of various factors, many recent studies seek to evaluate how well jurors actually judge eyewitness accuracy. In these studies, mock jurors read descriptions of prior eyewitness identification studies, and are asked to predict the accuracy of the resulting eyewitness identifications. For example, the mock jurors are told that in the prior study, the witnesses observed a "crime" and later made an eyewitness identification. The mock jurors are also told about any variables involved, for instance that some of the witnesses would see a perpetrator of their own race, and that some would see a perpetrator of a different race, or that some witnesses had seen the perpetrator appear in prior lineups. The mock jurors then predict the accuracy of the eyewitness identifications, based on the witness's particular conditions. Across several studies, the mock jurors repeatedly predicted a higher level of accuracy than the witnesses had actually demonstrated in the previous experiments.<sup>47</sup> These prediction studies indicate that jurors consistently overestimate the accuracy of eyewitness identifications.<sup>48</sup> Given the relationship between faulty eyewitness identifications and false convictions, educating juries about the weaknesses of eyewitness testimony is extremely important.

## II

### THE JUDICIAL SYSTEM'S RESPONSE

The judicial system has responded to the danger of eyewitness inaccuracy in several ways. The first response has always been to subject eyewitnesses to cross-examination. In addition, several new approaches have arisen following the development of the findings outlined above, including safeguards in the lineup and identification processes, and special jury instructions on the unreliability of eyewit-

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<sup>45</sup> *Id.* at 175.

<sup>46</sup> *See id.* at 175-76. Forty percent of the Omaha sample and forty-nine percent of the Seattle sample incorrectly thought that memory remains ninety to ninety-five percent accurate even after several months. *Id.*

<sup>47</sup> *See id.* at 177-79. For example, in one race-identification study, thirty-two percent of white witnesses correctly identified black suspects. The mock jurors had predicted that fifty-one percent of the witnesses would make a correct identification. In the same study, thirty-one percent of black witnesses correctly identified white suspects, but the mock jurors predicted that seventy percent would do so. *Id.* at 179 (reporting similar results for forgetting curve and unconscious transference).

<sup>48</sup> *See id.* at 179.

nesses. Over time, however, each of these techniques has proved inadequate to educate the jury about eyewitness inaccuracy. A final and more promising—although more controversial—option has been the use of expert testimony about eyewitness fallibility. I discuss each of these alternatives below.

### A. Cross-Examination

The traditional method for impeaching witnesses is cross-examination.<sup>49</sup> Eyewitnesses are cross-examined in almost every trial in which they testify.<sup>50</sup> Some courts have found that this is sufficient to demonstrate eyewitness inaccuracy to a jury.<sup>51</sup> For example, a defense attorney could cross-examine an eyewitness on the viewing conditions at the crime scene: Was it dark out? Raining? Defense counsel can reiterate any weaknesses in the testimony in closing argument, and ask the jury to draw inferences from these weaknesses. Yet even the most skillful cross-examination might not effectively expose inaccurate eyewitness identifications.<sup>52</sup> Many eyewitnesses are telling the truth as they recall it; they are simply mistaken. Because they believe they are telling the truth, they are somewhat less vulnerable to cross-examination.<sup>53</sup> Furthermore, for cross-examination to be effective, attorneys must be well versed in the factors that contribute to eyewitness inaccuracy. But attorneys are not psychologists, and research has shown that they are not particularly knowledgeable about the factors affecting accuracy.<sup>54</sup> Consistent with these difficulties, several studies indicate that when mock jurors see eyewitnesses cross-examined, even by experienced lawyers, the jurors are no better able to distinguish accurate from inaccurate eyewitness testimony.<sup>55</sup>

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<sup>49</sup> See *id.* at 143.

<sup>50</sup> See *id.*

<sup>51</sup> See, e.g., *United States v. Smith*, 122 F.3d 1355, 1358 (11th Cir. 1997) (holding cross-examination sufficient); *United States v. Larkin*, 978 F.2d 964, 971 (7th Cir. 1992) (holding defense counsel had “ample opportunity” to discuss hazards of eyewitness identification and “cast doubt upon witnesses’ eyewitness identification”); *Jackson v. Ylst*, 921 F.2d 882, 886 (9th Cir. 1990) (holding cross-examination sufficient); *Moore v. Tate*, 882 F.2d 1107, 1111 (6th Cir. 1989) (same); *United States v. Christophe*, 833 F.2d 1296, 1300 (9th Cir. 1987) (same).

<sup>52</sup> See *Brigham et al.*, *supra* note 35, at 23 (discussing reasons for ineffectiveness).

<sup>53</sup> See *id.* (noting that testing honesty of eyewitnesses will not reveal when they are honestly mistaken).

<sup>54</sup> See, e.g., CUTLER & PENROD, *MISTAKEN IDENTIFICATION*, *supra* note 20, at 159–68 (summarizing studies of lawyers’ knowledge of factors affecting eyewitness accuracy).

<sup>55</sup> See *id.* at 181–86 (citing numerous studies).

### B. Lineup and Identification Requirements

Mindful of potential eyewitness inaccuracy, the Supreme Court has developed procedural guidelines to help avoid the circumstances that may contribute to incorrect identifications. In *United States v. Wade*,<sup>56</sup> the Supreme Court ruled on lineups, the source of many eyewitness identifications, holding that identifications made without the defendant's counsel present are inadmissible.<sup>57</sup> In *Gilbert v. California*,<sup>58</sup> the Court held that an in-court identification following an illegal lineup would be inadmissible unless the prosecution could show that the in-court identification was based on a source independent of the lineup.<sup>59</sup> And, in *Stovall v. Denno*, the Court held that unnecessarily suggestive procedures that might contribute to inaccurate eyewitness identifications seriously undermine due process rights.<sup>60</sup>

Unfortunately, the Supreme Court has significantly retreated from its earlier requirements. In *Kirby v. Illinois*,<sup>61</sup> the Court held that *Wade* and *Gilbert* rights only apply after the initiation of formal proceedings against a defendant,<sup>62</sup> even though a substantial portion of lineups occur before indictment.<sup>63</sup> In *Manson v. Braithwaite*,<sup>64</sup> the Court decided that even if lineup procedures were suggestive, the resulting identification would be admissible if it was reliable under "the totality of the circumstances."<sup>65</sup> Cases such as these have eroded the procedural safeguards that might have limited the number of faulty eyewitness identifications. Some commentators have charged that "for better or worse, after *Kirby* . . . and *Manson*, many courts are not very careful in their handling of eyewitness evidence."<sup>66</sup>

Even if these limited procedural safeguards could reduce the chance that eyewitnesses will be subject to suggestive influences, they do nothing to protect against other causes of eyewitness inaccuracy,

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<sup>56</sup> 388 U.S. 218 (1967).

<sup>57</sup> *Id.* at 236-37.

<sup>58</sup> 388 U.S. 263 (1967).

<sup>59</sup> *Id.* at 272.

<sup>60</sup> 388 U.S. 293, 302 (1967) (holding that due process rights were implicated where defendant was handcuffed and taken alone to victim's hospital room so she could identify him as her attacker). The Court found, however, that in the circumstances of this case, the suggestive procedure was necessary because of the unstable medical condition of the witness. *Id.*

<sup>61</sup> 406 U.S. 682 (1972).

<sup>62</sup> *Id.* at 688-89.

<sup>63</sup> STEPHEN A. SALTZBURG & DANIEL J. CAPRA, *AMERICAN CRIMINAL PROCEDURE: CASES AND COMMENTARY* 755-56 (6th ed. 2000).

<sup>64</sup> 432 U.S. 98 (1977).

<sup>65</sup> *Id.* at 113 (citing *Stovall v. Denno*, 388 U.S. 293, 302 (1967)).

<sup>66</sup> SALTZBURG & CAPRA, *supra* note 63, at 771.

such as the forgetting curve, weapon focus, or cross-racial identifications. Furthermore, they can do nothing to protect against juror misunderstanding of the relationship between confidence and accuracy.

### C. Jury Instructions

Jury instructions offer another possible safeguard against inaccurate witness testimony. Unlike cross-examination, jury instructions are not limited to the scope of the direct examination, and they have an air of neutrality that cross-examination does not.<sup>67</sup> One early case supporting this approach is *United States v. Telfaire*.<sup>68</sup> In *Telfaire*, the D.C. Circuit Court of Appeals approved a model set of special instructions on identification. The instructions informed the jury that identification was an important element of the case, and reminded them that the government bore the burden of proving identification beyond a reasonable doubt. It informed the jury that eyewitness identifications are expressions of the witness's belief, and that the value of the identification depends on the circumstances. The instructions also identified some factors for the jury to consider.<sup>69</sup> A number of courts have followed the lead set by *Telfaire* and required cautionary instructions.<sup>70</sup> Others leave it to the trial judge's discretion whether or not to give an instruction.<sup>71</sup> However, a number of commentators have questioned whether a jury instruction is sufficiently compelling to impress upon the jury the potential unreliability of eyewitness identifications.<sup>72</sup> In addition, as with lawyers conducting cross-examinations, judges may not be sufficiently well-versed in the psychological research to instruct the jury correctly.<sup>73</sup>

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<sup>67</sup> CUTLER & PENROD, MISTAKEN IDENTIFICATION, *supra* note 20, at 255.

<sup>68</sup> 469 F.2d 552 (D.C. Cir. 1972).

<sup>69</sup> *Id.* at 558–59 (including factors such as circumstances of identification, amount of time eyewitnesses saw perpetrator, lighting conditions, distance from witness to perpetrator, whether witness knew defendant before crime, whether witness was influenced by police's identification procedures, and whether lineup was suggestive). In retrospect, some of the factors, such as eyewitness confidence, are not good indicators of accuracy. See discussion *supra* Part I.B.3.

<sup>70</sup> See, e.g., *United States v. Anderson*, 739 F.2d 1254, 1258 (7th Cir. 1984); see also *United States v. Greene*, 591 F.2d 471, 475 (8th Cir. 1979) (expressing strong preference for jury instructions when eyewitness testimony is substantial basis for identification).

<sup>71</sup> See, e.g., *United States v. Luis*, 835 F.2d 37, 41 (2d Cir. 1987).

<sup>72</sup> See, e.g., Robert Buckhout, *Nobody Likes a Smart Ass: Expert Testimony by Psychologists*, 3 SOC. ACTION & L. 41, 45 (1976) (questioning utility of and scientific basis for recommended instructions); David Starkman, *The Use of Eyewitness Identification Evidence in Criminal Trials*, 21 CRIM. L.Q. 361, 376–77 (1979) (questioning sufficiency of jury instructions).

<sup>73</sup> See CUTLER & PENROD, MISTAKEN IDENTIFICATION, *supra* note 20, at 255–64 (discussing various studies on efficacy of jury instructions with regard to eyewitness reliability).

#### D. Expert Testimony

A final, more controversial option is to have psychological experts testify about the factors that affect the accuracy of eyewitness identifications, with the hope that jurors will then be better able to assess the credibility of eyewitnesses. These experts would generally refrain from testifying about a particular witness, but would perform a more general "educational function for the jury."<sup>74</sup>

Attempts to introduce eyewitness expert testimony began in earnest in the 1970s, around the same time that psychological evidence about eyewitness testimony began to amass.<sup>75</sup> Initially, the federal courts were quite unreceptive to this kind of testimony. An early Ninth Circuit case, *United States v. Amaral*,<sup>76</sup> set four guidelines for determining whether eyewitness expert testimony would provide the jury with "appreciable help," which was a requirement for admissibility at the time.<sup>77</sup> First, the witness had to be qualified. Second, the testimony proffered had to be a proper subject for expert testimony, meaning that it could not be part of the jurors' common knowledge and would not usurp their role as the finders of fact. Third, the expert testimony had to conform to a generally accepted explanatory theory. Last, the probative value of the testimony must outweigh any prejudicial effects.<sup>78</sup> *Amaral* was not binding outside the Ninth Circuit, but was influential as one of the first decisions concerning eyewitness expert testimony.<sup>79</sup> Under *Amaral*, eyewitness testimony could be challenged on the grounds that the psychological evidence was not yet "generally accepted," that it involved facts which were within the jury's common knowledge, and that having an expert testify would be too prejudicial.<sup>80</sup> Some courts even ruled that expert eyewitness testimony was per se inadmissible for these reasons.<sup>81</sup>

The Federal Rules of Evidence, adopted in 1975, liberalized this standard. Expert testimony would be admissible if it would "assist" the jury.<sup>82</sup> Following the adoption of the federal rules, federal courts

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<sup>74</sup> Brigham et al., *supra* note 35, at 22 (discussing how eyewitness experts can help jurors weigh eyewitness testimony by describing factors that cast doubt on such testimony).

<sup>75</sup> See Steven D. Penrod et al., *Expert Psychological Testimony on Eyewitness Reliability Before and After Daubert: The State of the Law and the Science*, 13 BEHAV. SCI. & L. 229, 231 (1995) (summarizing history of expert psychological testimony).

<sup>76</sup> 488 F.2d 1148 (9th Cir. 1973).

<sup>77</sup> Brigham et al., *supra* note 35, at 19.

<sup>78</sup> *Amaral*, 488 F.2d at 1152-53.

<sup>79</sup> See Penrod et al., *supra* note 75, at 232 (discussing influence of *Amaral* test).

<sup>80</sup> *Amaral*, 488 F.2d at 1152-53.

<sup>81</sup> Brigham et al., *supra* note 35, at 20.

<sup>82</sup> FED. R. EVID. 702; see also Penrod et al. *supra* note 75, at 232 (discussing change in standards from *Amaral* test to federal rules).

began to admit eyewitness expert testimony with increasing frequency,<sup>83</sup> but such testimony was by no means favored.<sup>84</sup> Courts continued to rely on the guidelines set forth in *Amaral* to reject eyewitness expert testimony. Many courts said that the subject of the testimony was within the common knowledge of jurors, or that other methods existed to highlight an eyewitness's unreliability for the jury.<sup>85</sup> Others excluded testimony because it invaded the jury's role as the finder of fact,<sup>86</sup> did not conform to a generally accepted explanatory theory or lacked scientific basis,<sup>87</sup> or because the potential prejudice outweighed any probative value.<sup>88</sup>

The Supreme Court's landmark 1993 decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*<sup>89</sup> changed the federal standards for admitting expert testimony. Although the case did not involve eyewitness expert testimony, the standards it set forth apply to all types of expert testimony in federal cases.<sup>90</sup> The *Daubert* decision explicitly rejected a "general acceptance" requirement for expert testimony.<sup>91</sup> The Court identified two considerations that courts should keep in mind when deciding whether to admit expert testimony: whether the expert would testify as to scientific knowledge, and whether the testimony will assist the trier of fact.<sup>92</sup> To satisfy the first requirement, the expert's knowledge must derive from the scientific method.<sup>93</sup> When determining whether proffered testimony is scientific knowledge,

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<sup>83</sup> See Penrod et al., *supra* note 75, at 233.

<sup>84</sup> See *id.* at 239.

<sup>85</sup> See, e.g., *United States v. Curry*, 977 F.2d 1042, 1051–52 (7th Cir. 1992) (finding eyewitness expert testimony unnecessary because jury was generally aware of issues and because defense thoroughly cross-examined witnesses); *United States v. Rincon*, 984 F.2d 1003, 1006 (9th Cir. 1992) (finding that subject matter of eyewitness expert testimony was within common knowledge of jurors and that cross-examinations and jury instructions were sufficient); *United States v. Hudson*, 884 F.2d 1016, 1024 (7th Cir. 1989) (citing general awareness of jury); *United States v. Dowling*, 855 F.2d 114, 119 (3d Cir. 1988) (noting that testimony on observations of photo arrays was based on common sense). Such opinions often cited the "traditional safeguards" of cross-examination and closing argument as sufficient. See, e.g., *Rincon*, 984 F.2d at 1006 (citing *United States v. Christophe*, 833 F.2d 1296, 1300 (9th Cir. 1987)) (holding that effective cross-examination is sufficient to alert jurors). For a discussion of the inadequacies of these methods, see *supra* Part II.A.

<sup>86</sup> See, e.g., *United States v. Langford*, 802 F.2d 1176, 1179 (9th Cir. 1986); *Dyas v. United States*, 376 A.2d 827, 832 (D.C. Cir. 1977).

<sup>87</sup> See, e.g., *Rincon*, 984 F.2d at 1005; *United States v. Christophe*, 833 F.2d 1296, 1299 (1987); *United States v. Watson*, 587 F.2d 365, 369 (7th Cir. 1978).

<sup>88</sup> See, e.g., *Rincon*, 984 F.2d at 1006.

<sup>89</sup> 509 U.S. 579 (1993).

<sup>90</sup> *Id.* at 592. The Court did, however, model its test on that in *United States v. Downing*, 753 F.2d 1224 (3d Cir. 1985), a case involving the admission of eyewitness expert testimony. 509 U.S. at 591.

<sup>91</sup> 509 U.S. at 588–89.

<sup>92</sup> *Id.* at 592.

<sup>93</sup> *Id.* at 590.

courts may consider whether the theory can be or has been tested and whether it has been subject to peer review and publication.<sup>94</sup> Although not required, general acceptance can be a factor contributing to a finding of scientific knowledge.<sup>95</sup>

One important effect of *Daubert* is that it reduces the likelihood of general scientific validity objections to eyewitness expert testimony. While the methodology of individual studies may come under attack, the majority of modern psychological research on eyewitness accuracy derives from the scientific method. Most of the theories discussed in this Note have been published in selective, peer-reviewed scientific journals, and many of them are generally accepted within the field.<sup>96</sup>

Despite this, eyewitness expert testimony must still satisfy the second prong of *Daubert*, that the testimony will assist the trier of fact.<sup>97</sup> Thus, the common knowledge challenge survives *Daubert*, as does the argument that other methods of impeachment are sufficient. In most circuits, the courts of appeals have placed the discretion to admit or exclude experts solely with the trial courts, and the appellate courts are deferential to the lower court decisions.<sup>98</sup> However, the policy debate over whether such testimony *should* be admitted is alive and well.<sup>99</sup>

Despite this ongoing debate, in practice eyewitness expert testimony has become more frequent in recent years. Since 2002, a number of published federal court opinions have allowed or upheld the admission of eyewitness expert testimony.<sup>100</sup> Judges deciding

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<sup>94</sup> *Id.* at 593.

<sup>95</sup> *Id.* at 594.

<sup>96</sup> See Saul M. Kassin et al., *On the "General Acceptance" of Eyewitness Testimony Research: A New Survey of the Experts*, 56 AM. PSYCHOL. 405, 413–14 (2001) (discussing general acceptance of various theories of eyewitness accuracy). Note that under *Daubert*, general acceptance is not required, but rather it is one factor that may be considered indicative of "scientific knowledge." Eyewitness research that has not yet gained general acceptance, but which has been published and peer-reviewed, may be admitted under *Daubert*. See *supra* note 95 and accompanying text.

<sup>97</sup> 509 U.S. at 592–93.

<sup>98</sup> See Brigham et al., *supra* note 35, at 20. Only the Eleventh Circuit rejects eyewitness expert testimony per se. See *United States v. Smith*, 122 F.3d 1355, 1358–59 (11th Cir. 1997).

<sup>99</sup> For examples of both sides of this debate, see *infra* note 112.

<sup>100</sup> See, e.g., *United States v. Beck*, 393 F.3d 1088, 1092 n.2 (9th Cir. 2005) (noting district court's admission of eyewitness expert testimony to counter in-court identifications); *United States v. Mathis*, 264 F.3d 321, 342 (3d Cir. 2001) (finding exclusion of eyewitness expert testimony abuse of discretion); *United States v. Smithers*, 212 F.3d 306, 311, 314, 318 (6th Cir. 2000) (holding denial of eyewitness expert testimony on basis of unreliability abuse of discretion and noting trend toward allowing such testimony); *United States v. Sullivan*, 246 F. Supp. 2d 696, 697, 700 (E.D. Ky. 2003) (allowing eyewitness expert testimony and noting trend toward admissibility in some courts); *United States v. Angleton*, 269 F. Supp. 2d 868, 878 (S.D. Tex. 2003) (admitting certain testimony on "earwitness"

whether to admit such testimony have noted the gradual trend toward admission.<sup>101</sup> These published opinions likely represent only a fraction of the cases in which eyewitness testimony is offered. District court judges do not publish opinions in every case in which they rule on eyewitness expert testimony.<sup>102</sup> For example, if a defendant is acquitted in a case where eyewitness expert testimony was offered, there may not be a published opinion reflecting the court's decision, one way or the other.<sup>103</sup> If the court admits the testimony and the defendant is nonetheless convicted, the issue will not be raised on appeal, because the defendant will have already won on the admissibility issue.<sup>104</sup> Even where the defendant wishes to appeal a conviction on the basis of excluded expert testimony, the appeal will not always be granted.<sup>105</sup> Only when such an appeal is granted is there sure to be a judicial opinion on the issue.

Another way to measure the frequency of eyewitness expert testimony is to ask the experts themselves. In 2001, Kassin et al. published such a study.<sup>106</sup> The study targeted psychologists who specialized in memory or cognitive psychology. Although the central purpose of the survey was to assess the "general acceptance" of certain eyewitness theories among psychologists, the survey also addressed the psychologists' courtroom experiences.<sup>107</sup> The survey included questions asking psychologists how many times they had been asked to testify over the course of their careers, how many times they actually had testified, and how many times their testimony was countered by an opposing expert.<sup>108</sup> These experts had been asked to testify 3370 times, actually testified 960 times, and were countered with an opposing expert 76 times.<sup>109</sup> This was an increase of more than 250% since the early 1990s.<sup>110</sup> The rate of testimony could actually be even higher, because not every expert responded to the survey, and because the survey

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identification); *United States v. Lester*, 254 F. Supp. 2d 602, 612–13 (E.D. Va. 2003) (granting in part and denying in part eyewitness expert testimony).

<sup>101</sup> See, e.g., *United States v. Smithers*, 212 F.3d 306, 311 (2000) (noting trend toward allowing eyewitness expert testimony); *United States v. Sullivan*, 246 F. Supp. 2d 696, 697 (2003) (noting trend toward admissibility in some courts).

<sup>102</sup> For an example of such a ruling made without publishing an opinion, see, for example, *Beck*, 393 F.3d at 1092 n.2.

<sup>103</sup> CUTLER & PENROD, MISTAKEN IDENTIFICATION, *supra* note 20, at 20.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> Kassin et al., *supra* note 96, at 406.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 409.

<sup>109</sup> *Id.*

<sup>110</sup> NATHAN R. SOBEL ET AL., EYEWITNESS IDENTIFICATION: LEGAL & PRACTICAL PROBLEMS § 9:12 (2d ed. 2004) (citing Brian L. Cutler, *Strategies for Mitigating the Impact of Eyewitness Experts*, 37 THE PROSECUTOR 14, 14 (2003)).

targeted research scientists, who are not the only psychologists who may qualify as experts on eyewitness identifications.<sup>111</sup> In light of this evidence, one can conclude that while eyewitness expert testimony may not yet be commonplace, it has taken on a role of growing significance in courtrooms.

### III

#### LOOKING BEYOND ADMISSIBILITY

Despite the increasing rate at which eyewitness experts are testifying in court, the legal literature still focuses almost exclusively on the admissibility question.<sup>112</sup> While admissibility is undoubtedly an important issue, the fact remains that some experts are admitted, but lawyers have received little guidance on how to use them most effectively. Legal writers must turn, at least in part, to the practical question of how best to present eyewitness experts. These practical questions are crucial because recent psychological studies indicate that while eyewitness expert testimony *can* be effective, it is not *always* effective. Effectiveness depends upon the circumstances in which it is presented.<sup>113</sup>

##### A. *The Importance of Seeing Past Admissibility*

Psychological studies have long focused on the efficacy of eyewitness expert testimony.<sup>114</sup> In recent years, psychologists have moved

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<sup>111</sup> Kassin et al., *supra* note 96, at 407, 409 (identifying research scientists as target of survey).

<sup>112</sup> For articles focusing on admissibility, see generally Brigham et al., *supra* note 35; Ralph Norman Haber & Lyn Haber, *Experiencing, Remembering, and Reporting Events*, 6 PSYCHOL. PUB. POL'Y & L. 1057 (2000); Robert J. Hallisey, *Experts on Eyewitness Testimony in Court—A Short Historical Perspective*, 39 HOW. L.J. 237 (1995); Higgins & Skinner, *supra* note 2; Michael R. Leippe, *The Case for Expert Testimony about Eyewitness Memory*, 1 PSYCHOL. PUB. POL'Y & L. 909 (1995); Rutledge, *supra* note 38; Wayne T. Westling, *The Case for Expert Witness Assistance to the Jury in Eyewitness Identification Cases*, 71 OR. L. REV. 93 (1992); Thomas Dillickrath, Comment, *Expert Testimony on Eyewitness Identification: Admissibility and Alternatives*, 55 U. MIAMI L. REV. 1059 (2001); Brooke Whisonant Patterson, Note, *The Tyranny of the Eyewitness*, 28 L. & PSYCHOL. REV. 195 (2004); Scott Woller, Note, *Rethinking the Role of Expert Testimony Regarding Eyewitness Identifications in New York*, 48 N.Y.L. SCH. L. REV. 323 (2003/2004). *But see* LOFTUS & DOYLE, *supra* note 8, § 11 (discussing presentation of eyewitness experts); Cutler, *supra* note 110, at 18, 20, 43 (offering advice for countering eyewitness experts).

<sup>113</sup> Michael R. Leippe et al., *Timing of Eyewitness Expert Testimony, Jurors' Need for Cognition, and Case Strength as Determinants of Trial Verdicts*, 89 J. APPLIED PSYCHOL. 524, 525–27 (2004) [hereinafter Leippe 2004 Study] (analyzing effectiveness under variety of conditions).

<sup>114</sup> *See* CUTLER & PENROD, MISTAKEN IDENTIFICATION, *supra* note 20, at 218–24 (summarizing such efficacy studies, some of which were conducted as early as 1980). Early studies generally manipulated the presence of eyewitness testimony in mock trials and compared conviction rates between control group juries and those that had heard the

beyond the basic question of whether such testimony can ever be effective. Psychological studies now seek to understand how to maximize the effect of eyewitness testimony, or alternately, how to undermine an opponent's eyewitness expert. For example, psychologists have attempted to measure the comparative effectiveness of expert testimony when the prosecution's case is strong or weak,<sup>115</sup> when the expert is countered by another expert or unopposed,<sup>116</sup> and when the expert testifies at varying stages of the trial.<sup>117</sup> These studies are far more nuanced than early studies, in which the mere event of the expert's testimony was the sole focus of the trial presented to mock jurors. In contrast, the more elaborate studies include substantial non-eyewitness evidence, and the eyewitness experts are "presented and questioned without much fanfare . . . [or] specificity."<sup>118</sup> This

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expert testimony. See Jennifer L. Devenport et al., *How Effective Are the Cross-Examination and Expert Testimony Safeguards? Jurors' Perceptions of the Suggestiveness and Fairness of Biased Lineup Procedures*, 87 J. APPLIED PSYCHOL. 1042, 1045-46 (2002). In general, these studies found that the expert testimony produced a general skepticism of eyewitnesses, known as a skepticism effect, rather than a more nuanced judgment based on psychological factors. See Leippe, *Case for Expert Testimony*, *supra* note 112, 940-47. See also Jennifer L. Devenport & Brian L. Cutler, *Impact of Defense-Only and Opposing Eyewitness Experts on Juror Judgments*, 28 LAW & HUM. BEHAV. 569, 570 (2004) [hereinafter Devenport & Cutler Study] (discussing skepticism effect). On its face, a skepticism effect appears less desirable than a sensitization effect, which occurs when the expert testimony educates the jury as to the factors that are more or less correlated with eyewitness accuracy, and the jury uses this information to judge the accuracy of a given witness. *Id.* Some members of the legal and psychological professions have also expressed concern that skepticism about eyewitnesses would have a halo effect, and lead to unwarranted juror skepticism of other elements of the trial. WEINSTEIN & BERGER, *supra* note 37, at 250. However, Michael Leippe has pointed out that the methodologies used in the studies tended toward demonstrating skepticism, and perhaps could not entirely distinguish it from juror sensitization. Leippe, *Case for Expert Testimony*, *supra* note 112, at 941. These studies, individually and as a group, have been used by lawyers and psychologists to argue that eyewitness expert testimony is effective in assisting juries to come to more accurate conclusions, and should be admitted. See, e.g., CUTLER & PENROD, *MISTAKEN IDENTIFICATION*, *supra* note 20, at 216-24 (describing studies that have been used to support use of eyewitness expert testimony, although expressing skepticism about effectiveness of such testimony under all circumstances); Deborah Davis & William C. Follette, *Foibles of Witness Memory for Traumatic/High Profile Events*, 66 J. AIR L. & COM. 1421, 1544-45 (2001) (arguing for use of expert eyewitness testimony); Haber & Haber, *supra* note 112, at 1093 (same); Hallisey, *supra* note 112, at 238-39, 282-86 (same); Leippe, *Case for Expert Testimony*, *supra* note 112, at 947-52 (same); Rutledge, *supra* note 38, at 209-11, 227 (same); Westling, *supra* note 112, at 125-26 (same); Patterson, *supra* note 112, at 202 (same); Woller, *supra* note 112, at 347-52 (same).

<sup>115</sup> Leippe 2004 Study, *supra* note 113, at 525-26.

<sup>116</sup> Devenport & Cutler, *supra* note 114, at 570.

<sup>117</sup> Leippe 2004 Study, *supra* note 113, at 526.

<sup>118</sup> *Id.* at 537. The hypothetical robbery/murder case in the Leippe 2004 Study also included evidence about the amount of money found in the defendant's clothing, the blood on the defendant's clothing, evidence of a struggle (or lack thereof) by the defendant, and an alibi witness for the defendant. *Id.* at 529-30.

more accurately represents the conditions in which most juries are asked to assess eyewitness credibility. Thus, this body of research may prove particularly helpful to lawyers and judges as they decide how to present expert eyewitness testimony after it has been admitted.

What is troublesome is the fact that a number of these studies have found eyewitness expert testimony to be ineffective in situations where one would expect it to be especially powerful.<sup>119</sup> Two recent studies provide examples. In October 2004, Jennifer Devenport and Brian Cutler published a study entitled *Impact of Defense-Only and Opposing Eyewitness Experts on Juror Judgments*.<sup>120</sup> The goal of Devenport and Cutler's research was to determine the extent to which a prosecutor or plaintiff's eyewitness expert testimony would mitigate the effect of a defendant's eyewitness expert testimony. Based on previous research, Devenport and Cutler expected that when there was no opposing expert, the defense expert's testimony would create jury sensitization, skepticism, or a combination of these effects.<sup>121</sup> Devenport and Cutler further hypothesized that opposing expert testimony would reduce the ability of defense experts to educate the jury about factors affecting eyewitness accuracy.<sup>122</sup>

Although they set out to demonstrate opposing expert testimony's capacity to undermine the effectiveness of a defense eyewitness expert, Devenport and Cutler instead found that the defense expert testimony produced neither sensitization nor skepticism.<sup>123</sup> If the defense expert had no such effect on the jury, then there was nothing for the prosecution expert to offset.<sup>124</sup> Trials with no experts, defense-only experts, and opposing experts all had comparable results.<sup>125</sup> This is an extremely significant result, and most of the discussion in Devenport and Cutler's article is devoted to this point.<sup>126</sup> This finding is in apparent conflict with prior research finding that defense expert testimony produces juror skepticism and/or sensitization.<sup>127</sup>

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<sup>119</sup> See Brian L. Cutler et al., *The Eyewitness, the Expert Psychologist, and the Jury*, 13 LAW & HUM. BEHAV. 311, 322-28 (1989); Devenport & Cutler Study, *supra* note 114, at 574; Devenport et al., *supra* note 114, at 1049-50.

<sup>120</sup> Devenport & Cutler Study, *supra* note 114.

<sup>121</sup> *Id.* at 570 (citing Cutler et al., *supra* note 119).

<sup>122</sup> Devenport & Cutler Study, *supra* note 114, at 570.

<sup>123</sup> *Id.* at 574.

<sup>124</sup> *Id.* at 575.

<sup>125</sup> *Id.*

<sup>126</sup> See *id.* at 573-75.

<sup>127</sup> See, e.g., Cutler et al., *supra* note 119, at 328 (finding evidence of increased jury sensitization after expert testimony); Leippe 2004 Study, *supra* note 113, at 538 (noting that previous research had found evidence of juror skepticism).

Another recent study produced similar results. In a June 2004 study, Michael R. Leippe et al. examined juror skepticism under various trial conditions by manipulating the strength of the prosecution's case, the timing of expert testimony, the nature of the expert testimony, and the presence of a judge's instruction about the expert testimony.<sup>128</sup> In all cases, the expert was court-appointed, which allowed more flexibility to manipulate the timing of the testimony.<sup>129</sup> The study found that defense expert testimony was ineffective unless it was presented after all other evidence, *and* the judge summarized the expert witness's points in the final jury instructions.<sup>130</sup> Without the judge's summary in the final instructions, the defense expert testimony was inconsequential.<sup>131</sup>

These studies and others like them<sup>132</sup> indicate that while expert testimony may reduce the effectiveness of the prosecution's eyewitnesses, this only occurs in a limited set of circumstances.<sup>133</sup> If experts are used ineffectively, the debate over admissibility that lawyers, psychologists, and legal scholars have waged for thirty years is rendered moot.<sup>134</sup> Therefore, the next step in the battle for eyewitness expert testimony is discovering what conditions support effective eyewitness testimony, and ensuring that the testimony is presented under those conditions.

### B. *Putting the Psychological Evidence to Work*

Once a lawyer has had the good fortune to have her eyewitness expert admitted, she is faced with the practical question of how to present the expert effectively. The developing body of psychological research discussed above is directly relevant because it addresses issues like the order of witnesses, the effect of non-eyewitness evidence, and the effect of combining experts with other methods of educating the jury, such as jury instructions. Although the research is still

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<sup>128</sup> Leippe 2004 Study, *supra* note 113, at 525–27.

<sup>129</sup> *Id.* at 526. In order to compare the effects of expert testimony given before the eyewitness testified with expert testimony given after the eyewitness testified, the expert had to be court-appointed, as this is the only way an expert could testify before evidence was heard. *Id.* The authors acknowledge that court-appointed experts are rare in actual trials, and that usually expert eyewitness testimony is presented by the defense. *Id.* at 538.

<sup>130</sup> *Id.* at 536.

<sup>131</sup> *Id.* at 537.

<sup>132</sup> *See, e.g.*, Cutler et al., *supra* note 119; Devenport & Cutler Study, *supra* note 114, at 574; Devenport et al., *supra* note 114.

<sup>133</sup> Leippe 2004 Study, *supra* note 113, at 536.

<sup>134</sup> Of course, those who oppose the admission of eyewitness expert testimony would welcome this outcome, but it is the position of this paper that such expert testimony should be admitted, for the reasons discussed *supra* in Part II.D.

in its infancy, I have derived some practical suggestions from the work that has been published to date.

### 1. Reinforcing Eyewitness Expert Testimony

#### a. Jury Instructions

Jury instructions are generally discussed as an *alternative* to expert testimony, but one recent study indicates that jury instructions may be an essential *supplement*.<sup>135</sup> Without a summary in the final instructions, the expert testimony in the Leippe study was inconsequential.<sup>136</sup>

We have seen that many courts are already open to the idea of jury instructions on the pitfalls of eyewitness identifications, so this dual approach is certainly a viable option.<sup>137</sup> Lawyers should request jury instructions reiterating the expert's testimony. In addition to improving the jury's knowledge about eyewitness identifications, basing the jury instructions on expert testimony would solve one of the problems we have seen with jury instructions in the past. Instructions such as those given in *Telfaire* are written by judges, based on law, and may not be scientifically accurate.<sup>138</sup> While judges should not be expected simply to mimic the testimony of a party's experts, they can ensure the accuracy of their instructions by basing them on the most widely accepted scientific research. A similar approach has been advocated by Judge Easterbrook, who suggested that judges should acquire relevant specialized scientific knowledge and include it in jury instructions.<sup>139</sup>

The timing of jury instructions may be important as well. Many legal commentators have suggested that jury instructions on eyewitnesses should be presented early in the trial, which judges may allow. This way, jurors will already know the psychological principles to apply when they hear eyewitness testimony.<sup>140</sup> While this suggestion makes sense intuitively, it is not borne out by the psychological research. Although there are no studies specifically manipulating the timing of jury instructions, one study manipulating the timing of

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<sup>135</sup> Leippe et al. found that the expert testimony in their study was only effective when followed by instructions in which the judge summarized the expert's points. Leippe 2004 Study, *supra* note 113, at 537.

<sup>136</sup> *Id.*

<sup>137</sup> See, e.g., *United States v. Telfaire*, 469 F.2d 552, 555 (D.C. Cir. 1972).

<sup>138</sup> See CUTLER & PENROD, MISTAKEN IDENTIFICATION, *supra* note 20, at 256.

<sup>139</sup> See *United States v. Hall*, 165 F.3d 1095, 1120 (7th Cir. 1999) (Easterbrook, J., concurring). But note that Judge Easterbrook suggested this approach as an *alternative* to eyewitness expert testimony, not as a method of bolstering such testimony. *Id.*

<sup>140</sup> See WILLIAM CARROLL & MICHAEL SENG, EYEWITNESS TESTIMONY: STRATEGY AND TACTICS § 9:9 (2d ed. 2003).

expert testimony found that it was only effective when presented at the *end* of the trial, and was entirely ineffective when presented before the eyewitness testimony.<sup>141</sup> Leippe, the researcher conducting the study, suggested that presenting such information at the end of the trial made it more “available” to the jurors to apply during deliberations.<sup>142</sup> The same may hold true for jury instructions; they may be most effective when presented as close to deliberations as possible, rather than prior to eyewitness testimony. Therefore, it is the lawyer’s responsibility to request that the judge read a cautionary instruction,<sup>143</sup> and lawyers would be ill-advised to eschew a pre-deliberation instruction in favor of one earlier in the trial.

#### b. Reiteration in Closing Argument

Closing argument, one of the traditional trial safeguards, is probably insufficient on its own to educate juries about eyewitness fallibility.<sup>144</sup> However, closing argument, like jury instructions, may be an important supplement to expert testimony that could increase its value. Although this tactic has not been specifically addressed in studies to date, there is some indication that a reiteration of expert testimony close in time to the jury’s deliberations may help to bring this information home to the jury, for reasons similar to those discussed above with reference to jury instructions. If a lawyer is unable to get cautionary jury instructions, which may be crucial to the effectiveness of eyewitness expert testimony,<sup>145</sup> another option would be to reiterate the expert’s testimony in closing argument. This might be a less effective option, but it is the one most easily available to defense counsel. One strategy would be to reiterate the expert’s testimony, element by element, thus replicating a jury instruction. Counsel could then move on to suggest how the expert’s testimony should apply to the facts, which is a more typical approach to closing argument.<sup>146</sup> Keeping the two parts distinct ensures that even if the jury disagrees with the lawyer’s suggested application of the expert testimony to the facts, the jurors still will have heard a reiteration of the expert testimony, without the lawyer’s opinion injected. This may serve the same

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<sup>141</sup> Leippe 2004 Study, *supra* note 113, at 536.

<sup>142</sup> *Id.* at 537.

<sup>143</sup> CARROLL & SENG, *supra* note 140, § 9:9.

<sup>144</sup> See *supra* Part II.A.

<sup>145</sup> Leippe 2004 Study, *supra* note 113, at 537 (noting that without judge reminding jury of expert’s testimony, such testimony was ineffective).

<sup>146</sup> See LOFTUS & DOYLE, *supra* note 8, § 13.28 (providing sample closing argument applying expert testimony to facts).

function as cautionary instructions in making the expert testimony “available” to the jury.<sup>147</sup>

## 2. *Court-Appointed Testimony*

Of the studies using more elaborate trial stimuli, the *only* ones that showed any effect on the jury involved court-appointed experts.<sup>148</sup> There is insufficient research to explain why this is the case, but Leippe et al. surmise that jurors perceive court-appointed experts to be endorsed by the judge, and therefore attach substantially more weight to their testimony.<sup>149</sup> Likewise, there are not enough studies to conclude that a court-appointed expert is the only way to get through to the jury, but future studies may bear out this conclusion. Federal Rule 706 allows the court to appoint expert witnesses, either of its own volition or on the motion of one of the parties. The parties may nominate experts, or the court may choose its own.<sup>150</sup> The judge may inform the jury that the expert is appointed by the court, and both parties may cross-examine her.<sup>151</sup>

Despite persistent urging by evidence scholars, federal judges have been reluctant to stray from the adversarial system and appoint their own experts.<sup>152</sup> In 1993, the Federal Judicial Center conducted a study on judicial attitudes about this practice. The study found that judges consider appointing experts to be an extraordinary action to be taken only in special circumstances where “the traditional adversarial process has failed to permit an informed assessment of the facts.”<sup>153</sup> If the studies discussed in this Note are any indication, the area of eyewitness expert testimony may be just such a failure of the adversarial process.

A related argument is that in any given case, court-appointed expert testimony would appear to support one side or the other, and that in effect, the judge would be appointing a defense expert or a plaintiff/prosecution expert. I believe that this concern is outweighed

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<sup>147</sup> But note that some studies that included a reminder of expert testimony in closing argument found that such a reminder had no effect, so any attempt to approximate the effect of a jury instruction through closing argument may be weak at best. See Devenport & Cutler Study, *supra* note 114, at 574.

<sup>148</sup> *Id.* at 574; Leippe 2004 Study, *supra* note 113, at 537–38.

<sup>149</sup> Leippe 2004 Study, *supra* note 113, at 538.

<sup>150</sup> Having the parties nominate experts from which the court will choose creates an incentive for both parties to choose a more reasonable expert, for the more “fringe” the expert’s methods and conclusions are, the less likely the judge is to select that expert.

<sup>151</sup> FED. R. EVID. 706.

<sup>152</sup> See Timothy Hillman, *Using Court-Appointed Experts*, 36 NEW ENG. L. REV. 587, 591 (2002).

<sup>153</sup> JOE S. CECIL & THOMAS E. WILLGING, COURT-APPOINTED EXPERTS: DEFINING THE ROLE OF EXPERTS UNDER FEDERAL RULE OF EVIDENCE 706, at 5 (1993).

by the need to give the jury well-established information about eyewitness identification, and to make sure that the information is actually used. One approach to dealing with this tension would be to create a higher standard for court-appointed eyewitness experts. At present, court-appointed experts must satisfy the same *Daubert* criteria as other experts. Holding them to a “general acceptance” test, as was applied before *Daubert*, would prevent courts from casting off their role as neutral arbiters when they appoint witnesses.

A general acceptance requirement would ensure that the court remains on relatively uncontroversial grounds while not unduly limiting the theories about which experts could testify. The Kassin study mentioned in Part II.D addressed the general acceptance of certain staple eyewitness theories among psychologists.<sup>154</sup> The forgetting curve, accuracy-confidence correlation and malleability, unconscious transference, cross-race identifications, increased likelihood of subsequent identification after viewing a mug shot, and weapon focus phenomena were all supported by eighty percent or more of the survey’s respondents.<sup>155</sup> This compromise protects the interests of the court in remaining neutral, and the more general interest in equipping juries with the information they need to make good decisions, particularly when eyewitness testimony is the principal evidence in the case.

#### CONCLUSION

Eyewitnesses play a critical role in the courts; they offer some of the most compelling evidence that a party could hope to present to a jury. After thirty years of psychological inquiry there remains little doubt, however, that eyewitnesses are frequently mistaken. This is not to say that eyewitnesses are always mistaken, or even that they are mistaken most of the time. Despite its shortcomings, eyewitness evidence can be an important resource for juries. However, jurors tend to vastly overcredit eyewitness testimony. The essential task is to reduce this overvaluation.

One potential solution is the admission of expert psychological testimony to educate the jury about eyewitness inaccuracy. The courts

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<sup>154</sup> Kassin et al., *supra* note 96, at 410. The study replicated one conducted in 1989, when expert testimony still had to meet a general acceptance requirement to be admissible. The latter study surveyed sixty-four psychologists who specialized in memory or cognitive psychology. Ninety-two percent had published one or more books, chapters, or articles on the psychology of eyewitness identification. *Id.* at 405–09.

<sup>155</sup> *Id.* at 412 tbl.4 (finding acceptance of forgetting curve by eighty-three percent of psychologists in field, accuracy-confidence correlation and malleability by ninety-five percent, unconscious transference by eighty-one percent, cross-race identifications by ninety percent, increased likelihood of subsequent identification after viewing mug shot by ninety-five percent, and weapon focus by eighty-seven percent).

still hotly debate the admissibility of such expert testimony, but it is nonetheless admitted with growing frequency. Although this is arguably a favorable development, recent psychological studies cast a shadow upon it. The studies suggest that while eyewitness expert testimony can appropriately sensitize juries to the potential inaccuracy of eyewitness testimony, it is effective in some trial circumstances, but not in others. Lawyers who offer eyewitness expert testimony must learn which trial circumstances support expert effectiveness, and create these circumstances at trial as much as possible. After all, who cares if the expert testimony is admissible if it is going to be ineffective?

Reinforcement of eyewitness expert testimony and court-appointed experts are just two possible solutions, based on the currently available research, to the problem of effectively presenting eyewitness expert testimony. It is likely that future psychological studies will focus on more narrowly and specifically defining the circumstances in which eyewitness expert testimony will be effective, pointing to other options, and elaborating on those that have been suggested in the studies published to date. The necessity of court-appointed experts, in particular, is a likely candidate for future study, because of the dramatic implications the results could have for the presentation of eyewitness experts. Additional questions ripe for psychological research include: Are reinforcement techniques such as those I have suggested helpful? What other reinforcement techniques are there? Which are the most useful?

For their part, lawyers and judges must be attentive to this developing research and incorporate it into their trial strategies. The legal literature must also turn, at least in part, to these important practical questions.