

6-1984

Cross-Racial Identification Errors in Criminal Cases

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CROSS-RACIAL IDENTIFICATION ERRORS IN CRIMINAL CASES

Sheri Lynn Johnson†

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INTRODUCTION

William Jackson was convicted of two rapes and spent five years in the Ohio penitentiary before authorities discovered their error. The true perpetrator of the crimes was not an amazing look-alike. Although both Jackson and the actual rapist were bearded blacks with trimmed afros and similar physiques, a comparison of their facial features suggests only a rough resemblance. Nevertheless, two white women testified they were positive Jackson was their assailant. Despite several alibi witnesses, an all white jury convicted him.¹

The personal tragedy of Jackson's unjust incarceration has been widely publicized,² and the Ohio House of Representatives has commenced hearings on legislation that would allow him to seek compensation for his years in prison.³ That the mistaken identification of Jackson was neither a unique occurrence nor random misfortune has not received much public attention.⁴ Legal observers have long recognized

¹ *Open-and-Shut Case*, 60 MINUTES, vol. XV, no. 24, at 1 (broadcast by CBS Television, Feb. 27, 1983).

² *See, e.g.*, N.Y. Times, Sept. 24, 1982, at A16, col. 3.

³ *Open-and-Shut Case*, *supra* note 1, at 7.

⁴ *See* Gillers, *I Will Never Forget His Face*, N.Y. Times, Apr. 21, 1984, at A19, col. 1

that cross-racial identifications by witnesses are disproportionately responsible for wrongful convictions.⁵ In the last fifteen years, psychologists have compiled empirical evidence that incontrovertibly demonstrates a substantially greater rate of error in cross-racial recognition of faces.⁶ Yet most judges confronted with these findings have refused to permit defense counsel to alert the jury to the potential for cross-racial identification errors.⁷

Several commentators have noted the cross-racial recognition studies, but always in the context of a general survey of psychological studies relevant to identification testimony.⁸ Some writers have argued that the proper judicial response to the expanding literature on identification error would be to permit expert testimony by psychologists on all of their findings;⁹ others have recommended wholesale incorporation of that data into cautionary jury instructions.¹⁰ Neither of these approaches has found judicial acceptance. Perhaps this is as it should be, for the importance and reliability of the supporting studies vary widely.

This article proposes discrete analysis of the problem of unreliable cross-racial identifications. It is premised on the belief that this narrower inquiry will be more productive than any attempt to find a single remedy for the disparate sources of identification error. The cross-racial identification problem is both more compelling and more readily ameliorated than other types of misidentification. Thus, the courts should address it separately.

There is a second reason to separate the problem of cross-racial identification from other sources of misidentification. Judge Bazelon has claimed that the criminal justice system has neglected the rate of cross-racial misidentification because the phenomenon primarily affects minorities.¹¹ He may be partially correct, but certainly there is another aspect to the explanation: the problem is ignored because it involves race, and race is always an uncomfortable subject. It is particularly uncomfortable where, as with cross-racial misidentification, we cannot place the blame on a few racist individuals, but must stare straight at the ubiquity of persisting racial differences. Furthermore, many judges may fear that merely to mention race in a criminal case is to stir racial animosity.

Before we can make any progress toward solving the problem of

(citing another recent example of a wrongful conviction based upon cross-racial identification testimony).

⁵ See *infra* notes 12-14 and accompanying text.

⁶ See *infra* notes 18-37 and accompanying text.

⁷ See *infra* notes 110-33, 141-81 and accompanying text.

⁸ See *infra* notes 139, 227-32 and accompanying text.

⁹ See *infra* notes 139, 182 and accompanying text.

¹⁰ See *infra* notes 227-32 and accompanying text.

¹¹ Bazelon, *Eyewitness News*, PSYCHOLOGY TODAY, Mar. 1980, at 105.

cross-racial misidentification, we must address the technical questions surrounding the proper role for the relevant psychological data as well as the broader concerns of racial divisiveness. This article presumes that discussion of the problem, however disquieting, is better than silent acceptance of wrongful convictions. Part I of this article summarizes and discusses the psychological data on cross-racial identification; Part II considers the adequacy of existing legal protections; and Part III addresses the propriety and effectiveness of two possible ameliorating measures.

I

THE RELIABILITY OF CROSS-RACIAL IDENTIFICATION

Patrick Wall's classic study of eyewitness identification¹² includes a dramatic case of cross-racial misidentification. The five victims of a kidnapping, rape, and robbery episode, all of whom spent several hours with the perpetrator, each identified a man who subsequently was proved to have been several hundred miles away at the time of the offense. When the true criminal was apprehended, it was apparent that, other than his black skin, he bore no resemblance to the original suspect.¹³ Wall commented:

In general, there is much greater possibility of error where the races are different than where they are the same. Where they are different, there is more likelihood of error where the subject belongs to a minority group and the witness to a majority group than there is in the opposite situation.¹⁴

Wall wrote in 1965 when there was no empirical evidence to support his impression. Since then more than a dozen studies have investigated this phenomenon—which psychologists call “the own-race effect”—in carefully controlled laboratory situations. In addition to demonstrating the existence of the own-race effect, psychologists have investigated correlations of this phenomenon in an attempt to explain and predict its occurrence: they have inquired whether all persons are equally likely to be better at recognizing members of their own race or whether only persons with animosity towards, or lack of contact with, other racial groups display the own-race effect. These findings are relevant to the question of whether the ordinary trial technique of cross-examination is sufficient to detect inadequate cross-racial recognition ability. Related studies have investigated whether these empirical findings accord with the common-sense perceptions of prospective jurors

¹² P. WALL, *EYEWITNESS IDENTIFICATION IN CRIMINAL CASES* (1965).

¹³ *Id.* at 75.

¹⁴ *Id.* at 122; *see also* E. BORCHARD, *CONVICTING THE INNOCENT* (1932). Borchard documents 65 cases of erroneous convictions, including several examples of cross-racial misidentifications. *See id.* at 74-79, 277-80.

and whether presentation of these findings to mock juries affects their deliberations.

Lawyers often discount empirical studies, relegating them to a footnote at best. Notwithstanding this impatience, a thorough review of these findings is necessary to assess contentions that the data are too inconclusive to justify calling them to the jury's attention.

A. The "Own-Race" Phenomenon

In the typical laboratory experiment in face recognition, subjects view photographs of a number of faces that are later randomly mixed with a new set of faces. Usually the length of observation time is carefully controlled. The subject then is asked to select the "old" faces from among the "new" faces.¹⁵ Each subject's performance is measured by plotting "hits" against "false alarms," and compiling the scores statistically into a single measure of observer sensitivity.¹⁶ In studies investigating the own-race effect, the performance of the subjects is aggregated by race and then each racial group's accuracy is measured on same-race and other-race photos. Differences in the aggregated scores are then tested for statistical significance.¹⁷ In order to gauge the importance of the psychologists' studies, we must examine both the consistency of results and the external validity of the experiments.

1. *Laboratory Findings*

Although the studies of white subjects are numerous and generally consistent, studies of black subjects have produced mixed data. There has been little research to date on Asian subjects. For these reasons it is convenient to report the own-race effect findings by racial group.

a. *White Subjects.* Ten studies document a significant difference in the ability of white American subjects to recognize white and black faces.¹⁸ The impairment in ability to recognize black faces is substan-

¹⁵ Ellis, Davies & Shepherd, *Experimental Studies of Face Identification*, 3 NAT'L J. OF CRIM. DEF. 219, 221 (1977).

¹⁶ For a more complete description of the statistical measure used in face recognition studies, see Buckout, *Eyewitness Testimony*, SCI. AM., Dec. 1974, at 31.

¹⁷ Tests of statistical significance calculate the probability that the data obtained from an experiment could be the result of a random occurrence. For a discussion of the difference between statistical and practical significance, see D. BARNES, *STATISTICS AS PROOF* 143-45 (1983).

¹⁸ See Barkowitz & Brigham, *Recognition of Faces: Own Race Bias, Incentive, and Time Delay*, 12 J. APPLIED SOC. PSYCHOLOGY 255, 261 (1982); Brigham & Barkowitz, *Do "They all look alike?" The Effect of Race, Sex, Experience and Attitudes on the Ability to Recognize Faces*, 8 J. APPLIED SOC. PSYCHOLOGY 306, 314 (1978); Chance, Goldstein & McBride, *Differential Experience and Recognition Memory for Faces*, 97 J. SOC. PSYCHOLOGY 243, 249, 250-51 (1975) (reporting on two experiments); Cross, Cross & Daly, *Sex, Race, Age and Beauty As Factors In Recognition of Faces*, 10 PERCEPTION & PSYCHOPHYSICS 393, 394 (1971); Galper, *"Functional Race Membership" and Recognition of Faces*, 37 PERCEPTUAL & MOTOR SKILLS 455, 458 (1973); Luce, *The Role of Experience in Inter-Racial Recognition*, 1 PERSONALITY & SOC. PSYCHOLOGY BULL. 39, 40 (1974);

tial. Most of these studies used college students as subjects,¹⁹ but the largest study sampled children at ages seven, twelve, and seventeen, and adults with an average age of thirty-six.²⁰ The college student subjects included residents of New York City, the Midwest, the South, California, and the Southwest.²¹ An eleventh study that sampled young British soldiers and school girls replicated the own-race effect findings.²²

Only two studies failed to find the own-race effect, but even these studies provide indirect support for the phenomenon. The first tested elderly subjects with a mean age of seventy-two.²³ Although the white subjects' mean recognition rate for pictures of white male faces was twice as great as the mean recognition rate for black faces (male or female), the authors found no own-race effect for white subjects because the recognition rate for white female photos was one-third of that for the black photos and one-sixth of that for the white male photos.²⁴ The authors concluded that this unique pattern resulted from the idiosyncratic characteristics of their white female photos.²⁵ The second apparently anomalous study involved a field experiment: clerks at convenience food stores were asked to recognize the photos of two customers, one black and one white, who had been in the store earlier that day.²⁶ The initial analysis found no own-race effect, but because the clerks misidentified one of the white customers almost twice as often as the other three,²⁷ the researchers repeated the analysis omitting the atypical customer. The second analysis yielded evidence of a modest own-race effect: white clerks misidentified blacks 54.8% of the time and

Malpass, *Racial Bias in Eyewitness Identification*, 1 PERSONALITY & SOC. PSYCHOLOGY BULL. 42, 43 (1974); Malpass & Kravitz, *Recognition for Faces of Own and Other Race*, 13 J. PERSONALITY & SOC. PSYCHOLOGY 330, 333 (1969); Malpass, Lavigneur & Weldon, *Verbal and Visual Training in Face Recognition*, 14 PERCEPTION & PSYCHOPHYSICS 285, 288 (1973).

¹⁹ See Barkowitz & Brigham, *supra* note 18; Brigham & Barkowitz, *supra* note 18; Chance, Goldstein & McBride, *supra* note 18; Galper, *supra* note 18; Luce, *supra* note 18; Malpass, *supra* note 18; Malpass & Kravitz, *supra* note 18; Malpass, Lavigneur & Weldon, *supra* note 18.

²⁰ See Cross, Cross & Daly, *supra* note 18.

²¹ See *supra* note 19.

²² Shepherd, Deregowski & Ellis, *A Cross-Cultural Study of Recognition Memory for Faces*, 9 INT'L J. PSYCHOLOGY 205, 210 (1974).

²³ Brigham & Williamson, *Cross-racial Recognition and Age: When You're Over 60, Do They Still "All Look Alike?"* 5 PERSONALITY & SOC. PSYCHOLOGY BULL. 218 (1979).

²⁴ *Id.* at 220.

²⁵ *Id.* at 220-21. The white female photos were all selected from early 1970s high school yearbook pictures. Long straight hair was prevalent among these white females. If hair length and style is a salient clue, particularly for elderly nearsighted observers, this could explain why the extremely poor performance on the white female photos overshadowed the own-race effect.

²⁶ Brigham, Maass, Snyder & Spaulding, *Accuracy of Eyewitness Identifications in a Field Setting*, 42 J. PERSONALITY & SOC. PSYCHOLOGY 673 (1982) (subjects were 64 white clerks and 9 black clerks).

²⁷ *Id.* at 678.

whites 34.9% of the time.²⁸

Four experiments have examined white subjects' ability to recognize Asian American faces. One study reported that white students who viewed white faces without any previous practice correctly recognized 76.8% of the white faces they were shown; in contrast, white students who viewed Asian faces without practice recognized only 52% of the Asian faces.²⁹ The other three experiments compared white performance on Asian, black, and white faces.³⁰ One team reported two experiments in which whites displayed the greatest accuracy in identifying white faces but more accuracy in identifying black faces than Asian faces.³¹ Another researcher, however, found only marginal differences between white recognition of white and Asian faces, but a sharply lower rate of recognition for the black faces.³²

b. *Black Subjects.* The data on the own-race phenomenon for black subjects is less consistent. Five domestic studies report that black subjects are significantly less able to recognize white faces than black faces.³³ Four other studies, however, show no significant differences.³⁴ Theorists have not been able to explain these differences by reference to the populations studied.³⁵ Two studies examining the ability of black subjects to recognize Asians found blacks less able to recognize Asian faces than black faces.³⁶

c. *Asian American Subjects.* Only one study of the own-race effect has

²⁸ *Id.* Because of the small sample size, see *supra* note 26, this difference was of "only borderline statistical significance." *Id.*

²⁹ Elliott, Will & Goldstein, *The Effects of Discrimination Training on the Recognition of White and Oriental Faces*, 2 BULL. PSYCHONOMIC SOC'Y 71, 73 (1973).

³⁰ Chance, Goldstein & McBride, *supra* note 18 (reporting on two experiments); Luce, *supra* note 18.

³¹ Chance, Goldstein & McBride, *supra* note 18, at 249-51.

³² Luce, *supra* note 18, at 40-41.

³³ Brigham & Williamson, *supra* note 23, at 221; Galper, *supra* note 18, at 458; Luce, *supra* note 18, at 40; Malpass, Laviguer & Weldon, *supra* note 18, at 288; see also Shepherd, Deregowski & Ellis, *supra* note 22, at 209 (African subjects had higher recognition scores for African faces than for European faces).

³⁴ Barkowitz & Brigham, *supra* note 18, at 261; Cross, Cross & Daly, *supra* note 18, at 394; Malpass & Kravitz, *supra* note 18, at 332-33; see also Chance, Goldstein & McBride, *supra* note 18, at 251 (noting possibility that some blacks might be expected to recognize whites and blacks equally well).

³⁵ Four of the five studies on each side used college students as subjects. The largest study, surveying 7, 12, and 17 year olds, as well as adults, found no significant differences between blacks' recognition of black and white faces. Cross, Cross & Daly, *supra* note 18, at 394. The study testing only senior citizens did find the own-race effect. Brigham & Williamson, *supra* note 23, at 221.

³⁶ Luce found recognition by blacks of Asian faces equal to recognition by blacks of white faces; both rates were significantly lower than black recognition of black faces. Luce, *supra* note 18, at 40.

Chance, Goldstein and McBride found that blacks performed best when asked to identify black photographs, next best for white photographs, and least well with Japanese faces. Chance, Goldstein & McBride, *supra* note 18, at 250.

included Asian American subjects.³⁷ That study reported that Japanese Americans are only marginally better at recognizing Japanese American faces than Chinese American faces; Chinese American subjects display a reciprocal and equally insignificant tendency. The same study finds both Japanese and Chinese Americans significantly better able to recognize Asian faces than black faces, as well as significantly better able to recognize black faces than white faces.³⁸

There are no relevant studies including Hispanic or Native American subjects.

2. *External Validity*

Given that white subjects consistently display a significantly impaired other-race recognition ability in the laboratory, and that some black and Asian samples display this impairment as well, can we infer that witnesses in criminal trials will make proportionately more errors in cross-racial identifications than in same-race identifications? We will answer this question affirmatively if the laboratory experiments have external validity; that is, if there is nothing peculiar to the laboratory setting that creates the own-race effect. The single field experiment on cross-racial identification³⁹ is flawed and provides only modest support for the own-race effect.⁴⁰ Nevertheless, there are several compelling reasons to believe that the laboratory findings discussed above reflect a phenomenon that occurs outside the laboratory.

One reason to believe that the own-race effect operates in criminal identifications is that the effect is insensitive to experimental manipulation of the incentive the subject has to make a correct identification. We might expect the obvious importance of correctly identifying a defendant in a criminal case to compel witnesses to scrutinize perpetrators more closely than they examine laboratory photos, and that this increased effort could overcome the own-race effect. However, experiments that have attempted to create an incentive to remember other-race faces by offering a monetary reward for accurate recognition have failed to affect recognition accuracy.⁴¹ These observations suggest that decreased accuracy in the recognition of other-race faces is not within the observer's conscious control, and that the seriousness of criminal proceedings would not improve accuracy.

The external validity of the laboratory findings is further supported

³⁷ Luce, *supra* note 18.

³⁸ *Id.* at 40.

³⁹ Brigham, Maass, Snyder & Spaulding, *supra* note 26; *see supra* notes 26-28 and accompanying text.

⁴⁰ Brigham, Maass, Snyder & Spaulding, *supra* note 26, at 678.

⁴¹ *See* Barkowitz & Brigham, *supra* note 18, at 257-63; *see also* Brigham & Barkowitz, *supra* note 18, at 314 (warning subjects that they will be asked to remember faces does not decrease other-race recognition impairment).

by the lack of a correlation between recognition accuracy and confidence. We might hypothesize that laboratory subjects would claim to recognize an other-race face in spite of any uncertainty whereas a witness in a criminal trial experiencing other-race recognition impairment would refuse to make an identification, or at least would admit his difficulty upon cross-examination. But this hypothesized difference between the laboratory and a criminal trial presupposes that the mistaken witness *feels* greater uncertainty, which is unlikely. General research on the relationship between witness confidence and witness accuracy has found the connection to be extremely tenuous;⁴² only in "optimal" conditions is there *any* correlation at all between accuracy and confidence. Generally, the witness's personality traits⁴³ and the amount of time he spends rehearsing his story with the prosecutor⁴⁴ are the prime determinants of his confidence level. The two studies specifically investigating confidence in the recognition of other-race photographs are consistent with the general research on confidence and accuracy. Luce has reported that his subjects' expressed post-test confidence in their accuracy bore no relation to their actual performance;⁴⁵ Chance, Goldstein, and McBride have shown that individual pretest statements of expected other-race recognition performance bore no relation to actual performance.⁴⁶ Because witnesses cannot detect other-race recognition impairment in themselves, they will not offset the unreliability of a cross-racial identification by acknowledging their disability on cross-examination.

A third reason for believing that laboratory results revealing impaired other-race recognition ability are applicable to nonlaboratory settings is the frequency of casual field observations of the own-race effect. Wall and other courtroom observers have commented that the rate of misidentification seems higher in interracial crimes.⁴⁷ Perhaps more importantly, the ordinary man's consternation at the difficulty of cross-racial recognition is so commonplace as to be the subject of both cliché and joke: "They all look alike." In short, the presence of the own-race effect in criminal identifications can confidently be predicted even though it cannot be directly demonstrated.

Moreover, it is clear that the own-race effect in criminal identifications is of noteworthy dimension. In the laboratory studies, it was common for the own-race/other-race recognition rates to differ by thirty

⁴² See Wells, Ferguson & Lindsay, *The Tractability of Eyewitness Confidence and Its Implications for Triers of Fact*, 66 J. APPLIED PSYCHOLOGY 688, 688 (1981).

⁴³ See Buckhout, *supra* note 16, at 31.

⁴⁴ See Wells, Ferguson & Lindsay, *supra* note 42, at 690.

⁴⁵ Luce, *The Neglected Dimension in Eyewitness Identification*, 4 CRIM. DEF. 5, 7-8 (1977).

⁴⁶ Chance, Goldstein & McBride, *supra* note 18, at 246-47 n.3.

⁴⁷ See, e.g., P. WALL, *supra* note 12, at 76; Bazelon, *supra* note 11.

percent,⁴⁸ and one study reported that people who tried to identify persons of another race made *four* times as many errors as those who attempted to identify members of their own race.⁴⁹ Because stress is known to *decrease* recognition accuracy,⁵⁰ the higher stress conditions of crime and courtroom are not likely to lead to an increase in other-race recognition rates.⁵¹

B. Correlates and Explanations of the Own-Race Effect

The ethnocentric explanation of the own-race effect is biological: minority group members really do "all look alike." This explanation ignores evidence of a smaller, although still significant, own-race effect in minorities.⁵² It ignores as well anthropological studies of human faces showing that the only significant difference in the variability of facial features between racial groups is that Asian females show *more* variability than any other group.⁵³

The second theory of the own-race effect points to prejudicial attitudes as an explanation for differences in recognition rates. A 1940 study provided some support for this explanation; it found whites with pro-black attitudes better at recognizing black faces than whites with anti-black attitudes.⁵⁴ Two recent studies, however, found no correlation between racial attitudes and the own-race effect; white subjects who showed no indication of prejudice were just as likely to make errors in recognizing black faces as were white subjects who displayed animosity

⁴⁸ Goldstein & Chance, *Memory for Faces and Schema Theory*, 105 J. PSYCHOLOGY 47, 47 (1980).

⁴⁹ See Rahaim & Brodsky, *Empirical Evidence Versus Common Sense: Juror and Lawyer Knowledge of Eyewitness Accuracy*, 7 LAW & PSYCHOLOGY REV. 1, 2 (1982).

⁵⁰ See Fishman & Loftus, *Expert Psychological Testimony on Eyewitness Identification*, 4 LAW & PSYCHOLOGY REV. 87, 92-93 & nn.19-20 (1978).

⁵¹ An interaction between the laboratory setting and the own-race effect is possible, but there is no reason, either empirical or theoretical, to postulate that such an interaction exists. Luce, one of the psychologists involved in the own-race effect studies, publicized his findings in popularized form in *Psychology Today*. Luce, *Black, Whites, and Yellows! They All Look Alike to Me*, PSYCHOLOGY TODAY, Nov. 1974, at 106. Within a few weeks after publication, two dozen black prison inmates had sent letters to him claiming that they had been wrongfully identified as perpetrators by white witnesses. As Luce notes in a later article, it would be naive to assume that all of the two dozen men were innocently imprisoned—but it would be equally naive to assume that none of them were innocently imprisoned. Luce, *supra* note 45, at 8.

⁵² See *supra* notes 33-38 and accompanying text.

⁵³ See Goldstein, *Race-Related Variation of Facial Features: Anthropometric Data I*, 13 BULL. PSYCHONOMIC SOC'Y 187, 190 (1979); Goldstein, *Facial Feature Variation: Anthropometric Data II*, 13 BULL. PSYCHONOMIC SOC'Y 191, 191 (1979); see also Goldstein & Chance, *Judging Face Similarity in Own and Other Races*, 98 J. PSYCHOLOGY 185 (1978) (finding no difference in perceived similarity of own and other-race faces).

⁵⁴ Seeleman, *The Influence of Attitude Upon the Remembering of Pictorial Material*, 36 ARCHIVES OF PSYCHOLOGY 6 (1940).

toward blacks.⁵⁵

A third explanation for the own-race effect points to lack of contact with persons from other ethnic groups. This explanation is consistent with a stronger own-race effect for whites than for blacks or Asians, who will probably have had substantial contact with the white majority. Furthermore, two studies finding that black and white subjects attend to different facial cues provide at least tangential support for this explanation.⁵⁶ Direct investigations of this hypothesized correlation, however, are surprising. One study found that white students from segregated schools were worse at recognizing black faces than were white students from integrated schools,⁵⁷ but that both groups displayed a significant own-race effect.⁵⁸ A second study then reported that white students from integrated schools were *less* successful at recognizing black faces than were white students from segregated schools.⁵⁹ Two further studies found self-reported interracial experiences wholly unrelated to cross-racial recognition ability.⁶⁰ Thus, if there is a correlation between exposure to other racial groups and recognition ability, it is either very tenuous or quite complex.⁶¹

Perhaps the most interesting and comprehensive explanation of the own-race effect is the *schema rigidity* model proposed by Goldstein and Chance.⁶² According to Goldstein and Chance, schemata organize information; a schema produces expectations, determines what aspects of stimuli will be attended to, and reduces the necessity for conscious, voluntary processing.⁶³ They hypothesize that an individual's ability to process faces improves as the number of faces he has processed increases. This improvement, however, decreases flexibility; as the number of "normal" faces processed increases, ability to recognize deviant faces declines.⁶⁴ In the typical child's socialization, most faces the child encounters will be of his own racial group. These "normal" faces will be

⁵⁵ See Brigham & Barkowitz, *supra* note 18, at 309; Lavrakas, Buri & Mayzner, *A Perspective on the Recognition of Other-Race Faces*, 20 PERCEPTION & PSYCHOPHYSICS 475, 480 (1976).

⁵⁶ Ellis, Deregowski & Shepherd, *Description of White and Black Faces by White and Black Subjects*, 10 INT'L J. PSYCHOLOGY 119, 120-23 (1975); Shepherd & Deregowski, *Races and Faces—A Comparison of the Responses of Africans and Europeans to Faces of the Same and Different Races*, 20 BRIT. J. SOC. PSYCHOLOGY 125, 132 (1981).

⁵⁷ Cross, Cross & Daly, *supra* note 18, at 394-95.

⁵⁸ *Id.*

⁵⁹ Lavrakas, Buri & Mayzner, *supra* note 55, at 480.

⁶⁰ Brigham & Barkowitz, *supra* note 18; Malpass & Kravitz, *supra* note 18.

⁶¹ Galper, who found the own-race effect present in all subjects except a small sample of white students in a black studies course, hypothesized that it is "functional race membership" that explains the phenomenon. Galper, *supra* note 18, at 459. "[T]he concept of 'functional race membership' might be applied to perceivers who describe themselves as 'white,' but respond to the present stimuli, in the present context, in a manner indistinguishable from that of black perceivers, and significantly different from that of 'typical' white perceivers." *Id.*

⁶² See Goldstein & Chance, *supra* note 48.

⁶³ Goldstein & Chance, *supra* note 48, at 48.

⁶⁴ *Id.*

overlearned; recognition memory for own-race faces will improve with age but recognition memory for other-race faces will be increasingly impaired.⁶⁵ Later experiences with other racial groups will not mitigate other-race impairment once the face schema has developed. Thus, according to this model, the presence and strength of the own-race effect *in any individual* will depend upon the number and kind of his early childhood experiences with other races.

Goldstein and Chance have reported several experiments designed to test this model. A developmental study of white subjects revealed that from the ages of six through twelve, recognition rates for Japanese and white faces are almost identical, and both rates improve steadily with age. In contrast, white adults had much more difficulty recognizing Japanese faces than white faces; in fact, the adults' recognition rates for Japanese faces were roughly equal to the face recognition rates of second and third grade children.⁶⁶

In a second set of experiments, Goldstein and Chance hypothesized that white subjects who had the highest recognition rates for white faces would be those who had best "overlearned" the schema and who therefore would show a more pronounced own-race effect than poor recognizers of white faces. This hypothesis proved correct: when Japanese photographs were substituted, the good recognizers lost seventeen percent of their white face performance levels whereas poor recognizers lost only six percent of their white face performance levels.⁶⁷ Furthermore, Goldstein and Chance predicted that if recognizing own-race faces involved using the developed schema but recognizing other-race faces did not, performance on other-race faces should be uncorrelated with performance on own-race faces whereas test-retest performance with own-race faces should be correlated. Again, their hypothesis was confirmed; white subjects who were good at recognizing white faces were as likely to be bad at recognizing Japanese faces as white subjects who were bad at recognizing white faces.⁶⁸

Although Goldstein and Chance acknowledge that limited sample size renders the results of their last experiment tentative, they assert that "[t]aken together, the results of the several studies offer consistent support for a schema interpretation" of the own-race effect.⁶⁹ In addition, the Goldstein-Chance hypothesis is consistent with the data gathered by others. It explains why experimenters consistently observe the own-race phenomenon in white subjects, but not in minority group members: some black and Asian subjects may have learned white faces as well as

⁶⁵ *Id.* at 49.

⁶⁶ *Id.* at 49-50.

⁶⁷ *Id.* at 53.

⁶⁸ *Id.* at 52.

⁶⁹ *Id.* at 58.

they learned own-race faces because of the number or importance of white figures in their early lives. It also explains why visual training on other-race faces improves other-race recognition for a short time,⁷⁰ after which the training effects quickly dissipate:⁷¹ the schema "takes over" again.

Finally, the schema rigidity theory can incorporate two pieces of empirical data on the *process* of own-race and other-race recognition. First, Ellis, Derogowski, and Shepherd have reported that white and black subjects attend to different facial features.⁷² Second, Chance and Goldstein have discovered that white subjects respond to own-race photographs more "deeply"; the subjects were more willing to draw inferences about subjective attributes when the persons pictured were whites than when the photographs were of different races.⁷³ It may be that children learn only those features that are most useful in distinguishing own-race faces and simultaneously learn to associate these features with various personalities, moods, and attitudes. Such associations then function to help them remember the faces. The important distinguishing features of other-race faces are not learned, and are therefore less likely to be noticed. When these features are noticed, they are less likely to be remembered.

C. Laymen's Beliefs About Cross-Racial Identification

Jurors tend to believe eyewitness accounts even in extremely doubtful circumstances.⁷⁴ Moreover, at least one study found jurors generally unable to differentiate between accurate and inaccurate eyewitness testimony, even after cross-examination.⁷⁵ This inability is partially attributable to the commonly held assumption that a witness's confidence is an important indicator of the accuracy of his testimony.⁷⁶

Three studies have investigated laymen's and lawyers' beliefs about

⁷⁰ See Elliott, Wills & Goldstein, *supra* note 29, at 72-73; Lavrakas, Buri & Mayzner, *supra* note 55, at 480; Malpass, Lavigueur & Weldon, *supra* note 18.

⁷¹ See Lavrakas, Buri & Mayzner, *supra* note 55, at 480. The other two studies cited *supra* note 70 did not investigate whether the improvement in other-race recognition disappeared after the passage of time.

⁷² See *supra* note 56 and accompanying text.

⁷³ Chance & Goldstein, *Depth of Processing in Response to Own- and Other-Race Faces*, 7 PERSONALITY & SOC. PSYCHOLOGY BULL. 475 (1981).

⁷⁴ See, e.g., Loftus, *The Incredible Eyewitness: Reconstructing Memory*, PSYCHOLOGY TODAY, Dec. 1974, at 117. In this study subjects read summaries of a criminal trial. One-third read only circumstantial evidence; one-third read additional incriminating evidence from an eyewitness; and one-third also read information revealing that the eyewitness was legally blind. Only 18% of the jurors who read only circumstantial evidence returned guilty verdicts, but 72% of the jurors who read the eyewitness testimony voted guilty. The knowledge that the eyewitness was legally blind only reduced the guilty verdicts to 68%. *Id.* at 117-18.

⁷⁵ See Note, *Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitnesses Identification*, 29 STAN. L. REV. 969, 994-95 (1979).

⁷⁶ Rahaim & Brodsky, *supra* note 49, at 11; Note, *supra* note 75, at 994-95.

cross-racial identifications.⁷⁷ Loftus, in a study conducted during 1977 and 1978, surveyed 500 students at the University of Washington, all of whom were registered voters.⁷⁸ One of the questions concerned cross-racial identification:

Two women are walking to school one morning, one of them is an Asian and the other white. Suddenly, two men, one black and one white, jump into their path and attempt to grab their purses. Later, the women are shown photographs of known purse snatchers in the area. Which statement best describes your view of the women's ability to identify the purse snatchers?

- (a) Both the Asian and the white woman will find the white man harder to identify than the black man.
- (b) The white woman will find the black man more difficult to identify than the white man.
- (c) The Asian woman will have an easier time than the white woman making an accurate identification of both men.
- (d) The white woman will find the black man easier to identify than the white man.⁷⁹

Only fifty-eight percent of the subjects chose (b), the correct answer; it is notable that thirteen percent of the subjects selected alternative (d), indicating that they thought the white woman would find the black man *easier* to identify than the white man.⁸⁰

Rahaim and Brodsky asked a similar question of forty-five practicing lawyers and twenty-eight sociologically representative lay residents of a southern community.⁸¹ Only thirty-nine percent of the laymen selected the correct answer; although the lawyers were more successful, more than forty percent responded incorrectly.⁸² The study posed four other cross-racial identification questions, each of which concerned the

⁷⁷ E. LOFTUS, *EYEWITNESS TESTIMONY* 172-73 (1979); A. YARMEY, *PSYCHOLOGY OF EYEWITNESS TESTIMONY* 100-02 (1979); Rahaim & Brodsky, *supra* note 49, at 11.

⁷⁸ See E. LOFTUS, *supra* note 77, at 172-73.

⁷⁹ *Id.* at 172.

⁸⁰ *Id.* at 172-73.

⁸¹ Rahaim and Brodsky, *supra* note 49, at 13, asked the following question:

Two women are walking to work one morning. One of them is an Oriental American, the other white. Suddenly two men, one black and one white, jump out and grab their purses. Each man is in view of both women for the same amount of time. Later, the two women are asked to look at photographs of known purse snatchers. Which statement below best describes your view of the women's ability to identify the purse snatchers?

- a. Both women will find both men equally difficult to identify.
- b. The white woman will find the black man more difficult to identify than the white man. [This is the correct answer].
- c. The Asian woman will find it more difficult to identify the black man than the white man.
- d. The white woman will find the white man more difficult to identify than the black man.

⁸² *Id.* at 9.

effect of attitudes and experience on cross-racial recognition ability.⁸³ Overall, an average of twenty-four percent of the laymen and twenty-two percent of the lawyers chose the empirically correct answers to the five items on race.⁸⁴ Because each question had only four alternative

⁸³ Rahaim and Brodsky asked the following additional questions (the correct answer is marked with an asterisk):

[1]. Two white men are held up by a black man on their way home from work. One of the victims hates blacks and the other neither hates nor loves blacks. In your view which victim will find it easier to identify the hold-up man?

- a. The victim who hates blacks will find it easier to identify the black hold-up man.
- b. The victim who neither loves nor hates blacks will find it easier to identify the black hold-up man.
- *c. Both victims will have the same ability to identify the black hold-up man.
- d. The victim who neither hates nor loves blacks will find it easier to identify the black hold-up man but the other victim will more clearly remember the details of the crime.

. . . .

[2]. Two black men are robbed by a white man on their way to a ball game. One of the black men grew up around whites and has several white friends. The other black man has had almost no contact with whites. Which statement below best describes your view of the abilities of the men to identify the robber?

- a. The victim who has white friends will recognize the robber more easily.
- b. The victim who has little contact with whites will find it easier to identify the robber.
- *c. They will have the same amount of difficulty recognizing the robber.
- d. The victim with white friends will find it easier to recognize the robber, but the other victim will remember more of the details of the crime.

. . . .

[3] A white man observes an Oriental woman and a black woman hold up a grocery store. Which statement best describes your view of his ability to recognize the criminals?

- a. He will recognize the black woman more easily than the Oriental woman.
- *b. He will recognize the Oriental woman more easily than the black woman.
- c. He will have equal ability to recognize the two women.
- d. It will depend upon whether he is usually around blacks or Orientals.

. . . .

[4] A Chinese American man is robbed by a white man and black man. Which statement below best describes your view of his ability to identify the robbers?

- a. He will have equal ability to identify the robbers.
- *b. He will find it easier to identify the black robber.
- c. He will find it easier to identify the white robber.
- d. It will depend on whether he has more experience with blacks or whites.

Id. at 13-15.

⁸⁴ *Id.* at 11.

answers, pure guessing would have produced a slightly higher rate of correct answers.

The third study asked fifty-four prosecutors to rate the importance of various witness attributes to the outcome of the prosecution.⁸⁵ Of thirty-two possible attributes, the prosecutors judged "same race as the defendant" to be twenty-ninth in importance.⁸⁶

Although it seems reasonably certain that misconceptions about cross-racial identification are common, it is difficult to predict how frequently juries would decide cases differently if they had access to the empirically correct information on the problems of cross-racial identification. No study has investigated the impact on jury deliberations of providing this information. Three studies, however, have explored how jury deliberations in mock trials are affected by expert testimony on sources of identification error.⁸⁷ Taken together, these three investigations demonstrate that, at least in a laboratory setting, expert testimony affects the beliefs and judgments of individual jurors, increases jury deliberation time, and modestly increases the number of acquittals and hung juries.⁸⁸

D. Exacerbating Factors in White Victim/Black Defendant Cases

As demonstrated in part A, the own-race effect is strongest and most consistent where white subjects attempt to identify black faces. If this data is externally valid,⁸⁹ the risk of misidentification is greatest where the victim is white and the defendant is black. At least three factors may exacerbate the own-race effect and increase the chance of wrongful conviction in these cases.

First, pretrial identification procedures are likely to be less fair for black defendants than for white defendants. Line-ups and photo arrays are unfair to the extent that they point to the defendant, either because the other participants differ markedly from the defendant, or because only the defendant resembles the victim's initial description of the per-

⁸⁵ See A. YARMEY, *supra* note 77, at 100-02, reporting the substance of a paper presented at the 1975 meeting of the American Psychological Association by P. Lavrakas and L. Bickman entitled *What Makes a Good Witness?* The study asked the prosecutors to rate the importance of each attribute on a scale of one to five, with "one" corresponding to totally unrelated; "two" usually unrelated; "three" somewhat related; "four" usually related; and "five" corresponding to very related. *Id.* at 101.

⁸⁶ *Id.* The mean rating for this attribute, on the scale reported was only 1.878. *Id.*

⁸⁷ Hosch, Beck & McIntyre, *Influence of Expert Testimony Regarding Eyewitness Accuracy on Jury Decisions*, 4 LAW & HUMAN BEHAVIOR 287 (1980); Loftus, *Impact of Expert Psychological Testimony on the Unreliability of Eyewitness Identification*, 65 J. APPLIED PSYCHOLOGY 9 (1980); Wells, Lindsay & Tousignant, *Effects of Expert Psychological Advice on Human Performance in Judging the Validity of Eyewitness Testimony*, 4 LAW & HUMAN BEHAVIOR 275 (1980).

⁸⁸ Hosch, *A Comparison of Three Studies of the Influence of Expert Testimony on Jurors*, 4 LAW & HUMAN BEHAVIOR 297, 300-01 (1980).

⁸⁹ See *supra* part I.A.2.

petrator. The more unfair the line-up or photo array, the greater the defendant's chance of being erroneously identified.⁹⁰

One researcher has argued that the race of the photo array or line-up constructor significantly affects the fairness of the procedure.⁹¹ The existence of the own-race effect suggests that line-up and photo array constructors will produce *fairer* line-ups when the defendant is a member of their own race because they are more sensitive to similarities and dissimilarities among members of their own race. Because most police officers and district attorneys are white, absent a conscious policy of assigning line-ups and photo arrays of black defendants to a black person, black defendants typically will be placed in less fair line-ups than white defendants.

Preliminary research on the accuracy of the "photo-fit" system, a widely used recall method comprised of numerous sketches of five facial features, supports the conclusion that identification procedures are less fair for blacks. Witnesses are asked to select the sketches that best fit their memory of the perpetrator's face. The male photo-fit system contains Caucasian and Afro-Asian features. Ellis, Davies, and McMurrin asked black and white subjects to construct photo-fits of previously seen black and white faces.⁹² Both white and black subjects made more accurate photo fits for whites than blacks.⁹³ The authors suggested two possible explanations for this result. First, the Afro-Asian kit contained fewer alternative facial features than the Caucasian kit.⁹⁴ Second, the photo-fit system was originally developed for the reconstruction of white faces, which may have biased the manner in which the face is segmented and the features selected.⁹⁵

A second factor likely to exacerbate the wrongful conviction rate in white victim/black defendant cases is the phenomenon of expectancy. As Allport first reported in 1965, white witnesses expect to see black criminals.⁹⁶ This expectation is so strong that whites may observe an interracial scene in which a white person is the aggressor, yet remember the black person as the aggressor. Subsequent studies have replicated

⁹⁰ See Brigham, *Perspectives on the Impact of Lineup Composition, Race and Witness Confidence on Identification Accuracy*, 4 LAW & HUMAN BEHAVIOR 315, 318-19 (1980) (citing Malpass, *Effective Size and Defendant Bias in Eyewitness Identification Lineups* (1980) (unpublished manuscript)); Lindsay & Wells, *What Price Justice? Exploring the Relationship of Line-Up Fairness to Identification Accuracy*, 4 LAW & HUMAN BEHAVIOR 303 (1980).

⁹¹ Brigham, *supra* note 90, at 318-19.

⁹² See Ellis, Davies & McMurrin, *Recall of White and Black Faces By White and Black Witnesses Using the Photofit System*, 21 HUMAN FACTORS 55 (1979).

⁹³ *Id.* at 58.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ G. ALLPORT & L. POSTMAN, *THE PSYCHOLOGY OF RUMOR* 75 (1965). Allport showed subjects a picture of several people on a subway car, including a white man holding a razor and apparently arguing with a black man. Over half of the subjects reported that the black man held the razor. *Id.*

Allport's findings.⁹⁷

The third exacerbating factor is related to expectancy: when the evidence is sparse, jurors are more likely to attribute guilt to defendants of a different race.⁹⁸ Jurors are also more likely to convict when the victim is of their own race.⁹⁹ Because most juries are predominantly white,¹⁰⁰ in marginal evidence conditions black defendants will tend to be acquitted less often than white defendants and black defendants with white victims will tend to be acquitted least often. Although detailed consideration of the expectancy and guilt attribution phenomena is beyond the scope of this article, it is worth noting that these systemic biases against black defendants may interact with the own-race effect in many cases.

II

THE ADEQUACY OF EXISTING LEGAL PROTECTIONS

The own-race effect would be of little concern if defense counsel had adequate techniques for revealing and neutralizing the errors it produces. Unfortunately, none of the three traditional protections against erroneous identification—suppression hearings, cross-examination, and closing argument—adequately protect against cross-racial recognition impairment.

A. Suppression Hearings

Two important safeguards against erroneous identifications focus on procedure. In order to eliminate deliberate and accidental suggestiveness in identification procedures, the Supreme Court has recognized the defendant's right to counsel at post-indictment line-ups,¹⁰¹ and imposed a due process fairness requirement on all identification proceedings, including uncounseled photo arrays and preindictment line-ups.¹⁰² Courts enforce both protections by suppression hearings. The suppression court will suppress a pretrial identification if it finds that the defendant's right to counsel was violated or that the proceeding was so unreasonably suggestive as to lead to the likelihood of irreparable mis-

⁹⁷ See, e.g., Brigham, *Ethnic Stereotypes*, 76 PSYCHOLOGY BULL. 15 (1971).

⁹⁸ Ugwuegbu, *Racial and Evidential Factors in Juror Attribution of Legal Responsibility*, 15 J. EXPERIMENTAL SOC. PSYCHOLOGY 133, 143 (1979); see also Gleason & Harris, *Race, Socio-economic Status and Perceived Similarity As Determinants of Judgments By Simulated Jurors*, 3 SOC. BEHAVIOR & PERSONALITY 175, 178-79 (1975); McGlynn, Megas & Benson, *Sex and Race as Factors Affecting the Attribution of Insanity in A Murder Trial*, 93 J. PSYCHOLOGY 93, 98 (1976) (where evidence on intent is ambiguous, black male defendants in murder trials less successful in asserting insanity plea than white male defendants).

⁹⁹ Feild, *Rape Trials and Juror's Decisions*, 3 LAW & HUMAN BEHAVIOR 261, 272 (1979).

¹⁰⁰ See J. VAN DYKE, *JURY SELECTION PROCEDURES* 311-30 app. G (1977) (Racial Statistics).

¹⁰¹ See *United States v. Wade*, 388 U.S. 218 (1967).

¹⁰² See *Stovall v. Denno*, 388 U.S. 298 (1967).

identification.¹⁰³ The court then will consider whether subsequent identifications have an "independent basis"; if the court finds no independent basis, it also will preclude an in-court identification.¹⁰⁴

It is not clear whether suppression hearings enforcing the right to counsel ("*Wade* hearings") and due process ("*Stovall* hearings") adequately protect criminal identifications from errors caused by suggestiveness.¹⁰⁵ Certainly suppression hearings do little to offset errors stemming from cross-racial recognition impairment. Either counsel or a subsequent due process hearing can ensure that the defendant is not the only black (or white) person in the line-up.¹⁰⁶ But because the aim of suppression hearings is to uncover misidentification caused by police misconduct, there will be no investigation of the recognition ability of the witness in cases where the police have not used suggestive procedures. Even where authorities have used suggestive procedures, courts will probably ignore the question of cross-racial recognition impairment.¹⁰⁷ The Supreme Court's criteria for determining whether an impermissible pretrial procedure has tainted an in-court identification include such factors as the witness's prior opportunity to observe the criminal; the length of time between the crime and the identification proceeding; discrepancies between pre-identification descriptions and the defendant's appearance; and prior failures to identify the defendant.¹⁰⁸ The witness's individual recognition impairment just does not fit the focus of suppression hearings.

B. Cross-Examination of the Eyewitnesses

The Supreme Court recently proclaimed that "the time-honored

¹⁰³ See *id.* at 302; *Gilbert v. California*, 388 U.S. 263, 272-74 (1967); *United States v. Wade*, 388 U.S. 218, 239-42 (1967).

¹⁰⁴ *Gilbert v. California*, 388 U.S. at 272-74; *United States v. Wade*, 388 U.S. at 242.

¹⁰⁵ See generally *Levine & Tapp, The Psychology of Criminal Identifications: The Gap From Wade to Kirby*, 121 U. PA. L. REV. 1079 (1973) (arguing that procedural reforms initiated by *Wade* and *Stovall* have been eroded by later decision); *Quinn, In the Wake of Wade: The Dimensions of Eyewitness Identification Cases*, 42 U. COLO. L. REV. 135 (1970) (problem of misidentification will never completely be solved, because errors in judgment are inevitable). Cf. *Uelmen, Testing the Assumptions of Neil v. Biggers: An Experiment in Eyewitness Identification*, 16 CRIM. L. BULL. 358 (1980) (arguing that Court's attempt in *Neil v. Biggers*, 409 U.S. 188 (1972), to isolate five factors by which to assess eyewitness identification was unsuccessful).

¹⁰⁶ See *People v. Menchaca*, 264 Cal. App. 2d 642, 645, 70 Cal. Rptr. 843, 844-45 (1968); *People v. Hogan*, 264 Cal. App. 2d 254, 259-60, 70 Cal. Rptr. 448, 452-53 (1968); *People v. Graves*, 263 Cal. App. 2d 719, 741-42, 70 Cal. Rptr. 509, 524 (1968).

¹⁰⁷ For example, in *Stovall v. Denno*, 388 U.S. 298 (1967), the Court upheld an extremely suggestive hospital room show-up without mention of the cross-racial nature of the identification. The only reference by the Court to witness-defendant racial congruence was in *Manson v. Braithwaite*, 432 U.S. 98, 115 (1977) where the Court implied that because both witness and defendant were black, this alleviated concern that the scanty prior description would have fit large numbers of black men in the area. See also *United States v. Thomas*, 463 F.2d 314, 315 (D.C. Cir. 1972) (noting racial similarity as a factor increasing reliability).

¹⁰⁸ *United States v. Wade*, 388 U.S. 218, 241 (1967).

process of cross-examination [is] the device best suited to determine the trustworthiness of testimonial evidence."¹⁰⁹ Most courts will not allow defense counsel to introduce expert testimony on the own-race effect on the ground that cross-examination is the proper way to elicit information on a witness's credibility.¹¹⁰ Nevertheless, cross-examination is extremely unlikely to reveal cross-racial recognition impairment.

The value of cross-examination lies in its capacity to elicit facts known but not disclosed by the witness. First, cross-examination can test veracity; if the witness is lying, careful cross-examination may reveal inconsistencies or a motive to fabricate. But if the witness honestly believes that he has a good memory for other-race faces, when in fact he does not, the best cross-examination will be to no avail. Because accuracy of other-race face recognition appears to be wholly unrelated to confidence,¹¹¹ many witnesses who suffer from cross-racial recognition impairment will deny it and the jury will perceive only certainty and sincerity.

Second, cross-examination may probe some sources of unreliability. If a witness honestly believes that he is telling the truth, it is nevertheless possible to elicit additional facts that cast doubt on his ability to discern the truth. Was the witness paying attention to the subject of his testimony or was he absorbed in another task? Is his eyesight adequate? Was he intoxicated or hysterical? Because these kinds of additional facts affect reliability, a jury can use them to infer the probability that the witness is reporting an accurate observation.

This second facet of cross-examination is also an ineffective tool for detecting cross-racial recognition impairment. Because there are no known and commonly understood correlates for the own-race effect,¹¹² ordinary cross-examination will never elicit facts from which the jury can infer the impairment. This problem may be exacerbated by attempts of the prosecutor to elicit facts on direct examination that erroneously convey an inference of reliability. For example, in a recent Michigan case, the prosecutor asked a white eyewitness about his professional experience with black people;¹¹³ the court found no error in these questions, reasoning that "[i]n an interracial identification situation, evidence of the witness's prior contacts with another race is properly admit-

¹⁰⁹ *Watkins v. Sowder*, 449 U.S. 341, 349 (1981).

¹¹⁰ *See, e.g.*, *People v. Johnson*, 97 Ill. App. 3d 1055, 1069-70, 418 N.E.2d 768, 775-76 (1981); *People v. Dixon*, 87 Ill. App. 3d 814, 818, 410 N.E.2d 252, 256 (1980); *State v. Reynolds*, 230 Kan. 532, 534, 639 P.2d 461, 464 (1982).

¹¹¹ *See supra* notes 42-46 and accompanying text.

¹¹² *See supra* part I.B. As discussed above, Goldstein and Chance have deduced some evidence that lack of childhood interracial contact may explain the own-race effect. If jurors remain unaware that interracial experience must come early in order to improve cross-racial recognition ability, cross-examination that shows *adult* interracial contact will be counterproductive.

¹¹³ *People v. Flinnon*, 78 Mich. App. 380, 260 N.W.2d 106 (1977).

ted to show the reliability of the in-court identification."¹¹⁴ The juror perception studies reveal that many jurors would agree with the court's reasoning and accept the evidence of interracial experience even though the empirical studies show such an inference to be incorrect.¹¹⁵

Because the inadequacy of cross-examination results in part from the witness's ignorance of his own impairment, the appropriate remedy might seem to be testing the witness for the own-race effect, informing him of the results, and then proceeding with ordinary cross-examination. This is easier said than done. A prosecution witness would be free to take the recognition tests upon a defense request, but he would be unlikely to do so; it is a rare prosecution witness who will agree to even a simple interview with defense counsel.¹¹⁶ Defense counsel might move the court for an order compelling an unwilling witness to undergo the test, but this would probably be futile. First, it is unclear whether most courts would have the authority to order this kind of examination.¹¹⁷ Second, those courts that have ordered physical or mental examinations of complaining witnesses have always required a particularized and compelling reason for such an examination; mere speculation about incapacity has not sufficed.¹¹⁸ And third, no appellate court has found that defendants are entitled to such orders as of right; rather, the decision whether to grant such orders is within the trial court's discretion.¹¹⁹

These obstacles cannot be surmounted by devising some test with which to confront the witness while he is on the stand. It is possible to "measure" a witness's eyesight by cross-examination, because an ordinary question will suffice: "What am I holding in my hand?" Similarly, it is possible to gauge acuteness of hearing by asking any question in a soft tone of voice. In contrast, defense counsel cannot probe interracial recognition ability by merely asking a question or even a series of questions. As an alternative method, defense counsel might try to show the witness a number of photographs, and then, after a substantial delay, recall the witness, show him more photographs, and ask which ones he recognized. Such a demonstration, however, would be an in-court experiment, and therefore subject to the basic requirement applicable to

¹¹⁴ *Id.* at 389, 260 N.W.2d at 110.

¹¹⁵ *See supra* notes 77-84 and accompanying text.

¹¹⁶ Defense counsel has no right to interview prosecution witnesses if they do not want to be interviewed. *See, e.g.*, *United States v. Fink*, 502 F.2d 1 (5th Cir. 1974), *rev'd on other grounds*, 425 U.S. 80 (1976); *Commonwealth v. St. Pierre*, 387 N.E.2d 1135 (Mass. 1979); *see also* *United States v. White*, 454 F.2d 435 (7th Cir. 1971) (government may inform its witness of right to refuse defense counsel's request for an interview).

¹¹⁷ The Federal Rules of Evidence, like many state codes, make no provision for such an examination. Nevertheless, there may be an "inherent" power to order one; rule 35 of the Federal Rules of Civil Procedure does make such a provision. *But cf. Wedmore v. State*, 237 Ind. 212, 143 N.E.2d 649 (1957) (no inherent power to order such examination).

¹¹⁸ *See* Annot., 18 A.L.R.3d 1433 (1968).

¹¹⁹ *See* *United States v. Skillman*, 442 F.2d 542 (8th Cir.), *cert. denied*, 404 U.S. 833 (1971).

all experimental evidence: similarity of relevant conditions.¹²⁰ This requirement often frustrates proposed courtroom experiments¹²¹ and would seem impossible to meet in testing other-race recognition impairment. Because no courtroom experiment could recreate the emotions that witnessing a crime engenders, and because the emotions of the witness often affect recall, the requirement of similarity of relevant conditions would not be satisfied.¹²² Thus, it seems that none of the “time-honored” forms of cross-examination can adequately elicit cross-racial recognition impairment.

C. Closing Arguments

Just as courts suggest cross-examination when defense counsel proffer expert testimony, they respond to requests for jury instructions with another conventional panacea: judges rule that jury instructions explaining the own-race effect are unnecessary because defense counsel can address the issue in his closing argument. This remedy, however, is also problematic.

The first problem is that courts may consider statements about cross-racial recognition impairment racially inflammatory and thus prohibit them. The earliest cases in which the racial component of identification accuracy was an issue involved black defendants and black witnesses.¹²³ When prosecutors argued that an identification was particularly reliable because witness and accused were of the same race, the New York courts condemned their arguments as inflammatory.¹²⁴

The rationale for these decisions came from a line of cases in which the courts disapproved argument that same-race *accusations* are more truthful than cross-racial accusations:

The vice of such an argument is not only that it is predicated on a false and illogical premise, but more important it is divisive: it seeks to separate the racial origin of witnesses in the minds of the jury, and to encourage the weighing of testimony on the basis of racial similarity or dissimilarity of witnesses. The argument offends the democratic and logical principle that race, creed or nationality, in themselves, provide no reason for believing or disbelieving a witness' testimony.¹²⁵

¹²⁰ See C. McCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 215, at 536 (2d ed. 1972).

¹²¹ *Id.* at n.96.

¹²² The burden of proving similar conditions is on the proponent of the evidence. *Id.* § 202, at 485 n.14.

¹²³ *People v. Williams*, 40 A.D.2d 812, 338 N.Y.S.2d 221 (1972); *People v. Fisher*, 19 A.D.2d 613, 241 N.Y.S.2d 217 (1963); *People v. Burris*, 19 A.D.2d 557, 241 N.Y.S.2d 75 (1963).

¹²⁴ *Id.*

¹²⁵ *People v. Hearn*, 18 A.D.2d 922, 923, 238 N.Y.S.2d 173, 173 (1963); see also *People v. Green*, 89 A.D.2d 874, 874, 453 N.Y.S.2d 228, 229 (1982) (citing *Hearn*); *People v. Burney*, 20 A.D.2d 617, 617, 244 N.Y.S.2d 1012, 1012 (1963) (quoting *Hearn*).

Although other courts concur in this reasoning where the challenged arguments concern the veracity of an accusation,¹²⁶ New York appears to be the only jurisdiction that has included arguments about the increased accuracy of a same-race identification within the prohibition against racially inflammatory arguments.

Two jurisdictions have explicitly approved counsel's references during closing arguments to the racial component in cross-racial identification cases. In a recent Kentucky case, the prosecutor stated that "it's hard for me to tell people of the Negro race apart."¹²⁷ The reviewing court found no error because "[the prosecutor] was merely trying to explain the prosecuting witness's difficulties in identifying one of her assailants."¹²⁸ In another recent case, the Louisiana Supreme Court rejected appellate counsel's complaint that trial counsel should not have challenged the identification by repeatedly referring to the defendant as the only black person in the courtroom.¹²⁹ The court held that such references to race were permissible because they did not appeal to prejudice.¹³⁰

Two other reported cases implicitly approve arguments addressing the reliability of cross-racial identifications.¹³¹ Whether or not such arguments should be completely proscribed by the rules against inflammatory racial comments, the Kentucky case makes it clear how easy it is for an advocate to stray from purely factual arguments about cross-racial accuracy into questionable innuendo. Perhaps this is only a minor pitfall in relying on closing arguments; with some practice, trial courts may become adept at sifting the wheat from the chaff.

A second and perhaps more intractable difficulty with relying on closing arguments to address cross-racial identification impairment is the lack of factual foundation for such arguments. Both defense attorneys and prosecutors are limited to arguments of facts in evidence or inferences from those facts.¹³² Certainly defense counsel may call to the jury's attention the racial dissimilarity of the witness and defendant. He may also ask the jury if they believe such an identification is reliable. But defense counsel has no foundation for an affirmative statement that a cross-racial identification is much less reliable than a same-race identi-

¹²⁶ See Annot., 45 A.L.R.2d 303, 322-69 (1953).

¹²⁷ *Patterson v. Commonwealth*, 555 S.W.2d 607, 610 (Ky. App. 1977).

¹²⁸ *Id.*

¹²⁹ *State v. McMorris*, 343 So. 2d 1011 (La. 1977).

¹³⁰ *Id.* at 1016.

¹³¹ *McFarland v. Smith*, 611 F.2d 414, 416-17 (2d Cir. 1979); *Haynes v. McKendrick*, 481 F.2d 152, 154 (2d Cir. 1973).

¹³² See, e.g., *People v. Ashwal*, 39 N.Y.2d 105, 109, 347 N.E.2d 564, 566-67, 383 N.Y.S.2d 204, 206-07 (1976). See generally Alschuler, *Courtroom Misconduct By Prosecutors and Trial Judges*, 50 TEX. L. REV. 629, 633 (1972); Vess, *Walking a Tightrope: A Survey of Limitations in the Prosecutor's Closing Argument*, 64 J. CRIM. L. & CRIMINOLOGY 22 (1973); ABA Standards, Prosecution and Defense Functions §§ 3-5.8, 4-7.8 (2d ed. 1979).

fication; such a statement would be an assertion of facts not in evidence. Upon objection, the court properly would tell the jury to disregard it.¹³³

Argument concerning the likelihood that *this* witness was affected by the own-race effect would be even more constrained. Suppose that a white witness called by the prosecutor testifies on direct examination that he had lived in an integrated neighborhood for five years and felt no prejudice toward blacks. Defense counsel could not claim in his closing argument that this experience was irrelevant to the likelihood of error; without the foundation of expert testimony, he would be asserting facts not in evidence. Again, the trial court properly would sustain an objection to such an argument.

Even if the prosecutor failed to object to statements in closing argument about the magnitude and correlates of the own-race effect, or if the court erroneously overruled his objections, such statements are likely to be unpersuasive. If the jury correctly perceives the role of defense counsel, it probably will interpret these statements as mere adversarial hyperbole. Even if some jurors are impressed by these arguments, they may feel *obliged* to ignore them because there is no support in the testimonial or real evidence for defense counsel's claims and the trial court has instructed them that the statements of counsel are not evidence.

Of the existing protections against misidentification, the primary safeguard, suppression hearings, is totally unsuited to uncovering errors produced by the own-race effect. Despite their potential value in revealing identification errors, cross-examination and closing argument are also ineffective because the jury is not informed about the existence and nature of the own-race effect. If we take the risk of cross-racial identification errors seriously, additional protective measures are necessary.

III

DEVELOPING ADDITIONAL SAFEGUARDS

A. Extreme Measures

Some commentators include outright exclusion as a possible remedy for the inherent untrustworthiness of identification evidence.¹³⁴ The courts could easily construct a mechanism for broader exclusion: merely expand the due process test of *Stovall v. Denno*¹³⁵ to include *all* cases where the relative value of the testimony is so small that its admission would mislead the jury regardless of the source of the unreliability. But most commentators seem to discuss this "solution" merely as a rhetorical device for strengthening the appeal of the individual author's fa-

¹³³ Cf. *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974) (prosecutor's comments on matters not in evidence rendered harmless error by trial court's instruction to jury to disregard them).

¹³⁴ See, e.g., Note, *supra* note 75, at 1000.

¹³⁵ 388 U.S. 293 (1967).

vored reform.¹³⁶ The remedy of outright exclusion is too drastic for courts to seriously consider it: in cases where additional evidence of the defendant's guilt exists, exclusion would thwart rather than advance accurate factfinding. Because many cross-racial identifications are reliable, outright exclusion is also an inappropriate tool for specifically addressing the own-race effect. Furthermore, a rule excluding only cross-racial identifications might lead to an increase in interracial crime.

A second extreme measure, the requirement of corroboration, has some serious advocates.¹³⁷ Although corroboration requirements have been imposed for particular offenses and particular types of witnesses,¹³⁸ no court or legislature has deemed it necessary to corroborate eyewitness testimony. Such a corroboration requirement would create the difficult practical problem of deciding what constitutes adequate corroboration. More importantly, however, the costs of this requirement are prohibitive. Some uncorroborated identifications are highly reliable, for example, those in which the witness was acquainted with the defendant prior to the crime. As with outright exclusion, imposing the requirement of corroboration only in cross-racial identification cases seems both drastic and maladroit. Again, the circumstances of some cross-racial identifications will make them very reliable, yet a rigid rule of corroboration would allow clearly guilty defendants to escape conviction. And again, the selective imposition of this requirement might generate more interracial crime.

Whatever the abstract merits of exclusion or corroboration, neither remedy is likely to be universally adopted and both are inappropriate for selective application to cross-racial identifications. An alternative approach that develops standards for the introduction of expert testimony and the delivery of jury instructions is more fruitful both because the means are less drastic and because they can be tailored to the problem of the own-race effect.

B. Expert Testimony

Many commentators, including several psychologists, have pro-

¹³⁶ Note, *supra* note 75, at 1000-01; Note, *Eyewitness Identification Testimony and the Need for Cautionary Jury Instructions for Criminal Cases*, 60 WASH. U.L.Q. 1387, 1400-02 (1982).

¹³⁷ See, e.g., M. HOUTS, FROM EVIDENCE TO PROOF 26 (1956); Goldstein, *The Fallibility of the Eyewitness: Psychological Evidence*, in PSYCHOLOGY IN THE LEGAL PROCESS 223 (B. Sales ed. 1977); P. WALL, *supra* note 12, at 182-93; Comment, *Possible Safeguards Against Mistaken Identification By Eyewitnesses*, 2 U.C.L.A. L. REV. 552, 557 n.23 (1955). Most advocates of the corroboration requirement would merely prohibit convictions based upon a single eyewitness identification. Goldstein has proposed the stiffer requirement that eyewitness identification testimony be inadmissible where it is the only class of evidence available in a criminal trial. Goldstein, *supra*, at 237-41.

¹³⁸ See generally 7 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW §§ 2036-75 (3d ed. 1940) (discussing corroboration requirements for certain kinds of witnesses and in various civil and criminal cases).

posed the use of expert testimony to inform jurors about the psychological data on identification.¹³⁹ Courts have responded cautiously, acknowledging that some experimental findings may have evidentiary value, but refusing *carte blanche* admissibility. Whether or not courts should always permit expert testimony on all sources of identification error, the balance between potential prejudice and probative value favors admissibility of data on the own-race effect.

1. *The Proposed Content and Presentation of Expert Testimony on the Own-Race Effect*

One way to bridge the gap between psychologists' and laymen's knowledge of the own-race effect would be to allow the defense to call an expert witness whenever the prosecution presents evidence that includes a cross-racial identification. Because the expert is unable to determine whether the witness's memory was actually distorted by the own-race effect, he would not be able to venture an opinion on the correctness of the identification at issue. The expert would instead explain the methodology and findings of the own-race effect research.¹⁴⁰ In cases where the defendant is black or Asian and the witness white, the expert would report consistent findings of cross-racial impairment; in cases where the defendant is white and the witness Asian or black, the expert would report split results; and in cases involving a Hispanic or Native American defendant (or witness), the expert would report all of the own-race effect studies, because there are no laboratory studies directly on point. The expert would then describe the strength of the effect, explaining how much a cross-racial identification increases the *likelihood* of error, but cautioning that not all cross-racial identifications are inaccurate and that not all persons exhibit the own-race effect. The expert would further explain that neither positive attitudes toward other races nor interracial experience precludes cross-racial recognition impairment. Finally, he would stress that an entirely confident and honest

¹³⁹ See, e.g., Clifford, *Eyewitness Testimony: The Bridging of a Credibility Gap*, in *PSYCHOLOGY, LAW AND LEGAL PROCESSES* 167, 180-81 (D. Farrington, K. Hawkins & S. Lloyd-Bostock eds. 1979); Loftus & Monahan, *Trial by Data*, 35 *AM. PSYCHOLOGIST* 270, 273-74 (1980); Wells, Lindsay & Tounignant, *Effects of Expert Psychological Advice on Human Performance in Judging the Validity of Eyewitness Testimony*, 4 *LAW & HUMAN BEHAVIOR* 275, 285 (1980); Comment, *Expert Testimony on Eyewitness Perception*, 82 *DICK. L. REV.* 465, 484-85 (1978); Note, *supra* note 75, at 1006 & n.173.

¹⁴⁰ [The psychologist's] testimony is designed to give the jury additional information to use when assessing the credibility of a particular witness. His testimony does not indicate whether or not any particular witness is telling the truth. It is limited to describing . . . scientific phenomena by way of citing literature and experiments in the field of psychology and to indicating the extent to which such phenomena might have affected an eyewitness identification in the case.

Fishman & Loftus, *Expert Psychological Testimony on Eyewitness Identification*, 4 *LAW & PSYCHOLOGY REV.* 87, 95-96 (1978).

identification might nevertheless reflect own-race effect error, explaining that subjects in laboratory settings were unable to predict or perceive their own impairment.

The prosecution, of course, could cross-examine the expert. He might draw attention to the fact that the strength, if not the existence of the own-race effect in *field* settings is unclear. If the expert had not been candid or complete, cross-examination would elicit that the data reflect group tendencies, that individuals may or may not experience cross-racial recognition impairment, and that the expert could not say whether the eyewitness in this case was affected by this tendency. The prosecutor might also want to explore the lack of any well supported theory explaining the own-race effect.

The prosecutor would also have the option of calling his own expert in rebuttal. Under ordinary circumstances, however, he would be unlikely to do so. Because expert testimony on the own-race effect would describe a scientific phenomenon rather than assess a particular witness, divergence in the testimony of different experts would be unlikely. On occasion, however, an ill-informed, biased, or unethical defense expert witness might compel the prosecutor to present the jury with a second perspective.

2. *The Judicial Response*

a. *General Standards for the Admission of Expert Testimony.* The variety of evidentiary rules in state and federal courts share two central principles: no fact is admissible unless it has rational probative value on an issue in dispute and every fact that has such value is admissible absent a countervailing and overriding policy.¹⁴¹ Thus courts should allow expert testimony when it provides information relevant to disputed legal issues and is not outweighed by other policy considerations. The Federal Rule of Evidence¹⁴² on the admissibility of expert testimony accordingly provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."¹⁴³

The application of traditional expert testimony criteria to psychological testimony on the reliability of eyewitness identifications is receiving increased appellate attention, but the decisions generally have been unfavorable to the defendant. The leading opinion is the Ninth Cir-

¹⁴¹ See 1 J. WIGMORE, *supra* note 138, §§ 9, 10.

¹⁴² The significance of the Federal Rules of Evidence is not limited to their application in federal courts; they serve as a model for many state courts. 21 C. WRIGHT & K. GRAHAM, *FEDERAL PRACTICE AND PROCEDURE* § 5007 (1977 & Supp. 1982).

¹⁴³ FED. R. EVID. 702.

cuit's 1973 decision in *United States v. Amaral*.¹⁴⁴ The court found no abuse of discretion in the trial judge's exclusion of psychological testimony on "the effect of stress on perception and . . . the [general] unreliability of eye-witness identification."¹⁴⁵ The opinion's significance lies in its reasoning. The *Amaral* court first outlined four criteria for the admissibility of expert testimony: (1) a qualified expert; (2) a proper subject matter; (3) conformity to a generally accepted explanatory theory; and (4) probative value outweighing prejudicial effect.¹⁴⁶ The court assigned the balancing implicit in the fourth test to the "broad discretion" of the trial judge, absent a "manifestly erroneous" determination.¹⁴⁷ Stressing the potential of effective cross-examination for revealing inconsistencies in eyewitness testimony, and the lack of any inconsistencies in the testimony of the witnesses in that case, the *Amaral* court found no abuse of discretion in the trial court's refusal to admit the proffered expert testimony.¹⁴⁸

Several circuits have adopted the *Amaral* guidelines.¹⁴⁹ Under these guidelines, no federal court of appeals has yet found a trial court's refusal to admit expert psychological testimony on identification to be reversible error.¹⁵⁰ A majority of the state courts hold that a trial court does not abuse its discretion by refusing to admit expert psychological testimony on eyewitness identifications.¹⁵¹

Although some cases simply find no abuse of the trial court's discretion,¹⁵² many decisions go further, ruling the proffered evidence inadmissible for failure to satisfy the second *Amaral* requirement, a proper subject matter. The proper subject matter standard has been variously

¹⁴⁴ 488 F.2d 1148 (9th Cir. 1973).

¹⁴⁵ *Id.* at 1153.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 1152.

¹⁴⁸ *Id.* at 1153.

¹⁴⁹ *See, e.g.*, *United States v. Thevis*, 665 F.2d 616, 641-42 (5th Cir.), *cert. denied*, 456 U.S. 1008 (1982); *United States v. Sims*, 617 F.2d 1371, 1374-75 (9th Cir. 1980); *United States v. Foshier*, 590 F.2d 381, 382-83 (1st Cir. 1979); *United States v. Brown*, 501 F.2d 146, 150-51 (9th Cir. 1974), *rev'd on other grounds sub nom. United States v. Nobles*, 422 U.S. 225 (1975).

¹⁵⁰ *See supra* note 149; *see also United States v. Watson*, 587 F.2d 365, 368-69 (7th Cir. 1978) (affirming exclusion under Federal Rule of Evidence 702 of expert testimony on cross-racial recognition on ground that "work in that field still remains inadequate" to assist jury), *cert. denied*, 439 U.S. 1132 (1979); *United States v. Brown*, 540 F.2d 1048, 1053-54 (10th Cir. 1976) (affirming exclusion of expert testimony on limitations of eyewitness identifications on ground that testimony would invade province of jury), *cert. denied*, 429 U.S. 1100 (1977); *State v. Helterbride*, 301 N.W.2d 545, 547 (Minn. 1980) (holding trial court did not abuse discretion in refusing to admit expert testimony on unreliability of eyewitness identifications).

¹⁵¹ *See, e.g.*, *State v. Valencia*, 118 Ariz. 136, 138, 575 P.2d 335, 357 (Ariz. Ct. App. 1977); *Dyas v. United States*, 376 A.2d 827, 831-32 (D.C. 1977); *State v. Warren*, 230 Kan. 385, 395, 635 P.2d 1236, 1243 (1981); *State v. Helterbride*, 301 N.W.2d 545, 547 (Minn. 1980); *Hampton v. State*, 92 Wis. 2d 450, 461, 285 N.W.2d 868, 873 (1979).

¹⁵² *See, e.g.*, *United States v. Foshier*, 590 F.2d 381, 384 (1st Cir. 1979) ("Given the additional discretion to consider the balance of prejudice and probative value, we cannot say that the trial court abused its discretion . . .").

interpreted. The predominant interpretation requires that the expert's testimony be beyond the knowledge of the average layperson.¹⁵³ Courts applying this interpretation frequently find that the proffered data on the own-race effect is no more than common sense.¹⁵⁴ The second common interpretation of proper subject matter is that the expert may not invade the province of the jury.¹⁵⁵ In this view, expert psychological testimony relating to the credibility of an eyewitness violates the policy against expression of expert opinions on an "ultimate issue" to be determined by the trier of fact.¹⁵⁶ A recent California case voices a more drastic objection: "Evidence that under contrived test conditions, or even in real life situations, certain persons totally unconnected with this case, have been mistaken in their identity [sic] of individuals is no more relevant than evidence that in other cases, witnesses totally unconnected with this case have lied."¹⁵⁷

The sole exception to this pattern of appellate court resistance is the recent Arizona Supreme Court decision in *State v. Chapple*.¹⁵⁸ Applying the *Amaral* criteria, the *Chapple* court found "the unusual facts of this case" required the admission of expert testimony on the reliability of eyewitness identifications.¹⁵⁹ The proffered testimony in *Chapple* included scientific data on such factors as the trustworthiness of immediate and delayed identification; the effect of stress upon perception; the problem of "unconscious transfer," "a phenomenon which occurs when the witness confuses a person seen in one situation with a person seen in a different situation";¹⁶⁰ assimilation of post-event information and the "feedback factor," where two eyewitnesses discuss what they saw and thereby obtain a false sense of certainty;¹⁶¹ and the relationship between confidence and accuracy. Because each factor was relevant to the undisputed facts surrounding Chapple's identification, and because the average juror probably would be unaware of the effect of these factors on memory, the court concluded that the evidence should have been

¹⁵³ See, e.g., *United States v. Amaral*, 488 F.2d 1148, 1152-53 (9th Cir. 1973). See generally C. MCCORMICK, *supra* note 120, § 13 (discussing general requirement that subject matter "be beyond the ken of the average layman").

¹⁵⁴ See, e.g., *United States v. Amaral*, 488 F.2d 1148, 1152-53 (9th Cir. 1973); *People v. Dixon*, 87 Ill. App. 3d 814, 818, 410 N.E.2d 252, 256 (1980).

¹⁵⁵ See, e.g., *United States v. Brown*, 501 F.2d 146, 150-51 (9th Cir. 1974), *rev'd on other grounds sub nom.* *United States v. Nobles*, 422 U.S. 225 (1975); *People v. Johnson*, 38 Cal. App. 3d 1, 6-7, 112 Cal. Rptr. 834, 837 (1974).

¹⁵⁶ See *People v. Johnson*, 38 Cal. App. 3d 1, 6-7, 112 Cal. Rptr. 834, 837 (1974). In *Johnson*, the court held that in the absence of evidence of a psychologically abnormal witness, expert testimony would usurp the jury's task of determining the weight to be accorded to the witness's testimony.

¹⁵⁷ *People v. Plasencia*, 33 CRIM. L. REP. (BNA) 2050, 2051 (Cal. Ct. App. 1983).

¹⁵⁸ 135 Ariz. 281, 660 P.2d 1208 (1983).

¹⁵⁹ *Id.* at 296, 660 P.2d at 1223.

¹⁶⁰ *Id.* at 294, 660 P.2d at 1221.

¹⁶¹ *Id.*

admitted.¹⁶²

b. *The Admission of Expert Testimony on the Own-Race Effect.* Five appellate courts have specifically addressed the admissibility of expert testimony on cross-racial identification errors. The reasoning in these cases varies, but the results are consistent: all five courts have upheld the trial court's decision to exclude the testimony.

In the only federal case involving expert testimony on the own-race effect, the trial court ruled the proffered testimony inadmissible on the ground that it would not be of probative value to the jury.¹⁶³ The Seventh Circuit agreed with the trial judge, citing both "the circumstances in this case involving prompt and positive identifications," and "the [court's] belief that work in [the cross-racial identification] field still remains inadequate," as bases for concluding that the testimony would have been of little use to the jury.¹⁶⁴

Two Illinois cases have also considered the issue. In the first, *People v. Dixon*,¹⁶⁵ the defendant argued that the trial court's ruling prevented the jury from properly weighing the credibility of the eyewitnesses against the credibility of his alibi defense.¹⁶⁶ The record provided some support for this contention: the witnesses' inability to give a precise description of the perpetrator after the incident, a questionable identification of the defendant by one witness based on a one man show-up, and the fact that the defendant was the only black man present during the courtroom identification.¹⁶⁷ The court nevertheless concluded that the trial court had correctly excluded the expert testimony because "the trustworthiness of eyewitness observations is not generally beyond the common knowledge and experience of the average juror."¹⁶⁸ The court supported this conclusion by quoting the expert's statements during the offer of proof that "[w]e have all heard, I am sure, of the notion that to whites all blacks look alike and all Asians look alike and similar folk notions" and his later statement that his research supported the validity of those beliefs.¹⁶⁹ "[M]oreover," the court noted, "defense counsel had ample opportunity in cross-examination and argument to challenge the identifications by the two eyewitnesses, and . . . took full advantage of these opportunities."¹⁷⁰ In the second Illinois case, the trial judge had refused to admit expert testimony on the reliability of cross-racial identi-

¹⁶² *Id.* at 296, 660 P.2d at 1223.

¹⁶³ *United States v. Watson*, 587 F.2d 365, 368 (7th Cir. 1978), *cert. denied sub nom. Davis v. United States*, 439 U.S. 1132 (1979).

¹⁶⁴ *Id.* at 369.

¹⁶⁵ 87 Ill. App. 3d 814, 410 N.E.2d 252 (1980).

¹⁶⁶ *Id.* at 818, 410 N.E.2d at 256.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 818-19, 410 N.E.2d at 256.

fications because he thought it would both invade the province of and confuse the jury without resolving any issues.¹⁷¹ The reviewing court did not comment on the lower court's reasoning, but instead adopted the two-pronged rationale of *Dixon*: first, the trustworthiness of identification testimony is not beyond the ken of the average juror; and second, questions concerning the accuracy of the identification were properly relegated to cross-examination of the eyewitness and closing argument.¹⁷²

The Kansas Supreme Court has relied on the same rationales for rejecting expert testimony concerning cross-racial identifications. In *State v. Reynolds*,¹⁷³ the court acknowledged that the cross-racial nature of the identification was an important factor, but one "fully capable of being elicited, and in fact [was] elicited, during other testimony."¹⁷⁴ In another case apparently involving cross-racial identification, the same court upheld the exclusion of expert testimony because Kansas law forbids expert opinions that "pass upon the credibility of witnesses or the weight of disputed evidence."¹⁷⁵ Such testimony would usurp the function of the jury, at least where the defendant makes no claim "that the [witness] suffered from any specific organic or emotional disability that would have affected the reliability of her identification."¹⁷⁶

A published opinion of a New York trial court also rejects testimony on the reliability of cross-racial identification.¹⁷⁷ The court reasoned that the psychological evidence was insufficiently "reliable or acceptable in the scientific community," and that its admission would usurp the function of the jury.¹⁷⁸

Of course, the reported opinions overstate judicial resistance to this kind of testimony. Appellate courts confront the issue only in cases where the trial judge has excluded the evidence and the defendant was convicted. Because an acquittal can not be appealed, there will be no occasion for appellate approval of the admission of the psychologist's testimony; because trial court opinions are rarely reported, there will be no official record of most cases in which lower courts have admitted such testimony. The accounts of several psychologists working in the field of identification suggest that the admission of evidence on the own-race effect is not so rare as it is sporadic.¹⁷⁹

171 *People v. Johnson*, 97 Ill. App. 3d 1055, 1061, 423 N.E.2d 1206, 1211 (1981).

172 *Id.* at 1069, 423 N.E.2d at 1216-17.

173 230 Kan. 532, 639 P.2d 461 (1982).

174 *Id.* at 535, 639 P.2d at 464.

175 *State v. Reed*, 226 Kan. 519, 521, 601 P.2d 1125, 1128 (1979).

176 *Id.* at 520, 601 P.2d at 1127.

177 *People v. Brown*, 117 Misc. 2d 587, 459 N.Y.S.2d 227 (Westchester County Ct. 1983).

178 *Id.* at 594, 459 N.Y.S.2d at 232.

179 Robert Buckhout reports that he has testified as an expert witness on eyewitness identification in over 60 cases. Letter from Robert Buckhout to author (June 30, 1983) (on file at *Cornell Law Review*). Although his records do not permit him to count the number of cases

Ironically, one court in a civil case has acknowledged the admissibility of testimony on the own-race effect, but for a purpose other than probing the reliability of a particular identification. In *Bridgeport Guardians, Inc. v. Members of Bridgeport Civil Service Commission*,¹⁸⁰ the court struck down a patrolman's entrance exam as racially discriminatory. The test included a section requiring the memorization of eight sets of mug shots, all of which were white. A psychologist's testimony, apparently unchallenged, that whites probably found it easier to distinguish white faces than did blacks, contributed to the court's decision.¹⁸¹

3. Meeting Judicial Objections

The developing case law on the admissibility of expert testimony on eyewitness identification forms a clear pattern. Although the appellate courts have provided rough guidelines for admissibility, they have relied on the trial courts' competent exercise of discretion to supply the details. This leads to capricious and inconsistent decisions that admit testimony in one case, then exclude it in the next. Commentators have criticized the deferential stance of *Amaral* and its counterparts, arguing for blanket admission of experimental psychologists' findings on the sources and risks of misidentification; in their view, the field as a whole meets the traditional criteria for the admission of expert testimony.¹⁸² The courts fear that capitulation will lead to a battery of psychologists testifying in every criminal case involving an eyewitness identification, or worse, in every case relying on testimonial evidence of any sort, for many of the factors affecting the perception and memory of faces also affect the perception and memory of events. Appellate courts can avoid these extremes by systematically considering whether *particular* factors affecting the reliability of identifications meet the criteria outlined in *United States v. Amaral* for admitting expert testimony: a qualified expert, proper subject matter, conformity to a generally accepted explanatory theory, and probative value outweighing prejudicial effect.¹⁸³ If courts measure the own-race effect data against these standards, they must conclude that the standards are easily satisfied and that discretionary refusals to admit expert testimony on that data are unwarranted.

that included testimony on the own-race effect, he states that he discussed it "many times." *Id.* Elizabeth Loftus also reports substantial experience testifying as an expert on eyewitness identification. Letter from Elizabeth Loftus to author (July 3, 1983) (on file at *Cornell Law Review*). She also is unable to determine how many of those cases involved cross-racial identifications, but one of her books, *Eyewitness Testimony*, reports one such instance. *See* E. LOFTUS, *supra* note 77, at 204-15. The book includes a transcript of her testimony. *Id.* at 217-35.

¹⁸⁰ 482 F.2d 1333 (2d Cir. 1973).

¹⁸¹ *Id.* at 1338.

¹⁸² *See* Clifford, *supra* note 139, at 167-68; Fishman & Loftus, *supra* note 140, at 95-101; Comment, *supra* note 139, at 476-83.

¹⁸³ *United States v. Amaral*, 488 F.2d 1148, 1153 (9th Cir. 1973); *see supra* notes 144-46 and accompanying text.

a. *Qualified Expert.* The requirement of a qualified expert is the least troublesome and ordinarily should pose no problem. The Federal Rules of Evidence provide that a witness may be qualified as an expert based upon his "knowledge, skill, experience, training, or education."¹⁸⁴ Admittedly, not all psychologists have the proper background to speak authoritatively on factors affecting eyewitness testimony; psychology includes numerous subfields, and many psychologists have no training or experience outside their specialty. Specialists in perception, memory, experimental cognitive, or social psychology would be appropriate candidates, however, because the research on eyewitness testimony incorporates elements from all of these areas.¹⁸⁵ In addition to holding an advanced degree in one of these areas, a witness proffered as an expert would have to be familiar with all of the research on the own-race effect; familiarity with only one study or with textbook summaries would not sufficiently guarantee a balanced and informed perspective. Many psychologists who have sufficient expertise to qualify as experts would not have experimented on the own-race effect themselves. Although counsel might prefer a witness who can cite his own work, such a witness is not necessarily more competent.¹⁸⁶

Under this standard a large number of psychologists are potentially eligible for qualification. Thus under the first of the criteria outlined by *Amaral*—the requirement of a qualified expert—testimony on the own-race effect is indistinguishable from expert testimony on other aspects of identification; there may be problems with some individuals proffered as experts, but the standard is readily met.

¹⁸⁴ FED. R. EVID. 702.

¹⁸⁵ In order to make an accurate identification, the eyewitness must observe or perceive the offender's face correctly, retain that complete perception without distortion in memory and retrieve a faithful version of the remembered image when called upon to identify a suspect at some later time. The term "eyewitness identification" refers to this entire process. Psychologists, however, in studying the phenomenon, traditionally have examined each of the stages separately. Specialists in perception concentrate on the factors affecting a witness' awareness of objects, qualities or relations through the sense organs, and have studied the manner in which sensory content is influenced by set and prior experience. Memory specialists investigate the changes that occur between the time something is first learned or observed and the time it is recalled, including the factors involved in the very process of retrieving information from memory. Social psychologists are interested in the manner in which the witness' behavior throughout the process is influenced by other individuals in a social environment.

Note, *supra* note 75, at 974 n.11.

¹⁸⁶ One student commentator has argued that a witness should have done work in the field of eyewitness identification, but recognizes that the expert need not have researched every fact about which he will testify. Note, *supra* note 75, at 1015 & n.212. Even this requirement seems unnecessary because all psychologists are trained to read the literature in their subfield. A psychologist who has read all of the studies on a particular factor is as competent as one working on the general area of eyewitness identification to summarize the literature on that factor.

b. *Proper Subject Matter.* The second criterion for the admissibility of expert psychological testimony is a proper subject matter. This requirement, variously phrased, appears in state court decisions as well as federal, and is the most common justification for excluding any form of psychological evidence. Courts may deem subject matter improper on any one of three grounds: first, and most fundamental, that data on parties not involved in the litigation are irrelevant; second, that the subject of the testimony is within the average juror's knowledge and experience; and third, that the expert's opinion invades the province of the jury. Although each of these reasons has served as the rationale for excluding testimony on cross-racial identifications, careful consideration of the own-race effect data reveals that reliance on any of the three is erroneous.

(i) *The Experimental Data is Irrelevant.* Experimental data is useless unless it is reliable and externally valid. Some of the experimental findings on other aspects of misidentification may be challenged for this reason. For example, it is unclear whether the *frequency* of misidentification in experimental settings has external validity; testimony regarding *rates* of laboratory misidentification, therefore, would be irrelevant to the jury's task. As discussed in part I, this is not an obstacle to the introduction of testimony on the own-race effect, for the data are consistent (at least as to other-race recognition impairment in whites)¹⁸⁷ and there is every reason to believe these studies reflect a real world phenomenon.¹⁸⁸

A second aspect of the irrelevancy objection is that the witness was not a subject in the experiments relied on by the expert witness. Because not all of the subjects in the experiments display the own-race effect, it is impossible to know whether a particular witness has an impaired ability to make cross-racial identifications. This means, the objection continues, that the data have nothing to do with the witness whose testimony the jury must assess. Loftus and Monahan persuasively rebut this objection:

The expert must agree that one cannot be sure whether any particular witness is influenced by this factor or not. The expert can only argue that a certain percentage of the people are affected in a particular way. The jury is then free, as it should be, to use whatever other information it has available to make the final decision about whether the particular witness or defendant is to be classified with the majority or the minority on this particular characteristic. Put another way, *probabilistic evidence can be presented as such, with its application to a particular person left for the jury to decide.*¹⁸⁹

That evidence *is* probabilistic presents no inherent bar to admissi-

187 See *supra* notes 18-37 and accompanying text.

188 See *supra* notes 38-51 and accompanying text.

189 Loftus & Monahan, *supra* note 139, at 280 (emphasis in original).

bility. As Wigmore explained, *all* circumstantial evidence is inductive in form, and hence, probabilistic.¹⁹⁰ Expert probabilistic testimony about physical (rather than psychological) events is commonplace. For

¹⁹⁰ A brief examination will show that in the offering of evidence in court the form of argument is always inductive. Suppose, to prove a charge of murder, evidence is offered of the defendant's fixed design to kill the deceased. The form of the argument is: "*A* planned to kill *B*; therefore, *A* probably did kill *B*." It is clear that we have here no semblance of a syllogism. The form of argument is exactly the same when we argue, "Yesterday, December 31, *A* slipped on the sidewalk and fell; therefore, the sidewalk was probably coated with ice" or "Today *A*, who was bitten by a dog yesterday, died in convulsions; therefore, the dog probably had hydrophobia." So with all other legal evidentiary facts. We may argue: "Last week the witness *A* had a quarrel with the defendant *B*; therefore, *A* is probably biased against *B*"; "*A* was found with a bloody knife in *B*'s house; therefore, *A* is probably the murderer of *B*"; "After *B*'s injury at *A*'s machinery, *A* repaired the machinery; therefore, *A* probably acknowledged that the machinery was negligently defective"; or "*A*, an adult of sound mind and senses, and apparently impartial, was present at an affray between *B* and *C* and testifies that *B* struck first; therefore, it is probably true that *B* did strike first." In all these cases, we take a single or isolated fact and upon it base immediately an inference as to the proposition in question.

It may be replied, however, that in all the above instances the argument is implicitly based upon an understood law or generalization and is thus capable of being expressed in the deductive or syllogistic form. Thus, in the first instance above, is not the true form, "Men's fixed designs are probably carried out; *A* had a fixed design to kill *B*; therefore, *A* probably carried out his design and did kill *B*?" There are two answers to this. (1) It has just been seen that every inductive argument is at least capable of being transmuted into and stated in the deductive form by forcing into prominence the implied law or generalization on which the argument rests more or less obscurely. Thus it is nothing peculiar to litigious argument that this possibility of turning the argument into deductive form exists here also. It is not a question of what the form might be—for all inductive forms may be turned into deductive forms—but of what it is, as actually employed; and it *is* actually put forward in inductive form. (2) Even supposing this transmutation to be a possibility, it would still be undesirable to make the transmutation for the purpose of testing probative values because it would be useless. We should ultimately come to the same situation as before. Above, we have this: "*A* repaired machinery after the accident; therefore, *A* was conscious of a negligent defect in it." Suppose we turn this into deductive form: "People who make such repairs show a consciousness of negligence; *A* made such repairs; therefore, *A* was conscious of negligence." We now have an argument perfectly sound deductively, if the premises be conceded. But it remains for the court to declare whether it accepts the major premise, and so the court must now take it up for examination. The proponent of the evidence appears as the champion of the premise, and his argument becomes, "The fact that people make such repairs indicates (shows, proves, probably shows, etc.) that they are conscious of negligence." But here we come again, after all, to an inductive form of argument. The consciousness of negligence is to be inferred from the fact of repairs, just as the presence of electricity in the clouds was inferred by Franklin from the shock through the kite string, i.e., by a purely inductive form of reasoning. So with all other evidence when resolved into the deductive form; the transmutation is useless because the court's attention is merely transferred from the syllogism as a whole to the validity of the inference contained in the major premise, which presents itself again in inductive form.

1A J. WIGMORE, *supra* note 138, § 30 (emphasis in original) (footnotes omitted). *But see* James, *Relevancy, Probability and the Law*, 29 CALIF. L. REV. 689, 694-701 (1941).

example, courts do not reject breathalyzer evidence merely because the expert must admit that the conversion formula for breath alcohol to blood alcohol overestimates blood alcohol for some members of the population.¹⁹¹

(ii) *The Experimental Data is Within the Average Juror's Experience.* Psychological findings that are not beyond the average juror's experience or knowledge are an improper subject for expert testimony. For example, when the data lead to a common sense result, such as the finding that stress adversely affects memory, it may be that the expert testimony contributes little or nothing to the jury's understanding. The own-race effect data, however, are clearly beyond the jury's ken.

It is true, as one court pointed out,¹⁹² that the average layman has some perception that members of another race are more difficult to recognize than those of one's own race.¹⁹³ But the standard does not require that the jury lack any experience or knowledge of its own, for this would obviate almost all expert testimony. Rather, the requirement is only that the proffered testimony contributes to a more intelligent evaluation of the facts.¹⁹⁴ Few jurors will have any notion of the true nature of the own-race effect and the survey data show that a substantial number of laymen are totally unaware of its existence.¹⁹⁵ There is another compelling reason to provide expert testimony on the own-race effect: without the sanction of expert testimony, jurors are unlikely to initiate discussion of this aspect of the identification. Many jurors will be inhibited by the fear that acknowledging difficulty in identifying members of other races shows them to be bigots, while other jurors will be constrained by the belief that consideration of racial differences is improper—as in most contexts, it is.

Furthermore, even in cases where jurors are aware of the existence of the own-race effect and manage to surmount these obstacles to discussion, lack of information on the causes and correlates of the own-race effect may lead the jury astray. A recent habeas corpus case illustrates the danger. In *Tobias v. Smith*,¹⁹⁶ one white juror argued to the others that he could not tell any blacks apart and that this was a reason for

¹⁹¹ In 1976 the National Safety Council Committee on Alcohol and Drugs approved the blood/breath ratio of 2100 to 1 for use in legal proceedings even though it overestimates the correct blood alcohol content for 14% of the population. The Committee reasoned that this was an acceptable error rate if the breathalyzer test was only one of many pieces of evidence on intoxication. R. ERWIN, DEFENSE OF DRUNK DRIVING CASES § 18-14.2 (3d ed. 1984).

¹⁹² *People v. Dixon*, 87 Ill. App. 3d 814, 410 N.E.2d 252 (1980).

¹⁹³ *Id.* at 818, 410 N.E.2d at 256.

¹⁹⁴ "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert . . . may testify thereto in the form of an opinion or otherwise." (emphasis added). FED. R. EVID. 702.

¹⁹⁵ See *supra* notes 77-84 and accompanying text.

¹⁹⁶ 468 F. Supp. 1287 (W.D.N.Y. 1979) (reversing conviction on ground of juror misconduct).

conviction. Apparently he believed that blacks were physically less distinguishable and that, as a practical matter, this required conviction even when the identification of a black defendant was not positive.¹⁹⁷ An expert could have refuted the common perception that "they all look alike" and could have explained that the correct statement of the phenomenon described by the juror is "they all look alike *to me*." In addition to disposing of the erroneous biological explanation for the own-race effect, the expert can also refute the two "common-sense" explanations: prejudice and lack of experience. Psychologists' initial theories of the own-race effect plus the results of two surveys of laymen suggest that most jurors without access to the data will believe that a witness with positive attitudes towards the defendant's racial group is immune to other-race impairment.¹⁹⁸ Furthermore, without expert testimony, many jurors might accept a prosecutor's fallacious argument that a witness's accuracy in cross-racial identifications increases with exposure to members of the defendant's race.¹⁹⁹ Thus, for several reasons, expert testimony on the own-race effect is not vulnerable to the charge that it contributes nothing that the jury does not already know.²⁰⁰

(iii) *The Experimental Data Invades the Province of the Jury.* Several courts have held that evidence on the own-race effect is an improper subject matter because it relates to another witness's credibility.²⁰¹ These courts reason that because credibility determinations are assigned to the trier of fact, any expression of opinion on the credibility of another witness constitutes a comment on an "ultimate issue." As such, it invades the province of the jury and is inadmissible.²⁰² Consistent with Wigmore's description of the "ultimate issue" rule as "one of those impracticable and misconceived utterances which lack any justification in principle,"²⁰³ the rule has been abolished in a majority of jurisdictions either by statute²⁰⁴ or by case law.²⁰⁵ But even in those jurisdictions still

¹⁹⁷ *Id.* at 1289.

¹⁹⁸ *See supra* notes 77-84 and accompanying text.

¹⁹⁹ *Id.*

²⁰⁰ Obviously, if data on the own-race effect were widely disseminated, expert testimony would no longer be appropriate. Wide dissemination seems unlikely, although perhaps not as unlikely as in highly technical areas of expertise such as ballistics.

²⁰¹ *See, e.g.,* United States v. Brown, 501 F.2d 146, 150 & n.1 (9th Cir. 1974), *rev'd on other grounds sub nom.* United States v. Nobles, 422 U.S. 225 (1975); People v. Johnson, 38 Cal. App. 3d 1, 6-7, 112 Cal. Rptr. 834, 836-37 (1974); People v. Valentine, 53 A.D.2d 832, 832-33, 385 N.Y.S.2d 545, 546 (1976).

²⁰² *See Note, Expert Testimony as an "Invasion of the Province of the Jury,"* 26 IOWA L. REV. 819, 825 (1941).

²⁰³ 7 J. WIGMORE, *supra* note 138, § 1921 (footnote omitted).

²⁰⁴ *See, e.g.,* FED. R. EVID. 704: "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." ACCORD CAL. EVID. CODE § 805 (West 1966).

²⁰⁵ For a comprehensive compilation of the leading cases, see Grismore v. Consolidated Prods. Co., 232 Iowa 328, 359-61, 5 N.W.2d 646, 662-63 (1942).

adhering to the ultimate issue rule, expert testimony on the own-race effect is not properly precluded. The psychologist testifying on the own-race effect would express no opinion on the ultimate issue of the particular witness's credibility. Rather, he would merely report the relevant psychological findings, thus informing the jury of the increased risk of misidentification inherent in cross-racial identification. He would leave to the jury the final determination of whether the cross-racial identification at issue was accurate.

c. *Conformity to a Generally Accepted Theory.* The third requirement, that the evidence conform to a generally accepted theory, stems from *Frye v. United States*.²⁰⁶ The *Frye* court rejected an offer of expert testimony on the reliability of a systolic blood pressure lie detector test, because the procedure had not yet gained adequate "standing and scientific recognition among physiological and psychological authorities."²⁰⁷ Some commentators have argued that this requirement should not be applied to *all* expert testimony, but limited to questions of the admissibility of innovative scientific techniques and apparatus that might unduly impress the jury.²⁰⁸ In support of this argument, they point to the fact that courts have consistently applied the requirement to polygraphs, breathalyzers, voice prints, radar, sodium pentothal ("truth serum"), and blood tests,²⁰⁹ but never to the testimony of medical and psychiatric experts.²¹⁰ Because expert testimony on eyewitness identification does not resemble testimony on the device at issue in *Frye* in that there is no potential for persuading jurors of its infallibility, the *Amaral* court was probably wrong to require satisfaction of the *Frye* standard as a condition for admissibility.

Even if the *Frye* requirement of an underlying generally accepted explanatory theory is retained, it should not operate as a bar to the admissibility of expert testimony on the own-race effect. Human perception and memory have been the subject of voluminous research for over seventy-five years, and the general causal principles are well understood.²¹¹ It is true that the precise explanation for the own-race effect is still evolving,²¹² but the existence of the phenomenon is universally accepted.²¹³

d. *Probative Value Outweighing Prejudicial Effect.* The final criterion for

²⁰⁶ 293 F. 1013 (D.C. Cir. 1923).

²⁰⁷ *Id.* at 1014.

²⁰⁸ See Boyce, *Judicial Recognition of Scientific Evidence in Criminal Cases*, 8 UTAH L. REV. 313, 325-27 (1963-64); Strong, *Questions Affecting the Admissibility of Scientific Evidence*, 1970 U. ILL. L.F. 1; Note, *supra* note 75, at 1021-22.

²⁰⁹ See Boyce, *supra* note 208, at 325-27; Strong, *supra* note 208, at 15-22.

²¹⁰ See Boyce, *supra* note 208, at 325-27.

²¹¹ For references to major early works in the field of human perception and memory see Note, *supra* note 75, at 974 n.12.

²¹² See *supra* notes 52-73 and accompanying text.

²¹³ See *supra* notes 18-38 and accompanying text.

the admissibility of expert psychological testimony requires that the probative value of the proffered testimony outweigh its prejudicial effect. Obviously, this consideration necessitates a case-specific analysis. Nevertheless, isolating the own-race effect makes generalization possible.

(i) *Probative Value.* Those critical of admitting expert psychological testimony have argued that there is no way to determine whether jurors place too much or too little reliance on eyewitness identification. If they place too little, so the argument goes, expert testimony will only magnify existing errors.²¹⁴ Although this could be true of some kinds of testimony on the unreliability of identifications, it has no application to testimony on the own-race effect because the expert will not address the absolute reliability of identifications, cross-racial or otherwise.

The evidence that the expert can contribute in this area is extremely probative. The own-race effect data, particularly on white-black identifications, show consistent impairment of recognition abilities.²¹⁵ Equally important is the *magnitude* of the own-race effect. If the cross-racial recognition rate were only five percent less than the rate for own-race identifications, the probative value might be slight, but the recognition rates frequently vary by one-third.²¹⁶ Furthermore, the knowledge that cross-racial identification rates are substantially less reliable regardless of the attitudes, experience, or confidence of the witness is a significant factor in the intelligent assessment of the reliability of an identification. As discussed previously, jurors do not have this information, and the techniques of cross-examination and closing argument cannot convey it effectively. Because a mistaken identification is likely to deprive the defendant of his liberty, or even his life, the possibility that evidence on the own-race effect might alter the jury's evaluation of the identification compels its admission, at least in the absence of a serious threat of prejudice.²¹⁷

(ii) *Prejudicial Effect.* The primary purpose of the prejudice rule is to avoid arousing the jury's prejudice, hostility, or sympathy.²¹⁸ In the context of expert testimony, the concern is that the expert's credentials may induce the jury to place undue reliance on his expertise, and thus preclude the jury's independent judgment of the facts. This concern is inapposite with regard to testimony on the own-race effect because the expert will express no conclusion on which the jury *could* rely. If the fear

²¹⁴ Wells, *Applied Eyewitness Testimony Research*, 12 J. OF PERSONALITY & SOC. PSYCH. 1546, 1551 (1978).

²¹⁵ See *supra* notes 18-38 and accompanying text.

²¹⁶ See Goldstein & Chance, *supra* note 48, at 47.

²¹⁷ Cf. *Chambers v. Mississippi*, 410 U.S. 284 (1973) (strict adherence to state evidentiary rules violates due process where evidence is trustworthy and of central importance to defendant's case); see also Churchwell, *The Constitutional Right to Present Evidence: Progeny of Chambers v. Mississippi*, 19 CRIM. L. BULL. 131 (1983) (discussing subsequent applications of *Chambers*).

²¹⁸ C. MCCORMICK, *supra* note 120, § 185.

is that the expert will overstate the evidence—for example, make a blanket statement that a black witness undoubtedly will suffer from cross-racial recognition impairment—the appropriate remedy is cross-examination eliciting the relevant studies, or, in an extreme situation, a rebuttal witness.

Ancillary purposes of the prejudice rule include preventing the tangential exploration of issues that may distract the jury from central questions, may consume an undue amount of time, or may create unfair surprise to the opposing party.²¹⁹ Generally, testimony on the own-race effect should not frustrate any of these purposes. First, the issue of identification accuracy is rarely tangential.²²⁰ Second, the requisite testimony and cross-examination would be quite brief. Although the prosecutor occasionally might want to call a rebuttal expert, the defense psychologist's limited role in describing the experimental findings makes the advantage of doing so dubious. Certainly the "battle of the experts" that the insanity defense often provokes is unlikely in cross-racial identification cases. Third, the salience of a cross-racial identification in a criminal case puts the prosecutor on notice of possible testimony on the own-race effect, thus eliminating the danger of surprise and unfair advantage.

None of the traditional criteria for admitting expert testimony present legitimate hurdles to the admission of testimony on the own-race effect. Discretion on the part of the trial judge is unnecessary, because application of the standards to this data does not depend on the factual circumstances of each case. Fears that requiring admission of own-race effect testimony as a matter of right will lead to admission of expert psychological testimony on all aspects of eyewitness identification and, eventually, on all aspects of any eyewitness testimony, should not inhibit this development. The slippery slope argument merits but a brief response: even if there are no bright lines, distinctions of degree are always possible. The case for mandatory admission of proffered testimony on the own-race effect is compelling. Less compelling cases may be decided differently.

4. *Other Problems*

Allowing expert testimony on the own-race effect would do much to counter the effects of erroneous cross-racial identification. The attractiveness of this remedy lies in its potential for conveying information precisely, and in the modest change it requires. The remedy is, however, flawed by some practical considerations.

²¹⁹ *Id.* § 187.

²²⁰ In those cases where the circumstantial evidence of identity is *truly* overwhelming, one would not expect either defense counsel or the prosecutor to spend much time testing the reliability of eyewitness testimony.

Financial considerations present the biggest problem. Because expert witnesses demand remuneration and most defendants are indigent, it becomes necessary to consider whether the state must fund these experts. Although there has been an increased recognition of the indigent's right to state-reimbursed experts,²²¹ determination of the need for such an expert is generally within the trial court's discretion.²²² The right to present evidence is probably broader than the right to state subsidization of that presentation.²²³ Even in cases where the trial court authorizes funding for an expert, the statutory ceiling on such expenditures frequently will preclude an indigent from actually retaining the expert.²²⁴

Furthermore, the need for experts on the own-race effect in many jurisdictions would be frequent²²⁵ and would therefore impose a greater financial burden on the state than results from most kinds of expert testimony. One suspects that this in turn would result in fewer discretionary authorizations by trial courts. From the defense perspective, a stipulation with the prosecutor as to the content of an expert's testimony would resolve these practical problems. The incentive for prosecutors to agree to such stipulations probably would be small, however, at least in cases involving indigent defendants.

C. Jury Instructions

The practical obstacles facing the use of expert testimony on the own-race effect suggest that another safeguard—the adoption of cautionary jury instructions—should be considered. Some commentators have viewed the trend toward adoption of such jury instructions as a most promising development.²²⁶ Although most jurisdictions have not incorporated the available psychological data into cautionary instructions, these commentators stress that it is possible to do so.²²⁷ We can

²²¹ 1 A. AMSTERDAM, TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES §§ 298-301 (3d ed. 1977).

²²² See Note, *The Indigent's Right to an Adequate Defense: Expert and Investigational Assistance in Criminal Proceedings*, 55 CORNELL L. REV. 632, 635 (1970).

²²³ This is perhaps unavoidable. It may be that a lenient rule permitting the defendant to present four psychiatrists' testimony that he is insane is desirable. It does not necessarily follow that the state must subsidize four psychiatrists for every indigent defendant's insanity defense.

²²⁴ See, e.g., N.Y. COUNTY LAW § 722-c (McKinney Supp. 1983) (authorizes hiring of expert witness for indigent defendant but payment is not to exceed \$300 except in extraordinary circumstances).

²²⁵ See Bazelon, *supra* note 11, at 105.

²²⁶ See, e.g., Grano, Kirby, Biggers, and Ash: *Do Any Constitutional Safeguards Remain Against the Danger of Convicting the Innocent?*, 72 MICH. L. REV. 717, 795-97 (1974); Note, *supra* note 75, at 1004; Note, *Eyewitness Identification Testimony and the Need for Cautionary Jury Instructions in Criminal Cases*, 60 WASH. U.L.Q. 1387, 1434-35 (1983).

²²⁷ See Note, *supra* note 226, at 1428 n.220; see also E. LOFTUS, *supra* note 77, at 189 (advocating cautionary jury instructions as first step); Grano, *supra* note 226, at 796 (same).

consider the propriety of including data on the own-race effect in jury instructions without making any broad generalizations concerning how effective or appropriate jury instructions are in responding to other sources of misidentification.

1. *The Content and Timing of Instructions on the Own-Race Effect*

Most cautionary jury instructions first exhort the jurors that the prosecutor's burden of proving his case beyond a reasonable doubt includes the identity of the defendant as perpetrator. The court then advises the jurors to consider factors such as the witness's capacity and opportunity for observation, suggestive circumstances that may have influenced the identification, and prior misidentifications or failures to make an identification, as well as the truthfulness of the witness.²²⁸

²²⁸ The model instructions set forth in *United States v. Telfaire*, 469 F.2d 552 (D.C. Cir. 1972), are typical:

One of the most important issues in this case is the identification of the defendant as the perpetrator of the crime. The Government has the burden of providing [sic] identity, beyond a reasonable doubt. It is not essential that the witness himself be free from doubt as to the correctness of his statement. However, you, the jury, must be satisfied beyond a reasonable doubt of the accuracy of the identification of the defendant before you may convict him. If you are not convinced beyond a reasonable doubt that the defendant was the person who committed the crime, you must find the defendant not guilty.

Identification testimony is an expression of belief or impression by the witness. Its value depends on the opportunity the witness had to observe the offender at the time of the offense and to make a reliable identification later.

In appraising the identification testimony of a witness, you should consider the following:

(1) Are you convinced that the witness had the capacity and an adequate opportunity to observe the offender?

Whether the witness had an adequate opportunity to observe the offender at the time of the offense will be affected by such matters as how long or short a time was available, how far or close the witness was, how good were lighting conditions, whether the witness had had occasion to see or know the person in the past.

[In general, a witness bases any identification he makes on his perception through the use of his senses. Usually the witness identifies an offender by the sense of sight—but this is not necessarily so, and he may use other senses.]

(2) Are you satisfied that the identification made by the witness subsequent to the offense was the product of his own recollection? You may take into account both the strength of the identification, and the circumstances under which the identification was made.

If the identification by the witness may have been influenced by the circumstances under which the defendant was presented to him for identification, you should scrutinize the identification with great care. You may also consider the length of time that lapsed between the occurrence of the crime and the next opportunity of the witness to see defendant, as a factor bearing on the reliability of the identification.

[You may also take into account that an identification made by picking the defendant out of a group of similar individuals is generally more reliable than one which results from the presentation of the defendant alone to the witness.]

[(3) You may take into account any occasions in which the witness failed

Judge Bazelon has proposed a supplementary instruction when the case involves cross-racial identification:

In this case the identifying witness is of a different race than the defendant. In the experience of many it is more difficult to identify members of a different race than members of one's own. If this is also your experience, you may consider it in evaluating the witness's testimony. You must also consider, of course, whether there are other factors present in this case which overcome any such difficulty of identification. For example, you may conclude that the witness has had sufficient contacts with members of the defendant's race that he would not have greater difficulty in making a reliable identification.²²⁹

This instruction is inadequate for two reasons. First, it conveys no psychological data; it merely suggests that the jurors consider the difficulties inherent in cross-racial identifications *if they have experienced such difficulties themselves*. Second, the instruction conveys *inaccurate* information by suggesting that the own-race effect may not operate where the witness has had interracial experiences.

A more successful instruction requires only a modest revision:

In this case the identifying witness is of a different race than the defendant. In the experience of many it is more difficult to identify members of a different race than members of one's own. Psychological studies support this impression. In addition, laboratory studies reveal that even people with no prejudice against other races and substantial contact with persons of other races still experience difficulty in accurately identifying members of a different race. Quite often people do not recognize this difficulty in themselves. You should consider these facts in evaluating the witness's testimony, but you must also consider whether there are other factors present in this case that overcome any such difficulty of identification.

Although this instruction does the trick, it is a more radical departure from usual instructions. It may be criticized for focusing on one source of identification error. This criticism is particularly troublesome be-

to make an identification of defendant, or made an identification that was inconsistent with his identification at trial.]

(4) Finally, you must consider the credibility of each identification witness in the same way as any other witness, consider whether he is truthful, and consider whether he had the capacity and opportunity to make a reliable observation on the matter covered in his testimony.

I again emphasize that the burden of proof on the prosecutor extends to every element of the crime charged, and this specifically includes the burden of proving beyond a reasonable doubt the identity of the defendant as the perpetrator of the crime with which he stands charged. If after examining the testimony, you have a reasonable doubt as to the accuracy of the identification, you must find the defendant not guilty.

Id. at 558-59. The bracketed sentences are to be used only if appropriate. *Id.* at 558.

²²⁹ *Id.* at 561 (Bazelon, J., concurring) (footnote omitted).

cause the instruction has the judicial stamp of importance and neutrality. A further ground for criticism of the instruction is that its failure to convey information on the strength of the own-race effect may frustrate the jury.

A second issue pertains to the appropriate timing for the instruction. Judge Bazelon assumed the instruction would be part of the more general cautionary comments on identification testimony, and suggested that it immediately follow the admonition concerning the witness's opportunity and capacity to observe the defendant.²³⁰ Some commentators have argued that, in order to be effective, instructions on identification should precede eyewitness testimony.²³¹ They may be right, but absent substantial change in the statutes governing trial procedure courts probably will not adopt this sequence.²³²

2. *The Judicial Response*

a. *The General Trend Toward Cautionary Instructions on Eyewitness Identification.* Several courts have recently considered the formulation of cautionary jury instructions on eyewitness identification. Unlike arguments in favor of the admissibility of expert testimony, the plea for additional instructions has frequently reached sympathetic ears.

The leading case on cautionary instructions is *United States v. Telfaire*,²³³ decided by the District of Columbia Circuit in 1972. Telfaire argued on appeal that the trial court committed reversible error when it failed to give a special instruction on identification. Although the court affirmed Telfaire's conviction,²³⁴ it took the occasion to promulgate "Model Special Instructions on Identification."²³⁵ These instructions direct the jury's attention to the reliability factors articulated by the Supreme Court in the suppression hearing cases of *United States v. Wade*²³⁶ and *Stovall v. Denno*.²³⁷ They make no reference to the findings of psychologists.

The federal courts have given *Telfaire* a warm reception; all circuits have approved cautionary instructions except the Fifth and Eleventh,

²³⁰ *Id.* at n.10.

²³¹ Leippe, *Effects of Integrative Memorial and Cognitive Processes on the Correspondence of Eyewitness Accuracy and Confidence*, 4 LAW & HUMAN BEHAVIOR 261, 272-73 (1980); Note, *supra* note 226, at 1431-32.

²³² For arguments that jury instructions generally should precede the taking of testimony, see Schwarzer, *Communicating With Juries: Problems and Remedies*, 69 CALIF. L. REV. 731 (1981); Note, *Jury Instructions v. Jury Charges*, 82 W. VA. L. REV. 555, 562-64 (1980).

²³³ 469 F.2d 552 (D.C. Cir. 1972).

²³⁴ The court reasoned that the omission was harmless error due to the inherent reliability of the identification at issue and because the jury's attention had otherwise been focused on the issue of identity. *Id.* at 556-57.

²³⁵ *Id.* at 558-59. See *supra* note 228 for the text of these instructions.

²³⁶ 388 U.S. 218, 228-39 (1967).

²³⁷ 388 U.S. 293, 296-97 (1967).

which have not yet had occasion to rule on the issue.²³⁸ The courts of appeals are split, however, on the issue of whether the failure to give such instructions is reversible error.²³⁹

The state courts have been less receptive. Although courts in West Virginia,²⁴⁰ Massachusetts,²⁴¹ Kansas,²⁴² and New York²⁴³ have held that a trial court errs when it refuses to give *Telfaire*-style instructions, the vast majority of states either prohibit or fail to require them. Several of the state courts that prohibit such instructions hold that the requested instruction violates the prohibition against judicial comment on the evidence,²⁴⁴ while others condemn the instructions as complex,

²³⁸ See, e.g., *United States v. Thoma*, 713 F.2d 604, 607-08 (10th Cir. 1983), *cert. denied*, 104 S. Ct. 721 (1984); *United States v. Cain*, 616 F.2d 1056, 1058 (8th Cir. 1980); *United States v. Scott*, 578 F.2d 1186, 1191 (6th Cir.), *cert. denied*, 439 U.S. 870 (1978); *United States v. Kavanagh*, 572 F.2d 9, 12 (1st Cir. 1978); *United States v. Lewis*, 565 F.2d 1248, 1253 (2d Cir. 1977), *cert. denied*, 435 U.S. 973 (1978); *United States v. Collins*, 559 F.2d 561, 566 (9th Cir.), *cert. denied*, 434 U.S. 907 (1977); *United States v. Roundtree*, 527 F.2d 16, 19 (8th Cir. 1975), *cert. denied*, 424 U.S. 923 (1976); *United States v. Hodges*, 515 F.2d 650, 652-53 (7th Cir. 1975); *United States v. Holley*, 502 F.2d 273, 275 (4th Cir. 1974); *United States v. O'Neal*, 496 F.2d 368, 373 (6th Cir. 1974); *United States v. Fernandez*, 456 F.2d 638, 643-44 (2d Cir. 1972); *United States v. Barber*, 442 F.2d 517, 528 (3d Cir.), *cert. denied*, 404 U.S. 958 (1971).

²³⁹ The Fourth, Seventh, and Eighth Circuits have reversed convictions for failure to give cautionary instructions. *United States v. Holley*, 502 F.2d 273, 276-77 (4th Cir. 1974); *United States v. Hodges*, 515 F.2d 650, 653 (7th Cir. 1975); *United States v. Greene*, 591 F.2d 471, 475-77 (8th Cir. 1979). The other circuits generally hold that the decision whether to give a cautionary instruction is within the trial judge's discretion, assuming that he raised the issue of identification for the jury's consideration. See, e.g., *United States v. Cueto*, 628 F.2d 1273, 1276 (10th Cir. 1980); *United States v. Field*, 625 F.2d 862, 872 (9th Cir. 1980); *United States v. Amaral*, 488 F.2d 1148, 1151 (9th Cir. 1973); *United States v. Evans*, 484 F.2d 1178, 1188 (2d Cir. 1973); *United States v. Barber*, 442 F.2d 517, 527-28 (3d Cir.), *cert. denied*, 404 U.S. 958 (1971).

²⁴⁰ See *State v. Payne*, 280 S.E.2d 72, 78-79 (W. Va. 1981).

²⁴¹ See *Commonwealth v. Bowden*, 379 Mass. 472, 483-84, 399 N.E.2d 482, 489-90 (1980); *Commonwealth v. Rodriguez*, 378 Mass. 296, 302, 391 N.E.2d 889, 893 (1979).

²⁴² See *State v. Warren*, 230 Kan. 385, 396-97, 635 P.2d 1236, 1243-44 (1981).

²⁴³ The New York appellate courts have repeatedly reversed convictions where the trial court failed to instruct the jury properly on how to evaluate eyewitness identification testimony. See, e.g., *People v. Hall*, 82 A.D.2d 838, 839, 439 N.Y.S.2d 661, 663 (1981); *People v. Gaines*, 80 A.D.2d 561, 562, 435 N.Y.S.2d 346, 347 (1981); *People v. Merriman*, 79 A.D.2d 619, 619, 433 N.Y.S.2d 475, 476 (1980); *People v. Bruno*, 77 A.D.2d 922, 923, 431 N.Y.S.2d 106, 107 (1980); *People v. Rothaar*, 75 A.D.2d 652, 652, 427 N.Y.S.2d 272, 273 (1980).

The Supreme Court of New Hampshire recently stated that in the future it would "view with grave concern" the failure to give a cautionary instruction in cases in which "eyewitness identification is essential to support a conviction." *State v. Burke*, 122 N.H. 565, 571, 448 A.2d 962, 966 (1982).

²⁴⁴ See, e.g., *State v. Valencia*, 118 Ariz. 136, 138, 575 P.2d 335, 337 (Ariz. Ct. App. 1977); *Conley v. State*, 270 Ark. 886, 889, 607 S.W.2d 328, 330 (1980); *State v. Robinson*, 274 S.C. 198, 203, 262 S.E.2d 729, 731-32 (1980); *State v. Jordan*, 17 Wash. App. 542, 545, 564 P.2d 340, 341 (1977).

Thirty-nine states prohibit judicial comment on the evidence. H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* 420, Table 104 (1966). The federal courts and the following 11 states permit judicial comments: California, Connecticut, Michigan, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Utah, Vermont, and Wisconsin. *Id.*

lengthy, and biased.²⁴⁵ Some courts simply hold that the decision to give such instructions is discretionary,²⁴⁶ reasoning that because cross-examination and closing arguments frequently focus the jury's attention on identification, general instructions on the prosecutor's burden of proof and the credibility of witnesses are sufficient.²⁴⁷ A few courts have held that the instructions achieve the necessary focus on the difficulties of eyewitness identification only if they include a statement that the prosecution must prove identity beyond a reasonable doubt.²⁴⁸

b. *The Response to Requests for Instructions on Cross-Racial Identification.* Judge Bazelon's concurrence in *Telfaire* marked the first judicial consideration of a jury instruction on the own-race effect. In an earlier concurrence, Bazelon discussed the own-race effect data and the need for providing the jury with information on cross-racial identification, but did not specify the means for doing so.²⁴⁹ In *Telfaire*, he concluded that jury instructions provided the best means to supply such information,

²⁴⁵ See, e.g., *People v. Robinson*, 75 Ill. App. 3d 112, 115-16, 394 N.E.2d 13, 15-16 (1979); *People v. Burnett*, 74 Ill. App. 3d 990, 1001-02, 394 N.E.2d 456, 464-65 (1979); *State v. Higgins*, 592 S.W.2d 151, 161 (Mo. 1979) (en banc), *appeal dismissed*, 446 U.S. 902 (1980); *State v. White*, 617 S.W.2d 596, 597 (Mo. Ct. App. 1981); *State v. Sloan*, 575 S.W.2d 836, 837 (Mo. Ct. App. 1978).

²⁴⁶ See, e.g., *Vincent v. State*, 399 So. 2d 923, 927 (Ala. Crim. App. 1981); *People v. Hurley*, 95 Cal. App. 3d 895, 900-01, 157 Cal. Rptr. 364, 366-67 (1979); *People v. Reynolds*, 38 Colo. App. 258, 260, 559 P.2d 714, 716 (1976); *State v. Harden*, 175 Conn. 315, 319-23, 398 A.2d 1169, 1171-73 (1978); *Wilkerson v. United States*, 427 A.2d 923, 927-28 (D.C.), *cert. denied*, 454 U.S. 852 (1981); *Nelson v. State*, 362 So. 2d 1017, 1022 (Fla. Dist. Ct. App. 1978); *Sapp v. State*, 155 Ga. App. 485, 486, 271 S.E.2d 19, 21 (1980); *State v. Padilla*, 57 Hawaii 150, 161-62, 552 P.2d 357, 365 (1976); *Brock v. Commonwealth*, 627 S.W.2d 42, 43 (Ky. Ct. App. 1981), *cert. denied*, 456 U.S. 1009 (1982); *Sparks v. State*, 96 Nev. 26, 29, 604 P.2d 802, 804 (1980); *State v. Burke*, 122 N.H. 565, 570-71, 448 A.2d 962, 965 (1982); *State v. Mazurek*, 88 N.M. 56, 58, 537 P.2d 51, 53 (N.M. Ct. App. 1975); *State v. Guster*, 66 Ohio St. 2d 266, 272-73, 421 N.E.2d 157, 161 (1981); *State v. Christian*, 35 Or. App. 339, 344, 581 P.2d 132, 134 (1978), *cert. denied*, 444 U.S. 845 (1979); *State v. Jones*, 273 S.C. 723, 735, 259 S.E.2d 120, 126 (1979); *State v. Lewis*, 628 S.W.2d 750, 752 (Tenn. Crim. App. 1981); *State v. Kasper*, 137 Vt. 184, 211, 404 A.2d 85, 100 (1979); *Hampton v. State*, 92 Wis. 2d 450, 461-63, 285 N.W.2d 868, 874-75 (1979).

²⁴⁷ See, e.g., *Conley v. State*, 270 Ark. 886, 890, 607 S.W.2d 328, 330 (1980); *People v. Hurley*, 95 Cal. App. 3d 895, 900-01, 157 Cal. Rptr. 364, 366-67 (1979); *People v. Reynolds*, 38 Colo. App. 258, 260, 559 P.2d 714, 715-16 (1976); *Nelson v. State*, 362 So. 2d 1017, 1022 (Fla. Dist. Ct. App. 1978); *State v. Padilla*, 57 Hawaii 150, 162, 552 P.2d 357, 365 (1976); *State v. Thomas*, 541 S.W.2d 775, 777 (Mo. Ct. App. 1976); *Sparks v. State*, 96 Nev. 26, 29, 604 P.2d 802, 804 (1980); *State v. Ollison*, 16 Or. App. 544, 556, 519 P.2d 393, 396 (1974); *State v. Jones*, 273 S.C. 723, 735, 259 S.E.2d 120, 126 (1979); *State v. Lewis*, 628 S.W.2d 750, 752 (Tenn. Crim. App. 1981); *State v. Schaffer*, 638 P.2d 1185, 1187 (Utah 1981); *State v. Kasper*, 137 Vt. 185, 211, 404 A.2d 85, 100 (1979); *State v. Edwards*, 23 Wash. App. 893, 896-97, 600 P.2d 566, 569 (1979).

²⁴⁸ See, e.g., *People v. Smith*, 67 Cal. App. 3d 45, 49, 136 Cal. Rptr. 387, 389 (1977); *People v. Guzman*, 47 Cal. App. 3d 380, 387-88, 121 Cal. Rptr. 69, 73 (1975); *State v. Green*, 86 N.J. 281, 293, 430 A.2d 914, 920 (1981); *State v. Guster*, 66 Ohio St. 2d 266, 272, 421 N.E.2d 157, 161 (1981); *Holt v. State*, 591 S.W.2d 785, 791 (Tenn. Crim. App. 1979); *Hampton v. State*, 92 Wis. 2d 450, 462-63, 285 N.W.2d 868, 874-75 (1979).

²⁴⁹ *United States v. Brown*, 461 F.2d 134, 145 n.1 (D.C. Cir. 1972) (Bazelon, J., concurring).

arguing that courts should not rely on closing argument because the inadvertence or inexperience of counsel could preclude the jury from consideration of a factor established by psychologists as important.²⁵⁰ Bazelon anticipated resistance based on the fear that such instructions would be "prejudicial" or "divisive,"²⁵¹ but maintained that neither fear is justified. In his view, the instructions are not prejudicial because they do not encourage decisions on "improper" bases, such as fear or animosity; instead, they merely advise the jury to consider racial differences that are logically relevant to the facts in dispute.²⁵² Furthermore, Bazelon reasoned that it is not "divisive" to point out that racial differences exist and may unintentionally affect determinations of guilt. He concluded that "if there can be any circumstances which would justify the fiction that these divisions do not exist . . . , a criminal trial is not any of them."²⁵³ This is because truth is more important than reassurance.²⁵⁴ Finally, Bazelon suggested that a jury instruction on cross-racial identification may actually reduce existing prejudice by defining the narrow context in which racial differences are relevant.²⁵⁵

In a second *Telfaire* concurrence, Judge Leventhal responded to Judge Bazelon's arguments. He described the issue of cross-racial identifications as "not ripe for this kind of distillation of wisdom,"²⁵⁶ basing his assessment on the "meager" data available and the inconsistent findings on whether black subjects identifying white faces experience the own-race effect.²⁵⁷ He also disagreed with Bazelon on the perils of divisiveness:

The wisdom of making haste slowly in discerning the generalization ready for inclusion in model instructions is underscored when what is involved is as sensitive as race relations in our society. If the subject of inter-racial identification is to be covered in instructions that are informative and objective, we may be opening the door to questioning and proffers of proof so that every time a witness makes an identification of an offender of another race, he is subject to cross-examination on the nature and extent of his contacts with and attitudes (favorable or not) toward the other race. The more I ponder the problems, the better I understand the kernel of wisdom in the decisions that shy away from instructions on inter-racial identifications as divisive.²⁵⁸

²⁵⁰ *Telfaire*, 469 F.2d at 560.

²⁵¹ Here Bazelon cited the New York cases, *see supra* notes 124-25, forbidding argument on the subject of racial differences. 469 F.2d at 559 n.4.

²⁵² 469 F.2d at 560.

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Id.* at 560-61.

²⁵⁶ *Id.* at 561 (Leventhal, J., concurring).

²⁵⁷ *Id.* at 561-62.

²⁵⁸ *Id.* at 562 (footnote omitted).

Leventhal did not exclude the possibility that some action on the problem of cross-racial identification is needed, but he contended that a legislative committee, rather than an adversarial proceeding, would be the appropriate forum for exploring the various options.²⁵⁹

Of the five other jurisdictions that have considered the issue of cross-racial identification instructions, four have refused to require them.²⁶⁰ Both the District of Columbia Court of Appeals²⁶¹ and the North Carolina Supreme Court²⁶² cited Judge Leventhal's concurring opinion in holding that such instructions were not mandated. The Tenth Circuit suggested that such instructions are "more in the realm of argument than law."²⁶³ Finally, an Illinois appellate court relied on general opposition to cautionary instructions of any sort, viewing the Bazelon instruction as violating the legislature's mandate that all criminal instructions be "simple, brief, impartial and free from argument."²⁶⁴

The only decision requiring a cross-racial identification instruction is *People v. West*,²⁶⁵ a 1983 decision of the California Court of Appeals that is idiosyncratic in its reasoning. The defendant had requested an instruction listing eight factors for the jury to consider in determining if the prosecution had proved identity beyond a reasonable doubt.²⁶⁶ One factor was "any evidence relating to the cross-racial nature of the identi-

²⁵⁹ *Id.* at 563.

²⁶⁰ *See* *United States v. Ingram*, 600 F.2d 260, 263 (10th Cir. 1979); *Abney v. United States*, 347 A.2d 402, 402-03 (D.C. 1975); *People v. White*, 58 Ill. App. 3d 226, 226-28, 374 N.E.2d 250, 251 (1978); *State v. Allen*, 301 N.C. 489, 494-95, 272 S.E.2d 116, 120 (1980).

²⁶¹ *Abney v. United States*, 347 A.2d 402, 403 (D.C. 1975).

²⁶² *State v. Allen*, 304 N.C. 489, 495, 272 S.E.2d 116, 120 (1980). The *Allen* court added that "[i]n the case at hand, there is no indication that race in any way affected the identification of defendant by the witnesses." *Id.*

²⁶³ *United States v. Ingram*, 600 F.2d 260, 263 (10th Cir. 1979).

²⁶⁴ *People v. White*, 58 Ill. App. 3d 226, 227-28, 374 N.E.2d 250, 251 (1978).

²⁶⁵ 139 Cal. App. 3d 606, 189 Cal. Rptr. 36 (1983).

²⁶⁶ The proposed instruction read:

In determining whether reasonable doubt exists in regard to the identification of the defendant, . . . you should consider, among others, the following factors:

Any evidence relating to the witness' opportunity to observe the alleged criminal act;

Any evidence relating to the witness' opportunity to observe the persons committing that act;

Any evidence relating to the stress under which the witness made observations;

Any evidence relating to whether the witness was able to provide a description of the perpetrator of the act;

Any evidence relating to any inconsistency between the descriptions of the perpetrator and the defendant's description;

Any evidence relating to the cross-racial nature of the identification;

Any evidence relating to whether the witness had an uncorrected visual deficiency;

Any evidence relating to the witness' ability to make other identifications.

Id. at 609, 189 Cal. Rptr. at 38.

fication.”²⁶⁷ The trial court refused the proposed instruction and the appellate court reversed. Under California law, the defendant is entitled to instructions that direct the jury’s attention to evidence from which the jury could infer a reasonable doubt as to the defendant’s guilt.²⁶⁸ Without discussing the issue of cross-racial identification, the court reasoned that because the proposed instructions mentioned several factors that might create a reasonable doubt, the refusal to give the instructions was error.²⁶⁹

3. *Meeting Judicial Objections*

a. *The Need for Instructions on the Own-Race Effect.* The most basic judicial objection to cross-racial identification instructions—that they are unnecessary—has already been addressed in the context of expert testimony.²⁷⁰ This objection, like the *Amaral* requirement of a proper subject matter, asks for proof that innovation will substantially improve the jury’s ability to evaluate the facts. The answer to this objection lies not in generalities about identification error, but in the specifics of the own-race effect. Additional protection is needed because the own-race effect strongly influences the accuracy of identification, because that influence is not understood by the average juror, because cross-examination cannot reveal its effects, and because jurors are unlikely to discuss racial factors freely without some authorization to do so.

b. *The Ripeness of Proposed Instructions on the Own-Race Effect.* A second objection to instructions on cross-racial identification points to conflicting data in arguing that the subject is not yet ripe for formulation of an instruction. Here the parallel between expert testimony and jury instructions is less exact. Conflicting data is more problematic in the context of jury instructions because cross-examination is unavailable to probe overbroad generalizations. Nevertheless, the ripeness objection has no bearing on a large subset of cross-racial identifications: those in which the victim is white and the defendant is black. In those cases, experimenters have consistently observed the own-race phenomenon.²⁷¹

The ripeness objection is more apposite where other cross-racial identifications are at issue. Only half of the studies on black subjects have found the own-race effect.²⁷² The data on Asian subjects is scanty, but the few studies that exist do report an own-race effect.²⁷³ There is no data on subjects from other minority groups. Unfortunately, the passage of time may produce neither more consistent results nor studies of addi-

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ *Id.* at 610, 189 Cal. Rptr. at 38-39.

²⁷⁰ *See supra* notes 187-200 and accompanying text.

²⁷¹ *See supra* notes 18-32 and accompanying text.

²⁷² *See supra* notes 33-36 and accompanying text.

²⁷³ *See supra* notes 37-38 and accompanying text.

tional minority groups. The inconsistent results with black subjects suggests that greater variability exists in black subject cross-racial recognition abilities than in white subjects; the dearth of studies on Hispanics and Native Americans may reflect a lesser availability of subjects. Because these conditions are slow to change, "better" instructions may not be forthcoming at any time in the near future. The question then becomes whether longer and more complex instructions on these cross-racial identifications are better than no instructions at all.

c. *Statutory Constraints on the Content of Jury Instructions.* Although judges in the federal trial courts are relatively free to comment on the evidence and express opinions on the facts, they have no constitutional mandate to do so. The Supreme Court has imposed only modest jury instruction requirements on the state courts: the judge must instruct the jurors that the defendant is presumed innocent until proven guilty,²⁷⁴ and that the prosecution must prove the defendant's guilt beyond a reasonable doubt.²⁷⁵ The judge also must avoid giving instructions that infringe upon the defendant's constitutional rights.²⁷⁶ Therefore, if a state judge rules that a statutory prohibition against comment on the evidence or against lengthy instructions bars cross-racial identification instructions, the defendant has no constitutional complaint.

It is open to question, however, whether courts should construe these statutory prohibitions as precluding instructions on cross-racial identifications. Although some proposed cautionary instructions do include an evaluation of the witness's credibility, the proposed instructions on the own-race effect do not. These instructions admonish the jurors to consider a factor they otherwise might have overlooked, but they do not tell the jurors how to weigh that factor. As a result, such instructions do not constitute judicial infringement on the jury's factfinding role. Nor should courts necessarily reject requests for cross-racial identification instructions as violating statutory requirements of short and simple instructions; these instructions could be condensed into one sentence admonitions if lack of brevity is the obstacle to their adoption.²⁷⁷

d. *Divisiveness.* The divisiveness objection is specific to cross-racial

²⁷⁴ *Taylor v. Kentucky*, 436 U.S. 487, 485 (1978). *But see Kentucky v. Whorton*, 441 U.S. 786, 789 (1979) (per curiam) (failure to give instruction on presumption of innocence does not violate Constitution if other instructions are adequate).

²⁷⁵ *Cf. In re Winship*, 397 U.S. 358, 364 (1970) (prosecution must prove beyond a reasonable doubt every element of offense). The federal courts of appeals have held that the failure to instruct the jury that the prosecution must prove guilt beyond a reasonable doubt, if properly objected to, is reversible error. *See, e.g., United States v. Jackson*, 569 F.2d 1003, 1008 n.12 (7th Cir.), *cert. denied*, 437 U.S. 907 (1978); *United States v. Corrigan*, 548 F.2d 879, 883 (10th Cir. 1977).

²⁷⁶ *See, e.g., Griffin v. California*, 380 U.S. 609 (1965).

²⁷⁷ For example, the instruction requested in *People v. West*, 139 Cal. App. 3d 606, 609, 189 Cal. Rptr. 36, 38 (1983), that the jurors consider "[a]ny evidence relating to the cross-racial nature of the identification" is a model of brevity.

identification instructions. The objection concedes the general need for cautionary instructions, but argues that this need is outweighed by the risk of arousing racial animosity. This objection has no counterpart in the consideration of expert testimony on the own-race effect, because it is the *judicial* acknowledgement of racial differences that is troubling. Perhaps these fears are genuine, but an ostrich-like response to such fears is irresponsible.

Some might object here that the Constitution often commands ostrich-like behavior on questions of race, and that Judge Leventhal's concern over "divisiveness" can be more authoritatively dressed in equal protection clothes. But an equal protection objection is without merit for two reasons. First, although jury instructions constitute state action advertent to race, they establish no disadvantaging classification. Strict scrutiny is therefore inappropriate.²⁷⁸ Second, even if strict scrutiny were the proper standard, this classification arguably satisfies that standard: the state's interest in preventing wrongful convictions is surely compelling, and the instruction is perfectly tailored to that interest.²⁷⁹

If we return to the divisiveness issue as Judge Leventhal cast it, two distinct risks appear. First, there is the risk of engendering racial animosity prejudicial to the defendant's interest in a fair trial. This risk seems small enough to disregard. That defendants (rather than prosecutors) are requesting this instruction suggests that the risk of prejudice to the defendant is insignificant. The judgment of counsel might be wrong, but reference to the language of the instruction supports that judgment: the words are tempered and objective, reporting the phenomenon without implying blameworthiness. Any judicial instruction—including those admonishing the jury not to consider the defendant's race in determining his guilt—might in some circumstances prompt a hostile and biased evaluation of the evidence. From the defendant's perspective, the risk that the jury will neglect the increased unreliability of cross-racial identification clearly outweighs the risk of such an improbable response to a cautionary instruction.

The courts' fear of divisiveness, however, may extend beyond the

²⁷⁸ Absent discriminatory effects, provisions for racial designations do not require strict scrutiny. *Tancil v. Woolls*, 379 U.S. 19 (1964) (per curiam). The racial classification in cross-racial identification instructions does little more than designate the race of the defendant and witness, and inform the jury of relevant data on applicable accuracy rates. One might argue that this defense of racial classification resembles the "equal application" doctrine rejected in *Loving v. Virginia*, 388 U.S. 1 (1966) and *McLaughlin v. Florida*, 379 U.S. 184 (1963). However, those decisions are inapposite, for the use of race at issue here neither restricts the rights of citizens based on their race nor encourages segregation. *Cf.* *Adickes v. Kress & Co.*, 398 U.S. 144, 151-52 (1970) ("[A] State must not discriminate against a person because of his race or the race of his companions, or in any way act to compel or encourage racial segregation.") (footnote omitted).

²⁷⁹ *See, e.g.*, *Eisenstadt v. Baird*, 405 U.S. 438, 447 n.7 (1972) (racial classifications must be necessary to achievement of a compelling state interest).

defendant's interest in a fair trial. Perhaps the real concern is that the witness, the jurors, or even the observing public will regard this instruction as evidence that blacks and whites still view the world very differently, as evidence that the effects of two centuries of slavery and segregation have not been obliterated in the last three decades, and as evidence that in many ways, two separate societies still exist. Such reflections may indeed be more "divisive" than the facade of a perfect melting pot, for they provide an occasion and excuse for hate-filled explanations of persisting differences.

There is, however, another possible reaction to exposure to data on such persisting differences: a sense of humility. It can be reflected in private self-examination, looking inward for remnants of racism; it can be reflected in public action looking for social causes and cures. To presume that the irrational response will both predominate and prevail seems fundamentally contrary to democratic traditions; to presume that public ignorance is to be preferred to public awareness seems paternalistic.

Perhaps this is too optimistic. In any event, Judge Bazelon's argument²⁸⁰ seems conclusive; whatever the prudent balance between truth and tact in other contexts, surely truth must prevail if it may exculpate a defendant in a criminal trial.

4. *Other Problems*

The major problem with expert testimony on the own-race effect is its availability. Jury instructions, in contrast, are both cheap and available to all defendants. The problem with jury instructions, however, is their questionable efficacy. One reason to doubt the efficacy of cross-racial identification instructions is that some general research indicates that jurors often do not comprehend or attend to jury instructions.²⁸¹ A second reason is that jury instructions are probably poor vehicles for conveying data. Although several commentators have suggested that jury instructions could be altered to incorporate data, the statutory and precedential barriers to such innovations are high. If the instructions convey no data, telling jurors to "consider" a factor they know nothing about may only confuse them. Furthermore, even if the barriers to incorporating data were surmounted, data conveyed in jury instructions may carry little weight with jurors because the strength of the results and authority of the conclusions cannot be explained.

²⁸⁰ See *supra* notes 251-55 and accompanying text.

²⁸¹ See Strawn & Buchanan, *Jury Confusion: A Threat to Justice*, 59 JUDICATURE 478, 480-81 (1976).

CONCLUSION

Neither expert testimony nor cautionary jury instructions are optimal means for ameliorating the effects of cross-racial identification error. A routine stipulation between prosecutor and defense attorney summarizing the data on the own-race effects seems most desirable. The next best alternative would be a data-laden judicial instruction delivered prior to the eyewitness testimony. These preferred variations on expert testimony and cautionary instructions are not likely to be implemented, the first because most prosecutors will be uncooperative, and the second because most courts will consider such a departure from precedent unwarranted. But the conclusion that neither expert testimony nor jury instructions is a perfect solution does not argue against the legitimacy of the defendant's demand for these options. Unlike expert testimony on many other sources of identification error, testimony concerning the own-race effect so clearly meets evidentiary standards that permitting trial court discretion to determine its admissibility is unjustified. Unlike proposed cautionary instructions on other possible sources of identification error, courts need not construe information on cross-racial identification as commenting on the weight of the evidence.

Despite strong supporting data, the judiciary has been quite unresponsive to requests to put the issue of cross-racial recognition impairment before juries. In part this may be attributed to the undifferentiated demand from commentators and defense attorneys: let us show the jury the entire department store of psychological studies on identification. A more limited argument and a more detailed offer of proof would be more persuasive. But the reluctance of the judiciary probably runs deeper: the lurking racial issues create a special readiness to turn away. There is the fear that racial animosity may be aroused; there is the shame that such deeply ingrained and widely spread racial divisions persist; there is the frustration that there are no judicial remedies, only judicial accommodations.

There is also a special obligation. Of course, all sources of misidentification should be combatted, either through prevention or detection. But most of these sources are rooted in unalterable imperfections in the human system of recording, storing, and retaining information; in no sense can society be blamed for "causing" such malfunctions. In contrast, cross-racial identification errors are not biologically inevitable, but are the product of socialization. Although the exact mechanisms of these social processes are uncertain, it seems fairly safe to assume that racism and de facto segregation play an important role. Blame is therefore appropriate. That the blame is collective rather than individual is the primary reason that cross-examination is an inadequate remedy. It is also the reason that society should assume collective responsibility. Courts may be unable to eliminate cross-racial recognition impairment or its

underlying causes, but they are able to ameliorate its effects. Because most of the victims of judicial inaction will be poor black defendants, courts should respond with special alacrity.