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## Hidden in Plain View: Juries and The Implicit Credibility Given To Police Testimony

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**HIDDEN IN PLAIN VIEW: JURIES AND THE IMPLICIT CREDIBILITY  
GIVEN TO POLICE TESTIMONY**

*Jonathan M. Warren*

## WARREN: HIDDEN IN PLAIN VIEW

## I. INTRODUCTION

From the perspective of today's cultural zeitgeist, police officers are either noble keepers of civilization or wicked manipulators of justice. Officers either chivalrously lay down their lives to protect the public, or corruptibly oppress the downtrodden. As with many things, however, the truth lies somewhere between these two extremes, and generally varies along this spectrum on a case-by-case basis. Unfortunately, the criminal justice system operates on this extreme binary system of police credibility: officers are either honorable or, if thoroughly convinced, horrible.

Justice Warren Burger succinctly summarized the judiciary's long-standing view of officer testimony<sup>1</sup> half a century ago.

[I]t would be a dismal reflection on society to say that when the guardians of its security are called to testify in court under oath, their testimony must be viewed with suspicion. This would be tantamount to saying that police officers are inherently untrustworthy. The cure for unreliable police officers is not to be found in such a shotgun approach.<sup>2</sup>

According to the judiciary, then, officers are presumed gallant. At the same time, juries are currently instructed to treat police officer testimony as though it came from any other witness.<sup>3</sup> This method presumably attempts to assuage jurors who may view police testimony as irreproachable. Instead, such an approach sweeps many problems associated with police testimony under the proverbial rug.<sup>4</sup> It seems imbalanced for courts to acknowledge police as the "guardians of its security," a view shared by many in the public, but only offer a few sentences within jury instructions ordering jurors to treat officers as any other witness. In the face of the strong favorable bias currently attached to police testimony by certain juror demographics, such a blasé attempt to convince a jury to treat these judicially proclaimed heroes as merely any other witnesses is not an effective solution.

Viewing police testimony from the courts' binary perspective obfuscates the real problem. Instead of painting the issue as one concerned with the inherent trustworthiness of officers, this article suggests recommendations that seek to make the criminal justice system fairer in its outcomes. The main recommendation of this article is to introduce cautionary jury instructions in certain cases where police officers testify, while a secondary recommendation concerns using specific *voir dire* questions to obtain a fairer jury. These recommendations would simply be continuing the trend of bettering the justice system, both through police practices and courtroom procedures, by giving juries awareness of the true role and power that officers have in the criminal courts.

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<sup>1</sup> Justice Warren Burger wrote this opinion before he became the Chief Justice of the United States Supreme Court.

<sup>2</sup> *Bush v. United States*, 375 F.2d 602, 604 (D.C. Cir. 1967).

<sup>3</sup> Vida B. Johnson, *Bias in Blue: Instructing Jurors to Consider the Testimony of Police Officer Witnesses with Caution*, 44 PEPP. L. REV. 245, 256 (2017).

<sup>4</sup> *Id.*

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In Part II, this article outlines the problem of unearned, implicit credibility given to police officer testimony by juries, as well as the reasons behind this problem's existence. Part III examines the negative effects of this issue on the criminal justice system, including police officer conduct and the various consequences of wrongful convictions. Part IV offers recommendations to address this problem, such as cautionary jury instructions and *voir dire* questions to identify jurors most likely to take police testimony at face value. Finally, Part V provides a conclusion to this article.

## II. THE PROBLEM: JURORS OFTEN GIVE OFFICER TESTIMONY IMPLICIT CREDIBILITY FOR NO GOOD REASON

### A. *Why Officers Gain Credibility from Juries by Merely Being Officers*

Police officers inhabit a unique role in society. As noted by former Chief Justice Burger, officers act as the protectors of society, and in that role interact with members of the public who vary in economic, racial, and social status. The perception of police tends to vary drastically among these different demographics, and is especially pronounced among different racial groups.<sup>5</sup> Specifically, white, upper-middle class Americans are about twice as likely to have a positive view of police as African-Americans.<sup>6</sup> While the reasons for these different perceptions are numerous, one disproportionate cause is both the real and perceived discrimination against minorities within the criminal justice system.

Discrimination against minorities in the criminal justice system has been well documented.<sup>7</sup> One particularly noteworthy example is the fact that African-Americans are imprisoned at over five times the rate of white Americans in state prisons, despite making up a much smaller portion of the overall population.<sup>8</sup> While this statistic alone may not be dispositive proof of discrimination, it should at least raise eyebrows.

Another curious issue generally not discussed in the public sphere is that cities in need of revenue often end up ticketing minority populations disproportionately to white populations.<sup>9</sup>

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<sup>5</sup> Terry Smith, *Speaking Against Norms: Public Discourse and the Economy of Racialization in the Workplace*, 57 AM. U. L. REV. 523, 540 (2008) (discussing white, black, and Hispanic views on police satisfaction by demographic).

<sup>6</sup> Rich Morin et al., *The Racial Confidence Gap in Police Performance*, PEW RESEARCH CENTER (Sept. 29, 2016), <http://www.pewsocialtrends.org/2016/09/29/the-racial-confidence-gap-in-police-performance/>.

<sup>7</sup> Mario L. Barnes, *Criminal Justice for Those (Still) at the Margins-Addressing Hidden Forms of Bias and the Politics of Which Lives Matter*, 5 UC IRVINE L. REV. 712–16 (2015) (examining certain implicit biases which create a broad variance in the way racial groups are treated at various phases in the criminal system); Frank Rudy Cooper, *The Un-Balanced Fourth Amendment: A Cultural Study of the Drug War, Racial Profiling and Arvizu*, 47 VILL. L. REV. 851 (2002); see German Lopez, *American policing is broken. Here's how to fix it*, VOX (May 2, 2017, 9:24 AM), <https://www.vox.com/policy-and-politics/2016/11/29/12989428/police-shooting-race-crime/>.

<sup>8</sup> Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparities in State Prisons*, THE SENTENCING PROJECT (June 2016) at 3, <http://www.sentencingproject.org/wp-content/uploads/2016/06/The-Color-of-Justice-Racial-and-Ethnic-Disparity-in-State-Prisons.pdf>.

<sup>9</sup> German Lopez, *Study: cities rely more on fines for revenue if they have more black residents*, VOX (July 7, 2017, 8:01 AM), <https://www.vox.com/identities/2017/7/7/15929196/police-fines-study-racism>.

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Interestingly, these citations fell on average by about fifty percent after the election of one black person onto city council.<sup>10</sup>

Yet another disconcerting issue with racial implications is the differential punishment associated with crack cocaine versus powdered cocaine, despite the fact both drugs are nearly identical in their chemical makeup.<sup>11</sup> Individuals who use crack cocaine have a higher likelihood of being black, low-income, and less educated than those who use powdered cocaine.<sup>12</sup> For example, in 2015, 87% of prisoners convicted in federal court of crack offenses were black,<sup>13</sup> while the racial statistics of powdered cocaine offenses were far less skewed.<sup>14</sup> Those charged with possessing one gram of crack cocaine generally face the same sentence as those found with 18 grams of powdered cocaine.<sup>15</sup> While one would expect such unfairness to have simply been overlooked or unexamined, this wide sentencing disparity exists *after* already having undergone reform.<sup>16</sup> The Fair Sentencing Act of 2010 lowered the sentencing gap between crack and powdered cocaine from 100:1 to the current 18:1 ratio.<sup>17</sup> In other words, before 2010, those who possessed one gram of crack generally received a similar sentence to those in possession of 100 grams of powdered cocaine.<sup>18</sup> Such a contrast at least gives the appearance of unfairly targeting black, low-income, and less educated individuals.<sup>19</sup>

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<sup>10</sup> *Id.* Similarly, in schools, one study has shown African-American children receive harsher punishments than white students, which likely does nothing to allay perceptions of unfairness attributed to authority figures later in life. See Russell J. Skiba, Suzanne E. Eckes, & Kevin Brown, *African American Disproportionality in School Discipline: The Divide Between Best Evidence and Legal Remedy*, 54 N.Y.L. SCH. L. REV. 1071, 1088 (2010) (citing Anne C. McFadden & George E. Marsh, *A Study of Race and Gender Bias in the Punishment of School Children*, 15 EDUC. & TREATMENT CHILD 140, 140–47 (1992)).

<sup>11</sup> Elizabeth Kulze, *How Crack Vs. Coke Sentencing Unfairly Targets Poor People*, VOCATIV (Feb. 22, 2015, 12:14 PM), <http://www.vocativ.com/underworld/drugs/crack-vs-coke-sentencing/> (citing Joseph J. Palamar et al., *Powder cocaine and crack use in the United States: An examination of risk for arrest and socioeconomic disparities in use*, 149 DRUG & ALCOHOL DEPENDENCE 108, 114 (2015)).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> Danielle Kurtzleben, *Data Shows Racial Disparity in Crack Sentencing*, U.S. NEWS (Aug. 3, 2010, 2:45 PM), <https://www.usnews.com/news/articles/2010/08/03/data-show-racial-disparity-in-crack-sentencing>.

<sup>15</sup> Elizabeth Kulze, *How Crack Vs. Coke Sentencing Unfairly Targets Poor People*, VOCATIV (Feb. 22, 2015, 12:14 PM), <http://www.vocativ.com/underworld/drugs/crack-vs-coke-sentencing/> (citing Joseph J. Palamar et al., *Powder cocaine and crack use in the United States: An examination of risk for arrest and socioeconomic disparities in use*, 149 DRUG & ALCOHOL DEPENDENCE 108, 114 (2015)).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> Likewise, at least one study has shown that officers are consistently more likely to use greater force on minority suspects than with white suspects. See also Cristal Harris, *Dark Innocence: Retraining Police with Mindfulness Practices to Aid in Squelching Implicit Bias*, 51 U.S.F. L. REV. 103, 112 (2017) (citing Joshua Correll et al., *Across the Thin Blue Line: Police Officers and Racial Bias in the Decision to Shoot*, 92 J. PERSONALITY & SOC. PSYCHOL. 1006 (2007)).

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Additionally, the U.S. Supreme Court has addressed the issue of race when selecting jurors due to the prevalence of discrimination by prosecutors nationwide. Over 40 years ago, the Supreme Court ruled that it is unconstitutional to deny someone the opportunity to serve on a jury based on their race.<sup>20</sup> Although the Supreme Court recognized a significant problem with jury selections, and its ruling likely had some positive effect, the ruling is still criticized for allowing prosecutors to mask their peremptory challenges in neutral language, which has the effect of removing minority jurors.<sup>21</sup>

While issues of racial discrimination are a problem all their own, these issues are often compounded because of the lack of jury diversity.<sup>22</sup> Many times, the jury pool looks much different than the defendant, as juries across America tend to be white and upper-middle class.<sup>23</sup> Instead of being tried by a jury of one's peers, a defendant usually finds himself facing "peers" with a higher economic class, lighter skin tone, different social background, and inability to truly empathize with the defendant's circumstances.<sup>24</sup> This problem is pronounced with race, especially in regard to African-Americans.<sup>25</sup> For example, one study found all-white juries convict black defendants 16% more often than white defendants.<sup>26</sup> However, when at least one African-American was included in the jury pool, the racial conviction gap fell to nearly even.<sup>27</sup>

Moreover, individuals with a more positive perception of police have a higher probability of obeying officer commands, engaging in crime stopping activities, and, critically, supporting prosecution theories of evidence.<sup>28</sup> Studies have shown broadly that white jurors are more

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<sup>20</sup> *Batson v. Kentucky*, 476 U.S. 79, 87 (1986).

<sup>21</sup> See also Kenneth J. Melilli, *Batson in Practice: What We Have Learned About Batson and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447, 503 (1996) (defining the legacy of *Batson* as a failure and seeking the abolishment of peremptory challenges); Parker Kelly, *Racial Discrimination in Jury Selection: The Failure of Batson Challenges and Potential Solutions*, GW JUSTICE J. (Nov. 19, 2016), <https://www.gwjusticejournal.com/single-post/2016/11/19/Racial-Discrimination-in-Jury-Selection-The-Failure-of-Batson-Challenges-and-Potential-Solutions> (explaining prosecutors hide racial challenges with neutral reasons for removing minority jurors).

<sup>22</sup> Ashish S. Joshi & Christine T. Cline, *Lack of Jury Diversity: A National Problem with Individual Consequences*, AMERICAN BAR (2015), <https://www.americanbar.org/groups/litigation/committees/diversity-inclusion/articles/2015/lack-of-jury-diversity-national-problem-individual-consequences.html>

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> Vivian Ho, *For SF's black defendants, it's hard to find jury of peers*, SF CHRONICLE (March 4, 2017), <http://www.sfchronicle.com/crime/article/For-SF-s-black-defendants-it-s-hard-to-find-10977625.php>.

<sup>26</sup> Steve Hartsoe, *Study: All-White Jury Pools Convict Black Defendants 16% More Often than Whites*, (April 17, 2012), <https://today.duke.edu/2012/04/jurystudy>.

<sup>27</sup> Shamena Anwar et al., *The Impact of Jury Race in Criminal Trials*, Q. J. ECONOMICS (2011) at 3, <http://repository.cmu.edu/cgi/viewcontent.cgi?article=1349&context=heinworks>.

<sup>28</sup> Amy Farrell, Liana Pennington, & Shea Cronin, *Juror Perceptions of the Legitimacy of Legal Authorities and Decision Making in Criminal Cases*, 38 LAW & SOC. INQUIRY 773, 793 (2013).

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accepting of the prosecution's theories of evidence, while African-American jurors are more suspicious, especially concerning police testimony.<sup>29</sup>

Therefore, the lack of jury diversity has two troublesome components. Not only are the white, upper-middle class individuals that generally serve on juries implicitly unable or unwilling to identify with certain defendants, but these same jurors, who generally view police favorably, are more willing to sympathize with the prosecution and police testimony. When faced with these facts, the purported gap in convictions based on race suddenly becomes more understandable.<sup>30</sup>

Distortions of the judicial system are not limited to race, as many people exhibit both implicit and explicit biases in favor of authority figures.<sup>31</sup> Authority and the effects of obedience have been long studied,<sup>32</sup> and a link exists between authority-biased jurors and defendant convictions.<sup>33</sup> The company of such jurors in a jury pool leads to a higher conviction rate, even when evidence is slanted toward the defendant.<sup>34</sup> The presence of authoritarian jurors appear even more problematic when viewed with the ancillary problem of implicit police credibility, as such jurors may have a broader impact on convictions than previously realized, especially if many other jurors already implicitly favor the prosecution.

Unfortunately, the need for juries to scrutinize officers on the stand is not simply theoretical, as implicit credibility towards police testimony can lead to a host of untoward consequences within the criminal system.

## III. THE EFFECTS: NOT GREAT FOR THE JUDICIAL SYSTEM

*A. Unsubstantiated Officer Credibility Leads to Less Scrutiny of Police Conduct and Opens the Door for Injustice*

As previously discussed, the current composition of juries tends to be more favorable to the prosecution and police. One manifestation of this bias is through increased credibility of police

<sup>29</sup> *Id.* at 777; Vida B. Johnson, *Bias in Blue: Instructing Jurors to Consider the Testimony of Police Officer Witnesses with Caution*, 44 PEPP. L. REV. 245 (2017).

<sup>30</sup> Steve Hartsoe, *Study: All-White Jury Pools Convict Black Defendants 16% More Often than Whites*, (April 17, 2012), <https://today.duke.edu/2012/04/jurystudy>.

<sup>31</sup> See also Gayle W. Herde, *Take Me to Your Leader: An Examination of Authoritarianism as an Indicator of Juror Bias*, THE JURY EXPERT (Jan. 1, 2009), <http://www.thejuryexpert.com/2009/01/take-me-to-your-leader-an-examination-of-authoritarianism-as-an-indicator-of-juror-bias/> (citing Douglas J. Narby, Brian Cutler, & Gary Moran, *A meta-analysis of the association between authoritarianism and jurors' perceptions of defendant culpability*, 78 J. APPLIED PSYCHOL 34, 34-42 (1993)); cf. Stanley Milgram, *Behavioral Study of Obedience*, 67 J. ABNORM. PSYCHOL. 371 (1963) (examining the limits and pressures of obedience on behavior).

<sup>32</sup> Stanley Milgram, *Behavioral Study of Obedience*, 67 J. ABNORM. PSYCHOL. 371-78 (1963) (examining the limits and pressures of obedience on behavior).

<sup>33</sup> See also Douglas J. Narby, Brian Cutler, & Gary Moran, *A meta-analysis of the association between authoritarianism and jurors' perceptions of defendant culpability*, 78 J. APPLIED PSYCHOL 34, 34-42 (1993).

<sup>34</sup> *Id.*

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testimony. Such unearned officer credibility creates an atmosphere of reduced scrutiny, as jurors are more willing to take an officer at her word without the necessary analysis, reasoning, and ultimate weighing of credibility. Less police scrutiny leads to problems for the judicial system, especially because police officers, like anyone, are not perfect.

First of all, it is hard to be a cop. The average life span of a male law enforcement officer is nearly 22 years shorter than men in the general public.<sup>35</sup> Officers generally carry higher levels of stress than the average citizen, which is linked to a bevy of negative health effects.<sup>36</sup> These effects include a higher prevalence of sleep disorders, diabetes, heart disease, brain cancer, Hodgkin's lymphoma and suicide.<sup>37</sup> Moreover, the stress and pressure of the job has an impact on brain chemistry, as officers' brains show a connection between trauma and a reduction in decision-making, memory, and stress regulation.<sup>38</sup> Compounding these issues is the fact that 7%-19% of active-duty police officers likely suffer from Post-Traumatic Stress Disorder.<sup>39</sup> Perhaps as a direct consequence of these factors, officers are more likely to die from suicide than in the line of duty.<sup>40</sup> Operating under these pressures and difficulties, police sometimes make good-faith mistakes both during an investigation and on the stand.<sup>41</sup> Such mistakes can be expected but should be appropriately litigated and scrutinized in court by a jury cognizant of these issues.

Similarly, police officers are not necessarily in a position to be impartial, and juries are not told of this fact. Officers work closely with prosecutors, and spend every day dealing with crime and

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<sup>35</sup> Stephen M. Soltys, MD, *Officer Wellness: A Focus on Mental Health*, 40 S. ILL. U. L.J. 439 (2016).

<sup>36</sup> Ellen Goldbaum, *Police Officer Stress Creates Significant Health Risks Compared to General Population, Study Finds*, UB NEWS CENTER (July 9, 2012), <http://www.buffalo.edu/news/releases/2012/07/13532.html> (citing M.E. Andrew et al., *The Buffalo Cardio-Metabolic Occupational Police Stress (BCOPS) pilot study: methods and participant characteristics*, PUBMED (Sept. 12, 2005), <https://www.ncbi.nlm.nih.gov/pubmed/16165369>).

<sup>37</sup> *Id.*

<sup>38</sup> Erika Hayasaki, *Life of a Police Officer: Medically and Psychologically Ruinous*, THE ATLANTIC (March 14, 2014), <https://www.theatlantic.com/health/archive/2014/03/life-of-a-police-officer-medically-and-psychologically-ruinous/284324/> (citing C. Chung et al., *Symptoms of posttraumatic stress disorder and exposure to traumatic stressors are related to brain structural volumes and behavioral measures of affective stimulus processing in police officers*, PUBMED (Oct. 30, 2012), <https://www.ncbi.nlm.nih.gov/pubmed/23177923>).

<sup>39</sup> Charles R. Marmar, et al., *Predictors of Posttraumatic Stress in Police and Other First Responders*, 1071 ANNALS N.Y. ACAD. SCI. 1, 18 (2006), <https://deepblue.lib.umich.edu/bitstream/handle/2027.42/74485/annals.1364.00?sequence=1>.

<sup>40</sup> Stephen M. Soltys, MD, *Officer Wellness: A Focus on Mental Health*, 40 S. ILL. U. L.J. 439 (2016). (citing Pamela Kulbarsh, *2015 Police Suicide Statistics*, OFFICER (Jan. 13, 2016), <http://www.officer.com/article/12156622/2015-police-suicide-statistics>).

<sup>41</sup> Daniel N. Haas, *Must Officers Be Perfect?: Mistakes of Law and Mistakes of Fact during Traffic Stops*, 62 DEPAUL L. REV. 1035 (2013); Traci Pedersen, *Study Finds Racial Disparities in Traffic Stops*, PSYCHCENTRAL, <https://psychcentral.com/news/2016/07/02/study-finds-racial-disparities-in-traffic-stops/106086.html>; Frank Rudy Cooper, *The Un-Balanced Fourth Amendment: A Cultural Study of the Drug War, Racial Profiling and Arvizu*, 47 VILL. L. REV. 851 (2002)



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criminals.<sup>42</sup> This sort of exposure has the potential to affect their outlook and perspective.<sup>43</sup> Due to this viewpoint, some officers may hold implicit biases against individuals who are identified as suspects. Even the Supreme Court has opined on this subject and long recognized that officers engage in the “often competitive enterprise of ferreting out crime,” which may affect the ability to be impartial.<sup>44</sup> Just as with good-faith mistakes made by officers, juries should be made fully aware of police relationships with the prosecution and the potential for biases this engenders.

Additionally, unlike other witnesses who may testify only once in a lifetime, police officers are “expert” fact witnesses.<sup>45</sup> Officers consistently understand more about courtroom procedure, reasonable doubt, and the elements of a crime than lay witnesses, and they know how to manipulate the system to their advantage if they choose to do so.<sup>46</sup>

Unfortunately, some officers intentionally behave unlawfully. These officers engage in illegal activities across a broad spectrum.<sup>47</sup> Such individuals actively and measurably diminish the credibility of the judicial system with each indiscretion. While Justice Burger was not in favor of a “shotgun approach” for cautionary jury instructions with police testimony, officers who act illegally should not be allowed to continue unnoticed and unhindered merely because of their status in the criminal system.

Compounding these issues is a lack of appropriate punishment for officers who engage in unlawful behavior, especially when considering the unique role and power police have within the judicial system.<sup>48</sup> While a lack of disciplinary action can be attributed to a number of factors —

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<sup>42</sup> Howard Friedman, *To Protect and Serve?*, TRIAL, Dec. 7, 2011, at 14, 16 (citing David Harris, *The Interaction and Relationship between Prosecutors and Police Officers in the U.S.*, and *How this Affects Police Reform Efforts*, in THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE (Erik Luna and Marianne Wade eds., 2011) (examining the relationship between prosecutors and officers, and how this relationship impacts police misconduct).

<sup>43</sup> See also Cristal Harris, *Dark Innocence: Retraining Police with Mindfulness Practices to Aid in Squelching Implicit Bias*, 51 U.S.F. L. REV. 103, 112 (2017) (citing Joshua Correll et al., *Across the Thin Blue Line: Police Officers and Racial Bias in the Decision to Shoot*, 92 J. PERSONALITY & SOC. PSYCHOL. 1006 (2007) (discussing that officers are consistently more likely to use greater force with minority suspects than with white suspects)).

<sup>44</sup> *Johnson v. United States*, 333 U.S. 10, 13–14 (1948).

<sup>45</sup> Morgan Cloud, *The Dirty Little Secret*, 43 EMORY L.J. 1311, 1322 (1994) (“The problem is that some officers have learned to describe investigations that conform to constitutional requirements - regardless of the reality of the investigation.”).

<sup>46</sup> *Id.*

<sup>47</sup> Vida B. Johnson, *Bias in Blue: Instructing Jurors to Consider the Testimony of Police Officer Witnesses with Caution*, 44 PEPP. L. REV. 245, 253 (2017); Melanie D. Wilson, *An Exclusionary Rule for Police Lies*, 47 AM. CRIM. L. REV. 1, 3 (2010); Melanie D. Wilson, *Improbable Cause: A Case for Judging Police by A More Majestic Standard*, 15 BERKELEY J. CRIM. L. 259, 268 (2010) (finding police perjury commonplace, beginning with a study in 1968 after Mapp).

<sup>48</sup> Gabriel J. Chin & Scott C. Wells, *The “Blue Wall of Silence” As Evidence of Bias and Motive to Lie: A New Approach to Police Perjury*, 59 U. PITT. L. REV. 233 (1998); David Harris, *The Interaction and Relationship between Prosecutors and Police Officers in the U.S.*, and *How This Affects Police Reform*

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including the strength of police unions, the reflexive instinct for police to protect other officers from perceived attacks, and officers' close relationships with prosecutors — the buck ultimately stops with the courts' overall reluctance to address the issue.<sup>49</sup> Courts have been unwilling to adequately deter police misconduct, and have generally avoided the perception of categorizing police “as accomplices, drug addicts, or perjurers when it comes to weighing credibility,” even when it appears warranted.<sup>50</sup> Moreover, officers know the risk of severe punishment is minimal and that, even if caught, they would likely receive only “a court reprimand or, at most, a fairly short jail sentence.”<sup>51</sup> Coupled with less scrutiny, some officers can more easily manipulate the outcome of a case, while other officers may feel less risk associated with committing illegal acts. An officer's unlawful behavior may lead to severe consequences, if not for the individual officer, then at least for the criminal justice system as a whole.

*B. Less Police Scrutiny Leads to a Higher Wrongful Conviction Rate (And the Problems that Accompany It)*

Less scrutiny of police officer testimony can lead to a higher wrongful conviction rate<sup>52</sup> and all of the problems (both direct and collateral) that accompany such convictions.<sup>53</sup> For one, an atmosphere of unchecked police support in the courtroom allows otherwise discernable double-counting problems to escape detection and multiply. Evidentiary double counting occurs when one independent and one dependent piece of evidence are incorrectly viewed as two independent

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*Efforts*, in *THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE* (Erik Luna & Marianne Wade, eds, 2011) (examining the relationship between prosecutors and officers, and how this relationship impacts police misconduct); Connor Friedersdorf, *How Police Unions and Arbitrators Keep Abusive Cops on the Street*, *THE ATLANTIC* (Dec. 2, 2014), <http://www.theatlantic.com/politics/archive/2014/12/how-police-unions-keep-abusive-cops-on-the-street/383258/>; Waseem Abbasi, *Convictions are rare for officers in police shootings*, *USA TODAY* (June 17, 2017, 7:23 AM), <https://www.usatoday.com/story/news/nation/2017/06/17/convictions-rare-officers-police-shootings/102947548/>.

<sup>49</sup> Gabriel J. Chin & Scott C. Wells, *The "Blue Wall of Silence" As Evidence of Bias and Motive to Lie: A New Approach to Police Perjury*, 59 *U. PITT. L. REV.* 233 (1998); David Harris, *The Interaction and Relationship between Prosecutors and Police Officers in the U.S., and How This Affects Police Reform Efforts*, in *THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE* (Erik Luna & Marianne Wade, eds, 2011) (examining the relationship between prosecutors and officers, and how this relationship impacts police misconduct); Connor Friedersdorf, *How Police Unions and Arbitrators Keep Abusive Cops on the Street*, *THE ATLANTIC* (Dec. 2, 2014), <http://www.theatlantic.com/politics/archive/2014/12/how-police-unions-keep-abusive-cops-on-the-street/383258/>; Waseem Abbasi, *Convictions are rare for officers in police shootings*, *USA TODAY* (June 17, 2017, 7:23 AM), <https://www.usatoday.com/story/news/nation/2017/06/17/convictions-rare-officers-police-shootings/102947548/>.

<sup>50</sup> Gabriel J. Chin & Scott C. Wells, *The "Blue Wall of Silence" As Evidence of Bias and Motive to Lie: A New Approach to Police Perjury*, 59 *U. PITT. L. REV.* 233, 264 (1998)

<sup>51</sup> *Id.* at 272.

<sup>52</sup> Russell Covey, *Police Misconduct as a Cause of Wrongful Convictions*, 90 *WASH. U. L. REV.* 1133 (2013) (explaining how officer misconduct causes wrongful convictions).

<sup>53</sup> Sarah B. Berson, *Beyond the Sentence – Understanding Collateral Consequences*, 272 *NAT'L INST. OF JUST. J.* 25, <https://www.nij.gov/journals/272/Pages/collateral-consequences.aspx>.

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pieces.<sup>54</sup> An example of this issue would be an eyewitness identification combined with a dubious confession gained through subsequent officer interrogation. On its face it would appear the defendant had been identified and confessed; however, with a reasonable dose of scrutiny, one hopes the veracity of the confession would be examined in the courtroom by a jury aware of the potential issues.

Moreover, once these wrongful convictions come to light, the criminal justice system loses important credibility with the public.<sup>55</sup> After a prolonged degradation of the courts' credibility, it is to be assumed that some people would start to question the usefulness of an unfair system of justice. The reality or perception of allowing the judicial system to impose harsher penalties for the same conduct based on a protected class (such as race) is unsustainable and continues to whittle away at the courts' credibility in the public sphere.<sup>56</sup>

Finally, wrongful convictions (like any conviction) carry a host of collateral consequences.<sup>57</sup> Wrongful convictions can unjustifiably take years away from an innocent individual, isolate them from family and friends, and lead to the inability to support themselves.<sup>58</sup> Any convicted person will face employment issues, as those with a criminal record will likely find employers less willing to "risk" hiring a convict.<sup>59</sup> Similarly, convicts can expect to face housing problems, as certain areas will not rent to convicted individuals.<sup>60</sup> Even the children of convicts are impacted, as they face higher rates of recidivism and incarceration, which leads to cyclical issues for their family.<sup>61</sup>

Taken together, these circumstances lay bare an unseemly and harmful problem: the current composition of juries across the nation tend to favor the prosecution and police testimony, while simultaneously disfavoring many defendants, simply because of the unknown (or sometimes, known) presence of bias. Regarding police testimony, such unearned favor can lead to a multitude of detrimental effects for the justice system. For these reasons, the current system requires change.

IV. RECOMMENDATIONS: *VOIR DIRE*, JURY INSTRUCTIONS, AND OTHER SUGGESTIONS

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<sup>54</sup> Cf. Robert P. Mosteller, *Pernicious Inferences: Double Counting and Perception and Evaluation Biases in Criminal Cases*, 58 HOW. L.J. 365, 380–83 (2015).

<sup>55</sup> Cf. Matt Ford, *Guilty, Then Proven Innocent*, THE ATLANTIC (Feb. 9, 2015), <https://www.theatlantic.com/politics/archive/2015/02/guilty-then-proven-innocent/385313/> (exposing flaws within the current judicial system).

<sup>56</sup> See Stephen B. Bright, *Casualties of the War on Crime: Fairness, Reliability and the Credibility of Criminal Justice Systems*, 51 U. MIAMI L. REV. 413, 415 (1997); Elizabeth Kulze, *How Crack vs. Coke Sentencing Unfairly Targets Poor People*, VOCATIV (Feb. 22, 2015, 12:14 PM), <http://www.vocativ.com/underworld/drugs/crack-vs-coke-sentencing/> (discussing the racial implications of inconsistent sentencing with crack and powdered cocaine).

<sup>57</sup> Sarah B. Berson, *Beyond the Sentence – Understanding Collateral Consequences*, 272 NAT'L INST. OF JUST. J. 25, <https://www.nij.gov/journals/272/Pages/collateral-consequences.aspx>.

<sup>58</sup> *Id.*

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

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

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*A. The Judiciary's Current Solution Is Inadequate*

One case highlighting the criminal justice system's current treatment of police is *State v. Williams*.<sup>62</sup> In *Williams*, the defendant was charged with murder and, as part of his defense, sought cautionary jury instruction that examined the credibility of law enforcement officers.<sup>63</sup> Defendant suggested the following jury instructions be given:

You have heard the testimony of law enforcement officials. The fact that a witness may be employed by the federal or state government as a law enforcement official does not mean that his testimony is necessarily deserving of more or less consideration or greater or lesser weight than that of an ordinary witness.

At the same time, it is quite legitimate for defense counsel to try to attack the credibility of a law enforcement witness on the grounds that his testimony may be colored by a personal or professional interest in the outcome of the case.

It is your decision, after reviewing all the evidence, whether to accept the testimony of the law enforcement witness and to give to that testimony whatever weight, if any, you find it deserves.<sup>64</sup>

This instruction does not appear on its face to be unreasonable, as it simply states police may not be in a position to be impartial. Nonetheless, the North Carolina Supreme Court agreed with the holding in *Bush*, stating that cautionary instructions were appropriately given to certain witnesses in the underlying trial, which included one individual who received a plea deal and another who may have been under a large amount of emotional and physical stress at the time of her observation.<sup>65</sup> The court went on to state that “[s]pecial instructions concerning potentially interested witnesses are proper . . . but they are inappropriate when, as here, there is nothing in the record to cast doubt upon the truthfulness and objectivity of the witness.”<sup>66</sup> In other words, even though the officer was engaged in a profession fraught with the potential for bias towards suspected criminals,<sup>67</sup> because the record showed no misconduct or untruthfulness in this particular case, it was proper for the lower court to refuse to give cautionary jury instructions regarding the officer's testimony.<sup>68</sup>

By instructing juries to treat police as normal witnesses, the courts' current solution to officer testimony is flawed. Courts presumably are attempting to dispel the notion that officer testimony

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<sup>62</sup> *State v. Williams*, 430 S.E.2d 888, 895 (1993).

<sup>63</sup> *Id.* at 894.

<sup>64</sup> *Id.* at 895. These instructions appear relatively tame considering the later recommendations of this article.

<sup>65</sup> *Id.*

<sup>66</sup> The court denied a request for special instructions regarding the credibility of police testimony. *Id.*

<sup>67</sup> See also Cristal Harris, *Dark Innocence: Retraining Police with Mindfulness Practices to Aid in Squelching Implicit Bias*, 51 U.S.F. L. REV. 103, 112 (2017) (citing Joshua Correll et al., *Across the Thin Blue Line: Police Officers and Racial Bias in the Decision to Shoot*, 92 J. PERSONALITY & SOC. PSYCHOL. 1006 (2007)).

<sup>68</sup> It should also be noted the police officer's testimony in *Williams* did not appear to be a substantial portion of the State's case against the defendant. *Id.*

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is unimpeachable, but, by ignoring a plethora of issues, such an attempt eventually has unwanted effects.<sup>69</sup> Primarily, the judiciary expects a seemingly offhand instruction — that officers should be treated as any other witness — to do an inordinate amount of work. As discussed, individuals who currently serve as jurors generally have a more favorable view of police and the prosecution. This perspective likely tips the scales of justice towards the prosecution. Instead of addressing the presence of this advantageous bias and discussing the actual role police inhabit in society, the courts simply tell jurors to treat officers as any other witness. These instructions ignore the potential for inherent favoritism towards police that the average juror may knowingly or unknowingly hold.<sup>70</sup>

The recommendations of this article shouldn't wither and die simply because the argument against jury instructions is recast and viewed as an attempt to subvert officer trustworthiness in general. Instead, these recommendations should be regarded as additional, relatively small steps towards resolving problems within the criminal justice system. Acknowledging the potential for implicit bias towards police credibility is merely one small (but significant) step in the right direction.

*B. Recommendation One: Provide Cautionary Jury Instructions Regarding Police Testimony To Lessen The Implicit Bias Of Juries*

The judicial system needs to acknowledge, through jury instructions, that many juries today give officers an implicit boost in credibility. Such instructions would attempt to move any implicit bias to the forefront of a jury's consciousness, where it could be examined, dissected, and ultimately rejected. The wording of these instructions would need to walk a thin tightrope, where leaning too far to one side unfairly paints all officers as inherently untrustworthy (as noted by Justice Burger), and leaning too far to the other side has no effect on juries at all.

*1. Effectiveness of Jury Instructions in Other Areas of the Law*

To avoid reinventing the wheel, one should examine the outcomes of cautionary jury instructions given in other contexts of the law in crafting useful and convincing jury instruction language regarding the credibility of officer testimony. Even if certain language for jury instructions regarding officer testimony is unanimously deemed adequate by judges throughout the nation,

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<sup>69</sup> Vida B. Johnson, *Bias in Blue: Instructing Jurors to Consider the Testimony of Police Officer Witnesses with Caution*, 44 PEPP. L. REV. 245 (2017); Michelle Alexander, *Why Police Lie Under Oath*, NY TIMES (Feb. 2, 2013), <http://www.nytimes.com/2013/02/03/opinion/sunday/why-police-officers-lie-under-oath.html>.

<sup>70</sup> See also *State v. Guilbert*, 306 Conn. 218, 251, 49 A.3d 705, 731 (2012) (“[T]he reliability of eyewitness identifications frequently is not a matter within the knowledge of an average juror.”). Similarly, the average juror (who is generally white, upper-middle class, and holds a more favorable view of police) cannot be expected to sufficiently identify and grapple with the unconscious favor given to police from the current form of jury instructions. Just as with other areas of the law, certain jurors may need to hear all of the facts to convince them that every officer does not fit the stereotypical mold of friendly, helpful, and impartial.

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such language must successfully influence juries in order to be effective. Unfortunately, the judicial system appears to still be searching for such effectiveness.<sup>71</sup> In general:

Studies are mixed as to whether instructions actually improve jurors' understanding. Overall, research shows that jurors' comprehension of instructions is rather poor. Some studies show modest improvement in juror understanding about procedural rules or definitions of crimes, for example, while other studies show that instructed jurors are no more knowledgeable than non-instructed jurors.<sup>72</sup>

While other areas of the law have given specific cautionary jury instructions,<sup>73</sup> the effects of these exact instructions have not been thoroughly studied. One area worth discussing, however, are the different types of jury instructions given in eyewitness identification cases, as well as the effect of such instructions.

## 2. *Eyewitness Identifications: Effectiveness of Jury Instructions*

This section examines three separate cases that have delved into the guidelines behind cautionary jury instructions for eyewitness identifications. Each case, while similar, took a somewhat different route to accomplish this task. This article takes an analogous approach by offering three different versions of potential jury instructions regarding police credibility, and bases these versions in part on the approaches discussed in the eyewitness identification cases within this section.

In recent years, a litany of research has shown serious issues with eyewitness identifications, as evidenced by the fact that 71% of wrongful convictions examined by the Innocence Project have involved these types of identifications.<sup>74</sup> In fact, misidentifications are one the largest contributor to wrongful convictions in the United States.<sup>75</sup> Due to the unreliability of these identifications and the large role they play in the criminal justice system, courts across the nation have attempted to address misidentifications through jury instructions.

Just as cautionary jury instructions with officer testimony would need to walk a tightrope to be effective, so too must jury instructions for eyewitness testimony. “To be effective, safeguards

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<sup>71</sup> Laura Whitney Lee, *Silencing the "Twittering Juror": The Need to Modernize Pattern Cautionary Jury Instructions to Reflect the Realities of the Electronic Age*, 60 DEPAUL L. REV. 181 (2010) (examining the effects of and ease of access to the internet on juries).

<sup>72</sup> Tracy L. Denholtz & Emily A. McDonough, *State v. Guilbert: Should Jurors in Connecticut Be Educated About Eyewitness Reliability Through Expert Testimony or Jury Instructions*, 32 QUINNIPAC L. REV. 865, 923–24 (2015).

<sup>73</sup> These areas include instructions involving testimony from defendants (although many courts merely instruct juries to treat this testimony as if it were from any other witness), accomplices (especially when uncorroborated), and informants. Vida B. Johnson, *Bias in Blue: Instructing Jurors to Consider the Testimony of Police Officer Witnesses with Caution*, 44 PEPP. L. REV. 245, 260–261 (2017).

<sup>74</sup> THE INNOCENCE PROJECT, *DNA Exonerations in the United States*, <https://www.innocenceproject.org/dna-exonerations-in-the-united-states/>.

<sup>75</sup> THE INNOCENCE PROJECT, *Eyewitness Misidentification*, <https://www.innocenceproject.org/causes/eyewitness-misidentification/>.

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should maximize juror sensitivity to factors that influence the accuracy of an identification (i.e., the ability to discriminate between good and bad witnessing and identification conditions) without inducing a general sense of skepticism regarding the ability of all eyewitnesses to make correct identifications.”<sup>76</sup>

Courts have looked to scientific data to address cautionary jury instructions for eyewitness identifications.<sup>77</sup> Based on nearly universal scientific consensus, these instructions explain the factors that research has shown may lead to a higher probability of misidentifications.<sup>78</sup> In 1996, the court, in *United States v. Burrous*, offered a comprehensive and lengthy cautionary instruction on many of these factors.<sup>79</sup> The beginning of this instruction summarized the dangers of misidentifications as follows:

I want to caution you, first, that the kind of identification testimony you heard in this case must be scrutinized carefully. Scientific studies have amply demonstrated the dangers of mistake in human perception and identification. Of course, this does not mean that the identification in this case is incorrect. I merely tell you this so that you understand the importance of carefully evaluating the evidence here.<sup>80</sup>

The court in *Burrous* then embarked on a cautionary instruction, which although not as organized as the eyewitness instructions generally seen today, still discussed the factors of misidentifications in length.<sup>81</sup> While this opening paragraph in *Burrous* laconically outlines the issues surrounding eyewitness misidentifications, the court found it necessary to support this opening statement with a litany of specific evidence behind it.<sup>82</sup> However, as discussed later in this article, one potential approach to jury instructions for police credibility would be to offer a similarly concise instruction in the form of a one-paragraph summary. While such an instruction would lack effectiveness, it would at least acknowledge the problem and leave room for reform down the road.

Nonetheless, other potential avenues for structured, scientific, and extensive eyewitness jury instructions exist. For example, the Massachusetts Supreme Court recently found certain factors must be included in model cautionary jury instructions regarding eyewitness testimony. In *Commonwealth of Massachusetts v. Gomes*, “the defendant slashed the face of the victim . . . with a box cutter while the victim was sitting in the driver's seat of his vehicle.”<sup>83</sup> A nearby

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<sup>76</sup> Amanda N. Bergold et al., *Comparing the Effectiveness of Instructions and Expert Testimony: Which Safeguard Improves Jurors' Evaluations of Eyewitness Evidence*, J. EXPERIMENTAL CRIM. 7, <https://www.law.upenn.edu/live/files/6280-jonesbergoldetal>.

<sup>77</sup> *United States v. Burrous*, 934 F. Supp. 525 (E.D.N.Y. 1996); *Com. v. Gomes*, 22 N.E.3d 897, 470 Mass. 352 (2015) (holding modified by *Com. v. Bastaldo*, 32 N.E.3d 873, 472 Mass. 16 (2015); *State v. Henderson*, 27 A.3d 872, 208 N.J. 208 (2011) (holding modified by *State v. Chen*, 27 A.3d 930, 208 N.J. 307 (2011))).

<sup>78</sup> *Com. v. Gomes*, 22 N.E.3d 897, 909-10 (Mass. 2015).

<sup>79</sup> *United States v. Burrous*, 934 F. Supp. 525, 530-31 (E.D.N.Y. 1996).

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Com. v. Gomes*, 22 N.E.3d 897, 899 (Mass 2015).

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convenience store clerk, the victim's passenger, and the victim all later identified the defendant.<sup>84</sup> At trial, the defendant requested a jury instruction that would have included many of the scientific factors shown to increase the chances of a misidentification.<sup>85</sup> However, the judge declined to do so.<sup>86</sup>

On appeal, the Massachusetts Supreme Court reviewed the lower court's ruling and affirmed two of the convictions.<sup>87</sup> Nonetheless, the court decided to incorporate certain factors that have achieved "near consensus in the relevant scientific community" into model eyewitness identification instructions.<sup>88</sup> Somewhat ironically, these factors appear to be substantially similar to the factors proposed by the defendant in his underlying case.<sup>89</sup> The five factors listed by the court included the following:

[1] Human memory does not function like a video recording but is a complex process that consists of three stages: acquisition, retention, and retrieval . . . [2] An eyewitness's expressed certainty in an identification, standing alone, may not indicate the accuracy of the identification, especially where the witness did not describe that level of certainty when the witness first made the identification . . . [3] High levels of stress can reduce an eyewitness's ability to make an accurate identification . . . [4] Information that is unrelated to the initial viewing of the event, which an eyewitness receives before or after making an identification, can influence the witness's later recollection of the memory or of the identification . . . [5] A prior viewing of a suspect at an identification procedure may reduce the reliability of a subsequent identification procedure in which the same suspect is shown.<sup>90</sup>

The court then took these factors and created a model jury instruction.<sup>91</sup> This instruction included approximately three pages of language that would be used in every case.<sup>92</sup> Portions of the rest of the instructions were to be included only if evidence in the case made them relevant.<sup>93</sup> These portions delved more deeply into the original five factors listed by the court, and included evidence such as whether an individual's face was obscured,<sup>94</sup> a weapon was involved,<sup>95</sup> the identification was cross-racial,<sup>96</sup> there was a lineup<sup>97</sup> or a witness viewed the defendant multiple

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<sup>84</sup> *Id.* at 901–02.

<sup>85</sup> *Id.* at 902–03.

<sup>86</sup> *Id.* at 904.

<sup>87</sup> *Id.* at 905.

<sup>88</sup> *Id.* at 909.

<sup>89</sup> *Com. v. Gomes*, 22 N.E.3d 897, 911-16 (Mass 2015).

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 918–27.

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

<sup>93</sup> *Id.* at 920–27.

<sup>94</sup> *Id.* at 920.

<sup>95</sup> *Com. v. Gomes*, 22 N.E.3d 897, 920 (Mass 2015).

<sup>96</sup> *Id.* at 921.

<sup>97</sup> *Id.* at 924.



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times.<sup>98</sup> The court also made sure to note the potential need for revision of these model jury instructions in the future.<sup>99</sup> While the jury instructions created in *Gomes* may seem thorough, the Massachusetts Supreme Court actually relied on a prior case from New Jersey that went into even greater detail and has been seen as a turning point in eyewitness identification instructions.<sup>100</sup>

In *State v. Henderson*, the New Jersey Supreme Court, relying on thousands of pages of scientific research and data, recognized the effects of certain factors on misidentifications and the importance of revising jury instructions for eyewitness testimony.<sup>101</sup> After discussing the need to balance the defendant's right to a fair trial and the State's interest in presenting important evidence, the court listed variables that lower courts should examine when dealing with eyewitness identifications.<sup>102</sup> These variables were similar to those presented in *Gomes* but much more in-depth.<sup>103</sup> Moreover, *Henderson* also included additional jury instructions that could be implicated based on the presence of certain evidence in the case.<sup>104</sup> Since *Henderson*, the effect of these detailed instructions on juries has been examined, and the results seem to show that, while jurors are impacted by such instructions, it's not precisely how the New Jersey Supreme Court likely intended:<sup>105</sup>

An initial evaluation suggests Henderson instructions may minimize the risk of wrongful convictions, but may not provide the educational function that results in sensitivity to the quality of eyewitness factors. That is, mock jurors were less likely to convict when given the Henderson instructions, regardless of whether the identification in question was secured using good or poor police practices.<sup>106</sup>

Jurors were indeed convinced to scrutinize eyewitness identifications more closely, but did so uniformly, regardless of the specific facts and evidence of the case.<sup>107</sup> It would therefore appear that *Henderson* might lean too far and instead bias jurors against all identifications. While one study is not dispositive and more research is needed on these issues, these results, if correct,

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<sup>98</sup> *Id.* at 926.

<sup>99</sup> *Id.* at 911.

<sup>100</sup> *Id.* at 910.

<sup>101</sup> Mark W. Bennett, *Unspringing the Witness Memory and Demeanor Trap: What Every Judge and Juror Needs to Know About Cognitive Psychology and Witness Credibility*, 64 AM. U. L. REV. 1331, 1372 (2015) (citing *State v. Henderson*, 27 A.3d 872, 208 N.J. 208 (2011) (holding modified by *State v. Chen*, 27 A.3d 930, 208 N.J. 307 (2011))).

<sup>102</sup> *See State v. Henderson*, 27 A.3d 872, 208 N.J. 208 (2011) (holding modified by *State v. Chen*, 27 A.3d 930, 208 N.J. 307 (2011)).

<sup>103</sup> *See id.*; *Com. v. Gomes*, 22 N.E.3d 897, 910 (Mass 2015) (noting the court in *Henderson* eventually led to the creation of a ten-page jury instruction for eyewitness identifications).

<sup>104</sup> *See State v. Henderson*, 27 A.3d 872, 920-22 (2011).

<sup>105</sup> Amanda N. Bergold et al., *Comparing the Effectiveness of Instructions and Expert Testimony: Which Safeguard Improves Jurors' Evaluations of Eyewitness Evidence*, J. EXPERIMENTAL CRIM. 7, <https://www.law.upenn.edu/live/files/6280-jonesbergoldetal> (noting potential methodology problems with the study).

<sup>106</sup> *Id.* at 9.

<sup>107</sup> *See id.*

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would be unacceptable for the courts. Fortunately, other possibilities exist to help make eyewitness instructions effective without broadly discrediting all identifications.

### 3. *Eyewitness Identifications: Effectiveness of Jury Instructions When Offered In Plain English*

One potential way to reduce the overbearing result of *Henderson* is to offer plain English instructions.<sup>108</sup> Instead of inundating jurors with page after page of legalese and scientific jargon, giving jurors a comparatively brief and understandable overview of the issues may help lead to fairer outcomes.<sup>109</sup> A sitting federal judge has offered the following example of plain English jury instructions:

[y]ou may believe all of what any witness says, only part of it, or none of it. In evaluating a witness's testimony, consider the witness's:

- Motives for testifying;
- Interest in the outcome of the case;
- Drug or alcohol use or addiction, if any;
- The reasonableness of the witness's testimony.<sup>110</sup>

Clear, simple, and straight-forward instructions like the excerpt offered above would likely do a better job of educating jurors without unintentionally and relentlessly indoctrinating them into believing eyewitness identifications (and police testimony) are always incorrect. Jurors already have a difficult time comprehending jury instructions.<sup>111</sup> Giving juries the ability to grasp at least an overview of the issues seems preferable to the current system, where many times jurors cannot understand jury instructions and instead rely simply on a “gut feeling.”<sup>112</sup> While the actual language of any jury instruction is important, another factor that may impact effectiveness is the introduction of an expert to support such instructions.

### 4. *Eyewitness Identifications: Effectiveness of Jury Instructions Accompanied by an Expert Witness's Testimony*

Another potential way to more effectively walk the jury instruction tightrope would be to allow expert witnesses to testify and explain faulty identifications to the jury. Expert testimony is

<sup>108</sup> Mark W. Bennett, *Unspringing the Witness Memory and Demeanor Trap: What Every Judge and Juror Needs to Know About Cognitive Psychology and Witness Credibility*, 64 AM. U. L. REV. 1331,1373 (2015) (citing *See State v. Henderson*, 27 A.3d 872, 208 N.J. 208 (2011)).

<sup>109</sup> *Id.* at 1375.

<sup>110</sup> *Id.* at 1374. These instructions handle issues surrounding scientific research in a similarly modest manner. Scientific research has established that memory is not an exact recording of past events and witnesses may misremember events and conversations due to external stimuli that they may be exposed to such as statements, conversations, opinions, documents, reports, etc. Even if a witness confidently testifies in good faith, his memory may be distorted at any stage: acquisition, storage and retrieval. Such an approach would still adequately convey the issues surrounding eyewitness identification. *Id.*

<sup>111</sup> Tracy L. Denholtz & Emily A. McDonough, *State v. Guilbert: Should Jurors in Connecticut Be Educated About Eyewitness Reliability Through Expert Testimony or Jury Instructions*, 32 QUINNIPAC L. REV. 865, 923–24 (2015).

<sup>112</sup> *Id.*

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already generally viewed by the courts as a mechanism to aid jurors in their understanding and ultimate deliberations.<sup>113</sup> Such an approach for eyewitness identifications (and implicit police credibility issues) would presumably help juries obtain a more thorough understanding of the science behind misidentifications, which would lead to more knowledgeable jurors coming to more just outcomes.<sup>114</sup>

[S]tudies show that jurors tend to “accept [expert testimony] and incorporate it into their decision[-]making.” Research shows that jurors do not simply “suspend their own judgment in deference to the expert,” but rather they “evaluate [the expert’s testimony] in light of [their] own experience, common sense, and recognition of the adversarial nature of the trial process.”<sup>115</sup>

Expert testimony would be especially useful where jurors have preexisting, incorrect beliefs on certain subjects.<sup>116</sup> For example, the common juror may hold misconceptions regarding the reliability and accuracy of a witness’s identification.<sup>117</sup> Expert testimony could allay some of those misconceptions more effectively than jury instructions alone.<sup>118</sup>

However, a large roadblock to obtaining an expert witness is the cost. Many criminal defendants are indigent and assigned public defenders, who in turn are already underfunded and overworked.<sup>119</sup> State-level public defenders often lack the financial resources and time to hire every expert witness that would be helpful in a case.<sup>120</sup> Hiring an expert merely to clarify the court’s jury instructions would likely be perceived as a much lower need for defendants.<sup>121</sup> Moreover, many state courts believe the absence of an expert to explain eyewitness misidentifications is usually not a due process violation.<sup>122</sup> A potential reason for this view is

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<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> Tracy L. Denholtz & Emily A. McDonough, *State v. Guilbert: Should Jurors in Connecticut Be Educated About Eyewitness Reliability Through Expert Testimony or Jury Instructions*, 32 QUINNIPAC L. REV. 865, 923–24 (2015) (quoting Neil J. Vidmar & Regina A. Schuller, *Juries and Expert Evidence: Social Framework Testimony*, 52 LAW & CONTEMP. PROBS. 140, 172 (1989)).

<sup>116</sup> See Tracy L. Denholtz & Emily A. McDonough, *State v. Guilbert: Should Jurors in Connecticut Be Educated About Eyewitness Reliability Through Expert Testimony or Jury Instructions*, 32 QUINNIPAC L. REV. 865, 894 (2015).

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> Oliver Laughland, *The human toll of America’s public defender crisis*, THE GUARDIAN (Sept. 7, 2016, 6:55 AM), <https://www.theguardian.com/us-news/2016/sep/07/public-defender-us-criminal-justice-system>.

<sup>120</sup> See also *id.*

<sup>121</sup> Fortunately, some progress has been made on the federal level for this issue. The United States Supreme Court has found that an expert witness for an indigent defendant must provide a “significant factor” to the defense so that the expert’s absence would otherwise make a fair trial impossible. *Ake v. Oklahoma*, 470 U.S. 68, 82–83 (1985). Partially because of this ruling, there is funding for federal expert witnesses available for to indigent defendants. National Research Council et al., *Identifying the Culprit: Assessing Eyewitness Identification* (2014), <https://www.nap.edu/read/18891/chapter/5#39>.

<sup>122</sup> National Research Council et al., *Identifying the Culprit: Assessing Eyewitness Identification* (2014), <https://www.nap.edu/read/18891/chapter/5#39>.

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that state courts may believe experts in this situation tend to favor the defense more than the prosecution. These courts presumably want to avoid placing a thumb on the scales of justice for either side, and would therefore rather keep the defendant's expert out of the courtroom on this issue.

Similarly, allowing experts to explain misidentifications could lead to conflicting expert testimony, which has the potential to confuse the jury.<sup>123</sup> Instead of clarifying the scientific factors behind identifications, the issue for jurors could simply become more muddled.<sup>124</sup> Courts have discretion to determine whether the benefits of expert testimony outweigh the costs,<sup>125</sup> and could very well decide to exclude both prosecution and defense experts on the grounds of keeping the issue relatively clear for juries, especially given the general reticence against experts in this area.<sup>126</sup>

Despite the potential benefits that expert testimony can bring to aid a jury's understanding of misidentifications, such an arrangement is likely unrealizable in the area of implicit bias towards police testimony.<sup>127</sup> Scientific research on the implicit credibility of police testimony pales in comparison to the study of eyewitness misidentifications.<sup>128</sup> Unlike with eyewitness testimony, jurors' implicit favor towards police does not have the well of scientific data from which to spur change. While experts on this issue may currently be unobtainable, other avenues exist to increase the effectiveness of cautionary instructions on juries.

#### *5. Effectiveness of Jury Instructions Based on When They Are Given*

The timing of the jury instructions may also impact their effectiveness to jurors. As one study explained:

For example, instructions on reasonable doubt and burden of proof, when given at the outset of the trial, increase jurors' threshold for conviction and assist jurors in evaluating evidence in line with legal standards. Eyewitness instructions given prior to an eyewitness' testimony may similarly assist jurors to evaluate such evidence.<sup>129</sup>

While the cited study showed an increase in convictions, it also crucially showed an increased ability for jurors to evaluate the evidence.<sup>130</sup> A juror who obtains the legal framework early can

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

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

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

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> See Virginia Hughes, *Why Police Lineups Will Never Be Perfect*, THE ATLANTIC, (Oct. 2, 2014), <https://www.theatlantic.com/technology/archive/2014/10/the-evolving-science-of-police-lineups/381046/> (noting it can take years before a scientific consensus emerges on a given topic, but especially when "injecting science into the justice system").

<sup>129</sup> Amanda N. Bergold et al., *Comparing the Effectiveness of Instructions and Expert Testimony: Which Safeguard Improves Jurors' Evaluations of Eyewitness Evidence*, J. EXPERIMENTAL CRIM. 7, <https://www.law.upenn.edu/live/files/6280-jonesbergoldetal>.

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

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thereafter observe the case through the lens of the pertinent evidentiary standard. Otherwise, the juror must wait until the end of the trial to learn of the burden of proof, which is after the juror has likely formed a non-legal opinion on the disposition of the case. Such reasoning for the timing of jury instructions can be extended to instructions involving officer testimony. Jurors who are instructed on implicit credibility issues for police testimony before such testimony occurs would then likely be better equipped with the necessary knowledge to sufficiently inspect such testimony more so than someone who learns of this unconscious bias after the fact.

Moreover, giving these instructions early will likely cause jurors to be “more alert and therefore receptive to the new information earlier in the trial.”<sup>131</sup> Just as law students are generally less receptive to learning new material in the classroom on a Friday afternoon, so too is a jury less receptive to new information after several days (or even hours) of a trial. Therefore, giving these instructions early would likely find jurors more open to the idea that jury bias in favor of police exists, while also increasing the probability that these instructions would be remembered.

*6. Bringing Everything Together: How to Effectively Phrase and Implement Cautionary Jury Instructions Regarding Implicit Bias towards Police Officer Testimony*

After examining other areas of the law, a sufficiently effective solution can be crafted to address the issue of implicit police credibility. As discussed, the phrasing of cautionary jury instructions would need to straddle the line between having no impact and causing jurors to view all officers as inherently untrustworthy. In other words, these instructions would ideally dispel juries’ implicit (or explicit) biases in favor of police testimony, without going so far as to create biases *against* officer testimony.

Part of the difficulty in completing this tightrope walk is the relative lack of research on the effectiveness of jury instructions. However, some of the research completed on this topic suggests a troubling outcome, as evidenced by the fact that the verbose and scientific approach taken by the court in *Henderson* appeared to decrease convictions across the board, regardless of the evidence.<sup>132</sup> Therefore, this article offers three different types of potential cautionary jury instructions regarding jury bias in favor of police testimony (hereafter referred to as the “Brief Instructions,” “Pragmatic Instructions,” and “Lengthy Instructions”). While the Brief Instructions and Pragmatic Instructions offer a general, uniform template, the Lengthy Instructions would take an approach similar to *Henderson* and *Gomes*, in that additional instructions may be implicated based on the facts of the case. Moreover, some of these recommendations would be

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<sup>131</sup> The benefits of early exposure can be attributed to the primary effect seen when jurors tend to place great emphasis on ideas to which they are first exposed, i.e. first impressions are lasting impressions. Therefore, information presented during the earliest part of trial will be received, retained, and recalled better than other evidence. Attorneys use the concept of primacy when structuring the order of witnesses and exhibits by presenting high impact witnesses and exhibits first to make a stronger and more lasting impression. Tracy L. Denholtz & Emily A. McDonough, *State v. Guilbert: Should Jurors in Connecticut Be Educated About Eyewitness Reliability Through Expert Testimony or Jury Instructions*, 32 QUINNIPAC L. REV. 865, 925 (2015).

<sup>132</sup> See Amanda N. Bergold et al., *Comparing the Effectiveness of Instructions and Expert Testimony: Which Safeguard Improves Jurors’ Evaluations of Eyewitness Evidence*, J. EXPERIMENTAL CRIM. 7, <https://www.law.upenn.edu/live/files/6280-jonesbergoldetal>.

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practical, straightforward, and ready to be applied, while others would require more research before being implemented. This article will set the guidelines for each of these solutions while also addressing potentially important issues surrounding their implementation.

While all three versions of the jury instructions offer different challenges and benefits, they also share several common features, including being written in plain English, as opposed to highly-technical legal jargon; the situations in which to give the instructions' when during the trial the instructions are given; and the presence of an expert witness to help explain the reasoning behind the instructions.

### 7. *Common Traits Shared Among the Jury Instruction Recommendations*

First, any cautionary instructions on implicit police credibility should be used where an officer's testimony is a substantial portion of the prosecution's evidence, regardless of the level of offense. For the purposes of this article, "substantial" means that without such testimony, the State's case would have to be dismissed. This standard would probably lead to cautionary instruction being given in cases involving misdemeanors and lower-level felonies, where police would likely be an eyewitness to the crime. While the stakes in such cases are relatively low, this area of the criminal justice system in particular would benefit from some level of reform, as the vast majority of the public's interaction with the criminal justice system occurs here.<sup>133</sup>

Second, these instructions should be given at the beginning of the judicial proceeding. Just as instructions on evidentiary standards have been shown to assist jurors in evaluating evidence, so too could instructions regarding implicit police credibility.<sup>134</sup> Bringing awareness to this issue as soon as possible would help juries evaluate testimony with as little bias as possible. Jurors would learn about the issues surrounding implicit credibility before any testimony is heard, and would view such testimony through this lens without having to retroactively apply it. The early timing of these instructions would therefore equip juries with the knowledge to reliably evaluate testimony and lead to fairer outcomes.

Third, to further increase the effectiveness of these cautionary jury instructions, the right to an expert witness should be created. An expert could then explain many of the issues outlined in this article regarding the implicit credibility given to police testimony by jurors. When dealing with eyewitness identifications, expert witnesses can bring credibility and understanding to issues of misidentifications for juries.<sup>135</sup> Experts could bring similar benefits to the issue of police credibility. For example, experts have been shown to be particularly useful in dispelling incorrect, preconceived notions held by jurors.<sup>136</sup> As previously discussed, the current demographic makeup of juries across the nation tends to implicitly favor the prosecution and

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<sup>133</sup> See also Adam M. Gershowitz & Laura R. Killinger, *The State (Never) Rests: How Excessive Prosecutorial Caseloads Harm Criminal Defendants*, 105 NW. U. L. REV. 261, 267 (2011).

<sup>134</sup> Tracy L. Denholtz & Emily A. McDonough, *State v. Guilbert: Should Jurors in Connecticut Be Educated About Eyewitness Reliability Through Expert Testimony or Jury Instructions*, 32 QUINNIPAC L. REV. 865, 925 (2015).

<sup>135</sup> *Id.* at 922–23.

<sup>136</sup> *Id.* at 924.

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police testimony.<sup>137</sup> Just as some jurors may hold misconceptions and need to be convinced misidentifications are a problem, so too may jurors need to hear more evidence supporting the issue of implicit officer trustworthiness.<sup>138</sup> Therefore, similar to expert testimony regarding eyewitness misidentifications, experts could offer further support to aid in effectively dispelling implicit biases in favor of police testimony at trial.

Lastly, any cautionary instructions should be written in plain English to increase a jury's understanding. In general, the effectiveness of jury instructions is unacceptably low.<sup>139</sup> A large part of this problem stems from a lack of comprehension.<sup>140</sup> While lawyers and judges train for years to enter the courtroom arena, serving as a juror is often the first time a lay juror has witnessed a trial. Instead of using highly technical, legal phrases, courts should strive to make jury instructions as accessible and understandable as possible to all potential jurors. Therefore, in order to balance the complexities of the issues being conveyed with the ability for all jurors to understand those issues, all three types of the jury instructions recommended by this article will use plain English as much as possible.

#### 8. Recommendation One: The Brief Instructions

The Brief Instructions would offer an undeviating, general template for addressing juror bias in favor of police testimony. The Brief Instruction would not be tailored to the particular facts of a case, but would instead uniformly apply where an officer's testimony is a substantial part of the prosecution's case.

The Brief Instruction would likely have the highest chance of implementation because of the low level of effect it would have on juries. This instruction would hopefully bring some level of awareness to jurors without creating prejudice against all officer testimony. However, just as the courts' current, fleeting instruction to treat police as any other witness likely does not alleviate issues of implicit bias, the Brief Instruction would likely also not go far enough in effectively addressing this issue. The Brief Instruction would be similar to the length and scope of the summary paragraph of the eyewitness identification instructions given in *Burrous* and *Williams*. It would read as follows:

I want to instruct you, first, that the kind of police officer testimony you will hear in this case must be examined carefully. Scientific studies and judicial proceedings have shown the difficulties, stresses, and potential for abuses inherent to policing.

At the same time, it is quite legitimate for defense counsel to examine the credibility of a police officer on the grounds that her perspective may not be neutral.

Of course, this does not mean any of these issues are applicable in this case. Instead, I merely say this so you understand the importance of carefully evaluating the evidence here.

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<sup>137</sup> Amy Farrell, Liana Pennington, Shea Cronin, *Juror Perceptions of the Legitimacy of Legal Authorities and Decision Making in Criminal Cases*, 38 LAW & SOC. INQUIRY 773, 793 (2013).

<sup>138</sup> Tracy L. Denholtz & Emily A. McDonough, *State v. Guilbert: Should Jurors in Connecticut Be Educated About Eyewitness Reliability Through Expert Testimony or Jury Instructions*, 32 QUINNIPAC L. REV. 865, 925 (2015).

<sup>139</sup> *Id.* at 923–24.

<sup>140</sup> *Id.*

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The Brief Instructions would likely not be as effective as other potential instructions, in part because of the entrenched, positive views of police held by many jurors and in part because of the brevity of the instructions. However, implementing these instructions would certainly be an improvement over the current situation, and would serve as both an acknowledgement of an issue within courtrooms across the United States, as well as a step towards remedying that problem. While any progress on this issue would be noteworthy, the next recommendation would do even more to increase the effectiveness of juries.

*9. Recommendation Two: The Pragmatic Instructions*

The second recommendation falls somewhere between the concision of the Brief Instructions and the wordiness of the Lengthy Instructions. Like the Brief Instructions, the Pragmatic Instructions would also contain an undeviating, general template for every case in which it is applied. However, this template would be longer than the in the Brief Instructions and implicate certain issues with more specificity.

The phrasing of the Pragmatic Instructions would look more like the instructions offered in *Gomes*, which contained a relatively short, general template. However, unlike *Gomes* and *Henderson*, no additional instructions would be given based on the facts of a case. The general template would go farther than the Brief Instructions by getting more in-depth regarding the role of police in the judicial system. Specifically, language similar to (but not limited to) the following would be included:

Carefully weighing the credibility of police officer testimony is one way to ensure the judicial system maintains its impartiality. Officers operate under higher levels of stress than the general public, work closely with prosecutors, regularly testify in the courtroom, and spend most of their time addressing crime and criminals. Due to this viewpoint, officers may not be a neutral observer like the ordinary witness. Of course, this does not mean any of those factors affect the officer's credibility in this case. Instead, I merely tell you this so that you understand the importance of carefully evaluating the evidence here.

This uniform script would more carefully straddle the thin line of simply dispelling implicit biases than the Brief Instructions, in part because of its specificity. In other words, because the Pragmatic Instructions would discuss the context of officers in the criminal system more thoroughly, these instructions would have to be cautiously crafted to avoid decreasing convictions across the board. Nonetheless, the Pragmatic Instructions, by illuminating the role of the officer in the judicial system, would be more effective than the Brief Instructions in dispelling issues of implicit bias in favor of police. However, these instructions would not stop simply with the role of police, but would also go into issues surrounding juries today.

The Pragmatic Instructions would also inform juries of the problem presented by this article. These instructions would discuss perceptions of local police, which generally follow trends based on racial demographics.<sup>141</sup> Such instructions would also include an explanation that people

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<sup>141</sup> Terry Smith, *Speaking Against Norms: Public Discourse and the Economy of Racialization in the Workplace*, 57 AM. U. L. REV. 523, 540 (2008) (discussing white, black, and Hispanic views on police



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who view police more favorably are often more willing to accept officers' statements at face value and, as a result, are less likely to give such statements sufficient scrutiny.<sup>142</sup> This portion of the Pragmatic Instructions would need to succinctly and successfully persuade jurors of the potential existence of implicit bias.

While this article's focus is on the implicit jury bias in favor of police testimony, its ultimate goal is a fairer criminal justice system. In that vein, another important segment that could be included in the Pragmatic Instructions might examine issues surrounding a defendant's true "peers."<sup>143</sup> Here, these instructions would inform jurors as to the critical necessity of judging a defendant on her conduct, and of not allowing biases concerning race, economic status, and social background to affect the jury's reasoning. This statement would be followed by a short recitation of scientific research, which shows the dangers these implicit biases can wreak when a defendant appears differently than jurors.<sup>144</sup> This way, juries would be better aware of the heightened potential for unfair outcomes when these two issues are combined, and would perhaps more closely scrutinize officer testimony and more fairly judge a defendant as a result. The Pragmatic Instructions would outline these concerns in manageable chunks for the jury to digest.

These instructions would likely be more effective than the Brief Instructions primarily because of the greater specificity of the research backing up its content. The Pragmatic Instructions would go a long way towards addressing the issue of jury bias in favor of police testimony, and are this article's foremost recommendation.

Also worth addressing, however, is an approach more closely akin to the *Henderson* court: the Lengthy Instructions. The Lengthy Instructions, as its name implies, addresses the same issues brought up in the Pragmatic Instructions, only much more comprehensibly.

*Recommendation Three: The Lengthy Instructions*

The Lengthy Instructions are the longest and most detailed rendition of the three recommendations outlined in this article. Similar to the Pragmatic Instructions, the Lengthy Instructions would contain a general template applicable to every case where an officer's testimony is a substantial portion of the State's case. However, this template would go into even greater specificity than the Pragmatic Instructions.

For one, these instructions would definitively include the main problem presented with this article and the scientific research supporting it. This portion of the Lengthy Instructions would delve deeper into these issues than the potential discussions offered in the Pragmatic Instructions.

satisfaction by demographic); Rich Morin et al., *The Racial Confidence Gap in Police Performance*, PEW RESEARCH CENTER (Sept. 29, 2016), <http://www.pewsocialtrends.org/2016/09/29/the-racial-confidence-gap-in-police-performance/>.

<sup>142</sup>Amy Farrell, Liana Pennington, Shea Cronin, *Juror Perceptions of the Legitimacy of Legal Authorities and Decision Making in Criminal Cases*, 38 LAW & SOC. INQUIRY 773, 793 (2013).

<sup>143</sup>Christine T. Cline et al., *Lack of Jury Diversity: A National Problem with Individual Consequences*, AMERICAN BAR (2015), [https://www.americanbar.org/groups/litigation/committees/diversity-inclusion/news\\_analysis/articles\\_2015/lack-of-jury-diversity-national-problem-individual-consequences.html](https://www.americanbar.org/groups/litigation/committees/diversity-inclusion/news_analysis/articles_2015/lack-of-jury-diversity-national-problem-individual-consequences.html).

<sup>144</sup>*Id.*

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For example, issues involving implicit police bias with white, upper-middle class jurors would be presented in a step-by-step fashion, similar to the progression of this article's Section I. Moreover, a similar, logical progression would address issues surrounding race and one's "peers."<sup>145</sup>

Second, instead of simply mentioning the high stress conditions in which officers operate, the Lengthy Instructions would go into greater detail as to what those conditions are and how they can affect decision-making and judgment.<sup>146</sup> Moreover, these instructions would examine the effects of such conditions, including the higher prevalence of negative health conditions experienced by officers and the implications associated with them.<sup>147</sup> These instructions would also necessarily emphasize the fact that good-faith errors may occur under such difficult conditions.

Third, the Lengthy Instructions would also thoroughly discuss the relationship between police officers, prosecutors, and the police's frequent dealings with suspects of a crime.<sup>148</sup> To this end, the fact that officers are "expert" fact witnesses would also be examined.<sup>149</sup> Similarly, the Lengthy Instructions would discuss the potential police misconduct and the corresponding lack of punishment.<sup>150</sup> However, the police misconduct portion of the Lengthy Instructions would be

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<sup>145</sup> *Id.*

<sup>146</sup> Erika Hayasaki, *Life of a Police Officer: Medically and Psychologically Ruinous*, THE ATLANTIC (March 14, 2014), <https://www.theatlantic.com/health/archive/2014/03/life-of-a-police-officer-medically-and-psychologically-ruinous/284324/> (citing C. Chung et al., *Symptoms of posttraumatic stress disorder and exposure to traumatic stressors are related to brain structural volumes and behavioral measures of affective stimulus processing in police officers*, PUBMED (Oct. 30, 2012), <https://www.ncbi.nlm.nih.gov/pubmed/23177923>); Charles R. Marmar, et al., *Predictors of Posttraumatic Stress in Police and Other First Responders*, 1071 ANNALS N.Y. ACAD. SCI. 1, 18 (2006), <https://deepblue.lib.umich.edu/bitstream/handle/2027.42/74485/annals.1364.00?sequence=1>).

<sup>147</sup> Erika Hayasaki, *Life of a Police Officer: Medically and Psychologically Ruinous*, THE ATLANTIC (March 14, 2014), <https://www.theatlantic.com/health/archive/2014/03/life-of-a-police-officer-medically-and-psychologically-ruinous/284324/> (citing C. Chung et al., *Symptoms of posttraumatic stress disorder and exposure to traumatic stressors are related to brain structural volumes and behavioral measures of affective stimulus processing in police officers*, PUBMED (Oct. 30, 2012), <https://www.ncbi.nlm.nih.gov/pubmed/23177923>); Charles R. Marmar, et al., *Predictors of Posttraumatic Stress in Police and Other First Responders*, 1071 ANNALS N.Y. ACAD. SCI. 1, 18 (2006), <https://deepblue.lib.umich.edu/bitstream/handle/2027.42/74485/annals.1364.00?sequence=1>).

<sup>148</sup> Howard Friedman, *To Protect and Serve*, TRIAL, Dec. 7, 2011, at 14, 16 (citing David Harris, *The Interaction and Relationship between Prosecutors and Police Officers in the U.S.*, and *How this Affects Police Reform Efforts*, in THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE (Erik Luna and Marianne Wade eds., 2011) (examining the relationship between prosecutors and officers, and how this relationship impacts police misconduct).

<sup>149</sup> Cloud, *The Dirty Little Secret*, 43 EMORY L.J. 1311, 1322 (1994) ("The problem is that some officers have learned to describe investigations that conform to constitutional requirements regardless of the reality of the investigation.").

<sup>150</sup> Mario L. Barnes, *Criminal Justice for Those (Still) at the Margins-Addressing Hidden Forms of Bias and the Politics of Which Lives Matter*, 5 UC IRVINE L. REV. 712–16 (2015) (examining certain implicit biases which create a broad variance in the way racial groups are treated at various phases in the criminal system); Frank Rudy Cooper, *The Un-Balanced Fourth Amendment: A Cultural Study of the Drug War*,

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relatively brief compared to the rest of the instructions. Part of the reasoning behind this decision would be to focus more on illuminating the potential implicit bias when viewing police credibility, as opposed to creating the perception of attacking police officer credibility in general.

Topics generally regarded as an increase in credibility could, in this way, be cast in a different light. For example, traditionally, a twenty-year veteran would appear as experienced and proficient, which would in turn lead to a boost in credibility. However, when accompanied by the relevant jury instructions detailing the potential health and personal effects of long-term policing, jurors could also see an officer who has an altered perspective based on his dealings with criminals, the prosecution, and the justice system over the course of two decades. Although potential issues involving the credibility of a specific officer would likely be exposed at trial, such instructions would help jurors reach fairer outcomes.

Another provocative idea would be to examine the composition of the jury and background of the defendant in each case to determine whether additional instructions are necessary. Primarily, this scenario would occur when an all-white jury faces a minority defendant. As discussed, the conviction rates of an all-white jury and black defendant drop significantly when at least one black individual is present on the jury.<sup>151</sup> It would therefore make sense to attempt to alleviate this conviction gap with alternative measures, such as additional instructions, when a jury is composed solely of white members. If these instructions were included in this section, then discussion of this issue in the general template of the Lengthy Instructions could likely be shaved, with a full discussion given only when relevant.

The idea behind the Lengthy Instructions is to fully draw back the curtain and allow juries to see the entire picture. While the Brief Instructions and the Pragmatic Instructions primarily concern themselves with examining the role, difficulties, and potential for partiality associated with policing, the Lengthy Instructions would go a step further. These instructions would thoroughly scrutinize the police while at the same time informing jurors that they themselves may not be so impartial. Many jurors would likely need a substantial regiment of persuasion and evidence before believing they may hold certain implicit biases, and the Lengthy Instructions would be in a better position to deliver exactly that.

A potential drawback from the implementation of the Lengthy Instructions is the possibility of painting all officers as inherently untrustworthy, thereby creating biases against police testimony. Just as listing the scientifically verified factors in *Henderson* over a prolonged period of time may have made jurors more doubtful on the usefulness of eyewitness identifications in any situation, so too may the Lengthy Instructions carry a jury too far. After hearing so many

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*Racial Profiling and Arvizu*, 47 VILL. L. REV. 851 (2002); see German Lopez, *American policing is broken. Here's how to fix it*, VOX (May 2, 2017, 9:24 AM), <https://www.vox.com/policy-and-politics/2016/11/29/12989428/police-shooting-race-crime> (examining comprehensive police misconduct).

<sup>151</sup> Steve Hartsoe, *Study: All-White Jury Pools Convict Black Defendants 16% More Often than Whites*, (April 17, 2012), <https://today.duke.edu/2012/04/jurystudy>; see also German Lopez, *Study: cities rely more on fines for revenue if they have more black residents*, VOX (July 7, 2017, 8:01 AM), <https://www.vox.com/identities/2017/7/7/15929196/police-fines-study-racism> (noting that traffic citations of minority citizens fell more than fifty percent, in towns seeking additional sources of revenue, with the election of one black individual to city council).

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potentially negative issues surrounding police, as well as attempting to alter the perspective a juror may have previously held about herself, it would not defy logic to conclude juries would likely exonerate defendants across the board, regardless of the strength of the evidence, when such officer testimony and instructions are involved.

Of the three, the Pragmatic Instructions likely represent the best attempt to walk the tightrope between being unheeded by juries and portraying all police as inherently untrustworthy. The Pragmatic Instructions would outline several ostensibly radical ideas and give jurors enough evidence to potentially convince them of the existence of implicit bias. For reasons likely guessed, the Brief Instructions are probably too brief to make a significant impact, and the Lengthy Instructions would go much too far for large swaths of the public. However, no progress on this issue can be made if these issues are simply ignored. Unfortunately, the implementation of any of these proposed instructions would likely fall flat in courtrooms across the nation.

*10. Will Courts Actually Give These New Instructions?*

Regrettably, courts would likely be unwilling to give any cautionary jury instructions regarding police testimony for a litany of reasons. For one, courts have historically almost uniformly refused to offer cautionary jury instructions regarding officer testimony.<sup>152</sup> Other than the recently visible groundswell of activity from certain portions of the public, no momentous transformation has occurred to spur courts to change.<sup>153</sup> Compounding this glacial movement is the lack of research on this topic. The dearth of evidence on jury bias towards officers makes it difficult not only to implement an effective instruction, but also to convince courts a problem even exists. Courts would likely be hesitant to change decades, if not centuries, of precedent without an abundance of evidence to support it, especially when it concerns the “guardians of society.”<sup>154</sup>

Moreover, even with the necessary research, it may take decades to effectuate change. One only needs to look at the length of time it has taken the judicial system to recognize certain issues surrounding eyewitness identification — issues that have been known by the scientific community for quite some time — to see an example of this.<sup>155</sup> Coupled with this lack of research, courts would continue to worry about unfairly prejudicing one side over the other in a criminal trial.

*C. Recommendation Two: Use Certain Voir Dire Questions To Remove Authoritarian Jurors*

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<sup>152</sup> Vida B. Johnson, *Bias in Blue: Instructing Jurors to Consider the Testimony of Police Officer Witnesses with Caution*, 44 PEPP. L. REV. 245, 250 (2017).

<sup>153</sup> Mario L. Barnes, *Criminal Justice for Those (Still) at the Margins-Addressing Hidden Forms of Bias and the Politics of Which Lives Matter*, 5 UC IRVINE L. REV. 712–16 (2015) (examining certain implicit biases which create a broad variance in the way racial groups are treated at various phases in the criminal system).

<sup>154</sup> *Bush v. United States*, 375 F.2d 602, 604 (D.C. Cir. 1967).

<sup>155</sup> See Virginia Hughes, *Why Police Lineups Will Never Be Perfect*, THE ATLANTIC, (Oct. 2, 2014), <https://www.theatlantic.com/technology/archive/2014/10/the-evolving-science-of-police-lineups/381046/> (noting it can take years before a scientific consensus emerges on a given topic, but especially when “injecting science into the justice system”).

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Jury instructions can only be effective if jurors are willing to listen. Accordingly, the second recommendation of this article suggests making courtroom verdicts fairer by selecting better-suited jurors, especially in cases where police testimony is a substantial portion of the prosecution's case. Specifically, attorneys should seek to identify and remove jurors who exhibit authoritarian tendencies from the jury pool.<sup>156</sup> These "authoritarian jurors" are not ideal candidates for juries.<sup>157</sup>

Authoritarian jurors are more likely to accept police officer testimony at face value than average jurors, and also more likely to find a defendant guilty.<sup>158</sup> This is true even when the evidence is decidedly in favor of the defendant:<sup>159</sup>

[A] study of authoritarianism in the legal setting concluded that persons prone to convict, even when the evidence was deliberately slanted toward innocence, scored higher in authoritarianism than persons who acquitted, confirming previous studies showing that high authoritarians tend to be punitive. Authoritarian jurors are more likely to convict in criminal trials and are more severe in their punishments.<sup>160</sup>

As a consequence, each additional authoritarian juror on a jury tends to increase both convictions and the length of prison sentences,<sup>161</sup> and a jury composed entirely of authoritarian jurors generally recommends sentences twice as long as juries without authoritarians present.<sup>162</sup>

These types of jurors are detrimental to the criminal justice system. For one, the criminal system strives towards consistency when it comes to sentencing.<sup>163</sup> Unfortunately, authoritarian jurors

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<sup>156</sup> This attempt to seek out authoritarian jurors should not be limited solely to defense attorneys. Prosecutors have just as much an interest in securing the fair outcome of a case, in part because of the harmful effects a wrongful conviction can play for the prosecutor personally, the defendant, and the justice system in general. Sarah B. Berson, *Beyond the Sentence – Understanding Collateral Consequences*, 272 NAT'L INST. OF JUST. J. 25, <https://www.nij.gov/journals/272/Pages/collateral-consequences.aspx>.

<sup>157</sup> See Gayle W. Herde, *Take Me to Your Leader: An Examination of Authoritarianism as an Indicator of Juror Bias*, THEJURYEXPERT.COM (Jan. 1, 2009), <http://www.thejuryexpert.com/2009/01/take-me-to-your-leader-an-examination-of-authoritarianism-as-an-indicator-of-juror-bias/> (citing Douglas J. Narby, Brian Cutler, & Gary Moran, *A meta-analysis of the association between authoritarianism and jurors' perceptions of defendant culpability*, 78 J APPLIED PSYCHOL 34, 34–42 (1993)).

<sup>158</sup> *Id.*

<sup>159</sup> Authoritarian jurors give higher probabilities to the likelihood a defendant is guilty. *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> Dennis J. Devine et. al., *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 PSYCHOLOGY PUB. POL'Y & L. 622, 633 (2001).

<sup>162</sup> *Id.*

<sup>163</sup> The need to strive for consistency is due to possible implicit biases that impact sentencing towards various groups, such as different racial groups. Frank O. Bowman, III, *Debacle: How the Supreme Court Has Mangled American Sentencing Law and How It Might Yet Be Mended*, 77 U. CHI. L. REV. 367, 374–75 (2010).

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unjustifiably skew both sentencing and convictions upwards.<sup>164</sup> In other words, whether a defendant is convicted may turn solely on how many authoritarian jurors are present. Furthermore, authoritarians increase the chance for variance among defendants convicted for substantially similar acts.<sup>165</sup> Moreover, as previously discussed, any conviction carries with it a host of collateral consequences.<sup>166</sup> Those consequences should not be increased simply because an authoritarian juror is present. The unfairness and unwarranted harshness created by authoritarian jurors is yet another way the credibility of the courts is strained,<sup>167</sup> and such actors should be urgently removed from the courtroom. The best (and generally only) opportunity to identify these jurors is during *voir dire*, and both prosecutors and defense attorneys should carefully consider which questions to ask to weed out authoritarian jurors.

### 1. Composition of Voir Dire Inquiries

Studies have been completed on effectively identifying individuals who exhibit strong characteristics of authoritarianism.<sup>168</sup> Some of these questions appear on the nose, especially when read or asked one after the other. Therefore, attorneys should carefully consider which questions to ask, when to ask them, and how to ask them. Several such inquiries, which can be used to elicit a yes or no response from a juror, are as follows:

- Too many obviously guilty persons escape punishment because of legal technicalities.
- The law coddles criminals to the detriment of society.
- Upstanding citizens have nothing to fear from the police.
- The freedom of society is endangered at least as much by overzealous law enforcement as by the acts of individual criminals.
- It is better for society that several guilty men be freed than that one innocent man be wrongfully imprisoned.
- Citizens need to be protected against excess police power as well as against criminals.

<sup>164</sup> See Gayle W. Herde, *Take Me to Your Leader: An Examination of Authoritarianism as an Indicator of Juror Bias*, THEJURYEXPERT.COM (Jan. 1, 2009), <http://www.thejuryexpert.com/2009/01/take-me-to-your-leader-an-examination-of-authoritarianism-as-an-indicator-of-juror-bias/> (citing Douglas J. Narby, Brian Cutler, & Gary Moran, *A meta-analysis of the association between authoritarianism and jurors' perceptions of defendant culpability*, 78 J APPLIED PSYCHOL 34, 34–42 (1993)).

<sup>165</sup> See Dennis J. Devine et. al, *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 PSYCHOLOGY PUB. POL'Y & L. 622 (2001).

<sup>166</sup> Sarah B. Berson, *Beyond the Sentence – Understanding Collateral Consequences*, 272 NAT'L INST. OF JUST. J. 25, <https://www.nij.gov/journals/272/Pages/collateral-consequences.aspx>.

<sup>167</sup> See Stephen B. Bright, *Casualties of the War on Crime: Fairness, Reliability and the Credibility of Criminal Justice Systems*, 51 U. MIAMI L. REV. 413, 415 (1997); Elizabeth Kulze, *How Crack vs. Coke Sentencing Unfairly Targets Poor People*, VOCATIV.COM (Feb. 22, 2015, 12:14 PM), <http://www.vocativ.com/underworld/drugs/crack-vs-coke-sentencing/> (citing Joseph J. Palamar et al., *Powder cocaine and crack use in the United States: An examination of risk for arrest and socioeconomic disparities in use*, 149 DRUG & ALCOHOL DEPENDENCE 108, 114 (2015)).

<sup>168</sup> See Gayle W. Herde, *Take Me to Your Leader: An Examination of Authoritarianism as an Indicator of Juror Bias*, THEJURYEXPERT.COM (Jan. 1, 2009), <http://www.thejuryexpert.com/2009/01/take-me-to-your-leader-an-examination-of-authoritarianism-as-an-indicator-of-juror-bias/> (citing Douglas J. Narby, Brian Cutler, & Gary Moran, *A meta-analysis of the association between authoritarianism and jurors' perceptions of defendant culpability*, 78 J APPLIED PSYCHOL 34, 34–42 (1993)).

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- It is justifiable to suspend a person's civil rights in the interests of national security.
- Defendants in a criminal case should be required to take the witness stand.<sup>169</sup>

The above questions should aid both prosecutors and defense lawyers in identifying authoritarian jurors.<sup>170</sup> However, while these questions may be effective, such inquiries are only useful if attorneys decide to use them. Authoritarian jurors have been known to the legal system for many years, and nearly all of these questions came from studies that occurred in the last century. Attorneys should understand the enormous problems authoritarian jurors pose for the justice system, especially after examining the issues surrounding implicit credibility of police officers.

Authoritarians are impacting a justice system where the majority of juries already implicitly favor the prosecution and police testimony, while simultaneously implicitly disfavoring a defendant who has the misfortune of simply being different than those in the jury box.<sup>171</sup> Authoritarian jurors should have no place in an already imperfect system of justice. All attorneys in a criminal proceeding should therefore use the above inquiries to identify and remove malignant authoritarians before their intolerable ideals of justice can infect other jurors.

*D. Recommendation Three: Disallow Officers to Testify in Uniform and Sit at the Prosecution's Table in Court*

Finally, the simple and seemingly practical procedures of officers in the courtroom should be briefly examined. Specifically, police should not be allowed to testify in uniform. Officers in uniform have been shown to impact nearby observers in a variety of ways.<sup>172</sup> Such impacts include feeling safer around a uniformed officer;<sup>173</sup> an increased perception of "competence,

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<sup>169</sup> See *id.*; see Mark Bennett, *Small Step Toward Scientific Jury Selection*, BENNETT & BENNETT BLOG (June 22, 2010), <http://blog.bennettandbennett.com/2010/06/small-step-toward-scientific-jury-selection/>.

<sup>170</sup> Attorneys may also consider that prospective jurors may give false answers due to fear of public scorn or otherwise. Additional questions exist to identify authoritarian jurors, but the wording of these questions create at least some doubt in the author's mind that a juror's answers would always be truthful (e.g. "[h]ow would you feel if a family member wanted to marry someone who is [African-American, Muslim, an exotic dancer, etc.]?"; and "[h]ave you ever been invited to the home of someone who is [homosexual, Hispanic, Jehovah's Witness, etc.]?"). See Gayle W. Herde, *Take Me to Your Leader: An Examination of Authoritarianism as an Indicator of Juror Bias*, THEJURYEXPERT.COM (Jan. 1, 2009), <http://www.thejuryexpert.com/2009/01/take-me-to-your-leader-an-examination-of-authoritarianism-as-an-indicator-of-juror-bias/> (citing Douglas J. Narby, Brian Cutler, & Gary Moran, *A meta-analysis of the association between authoritarianism and jurors' perceptions of defendant culpability*, 78 J APPLIED PSYCHOL 34, 34-42 (1993)). These questions should therefore likely be avoided in favor of other effective and less controversial questions.

<sup>171</sup> See Amy Farrell, Liana Pennington, & Shea Cronin, *Juror Perceptions of the Legitimacy of Legal Authorities and Decision Making in Criminal Cases*, 38 Law & Soc. Inquiry 773, 793 (2013); Vida B. Johnson, *Bias in Blue: Instructing Jurors to Consider the Testimony of Police Officer Witnesses with Caution*, 44 PEPP. L. REV. 245, 256 (2017).

<sup>172</sup> *Ciro Civile & Sukhvinder S. Obhi, Students Wearing Police Uniforms Exhibit Biased Attention toward Individuals Wearing Hoodies*, FRONT. PSYCHOL. (Feb. 6, 2017), <http://journal.frontiersin.org/article/10.3389/fpsyg.2017.00062/full>.

<sup>173</sup> *Id.*

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reliability, intelligence, helpfulness, status, and authority” of the person in uniform;<sup>174</sup> an increased perceived level of attractiveness of an officer;<sup>175</sup> and other links between the uniform and “concepts of power and social control.”<sup>176</sup> All of these influences serve to increase the implicit credibility of police officers and should therefore be left out of the courtroom during an officer’s testimony.

Furthermore, while there is no prohibition against it, other witnesses generally do not wear clothing specifically associated with their professions on the stand. In the author’s experience, firefighters usually do not testify in a flame-retardant outfit, astronauts do not testify in a NASA jumpsuit, and doctors do not testify in a white coat, with a stethoscope at the ready around their necks. When viewed through this light, it becomes even more curious as to why officers testify in uniform. If the criminal justice system truly believes instructing officers to be treated as any other witness is an effective approach to the problems discussed in this article, then police should at least be required to dress like one.

In a similar vein, police should not be permitted to sit with the prosecution at their trial table. Normal witnesses are not generally seen sitting with the prosecution, even when called by the State.<sup>177</sup> Such an act further diminishes the courts’ instruction to treat officers merely as any other witness. Therefore, either police should be required to act accordingly, or the courts’ instruction regarding police credibility need to change.

## IV. CONCLUSION

The recommendations set forth in this article would help make outcomes fairer in court. While police officers are an integral part of society and play a vital role in civilization,<sup>178</sup> so too does the perception of the criminal justice system by the public. Officers cannot continue to be both “the guardians of society” and merely any other witness in the eyes of the court. The criminal justice system should strive to illuminate the issues of implicit credibility in relation to police testimony instead of refusing to address them. While all of the recommendations in this article should be examined, cautionary jury instructions, in particular, would be an effective way to address a fundamental problem that has quietly plagued the judiciary for decades.

The Pragmatic Instructions likely present the best way to walk the line between being ineffective on juries and creating universal untrustworthiness toward officers. Such instructions would effectively convey the issues discussed in this article and efficiently provide supporting evidence outlining these problems. Moreover, the Lengthy Instructions could be examined after more

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<sup>174</sup> *Id.*

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

<sup>176</sup> *Id.*

<sup>177</sup> *United States v. Adamo*, 882 F.2d 1218, 1235 (7th Cir. 1989) (finding no impropriety when an FBI agent sat at the prosecution’s table during the trial); *United States v. Lee*, 834 F.3d 145, 162 (2d Cir. 2016) (finding that an investigative officer in a criminal case can be exempted from witness sequestration and can remain in the courtroom even when other witnesses are required to leave). Such acts indisputably treat officers differently than any other witnesses called to testify.

<sup>178</sup> *See also* Thomas Hobbes, *LEVIATHAN, OR THE MATTER, FORME & POWER OF A COMMONWEALTH, ECCLESIASTICALL & CIVIL* (1651).



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research has occurred on the problems discussed in this article. Until such study occurs, even something as diminutive as the Brief Instructions would be a step in the right direction. Although such a short instruction would likely be relatively ineffective in convincing jurors a problem exists, at the very least the judiciary would be recognizing an issue in courtrooms across the United States. Such a change would hopefully crack the door for real change in the future.

Despite the breadth of recommendations discussed in the article, a true fix to this issue is likely not possible. Potential for abuses will always be present, humans will continue to be imperfect, and true justice will remain elusive. However, although far from perfect, these recommendations would make a measurable difference in the impartiality of the criminal justice system today. The goal of the criminal system should not be to endeavor for perfection, but instead to always strive towards greater fairness, equality, and objectivity. Such an opportunity presents itself with the recommendations of this article. While the evolution of the judicial system sometimes feels excruciatingly slow, it is my hope the issues discussed in this article will be efficiently and effectively addressed, and one day supplemented by better solutions for ensuring fairness in our continuing pursuit of justice for all.