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Peter J. Cohen

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Article

How Shall They Be Known? *Daubert v. Merrell Dow Pharmaceuticals* and Eyewitness Identification

Peter J. Cohen, MD, JD*

[I]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.¹

“All the evidence points rather strikingly to the conclusion that there is almost nothing more convincing than a live human being who takes the stand, points a finger at the defendant, and says ‘That’s the one!’ ”²

* JD, 1995, Georgetown University Law Center. Medications Development Division, National Institute on Drug Abuse, National Institutes of Health, Rockville Maryland 20857. The views and opinions expressed herein are those of the author and do not necessarily reflect those of the National Institute on Drug Abuse.

I would like to express my appreciation to Professor Steven Goldberg of Georgetown Law School for the encouragement and suggestions he gave me during my preparation of this paper.

1. *Bowers v. Hardwick*, 478 U.S. 186, 199 (1986) (Blackmun, J., dissenting) (quoting Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897)).

2. ELIZABETH F. LOFTUS, EYEWITNESS TESTIMONY 19 (Harvard 1979) [hereinafter LOFTUS].

I. Introduction

On October 16, 1846, ether anesthesia was administered in the Massachusetts General Hospital.³ Within weeks, news of the phenomenon of surgery without pain spread to England and the Continent.⁴ The gift of anesthesia had long been sought, and its novelty did not preclude widespread acceptance throughout much of the medical community.⁵ In contrast to the scientific community, the legal profession has been slow to accept change, whether by allowing admission of new types of evidence or by barring long accepted, but problematic, evidence.

The use of fingerprints for identification has a far longer heritage. The Chinese were probably the first people to realize the utility of this technique over two thousand years ago.⁶ In today's trial practice, while specific techniques used in indentifying a fingerprint may be challenged,⁷ the underlying principles are completely accepted and there are objective criteria for all aspects of its use.⁸

The use of deoxyribonucleic acid (DNA) for both exculpatory and inculpatory identification is a recent arrival in our legal history.⁹ The structure of this genetic messenger was described forty three years ago.¹⁰ However, its evidentiary admissibility was only established in the last decade in *Andrews v. State*.¹¹ Furthermore, less than one year after this judicial deci-

3. PETER J. COHEN & ROBERT D. DRIPPS, HISTORY AND THEORIES OF GENERAL ANESTHESIA, IN THE PHARMACOLOGICAL BASIS OF THERAPEUTICS 45 (Louis S. Goodman & Alfred Gilman eds., 3d ed. 1965) [hereinafter COHEN & DRIPPS].

4. THOMAS J. DEKORNFELD & PETER J. COHEN, HISTORY OF ANESTHESIOLOGY, IN ANESTHESIOLOGY, 8 (Thomas J. DeKornfeld ed., 1986).

5. See generally COHEN & DRIPPS.

6. ANNITA T. FIELD, FINGERPRINT HANDBOOK 3 (1971).

7. For example: improper laboratory technique, fraud in either analysis or collection of the prints.

8. ADVANCES IN FINGERPRINT TECHNOLOGY, Henry C. Lee & R.E. Gaensslen, eds., (1991). The first successful evidentiary use of fingerprints occurred in the United Kingdom in 1905, and in the United States in 1911, *Id.* at 29, 35.

9. See, e.g., Jeffrey A. Norman, *DNA Fingerprinting: Is It Ready For Trial?*, 45 U. MIAMI L. REV. 243 (1990) [hereinafter Norman]; Sally E. Renskers, *Trial by Certainty: Implications of Genetic "DNA Fingerprints"*, 39 EMORY L.J. 309 (1990) [hereinafter Renskers].

10. James Watson & Francis Crick, *Genetical Implications of the Structure of Deoxyribonucleic Acid*, 171 NATURE 964 (1953).

11. 533 So. 2d 841, 850 (Fla. Dist. Ct. App. 1988).

sion, in *People v. Castro*,¹² the misuse of this technology through faulty laboratory technique resulted in its exclusion from the jury's consideration.¹³

Since *Andrews v. State* and *People v. Castro* were decided, both the science and applicability of DNA-identification have been major foci of legal contention. Even when such evidence is admitted by the court, expert testimony concerning its specific use in a particular case is essential, and vehement contention regarding both admissibility and credibility often ensue.¹⁴

While the purpose of this paper is not to discuss DNA *per se*, it suffices to say that there have been major criticisms of DNA collection, analysis, and statistics used to compare the evidentiary sample with that obtained from the defendant or suspect.¹⁵ Concern with statistical methodology used to determine whether or not there is a match between samples has been deemed appropriate, even when conceded that the laboratory techniques for sampling and analysis were irreproachable.¹⁶ Furthermore, the use of DNA evidence alone has been felt to prejudice a jury as a result of awe associated with an objective scientific determination.¹⁷ The novelty of this technique and the possibility of excessive prejudice continue to make the courts move with caution towards allowing DNA evidence.¹⁸

The ability of one human to identify another quickly and with certainty is absolutely necessary for the continued function of society. Recall and recognition through facial and other characteristics is part of the human condition and history. Homer tells us that three thousand years ago, upon his return after a long absence, Odysseus was recognized by his nurse who

12. 144 Misc. 2d 956, 545 N.Y.S.2d 985, 999 (Sup. Ct. Bronx County 1989).

13. *Id.* at 979, 545 N.Y.S.2d at 999.

14. *See, e.g., People v. Wesley*, 83 N.Y.2d 417, 633 N.E.2d 451, 611 N.Y.S.2d 97 (1994).

15. *See* Jonathan J. Koehler et al., *The Random Match Probability in DNA Evidence: Irrelevant and Prejudicial?*, 35 JURIMETRICS J. 201 (1995); Janet C. Hoeffel, Note, *The Dark Side of DNA Profiling: Unreliable Scientific Evidence Meets the Criminal Defendant*, 42 STAN. L. REV. 465 (1990) [hereinafter Hoeffel].

16. *See* Renskers, *supra* note 9 at 319-20.

17. *See* Renskers, *supra* note 9 at 320.

18. *See generally* Renskers, *supra* note 9; and Norman, *supra* note 9. The use of DNA for identification has been strongly criticized for use of faulty statistics. *See generally* Koehler. Concern has been expressed with its use in "data banking." Hoeffel, *supra* note 15.

noted a familiar scar on his body.¹⁹ Homer even detailed an ancient high-tech tool for identification: dogs. Odysseus was recognized by his dog which he had trained as a puppy.²⁰

Admissibility of DNA evidence has engendered much controversy, although the evidence itself has strong scientific support.²¹ In contrast, eyewitness identification is well-established, although it is more problematic.²² Unlike the forensic use of DNA, eyewitness identification has never been designated "novel"; its utility has long been obvious to the common sense of jury and court. However, its patina derives not so much from its accuracy, objectivity and fairness, as from its age.

Yet, the accuracy of eyewitness identification is far from a universal truth; furthermore, its problems are becoming well known.²³ Why, then, does it still meet with general acceptance in most instances? Is it simply a quirk in history and a manifestation of our greater reluctance to accept the new than to continue with the old?²⁴

This paper first examines the considerable experimental evidence in support of the theory that the mental processes necessary for accurate eyewitness identification are extremely complex.²⁵ In contrast, the general public believes eyewitness identification is simple.²⁶ This section will examine some of the

19. HOMER, *THE ODYSSEY* book 19 (Robert Fitzgerald trans., 1963).

20. *Id.* at book 17.

21. Renskers, *supra* note 9, at 310.

22. Cindy J. O'Hagan, *When Seeing is Believing: The Case for Eyewitness Testimony*, 81 GEO. L.J. 741, 752 (1993) [hereinafter O'Hagan].

23. *See infra* part II.

24. Peter Huber, *The Old-New Division in Risk Regulation*, 69 VA. L. REV. 1025, 1026-28 (1983).

Risk-regulating statutes of all types share one common characteristic: they divide the regulatory universe between "old" and "new" sources of risk. . . . Old risks are those to which society has been widely exposed before Congress or an agency finds federal regulation necessary. . . . Old risks are risks which society has already embraced or come to tolerate [T]here is a manifest congressional agency perception that improving the risk environment by excluding new risks is cheaper than improving it by attacking old ones. That perception is correct often enough to be useful, but incorrect too often to be relied upon to the exclusion of other important considerations.

Id.

25. *See infra* part II.

26. *See* ELIZABETH LOFTUS & JAMES M. DOYLE, *EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL* 11 (2d ed. 1992) [hereinafter LOFTUS & DOYLE].

problems in identification that have been formulated by psychological experts in the field.²⁷

The difficulties inherent in eyewitness identification are far more than interesting abstract theories since they confront our courts in their every day function. Therefore, this paper focuses on the ways in which our judiciary has dealt with this problem,²⁸ and proposes a general solution that is not yet part of our legal tradition.²⁹

In order to do this, it is necessary to evaluate tensions which arose in the confrontation between questions of jury discretion and knowledge. What is the role of common sense and intuition?³⁰ When should such dogma be challenged by scientific fact and education?³¹ How do we decide whether a matter is outside the reasonable person's intuition and that neutral science might be useful in furthering the ends of justice?³² Is there a role for the expert in sensory perception, or should the courts allow only skilled cross-examination by the attorneys, as well as cautionary instructions from the bench to impact upon the jury's deliberations?³³

The fact that eyewitness testimony is an old, and even venerable, tradition does not confer reliability. Indeed, its unreliability would not be tolerated by any scientific laboratory; neither should it be by the courts of this country. This paper does not propose to abolish the adversary system, but does suggest that the jury is far more likely to succeed in its quest for justice if the courts take a more rational and consistent approach regarding eyewitness identification.³⁴ Furthermore, just as vigorous cross-examination may not suffice to undo the reliability of some eyewitness identification, cautionary jury instructions may be similarly flawed.³⁵

Finally, this paper advocates the use of the Federal Rules of Evidence as required by the Supreme Court's recent decision in

27. See *infra* part II.

28. See *infra* part III.

29. See *infra* part III.

30. See *infra* parts III and IV.

31. See *infra* parts III and IV.

32. See *infra* parts III and IV.

33. See *infra* part IV.

34. See *infra* parts III, IV and V.

35. See *infra* part IV.

Daubert v. Merrell Dow Pharmaceuticals, Inc.,³⁶ which, when coupled with a more aggressive use of Federal Rule of Evidence 706,³⁷ could result in a far more reasonable approach to this difficult problem.³⁸

II. The Psychology of Memory

The processing of memory in general, and eyewitness identification in particular, is far from a simple and single unitary function.³⁹ It involves three distinct stages: acquisition, retention and retrieval, each of which has been carefully and objectively studied.⁴⁰ A basic understanding of the phenomenon of memory is essential if we are to deal with the problems inherent in eyewitness identification.

Reliable eyewitness identification depends on human memory, an extraordinary complex process subject to internal and external factors.⁴¹ The significant stages in this intuitively simple function have been well outlined.⁴² The *acquisition* stage depends on two factors: (1) event factors which include lighting conditions, changes in visual adaptation to light and dark, duration of the event, speed and distance involved, and the presence or absence of violence;⁴³ (2) witness factors⁴⁴ such as stress

36. 113 S. Ct. 2786 (1993).

37. Rule 706 allows the court to appoint expert witnesses on their own motion or at the request of either party. FED. R. EVID. 706(a).

38. See *infra* parts IV and V.

39. LOFTUS & DOYLE, *supra* note 26.

40. *Id.*

Over a period of decades, a number of investigators have established that when we experience an important event, we do not simply record it in memory like a videotape. Rather, most theoretical analyses divide the memory process into three major stages. First, the event is perceived by a witness, and the information is entered into the memory system. This is called *the acquisition stage*. Next, some time passes before a witness attempts to remember the event, and this is called *the retention stage*. Finally, the witness tries to recall the stored information, and this is called *the retrieval stage*. This three-stage analysis is central to the concept of human memory. Psychologists who conduct research in this area try to identify and study the important factors in each of the three stages.

Id. (emphasis added).

41. *Id.*

42. *Id.*

43. ELIZABETH F. LOFTUS ET AL., *THE PSYCHOLOGY OF EYEWITNESS TESTIMONY, PSYCHOLOGICAL METHODS IN CRIMINAL INVESTIGATION AND EVIDENCE* 6-13 (David C. Raskin ed., 1989).

or fear (e.g., "weapon focus"), chronic stress (recent negative life changes cause small memory deficits)⁴⁵, expectations, age (the very young and very old have unique problems) and gender.⁴⁶ The *retention* stage is impacted by the length of retention intervals and post-event information.⁴⁷ Finally, the *retrieval* stage is influenced by the method of questioning and confidence level.⁴⁸

A. Acquisition

When a potential eyewitness is confronted by a crime, a great deal of sensory input is acquired in an emotionally disturbing environment.⁴⁹ It is not surprising, therefore, that later descriptions of what happened may sometimes deviate from the actual events.⁵⁰ Remember that the process of acquisition is affected by the two categories of variables described above: event and witness factors.⁵¹

Although the effects of many of these variables are felt to be "intuitively obvious," many studies have demonstrated that "common sense," the linchpin of a jury's deliberative process, may be misleading.⁵² For example, most people believe that perception accuracy is greater when an individual is under considerable stress; witnesses "obviously" remember details of a violent crime more accurately than when the emotional consequences of such violence are missing.⁵³ Yet, there are considerable experimental data that perception accuracy is greatest at a *moderate* level of stress, with a significant decrement occurring as stress increases above this level. This phenomenon is described by the Yerkes-Dodson law, first proposed in 1908, to describe the phenomenon in which strong motivational states facilitate learning at first, but then cause a decline in performance.⁵⁴

44. *Id.* at 13-25.

45. LOFTUS & DOYLE, *supra* note 26, at 36.

46. *Id.* at 45.

47. *Id.* at 7.

48. *Id.*

49. *See, e.g.,* LOFTUS, *supra* note 2; and LOFTUS & DOYLE, *supra* note 26.

50. *See* LOFTUS & DOYLE, *supra* note 26, at 7.

51. *See supra* text accompanying notes 43-46.

52. LOFTUS & DOYLE, *supra* note 26, at 13.

53. *Id.* at 7.

54. LOFTUS, *supra* note 2, at 33.

The term "weapon focus" has been coined to describe a particular application of the Yerkes-Dodson law.⁵⁵ It is not unexpected that crime victims spend far more time concentrating on a threatening gun than in processing other aspects of the situation.⁵⁶

There may be problems even when a police officer acquires the information, for trained law enforcement officers may not be any better than civilians in handling ordinary mundane events, although unique details stressed in training may be recalled more readily.⁵⁷ Indeed, some investigators concluded that police may perform more poorly than lay people due to their biased interpretation of events.⁵⁸

Legal observers have long recognized a *major* problem in eyewitness perception: cross-racial identifications are disproportionately responsible for wrongful convictions.⁵⁹ Significant information has been obtained through controlled psychological testing in a wide variety of volunteers.⁶⁰ Patrick Wall's classic study of eyewitness identification includes a depressing case of cross-racial misidentification.⁶¹ Five victims of a kidnapping, rape and robbery episode spent several hours with the guilty party.⁶² Nonetheless, each identified an innocent man who subsequently was proven to have been several hundred miles away when the crime was committed.⁶³ When the actual criminal was taken into custody, it was apparent that other than his black skin, he bore no resemblance to the original suspect.⁶⁴

Studies demonstrate a substantial difference in the ability of white American subjects to recognize black faces.⁶⁵ Loftus clearly summarized this phenomenon: "people are better at rec-

55. LOFTUS & DOYLE, *supra* note 26, at 34.

56. *Id.*

57. ELIZABETH LOFTUS, ET AL., THE PSYCHOLOGY OF EYEWITNESS TESTIMONY, IN PSYCHOLOGICAL METHODS IN CRIMINAL INVESTIGATION AND EVIDENCE, 24 (David C. Raskin ed., Springer 1989).

58. LOFTUS & DOYLE, *supra* note 26, at 49.

59. Sheri Lynn Johnson, *Cross-Racial Identification Errors in Criminal Cases*, 69 CORNELL L. REV. 934, 936 (1984) [hereinafter Johnson].

60. *Id.* at 938.

61. *Id.* at 937.

62. *Id.*

63. *Id.*

64. *Id.*

65. LOFTUS, *supra* note 2, at 136-37.

ognizing faces of persons of their own race than a different race."⁶⁶

While difficulties in trans-racial identification may be "intuitively obvious," their etiology is probably more complex.⁶⁷ Contrary to widely held assumptions, racial attitudes and the amount of interracial experience cannot be related systematically to recognition accuracy for either race.⁶⁸ While it is clear that people have greater difficulty in recognizing faces of another race than their own, it is not simply due to prejudice or inexperience.⁶⁹ More likely, it involves a fundamental step in information processing during the acquisition stage such as the tendency to focus on common attributes (e.g., skin color or eye shape) rather than the specific features so necessary to make an accurate identification.⁷⁰

Not unexpectedly, the interaction of expectations and race are important since cultural expectations represent classic stereotyping.⁷¹ In a provocative study, subjects (mixed race with a variety of backgrounds) looked at a picture of a New York subway car in which a neatly dressed African-American man wore a tie while a white man held a razor blade.⁷² The first subject viewed the picture and described it to the second person.⁷³ The second described it to the third subject; this information transmission continued through six or seven subjects.⁷⁴ In over half the trials, the last subject reported that it was the African-American who held the weapon.⁷⁵ Unfortunately, the demographic breakdown of the subjects and responses is not given.⁷⁶

Expectations play a major role in the process by which external data are acquired and internalized.⁷⁷ Consider the story of five men who went deer hunting, during which their car

66. *Id.* at 136.

67. *See id.* at 137-38.

68. *See id.* at 139.

69. *See id.* at 137-38.

70. LOFTUS, *supra* note 2, at 137.

71. *See id.* at 136-37.

72. LOFTUS, *supra* note 2, at 38.

73. *Id.*

74. *Id.*

75. *Id.*

76. *See id.* at 38-39.

77. LOFTUS, *supra* note 2, at 37.

broke down.⁷⁸ Two went for help while the other three stayed with the car. However, unknown to those remaining behind, one of the "help-seekers" continued to look for deer in the forest.⁷⁹ It is not surprising that when those remaining with the car saw a movement in the forest, they perceived it as a deer.⁸⁰ At their trial, one of the defendants exclaimed, "In my thoughts and my eyes, it was a deer."⁸¹ In contrast, a police officer testified that when he saw a man running from a similar scene, he perceived the object to be a man.⁸² Because the hunters expected the moving object to be a deer, the cries of their friend sounded like the cries of a deer.⁸³

B. *Retention*

It is not surprising that the process of information retention is just as complex as that of acquisition. The time elapsed from acquisition to retrieval, i.e., the duration that the information must be retained, is an obvious factor.

Individuals acquiring information do not exist in a vacuum; the interaction between information originally acquired and additional input at a later time may be less intuitive than the effect of time itself.⁸⁴ Post-event exposure to newly released information can dramatically affect the memory of the original event.⁸⁵ Since it is not uncommon for a witness to a serious event to discuss it during the months that follow, the importance of this observation ought not be underestimated. For example, a witness to a traffic accident may later read a newspaper article which stated that the driver had been drinking before the accident.⁸⁶ "Postevent information can not only enhance existing memories but also change a witness's [sic] memory and even cause nonexistent details to become incorporated into a previously acquired memory."⁸⁷ When witnesses

78. *Id.* at 36.

79. *Id.*

80. *Id.* at 36.

81. *Id.* at 37.

82. *Id.*

83. *Id.*

84. *Id.* at 54.

85. *Id.* at 35.

86. *Id.* at 54.

87. *Id.* at 55.

later learn new information which conflicts with the original input, many will compromise between what they saw and what they were told later on.⁸⁸

Mental processes continue between the time an event is perceived and when it must be recalled.⁸⁹ These dynamic events cannot be denied, for our brains are far more than cameras.

C. Retrieval

As with acquisition and retention, retrieval of information is subject to significant internal and external factors.⁹⁰ How a witness is questioned is of great importance, and easily subject to (perhaps unintended) bias.⁹¹

Volunteer subjects observed a movie of an automobile crash resulting from failure to obey a stop sign which was clearly visible in the film.⁹² They were then asked a number of questions. One group was asked, "How fast was the car going when it *ran the stop sign?*"⁹³ The others were asked, "How fast was the car going when it *turned right?*"⁹⁴ The final question asked of both groups was whether the observer had actually seen a stop sign for the car.⁹⁵ In the first group, where the stop sign was incorporated into the question, 53% responded in the affirmative; the other group saw the stop sign only 35% of the time.⁹⁶ Thus, simply mentioning an existing object will significantly increase the chances that the witness will "remember" it, while neglecting to incorporate it into the question may result in its being "forgotten."⁹⁷ It is worrisome that the same process may also occur should an interrogator "suggest" an object that was never present.

A similar study employed two questions. One asked, "About how fast were the cars going when they *smashed* into

88. *Id.* at 56.

89. *See id.* at 86-87.

90. LOFTUS, *supra* note 2, at 87.

91. *See id.* at 77.

92. LOFTUS, *supra* note 2, at 77.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.* at 56.

each other?"⁹⁸ The other, "About how fast were the cars going when they *hit* each other?"⁹⁹ Not unexpectedly, the former elicited a much higher estimate of speed.¹⁰⁰ Perhaps more interesting was the response to the question asked one week later: "Did you see any broken glass?" even though there was *no* broken glass.¹⁰¹ Yet, since numerous glass fragments are associated with high speed accidents, the affirmative responses were 32% in the "smash" but only 14% in the "hit" group.¹⁰²

When asked to recall a crime, witnesses almost invariably think that the event took longer than it actually did.¹⁰³ Furthermore, the ability to recall events is significantly worse when a violent event is viewed than when a nonviolent version is observed.¹⁰⁴

The external environment where a witness is questioned is important, for familiar surroundings enhance performance.¹⁰⁵ Questions employed to elicit retrieval are frequently far from neutral. Even when they appear to be without bias, their form may be important. Thus, an interviewer may ask a witness to describe "everything you can remember," an open-ended request for a narrative or free report.¹⁰⁶ Another interviewer may ask the victim to describe "what your assailant was wearing?"¹⁰⁷ Finally, the victim might simply be presented with a set of photographs and asked to identify the perpetrator.¹⁰⁸ Narrative reports include fewer errors, but tend to be less complete.¹⁰⁹

Asking how "tall" an observed subject was elicited an average of 79 inches; substitution of "short" for "tall" decreased the average response by 10 inches.¹¹⁰

98. *Id.* at 77 (emphasis added).

99. *Id.* (emphasis added).

100. *Id.*

101. *Id.* at 77.

102. *Id.* at 77-78.

103. LOFTUS & DOYLE, *supra* note 26, at 7.

104. LOFTUS, *supra* note 2, at 31.

105. *Id.* at 89.

106. *Id.* at 90.

107. *Id.*

108. *Id.*

109. *Id.* at 91.

110. *Id.* at 94.

"Unconscious transference" is yet another factor in the final processing by which retrieval is accomplished.¹¹¹ This refers to a phenomenon in which a person seen in one situation is confused with, or recalled as, a person seen in a second situation.¹¹² Thus, if individual "A" has frequently observed "B" in a completely innocent context, "A" may misidentify "B" in a lineup.¹¹³ Since "B" is a familiar face, although never at the scene of the crime, the retrieval process could result in a tragedy for the defendant.¹¹⁴

The lineup, itself, may be unfair as when a member of one race is placed among members of a noticeably different race.¹¹⁵ In addition, the mere knowledge that the suspect has been included as one member of the lineup may affect the observer's response.¹¹⁶

When pretrial lineups or observation of photo-arrays are employed, significant questions of reliability arise.¹¹⁷ Psychological studies have demonstrated that eyewitnesses who had publicly stated their choice stayed with even *incorrect* choices 78% of the time.¹¹⁸

Furthermore, instructions may produce bias: compare "We have a suspect in the lineup" with "The actual offender may or may not be in the lineup." In an experiment duplicating this scenario with the "offender" absent from the lineup, 78% made a positive identification when biased instructions had been given.¹¹⁹ In contrast, when told that the suspect was not necessarily in the lineup, only 33% made this misidentification.¹²⁰

Even when jurors have a considerable pool of experience relating to a witness' mental and physical condition, that experience may contain misconceptions or error that lead to distortions in assessment.¹²¹ Irrational factors such as

111. *Id.* at 142.

112. *Id.*

113. *Id.* at 143.

114. *See id.* *See also* LOFTUS & DOYLE, *supra* note 26.

115. LOFTUS, *supra* note 2, at 145.

116. LOFTUS & DOYLE, *supra* note 26, at 93.

117. *Id.* at 92.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* at 2.

discrimination, prejudice or myth may unduly influence a juror's determination of the witness' truthfulness or accuracy, and consequently, the juror's assessment of that witness. This type of deficiency applies to all witnesses, but is perhaps best typified by eyewitness testimony.¹²²

III. The Eyewitness and the Jury

The preceding discussion ought not indicate that eyewitness identification is inevitably unreliable. Rather its purpose is to suggest that its historical veneration coupled with a personal and emotional impact on the jury may, at times, result in a miscarriage of justice. Therefore, we should inquire as to the importance juries give to eyewitness identification.

A single eyewitness can have a major impact. An "experimental" jury presented with a defendant suspected of robbing a store, found him guilty 18% of the time in the absence of an eyewitness.¹²³ A single eyewitness increased the "prosecutor's" success to 72%.¹²⁴ Even when this testimony was clearly impeached by evidence that the eyewitness was not wearing his glasses at the time of the robbery and that his vision was too poor to observe the suspect reliably, the conviction rate remained 68%.¹²⁵

Eyewitness testimony is likely to be believed by jurors, especially when offered with a high level of confidence, even though accuracy and confidence are not related to one another.¹²⁶ Experimental "jurors" were as likely to believe a witness making an incorrect identification as one who was completely accurate.¹²⁷ The crucial determinant was the apparent confidence of the witness, a factor of immense importance to the average juror.¹²⁸ Indeed, some studies have even shown that under certain circumstances a person can be *more* confident when incorrect than when correct.¹²⁹

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.* See notes 135-37 and accompanying text.

129. LORTUS, *supra* note 2, at 101.

In another experiment to demonstrate the effect of eyewitnesses as evidentiary sources, a "jury" considered evidence that the "defendant" had passed a bad check.¹³⁰ Eyewitness identification resulted in the highest (78%) conviction rate.¹³¹ Significantly, the conviction rate was lowest (34%) when the "witness" was a handwriting expert.¹³² Fingerprint and polygraph evidence resulted in an intermediate rate of conviction.¹³³

Jurors are impressed when an eyewitness provides much detail, e.g., the robber dropped "a few store items," versus the robber dropped "Milk Duds and Diet Pepsi." Even when the details are totally unrelated to the crime, experimental jurors remain impressed.¹³⁴ The poor relationship between confidence and accuracy in recollection is even worse when viewing conditions are poor.¹³⁵

Intuitively, it is inconceivable that confidence and accuracy are *not* related. Our own personal experience suggests that a reasonable jury ought to be able to estimate the accuracy of an eyewitness' memory from his or her confidence and demeanor. Nonetheless, Wells and Murray have derived experimental data which allowed them to put the matter quite forcefully — any claim that witness confidence guarantees witness accuracy is simply wrong.¹³⁶

Overconfidence is certainly not the only problem. Sometimes, in spite of an aura of confidence, a witness may change

130. LOFTUS & DOYLE, *supra* note 26, at 5.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* at 6.

135. *Id.* at 7.

136. GARY L. WELLS AND DONNA M. MURRAY, EYEWITNESS CONFIDENCE, IN EYEWITNESS TESTIMONY 165 (Gary L. Wells et al., eds., Cambridge University Press 1984).

We submit that the eyewitness accuracy-confidence relationship is weak under good laboratory conditions and functionally useless in forensically representative settings. Forensically representative factors include the use of both perpetrator-present and perpetrator-absent lineups or picture arrays, the allowance for attorney "briefings" of witnesses, and the anxiety and other relevant accomplishments of knowing that the identification and testimony have real consequences. Studies that include these factors do not find accuracy-confidence correlations.

Id.

his or her mind, thus adding to problems of assessing reliability.¹³⁷

The use of statistics in conjunction with eyewitness identification poses an interesting paradox. In general, the courts will not allow a conviction based on statistical evidence alone when the statistics are flawed and naive.¹³⁸ Similarly, a conviction based on statistics was reversed by the Eighth Circuit¹³⁹ because of "prejudicial error in the overall reference to the defendant's guilt in terms of mathematical probabilities."¹⁴⁰ The Eighth Circuit held that application of mathematical probabilities was speculative and confusing.¹⁴¹ The above reversals both made clear that a verdict based on juror's "intuition" and "common knowledge" would be unjust.

In *People v. Collins*,¹⁴² an often quoted case combining eyewitness identification and "science", the victim and an eyewitness identified the defendant as a young white woman with a blond ponytail who ran to a yellow car driven by a black man with a mustache and beard.¹⁴³ The prosecutor had offered statistical evidence "proving" that a couple sharing the defendant's characteristics were one in twelve million.¹⁴⁴ In spite of the aura of scientific credibility, the appellate court rejected the statistical analysis as inaccurate and incapable of providing the jury with guidance.¹⁴⁵ At least in this case, it appears that adversarial cross-examination was insufficient to undo the testimonial damage; the court held that the impressive mathematical gyrations of the prosecutor had been flawed by

137. *Simkunas v. Tardi*, 720 F. Supp. 687 (N.D. Ill. 1989).

It has been the experience of this court, with over 40 years on the bench of both the federal and state courts, and the many years before that as a trial attorney and as a prosecutor, that it is neither a unique nor uncommon occurrence for an identifying witness, for whatever reason, to change his or her mind about an identification that was previously made.

Id. at 694.

138. *Smith v. Rapid Transit, Inc.*, 58 N.E.2d 754 (Mass. 1945).

139. *United States v. Massey*, 594 F.2d 676 (8th Cir. 1979).

140. *Id.* at 677.

141. *Id.* at 680.

142. 438 P.2d 33 (Cal. 1968)(en banc).

143. *Id.* at 34.

144. *Id.* at 37.

145. *Id.* at 38.

inadequate evidentiary foundation and inadequate proof of statistical independence.¹⁴⁶

In its holding, the court was governed by the fact that accurate knowledge of statistics was beyond the "ken" of an average jury.¹⁴⁷ Furthermore, the decision conceded that this confident and "scientific" testimony would have a prejudicial impact upon the trier of fact.¹⁴⁸ These difficulties could *not* be cured by vigorous cross-examination or even through the court's instructions to the jury.¹⁴⁹

Collins poses a paradox: although *eyewitness* identification is fraught with dangers similar to *statistical* identification as seen above, the overwhelming judicial consensus is that operation of the adversarial system through cross-examination complemented by the court's final charge will suffice with the former but not the latter.

These decisions suggest that courts would rather have a jury base its decision on traditional, nonquantitative types of evidence than to reduce the judicial process to numbers.¹⁵⁰ It is likely that this concept will continue to support the reluctance of courts to convict solely on the statistical evidence required for a DNA "match" while allowing jury discretion when eyewitness identification is under scrutiny.

Similarly, although courts have often required expert testimony when statistics are used as evidence, they are far less tolerant of the proposition that eyewitness testimony should be subjected to the same constraints, a concept which takes us to the next section of this article.

146. *Id.*

[The] engaging but logically irrelevant expert demonstration, foreclosed the possibility of an effective defense by an attorney apparently unschooled in mathematical refinements, and placed the jurors and defense counsel at a disadvantage in sifting relevant fact from inapplicable theory.

Id.

147. *Id.* at 40.

148. *Id.* at 41.

149. *Id.* at 41-42.

150. O'Hagan, *supra* note 22, at 743-44.

IV. How Well Does the System Work

Is there a relationship between "experimental" problems with eyewitness reliability and actual judicial events? There are numerous examples of system failure. Estimates of wrongful convictions for serious crimes range from 7,500 to 150,000 annually.¹⁵¹ The major source of wrongful conviction is erroneous eyewitness identification.¹⁵²

The trial, conviction and execution of Sacco and Vanzetti¹⁵³ almost 70 years ago for robbery and murder may have been a major miscarriage of justice. The trial testimony was totally flawed from the perspective of today's standards.¹⁵⁴ For example, one witness had testified at a preliminary hearing that her opportunity to observe the robbers was too limited for her to be certain.¹⁵⁵ Another told the interviewing officer that she had not seen the robbers' faces.¹⁵⁶ Yet, at trial, the identifications were positive.¹⁵⁷

Far more recently, a new trial was ordered for George Franklin Sr., sentenced to life in prison in January 1990 for the 1969 slaying of eight-year old Susan, his daughter's childhood friend.¹⁵⁸ The killing remained unsolved until the daughter suddenly "remembered" seeing her father raise a rock above Susan's head.¹⁵⁹ The daughter was the main witness against her father.¹⁶⁰ Significantly, the new trial was ordered *not* because of the potential unreliability of "suppressed memory," but because of prejudicial remarks made by the prosecutor who told jurors they could consider Franklin's silence as indicative of his guilt.¹⁶¹

151. *Id.* at 741-42.

152. Andrew R. Tillman, *Expert Testimony on Eyewitness Identification: The Constitution Says, "Let the Experts Speak"*, 56 TENN. L. REV. 735, 736 (1989).

153. See *Commonwealth v. Sacco*, 158 N.E. 167 (Mass. 1927).

154. See LOFTUS, *supra* note 2, at 3.

155. *Id.* at 2.

156. *Id.*

157. *Id.*

158. *Franklin v. Duncan*, 884 F. Supp. 1435, 1438 (N.D. Cal. 1995).

159. *Id.* at 1440.

160. *Id.*

161. *Id.* See also Associated Press, *New Trial Ordered in Case of Remembered Slaying*, Washington Post, April 5, 1995, at A03.

An eighteen-year old who had been sexually assaulted described her attacker as a white male with full beard, reddish-blond "Afro" and a web-like cross tattooed on his left hand.¹⁶² Over 17 months later a suspect was arrested.¹⁶³ Two months prior to his arrest, the victim viewed six photographs; the suspect alone had a full beard.¹⁶⁴ She pointed and said, "That's him."¹⁶⁵ After his arrest, and during a lineup, the victim was told that the person she had identified was definitely in the lineup.¹⁶⁶ Again, he was the only one with a beard.¹⁶⁷ The prosecution was based almost exclusively on the visual identification.¹⁶⁸ Although the trial took place two years after the attack, the victim was absolutely certain of her identification, and, in less than ninety minutes the defendant was found guilty.¹⁶⁹ The jurors stated that the victim's absolute confidence swayed them to convict.¹⁷⁰ The convicted felon maintained his innocence for six years, at the end of which he was exculpated by indisputable DNA evidence.¹⁷¹

A. *The Devlin Report*

Astonished by pardons of two individuals who had been independently convicted on the basis of erroneous eyewitness identifications, the British home secretary appointed a committee to investigate this area of criminal law and police procedure.¹⁷² Established in May, 1974 under the chairmanship of Lord Devlin, a distinguished former law lord skilled in criminal law and procedure, the committee presented a provocative report two years later.¹⁷³ Of interest was its analysis of 2,116 lineups from which 952 suspects had been identified.¹⁷⁴ Of

162. Connie Mayer, *Due Process Challenges to Eyewitness Identification Based on Pretrial Photographic Arrays*, 13 PACE L. REV. 815 (1994).

163. *Id.* at 817.

164. *Id.* at 816.

165. *Id.* at 816-17.

166. *Id.* at 817.

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.* at 817-18.

171. *Id.* at 818.

172. Lofrus, *supra* note 2, at 8.

173. *Id.*

174. *Id.*

these, 850 were prosecuted and 697 convicted.¹⁷⁵ Eyewitness testimony was the *only* evidence in 347 cases, with a single witness in 169 and more than one in 178 cases.¹⁷⁶ Of these 347 defendants, 74% were convicted.¹⁷⁷ Thus, the Devlin Report clearly demonstrated that in the absence of any additional evidence, one or more eyewitness identifications may be overwhelming.¹⁷⁸

As a result of its investigation, the Devlin Committee recommended that a trial judge should be required by statute: (1) to direct the jury that it is not safe to convict upon eyewitness evidence unless the circumstances of the identification are exceptional or the eyewitness testimony is supported by substantial evidence of another sort; (2) to indicate to the jury the circumstances, if any, which they might regard as exceptional and the evidence, if any, which they might regard as supporting the identification; and (3) if a trial judge is unable to indicate either such circumstances or such evidence, to direct the jury to return a verdict of *not guilty*.¹⁷⁹ The clear impact of this report called into serious question the venerable tradition of eyewitness identification, especially when it was the *sole* evidence against the defendant.

In contrast, the "one-witness" rule, adhered to by a majority of United States jurisdictions, will sustain a conviction upon the uncorroborated identification testimony of a single eyewitness.¹⁸⁰ Implicit in the one-witness rule is the traditional view of both judiciary and general public that such eyewitness testimony is reliable as evidence, reliable enough to form the sole foundation for conviction.¹⁸¹

The same questions which faced the British judiciary have been of importance to United States courts, and go directly to the role of the jury, the "expert," and the adversarial system itself.

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.* at 9.

179. *Id.* at 190.

180. Steven E. Holtshouser, *Eyewitness Identification Testimony and the Need for Cautionary Jury Instructions in Criminal Cases*, 60 WASH. U. L.Q. 1387, 1391-92 (1983) [hereinafter Holtshouser].

181. *Id.*

B. *Eyewitness testimony without restraint*

Courts have allowed eyewitness testimony notwithstanding its questionable acquisition. In *Pruitt v. Hutto*,¹⁸² John Pruitt was charged with raping an eight-year old who identified him at trial.¹⁸³ Pruitt appealed his conviction, alleging that the prosecutor elicited the identification by pointing his finger directly at him and asking, "Is he the one?"¹⁸⁴ The trial court had allowed the testimony, although "the prosecutor's question may have been suggestive." However, although this type of identification "was not favored . . . under the totality of all the circumstances, the procedure was not an adequate basis for granting post-conviction relief."¹⁸⁵ The Eighth Circuit affirmed on the grounds that the Supreme Court had previously rejected a *per se* exclusionary rule as applied to suggestive identification procedures.¹⁸⁶ "[R]eliability is the linchpin in determining the admissibility of identification testimony"¹⁸⁷ It is quite unclear how the court could have objectively judged the "reliability" of the girl's testimony given three years earlier, since "the transcript of that trial had been lost or destroyed."¹⁸⁸

Unfettered use of questionable eyewitness testimony has occurred more recently than that observed in *Pruitt*. Willie Smith was convicted of murder and sentenced to death.¹⁸⁹ His conviction was based on the eyewitness testimony of two men, as well as circumstantial evidence which the Mississippi Supreme Court had found "overwhelming."¹⁹⁰ However, the Mississippi Supreme Court had also "found, by clear and convincing evidence, that the witnesses had perjured themselves at trial in identifying Smith as the assailant."¹⁹¹ Nevertheless, the Fifth Circuit upheld the conviction.¹⁹² Although the two witnesses "had perjured themselves, and the prosecution may have

182. 574 F.2d 956 (8th Cir. 1978).

183. *Id.* at 957.

184. *Id.*

185. *Id.*

186. *Id.*

187. *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977).

188. *Pruitt*, 574 F.2d at 957.

189. *Smith v. Black*, 904 F.2d 950, 956 (5th Cir. 1990).

190. *Smith v. State*, 492 So. 2d 260, 267 (Miss. 1986).

191. *Smith*, 904 F.2d at 956.

192. *Id.*

negligently used perjured testimony, the other evidence of guilt allowed no reasonable probability that the outcome was affected by the testimony.”¹⁹³

Given the impact of this perjured in-court identification, one can only wonder what was required to declare it to be reversible error.

C. *Role of the adversary system*

An important theme in American criminal jurisprudence is that a jury can sift through conflicting claims to arrive at a correct verdict, and that vigorous direct and cross-examination combined with the court's instruction of how to apply law to fact will suffice to achieve justice. While a jury might need expert assistance when interpreting complex scientific matters, its ability to determine the credibility of eyewitness testimony is assumed intuitively obvious.

Consider, for example, the facts of *United States v. Wade*.¹⁹⁴ On September 21, 1964 a federally insured bank was robbed.¹⁹⁵ Mr. Wade was arrested and indicted.¹⁹⁶ One month after his arrest, an FBI agent, without notifying Wade's court-appointed attorney, conducted a lineup.¹⁹⁷ Wade and five other prisoners were observed by the two bank employees who made a positive identification.¹⁹⁸ At trial, the employees were asked on direct examination if the robber was in the courtroom; they pointed to Wade.¹⁹⁹ Wade moved to strike this testimony alleging that his Sixth Amendment rights to counsel had been violated by the pre-trial identification procedure.²⁰⁰ Justice Brennan, writing for the Court, held that a post-indictment lineup was a critical prosecutive stage at which Wade was entitled to the aid of counsel.²⁰¹ The Court also noted that the in-court identification,

193. *Id.* at 960 (citing *Smith v. State*, 492 So. 2d at 264).

194. 388 U.S. 218 (1967).

195. *Id.* at 220.

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.* at 223-34. “The Framers of the Bill of Rights envisaged a broader role for counsel than under the practice then prevailing in England of merely advising his client in ‘matters of law’ and eschewing any responsibility for ‘matters of fact.’” *Id.* at 224. “[T]he colonists appreciated that if a defendant were forced to stand

even in the presence of counsel, might have been flawed by the prior events, and that such evidence must be excluded unless it can be established that such evidence had an independent origin or that its admission was harmless.²⁰²

It might appear that the *Wade* Court's analysis was more concerned with the constitutional issues raised by an aggressive prosecutor proceeding in the absence of defendant's counsel, than the possibility that the eyewitness identification itself might have been in error.²⁰³ However, at the same time, the Court indirectly set the stage for examining the question of the in-court eyewitness testimony itself - the need for counsel is dictated by the *fallibility* of the identification process.²⁰⁴

Although the Court grasped some of the problems of eyewitness testimony, it did not move beyond making a simple procedural change. The presence of a zealous advocate at the time of a pre-trial lineup coupled with vigorous cross-examination during the trial would suffice.²⁰⁵

But more should be included in our concepts of justice, for it is necessary to obviate the substantive problems inherent in eyewitness identification. Although the Court hinted that in-

alone against the state, his case was foredoomed." *Id.* (quoting 73 Yale L.J. 1000, 1033-34 (1964)) (footnote omitted).

202. *Id.* at 240.

203. See generally *Wade*, 338 U.S. 218 (1967).

204. *Wade*, at 239-43.

[T]he confrontation compelled by the State between the accused and the victim or witnesses to a crime to elicit identification evidence is peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial. The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification. Mr. Justice Frankfurter once said: "What is the worth of identification testimony even when uncontradicted? The identification of strangers is proverbially untrustworthy. The hazards of such testimony are established by a formidable number of instances in the records of English and American trials."

Id. at 228 (quoting *The Case of Sacco and Vanzetti*, 158 N.E. 167 (Mass. 1927)) (footnote omitted).

205. *Wade*, at 235.

Insofar as the accused's conviction may rest on a courtroom identification . . . the fruit of a suspect pretrial identification which the accused is helpless to subject to effective scrutiny at trial, the accused is deprived of that right of cross-examination which is an essential safeguard to his right to confront the witnesses against him.

Id. (citing *Pointer v. Texas*, 380 U.S. 400 (1965)).

court cross-examination may not always suffice, it then retreated to the proposition that a vigorous adversary is all that is required to reach truth.²⁰⁶ The jury must remain the ultimate decisionmaker, bringing its intuition and common sense to bear on the questions at hand; the presence of counsel at the pre-trial proceedings will assure their fairness.²⁰⁷

The possibility that eyewitness testimony may be beyond the scope of a jury's expertise and that neutral expert testimony concerning its reliability might thereby serve the cause of justice was not worth pursuing. The fundamental dichotomy between the role of an "independent" jury and an expert "intruding" on its province remained.

John Watkins was convicted of attempting to rob a liquor store on January 11, 1975.²⁰⁸ Two victims, one of whom was shot, were witnesses.²⁰⁹ Two days after the robbery, the uninjured victim identified the defendant in a lineup consisting of only three persons (including Watkins).²¹⁰ Watkins, standing alone and without counsel, was identified by the injured witness from his hospital bed; the police testified that there was "some question as to whether or not [the witness] was going to survive" ²¹¹ Following this, Watkins was charged with the crime.

At trial, Watkins argued that the court had a constitutional obligation to conduct a hearing concerning the admissibility of

206. *See id.* at 235-37.

207. *Id.*

[E]ven though cross-examination is a precious safeguard to a fair trial, it cannot be viewed as an absolute assurance of accuracy and reliability. Thus in the present context, where so many variables and pitfalls exist, the first line of defense must be the prevention of unfairness and the lessening of the hazards of eye-witness identification of the lineup itself . . . with the State aligned against the accused [and the witness who states] "that's the man."

Id. at 235-36.

Since it appears that there is a grave potential for prejudice, intentional or not, in the pretrial lineup, which may not be capable of reconstruction at trial, and since presence of counsel itself can often avert prejudice and assure a meaningful confrontation at trial, there can be little doubt that . . . [Wade] was "as much entitled to such aid . . . as at the trial itself."

Id. at 237 (quoting *Powell v. Alabama*, 287 U.S. 45, 57 (1932)).

208. *Watkins v. Sowders*, 449 U.S. 341, 342 (1981).

209. *Id.*

210. *Id.*

211. *Id.* at 343.

the eyewitness identification outside the jury's presence.²¹² The trial court rejected the argument and Watkins was convicted.²¹³

On appeal, the Kentucky Supreme Court affirmed the trial court's judgment.²¹⁴ The court followed the approach already seen in *Pruitt*, holding that more meticulous attention to the defendant's rights would have been *preferable* but was not *necessary*.²¹⁵

The Sixth Circuit's affirmation was upheld by the Supreme Court.²¹⁶ Justice Stevens, speaking for a divided Court, agreed that "[t]he prudence of such a hearing has been emphasized by many decisions in the Courts of Appeals, most of which have in various ways admonished trial courts to use that procedure."²¹⁷ However, the use of such a procedure is simply not mandatory.²¹⁸

The Court held that any problem resulting from the hospital identification in the absence of counsel would be obviated by the trial court's instructions.²¹⁹ The Court further held that cross-examination is a time-honored tool for attacking credibility of any witness; thus, a pretrial hearing out of the jury's presence is not constitutionally required.²²⁰

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.* at 361. "Although we are of the opinion that the holding of such a hearing prior to the introduction of this testimony would have been the preferred course to follow, we are not persuaded that the failure to have done so requires reversal of appellant's conviction." *Id.* (quoting *Ray v. Commonwealth*, 550 S.W.2d 482, 483 (Ky. 1977)). "The identification procedures [failed] to raise any impermissible suggestiveness and the [defendant] was in no way prejudiced." *Id.*

216. *Watkins*, 449 U.S. 341.

217. *Id.* at 345.

218. *See id.* at 349.

It is the reliability of identification evidence that primarily determines its admissibility. And the proper evaluation of evidence under the instructions of the trial judge is the very task our system must assume juries can perform. . . . [T]he *only* duty of a jury in cases in which identification evidence has been admitted will often be to assess the reliability of that evidence.

Id. at 347 (emphasis in original) (citations omitted).

219. *Id.*

220. *Id.* at 349.

[U]nder our adversary system of justice, cross-examination has always been considered a most effective way to ascertain truth. We decline . . . to hold that the Due Process Clause of the Fourteenth Amendment inevitably requires the abandonment of the time-honored process of cross-examination

Is it reasonable to allow juries to consider potentially prejudicial evidence obtained in the absence of counsel? Does not the knowledge of eyewitness fallibility (especially when one of the witnesses is in hospital viewing *only* the defendant), impose an obligation on the system?

Justices Brennan and Marshall dissented; eyewitness identification is known to be unreliable and therefore deserves at least the presence of legal counsel when it is to be employed.²²¹

Eyewitness identification without counsel standing between defendant and state represents a significant intrusion on our freedoms. In *Kirby v. Illinois*,²²² the defendants were identified at a pre-trial hearing; no counsel was present. The victim later made an in-court identification. The conviction was upheld: there were no Sixth Amendment rights to counsel until after "adversary judicial criminal proceedings" had started. As might have been predicted, as a result of *Kirby*, "the police now often delay formal charges until after the identification has been made."²²³

as the device best suited to determine the trustworthiness of testimonial evidence.

Id. (footnote omitted).

221. *Id.* at 350-52 (Brennan, J. and Marshall, J., dissenting).

At least since *United States v. Wade* . . . the Court has recognized the inherently suspect qualities of eyewitness identification evidence. Two particular attributes of such evidence have significance for the instant cases. First, eyewitness identification evidence is notoriously unreliable Second, despite its inherent unreliability, much eyewitness identification evidence has a powerful impact on juries. Juries seem most receptive to, and not inclined to discredit, testimony of a witness who states that he saw the defendant commit the crime.

Id. (citations omitted).

[T]o guard against the 'dangers inherent in eyewitness identification' . . . the Court has required the presence of counsel at postindictment lineups . . . and has held inadmissible identification evidence tainted by suggestive confrontation procedures and lacking adequate indicia of reliability Thus, *Wade* and its companion cases reflect the concern that the jury not hear eyewitness testimony unless that evidence has aspects of reliability.' . . . An important thrust of our eyewitness identification evidence cases . . . has been to prevent impairment of the jury's decisionmaking process by the introduction of unreliable identification evidence.

Id. at 351-52 (citations omitted).

222. 406 U.S. 682 (1979).

223. LOFTUS, *supra* note 2, at 185. See also Holtshouser, *supra* note 180, at 1388-89.

At times, deference to jury discretion appears based on more than firm adherence to the legal tradition that prejudicial expert testimony should be excluded. Rather, as seen in the next case, there may be a distinct anti-intellectual rejection of an expert "intruder"; for today's society does not view science with unbridled respect.

In *State v. Warren*,²²⁴ John Warren appealed his conviction of armed robbery alleging that the trial court had erred in denying his motion to allow expert testimony.²²⁵ The trial court, rejecting the expert's (Loftus's) proffered testimony, stated that it did not think courts "ought to be bringing in psychologists to say, 'Well, this witness is wrong or that witness is wrong.'"²²⁶ Furthermore, as to the defense contention that many people suffer improper convictions because of mistaken identification, the State's objection was sustained by the trial court which held "*that there was no evidence to that effect.*"²²⁷

The Kansas Supreme Court reversed.²²⁸ During cross-examination of the defendant, the prosecutor had asked him, "Tammie Moss identified you as the robber . . . didn't she?"²²⁹ The defense objected since Moss had never testified at the trial.²³⁰ The motion for mistrial was denied and the jury simply instructed to disregard the statement. The case was reversed on this obvious prejudicial error.²³¹

More important to our argument was the Kansas Supreme Court's holding regarding expert testimony.²³² It unreservedly conceded that fallibility of eyewitness identification is a significant problem for the American judiciary, even quoting from the Devlin Report.²³³ Nonetheless, it also held that the solution is *cautionary instructions* rather than expert testimony.²³⁴

224. 635 P.2d 1236 (Kan. 1981).

225. *Warren*, at 1238.

226. *Id.* at 1242.

227. *Id.* (emphasis in original).

228. *Id.* at 1239.

229. *Id.*

230. *Id.*

231. *Id.*

232. *See id.* at 1239-41.

233. *Warren*, at 1241.

234. *Id.* at 1243. "At the outset, it should be stated that the unreliability of eyewitness identification and the conviction of innocent people as a result thereof has been a matter of concern for the judiciary in many countries." *Id.* at 1239.

D. *Use of guidelines*

The first appellate decision that sought to develop guidelines for lower courts to use in considering admission of expert testimony was delivered in 1973.²³⁵ Under *Amaral*, the defense must establish a four-point foundation for admission: (1) the witness must be a qualified expert; (2) the testimony must conform to a generally accepted explanatory theory; (3) its probative value must outweigh its potentially prejudicial effect; and (4) it must pertain to a proper subject.²³⁶

Courts have interpreted the "proper subject" requirement in two ways. Under one trend of thought, expert testimony concerns an improper subject when it usurps the jury's function of assessing the credibility of eyewitnesses.²³⁷ The *Amaral* trial court justified exclusion on this ground, fearing that the proffered testimony would "take from the jury their own determination as to what weight or effect to give to the evidence of the eyewitnesses."²³⁸ The second interpretation of the proper sub-

"This problem of the potential unreliability of eyewitness identification has been with us for a long time." *Id.* at 1240. "The problem inherent in eyewitness identification from criminal lineups is also recognized in Canada, in continental Europe and in Latin America." *Id.* at 1241 (citation omitted).

In spite of the great volume of articles on the subject of eyewitness testimony by legal writers and the great deal of scientific research by psychologists in recent years, the courts in this country have been slow to take the problem seriously and, until recently, have not taken effective steps to confront it. The trouble is that many judges have assumed that an "eyeball" witness, who identifies the accused as the criminal, is the most reliable of witnesses, and, if there are any questions about the identification, the jurors, in their wisdom, are fully capable of determining the credibility of the witness without special instructions from the court.

Id. at 1241.

[W]e have concluded that requiring trial courts to admit this type of expert evidence is not the answer to the problem. We believe that the problem can be alleviated by a proper cautionary instruction to the jury which sets forth the factors to be considered in evaluating eyewitness testimony. Such an instruction coupled with vigorous cross-examination and persuasive argument by defense counsel dealing realistically with the shortcomings and trouble spots of the identification process, should protect the rights of the defendant . . .

Id. at 1243.

235. *United States v. Amaral*, 488 F.2d 1148 (9th Cir. 1973).

236. *Id.* at 1153.

237. *See id.*

238. *Id.*

ject requirement permits exclusion whenever the court feels that effective cross-examination would enable the jury to ascertain fully the reliability of an eyewitness.²³⁹ As opposed to "invading the province of the jury" interpretation, which bars testimony as impermissible, this "within the ken of the jury" interpretation excludes it as unnecessary.²⁴⁰

It is to be noted that *Amaral* affirmed the trial court's exclusion of the expert, holding that jurors could effectively assess the impact of witness stress by themselves.²⁴¹ What the expert knew was within the common knowledge of the jury and need not be further discussed.²⁴² However, as much of the above discussion has demonstrated, there has been adequate and substantial demonstration that frequently the jury *may not have a knowledge base* that will enable it to judge witness reliability in an accurate fashion.

Indeed, by disallowing the assistance of experts, *Amaral* and its successors established a *per se* exclusionary rationale: the trial court can always exclude because the testimony will never be a "proper subject."²⁴³ The problem with using the "proper subject" analysis is its subjectivity. While arguing that the expert's intrusion would be prejudicial to the jury's deliberations, it allows substitution of the court's mind-set regarding reliability of eyewitness identification. Thus, now, the discretion of the court instead of the expert's testimony, replaces the jury's function.²⁴⁴

Should prejudice introduced by the expert's "aura of reliability" preclude *all* expert testimony offered by either party, including the government's expert, a possibility surely not favored by the courts?²⁴⁵ Alternatively, if the expert is not allowed to educate the jury regarding eyewitness testimony, the eyewitness evidence itself, at least when the "one-witness rule" is followed, should also be precluded as overly prejudicial and burdened by error.

239. See O'Hagan, *supra* note 22, at 759.

240. *Id.* at 760.

241. *Amaral*, at 1153.

242. O'Hagan, *supra* note 22, at 758.

243. *Id.* at 759-60.

244. See *id.*

245. See *id.* at 763-64.

E. *Expert testimony* may be admitted

As already stated, despite its elegant analysis, *Amaral* made exclusion of an expert fairly easy. This difficulty is seen in *United States v. Downing*²⁴⁶ which presented a question of first impression in the Third Circuit: did Federal Rule of Evidence 702 permit a defendant in a criminal prosecution to question the reliability of eyewitness identification through the testimony of an expert in the field of human perception and memory?²⁴⁷ The defendant had been convicted *solely* on the basis of eyewitness testimony which, he claimed, was mistaken.²⁴⁸ The testimony was unreliable, as the witnesses had only a short time in which they were able to view the culprit; in addition, a long time had elapsed between their observations and their subsequent identification.²⁴⁹

The district court refused to admit the expert testimony believing it could never meet the "helpfulness" standard of rule 702.²⁵⁰ Presumably, the jury needed no further information or education; "expert testimony concerning the reliability of eyewitness identifications is never admissible in federal court because such testimony concerns a matter of common experience that the jury is itself presumed to possess."²⁵¹

It is the ruling of this court that the motion to have the psychologist testify is denied because [it] is a function of the jury to deal with the credibility of the witness[es] that have appeared here and give whatever weight to that testimony that they see fit and also determine if their evidence is credible.²⁵²

The Third Circuit reversed, holding that trial courts have broad discretion to admit expert testimony over the objection that this would improperly invade the province of the jury.²⁵³ "An expert can be employed if his testimony will be helpful to the trier of fact in understanding evidence that is simply difficult, [although] not beyond ordinary understanding."²⁵⁴ In doing so,

246. 753 F.2d 1224 (3d Cir. 1985).

247. *Id.* at 1226.

248. *Id.* (emphasis added).

249. *Id.* at 1227.

250. *Id.* at 1226.

251. *Id.* at 1229.

252. *Id.* at 1228.

253. *Id.* at 1229.

254. FED. R. EVID. 702.

the Third Circuit proposed to enhance the jury's ability rather than to "invade" it.²⁵⁵

However the Third Circuit held that admission of such testimony is not *automatic* but *conditional*.²⁵⁶ For a court to admit expert testimony, it must undergo a two-prong test. The first prong is a preliminary scrutiny in an *in limine* proceeding conducted by the district judge using a balancing test centering on two factors: "(1) the reliability of the scientific principles upon which the expert testimony rests, hence the potential of the testimony to aid the jury in reaching an accurate resolution of a disputed issue; and (2) the likelihood that introduction of the testimony may in some way overwhelm or mislead the jury."²⁵⁷

The second prong depends upon the "fit";²⁵⁸ a defendant seeking admission of expert testimony:

must make an on-the-record detailed proffer to the court, including an explanation of precisely how the expert's testimony is relevant to the eyewitness identifications under consideration. The offer of proof should establish the presence of factors . . . which have been found by researchers to impair the accuracy of eyewitness identifications.²⁵⁹

It is ironic that eyewitness testimony is "generally accepted" by the legal community while those who question its lack of reliability are deemed to be advocating a "novel" scientific theory. Perhaps, *Downing* inverted our tradition. At least, it suggested that there should be guidelines by which to determine that the jury and court cannot function alone and without expert input.

The case was remanded and the expert remained excluded.²⁶⁰ The trial court was unpersuaded by the expert's presentation of his methodology and raw data.²⁶¹ Furthermore, the

255. *Downing*, at 1229.

256. *Id.* at 1226.

257. *Id.* at 1226.

258. *Id.* The courts looked for a fit "between the scientific research presented . . . and the disputed factual issues of [the] case" in order to admit the expert testimony. See *United States v. Downing*, 609 F. Supp. 784, 792 (E.D. Pa. 1986). See also *Downing*, 753 F.2d at 1226.

259. *Downing*, 753 F.2d at 1242.

260. *United States v. Downing*, 609 F. Supp. 784 (E.D. Pa. 1986), *aff'd*, 753 F.2d 1224 (3d Cir. 1985).

261. *Downing*, 609 F. Supp. at 791.

court read the *Downing* guidelines literally and held that there was not sufficient "fit"; the expert's research did not include memory accuracy evaluations for periods longer than eleven months.²⁶² While this may have had some legal merit, it was completely flawed in its scientific analysis; there was no data suggesting that thirty-six-month old memories would be more reliable than eleven-month old recollections.²⁶³ The *Downing* court's strict guidelines allowed the trial court to ignore the important role of the expert - not to testify that the identification *was or was not* inaccurate - but to assist the jury to judge all the facts that might have affected its accuracy.

Until now, it is evident that some holdings exclude expert testimony while others are permissive and set criteria for its admission. Are there circumstances under which admission of expert testimony is *mandatory*?

F. *Expert testimony must be admitted*

Circumstances may prohibit trial courts to exclude qualified expert testimony on eyewitness perception and memory.²⁶⁴ While conceding the proposition that all jurors realize that certain factors, such as lighting, distance, and duration, may affect the accuracy of identifications, "[i]t appears from the professional literature, however, that other factors bearing on eyewitness identification may be known only to some jurors, or may be imperfectly understood by many, or may be contrary to the intuitive beliefs of most."²⁶⁵

It is not enough that a jury observe two skilled attorneys engaged in a courtroom duel; knowledge of the many factors involved in eyewitness identification is *not* intuitive even to the

In view of the inconsistent results produced by the studies and the lack of testimony regarding either the methodology of those studies or the underlying data on which the test results are based, the court finds that the proffered testimony . . . does not carry with it a sufficient degree of reliability to warrant its admission.

Id.

262. *Id.* at 786. The identifications in *Downing* were made at least three years after viewing the defendant. *Id.*

263. *Id.* at 786-87.

264. *See, e.g.,* *People v. McDonald*, 690 P.2d 709 (Cal. 1984) (en banc).

265. *Id.* at 720.

conscientious layperson.²⁶⁶ The most meticulous attention by a jury, without a basic knowledge, cannot possibly yield a just result. And *McDonald* clarifies that the expert's role is that of education, not advocacy.²⁶⁷

The significance of *McDonald* is that an expert must testify whenever he can contribute significant information about a "key" eyewitness' identification that is not independently reliable.²⁶⁸ The expert's contribution is more significant the greater the possibility that specific factors not within the ken of jurors, may have affected the reliability of the eyewitness.²⁶⁹

McDonald requires the judge to make specific findings as to whether a challenged identification is "key," and how strongly it is corroborated.²⁷⁰ The defense must show that the jury could not appraise the effect of certain factors on reliability from *the particular circumstances of the identification*,²⁷¹ a restatement of the "beyond the ken" interpretation of the proper subject requirement. For factors such as stress and confidence, the showing may be impossible.²⁷² For other factors such as cross-racial identification, there will be little room for excluding the expert.²⁷³

266. See *id.* at 720.

267. See *id.*

[The expert] made it clear that he did not propose to offer an opinion that any particular witness at this trial was or was not mistaken in his or her identification of defendant. But he did intend to point out various psychological factors that could have affected that identification in the present case . . . [and] to explain to the jury that empirical research has undermined a number of widespread lay beliefs about the psychology of eyewitness identification

Id. at 716.

[A]lthough jurors may not be totally unaware of the foregoing psychological factors bearing on eyewitness identification, the body of information now available on these matters is "sufficiently beyond common experience" that in appropriate cases expert opinion thereon could at least "assist the trier of fact."

Id. at 721 (citations omitted).

268. See *id.* at 727.

269. See *id.* at 726.

270. See *id.* at 727.

271. *Id.* at 722.

272. See O'Hagan, *supra* note 22, at 758.

273. See *McDonald*, 690 P.2d at 720-21.

In *United States v. Stevens*,²⁷⁴ the trial court had refused to allow expert testimony regarding the correlation between accuracy and confidence in eyewitness identifications as well as the suggestiveness of the identification procedure (a "wanted" board).²⁷⁵ The Third Circuit reversed the holding that exclusion was an abuse of discretion. "It cannot seriously be controverted that the 'wanted' board had several suggestive attributes."²⁷⁶ The trial court had also excluded testimony of the expert regarding the relation of subsequent identification to the initial one.²⁷⁷ Again, the Third Circuit agreed with the use of the expert: "once a witness makes an identification, he or she will tend to stick with that initial choice at subsequent photographic arrays or lineups, even if it was erroneous."²⁷⁸ Finally, the Third Circuit supported Stevens's claim that the exclusion of expert testimony regarding correlation between accuracy and confidence in eyewitness identification was an abuse of the trial court's discretion.²⁷⁹

The lesson to be learned is that the expert's role is not simply one of mere advocacy. It is to educate the jury, to assist the trier of fact to reach a fair and just verdict.²⁸⁰

274. 935 F.2d 1380 (3d Cir. 1991).

275. *Id.* at 1397.

276. *Id.* at 1390.

277. *Id.* at 1397.

278. *Id.* at 1399.

279. *Id.* at 1401.

Downing requires that Stevens' expert be permitted to testify concerning the lack of a correlation between confidence and accuracy in eyewitness identifications. Both of the victims expressed a great deal of confidence in their identifications of Stevens. To counteract this highly damaging testimony, Stevens offered expert testimony that, contrary to popular belief, scientific studies have shown a "fairly weak relationship" between confidence and accuracy. We conclude that the district court erred in holding that there was no "fit" between this testimony and the facts at bar.

Id.

280. *See id.* at 1392.

[T]he district court's errors involved evidence that detracted from the reliability of the victims' identifications - the sole predicate for Steven's convictions. Had the jurors learned that confidence is a poor indicator of the accuracy of an identification . . . the outcome of their deliberations could have been different. Simply put, we are not left with a sure conviction that the error did not prejudice the defendant . . . nor can we say that it is highly probable that the district court's errors did not contribute to the jury's judgment of conviction.

G. *The role of mandatory cautionary instructions*

The pioneer case standing *for* cautionary instructions but *against* the use of experts is *United States v. Telfaire*,²⁸¹ which affirmed a conviction for robbery based on a "one-witness" identification. The D.C. Circuit held that the trial court's failure to offer a *sua sponte* identification instruction was harmless in *this* case.²⁸²

The *Telfaire* court did not stop here, but proposed a "Model Special Instruction on Identification" aimed at directing the jury's attention to specific factors in the record which may lead to misidentification.²⁸³ Therefore, under *Telfaire*, the jury is in-

Id.

281. 469 F.2d 552 (D.C. Cir. 1972).

282. *Id.* at 558.

We do not qualify in any particular the importance of and need for a special identification instruction. But in evaluating the prejudice inherent in the failure of the trial court to offer one, we have taken into account that in the circumstances of a particular case, the proof, contentions and general instructions may have so shaped the case as to convince us that in any real sense the minds of the jury were plainly focused on the need for finding the identification of the defendant as the offender proved beyond a reasonable doubt. . . .

Moreover, this case exhibits none of the special difficulties often presented by identification testimony that would require additional information be given to the jury in order for us to repose confidence in their ability to evaluate. . . . The absence of a special identification instruction did not prejudice appellant's defense.

Id. at 555-57 (citations omitted).

283. *Id.* at 558-59.

Appendix: Model Special Instructions on Identification.

[Y]ou, the jury, must be satisfied beyond a reasonable doubt of the accuracy of the identification of the defendant before you may convict him. If you are not convinced beyond a reasonable doubt that the defendant was the person who committed the crime, you must find the defendant not guilty. Identification testimony is an expression of belief or impression by the witness. Its value depends on the opportunity the witness had to observe the offender at the time of the offense and to make a reliable identification later. In appraising the identification testimony of a witness, you should consider the following:

(1) Are you convinced that the witness had the capacity and an adequate opportunity to observe the offender? . . . [This] will be affected by such matters as how long or short a time was available, how far or close the witness was, how good were lighting conditions, whether the witness had occasion to see or know the person in the past. . . .

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

structed that it should consider whether the eyewitness had the ability and opportunity to observe the offender, whether the identification was truly the product of the witness's recollection, whether the witness has made inconsistent identifications, and whether the witness is credible.

In spite of the elegance of its model, and the detail with which the court described some of the factors involved in eyewitness identification, *Telfaire* did not go to the heart of the matter. Most people believe that eyewitness identification is one of the most reliable forms of evidence that can be produced against a defendant. Evidentiary rules allowing juries to convict solely on the basis of such testimony simply reinforce its credibility and *Telfaire* holds that corroboration is not required to support a conviction based on eyewitness identification.²⁸⁴

Furthermore, although *Telfaire* instructions are based on a careful analysis and balancing of policy concerns, including potential risks of eyewitness identification both in terms of accuracy and unjustified jury reliance, they cannot completely ameliorate the problems inherent in eyewitness identification. There is no scientific evidence that cautionary jury instructions, given at the end of what might be a long and fatiguing trial, and buried in an overall charge by the court, are effective. A powerful eyewitness' testimony may be so firmly embedded in the jurors' minds that the court's instructions days or weeks later may be unable to undo potential prejudice. In short, once a juror has decided that the eyewitness identification is dispositive,

the identification was made. If the identification by the witness may have been influenced by the circumstances under which the defendant was presented to him for identification, you should scrutinize the identification with great care. You may also consider the length of time that lapsed between the occurrence of the crime and the next opportunity of the witness to see the defendant as a factor bearing on the reliability of the identification. *[(3) You make [sic] take into account any occasions in which the witness failed to make an identification of defendant, or made an identification that was inconsistent with his identification at trial.]

*Sentence in brackets [] to be used only if appropriate. Instructions to be inserted or modified as appropriate to the proof and contentions.

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

Id.

284. See generally *Telfaire*, 469 F.2d 552.

there is no guarantee that trial court instructions at a later time will change his or her mind.

Moreover, *Telfaire* instructions do not go far enough. They list the factors that might contribute to misidentification²⁸⁵ but do not explain the impact these factors can have on memory accuracy. While they alert the jury to possible physical problems with identification (e.g., lighting and duration of observation), they do not purport to instruct its members on the physiology and psychology of the memory process.²⁸⁶ And if a jury thinks that memory is simple, it will be unlikely to consider the internal and external factors that might affect it.²⁸⁷

Although clothed with the aura of history, cross-examination is not necessarily the answer. If a witness honestly believes his or her testimony is accurate, and if the response to cross-examination exudes great confidence, it is not unlikely that an honest, but incorrect, identification will be completely accepted by the jury.

H. *The expert — assistance or prejudice?*

It is a cardinal principle of Anglo-American jurisprudence that, in Blackstone's challenging words, it is better that ten guilty persons go free than that one innocent person be convicted.²⁸⁸ Implicit in this principle is a recognition that in any system some innocent persons unavoidably will be convicted. But no one wants to see an innocent person suffer, and all are anguished when confronted with an unjust verdict of guilty.²⁸⁹

Unfortunately, Blackstone's noble thoughts are not accepted by all, whether they be attorney, judge, or "ordinary" citizen. Indeed, it is unclear whether a *majority* of today's population would subscribe to these sentiments. The fact that society tolerates capital punishment, although the possibility of executing an innocent person is always present (and has occurred), indicates that many might acquiesce if Blackstone's

285. See *supra* note 283; see also *supra* parts II A-C.

286. See *Telfaire*, at 558-59.

287. O'Hagan, *supra* note 22, at 754-55 (1993).

288. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 909 (Bernard C. Gavit ed., 1941) [hereinafter BLACKSTONE].

289. Holtshouser, *supra* note 180, at 1387-88.

"ten guilty people"²⁹⁰ were changed to 100 or, if this were repugnant, to a higher figure. *People v. Collins*²⁹¹ is illustrative, for when the prosecutor's flawed statistics were challenged, the chilling response was that sacrificing some innocent people is essential if society is to survive.²⁹² Finally, and in direct conflict with Blackstone's admonition, is the fact that the judicial system is aware of the fallibility of eyewitness identification.²⁹³

Nonetheless, the weight of authority in the United States and abroad is that expert testimony is, if not totally improper and therefore inadmissible, within the broad discretion of the trial court. Those who oppose admission of expert testimony argue that it would violate a jury's function as factfinder, unduly discredit eyewitness testimony, and only result in a confusing "battle of experts." One of the most serious claims is that expert testimony over-emphasizes the unreliability of eyewitnesses, and may make an already doubtful jury too skeptical of an otherwise reliable eyewitness. As a result, such a jury will be overly reluctant to convict.²⁹⁴

Contrary to this proposition is the simple fact that there is no data to substantiate the contention that expert testimony will inevitably produce a jury that is "too skeptical" of the witness. There is simply no objective evidence that to allow expert

290. See BLACKSTONE, *supra* note 288.

291. 438 P.2d 33 (Cal. 1968) (en banc).

292. *Id.* at 41.

[T]he traditional idea of proof beyond a reasonable doubt represented "the most hackneyed, stereotyped, trite, misunderstood concept in criminal law." [The prosecutor was willing to take the risk that] "on some rare occasion . . . an innocent person may be convicted. "Without taking that risk . . . life would be intolerable [as] there would be immunity for the Collinses . . . [to] push old ladies down and take their money and be immune because how could we ever be sure that they are the ones who did it."

Id. (citations omitted).

293. Benjamin E. Rosenberg, *Rethinking the Right to Due Process in Connection with Pretrial Identification Procedures: An Analysis and a Proposal*, 79 Ky. L.J. 259, 261 (1990-91).

Eyewitness identification evidence "has been thought by many experts to present what is conceivably the greatest single threat to the achievement of our ideal that no innocent man shall be punished." Yet, notwithstanding its well-recognized unreliability, eyewitness identification testimony is featured frequently and prominently in criminal trials.

Id. (footnote omitted).

294. Holtshouser, *supra* note 180, at 1425.

testimony would yield injustice. To base a decision that expertise automatically signifies prejudice is to take a very dim view of the jury's ability to examine such evidence. Expert testimony only substitutes the court's discretion for that of the jury in deciding what relevant information should be evaluated by the jury.

If American jurisprudence is to serve Blackstone's ideals,²⁹⁵ the cases discussed raise important questions. Are there situations in which cross-examination and the court's cautionary instructions at the end of the trial are insufficient by themselves to serve the ends of justice? Are there objective means by which the courts may determine when expert input is necessary? This article suggests that the Federal Rules of Evidence make clear that admission of expert testimony regarding eyewitness identification is normally permissive and, at times, should be mandatory.²⁹⁶ The latter is certainly the case where the *sole* evidence is that of one eyewitness.

There is a theoretical tension between a jury's independent deliberations and the alleged intrusion by an expert in eyewitness identification. Yet, there need be no such conflict: evaluation of relevance, prejudice, and assistance to the trier of fact are complementary functions of the Federal Rules of Evidence. Indeed, I would argue that *failing* to provide assistance to the trier of fact may very well constitute *per se* prejudice. When information outside the "ken" of the average jury is known within the scientific community, but not allowed to be shared with the jury, prejudice and injustice must result.

Daubert v. Merrell Dow Pharmaceuticals, Inc., provides criteria for admission or exclusion of "expert" or "scientific" testimony.²⁹⁷ It can be argued that the proposition that *eyewitness* testimony would be susceptible to exclusion were *Daubert* the standard by which it were judged. Furthermore, it may follow that if expert testimony concerning eyewitness testimony is excluded, so too should be the *eyewitness*'.

Our analysis begins with an *evidentiary trilogy*: relevance, prejudice, and assistance to the trier of fact. Relevant evidence

295. See *supra* notes 288-90.

296. FED. R. EVID. 702.

297. See *generally* *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786 (1993).

means "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."²⁹⁸ Furthermore, "[a]ll relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority."²⁹⁹ There are times that evidence, although relevant, must be excluded; this occurs "if its probative value is substantially outweighed by the danger or unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."³⁰⁰

It is on the last arm of the "trilogy," assistance to the trier of fact, that courts have often relied in justifying their refusal to admit testimony of individuals who are experts in the field of eyewitness testimony. In considering admissibility of expert testimony, courts, until recently, were bound by the *Frye* (or "general acceptance") test.³⁰¹ However, its application must not be static, for it is complemented by the provision that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."³⁰²

The necessity of deciding between relevance and prejudice has often been triggered by the "novelty" of the expert's proposed testimony or the scientific principles underlying it. In contrast, testimony bathed in tradition and history is consid-

298. FED. R. EVID. 401.

299. FED. R. EVID. 402.

300. FED. R. EVID. 403.

301. *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923).

Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitted expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field to which it belongs.

Id.

302. FED. R. EVID. 702.

ered to be far from "novel" and therefore never questioned. In performing a *Frye* analysis, the court's focus was on the scientific community, and not necessarily on the trier of fact. Testimony which had gained "general acceptance" in the population at large, e.g., eyewitness identification, would certainly not be a candidate for a *Frye* challenge. And therein lies the problem: by focussing on the *expert* witness, the courts have failed to consider the underlying *lay* eyewitness testimony. It is *this* testimony which is the real issue.

Frye is no longer the basis on which to determine admissibility of expert testimony. *Daubert*, a unanimous decision by the Supreme Court, has provided *a priori* principles by which to judge admissibility of expert and, I propose, *any* problematic testimony. *Daubert* is concerned not only with the scientific community; its underlying analysis depends on the ability of questioned testimony to assist the trier of fact. The holding makes clear that, far from intruding on the jury's prerogatives, expert testimony could illuminate the case for its deliberations. The ability of an expert to assist the jury was evaluated in terms of four principles:

Ordinarily, a key question to be answered in determining whether a theory or technique is scientific knowledge that will assist the trier of fact will be whether it *can be (and has been) tested*. Scientific methodology today is based on generating hypotheses and testing them to see if they can be falsified; indeed, this methodology is what distinguishes science from other fields of human inquiry. . . . Another pertinent consideration is whether the theory or technique has been *subjected to peer review and publication*. . . . Additionally, in the case of a particular scientific technique, the court ordinarily should consider the *known or potential rate of error*. . . . Finally, "*general acceptance*" can yet have a bearing on the inquiry. A reliability assessment does not require, although it does permit, explicit identification of a relevant scientific community and an express determination of a particular degree of acceptance within that community.³⁰³

Substitution of *Daubert* for *Frye* leads to an interesting result. The large amount of information developed by psychologists who have studied the phenomenon of memory is testable and has been tested. Furthermore, the data has been subjected

303. *Daubert*, at 2796-97 (emphasis added) (citations omitted).

to peer review and publication, the mainstay of the scientific community. Of importance is the description of potentially high error rates in specific areas of memory acquisition, retention and retrieval. Finally, the experts have gained general acceptance within their "relevant scientific community." Under this analysis, testimony by professionals such as Loftus, Wall, and Doyle should be admitted to educate rather than advocate.

The expert's role is that of a tutor who attempts to bolster the jury's own ability to assess the evidence. In order to carry out this non-adversarial function, an expert's testimony must only summarize the results of studies, the methodologies involved, and, perhaps, provide some general comments on how the psychological studies may be applied to the "real world." The expert will not comment on the reliability of any particular eyewitness. Indeed, should this occur, the court would be well within its judicial discretion in precluding such testimony. It is precisely because an expert lacks familiarity with the particulars of the case that he or she is probably less qualified than the jury to consider the weight to be given the account of a specific eyewitness. "In fulfilling its tutoring function, eyewitness-expert testimony typically focuses on two major subject areas: how the process of perception, memory, and retrieval of information work in general, and how specific circumstances surrounding an identification at issue may have affected its accuracy."³⁰⁴

As far as possible, a jury is chosen to be without preconceived notions regarding any evidence to be presented. At the end of the trial, the court's final instructions to the jury inform it how to apply the law to facts. I propose that an impartial expert's instructions might be analogous: the jury will be informed of how to apply science to the facts.

Yet, the majority rule in the United States is either that expert psychological testimony on eyewitness identifications is inadmissible or that a trial court does not abuse its discretion by refusing to admit it.³⁰⁵

Daubert, while appearing to offer substantial basis for the admission of expert testimony in the area of memory, does not dispose of the claim that such testimony would be unduly preju-

304. Christopher M. Walters, *Admission of Expert Testimony on Eyewitness Identification*, 73 CAL. L. REV. 1402, 1407 (1985).

305. Holtshouser, *supra* note 180, at 1401, n.66.

dicial. But, if we agree that a potential expert *is* qualified, I do not see the basis on which we can reject his or her assistance as prejudicial unless we believe that *too much* relevant knowledge is detrimental to the aims of justice.

"Implicit in the one-witness rule is the traditional view of both the judiciary and the general public that eyewitness identification testimony is reliable evidence, reliable enough to form the sole foundation for a conviction."³⁰⁶ Yet we know that this reliability is often a myth justified only by longstanding acceptance.

In response to overwhelming evidence that eyewitness testimony, especially when the *sole* basis of conviction may be itself misleading and prejudicial, it is unreasonable to assume that a jury will function best in ignorance.

Perhaps, the answer lies in focusing not on the expert but on the eyewitness. Imagine that we no longer justify eyewitness testimony on the grounds that it has withstood the test of time - for it truly has not. Imagine that we were to subject an eyewitness to the same analysis as an expert in memory, or a scientist proposing to testify concerning evidence based on DNA analysis. This would be justified, for on the basis of today's scientific knowledge, eyewitness testimony is "novel" and thus subject to *Daubert* scrutiny.

That eyewitness testimony has gained "general acceptance" in the lay community is uncontroverted; that is precisely the problem. The general rule is that eyewitness identification evidence will not be excluded unless the identification procedures are so suggestive and the eyewitness's testimony so unreliable that there is very substantial likelihood of a false identification.³⁰⁷

Daubert held that general acceptance is not the *sole* basis on which to judge novel testimony. Let us then use the three other principles already cited.³⁰⁸ The proposal that a specific eyewitness be "subjected to peer review and publication" is unrealistic. However, generic eyewitness testimony can be (and has been) tested, and, as we have already discussed, is often

306. *Id.* at 1392.

307. *Id.* at 1399.

308. See *supra* notes 303-04 and accompanying text.

woefully flawed. Indeed, the "potential rate of error" in eye-witness testimony is sufficiently great that, were similar flaws found in *any scientific discipline or methodology*, information so derived would be summarily rejected.

It is not likely that the courts will exclude eyewitness testimony, whether or not such decision is consistent with *Daubert*. Significant policy questions would preclude such action, for in many criminal cases where a defendant is obviously guilty, the prosecution would be unable to carry its burden of proof without a reasonable identification.³⁰⁹

If eyewitness identification is to remain part of the judicial system, we must be honest about its potential prejudicial effect on the jury, especially in jurisdictions which adhere to the one-witness rule. As already discussed, cautionary instructions at the end of trial will not suffice, for it has never really been shown that *immediate* instructions from the bench (e.g., "the jury is instructed to ignore . . .") have any significant effect. It is not unreasonable, therefore, to allow expert testimony regarding eyewitness identification just as would occur were the evidence a "novel" and impersonal DNA match rather than the witness's classic declaration: "That's the one!"

While admitting "partisan" expert testimony may go a long way to ameliorating the problems inherent in some eyewitness identifications, it must be acknowledged that it may very well introduce new problems. A "battle of experts" is not unknown in litigation, and confusion rather than light may result. As a result, the jury may be no closer to rendering justice than it would have in the absence of such testimony.

There is another possibility that warrants consideration. In order to promote fairness and justice, the court has the prerogative of calling its own expert, and, if necessary, of examining such an expert.³¹⁰

309. Holtshouser, *supra* note 180, at 1423.

310. FED. R. EVID. 706.

The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, any may request the parties to submit nominations. The court may appoint any expert witness agreed upon by the parties, and may appoint expert witnesses of its own selection The witness shall be subject to cross-examination by each party, including a party calling the witness.

Id.

That this tool is rarely employed by today's judiciary is not unreasonable in view of our adversarial system. If such a system is to function in its ideal manner, neither party should be provided an advantage other than the facts of the case and skills of the respective attorneys. A judicial "imprimatur," unavoidably inherent in a court-appointed expert, cannot be discounted. Nonetheless, at times it may be preferable either to a "battle of the experts" or allowing the jury to hear eyewitness testimony in ignorance of its potential to mislead.

Furthermore, much of the bias resulting from a judicial appointment would be mitigated if the court selected its expert from a panel acceptable to both parties.

In such instances, the court may be more likely to achieve justice by taking an activist position than simply attempting to achieve fairness by omission. Judges have realized the necessity of becoming expert in areas far beyond the confines of law.³¹¹ A judicial expert would simply function as an extension of the court as an impartial tutor to the jury.

Finally, the adversary system demands that the court's decisions be made in the context of the trial; it is therefore not surprising that uncertainty and inconsistency are the rule. In view of the significant problems of eyewitness identification, it is inefficient to repeat the debate over relevance or prejudice of experts at each trial. The admissibility of expert witnesses (whether called by the competing attorneys or the court) should be decided generically and in advance of any specific litigation. These *a priori* standards might be formulated by a judicial panel, a change in the Federal Rules of Evidence or even a Science Court.³¹² The latter approach would have the merit of bringing scientific methodology to bear on a significant legal problem. However, developed, the changed rules should be clear and unambiguous in order to achieve uniformity, consistency and predictability. While the courts may deal only with the case at hand, a special panel's deliberations will be free from the emotions and constraints accompanying a specific trial.

311. Edward V. DiLello, Note, *Fighting Fire with Firefighters: A Proposal for Expert Judges at the Trial Level*, 93 COLUM. L. REV. 473, 485 (1993).

312. Richard E. Talbott, "Science Court": A Possible Way to Obtain Scientific Certainty for Decisions Based on Scientific "Fact"?, 8 ENVTL. L. 827 (1978).

These proposals are unproven hypotheses. However, they are made in face of the equally unproven dogma that the adversary system will always triumph in providing justice. A judge need not, and cannot, become a complete expert in the potential fallibility of eyewitness identification, but should have sufficient appreciation to realize the help a disinterested expert might give to the jury. If the traditional adversarial system is unable to provide such a witness, the court has the power to do so itself. It would be an interesting experiment to try such an innovative procedure systematically, and then to measure the outcome.

Some of these proposals may be considered in the nature of "experiments". How they might be devised, where and who would be its subjects, what would be its endpoints, whose "informed consent" would be secured, are all questions which now remain unanswered. The practical difficulties inherent in these questions make it likely that historical comparison, rather than controlled randomized evaluation, would be a reasonable methodology. It is the principle that is important - objectively verifiable facts, testability and statistical "falsifiability" used to complement our legal traditions. Scientific methodology should not be excluded, and, indeed, should be encouraged to replace dogma, "intuition," and "common sense" in the courtroom.

V. Conclusion

It has been proposed that all jurisdictions in the United States mandate the use of *Telfaire*-type instructions in appropriate cases, and that jurisdictions that refuse to take this step ignore the wealth of evidence that eyewitness identification testimony is inherently unreliable.³¹³ *Daubert* requires an expansion of this thesis; today's quest for justice demands participation of disinterested experts in the trial process. The courts must become more creative and, if necessary, modify the tradition of adversary confrontation by allowing a neutral expert when appropriate. By aggressively using the principles of *Daubert* combined with the judicial power inherent in Rule 706, the courts could go far in solving the modern dilemma inherent in the ancient "technology" of eyewitness identification. An im-

313. Holtshouser, *supra* note 180, at 1434-35.

partial panel would help greatly in formulating *a priori* principles in advance of the actual trial.

Some may say this solution is simplistic, and perhaps it is. "For every complex problem in our society, there is a solution that is simple, plausible—and wrong."³¹⁴ Yet, just as a laboratory will evaluate an unexpected and even unpopular hypothesis, I wonder whether an objective scientific comparative test in one or more jurisdictions might be an interesting, exciting and even productive exercise.

314. DAVID L. BAZELON, QUESTIONING AUTHORITY: JUSTICE AND CRIMINAL LAW 6 (1988) (quoting H.L. Mencken) [hereinafter BAZELON]. See also Michael L. Perlin, *Unpacking the Myths: The Symbolism Mythology of Insanity Defense Jurisprudence*, 40 CASE W. RES. L. REV. 599, 677 (1989) (quoting BAZELON).