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The (Un)Reliability Of Eyewitness Evidence: A Philosophical Examination Of The Conflict Between The Psychological Research And The Use Of Eyewitnesses In The Legal System

by

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ABSTRACT

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The legal system relies heavily on eyewitness evidence. Not only is eyewitness evidence key evidence in law, it is given a presumption of reliability. Recent psychological research, however, demonstrates that eyewitness testimony is unreliable. Studies reveal that the eyewitness's perceptions and memories of those perceptions are frequently inaccurate. The research also shows that the majority of lay persons are unaware of the unreliability of this sort of evidence and of the various factors that impact its reliability. Consequently, according to the psychologists, finders of fact erroneously – though unknowingly – place too much weight on eyewitness testimony. One consequence of this misplaced reliance is the conviction of innocent persons. To remedy this problem with eyewitness testimony, the majority of psychologists advocate the introduction of an expert in eyewitness testimony – ordinarily a research psychologist who is familiar with the factors affecting the reliability of the eyewitness’s perceptions and memories – whenever eyewitness evidence is admitted. Such experts have been admitted in some cases, but the courts have generally been reluctant to admit eyewitness expert testimony; the reasons given for this exclusion have varied. The psychologists’ arguments for admitting eyewitness experts and the courts’ explanations for excluding this testimony are fraught with difficulties. However, alternative remedies – those currently existing as well as potential remedies – similarly fail to resolve the problem.

This thesis constitutes the first of a two-part work. In the present part, the different positions are assessed. The analysis yields three alternatives: 1) exclude all eyewitness testimony; 2) accept a partial, though far from complete, resolution; or, 3) do nothing. In the next part, the reasons giving rise to this seemingly insurmountable conflict will be examined. First, the psychological and legal fields use the concept ‘reliable’ differently; clarification of differing standards of reliability, as well as distinguishing the concepts ‘reliable’, ‘credible’, ‘competent’, and ‘useful’, will be undertaken. Second, psychologists hold different underlying assumptions about the legal system; an examination of the role of truth in the multi-purposed system will also be undertaken.
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PROLOGUE
CHAPTER I
INTRODUCTION

"Once the victim points to the defendant and says, 'That's the one,' there is not much even a skilled defense lawyer can do to persuade the jury an innocent mistake has been made."

Bobby Lambert was murdered in 1981. Nineteen years later, on June 22, 2000, the State of Texas executed by lethal injection its 23rd inmate of the year, Gary Lee Graham, for Lambert's murder. Graham was pronounced dead at 8:49 p.m.

However routine, Graham's execution was nonetheless atypical, even for Texas. His impending death received nationwide press coverage. The Reverend Jesse Jackson provided spiritual counseling to Graham and was among the most vociferous of his supporters.

The protests and the coverage were a bit surprising. It was not the protests and the coverage in general; the death penalty is a polarizing ethical issue. But Graham did not appear to be an ideal poster boy for an anti-death penalty movement. In one week alone - in 1981, when Graham was 17 years old - he had been tied to 22 similar armed robberies; he was convicted of 10 armed robberies that occurred during that one week. He had already been granted a reprieve by the Texas governor in 1993. In fact, June 22 was Graham's eighth execution date. Through the 19 year legal battle, Graham's case had been reviewed more than 30 times.

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2 Salatheia Bryant, A Call For Justice, HOUSTON CHRONICLE, Sun. June 18, 2000, at A1 (listing the 22 crimes and indicating those wherein Graham was convicted); see also Judge Michael McSpadden, The Wrong Poster Child For Death-Penalty Foes, HOUSTON CHRONICLE, Fri. June 23, 2000, at A37 ("During a one-week period in 1981, Graham committed at least 10 aggravated robberies, during which two people were shot and a 57-year-old woman was brutally raped. Graham pled guilty to each of these offenses and was sentenced to 20 years in prison in each case. Additionally, Graham was charged with a capital murder which occurred during his crime spree.")
However, Graham was convicted of murdering Lambert on the basis of one eyewitness, Bernardine Skillern. Even in the face of the national press coverage, Skillern steadfastly maintained that she was confident that Graham was the man she saw kill Lambert. Despite her confidence, however, Graham’s supporters question Skillern's testimony and the conviction based solely on her identification.

As Tovia Smith reported:

The case against Gary Graham is a defense attorney’s nightmare. Back in 1981, Graham was a 17-year-old thug with a habit of sticking up strangers at gunpoint. While police had no physical evidence that Graham was responsible for the murder of Bobby Grant Lambert, they did have the kind of evidence juries love, an eyewitness who would insist she never forgets a face.

* * * * *

....Bernadine Skillern insisted she’s still certain of her ID, even though it’s been nearly two decades since she witnessed the incident, even though she saw the shooter’s face only briefly, even though it was nighttime and she was watching from inside a car 30 to 40 feet away, and even though she failed to pick Graham out of a group of five mug shots before police put together a live lineup.  

Skillern remains confident of the accuracy of her recollection of her perceptions from that night.

Graham’s is not the only case raising concerns about convictions based upon eyewitness testimony. The literature is replete with examples; the anecdotes are legion.

For example, Ainsworth relates the story of Father Bernard T. Pagano:

Pagano was accused of having committed a number of robberies in the state of Delaware, USA. These crimes were distinctive as the robber frequently apologised to his victims during the crime, resulting in the perpetrator being labeled as the “Gentleman Bandit”. The police published a composite picture of the robber based on the witnesses’ descriptions and an anonymous caller suggested that the drawing resembled Father Bernard T. Pagano, the assistant...
pastor of a Catholic church in Bethesda, Maryland. Despite protesting his
innocence, Pagano was arrested and subsequently charged with the crimes. At his
trial, no fewer than seven victims positively identified him as being the robber.
Apart from the eyewitness testimony, there was little other evidence linking
Pagano with the crimes, but as each witness identified him, a conviction looked
increasingly likely.

However, during Pagano’s trial a man who was already serving a sentence
in prison came forward and confessed to the crimes. He was some 15 years
younger than Pagano, but was otherwise very similar in appearance.⁴

A case reported in the New York Times also involved similarly appearing individuals:

[A] 19-year-old high school youth was arrested and charged with robbing a
woman. The only evidence was the victim’s identification. While out on bail, the
youth read in a newspaper story of a man, accused of rape by an eyewitness’s
(mis)identification, who was subsequently freed because the real rapist confessed
to the attack. From photographs which accompanied the news article, it was
evident to the youth that both men resembled him. As a result of further
investigation by the youth’s lawyer, the rapist also confessed to the robbery, and
the charges against the youth were dropped….⁵

These examples are not anomalous.

There are other cases wherein numerous witnesses averred that the defendant was
the criminal, only to have another confess to the crimes; there are also cases wherein
numerous witnesses provided the defendant with a solid alibi but the defendant,
nonetheless, is convicted on the basis of eyewitness testimony. Unlike Father Pagano and
the youth who was the subject of the New York Times article, not all cases of erroneous
identifications involve persons who are very similar in appearance.⁶

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⁵ Goldstein, The Fallibility of the Eyewitness: Psychological Evidence, in Sales, ed. Psychology in the
(The week in review)).
⁶ See, e.g., Jennifer Thompson, But What If Graham Eyewitness Is Dead Wrong? Houston Chronicle,
June 21, 2000, at A23 (DNA evidence proved that the man Thompson selected, 11 years earlier, as the
man who raped her was, in fact, not the rapist, despite her conviction that she had identified the correct
individual).
There are stories of Professors staging thefts or assaults during class time and students being unable to identify the criminal. 7 A 1974 incident was reported in which NBC aired a staged purse-snatching; a lineup of six men was then shown, and viewers were able to call in and identify the criminal. Over 2,000 calls were received, but only 14.1% correctly identified the criminal, the expected result if a non-viewer had merely guessed. 8

According to the majority of psychologists, these incidents and the recent spate of psychological research on human perception and memory reveal the fallibility of both our perceptions and our memories of those perceptions. Not only are they unreliable, but worse, humans in general appear to be unaware of this fallibility. We rely quite heavily on those perceptions and memories and do not demonstrate an awareness of the many shortcomings revealed by the research.

One arena wherein human perception and memory is heavily relied on is the legal arena. Eyewitness evidence is the primary form of evidence utilized by the legal system. This results in a problem.

The problem, according to the majority of psychologists, is that human perception and memory are unreliable, yet most people are unaware of this fallibility and place great weight on the perceptions and memories of themselves and others. The legal system’s heavy reliance on the testimony of eyewitnesses – with little apparent recognition of the shortcomings of this evidence – leads, according to psychologists, to some of the most

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7 Professor John Mixon relates a story about such a staged crime that one of his colleagues set up for his evidence class. Apparently one of the students in the class was a police officer. He ran after the person who had performed the staged crime – only to return to class with the wrong person! Personal conversation with John Mixon. Houts provides a detailed description of a similar experiment, Marshall Houts, FROM EVIDENCE TO PROOF, 3-10 (1956).
8 Elizabeth Loftus, EYEWITNESS TESTIMONY, 135 (1996).
egregious consequences possible from this ignorance, namely conviction of innocent persons. Some innocent persons, according to the eyewitness evidence critic, are even wrongly put to death.

It is difficult to pinpoint precisely how often eyewitness evidence is incorrect or how often innocent persons are wrongly convicted because of eyewitness error. One author states that "[m]istaken identifications are the greatest single cause of wrongful convictions. Every time someone is convicted on an uncorroborated witness identification, the odds are fifty-fifty that justice has miscarried."\(^9\) Another provides different numbers:

The Reverend James McCloskey, who leads the Centurion Ministries, estimates that 10% of all those convicted are innocent....George Hairston, a lawyer for the NAACP, estimates the figure at 5%, and a study by C. Ronald Huff, a criminologist at Ohio State University, puts it at a conservative .5%....With an annual conviction rate of approximately one and a half million, these percentages work out respectively to be: 150,000, 75,000, and 7500 innocent people convicted every year....\(^{10}\)

This author further claims that, in the twentieth century, there were 349 documented cases of wrongful conviction for capital offenses, 23 of whom were executed.\(^{11}\)

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\(^{11}\) Id. at n. 7. Cutler and Penrod state: "Huff (1987) notes that there is no known method for authoritatively determining how many erroneous convictions occur each year, but the estimates in the literature range from only a few cases per year to as many as 20% of all convictions." Brian L. Cutler and Steven D. Penrod, MISTAKEN IDENTIFICATION, 7 (1995). Using one method of estimating the erroneous conviction rate, Cutler and Penrod find that there could be as many as 7,500 erroneous convictions per year for serious offenses. Id. Another author estimated that eyewitness error was the number one cause of error, at a rate of 52.3%. William David Gross, Comment, The Unfortunate Faith: A Solution To The Unwarranted Reliance Upon Eyewitness Testimony, 5 TEX. WESLEYAN L. REV. 301, 313, n. 56 (1999). See also Edward Connors, Thomas Lundregan, Neal Miller, and Tom McEwen, Convicted By Juries, Exonerated By Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial, NATIONAL INSTITUTE OF JUSTICE RESEARCH REPORT (June 1996)(presenting 28 cases of erroneous conviction based upon eyewitness testimony).
It is dubious whether the true number of convictions of innocent persons, especially on the basis of mistaken identification, will ever be known. With the recent movement toward a moratorium on executions, at least pending DNA testing, perhaps a more accurate figure can be ascertained.

Faced with the problem of eyewitness unreliability, the majority of psychologists argue that expert testimony should be admitted into court whenever eyewitness testimony is used. The expert – typically a research psychologist familiar with the literature concerning eyewitness reliability – could inform the judge and the jury of the difficulties inherent in eyewitness evidence.

Many courts have been reluctant, however, to admit the testimony of an eyewitness expert. As the standard for admitting expert testimony has become looser and as human memory and perception have undergone rigorous scientific inquiry, courts have become somewhat more amenable to expert testimony about eyewitness reliability. Nonetheless, the courts are not warmly embracing eyewitness experts. The psychologists, in turn, charge that legal professionals are ignorant of the truth about the eyewitnesses on which they rely so heavily.

This thesis examines this divisive issue through philosophical analysis, by critically evaluating the tension between the legal and psychological professions. The first part sets out the specific problem arising from reliance on eyewitness evidence. The second part considers solutions – including mechanisms currently employed, the psychologists’ idea of eyewitness expert testimony, and other possible modifications – in an attempt to resolve the problem. As none is successful, the conclusion then lays the groundwork for future analysis.
PART I: THE PROBLEM
CHAPTER II
THE PSYCHOLOGICAL RESEARCH:
AN OVERVIEW

"Eyewitness testimony has now become one of the most researched areas within the field of applied psychology"\textsuperscript{12}

An eyewitness's perceptions, and subsequent memories of those perceptions, are influenced and affected by numerous factors. These variables and their impact on the reliability of eyewitness evidence have been well studied by psychologists; there appears to be a plethora of psychological research concerning eyewitness reliability. This has not always been the case. Although the question of the reliability of eyewitness memory has long been of interest to psychologists, research on this evidence – and its role in the legal system – has mushroomed in the last two to three decades.

A great deal of this research has scientifically verified many of the intuitions that people commonly have about eyewitness perception and memory. These studies do not reveal facts that many of us do not know; rather they demonstrate that our commonly held beliefs about perception and memory in eyewitnesses are veridical.

For example, results of psychological research support our intuitions that memories fade over time. Hermann Ebbinghouse exposed subjects, himself included, to lists of three letter combination nonsense words. Sometime after memorizing the words, subjects were tested to evaluate their memory of these meaningless words. The results demonstrated the rapidity of forgetting learned information. Although most lay persons are unfamiliar with Ebbinghouse's "forgetting curve" and are unaware of the rapid rate at which learned information is forgotten – geometrically, not arithmetically – most understand the general notion that memory fades over time.

\textsuperscript{12} Ainsworth, supra note 4, at xi.
There are many examples like this wherein the results of psychological research verify commonly held beliefs that lay persons hold about eyewitness perception and memory. Some of the more mundane examples include the negative effect on perception and memory of intoxication, poor lighting and viewing conditions, short exposure time, a disguised perpetrator, and the like. Similarly, many people are aware, for instance, that people remember better when they are questioned in a supportive environment and when they want to please the questioner.

Not all of the research, however, scientifically confirms our intuitions about eyewitness evidence. There are some variables whose effects on eyewitness perception and memory run counter to our commonly held intuitions.\(^1\) It is these variables – for example, the absence of a clear relationship between an eyewitness’s confidence in his/her recollection and the accuracy of that recollection – that are at issue when the reliability of the eyewitness testimony introduced into court is in question. Although most of us are aware of the factors whose impacts are in line with our intuitions, those wherein the effect runs counter to our intuition are generally unknown and interfere with our ability to distinguish accurate from inaccurate eyewitness testimony. These latter variables are the ones that concern the psychologists who favor the introduction of eyewitness expert testimony, as such variables inhibit most jurors’ delineation of reliable

\(^1\) Some research even dispels commonly believed myths. Yarmey relates some examples:

In 1976 Judge Vincent McEwan, 57, a provincial court judge, declared in a Toronto court that the testimony of a 48-year-old woman might be unreliable because she was at a menopausal age. Similarly, in 1972 a Maryland physician, Dr. Edgar Berman, stated that the judgment of women executives must be suspect, since their cognitive abilities are seriously impaired by the “raging hormonal influences” present in their menopausal years.

from unreliable eyewitness testimony. The following discussion focuses on these
counterintuitive variables.

The different factors affecting perceptions and memories arise at different times.
The psychological research is often categorized by the stage at which the variables
impact reliability: acquisition, retention, and retrieval. During the acquisition stage, the
eyewitness perceives the event in question; it is the stage wherein the witness experiences
the event and the experience is entered into the witness's memory. The retention stage is
the time between the experiencing of the event and the recall of memories of that
experience. The third stage, retrieval, involves the actual remembering of information;
this is the stage wherein the witness recalls memories of the experienced event.

Erroneous eyewitness identification, potentially resulting in innocent people being
convicted, can arise from errors occurring at any of these three stages. Some of the
factors that can lead to errors during acquisition arise from the witness — for example, the
gender, anxiety level, experiences, and expectations of the witness. Other factors that
may yield acquisition stage error are external to the witness and arise from the event — for
example, the use of disguises, the length and frequency of exposure, and observation
conditions. The reliability of eyewitness evidence can also be impacted by variables
during the retention stage. Information acquired after the event, and even the thoughts of
the witness, may result in modification of the perception that was stored during
acquisition. Errors and inaccuracies in recollections can also arise during retrieval. Some
of the variables affecting the reliability of eyewitness evidence during retrieval include,

14Some psychologists, e.g. Yarmey, id. at 57, refer to these three basic intervals as encoding, storage, and retrieval.
for example, the retrieval environment, the identity of the questioner, and the particular method and wording of questioning employed.

Categorizing the affecting variables by the stage during which each can be influential may be convenient, but the factors do not always fit neatly into one or another category. For example, one source of error that has been discussed is the freezing effect. The ‘freezing effect’ refers to the witness’s persistence, during subsequent retellings of perceptions, in including comments he/she made during the initial recollection.\textsuperscript{15} This phenomenon can adversely affect accuracy when the originally recalled comments are false, yet are frozen in memory and often repeated on subsequent occasions. Studies have shown how inaccuracies that are initially reported are persistently held and repeated through later reportings.\textsuperscript{16} Despite the fact that the freezing effect involves recall and reporting, Loftus discusses it as an intervening thought of a witness, a retention stage factor.

Another example of a variable involving more than one category is a retention stage factor discussed by Woocher, filling of gaps in memory.\textsuperscript{17} Ainsworth explains this phenomenon:

If a portion of a scene is hidden from view, perception will tend to fill in the gaps so as to allow the person to perceive the scene as a whole. This happens often unconsciously without the witness being aware of the process. The witness will later be unable to distinguish those parts of a memory which were actually witnessed, and those bits which have been imagined in order to fill in the missing detail.\textsuperscript{18}

\textsuperscript{15} Loftus explains: “In essence, early comments are frozen into place in one’s memory and pop up frequently when the witness recalls his experiences at later times.” Loftus, supra note 8, at 84.

\textsuperscript{16} Id. at 84-86 (describing work by Bartlett 1932; Kay 1955; and Whipple 1909).

\textsuperscript{17} According to Woocher, “memory, like perception, is an active, constructive process that often introduces inaccuracies by adding details not present in the initial representation or in the event itself.” Fredric D. Woocher, Note, \textit{Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification}, 29 Stan. L. Rev. 969, 983-84 (1977).

\textsuperscript{18} Ainsworth, supra note 4, at 3.
Woøcher adds that the human need to "reduce uncertainty and eliminate inconsistencies," leads people not only to fill gaps in memory, but also to unconsciously change their recollections so that the memories make sense.\textsuperscript{19} Subsequently, the individual cannot distinguish the original perceived memories from the added or modified details.\textsuperscript{20}

This factor is similar to one discussed by Loftus as a retrieval stage variable, the knew-it-all-along effect.\textsuperscript{21} Studies of this effect demonstrate that if you give a witness information about what had occurred, or supply the answer, he/she is more likely to integrate the information with existing knowledge to form one coherent memory. In other words, after receiving the information, the witness integrates the information into memory and now believes that he/she knew the answer all along.\textsuperscript{22} The knew-it-all-along effect, then, appears to be closely related to the gap-filling retention variable.\textsuperscript{23}

Consequently, categorizing the variables by stage of occurrence, while useful, is not as clear cut as might be suggested by psychologists. Despite these gray areas, however, and the difficulty in categorizing some of the variables, the fact remains that eyewitness evidence may be influenced during each of the three stages.

At each stage there are many variables that are intuitive and commonly known that can give rise to eyewitness error. There are others at each stage, however, that are counterintuitive. When arguing for the introduction of eyewitness experts, the psychologists do not distinguish those influencing factors wherein the research supports our intuitions and those wherein the research demonstrates that the influence of the factor

\textsuperscript{19}Woøcher, supra note 17, at 983 (footnotes omitted).
\textsuperscript{20} Id. at 983. Woøcher additionally points out that the postevent information can be so subtle that its effect cannot be avoided. Within this context, he mentions the work on the effect the wording of questions has on the witnesses being interviewed. Id. at 984.
\textsuperscript{21} Loftus, supra note 8, at 101-104.
\textsuperscript{22} Id.
\textsuperscript{23} Thanks to Dr. Baruch Brody for bringing this point to my attention.
is contrary to our commonly held beliefs. As lay persons are aware of many of the commonly known factors that negatively impact eyewitness reliability – like intoxication – expert testimony about these influences would be superfluous. The research demonstrating that the influence of some variables runs counter to our common intuitions, on the other hand, appears to be pertinent and to increase the value of eyewitness expert testimony.

The first part of this chapter reviews some of the research demonstrating the counterintuitive nature of six of the more interesting influencing variables. The psychological research fails to explicitly draw the distinction, but for each issue considered, there are really two separate, though related, questions. The first question asks whether the variable does, in fact, impact accuracy; the second instead questions whether jurors and other lay persons are in fact aware of the effect that the variable has on the accuracy of the witness’s testimony. The second part of the chapter, then, focuses on this second question. The third and last part raises concerns with the research methodology.

A. Six Interesting Variables

The first question is concerned with the effect of the variables themselves; what, if any, effect do the various factors have on the integrity of an eyewitness’s perceptions and memories? This section presents some of the research pertaining to six of the less intuitive factors that can impact the accuracy of eyewitness testimony.

1. Stress

One variable that influences eyewitness evidence in a manner contrary to that commonly believed by lay persons is the amount of stress or fear that the witness
experiences. Very few people are aware of the precise impact of an elevated level of stress or fear, although many individuals believe that the amount of stress arising from the situation can impact the reliability of an eyewitness's perceptions and recollections of those perceptions. Most believe the witness who says "I was so frightened that his face is etched in my memory forever." However, research shows that this sort of stress and fear actually decreases, not increases, perceptual accuracy.

This phenomenon is known as the Yerkes-Dodson law: "strong motivational states such as stress or other emotional arousal facilitate learning and performance up to a point, after which there is a decrement." Accordingly, performance is optimal when there is a mild level of emotional arousal; at either low levels or high levels of emotional arousal, there is a decrement in performance. So, according to this research, the eyewitness who experiences a great deal of stress or fear during acquisition will not be more reliable, as common intuitions suggest, but will instead tend to be less reliable.

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24 Woocher, supra note 17, at 979.
25 Woocher explains the physiological underpinnings of this phenomenon. In addition to the common reactions to stress, including increases in heart rate, breathing, and perspiration, it also results in fixation of the eyes. Woocher notes that "because visual information is processed by contrasting successive retinal images, this fixation reduces visual acuity, particularly for details on the periphery of the environment." He further explains how, in addition to eye fixation, high levels of stress also result in involuntary cognitive reactions in which the observer "will attempt to cope with a frightening situation simply by rejecting it", a phenomenon he calls 'perceptual defense'. Instead of taking in many of the details, the witness focuses on those things deemed to be "psychologically most important". Thus, stress is a powerful variable that may impact what, and to what degree, the witness perceives and recalls detail from the event. Id. at 979-980 (footnotes omitted).
26 Loftus, supra, note 8, at 33.
27 Id.; see also, Ainsworth, supra note 4, at 38 ("The Yerkes Dodson law ... stated that stimulation affects performance in a curvilinear manner. Insufficient stimulation will cause insufficient arousal which in turn will lead to a poor performance. But too much stimulation will produce too much arousal, which will also lead to a poor performance.").
28 There are, of course, those who question the conclusion that high stress, in accordance with the Yerkes-Dodson law, impairs memory functioning. According to McCloskey, Egeth, and McKenna, the Yerkes-Dodson law is well-supported by research; however:

the application of the law to eyewitnesses is not entirely straightforward. In the first place, the optimal level of stress is not constant, but varies across tasks: the optimal level (and in fact the entire function) shifts with task complexity, such that the more complex the task the lower the
A related influencing factor is the violence associated with the witnessed event. The common belief is that the more violent the event, the more ingrained the perceptions are in the witness's memories. The psychological research, however, belies this intuition. The research demonstrates that those who witness a violent event have poorer retention of details of the event than those who witness a similar nonviolent event.

Loftus and Burns, for example, demonstrated that the shock from witnessing a violent event can result in retrograde amnesia. They showed subjects, undergraduate students, films of a bank robbery. In the violent version of the film, the robber exited the bank after the robbery, the teller shouted that she has been robbed, two employees chased the robber who turned around and shot toward the two employees, striking a young boy in the face. The nonviolent version was the same except that just prior to the shooting, the film returned to the bank where the employer told everyone what happened.

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level of stress at which the best performance is obtained. Because there is no way to compare the complexity of an eyewitness's "task" to tasks for which arousal—performance functions have been obtained, and because (for obvious ethical reasons) there are no data concerning eyewitness performance under levels of stress comparable to those experienced by actual witnesses, there is no way to determine from the available data what levels of stress will lead to good eyewitness performance, and what levels will impair performance. Even if arousal-performance functions were available for situations in which eyewitnesses observe crimes, problems would arise in applying these functions to particular circumstances (e.g., problems in determining how much stress a witness experienced, and problems stemming from the possibility that in any given situation, the optimal stress level may vary across individuals). Thus, the statement that stress impairs the performance of eyewitnesses, although based to some extent upon empirical results, is partially grounded in the judgment that the Yerkes-Dodson law is applicable to eyewitness performance, and the intuition that the stress experienced by witnesses generally places them on the "impaired" part of the Yerkes-Dodson function.

Michael McCloskey, Howard Egeth, and Judith McKenna, The Experimental Psychologist in Court: The Ethics of Expert Testimony, 10 LAW & HUM. BEHAVIOR 1, 8 (1986).

So, there is a minority that questions the applicability of the Yerkes-Dodson law to eyewitness experiences and the conclusion that, following this law, high levels of stress or fear yield less reliable eyewitness evidence.

Elizabeth F. Loftus and Terrence E. Burns, Mental Shock Can Produce Retrograde Amnesia, 10 MEMORY AND COGNITION 318 (1982). According to Loftus and Burns, 'retrograde amnesia' "refers to the loss of memory for events that occur prior to some critical incident, such as a head injury, electroconvulsive stimulation, or the administration of a variety of drugs." Id. at 318.
After viewing the film, subjects were given questions to answer and were to indicate the degree of confidence they had in their answers. The crucial question was the last, asking the subject to fill in the number on the football jersey of one of the young boys playing in the parking lot. The number, 17, had been seen for two seconds, four seconds to two seconds before the shooting or the return to the bank.

The results of the experiment showed that 4.3% of those viewing the violent version recalled the correct number while 27.9% of subjects viewing the nonviolent version correctly recalled the number. These results led Loftus and Burns to conclude that "subjects who viewed a violent version of an event were less able than control subjects to remember details that occurred prior to the eruption of the violence."\(^{30}\) Because they could not determine whether the impairment resulted from a failure to store the information or from an inability to retrieve the information, they performed a second experiment.

The second experiment was the same as the first except for two changes. First, the crucial question was modified to test recognition rather than recall: subjects were given four alternatives – 10, 13, 1, and 17 – from which to select the number of the football jersey. Second, a third version of the film was added to eliminate any effect that a return to the bank might have. In the third version, instead of the violent event, subjects viewed the arrival of a police car in the parking lot and subsequent conversation.

The results of the second experiment supported the findings of the first: those who viewed the violent version were less likely to remember the number on the shirt that was viewed prior to the violent event. Of the subjects viewing the violent version, only 28%

\(^{30}\) *Id.* at 320.
correctly identified the number, while 55% of the nonviolent-bank version viewers and 52% of the nonviolent-police version made correct identifications.

Loftus and Burns pointed out that the violence viewers did not exceed chance – 25% correct – while both nonviolent version viewers exceeded chance considerably. They concluded that the experiment “demonstrates that the viewing of a violent event affects not only the recall of information but recognition as well.”\textsuperscript{31} To eliminate the possibility that the retrograde amnesia resulted from the unexpectedness of the event, rather than from the violence, they ran a third experiment.

In the third experiment, one group of subjects was shown the violent version film, a second group was shown the nonviolent – bank version, while a third group viewed a new version containing a nonviolent but unexpected ending. Specifically, in the new version, the subjects saw the same film up until the shooting; right before the shooting, they were shown a clip of two people walking on a beach. Again the subjects were questioned, including the crucial question about the football jersey, in which they were to select the correct of the four possible answers.

The results were in line with Loftus’s and Burns’s expectations, as the subjects who had viewed the violent version were less likely to select the correct response: 24% of the violent version viewers selected the correct answer, while 47% and 50% of the nonviolent – bank and nonviolent – beach versions, respectively, answered correctly. These results led Loftus and Burns to conclude that “an unexpected event that is nonviolent in nature does not produce a similar retrograde effect for the critical item.”\textsuperscript{32}

Taken together, they concluded, the three experiments supported their hypothesis that

\textsuperscript{31} \textit{Id.} at 321.

\textsuperscript{32} \textit{Id.} They did acknowledge, however, that “[a] segment that was unexpected and unusual but more similar to the other conditions of information content might have produced a very different pattern of results.” \textit{Id.}
witnessing a violent event can lead to retrograde amnesia for events occurring a short
time prior to the violent incident.

The effect of stress and violence, then, can affect the reliability of eyewitnesses in
a manner that is contrary to the effect most people commonly expect. The
counterintuitive nature of the effect can lead jurors to error when they evaluate the
credibility of an eyewitness and the accuracy of the eyewitness’s testimony.

2. Police Officers

A second misconception identified by psychologists is the tendency of lay persons
to believe that police officers, or others with specialized training, are superior at
perceiving and later recalling or identifying what they have witnessed.\textsuperscript{33} Based on this
belief, testimony from police officers and others with specialized training is given more
weight. Despite the belief that police officers are more accurate than “lay”, or “civilian”,
observers,\textsuperscript{34} research has shown little difference between the recall of police officers and
civilians.\textsuperscript{35}

\textsuperscript{33} See, e.g., Brian Clifford, \textit{Police As Eyewitnesses}, \textit{New Society} 176, 176-77 (April 22, 1976). Both
Clifford and Ainsworth quote a British police recruitment advertisement:

\begin{quote}
Something you’ll develop on the beat is your ability to observe and remember. To make the
seemingly unimportant stick …. You may not be very good at first. But you will be taught to be
observant and to develop a quick eye for detail.
\end{quote}

Peter B. Ainsworth, \textit{Incident Perception by British Police Officers}, \textit{5 Law and Hum. Behavior} 231, 231

\textsuperscript{34} See Ainsworth, supra note 4, at 43 (“Groups such as police officers, security guards, and intelligence
officers might be presumed to be more accurate and more complete in their recall of factual information.
That such a presumption exists has been supported by some research….This assumption means that the
word of a police witness may be presumed to be more accurate than the word of a civilian witness.”)

\textsuperscript{35} One psychologist summarized the findings from the research:

\begin{quote}
So far, then, research has pointed to two main conclusions:
1. The police are no better than the general public at perceiving and remembering events, action
and people.
2. The police are very likely to misinterpret events because of their past experience.
\end{quote}

Clifford, \textit{supra} note 33, at 177.
One study that provided information about the differences between police and civilian eyewitnesses, by Tickner and Poulton,\(^{36}\) was concerned with differences between viewing action versus viewing people. The experiment involved the viewing of two films, a four hour black and white film and a one hour color film, depicting the view from a first floor window looking out on the street. Along with the usual movement of traffic and pedestrians, additional people and actions were inserted. Below the screen were three photographs of each person who was to be identified.\(^{37}\) Subjects were required to identify different people and, in all but one version, petty thefts that were observed.

Twenty-four police officers were included in this study. The results show, *inter alia*, that the police officers “report[ed] reliably more alleged thefts than … the panel members….”\(^{38}\) No reliable differences were found between police and civilians, however, in their true detections of people and actions.\(^{39}\)

A subsequent study, by Clifford and Richards,\(^{40}\) also examined the counterintuitive conclusion that police officers’ perceiving and recalling skills are no better than those of civilians.\(^{41}\) In the experiment, using 16 policemen and 16 civilians, the subject was approached by the target who inquired about the time or about directions; the former question provided a short exposure interval, while the latter question resulted


\(^{37}\) One of the photographs was a full-length picture of the person facing the camera, one was a left profile, and one was a full face.

\(^{38}\) *Id.* at 47.

\(^{39}\) In a later study supporting this conclusion, Ainsworth concluded that “the claim that police officers are specially trained to be vigilant in the perception of offenses and suspicious circumstances was not supported by the data presented here.” Ainsworth, *supra* note 33, at 235.


\(^{41}\) The study considered differences in the field, rather than the laboratory: “[T]he present experiment addresses the question of whether there is a superiority of police in naturalistic field situations where perception is assured and immediate memory for clearly specified details is probed.” *Id.* at 505.
in a long exposure interval. Thirty seconds later, the questioner approached the subject and asked for a description of the target.

The results of the experiment reflect differences, albeit small, between the police and civilian subjects. Specifically, first, the police subjects remembered more correct details than civilian subjects at the longer exposure intervals, but not at shorter intervals. Second, the police subjects had more errors than the civilians at the short exposure intervals, but fewer at the longer intervals. And third, the police and civilian subjects differed in the number of no answers given, with the civilians providing nearly twice as many as the police subjects.42

So, the results demonstrate that there was no difference in detail correctly observed, between police and civilian subjects, at short exposure, though the police exhibited superior performance overall, after longer exposure duration. These led Clifford and Richards to conclude:

[T]he results strongly suggest that training can increase the ability to perceive people and remember details of appearance but that an irreducible minimum time is needed to allow this training to have an effect....This experiment strongly suggests that police training in, and experience of, person perception could have significant effects on ability to recall details of a person, over and above facial features, at least at short intervals of exposure and provided that a sufficient length of time has been allowed to utilize these strategies.43

This study suggests that lay intuitions appear to be correct in part, though also mistaken in part. The effect of the factor is more complex than commonly believed. Contrary to

42 Clifford and Richards also concluded that though “the civilians actually recalled fewer items correctly after long exposure than after short exposure, this difference was not statistically significant. For the police however their recall scores under the short and long exposures did differ significantly ... such that recall after long exposure was much better. The difference between police and civilians at the longer duration was significant....[P]olice produced more errors under short exposure than under longer exposure, while the civilians produced the opposite results....[C]ivilians and police did not differ significantly at short intervals ....[B]oth the civilians and the police produced significantly different errors under short and longer exposures. Police produced significantly more errors at short rather than longer intervals ... while civilians produced more errors under longer exposures....” Id. at 508.
43 Id. at 511.
what those advocating for an eyewitness expert contend, these results support our lay
intuitions, even though they are not wholly supported; commonly held beliefs about
police abilities lack an understanding of the nuances demonstrated through this study.

3. Cross-Racial Identifications

A third interesting variable that has been misunderstood by lay persons is cross-
racial identifications. Though it is commonly said, of people of a different race, that “they
all look alike,” many lay persons discount this assertion as, perhaps, a poor attempt at
humor that is heavily laden with racism. Although it is frequently said that it appears
more difficult to identify members of a different race, people frequently disbelieve and
quickly discount this notion as a racist remark that reflects the racist beliefs of the
speaker.

Research has shown, however, that there is some truth behind these remarks; that
is, people in fact do not identify individuals of other races as well as they do members of
their own race.44 The existence of a cross-racial identification effect has been well-
documented and frequently replicated.45

The cross-racial identification difficulties appear across various races;46 however,
it seems to be most prevalent, though not exclusive, in whites trying to identify blacks.47

Although some say that the difficulties encountered when trying to identify members of

44 See Lofus, supra note 8, at 136-142. For a thorough review of the topic, see, June E. Chance and Alvin
G. Goldstein, The Other-Race Effect and Eyewitness Identification, in Siegfried Ludwig Sporer, Roy S.
Malpass, and Guenter Koehnken, eds. PSYCHOLOGICAL ISSUES IN EYEWITNESS IDENTIFICATION 153 (1996).
45 Chance and Goldstein, supra note 44, at 171 (“The number of studies that have replicated the other-race
effect finding is impressive. Few psychological findings are so easy to duplicate.”). Despite this, and not
surprisingly, there are some psychologists who “have recently questioned the conclusion that cross-race
identifications are less reliable than within-race identifications.” See McCloskey, Egeth, and McKenna,
supra note 28, at 6.
46 Cutler and Penrod state that “the cross-race recognition effect is substantial and comparable in magnitude
across races.” Cutler and Penrod, supra note 11, at 104.
47 Cutler and Penrod describe a study which found that whites, blacks, and Mexican-Americans presented
an own-race bias. Id.
different races do not result from a lack of exposure to members of those races and that the ability to successfully make these identifications does not improve with increased amounts of exposure to the other race,\textsuperscript{48} others, in contrast, have concluded that exposure might be related to the cross-racial identification difficulty.\textsuperscript{49}

One explanation that has been postulated for this phenomenon is that “members of one race may fail to encode appropriate facial features of members of another race. Thus most people would be less able to reconstruct … or to identify faces of another race than they would faces of their own race ….”\textsuperscript{50} Although this may be the cause of the difficulty inherent in cross-racial identifications, it does not explain why the encoding fails when the facial features belong to one of another race.

Regardless of the cause, cross-racial identification difficulties are an established effect and can have grave repercussions on eyewitness accuracy. Not only are many people unaware that the phenomenon is not a myth but in fact has been found to affect eyewitness accuracy, they are unlikely to raise or consider the issue for fear that they will be seen as racist. If a lawyer argues this effect to the jury, he or she might alienate the jurors, who likely will believe that the advocate is racist; judges, too, are unlikely to raise the topic in jury charges because they, too, believe that the phenomenon is merely a racist myth. Even were the jury provided this information, from the judge or the attorneys, jurors might be reticent to discuss it; alternatively, they might discuss it in the context of how racist the lawyer or judge is but not in application to the identification. According to

\textsuperscript{48} See, e.g., Woocher, supra note 17, at 982.

\textsuperscript{49} See, e.g., Chance and Goldstein, supra note 44, at 169: “At the present time, the other-race differential facial memory effect is a well-established observation that seems most closely related to differences in both extent and quality of contact between individuals belonging to one social group and members of other groups.”

\textsuperscript{50} Hadyn D. Ellis, Practical Aspects of Face Memory, in Wells and Loftus, supra note 9, at 17. For other theories, see Chance and Goldstein, supra note 44.
some psychologists, these factors make the cross-racial identification effect a particularly important subject of eyewitness expert testimony.\textsuperscript{51} In our multi-racial society, this misinformation can have a major impact.

4. Expectations

A fourth variable wherein research has demonstrated that its effects on eyewitnesses are contrary to common intuitions is the role that expectations play in memory and recollection. There are different types of expectations – Loftus discusses four, namely cultural expectations, expectations from past experiences, personal prejudices, and temporary expectations\textsuperscript{52} – and each can influence a perceptual experience. Although this influence, in and of itself, may not be contrary to our common intuitions – that is, we may acknowledge that expectations undoubtedly affect perceptions – most lay persons are unaware of the extent of the impact or the manner in which it yields its influence.

Loftus offers a poignant example, an incident involving five men who went hunting and experienced car trouble.\textsuperscript{53} Two of the men went off to find help, one man stayed in the car, and the remaining two stood outside of the car. One of the two who had gone in search of help decided instead to circle around in search of deer. The two who were standing in front of the car saw something move, believed it to be a deer, and one of them shot it. When the shot man-believed-to-be-a-deer screamed and ran, they believed they heard a deer scream and shot two more times until the man was dead. Both men believed they had seen and heard a deer. A police officer investigating the incident viewed the scene under the same conditions, but clearly perceived a man, not a deer.

\textsuperscript{51} See, e.g., Chance and Goldstein, supra note 44.
\textsuperscript{52} See Loftus, supra note 8, at 36-48.
\textsuperscript{53} See id. at 36-7.
Loftus emphasizes how the men expected to see a deer, while the police officer expected to see a man; the observations of all three were influenced by their expectations.

Woocher explains this process. As the brain is limited in the amount of detail it can process, it draws conclusions based on a small, incomplete amount of perceptual information: "It accomplishes this task by integrating fragmentary visual information into existing conceptual schemata based upon a fund of general knowledge acquired over time. In essence, witnesses unconsciously reconstruct what has occurred from what they assume must have occurred. Consequently, they exhibit a pronounced tendency to perceive the expected." Woocher notes that the context in which the same object/event is viewed can shape expectancies and lead the witness to view and interpret it differently. And, once it has been classified, witnesses tend to conform their recollections to that expectation.

5. Unconscious Transference

A fifth interesting variable affecting eyewitness reliability is unconscious transference. Although there are many factors yielding erroneous identifications, one of the more difficult effects to uncover the resulting error is unconscious transference. An example is an infamous case described by Houts: [1956 or ??]

I remember an armed robbery case where the ticket agent in a railroad depot was held-up. He subsequently picked a sailor out of a line-up as the guilty party. The man had a good alibi and was eventually released. The sailor's base was near the depot and on three occasions he had purchased tickets from this ticket agent. I interviewed the ticket agent in an effort to determine why he identified the sailor. He told me that when he saw the sailor in the line-up, his face looked familiar. He knew he had seen it before, although he was not really acquainted with the man. He then assumed that the familiarity related back to the robbery when, in fact, it undoubtedly went back to the three times he sold the man train tickets.

54 Woocher, supra note 17, at 980.
55 Id.
56 Houts, supra note 7, at 18.
This is a clear case of unconscious transference. How frequently the phenomenon occurs, however, is difficult to discern. As Loftus points out, "[o]ne problem concerning unconscious transference is that in any given case it is nearly impossible to determine whether it has occurred."\textsuperscript{57}

Not only are the effects of unconscious transference highly influential on the unwitting eyewitness, but jurors and other lay persons have little, if any, knowledge of the existence of the factor. 'Unconscious transference' is "the phenomenon in which a face is remembered as being familiar, but is incorrectly remembered as the face of the suspect."\textsuperscript{58} In other words, the witness has seen the face before, but does not recall the context in which that person was seen; this is a common experience, such as when we see the contractor at the opera and cannot recall, out of context, from where we know him. With unconscious transference, the witness unconsciously transfers the familiarity to the present context and misidentifies the familiar face as being the perpetrator.

In a study of unconscious transference and media reporting, Ainsworth found evidence of the phenomenon.\textsuperscript{59} The basis of his study was a newspaper article reporting a number of sex attacks. Accompanying the article were two photographs, one of the

\textsuperscript{57} Elizabeth F. Loftus, \textit{Unconscious Transference in Eyewitness Identification}, 2 LAW & PSYCH. REV. 93, 98 (1976); see also Peter B. Ainsworth, \textit{Turning Heroes into Villains: The Role of Unconscious Transference in Media Crime Reporting}, 5\textsuperscript{th} EUROPEAN CONFERENCE ON LAW AND PSYCHOLOGY 399, 399 (September 2, 1995): "Whilst cases of unconscious transference only occasionally come to light, there is no objective way of knowing whether it is a more common occurrence."

\textsuperscript{58} Ainsworth, \textit{supra} note 57, at 399. Loftus explains how/why this phenomenon occurs:

Unconscious transference is a byproduct of the integrative, malleable nature of human memory. It appears that a brief exposure to a person can cause that person to look familiar when he is seen later....[I]n any given case it is nearly impossible to tell whether it has occurred or not.\textsuperscript{58}

Loftus, \textit{supra} note 8, at 143-44.

\textsuperscript{59} Ainsworth, \textit{supra} note 57.
suspect — labeled “Sex Monster: Face of a Fiend” — and the other of a Good Samaritan who had rescued one of the victims — ambiguously labeled “Foiled Attacker”.

Ainsworth had sixty-three students study the article for five minutes; they were then asked some factual questions about the material but nothing about the facial appearance of the suspect or the Good Samaritan. The subjects returned one week later to view six photographs and to try to identify the suspect. Three different photospreads were used. Although all contained six pictures, one included neither the suspect nor the Good Samaritan, one included the suspect and five foils, and one included the Good Samaritan and five foils.

One third of the group that viewed the spread wherein neither the suspect nor the Good Samaritan was present identified a foil as the suspect; in the group that was shown the spread with the suspect, but not the Good Samaritan, present, eight (38%) identified the suspect, five (24%) selected a foil, and eight did not select anyone; and, in the last group, including the Good Samaritan but not the suspect, seven (33%) did not select anyone, four (19%) selected a foil, and ten (48%) identified the Good Samaritan as the suspect. These results led Ainsworth to conclude that “familiar faces tend to be chosen, but the familiar face of the real suspect is chosen no more often than the face of the previously presented ‘Good Samaritan’ in this study.” Ainsworth is cautious, however, in the generalized conclusions he draws, noting that the analysis is preliminary, that the circumstances — the subjects were not informed that they would later be asked to identify people — and the manner in which the article was presented by the newspaper might have engendered confusion.
One problem with this study is similar to the last caution mentioned by Ainsworth. Specifically, this study appears to demonstrate how confusion can result from the manner of presentation of an article and accompanying pictures in the newspaper. Without more – such as a study that does not employ newspaper articles or one that presents the same article and photographs laid out in a different, less confusing format – it is difficult to conclude whether this study says anything about unconscious transference as a phenomenon of identification per se or about the effects of media presentation.

Another problem that suggests that the results should be taken with caution concerns the generalizability of the results. In other words, there are sufficient differences between the experimental conditions and real life situations to question the applicability of this study. As Ainsworth pointed out, the study is similar to real life in that the subjects were unaware that they would be asked to identify the suspect. However, the subjects knew that they were participating in a research study. Whether they knew or did not know that the newspaper article was a real life situation, they were aware that they were not in a situation where something major depended upon their selection. Unlike real life, they were looking at still photographs, not a live occurrence. Unlike real life, further, they were not disturbed by the witnessing of the unpleasant crime. And, also unlike real life, they were not experiencing the desire to help the victim and to please, or be of help to, the investigating authority.⁶⁰ These differences might result in different levels of stress or anxiety or other emotional state in a witness; this different state of mind might, in turn, yield different results.

⁶⁰ Although the subjects may have wanted to please and help the experimenter, this desire differs from the desire to assist a victim or to please an investigating officer. The latter, real life scenario is accompanied by a seriousness and weighty responsibility, arising from witnessing actual harm being experienced by the victim, that is lacking in the experimental conditions; this may yield subjects who, with a desire to help, are more cautious in their selection of subjects.
Another study on unconscious transference was undertaken by Loftus.\textsuperscript{61} Fifty University of Washington students listened to a tape recorded story about six fictitious college students. When each character was introduced, the subject was shown a yearbook photograph of that character.\textsuperscript{62} After the story, the subject performed a filler activity and then was asked two questions about the story. Each was told to return in three days to collect the $2.00 for participating. Unknown to the subjects, upon return each was asked to look at five photographs and to select which, if any, of the five was the person who threw a paperweight in the story. Half of the subjects viewed a set containing the criminal plus four new faces, while the other half viewed a set containing a bystander from the story plus four new faces.

Of the subjects viewing the set which contained the criminal, 84% correctly identified the criminal, 12% made an incorrect selection, and 4% refused to choose. Of the subjects viewing the alternative set, with the bystander but without the criminal, 60% selected the bystander, 16 percent incorrectly selected one of the other four, and 24% refused to make a choice. Loftus points out that, by chance, 20% of those selecting would pick the bystander; the number actually selecting the bystander, 79% of those making a selection, was significantly larger. According to Loftus, the results demonstrate unconscious transference, “a by-product of the integrative malleable nature of human memory.”\textsuperscript{63}

\begin{flushleft}
\textsuperscript{61} Loftus, \textit{supra} note 57, at 94. According to Loftus, the purpose of the study was “to determine whether people tend to mistake for a criminal someone whose face was seen in another context.”

\textsuperscript{62} Each photograph was of a white male with medium brown hair and without glasses.

\textsuperscript{63} \textit{Id.} at 97. Loftus explains:
\end{flushleft}

"Psychological research indicates that when we experience an event we do not simply file a memory and then, on some later occasion, retrieve it and read off exactly what we have stored. At the time we try to recall the event, we reconstruct it using information from many different sources. These include the original perception of the event, knowledge acquired prior to the event,
Loftus's experiment, while instructive, does not consider the situation where the witnesses were asked to make an identification from a set including both the criminal and a bystander. It also suffers from some of the same shortcomings as Ainsworth's, such as questionable generalizability to real life. Would similar results obtain if the subjects were viewing live suspects as opposed to photographs; if the subjects were unaware that they were participating in a study; if the "bystander" had been seen before or after the event or from a totally unrelated event?

Although it is not often identified as such, another example of the unconscious transference phenomenon is a common practice that Loftus calls "photo-biased lineups". She describes this phenomenon:

When a crime has been committed, and the police have an available eyewitness, it is common procedure for them to first present the witness with an array of photographs. If an identification is made, an in-person lineup often follows. Such a lineup identification has serious problems, since almost invariably only one person is seen in both the photographs and the lineup. It is unlikely that a witness will identify in the lineup anyone other than the person who was chosen from the photospread. The chances of a mistaken identification rise dramatically in these situations, and so such lineups have been referred to as "photo-biased lineups." 64

In these situations, then, unconscious transference yields an erroneous identification. The witness making a selection from a lineup sees an individual who looks familiar; not recalling that the familiarity arises from previously viewing the mugshots, the witness mistakenly identifies the individual as the criminal. 65

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64 Loftus, supra note 8, at 150.
65 According to Loftus, a similar difficulty results when a witness constructs a composite sketch. Id. at 151.
So, although Ainsworth’s and Loftus’s studies suggest that unconscious transference occurs, more research must be performed before drawing concrete conclusions about the impact upon eyewitnesses. These studies do suggest, however, that unconscious transference appears to be a powerful phenomenon that has the potential to greatly influence the accuracy of memories and later identifications by eyewitnesses.

6. Confidence

The last, and by far most important, of the interesting, counterintuitive factors affecting eyewitness reliability is the relationship between the confidence of the eyewitness and the accuracy of the eyewitness’s recall or testimony. A witness’s confidence level is one of the main factors considered by jurors when evaluating the veracity of an eyewitness’s testimony. Many people believe that the more confident a witness is in his/her report, the more accurate that report must be. In other words, when an eyewitness confidently testifies that the defendant is the person who committed the crime, the jury is more likely to believe that the eyewitness’s identification and recounting of the events that transpired is accurate.

An often cited example of the prevalence of this belief is the United States Supreme Court case Neil v. Biggers, wherein the Court stated:

[T]he factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness’ degree of attention, the accuracy of the witness’ prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.66

Despite the commonly held beliefs ascribed to by even members of the high court, studies have shown that confidence bears little relation to accuracy. A witness may be

very confident of his identification and testimony and be wrong; conversely, a witness may feel little confidence in her identification and testimony and yet be correct. Some psychologists point out that, contrary to this popular belief, a witness’s level of confidence bears little relationship to the accuracy of that witness’s testimony.67

Although many psychologists state that there is no correlation between a witness’s confidence and his/her accuracy, contrary to common belief, others contend that there is some evidence of a positive relationship between confidence and accuracy, albeit only a weak relationship and not as close a link as lay persons believe there to be. It becomes difficult to ascertain the truth concerning the confidence-accuracy correlation. Is the common sense belief correct? Are the majority of psychologists correct that there is no correspondence between confidence and accuracy? Or, is there a confidence-accuracy link, though a much weaker, looser connection than commonly believed? What is clear is

67 See, e.g., James M. Doyle, No Confidence: A Step Toward Accuracy In Eyewitness Trials, CHAMPION 12, 12 (Jan./Feb. 1998)(footnote omitted): “The psychological experiments indicate that in most criminal cases the eyewitness’ confidence has little or no correlation with the eyewitness’ accuracy.” Similarly, Loftus explains:

[A]lthough there are many studies showing that the more confident a person is in a response, the greater the likelihood that the response is accurate, some studies have shown no relationship at all between confidence and accuracy. In fact, there are even conditions under which the opposite relation exists between confidence and accuracy, namely, people can be more confident about their wrong answers than their right ones.

Loftus, supra note 8, at 101.

Woocber concurs:

Psychological research also indicates that a witness’ feeling of confidence in the details of a memory concerning a particular event generally does not measure validly the accuracy of that recollection. In fact, a negative correlation sometimes exists between accuracy and confidence. Surprisingly, witnesses — particularly victims — often become more confident of the correctness of their identification as time progresses. For example, a victim who originally voiced grave doubts as to any ability to identify the assailant and who showed some hesitancy in making a pretrial identification commonly may exude and express absolute certainty in testifying on the witness stand that the defendant committed the crime.67

Woocber, supra note 17, at 985 (fns omitted).
that the effect of the variable is not as simplistic as lay persons believe or as the majority of psychologists suggests.

Wells and Murray\textsuperscript{68} examined this apparent discrepancy. They selected thirty-one studies that looked at the relationship between eyewitness confidence and accuracy; thirteen of those studies found statistically significant positive correlations between accuracy and confidence, while eighteen reported nonsignificant correlations. Wells and Murray focused on three of those that found significant correlations and no or negative correlations within the same study.

In one of those studies, by Malpass and Devine,\textsuperscript{69} subjects witnessed a staged vandalism and then tried to identify the perpetrator from perpetrator-present or perpetrator-absent lineups. They found a positive relationship between confidence and accuracy in the identifications from perpetrator-present lineups and a negative correlation when the selection was from the perpetrator-absent lineups, leading Wells and Murray to conclude that there was no significant correlation across both types of lineups. They suggested that the studies demonstrating a positive confidence-accuracy correlation might reflect a different conclusion if perpetrator-absent lineups had been included.\textsuperscript{70}

In another study using a staged theft, by Wells, Ferguson, and Lindsay,\textsuperscript{71} a significant positive correlation was found between confidence and accuracy of identification of the perpetrator from a photo array. Half of the subjects were briefed, however, about the fact that they would be cross-examined about their identification and about the types of questions they would be asked. Those subjects who had been briefed

\textsuperscript{68} Gary L. Wells and Donna M. Murray, \textit{Eyewitness Confidence}, in Wells and Loftus, \textit{supra} note 9, at 155.
\textsuperscript{69} \textit{Id.} at 162-63.
\textsuperscript{70} Wells and Murray point out that the inclusion of perpetrator-absent lineups better mirrors real life circumstances.
\textsuperscript{71} \textit{Id.} at 163-64.
showed a rise in their confidence level, which then eliminated the confidence-accuracy correlation.\textsuperscript{72} This sort of briefing occurs quite regularly in real life. Wells and Murray also noted that another real life circumstance, namely the passage of time, can negatively impact any confidence-accuracy correlations.\textsuperscript{73} As most of the studies they reviewed used short testing intervals, they suggested that the reports of a correlation might be overestimates of real life circumstances.

The third study, one of their own,\textsuperscript{74} involved repeated staged thefts. They found a statistically significant confidence-accuracy relationship only when the witnesses knew, at the time of identifying the perpetrator, that the crime had been staged; when the eyewitness believed the crime was real, at the time of identification, no significant correlation was found. The results led Wells and Murray to conclude that lower confidence-accuracy correlations are found in real life scenarios.\textsuperscript{75}

As a result of these studies, Wells and Murray determined that “the eyewitness accuracy-confidence relationship is weak under good laboratory conditions and functionally useless in forensically representative settings.”\textsuperscript{76} The more realistic the studies, the less reliable confidence level is as an indicator of eyewitness accuracy.

There are two difficulties arising from the confidence-accuracy studies. First, most of the situations established in the studies are not real life enough. As Wells and

\textsuperscript{72} Wells and Murray point out the concern associated with this finding: “This result is important because such briefings are common in actual criminal cases. Thus, even if there is an accuracy-confidence correlation at one point in time, real-world experiences can obliterate the accuracy-confidence correlation prior to the witnesses’ courtroom testimony.” \textit{Id.} at 163.

\textsuperscript{73} \textit{Id.} at 163-64 (citing Ruback, Greenberg, and Westcott (1982)).

\textsuperscript{74} \textit{Id.} at 164-65.

\textsuperscript{75} In further support of this conclusion, Wells and Murray reference a finding from a Clifford and Hollin study showing a significant confidence-accuracy relationship for subjects viewing a nonviolent videotape, but no correlation when a violent videotape was viewed. \textit{Id.} at 164.

\textsuperscript{76} \textit{Id.} at 165. These authors then review four explanations that have been offered for the poor confidence-accuracy relationship: experience, optimality, self-attributions, and selective cognitive abilities. \textit{Id.} at 165-68.
Murray pointed out, the results obtained from this research may be of little, if any, use in evaluating real life confidence-accuracy connections. Also, individuals who are participating in a psychology experiment are in a different emotional state of mind than those who have witnessed a criminal event and who believe that their eyewitness accounts and identifications have important consequences. This difference can have a major impact on a confidence-accuracy relationship.

A second problem stems from psychologists’ attempts to quantify confidence. There are different methods of calculating a witness’s confidence level [CITE]. Using different means of calculation – or, failing to correct for the use of different methods – can skew the results and, hence, call into question many of the conclusions that might be drawn from the different studies.

At the least, then, the confidence-accuracy relationship is much more complicated than common knowledge recognizes; there is not a simple correlation between the amount of confidence felt and exhibited by a witness and the accuracy of his/her report. Most of the research in this area suggests – and the majority of psychologists contend – that the witness’s confidence level is not correlated with the accuracy of the witness’s testimony. The studies that suggest that such a relationship exists can be explained by the limitations in the design of those research studies.

Not only is it unlikely that confidence reliably predicts accurate testimony, but most people are unaware that their commonly held belief is mistaken. Studies that have examined the extent of the common knowledge about the interrelationship, or lack thereof, between confidence and accuracy demonstrate this unawareness. Despite the results showing no or negative correlation between confidence and accuracy, most lay
people believe that confidence and accuracy are closely related and that confidence is an important criterion to consider in evaluating the testimony of an eyewitness.

Furthermore, it is not only non-legal lay persons who mistakenly rely on a confidence-accuracy relationship; judges\textsuperscript{77} and attorneys\textsuperscript{78} also incorrectly believe that there is an important correlation between the confidence and the accuracy of a witness.\textsuperscript{79}

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\textsuperscript{77} As examples, Penrod and Cutler describe part of the jury instruction from United States v. Telfaire, 469 F.2d 552, 558 (D.C. Cir. 1979)(emphasis added), in which the court instructed:

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

* * * * *

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

see Steven Penrod and Brian Cutler, Witness Confidence and Witness Accuracy: Assessing Their Forensic Relation, 1 PSYCHOL., PUB. POL’Y & L. 817, 817 (1995), as well as the Supreme Court’s opinion in Neil v. Biggers, quoted above, see text accompanying note 66, supra.

\textsuperscript{78} Penrod and Cutler review two studies in which this conclusion was reached. In the first, “75% of prosecutors but 40% of defense attorneys believed that witnesses who are more confident are more likely to be accurate.” Penrod and Cutler, supra note 77, at 818. Similarly, in the second, 64% of the attorneys answered that they believed that confident eyewitnesses are most likely to be correct. Id.

\textsuperscript{79} Doyle explains:

jurors rely more on the eyewitness’ confidence than they do on genuinely influential factors such as disguise, weapon focus, violence and retention intervals in evaluating eyewitness testimony. Jurors seem to believe confident incorrect identification testimony just as frequently as confident correct testimony. Eyewitness confidence is extremely malleable, and is easily enhanced when an identification is confirmed by another witness, the police, or some innocent circumstance. Even worse, experienced lawyers don’t seem to be any better at improving this situation than do third-year law students.

Doyle, supra note 67, at 12 (footnotes omitted). See also Gary L. Wells, Scientific Study Of Witness Memory: Implications For Public and Legal Policy, 1 PSYCHOL. PUB. POL’Y & L. 726, 728-29 (1995):

This issue [confidence] is an important one because people (including jurors) assume that eyewitness confidence is a reliable indicator of the accuracy of an eyewitness, and courts have also endorsed this assumption. As Penrod and Cutler note, there is some diagnostic value to eyewitness confidence under some conditions, but the magnitude of the confidence-accuracy relation is perhaps smaller than people believe. Furthermore, there are events that can destroy the diagnostic value of eyewitness confidence, and the justice system has some control over these events.

See also Penrod and Cutler, supra note 77, at 822:

Jurors appear to overestimate the accuracy of identifications (there are more convictions than there are accurate identifications), do not distinguish accurate from inaccurate eyewitnesses, and are generally insensitive to factors that influence eyewitness identification accuracy...[J]urors rely heavily on eyewitness confidence.
This lack of knowledge raises even more concern about the misguided belief about a confidence-accuracy relationship, as part of the job of the lawyers and the judge is to help the jury with its task of evaluating the evidence. Not only are they unable to correct the jurors’ mistaken belief, but they are likely, during argument and instruction, to suggest that the jurors consider the confidence with which the witnesses testified in evaluating the credibility of the witness and the reliability of the witness’s testimony. Without some sort of correction – perhaps an explanation from an eyewitness expert – a jury evaluating the reliability of testimony offered by an eyewitness may be misled by the level of perceived confidence held by the witness.

B. Lay Knowledge of Variable Effect

Unlike the first question, that focuses on the actual effect that the variable has on the reliability of an eyewitness’s perceptions and memories, the second question looks at the extent of the common knowledge about the effects, like those chronicled above. Are lay persons generally aware of the counterintuitive effect of these variables on eyewitness integrity? Do legal professionals – i.e., the lawyers and judges who are instrumental in revealing any inaccuracies or difficulties with, inter alia, the eyewitness evidence – have a better understanding of the impact of the various factors than general lay people? Although the answers to the first question are the cause of some concern to many psychologists, the answers to questions like these – the second question – are found to be alarming.
Questions like these were the focus of a study by Yarmey and Jones. This Canadian study was carried out on 211 subjects: 35 attorneys practicing criminal law in Ontario, eight judges from Ontario provincial criminal courts, 32 senior law students from Dalhousie University Law School in Halifax, Nova Scotia, 60 potential citizen jurors from Guelph, Ontario, 60 potential (non-psychology) student jurors from the University of Guelph, and 16 expert psychologists. Each subject completed a 16 item multiple choice questionnaire which included, *inter alia*, some of the variables discussed above.

When asked about the effect of stress on eyewitness reliability, 88% of the experts, 51% of the legal professionals, 69% of the law students, 62% of the student jurors, and 52% of the citizen jurors selected the correct response. When questioned about violence, 62% of the experts, 37% of the legal professionals, 16% of the law students, 10% of the student jurors, and 7% of the citizen jurors selected the correct

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81 “When a person experiences extreme stress as the victim of a crime, he/she will have:

(a) greater ability to notice and remember the details of the event;
(b) The same ability to notice and remember the details of the event under normal conditions;
(c) greater ability to remember the details of the event, but less ability to notice the details of the events as they occurred;
(d) reduced ability to notice and remember the details of the event.”
82 There was a significant difference between the experts and the legal professionals and jurors but not the law students.
83 “Suppose that a man and a woman both witness two crimes. One crime involves violence while the other is non-violent. Which statement do you believe is true?

(a) Both the man and the woman will remember the details of the non-violent crime better than the details of the violent crime.
(b) Both the man and the woman will remember the details of the violent crime better than the details of the non-violent crime.
(c) The man will remember the details of the violent crime better than the details of the non-violent crime, and the woman will remember the details of the non-violent crime better than the details of the violent crime.
(d) The woman will remember the details of the violent crime better, and the man will remember the details of the non-violent crime better.”
answer. Concerning cross-racial identification, 94% of the experts, 63% of the legal professionals, 81% of the law students, 48% of the student jurors, and 43% of the citizen jurors expressed awareness of the effect of this variable.

According to Yarmey and Jones, the results demonstrated that lay persons share police officers’ beliefs in the superiority of the officers as eyewitnesses. Two questions were asked, one about police officers and cross-racial identification and one comparing the perceived accuracy of identifications by officers as opposed to civilians. The percentage of experts selecting the correct response concerning police identification and race, 81%, differed reliably from those from other groups similarly selecting the correct response: 28% of legal professionals, 22% of law students, 28% of student jurors, and 33% of citizen jurors. The percentage of experts correctly answering the second question,

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

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

85 “Two white men, one of whom is a policeman, are walking together in front of a large store window. Through this window they see two men, one black and one white, robbing the store owner. The two robbers escape and the two witnesses are shown a number of mugshots of known thieves. Which statement best describes your view of the two men’s abilities to identify the robbers?

(a) The policeman will be superior to the civilian in identifying both robbers.
(b) The civilian will be superior to the policeman in identifying both robbers.
(c) The policeman and the civilian will be equally accurate in identifying the robbers.
(d) The policeman will be superior in identifying the black robber, but both will be equally accurate in identifying the white robber.”

86 “Two eyewitnesses give conflicting evidence about the identification of a suspect, seen earlier for about 10-15 seconds. One of the eyewitnesses is a policeman and the other is a clerk. Which statement best reflects your view about the witnesses’ testimony?

(a) The policeman’s evidence is more likely to be accurate.
(b) The clerk’s evidence is more likely to be accurate.
(c) It is likely that both the policeman and the clerk will be equally accurate.
(d) Since the evidence conflicts, neither person is likely to be accurate.”
concerning police versus civilian accuracy, only 69%, differed significantly from those in
the other groups who selected the correct response: 21% of legal professionals, 16% of
law students, 17% of student jurors, and 22% of citizen jurors.

The Yarmey and Jones study also demonstrated that unconscious transference – at
least the photo-biased lineup variety – is not as well known among lay persons as it is
among the experts. When asked about this phenomenon,11 100% of the experts selected
the correct answer, while 84% of the legal professionals, 66% of the law students, 43% of
the student jurors, and 45% of the citizen jurors expressed awareness of the effect.

These are some of the results that led Yarmey and Jones to conclude that the
factors influencing eyewitness reliability are not commonly known: "The findings of this
study strongly support our contention that knowledge about the psychological variables
that influence eyewitness identification and testimony does not fall within the province of
common knowledge."12 They further contend that the study demonstrates that the legal
system is not sufficient to remedy the eyewitness reliability problem but that the expert
psychologists have an important role to play in the resolution of the difficulties.

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11 "A robbery is committed. Later, the clerk who was robbed at gunpoint identifies someone from a set of
photographs as the person who committed the crime. Still later, the clerk is asked whether the robber is
present in a lineup of several somewhat similar individuals. Which of the following statements is most
likely to be true?

(a) Guilty or not, if the person identified in the photos is present, he/she is likely to be identified from
the lineup as well.
(b) Having seen the photos, the witness (victim) is not likely to choose someone from the lineup if the
robber is not present.
(c) If the robber is present in the lineup, having seen his/her photo previously would not alter the
chances of the victim identifying him/her from the lineup.
(d) The effect of viewing the photos on accuracy of identification later at the lineup, is not affected by
how good a look the witness got of the robber.

Yarmey and Jones, supra note 80, at 27.
12 Id. at 33.
Wells and Lindsay have also looked at lay knowledge of variables affecting eyewitness reliability, especially the lay perception regarding the relationship between confidence and accuracy. They were involved with four studies that utilized the same two-step paradigm. In the first part of this process, subjects entered a room, expecting to take a personality test, and unknowingly witnessed a staged crime. The experimenter then told the subjects that the theft had been staged and asked them to select the thief from a six person photo-array. In the second part, the eyewitness-subject was taken to a "courtroom", sworn in, and cross-examined. The cross-examination was videotaped and later shown to subject-jurors who evaluated whether the witness identified the thief or an innocent person.

In the first study using the paradigm, 42 subject-eyewitnesses were cross-examined; 24 of those made accurate identifications, and 18 made incorrect identifications. The eyewitnesses were believed by 79.5% of the subject-jurors, regardless of the eyewitness's accuracy. The jurors were also asked to assess the eyewitnesses' confidence levels. The estimated levels were not related to eyewitness accuracy but were highly correlated with juror belief of the eyewitness. Wells, Lindsay, and Ferguson concluded that "subject-jurors were unable to detect the difference between accurate and inaccurate eyewitness identification testimony....[T]he confidence exuded by the eyewitnesses under cross-examination bore no relationship to the eyewitnesses' accuracy, but was highly related to whether or not the subject-jurors believed the witnesses."90

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89 The paradigm and the four studies are discussed in Gary L. Wells and R.C.L. Lindsay, How do People Infer the Accuracy of Eyewitness Memory? Studies of Performance and a Metamemory Analysis, in Lloyd-Bostock and Clifford, supra note 80, at 41, 42-45.
90 Id. at 43.
In the second study, there were three different theft conditions, depending on how
good a look the eyewitness had, yielding low (33%), moderate (50%), or high (74%)
proportions of accuracy. Forty-eight eyewitnesses – eight accurate and eight incorrect
from each condition – were cross-examined. Like the first study, the results showed that
the jurors were as likely to believe accurate witnesses as inaccurate witnesses, though the
jurors were less likely to believe the eyewitnesses as the viewing conditions decreased,
and the attributed level of confidence was related to juror belief and not to witness
accuracy.

The third study differed in that, after identification from the array, half of the
eyewitnesses were briefed on the upcoming cross-examination. Wells, Ferguson, and
Lindsay then found:

(a) briefed eyewitnesses were judged more confident than non-briefed
eyewitnesses; (b) there was a small, but statistically significant confidence-
accuracy correlation for non-briefed eyewitnesses, but briefed eyewitnesses
showed no relationship; and (c) greater belief was accorded testimony from
briefed eyewitnesses than from non-briefed eyewitnesses and the percentages of
guilty votes followed the same pattern. Once again, there was no ability of
subject-jurors to detect the accuracy of the eyewitnesses and confidence was a
principal determinant of the jurors’ judgments of belief in testimony within and
across conditions. This study shows that confidence can be determined by things
unrelated to accuracy....[and] that the confidence of an eyewitness is more than
just a correlate of the extent to which the witness is believed by subject-jurors;
manipulation of the witnesses’ expressed confidence increased subject-jurors’
reliance on their testimony.\textsuperscript{91}

Again, the level of confidence of a witness was not found to be a useful predictor of
eyewitness accuracy.

The fourth study using the paradigm also looked at the confidence-accuracy
relationship. This study was identical to the second study, with the three viewing
conditions, except that half of the jurors were told to disregard the confidence of the

\textsuperscript{91} \textit{Ibid.} at 45.
eyewitness because it has not been found to be a reliable predictor of accuracy. Wells, Lindsay, and Tousignant obtained similar results as the second study for those jurors who had not been given the confidence instruction. With the instructed half, however:

[the] subject-jurors also showed no ability to distinguish between accurate- and false- identification eyewitnesses nor did they fare better in taking witnessing conditions into account. They did, however, greatly reduce their belief in the eyewitnesses’ testimony. The average rate of juror belief was 40.5% with advice to ignore confidence whereas the control groups’ average rate of belief was 61.5% (p > .05). Furthermore the advice to ignore eyewitness confidence was successful in that the high-confidence eyewitnesses were no more likely to be believed than were the low-confidence eyewitnesses, in remarkable contrast to the control group.  

The authors concluded that eliminating reliance on confidence itself may not make jurors better judges of eyewitness accuracy.

C. A Problem

A problem with the psychological findings arises from the methodology employed in the majority of the eyewitness research discussed above. There are several different concerns with the methodology typically used in the research.

First, there is a concern with the subjects typically used in the studies. More likely than not, the subjects are undergraduate psychology students. Although they are typically students in an introductory psychology class, in some studies they may be more advanced students.

The main concern with using undergraduates is that they are atypical when compared with the usual jury pool. Although many undergraduates are voters and have drivers licenses – the two standard lists utilized in selecting jury pools – they ordinarily do not reflect the diversity found in real life jury pools. Because they are atypical, the

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92 Id.
question arises about the transferability of the findings derived from studies employing undergraduate subjects to real life.

One study, however, suggests that this distinction might not be a cause for concern. Recognizing that the research suggests that jurors lack an awareness of the factors that influence eyewitness reliability, Cutler, Penrod, and Dexter asked whether "the results from undergraduate samples generalize to the more diverse population of individuals who would normally sit on juries."\(^93\) The subjects in this study were 129 eligible and experienced jurors from Dane County, Wisconsin who had been called for jury duty between January 1, 1986 and July 1, 1986. They viewed a videotaped armed robbery trial wherein the victim's identification of the defendant was key.

The results of the study were combined with those from an early study which employed the same conditions and methodology but used 321 undergraduate subjects. Ten different variables had been manipulated, one of them being witness confidence.\(^94\) The results confirmed that jurors are unaware of influencing factors on eyewitness accuracy and showed little differences between the student and nonstudent groups:

This study clearly demonstrates that jurors are insensitive to the factors that influence eyewitness memory and that, with few exceptions, undergraduates and eligible jurors are equally insensitive. When evaluating the identification both groups were insensitive to the effects of disguise, weapon presence, retention interval, suggestive lineup instructions, and procedures used for constructing and carrying out the lineup; both groups gave disproportionate weight to the confidence of the witness.....This research provides some justification for admitting expert psychological testimony on eyewitness identification. The juror apparently does not evaluate eyewitness memory in a manner consistent with psychological theory and findings. The effectiveness of traditional safeguards

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\(^{94}\) The factors were disguise of robber, weapon presence, violence, retention interval, mugshot search, lineup instructions, lineup size, similarity of lineup members, voice samples, and witness confidence.
designed to protect the defendant from mistaken identification therefore remains in question....\textsuperscript{95}

So, this study shows, \textit{inter alia}, that lay people are unaware of the relationship – or lack thereof – between witness confidence and accuracy and that the use of student subjects is not a cause for concern.

There remains a question, however, of how much reliance on this study is warranted. The study does suffer from the additional concerns raised below. Also unknown is the impact of the make-up of the eligible jurors of Dane County, Wisconsin and undergraduates used in the prior study. Would the results change if the constitution of either of these groups changes?\textsuperscript{96}

In theory, juries represent a nice cross section of the community from which they are drawn; in practice, however, with the many exemptions available to those who eschew jury service and the built-in bias by the use of certain lists from which parts of those cross sections are omitted, the make up of juries is skewed. If eligible jurors were selected from other locations – for example, Harris County, Texas; Allen County, Indiana; Dauphin County, Pennsylvania; Pima County, Arizona – would the results be similar to those obtained from the Dane County, Wisconsin jurors?

Similarly, would the results obtained change if the selected undergraduates attended, say, Harvard or Stanford? Although some might argue that undergraduates are undergraduates, there might be pertinent differences between those who are eligible to go, say, to Harvard rather than Lamar or those who self-select to go to a school like Stanford as opposed to, say, Texas A & M. The prior study simply says that the

\textsuperscript{95} \textit{Id.} at 190.

\textsuperscript{96} Also, does it make a difference whether or not the student jurors are themselves eligible or experienced jurors?
"[s]ubjects were 321 male and female undergraduates enrolled in an Introductory Psychology course."97 The article indicates that Cutler was at Florida International University – North Miami and that Stuves was at University of Wisconsin – Madison; although it does not indicate the university affiliation for Penrod, other studies indicate that he was at University of Wisconsin, where Cutler had earned his doctoral degree. If the selected undergraduates were from the University of Wisconsin and if the University is in Dane County, Wisconsin, it is possible that the undergraduates are a homogeneous population reflecting a homogeneous county population; in that case, Cutler, Penrod, and Dexter’s results would not be unexpected. Not only would the results not be surprising, but their value in extrapolating to a general conclusion would be limited.98 So, this study alone does not remove the concern about using undergraduate populations as subjects.

A second concern with the methodologies employed in the psychological research is the heavy reliance by many of the studies on the use of mock juries. Many of the psychological results derive from studies in which the subjects view films of trials, read portions of trial transcripts, or the like. The obviously artificial set-up of this methodology differs from real life. Thus, the question arises whether – or, to what extent – the findings can be extrapolated to real life scenarios.

Not only does this artificial method of presentation skew the situation – and until further studies are done, we will not know how much “skew” this imports – but it also affects the subjects’ ability to evaluate the witnesses. Unlike “real” jurors, these mock

98In the Yarmey and Jones study discussed above, comparisons were made for a few of the factors between the student juror findings and findings from a previous Loftus study involving 500 University of Washington students, from which some of the questions were drawn, and similarities were found. Although this may suggest that my concerns are groundless, there was no comparison provided concerning the makeup of the different university populations.
jurors are not even viewing real live, three-dimensional persons. Having an individual in front of you, in person, differs from viewing a photograph of that individual; hearing live testimony differs from learning of the same material through reading a transcript.

A real concern of the legal system is that the jurors have the witnesses in front of them. This is the primary impetus for the exclusion of hearsay evidence. Our system believes that jurors are in a better position to evaluate the evidence when the witness is actually present. The jurors not only hear what the witness has to say, they also have the opportunity to watch the witness’s demeanor and body language; a more accurate assessment of the witness and his testimony can be made when the jury can observe the witness as well as hear her testimony.

The inability of mock jurors to perceive and evaluate witnesses through more than one sense modality, and from more than one perspective, calls into question the reliability of the results obtained from these studies. The subjects may learn of the information from reading a transcript or from viewing a video; but, they are unable to observe the witness from different, three-dimensional perspectives and to evaluate the witness’s demeanor. These limitations call into question the reliability of the resulting findings and the transferability of the results to real life.

A similar issue was addressed by Lindsay, Wells, and O’Connor. They refer to the series of Wells studies using the paradigm, discussed above, in which subject-jurors viewed videotaped cross-examination of subject eyewitnesses and wherein they found a relationship between confidence and belief, not confidence and accuracy. According to Lindsay, Wells, and O’Connor, the results of these studies were met with skepticism from many legal professionals:
Lawyers were particularly likely to be concerned about the nature of the questions asked during the trial and the experience of the “lawyers” asking the questions. Some lawyers became skeptical of the value of the research when told that the “lawyers” were senior undergraduate and graduate students in psychology who followed a predetermined script and did not pursue issues after obviously inadequate responses by the witnesses. Many felt that any competent lawyer would do a much better job and perhaps produce more useful results.\(^9\)

Their study, then, repeated the paradigm studies with a few modifications to yield more realism: after a substantial delay, the trial took place in a real courtroom, and the eyewitnesses were cross-examined by real lawyers who could select their own questions and questioning style.\(^1\) Half of the lawyers were experienced attorneys with criminal law experience, and the other half were senior law students with legal aid experience. There were 16 tapes – half where the eyewitness identified the guilty person, and half where he/she identified an innocent person – were viewed by 178 introductory psychology students who, like the subjects in the earlier studies, were asked the probability that the accused was guilty, whether they would vote guilty or not guilty, and the perceived confidence level of the witness. They were also asked to rate the lawyers.

Of the subject jurors viewing the eyewitness identifying the guilty suspect, 68% voted guilty; of those who viewed films wherein the eyewitness identified an innocent person, 70% voted guilty. The jurors distinguished the experienced and inexperienced prosecutors and defense attorneys, but the experience level did not influence the verdict; rather, the eyewitnesses’ testimony did. And once again, confidence was a better predictor of juror verdict than was eyewitness accuracy. Lindsay, Wells, and O’Connor concluded that “[e]ven experienced lawyers, free to question the witness as they chose, were unable to lead mock jurors to believe accurate eyewitnesses more than inaccurate


\(^1\) For details of the more realistic trial, see id. at 335.
eyewitnesses.” They also found that pitting an experienced lawyer against an inexperienced lawyer did not enable the more experienced attorney to win his/her case. The authors thus conclude that “the courtroom is not the place to redress eyewitness errors. Experienced lawyers will not reduce the problem of false eyewitness identifications in court. The solution to eyewitness misidentification lies in control of the identification procedures employed by police.”

Although this study endeavored to be more realistic, there are shortcomings. The experiment used students as mock jurors; the jurors viewed videotapes of cross-examinations instead of live, three-dimensional cross-examination; and, though the “trial” was carried out in a real courtroom, it was an abbreviated, not complete, trial. Another major shortcoming in this experiment, namely the third concern, discussed below.

Loftus discusses a unique real life case which, though dealing with a different question, might be of some relevance here. Two brothers, charged with beating and torturing three Mexicans, were tried together. The case against Patrick and Thomas Hanigan was primarily the eyewitness identification of the three victims; almost identical evidence was used against each. However, two juries sat in the trial; one jury deliberated on Thomas’s guilt, and the other deliberated on Patrick’s guilt. Thomas’s jury heard

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101 Id. at 338.
102 Id. Interestingly, the authors note:

One trial did not include summary statements. After questioning the eyewitness, the lawyer for the defense claimed that he had so thoroughly discredited the witness that there was no need for a summary as the judge would dismiss the case. The prosecuting attorney agreed. Regardless of the decision that a judge may or may not have made, 73% of mock jurors who saw the tape of this trial voted guilty.

103 Loftus, supra note 9, at 280-81.
testimony from an eyewitness expert, while Patrick’s jury did not. Patrick was convicted, but Thomas was acquitted. Loftus suggests that the odd result is perhaps due to the eyewitness expert testimony. As she acknowledges, however, there are too many variables to draw any solid conclusion. Nonetheless, it suggests a vehicle that might yield more accurate conclusions.

A third limitation arising from the methods used in carrying out eyewitness research concerns the state of mind of the subjects. An eyewitness to a crime is in a different psychological state than a subject to a psychology experiment. Even if the procedure employed is as close to real life as possible, knowing that they are participating in an experiment leaves the subject in a different state of mind than one who has witnessed a crime. The subject in the experiment may experience a different – reduced – sense of importance than the eyewitness; the latter may feel more pressure, more urgency, and more stress as the gravity of the situation and the importance of his/her part is readily apparent. This, too, reduces the transferability of the results to real life.

Many of these concerns may result from the nature of the scientific discipline in general. Nonetheless, they are restricting and do impose limitations that must be kept in mind when applying the results of these controlled studies to real life situations.
CHAPTER III
THE LEGAL SYSTEM:
AN OVERVIEW

"Eyewitness testimony is among the most damning of all evidence that can be used in a court of law. When an eyewitness points a finger at a defendant and says, 'He did it! I saw him. I was so shocked I'll never forget that face!' the case is as good as over."

The eyewitness plays an integral role in the legal system. Human memory has, in a sense, been the cornerstone of the modern legal system.\textsuperscript{104} It is difficult even to try to imagine a common law legal system such as ours functioning without relying on human memory.

The last chapter provided some of the less intuitive factors that psychologists believe render evidence presented by an eyewitness to be unreliable and error-ridden. Yet precisely this sort of evidence is of utmost importance in legal proceedings. Despite the psychologists' findings, great credence is given to the report of an eyewitness.

This disregard for the findings of the psychologists is not new. Hugo Munsterberg, at the beginning of the twentieth century, expressed concerned that the legal system was not applying the new study of memory:

Nearly 90 years ago, Hugo Munsterberg (1908) argued that "Nearly every chapter and sub-chapter of sense psychology may help to clear up the chaos and confusion which prevail in the observation of witnesses" (p. 33), and he bemoaned the fact that juries and judges are not obliged to know and understand these things.\textsuperscript{105}

\textsuperscript{104} Former Attorney General Janet Reno, for example, has stated:

Eyewitnesses frequently play a vital role in uncovering the truth about a crime. The evidence they provide can be critical in identifying, charging, and ultimately convicting suspected criminals. That is why it is absolutely essential that eyewitness evidence be accurate and reliable....Recent cases in which DNA evidence has been used to exonerate individuals convicted primarily on the basis of eyewitness testimony have shown us that eyewitness evidence is not infallible. Even the most honest and objective people can make mistakes in recalling and interpreting a witnessed event; it is the nature of human memory.


\textsuperscript{105} Wells, \textit{supra} note 79, at 726. After mentioning Munsterberg, Ainsworth notes that "[s]ome 90 years later judges and juries are still accepting the evidence of eyewitnesses as though such testimony were an
Munsterberg, the “founder of applied psychology,” encountered the legal system in a professional manner, with regard to a Chicago murder case, in 1906; his participation, however, was met with hostility from the public, as well as from the legal profession. Nonetheless, he concluded that “[j]ustice would less often miscarry if all who were to weigh evidence were more conscious of the treachery of human memory.” This application of memory research did not reappear for decades.

Even today, however, when the psychological findings on eyewitness reliability are applied in the legal context, little weight appears to be given to the reported results of the psychological research. The legal system most certainly has been reticent to embrace the psychologists’ proposed solution, introduction of an eyewitness expert.

This chapter presents a brief overview of the legal system’s treatment of the introduction of eyewitness expert testimony as a solution to the problems attendant to reliance on eyewitness testimony. The first part of the chapter provides a cursory overview of the law’s treatment of scientific evidence and experts in general; the second part explains the reactions of various courts to the proffer of experimental psychologists as expert witnesses concerning the reliability of eyewitness evidence.

A. The Admissibility of Scientific Expert Evidence

The admissibility of expert testimony concerning scientific evidence has been governed by different enunciated standards. The three main standards that have been used

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107 “Critics pointed out that the Harvard professor did not fully understand the American legal system. He ignored, it was charged, that skepticism towards eyewitness testimony was already built into the system. Most of the criticism insisted that arbitrary guidelines deduced from laboratory experience cannot replace many years of courtroom experience.” *Id.* at 25.
are the Frye test, Federal Rule of Evidence (Fed. R. Evid.) 702, and the Daubert, or Daubert/Kumho test. Each is discussed separately.

1. The Frye Test

The first “formal” test used for the introduction of expert scientific evidence, referred to as the Frye test, was established in 1923 by the Court of Appeals of the District of Columbia, in Frye v. United States. Frye was a criminal defendant who had been convicted of second degree murder. The only issue raised on appeal was the trial court’s refusal to permit testimony by an expert who had conducted a deception test, or systolic blood pressure deception test, on the defendant.

The idea behind the deception test, a primitive lie detector test, is that:

blood pressure is influenced by change in the emotions of the witness, and that the systolic blood pressure rises are brought about by nervous impulses sent to the sympathetic branch of the autonomic nervous system. Scientific experiments, it is claimed, have demonstrated that fear, rage, and pain always produce a rise of systolic blood pressure, and that conscious deception or falsehood, concealment of facts, or guilt of crime, accompanied by fear of detection when the person is under examination, raises the systolic blood pressure in a curve, which corresponds exactly to the struggle going on in the subject’s mind, between fear and attempted control of that fear, as the examination touches the vital points in respect of which he is attempting to deceive the examiner.

In other words, the theory seems to be that truth is spontaneous, and comes without conscious effort, while the utterance of a falsehood requires a conscious effort, which is reflected in the blood pressure. The rise thus produced is easily detected and distinguished from the rise produced by mere fear of the examination itself. In the former instance, the pressure rises higher than in the latter, and is more pronounced as the examination proceeds, while in the latter case, if the subject is telling the truth, the pressure registers highest at the beginning of the examination, and gradually diminishes as the examination proceeds.\footnote{Frye v. United States, 293 F. 1013 (D.C.Cir. 1923).}

The court noted that expert testimony is permissible when the subject matter is beyond common experience and common knowledge. However, the court continued:

\footnote{Id. at 1013-1014.}
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 admitting 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 in which it belongs.\textsuperscript{111}

The court determined that the deception test had not acquired such a level of standing or recognition in its field; thus, it affirmed the trial court’s preclusion of the proffered expert.

The United States Supreme Court did not review the \textit{Frye} decision. Nonetheless, the \textit{Frye} standard, requiring that the scientific evidence being proffered through the introduction of an expert be sufficiently established to have gained general acceptance in its field – the general acceptance test\textsuperscript{112} – was accepted and followed in the majority of jurisdictions.\textsuperscript{113} In these jurisdictions, “the proponent of the evidence must prove general acceptance by surveying scientific publications, judicial decisions, or practical applications, or by presenting testimony from scientists as to the attitudes of their fellow scientists.”\textsuperscript{114}

According to Wooncher, “[t]he \textit{Frye} test generally reflects the judicial system’s concern over the prejudice that might result from admitting testimony of purported

\textsuperscript{111} \textit{Id.} at 1014. See John W. Strong, ed., \textsc{McCormick on Evidence} § 203, p. 306 (5\textsuperscript{th} ed. 1999): “The opinion did not state clearly whether ‘the thing’ that needed ‘to have gained general acceptance’ was the link between conscious insincerity and changes in blood pressure or the ability of an expert to measure and interpret the changes, or both.”

\textsuperscript{112} See also \textit{id.} at 305: “Under the [general acceptance approach], the proponent must show that the scientific community agrees that the principles or techniques on which the expert relies are capable of producing accurate information and conclusions.”

\textsuperscript{113} “Many courts adopted the \textit{Frye} standard in the ensuing years with scant discussion.” \textit{Id.} at 306.

\textsuperscript{114} \textit{Id.}
experts who have based their opinions on insufficiently substantiated scientific theories or techniques."\textsuperscript{115} He contends that there are two reasons for the \textit{Frye} precautions:

First, because a "scientific" technique is often imbued with an "aura of special reliability and trustworthiness," there is a fear that the expert's opinion based on such evidence will carry undue weight with the jury. Thus the \textit{Frye} requirements are an attempt to ensure not only that the expert's testimony will be sufficiently probative to assist the jury, but that its probative value will in fact be as great as the jury is likely to \textit{think} it is....Second, the \textit{Frye} test stems from a concern that the mechanisms and checks upon which the adversarial process usually relies may not be fully adequate in the case of scientific evidence. Because the expert's testimony almost by definition is founded upon specialized and often highly technical information and data, effective cross-examination may be difficult, and opposing counsel may have trouble rebutting the expert's opinion except by countering with the testimony of other experts or by assuming the heavy burden of attempting to acquire such specialized knowledge himself. Therefore, to prevent deception or mistakes and to allow meaningful response to the expert's opinion, courts demand that the principles and procedures on which the testimony is based be established enough to have received scrutiny from the critical eye of the scientific community and that the opinions advanced by the expert be shared by a significant segment of that community.\textsuperscript{116}

In an effort to prevent prejudice, then, courts have taken a rigid approach to the introduction of expert testimony and, as a result, have excluded a number of scientific experts or evidence.

During the 1970s and 1980s, the \textit{Frye} test was subject to criticism, modification, rejection, being ignored, and the like.\textsuperscript{117} The Supreme Court, for example, has noted: "In the 70 years since its formulation in the \textit{Frye} case, the 'general acceptance' test has been the dominant standard for determining the admissibility of novel scientific evidence at trial....Although under increasing attack of late, the rule continues to be followed by a


\textsuperscript{116} Id. at 54-55.

\textsuperscript{117} For an analysis of the \textit{Frye} test, criticisms of \textit{Frye}, and the relationship between \textit{Frye} and Fed. R. Evid. 702, see United States v. Downing, 753 F.2d 1224 (3rd Cir. 1985).
majority of courts...."\textsuperscript{118} In addition to this dissatisfaction with the general acceptance standard, the 1975 passage of the Federal Rules of Evidence led to further rejection of \textit{Frye}. The Federal Rules of Evidence contains a specific provision addressing expert testimony; the primary rule concerning the admissibility of experts is Rule 702.

2. \textbf{Federal Rule of Evidence 702}

Congress enacted the Federal Rules of Evidence (Rules), a codification of common law evidentiary principles for the federal courts, effective July 1, 1975.\textsuperscript{119} The primary rule governing the introduction of expert testimony, Rule 702, states:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.\textsuperscript{120}

The Advisory Committee’s Note provides further explanation concerning the rule:

An intelligent evaluation of facts is often difficult or impossible without the application of some scientific, technical, or other specialized knowledge. The most common source of this knowledge is the expert witness, although there are other techniques for supplying it....

The rule is broadly phrased. The fields of knowledge which may be drawn upon are not limited merely to the "scientific" and "technical" but extend to all "specialized" knowledge. Similarly, the expert is viewed, not in a narrow sense, but as a person qualified by "knowledge, skill, experience, training or education."\textsuperscript{121}

\textsuperscript{118} \textit{Daubert v. Merrell Dow Pharmaceuticals, Inc.}, 509 U.S. 579, 585 (1993). One commentator notes: "Yet, many jurisdictions have disavowed Frye in recent decades....Even in those jurisdictions that still purport to follow \textit{Frye}, courts repeatedly ignore it or depart from it in hard cases. Most of the scholarly commentary calls for outright rejection of the Frye test." D.H. Kaye, \textit{Science in Evidence}, 77 (1997); see also Joseph R. Meaney, \textit{From Frye To Daubert: Is A Pattern Unfolding?} 35 JURIMETRICS J. 191, 191 (1995)("For close to sixty years, the Frye test was dominant at both the state and federal levels. During this time, however, the standard was the target of much criticism, and many jurisdictions abandoned it.")(footnotes omitted).

\textsuperscript{119} For a brief overview of the history of the Rules, \textit{see Federal Rules of Evidence}, Introduction, III (West 1999-2000 ed.).

\textsuperscript{120} \textit{Fed. R. Evid.} 702. This was Rule 702 prior to the recent December 2000 revision. Rule 702 is one of the rules that was modified by these amendments. The text quoted here was Rule 702 prior to \textit{Daubert}, discussed below. The current Rule is quoted in full, \textit{infra} at text accompanying note 145.

The Advisory Committee also noted that the use of expert testimony is determined by the assistance it may render to the trier of fact.\textsuperscript{122} Rule 702 does not mention ‘general acceptance’ and does not distinguish scientific expert testimony from other forms of expert testimony.\textsuperscript{123} According to McCormick, the adoption of the Rules “intensified the retreat” from the \textit{Frye} test. The absence of any reference in the rule to general acceptance was interpreted by some as indicative of legislative intent to do away with this standard.\textsuperscript{124} The correct interpretation of the Rules concerning expert testimony was the issue addressed in \textit{Daubert}.

3. The \textit{Daubert/Kumho} Standard\textsuperscript{125}

The United States Supreme Court’s decision in \textit{Daubert v. Merrell Dow Pharmaceuticals, Inc.},\textsuperscript{126} did not really set forth a new standard for the admissibility of expert testimony. Rather, it established – or clarified – the standard to be used through its interpretation of Rule 702.

\textit{Daubert} was a suit to recover for limb reduction birth defects purportedly resulting from the mothers’ ingestion of the antinausea drug Bendectin. Defendant filed for summary judgment, supporting its motion with an affidavit from an expert who had reviewed all the literature concerning Bendectin and human birth defects and who concluded that Bendectin use during the first trimester was not a risk factor for birth

\textsuperscript{122} \textit{Id.} at 108.
\textsuperscript{123} McCormick points out that the Rules “do not explicitly distinguish between scientific and other forms of expert testimony, and they do not mention general acceptance….Some courts construed the omission of any direct reference to ‘general acceptance’ as evincing a legislative intent to overturn the well-established common law requirement.” Strong, \textit{supra} note 111, at 306.
\textsuperscript{124} \textit{Id.}
\textsuperscript{125} Technically, the Court’s position on experts is set forth as a trilogy, \textit{Daubert}, \textit{Joiner}, and \textit{Kumho}. The second case in the trilogy, \textit{General Electric Co. v. Joiner}, 522 U.S. 136 (1997), established that the appropriate standard of review concerning the admissibility of scientific expert testimony is abuse of discretion. This case is not discussed further in this thesis.
Plaintiffs responded with eight experts who concluded that there was a Bendectin-birth defects link, based on in vitro and in vivo animal studies, pharmacological studies, and reanalysis of epidemiological studies. The trial court applied a Frye standard, requiring general acceptance in its field for the admissibility of scientific evidence, and ruled that plaintiffs’ evidence did not satisfy this standard. Hence, it granted defendant’s motion. The United States Court of Appeals for the Ninth Circuit affirmed, stating:

[E]xpert opinion based on a scientific technique is inadmissible unless the technique is “generally accepted” as reliable in the relevant scientific community...[E]xpert opinion based on a methodology that diverges “significantly from the procedures accepted by recognized authorities in the field... cannot be shown to be ‘generally accepted as a reliable technique.’”

The Supreme Court granted certiorari to consider the proper standards to be used in evaluating the admissibility of expert testimony.

The Supreme Court agreed with the petitioners (plaintiffs below) that “the Frye test was superseded by the adoption of the Federal Rules of Evidence.” Specifically, the Court explained:

Nothing in the text of this Rule establishes “general acceptance” as an absolute prerequisite to admissibility. Nor does respondent present any clear indication that Rule 702 or the Rules as a whole were intended to incorporate a “general acceptance” standard. The drafting history makes no mention of Frye, and a rigid “general acceptance” requirement would be at odds with the “liberal thrust” of the Federal Rules and their “general approach of relaxing the traditional barriers to ‘opinion’ testimony.” ... Given the Rules’ permissive backdrop and their inclusion of a specific rule on expert testimony that does not mention “general acceptance,” the assertion that the Rules somehow assimilated Frye is unconvincing. Frye made “general acceptance” the exclusive test for admitting

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127 The statement of the expert, Dr. Steven H. Lamm, is reproduced in Kaye, supra note 118, at 99-100.
128 The statement of one of the eight experts, Dr. Shanna Nelen Swan, is reproduced in id. at 100-103.
129 According to the Supreme Court, the trial court found that “[g]iven the vast body of epidemiological data concerning Bendectin, ... expert opinion which is not based on epidemiological evidence is not admissible to establish causation.” Daubert, 509 U.S. at 583-584.
130 Daubert, 509 U.S. at 584 (citations omitted).
131 Id. at 587 (footnote omitted).
expert scientific testimony. That austere standard, absent from, and incompatible with, the Federal Rules of Evidence, should not be applied in federal trials.\textsuperscript{132}

After concluding that Rule 702 supercedes the \textit{Frye} test in determining the admissibility of expert testimony, the Court established the standard for admissibility to be applied pursuant to Rule 702.\textsuperscript{133}

Pursuant to \textit{Daubert}, the judge plays a gatekeeping role. In assessing admissibility of expert testimony, he/she must consider the relevance and the reliability of the proffered testimony; this inquiry includes a determination whether the testimony constitutes scientific knowledge and whether it will assist the trier of fact concerning a fact in issue.

For the relevance prong of the \textit{Daubert} test, judges are aided by the rules of evidence. \textit{Fed. R. Evid.} 401 provides:

"Relevant evidence" 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.

The Advisory Committee's Notes to Rule 401 provides further explanation:

Problems of relevancy call for an answer to the question whether an item of evidence, when tested by the processes of legal reasoning, possesses sufficient probative value to justify receiving it in evidence....Relevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case. Does the item of evidence tend to prove the matter sought to be proved?....The standard of probability under the rule is "more ... probable than it would be without the evidence." Any more stringent requirement is unworkable and unrealistic.\textsuperscript{134}

\textsuperscript{132} \textit{Id.} at 588-589 (citations and footnote omitted).
\textsuperscript{133} The Court continued:

That the \textit{Frye} test was displaced by the Rules of Evidence does not mean, however, that the Rules themselves place no limits on the admissibility of purportedly scientific evidence. Nor is the trial judge disabled from screening such evidence. To the contrary, under the Rules the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.

\textit{Id.} at 589 (footnote omitted).
\textsuperscript{134} \textit{FED. R. EVID.} 401, Advisory Committee's Notes, 25-26 (West Supp. 1999-2000).
So, when faced with a proffer of expert testimony or scientific evidence, the judge looks to this definition, provided by Rule 401.

Another important component to a relevance analysis concerns admissibility and appears in Rules 402 and 403. Rule 402 sets forth the admissibility standard:

All 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. Evidence which is not relevant is not admissible.\textsuperscript{135}

Very simply, Rule 402 codifies logical relevance, stating that only relevant evidence is admissible. However, legal relevance, set forth in Rule 403, differs from logical relevance in that it provides that even some evidence that is logically relevant is not admissible. Rule 403 states:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of 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.\textsuperscript{136}

So, even if the judge determines that the expert’s testimony is relevant under Rule 401, thereby rendering the testimony admissible pursuant to Rule 402, the court still might determine that the evidence is inadmissible under Rule 403 if the risk of prejudice substantially outweighs the probative value of the evidence.

The reliability prong of the judge’s determination proves more difficult. However, the \textit{Daubert} Court set forth guidelines or suggestions to assist the trial judge in his/her reliability inquiry, noting the flexibility apparent in the Rule 702 approach. Some of the suggested inquiries discussed by the Court include its testability, whether it has been subject to peer review and publication, “the known or potential rate of error” and “the

existence and maintenance of standards controlling the technique’s operation,137 and
general acceptance. In including this last inquiry, the Court pointed out that

“[w]idespread acceptance can be an important factor in ruling particular evidence
admissible, and ‘a known technique which has been able to attract only minimal support
within the community,’…may properly be viewed with skepticism.”138

In vacating and remanding the Ninth Circuit’s judgment, the Court concluded
with a summary:

“General acceptance” is not a necessary precondition to the admissibility of
scientific evidence under the Federal Rules of Evidence, but the Rules of
Evidence – especially Rule 702 – do assign to the trial judge the task of ensuring
that an expert’s testimony both rests on a reliable foundation and is relevant to the
task at hand. Pertinent evidence based on scientifically valid principles will satisfy
those demands.139

Hence, the Daubert Court interpreted the Federal Rules of Evidence as eliminating Frye
per se, though the Frye general acceptance standard remains one of the various criteria
that the trial judge considers when determining admissibility under Rule 702.140

137 Daubert, supra note 126, at 594.
138 Id. (citation omitted).
139 Id. at 597.
140 Though the Daubert decision represented a marked change in the handling or consideration of expert
scientific evidence, two authors suggest that the decision has not engendered a marked change in the
testimony that is admitted, at least not concerning behavioral and social science evidence:

[S]ince Daubert, evidence has been excluded in isolated cases that would have been admitted pre-
Daubert, but overall Daubert has not resulted in changes in the admissibility of behavioral and
social science evidence. Conversely, behavioral and social science evidence that was admitted
before Daubert has been admitted after Daubert….Even with the increased use of behavioral and
social science evidence in criminal cases, Daubert and its state court equivalents have had
relatively little impact on the admissibility of that evidence in criminal cases….Nor has Daubert
or its state court equivalents been a factor in reported cases addressing the admissibility of
behavioral and social science evidence in child custody cases….Finally, although clinical
testimony is frequently offered in guardianship and will contests, there are no reported cases
applying Daubert or its state court equivalents to the admissibility of this testimony.

Shuman and Sales, The Impact of Daubert and its progeny On the Admissibility of Behavioral and Social
Science Evidence, 5 Psychology, Public Policy, and Law 3, 4-5 (1999).
The Daubert Court limited its analysis to consideration of expert scientific evidence. The question remained -- and confusion ensued -- concerning other sorts -- i.e., nonscientific -- of proffered expert evidence. Though Rule 702 also mentions "technical, or other specialized knowledge," only scientific knowledge was addressed in Daubert, as that was the expert testimony at issue in that case.\(^{141}\)

In Kumho Tire Co., Ltd. v. Carmichael,\(^{142}\) the United States Supreme Court addressed this issue, whether Daubert applies to nonscientific experts as well. The Court summarized Daubert and explained the specific issue before it:

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\text{In Daubert v. Merrell Dow Pharmaceuticals, Inc., ... this Court focused upon the admissibility of scientific expert testimony. It pointed out that such testimony is admissible only if it is both relevant and reliable. And it held that the Federal Rules of Evidence "assign to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." ... The Court also discussed certain more specific factors, such as testing, peer review, error rates, and "acceptability" in the relevant scientific community, some or all of which might prove helpful in determining the reliability of a particular scientific "theory or technique." ... This case requires us to decide how Daubert applies to the testimony of engineers and other experts who are not scientists. We conclude that Daubert's general holding -- setting forth the trial judge's general "gatekeeping" obligation -- applies not only to testimony based on "scientific" knowledge, but also to testimony based on "technical" and "other specialized" knowledge... We also conclude that a trial court may consider one or more of the more specific factors that Daubert mentioned when doing so will help determine that testimony's reliability. But, as the Court stated in Daubert, the test of reliability is "flexible," and Daubert's list of specific factors neither necessarily nor exclusively applies to all experts or in every case. Rather, the law grants a district court the same broad latitude when it decides how to determine reliability as it enjoys in respect to its ultimate reliability determination.}\(^{143}\)

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\(^{141}\) The Court even noted that "Rule 702 also applies to 'technical, or other specialized knowledge.' Our discussion is limited to the scientific context because that is the nature of the expertise offered here." Daubert, 509 U.S. at 590, n. 8.


\(^{143}\) Kuhmo Tire Co., Ltd., 526 U.S. at 141-42.
In *Kuhmo*, the trial court denied admissibility to the plaintiff’s expert, a decision which the Supreme Court affirmed as being within the district court’s discretion.

*Kuhmo* was a personal injury suit arising out of an accident caused by a blown tire. The plaintiffs claimed that the tire was defective, and they relied on an expert in tire failure analysis. The district court performed a *Daubert*-type analysis and concluded that the methodology used by the expert was not reliable enough to admit his testimony, so it granted the motion to exclude the expert’s testimony. The court also granted plaintiff’s motion for reconsideration, performed another, more flexible *Daubert*-type evaluation, and again concluded that the expert’s methodology did not engender the requisite level of reliability. The United States Court of Appeals for the Eleventh Circuit reversed, finding that *Daubert* applies only to scientific, and not experiential-based, contexts.

The Supreme Court held that the gatekeeping obligation, to ensure that proffered expert testimony is both relevant and reliable, applies to all expert testimony. The trial court’s analysis of nonscientific experts, like scientific experts, is to be flexible, *may* include consideration of the factors set forth in *Daubert*, and the trial court is given a great deal of latitude in deciding how to evaluate expert reliability, as it is in deciding whether the expert’s testimony is relevant and reliable. Finding the trial court’s analysis to be within the judge’s discretion, the Court reversed the Eleventh Circuit’s judgment.

So, after *Kuhmo*, it is clear that the *Daubert* standard applies to the introduction of all expert testimony, not just scientific experts. Furthermore, the factors listed in *Daubert* are suggested criteria to be used in determining admissibility; they might or might not be pertinent to a relevance and reliability determination. Flexibility is important as the trial judge carries out the gatekeeping obligation.
There remains at least one problem with the Daubert/Kuhmo interpretation of Fed. R. Evid. 702, namely that the determination of admissibility is being made by the trial judge, typically a nonscientist/nonexpert. McCormick states the problem in terms of science:

The fundamental problem of scientific expert testimony is that judges and juries are compelled to evaluate scientific claims with little or no prior knowledge of the field. We call scientists in because they have knowledge that legal decisionmakers lack, then we ask those decisionmakers to evaluate intelligently that mysterious knowledge. How can they perform this task without becoming “amateur scientists”?144

Despite this shortcoming, the Daubert/Kuhmo interpretation of Rule 702 is currently the standard being applied to proffers of expert testimony, at least in federal court. In fact, Rule 702 was recently amended to incorporate Daubert and its progeny. The post-amendment Rule 702 states:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.145

It is likely that many state jurisdictions, which have adopted a similar version of Rule 702, will follow suit and adopt a Daubert/Kuhmo-type approach to expert testimony.146

144 Strong, supra note 111, at 309-310; see also Michael R. Leippe, The Case For Expert Testimony About Eyewitness Memory, 1 PSYCHOL., PUB. POL’Y & L. 909, 913 (1995): “First, the judges themselves are required by Daubert (1993) to make ‘a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and … properly can be applied to the facts in issue’ (p. 2796). This makes it likely that judges will scrutinize proffered testimony in piecemeal fashion. A judge may deem presentation of findings regarding some eyewitness factors admissible while excluding other findings from testimony because of inconsistencies across the otherwise valid studies. Theoretically, such scrutiny is sensible, except that the method leaves the decision of ‘enough’ regularity up to a nonscientist – the judge. Second, even if it is deemed ‘scientific knowledge,’ the judge must also decide whether a research finding assists jurors….This entails decisions regarding generalizability and intuitiveness of the finding, again a subjective matter.”


146 For a comparison of the Daubert versus Frye jurisdictions, as of 1995, see Meaney, supra note 118.
B. The Admissibility of Eyewitness Experts

"[A]sking a witness to tell 'nothing but the truth' may be a laudable ideal but an unrealistic expectation. Whilst most witnesses may well not lie deliberately, it is almost inevitable that at least some parts of their evidence will be fictitious."\textsuperscript{147}

The practice of introducing eyewitness experts appears to be of recent origin. In fact, the idea of experts testifying about eyewitness reliability was rarely considered before the mid-1970s.\textsuperscript{148} Even though the introduction of an eyewitness expert was not a popular practice prior to the 1970s and even though the legal field was reticent about accepting the psychologist's findings, some courts did acknowledge difficulties inherent in eyewitness identifications prior to the 1970s flourishing.\textsuperscript{149}

Courts on the whole, however, have been reticent about permitting evidence concerning the reliability of eyewitness testimony and have traditionally rejected a proffer of psychologist-as-expert to testify about the reliability of eyewitnesses. Although

\textsuperscript{147} Ainsworth, supra note 4, at 3.

\textsuperscript{148} Leippe, supra note 144, at 911. Cutler and Penrod mention the earlier history of such attempts:

Fulero (1993) identifies Criglow v. State (1931), an Arkansas case, as the first recorded instance in which a psychologist was proffered as an eyewitness expert....The trial court rejected the expert testimony and the Arkansas Supreme Court upheld the lower court’s decision. The basis for the Supreme Court’s ruling was that the expert testimony would “invade the province of the jury.” Twenty one years later, in People v. Callier (1952), the defense offered a psychologist as an expert to testify about the contention that “an individual under emotional stress would be less likely than at other times to make correct observations.” The California trial court did not admit the expert testimony, noting, as in Criglow, that the expert testimony would invade the province of the jury. The Criglow court also considered the content of the testimony was “within the field of common knowledge and experience.”

Cutler and Penrod, supra note 11, at 19.

According to Cutler and Penrod, again citing Fulero, the proffered testimony in these earlier cases differed from that proffered in more contemporary cases. In the earlier cases, the expert was asked his/her opinion about the reliability of a particular individual in particular circumstances. This opinion was elicited through response to a hypothetical question. In contemporary cases, however, experts are not asked about the reliability of a particular witness' identification or testimony; rather, today's experts are asked to explain the variables, how they can impact the reliability of identification, and the literature that supports these conclusions. \textit{Id.}

\textsuperscript{149} The United States Supreme Court, for example, discussed these problems in its trilogy, United States v. Wade, 388 U.S. 218 (1967), Gilbert v. California, 388 U.S. 263 (1967), and Stovall v. Denno, 388 U.S. 293 (1967).
courts may be moving in the direction of recognizing the value and propriety of, and embracing, expert testimony on eyewitness reliability, this change has been slow to evolve.

The reported appellate cases almost exclusively deal with review of a lower court’s exclusion of proffered testimony by an expert in eyewitness reliability. This is not surprising; as most cases in which the use of eyewitness experts arise are criminal cases wherein the defendant offers the expert, it would be unusual for there to be a review of a court’s decision to admit the testimony.

The next section discusses rationales employed in excluding eyewitness expert testimony, and the section following that considers rationales supporting the admission of the expert evidence. A difficulty that impacts evaluation of the courts’ positions in considering motions to admit eyewitness experts is raised briefly in the last section of the chapter.

1. Rationales Supporting Exclusion

The courts have given various arguments in support of their decisions to exclude these experts. Some of the rationales focus on the jury; some focus on the evidence itself; and, some focus on the trial procedure. Judges, however, rarely rely on only one of these justifications. They typically offer more than one reason in support of their decision to exclude eyewitness expert testimony, and often their justifications include more than one of these differing objects of focus.

The United States Court of Appeals for the Ninth Circuit, for example, has had ample opportunities to use assorted justifications for affirming exclusion, as it has reviewed a number of appeals of decisions to exclude eyewitness experts. As a result, this
court has relied on – or affirmed the reliance on – many of the rationales discussed below. In *United States v. Amaral*,¹⁵⁰ wherein the trial court excluded the proffered expert testimony of a psychologist to testify regarding the effect of stress on perception and the unreliability of eyewitness identification in general, the court recognized many of these rationales as it set forth its test, or criteria, for the admissibility of expert testimony:

The general test regarding the admissibility of expert testimony is whether the jury can receive “appreciable help” from such testimony....The balancing of the probative value of the tendered expert testimony evidence against its prejudicial effect is committed to the “broad discretion” of the trial judge and his action will not be disturbed unless manifestly erroneous....The countervailing considerations most often noted to exclude what is relevant and material evidence are the risk that admission will 1) require undue consumption of time, 2) create a substantial danger of undue prejudice or of confusing the issues or of misleading the jury, 3) or unfairly and harmfully surprise a party who has not had a reasonable opportunity to anticipate the evidence submitted. Scientific or expert testimony particularly courts the second danger because of its aura of special reliability and trustworthiness.

Because of the peculiar risks of expert testimony, courts have imposed an additional test, i.e. that the testimony be in accordance with a generally accepted explanatory theory....[E]xpert testimony must also be in regards to a proper subject.

Finally, expert testimony is admissible only when the witness is in fact an expert and is accepted as such by the trial court.¹⁵¹

The court affirmed the exclusion of the expert, concluding that cross-examination could reveal the effects of stress and any weaknesses in the identification and that the different eyewitnesses were under differing amounts of stress.

As the *Amaral* example suggests, most courts invoke multiple rationales when they render decisions to exclude or to affirm exclusion. These justifications supporting exclusion are discussed below according to their points of focus, and a paradigm example (or two) is presented.

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¹⁵⁰ *United States v. Amaral*, 488 F.2d 1148 (9th Cir. 1973).
¹⁵¹ *Amaral*, 488 F.2d at 1152-53.
a. Evidentiary Rationales

One category of rationales provided by courts excluding eyewitness expert testimony pertains to the nature of the evidence itself. These courts argue that the proffered eyewitness experts must be excluded because the underlying scientific theories are not sufficiently valid. There are two main objections frequently raised concerning the scientific nature of the evidence.

First, some courts embracing an evidentiary explanation, particularly in *Frye* jurisdictions, object that the science underlying the expert’s testimony has not gained general acceptance in the psychology field. These courts frequently cite the minority of psychologists who oppose the introduction of eyewitness experts particularly McCloskey and Egeth, to support their conclusion that the proffered evidence has not gained general acceptance among research psychologists.

This was one of the reasons given by the United States Court of Appeals for the Ninth Circuit in a pre-*Daubert* decision, *United States v. Rincon*, a bank robbery case.\(^{152}\) At trial, Rincon attempted to introduce the expert testimony of an experimental psychologist who would have informed the jury about the three phases involved in eyewitness identification, about how many commonly held beliefs are belied by the research, and about “the effect of various psychological factors on each phase, including stress, the observer’s state of mind, suddenness, suggestibility, and cross-ethnic identifications.”\(^{153}\) The Ninth Circuit concluded, *inter alia*, that the generally accepted theory component was not met:

\(^{152}\) *United States v. Rincon*, 984 F.2d 1003 (9th Cir.), *vacated*, 510 U.S. 801 (1993).

\(^{153}\) *United States v. Rincon (Rincon II)*, 28 F.3d 921, 923 (9th Cir.), *cert. denied*, 513 U.S. 1029 (1994). The court also noted that the expert “would have addressed factors that effect eyewitness identifications, such as
In affirming the district court [in *United States v. Christophe*, 833 F.2d 1296 (9th Cir. 1987)], we stated that "the proffered expert testimony does not conform to a generally accepted explanatory theory. Psychologists do not generally accept the claimed dangers of eyewitness identification in a trial setting." (citing McCloskey & Egeth, *Eyewitness Identification: What Can A Psychologist Tell A Jury?* 38 AM. PSYCHOLOGIST 550, 551 (May 1983) ("there is virtually no empirical evidence that [jurors] are unaware of the problems with eyewitness testimony"). We also noted that psychologists warn such expert testimony may make jurors overly skeptical of an eyewitness’ testimony as a result of the expert’s testimony. Id. at 1300 n. 1.

In this case, Rincon failed to convince the district court judge that the expert’s testimony on eyewitness identification is generally accepted in the field.\(^{154}\)

When *Rincon* was reconsidered, in light of *Daubert*,\(^{155}\) the lower court then determined, *inter alia*, that there was no evidence produced showing that the testimony was scientifically valid, that is, tied to an area recognized as a science.\(^{156}\)

The Ninth Circuit again affirmed the lower court’s decision to exclude the proffered expert. In *Rincon II*, the appellate court noted that the *Daubert* court held that Rule 702 superseded the *Frye* test. The trial court had reaffirmed its exclusion of the eyewitness expert on essentially the same grounds as it gave for its initial ruling:

1. The proposed testimony invades the province of the jury (i.e., it does not assist the trier of fact);
2. No showing has been made that the testimony relates to an area that is recognized as a science; and
3. The testimony is likely to confuse the jury.

Moreover, the district court stated that "the proposed expert eyewitness identification testimony is being offered by the defense more in the role of an advocate and not as a scientifically valid opinion."\(^{157}\)

\(^{154}\) Id. at 1282.

\(^{155}\) *Rincon*, 833 F.2d at 1296.

\(^{156}\) *United States v. Rincon*, 11 F.3d 922 (9th Cir. 1993).

\(^{157}\) Id. at 923.
Noting, *inter alia*, that the trial court conveyed the proffered information in a comprehensive jury charge, the appellate court found no abuse of discretion and, hence, affirmed.

The Ninth Circuit's conclusion, that the theory underlying the testimony was not generally accepted, misconstrues the nature of the discipline. Although this court recognized the wealth of research studying eyewitness evidence, it reached its conclusion because of a dissenting position held by a minority of psychologists. By citing the minority view, voiced by McCloskey and Egeth, the court demonstrated its misunderstanding of not only psychology but the nature of science in general. A generally accepted scientific theory may be widely accepted and yet have dissenters who reject that view. Being generally accepted does not mean that there are no opposing minority positions posited by those who disagree with the generally accepted view; the existence of a dissenting minority is not inconsistent with the theory being generally accepted.

Even the most widely accepted scientific theory can have detractors. For example, evolutionary theory is a generally accepted scientific theory; nonetheless, there is a vociferous minority that believes that this theory is incorrect and that creationist theory instead is the correct theory. The existence of this minority, though, does not mean that evolutionary theory is not generally accepted.

There are not many scientific theories without dissenters; in fact, it is hard to imagine a scientific theory without a dissenting view. But, having a few who disagree with the widely held theory does not yield the conclusion that the theory is not science or is not generally accepted. The *Rincon* court's conclusion suggests that the court
misunderstood the nature of science as a discipline, that it was employing too rigid a standard for general acceptance, or that it believed that psychology is sufficiently different from other sciences that, unlike those others, a dissenting view is not acceptable. If the court holds this latter belief, however, it does not explain why it believes psychology differs from other scientific disciplines.

Other courts -- particularly in Rule 702 and Daubert/Kumho jurisdictions -- go even further. Instead of questioning the general acceptance of the theory underlying the testimony, these courts raise the second main objection and question the scientific validity of the evidence. That is, these courts question whether the substance of the expert's testimony even constitutes scientific knowledge; they inquire whether the testimony is reliable because it does not constitute scientific knowledge.

The United States Court of Appeals for the Eighth Circuit, for example, upheld a district court's exclusion of a proffered eyewitness expert for this reason in United States v. Kime. The appellate court agreed with the lower court's determination that, inter alia, the proffered evidence does not constitute "scientific knowledge" under Daubert. The court was concerned that the scientific nature of the evidence had not been established in the materials submitted with the proffer of Dr. Wells. It noted that the submitted materials were "utterly deficient" to establish that the evidence is scientific in that "their reference to the research and/or studies upon which Dr. Wells' propositions and corollaries are based consist of nothing more than the name of the researcher

followed by the date of the study...." On this basis, the court concluded that the record supported the conclusion that the scientific nature of the testimony was in question.

The conclusion that the theoretical underpinnings of the expert’s testimony does not constitute scientific knowledge overlooks the advances of psychology as a discipline, as well as the rich development of the research in memory, perception, and eyewitness testimony. To be fair, the Kime court claimed to reach this conclusion because, in its view, the necessary evidence demonstrating the scientific nature of the proffered testimony was not introduced. However, the court did receive, at the least, names and dates of studies. Even if this were deemed insufficient, it does not follow that the discipline does not constitute scientific knowledge. If a different sort of expert were proffered – say an epidemiologist to offer an expert opinion that asbestos exposure causes asbestosis – and the supporting material did not sufficiently depict the underlying discipline as sufficiently proven, it is doubtful that the court would then conclude that Epidemiology is not a science. Perhaps the needed reliability was lacking; that is a different shortcoming, however, than the conclusion that it is not a science.

b. Procedural Rationales

A second category of rationales offered by courts in excluding eyewitness expert testimony focuses on the procedure or the nature of the proceedings. The genesis of most of the objections subsumed under procedural-oriented justifications is the Federal Rules of Evidence. Specifically, Rule 403 states:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of 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.

159 Id. at 883.
FED. R. EVID. 403.

There are five main procedural-oriented objections, deriving from Rule 403, that have been raised.

First, some courts exclude proffered eyewitness testimony because they believe that the testimony will lead to confusion. If there is a likely chance that jurors will become confused, the court will not permit the testimony.

Concern about confusion has influenced the United States Court of Appeals for the Second Circuit. In United States v. Serna,\(^{160}\) for example, while concluding that excluding the proffered expert was not error, the court stated: "This court is fully aware of the dangers of testimony based purely on eyewitness identification, and we have often commented on those dangers....Nevertheless, we do not think that this expert's proffered testimony would have done anything other than to muddy the waters."\(^{161}\) Hence, the court found that there had been no abuse of discretion. Also, the Second Circuit expressed concern about confusion in a more recent case, United States v. Veal.\(^{162}\) The potential for creating confusion was one of the justifications that the Veal court relied on in finding no abuse of discretion in the exclusion of the identification expert.\(^{163}\)


\(^{161}\) Serna, 799 F.2d at 850.


\(^{163}\) Another reason was the trial judge's belief that the subject of the testimony was common sensory and within the province of the jury. In Veal, "[t]he expert would have testified about factors that affect the validity of eyewitness identification such as the duration of time the witness sees someone, the length of time between witnessing the event and making an identification, the witness' motivation for remembering the event, and possible bias associated with photo arrays. Veal was particularly interested in the expert's proposed testimony that police officers are not superior eye witnesses and that a witness' confidence in making an identification does not correlate to its reliability." Veal, 1999 U.S. App. LEXIS 13324 at *2. As was discussed in the last chapter, the lack of superiority of police officers and the relationship between confidence and accuracy are not commonly known.
The Ninth Circuit has also utilized the confusion objection. In *Rincon II*, where the court quoted the lower court’s rationales for its exclusion ruling, as the passage quoted above reveals, one of the justifications was that the expert’s testimony would likely confuse the jury. The reviewing court affirmed the lower court’s holding.

There is no evidence, however, that eyewitness expert testimony in fact does confuse jurors. Besides this specious presumption, the confusion rationale is paternalistic and reflects a presumption that jurors are not very intelligent or sophisticated. That is, without any sort of evidentiary support, courts invoking the confusion rationale “determine” that the jurors would become confused if faced with expert testimony on the reliability of eyewitnesses; the judges then “protect” the jurors and exclude this testimony.

Furthermore, courts that advance this justification for excluding eyewitness expert testimony do not explain why this type of expert testimony differs from other expert testimony that is admitted into evidence. That is, why are jurors intelligent and sophisticated enough to be able to evaluate and consider expert testimony from, say, medical experts concerning relationships between Bendectin and birth defects without being confused, yet experience confusion when faced with a research psychologist testifying on the reliability of eyewitness testimony?

Other courts invoke a second procedural-focused objection, namely that the introduction of an eyewitness expert will take too much time. Courts are concerned about the strain placed upon the judicial system and their overloaded dockets. With this in mind, judges attempt to streamline the process as much as possible.
One of the few courts to mention time expenditure as an objection is the Ninth Circuit. In the *Amaral* opinion, the appellate court includes time: “The countervailing considerations most often noted to exclude what is relevant and material evidence are the risk that admission will 1) require undue consumption of time....”

The concern that eyewitness expert testimony will take up too much time is not an often-cited justification for excluding the testimony; frequently, when this objection is raised, it is in the context of a battle of the experts, discussed below. Nonetheless, it is a specious objection in most cases.

If the testimony is relevant, assists the jury in its decisionmaking process within the case, and is otherwise admissible, it is worth the time it will take to hear the testimony; simply because the introduction of some piece of evidence is time consuming, in and of itself, should not render inadmissible otherwise admissible evidence. This is particularly true in a criminal case when the expert is proffered by the accused, the most frequent scenario involving the proffer of eyewitness experts, as the legal system is especially concerned with protecting the rights of the accused and with providing the accused with ample opportunity to exculpate himself or herself. This procedural objection is contrary to some of the fundamental tenets of our legal system.

A third procedural objection embraced by courts is that the ensuing prejudice resulting from the testimony will, on balance, outweigh any probative effect of that testimony. The prejudice versus probative value test, set out in Rule 403, is frequently raised as a justification for a court’s decision that eyewitness expert testimony is inadmissible.

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164 *Amaral*, 488 F.2d at 1152.
One court to cite this objection was the United States Court of Appeals for the First Circuit, in *United States v. Fosher*, a case relying almost entirely on two eyewitnesses. The prejudice versus probative value concern was one of the reasons why the lower court disallowed the eyewitness expert:

the proffered testimony would not assist the jury in determining the fact at issue; ... the jury was fully capable of assessing the eyewitnesses' ability to perceive and remember, given the help of cross-examination and cautionary instructions, without the aid of expert testimony; ... expert testimony would raise a substantial danger of unfair prejudice, given the aura of reliability that surrounds scientific evidence; and ... the limited probative value of the proof offered was outweighed by its potential for prejudice.

The appellate court looked with favor upon the lower court's reasoning, despite the fact that the research has shown that jurors lack this capability and that cross-examination and jury instructions are not sufficient to resolve this problem.

Many courts relying on the probative value/prejudice balancing test appear to lack an understanding of the nature of the testimony and the effect that it has on the jury. The prejudices often cited by these courts – such as wasting time and juror confusion – are unsupported. Furthermore, these courts appear to underestimate the probative value of the expert's testimony. Their opinions seem to reflect a lack of understanding of the eyewitness research and the influence of the experts' testimony. Granted, there are times when the probative value of the proffered testimony might be low – for example, if an eyewitness expert were asked to testify about the effects of alcohol or poorly lit environs – but these are not the situations in which courts are concluding that the testimony has low probative value. The cases in which they are reaching these conclusions are frequently cases involving factors that influence eyewitnesses in counterintuitive ways.

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165 *United States v. Fosher*, 590 F.2d 381 (1st Cir. 1979).
166 *Id.* at 382.
and where the jury is not aware of these counterintuitive effects. Overall, applications of
the balancing test reflect general ignorance by courts about the results of eyewitness
research.

A fourth procedure-oriented objection that has been raised by the courts pertains
to the “battle of the experts”. This objection often overlaps with the time objection
considered above, as courts raising this rationale for exclusion envision a lengthy,
tangential process which will sidetrack the trial.

One court to recognize the “battle of the experts” rationale used by courts to
justify their decision to exclude eyewitness experts is the First Circuit, while setting forth
its general rules, in United States v. Brien:

In all events, for a range of reasons, trial courts have long hesitated to admit
expert evidence purporting to identify flaws in eyewitness identification: for
example, courts have said that the jury could decide the credibility issues itself;
that experts in this area are not much help and largely offer rather obvious
generalities; that trials would be prolonged by battles of experts; and that such
testimony created undue opportunity for confusing and misleading the jury.
Appeals courts have generally upheld rulings excluding such evidence.... 167

The concern that courts invoking this rationale have is that the move to admit expert
eyewitness testimony will not end with the admission of that expert. Instead, the simple
request, it is feared, will mushroom.

For example, if the court grants the defendant’s request for admission of the
eyewitness expert, the plaintiff or prosecution will then want to introduce its eyewitness
expert in an attempt to contradict the testimony of the defendant’s expert. Suddenly, a
great deal of the jury’s time is spent listening to conflicting expert testimony and trying to
understand the information imparted by the experts and to evaluate the credibility of the

conflicting positions. This “battle” is so far removed from the central issues in the case that the courts are reticent about permitting any of the testimony.

Although this objection might have merit, that merit is found only in a small number of limited circumstances, such as when the testimony of the eyewitness is itself tangential. For most situations, however, the identification of the defendant is a central issue, so evidence bearing on the credibility of those eyewitnesses – such as an eyewitness expert – is similarly not tangential. A court does not exclude a witness who, for example, will testify that the eyewitness wears glasses all the time but did not have the glasses on at the time of witnessing the event in question. If this witness’s impeachment testimony is not tangential, why is an eyewitness expert’s? Both provide the jury with tools to evaluate the credibility of witnesses and the reliability of testimony.

Courts employing this objection, however, do not explain why the introduction of competing experts in other areas – for example, reconstruction engineers with differing opinions about whether the tire separation caused a rollover accident – is permissible while a similar “battle” with eyewitness experts renders it inadmissible. Although courts are always mindful to avoid trying tangential issues in a trial, other commonly accepted expert testimony is generally not excluded when there is an expert with a contrary opinion testifying for the other side.

Furthermore, exclusion of eyewitness experts because of a potential “battle of experts” suggests a misunderstanding of the eyewitness research and of the scientific process in general. As noted above, virtually no scientific theory is without its detractors. Eyewitness research is no exception. Permitting an expert to testify on both sides provides the jury with a clearer idea of the status of the current thought in that field.
The fifth procedural-focus objection frequently cited by courts is that eyewitness expert testimony is unnecessary because the problems to which it is geared are sufficiently brought to the jury’s attention through other already existing procedural mechanisms. In other words, according to these courts, such expert testimony wastes time and is superfluous, or unnecessarily duplicative, because the jury is – or could be – informed of the reliability problems inherent in eyewitness evidence through existing procedural devices in trials. The primary procedural devices utilized are cross-examination, arguments of counsel, and instructions to the jury.

The United States Court of Appeals for the District of Columbia Circuit, for example, has relied on this objection. In United States v. Telfaire,168 a robbery case in which the defendant was convicted on the basis of a single witness. The court noted the instructions given by the trial judge and the “overall context of the case” and then concluded that “the attention of the jury was significantly focused on the issue of identity.”169 The Telfaire court went beyond its reviewing role and, in an appendix to the opinion, set forth a model jury instruction for lower courts to use.

Many courts embrace this rationale to justify the exclusion of a proffered eyewitness expert. They believe that the procedural mechanisms in our legal system – such as cross-examination, argument by counsel, and jury instructions – are the fundamental processes that enable our system to work.170 The belief that these other procedural processes obviate the need for an eyewitness expert, however, reflects a lack of understanding on the part of the judges.

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169 Id. at 556.
170 The Ninth Circuit, for example, has stated that “[o]ur legal system places primary reliance for the ascertainment of truth on the ‘test of cross-examination.’” Amaral, 488 F.2d at 1153.
First, the eyewitness research demonstrates that the use of cross-examination, argument by counsel, and instructions to the jury does not provide the assistance to the jury that the eyewitness expert does.171 Having the information imparted by a partial attorney— or even an impartial member of the judiciary— does not carry the same weight as having a research psychologist who works with, and is familiar with, the research explain the information. The research psychologist is a more credible source of information about eyewitness research. Even though the expert is frequently hired and paid by one side, he/she does not have a vested interest, as does the party’s attorney. The expert who spends his/her time researching and studying eyewitness reliability is not partial in the sense that a lawyer, who spends his/her time as an advocate for his/her clients, is partial.

Furthermore, though the judge is not partial in the sense that the lawyer is, the substance of the expert’s testimony is clearly outside the bailiwick of both the lawyer and the judge. As misunderstood as the legal profession might be, the lay public has a pretty good idea that the research psychology at issue is not taught in law schools. People are more likely to pay attention to or to accept information from one who is an expert in that area, as when the jury learns the law of the case, an area within the judge’s bailiwick, from the judge’s charge to the jury. Hence, the eyewitness expert, not the attorneys or the judge, is the one to impart the information about eyewitness reliability to the jurors.

Second, with the jury instructions and arguments by counsel, there is also a timing problem. That is, receipt of the information is so far removed from observation of the testimony of the witness, the time when jurors’ impressions and memories are formed,

171 See, e.g., Leippe, supra note 144; Penrod and Cutler, supra note 77.
that the information will not – or perhaps even cannot – be applied to the eyewitnesses observed.\textsuperscript{172}

And third, the psychological research demonstrates that lawyers and judges do not understand the permutations of eyewitness reliability any better than other lay people, such as the jurors. As they, too, are unaware of the counter-intuitive nuances of eyewitness reliability, the information that they impart to the jurors may perpetuate the misunderstandings. Even if they consulted with experts before informing the jury, they do not understand the material at the sophisticated level as does the expert.

We also do not permit the judge or attorneys to inform the jury about other specialized, technical information. Having the judge or the attorneys inform the jury about eyewitness reliability would be akin to having them inform the jury about, say, the tie between ingesting Bendectin and subsequent birth defects or the effect of tire tread separation on rollover accidents. Experts are used in these areas because the information is not within the legal bailiwick; similarly, with eyewitness reliability, the attorneys and judges are ill-prepared to educate the jury about the problems with the testimony. The courts adopting this rationale do not explain why the information in question differs from other information on which we routinely permit expert testimony.

c. Jury Rationales

A third group of rationales offered by courts in excluding eyewitness expert testimony looks to the jury. There are assorted jury-related concerns that courts frequently rely on; with the different ways that these objections are phrased, though, it

\textsuperscript{172} For more on the timing problem, in a slightly different context, see text accompanying notes 215-217, infra.
can often be difficult to distinguish the separate objections. Four main jury-oriented objections are considered here.

The first, frequently cited objection is that the proffered testimony will be of no assistance to the jury. Some courts that claim that eyewitness experts will not assist juries mean that the information that the experts impart to the jurors is commonsensical and is information of which jurors are already aware; this is the second jury-oriented objection, below. Other courts citing no assistance, however, mean that the jurors are capable of executing their duties – viz. evaluating the credibility of the eyewitnesses – without any added information from an expert. Yet others use the rationale that eyewitness experts are of no assistance to the jury as a generic objection including a panoply of unspecified difficulties.

One court to rely on this justification for affirming the exclusion of eyewitness testimony was the United States Court of Appeals for the Fourth Circuit, in United States v. Harris.¹⁷³ Harris was convicted of robbing a bank at knifepoint primarily on the testimony of three eyewitnesses, bank employees who recognized him by sight and voice as he had visited the bank on two separate occasions earlier that same day. Some of the proffered expert’s testimony would have included the confidence-boosting effect of witness discussions amongst themselves; the effect of stress; unconscious transference; and, the distortion of memories over time.

The trial court ruled that the expert evidence was inadmissible because the testimony would not be helpful to the jury, the identification was not at issue, the jury could resolve any credibility issues without the assistance, and the probative value was

¹⁷³ United States v. Harris, 995 F.2d 532 (4th Cir. 1993).
outweighed by the prejudicial effect. In affirming the trial court, the appellate court stated:

This type of evidence, almost by definition, can be of no assistance to a jury....Until fairly recently, most, if not all, courts excluded expert psychological testimony on the validity of eyewitness identification....But, there has been a trend in recent years to allow such testimony under circumstances described as "narrow"....Most courts allowing such expert testimony, however, recognize that the ultimate determination of admissibility, as with most Rule 702 evaluations, rests within the sound discretion of the trial court....Outside of such narrowly constrained circumstances, jurors using common sense and their faculties of observation can judge the credibility of an eyewitness identification, especially since deficiencies or inconsistencies in an eyewitness's testimony can be brought out with skillful cross-examination.\(^{174}\)

The court determined that the facts of the case did not constitute an instance of those narrow circumstances, as there was an "evidentiary cornucopia" supporting the conviction and as cross-examination could reveal discrepancies. Hence, it affirmed the exclusion of the expert testimony.

When courts, like the Fourth Circuit, conclude that eyewitness experts cannot provide assistance to jurors and that jurors using common sense are able to reliably evaluate the credibility of eyewitnesses, they are overlooking – or eschewing – the plethora of psychological research demonstrating both that experts can provide assistance to jurors and that jurors utilizing only common sense insufficiently distinguish reliable from unreliable eyewitness testimony. The courts that rely on this justification may, however, be correct if the expert is proffered to testify about those variables affecting eyewitness reliability that are within common knowledge – e.g. that intoxication or poor lighting conditions adversely affect reliability. However, the courts do not distinguish between these variables and the ones that have been found to be counterintuitive – such

\(^{174}\) *Id.* at 534-535.
as the relationship between confidence and accuracy or that the stress of the moment does not render one's recollections more accurate.

In other words, the courts' opinions do not suggest that they have a sophisticated understanding of the permutations of the psychological research and that they are distinguishing between experts who will testify about the commonly known variables, such as alcohol influence, and those who will testify about the variables that are outside of, or counter to, our common sense intuitions, such as the effect of stress. These courts appear to take a broad brush approach and exclude all eyewitness expert testimony because the testimony, as a whole, is commonsensical. This approach demonstrates a lack of understanding on the part of the deciding judges, which is not surprising in light of the studies, discussed in Chapter Two, that demonstrate judges' and lawyers' ignorance on the issue.

The second objection focusing on the jury overlaps with the first and perhaps is not a separate objection at all. Courts espousing this justification argue that the substance of the proffered testimony is a matter of common sense or, put a different way, that the jury is already aware of that information. No matter how they phrase the objection, courts relying on this justification for exclusion are concerned that the testimony will be superfluous. This objection looks a bit like the first because these courts believe that the expert cannot assist the jury as the subject matter of the expert's testimony is common knowledge; using their common sense, the jurors will evaluate eyewitness testimony in light of these known variables. However, even though courts do find that eyewitness experts cannot assist jurors because they are already aware of the information, they also do, or can, find that the experts will not assist the jury for other reasons. This second
rationale, often cited on its own, is only one of the grounds on which the failure to assist is alleged.

The First Circuit employed this sort of rationale in *Fosher*, discussed above. The *Fosher* court noted that the lower court had disallowed the testimony because, *inter alia*, "the proffered testimony would not assist the jury in determining the fact at issue;...the jury was fully capable of assessing the eyewitnesses’ ability to perceive and remember..."\(^{175}\)

The United States Court of Appeals for the Seventh Circuit also affirmed a lower court's exclusion of eyewitness experts because the testimony was a matter of common knowledge. In *United States v. Curry*,\(^ {176}\) a somewhat intricate case involving a large operation of manufacturing and distributing marijuana, Dr. Loftus was offered to testify that witnesses overestimate the duration of their observations, that there is little, if any, relationship between confidence and accuracy, that memory fades at geometric, rather than arithmetic rates, the possible distorting effect of post-event information and events, the negative effect of prior photographic identifications, and the decreased retention effect of social alcohol and marijuana use. The Seventh Circuit determined that the trial judge's decision to exclude Dr. Loftus' testimony – because the proffered testimony concerns issues of which the jury is generally aware – did not constitute an abuse of discretion.

It is not clear from *Curry*, however, whether the Seventh Circuit agreed with the lower court's reasoning, as it concluded that, though "Dr. Loftus' testimony may not have

\(^{175}\) *Fosher*, 590 F.2d at 382.

been totally unhelpful...", 177 the eyewitness evidence was only a portion of the available evidence and the weaknesses were revealed by vigorous cross-examination. However, this court’s position was later clarified in United States v. Daniels, [CITE]:

"Expert testimony regarding the potential hazards of eyewitness identifications ... will not aid the jury because it addresses an issue of which the jury already generally is aware, and it will not contribute to their understanding of the particular factual issues posed."... Obviously, it follows that if we do not permit eyewitness expert testimony, such testimony is not necessary for Daniels’ defense. 178

This affirmation suggests that this circuit does not recognize any need for expert eyewitness testimony.

Besides demonstrating ignorance of the psychological research, like the courts, discussed above, that use the justification that experts cannot assist juries, there is a further difficulty that applies to this rationale. Even if the court were uncertain about the commonsensical nature of the evidence, it cannot be harmful to the jury’s decisionmaking process to have their common sense beliefs confirmed by an expert doing research in the field. It can, in fact, be helpful; we have all known individuals who “have no common sense”. Those with skewed common sense, those who lack some basic intuitions, or those who might not feel too confident of their intuitions could benefit from learning the information or from having their knowledge reinforced by one who is an expert in that field. So, although admitting eyewitness expert testimony might take a bit more time, it is worth that expenditure to ensure that all jurors are at the same place with their common sense knowledge and, therefore, that the defendant’s rights are properly protected. Even putting aside the problem that the courts are generally ignorant of the fact that often times the “common sense knowledge” is erroneous – such as the belief that the

177 Id. at 1051.
178 Id. at 315.
stress of the moment will seer that experience or perception into one’s memory with accurate detail that one will never forget – the testimony is not superfluous.

Other courts raise a third jury-focused objection, namely that the expert’s testimony will usurp the jury’s function or, phrased differently, that the expert will invade the province of the jury. These courts usually point out that it is the jury’s job to evaluate the witnesses and to determine the credibility of the witnesses in light of the many variables unique to each particular case. Their concern is that the eyewitness expert will end up performing these functions instead of the jurors.

This objection is one of many raised by the Ninth Circuit in several of the eyewitness expert cases it has reviewed. For example, in *Amaral*, the court upheld the lower court’s finding that the anticipated testimony would usurp the jury’s decision concerning the weight to be given to the eyewitness testimony. The district court disallowed the expert evidence because:

“It would not be appropriate to take from the jury their own determination as to what weight or effect to give to the evidence of the eyewitness and identifying witnesses and to have that determination put before them on the basis of the expert witness testimony as proffered.”

The Ninth Circuit again accepted this objection in a later case, *Rincon II*. The *Rincon II* passage quoted above shows that invading the province of the jury was one of several reasons relied on by the lower court in excluding the proffered eyewitness expert. The decision was affirmed by the reviewing court.

This objection might have been valid when eyewitness experts were first proffered. In the early cases, experts were asked their opinions about the reliability of a particular individual in particular circumstances. This opinion was elicited through

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179 *Amaral*, 488 F.2d at 1153 (quoting the trial court).
180 *Rincon*, 28 F.3d at 921.
response to a hypothetical question. In this case, the testimony of the expert could be seen as invading the province of the jury or usurping the jury’s function, as the expert is judging the credibility of the actual witness, one of the jobs of the jury. It is not clear, however, why this sort of expert testimony is treated differently. That is, other expert witnesses are permitted to testify about issues that are within the province of the jury without being excluded because they usurp the jury’s function.

For example, in a products liability action, one of the key issues to be decided by the jury is causation, that is, whether the product in question was the cause of the injury in question. However, physicians have been admitted as experts to testify whether Bendectin causes birth defects, and accident reconstruction experts have been permitted to offer their expert testimony concerning tire separation causing rollover accidents. They are even asked, inter alia, whether, to a reasonable degree of medical certainty or to a reasonable degree of engineering certainty, the specific injuries in question were caused by the Bendectin or the tire separation, respectively. These causation issues are ultimately to be decided by the jury. Nonetheless, courts have admitted these experts and let them testify about ultimate issue such as these. No reason is given why eyewitness expert testimony is treated differently. Nonetheless, this objection is probably moot in today’s proceedings involving eyewitness experts.

In contemporary cases eyewitness experts are not asked about the reliability of a particular witness’s identification or testimony. Rather, today’s experts are asked to explain the variables, how they can impact the reliability of identification, and the literature that supports these conclusions. Their testimony is offered in an attempt to educate the jury and to assist the jury in its task of evaluating witness credibility; its
purpose is to inform the jury of psychological findings it is unaware of that will impact its ability to carry out its functions, not to carry out those functions for the jury. Unlike the experts in the Bendectin or tire separation cases, eyewitness experts are no longer questioned about the ultimate issue of the credibility of witnesses. So, to object to today’s proffered eyewitness expert on the ground that it invades the province of the jury and usurps the jury’s ultimate decision making function in evaluating the credibility of the witnesses reflects a misunderstanding of the nature and use of the expert’s testimony and of the procedure governing its admission.

A fourth jury-oriented objection sometimes voiced by courts focuses on the power of the eyewitness experts and the effect it will have on the jury. This concern focuses on the perceived power disparity between the lay persons on the jury and the expert as witness. These courts fear that, because of this purported power disparity, the jurors will likely put too much faith in the expert’s testimony, or will accept the expert’s testimony without using the critical evaluation that they purportedly apply to lay witness’ testimony. They are concerned, in short, that jurors will be overly influenced by the expert.

The First and Eighth Circuits, for example, have commented on the prejudice that would result due to the “aura of reliability and trustworthiness” attributed to the expert testimony by the jury.\textsuperscript{181} The Ninth Circuit, on the other hand, citing the minority of psychologists, argue that instead of inclining jurors to overbelieve the expert, the expert’s “aura” may render jurors overskeptical: “psychologists warn such expert testimony may

\textsuperscript{181} See Fosher, 590 F.2d at 383 (affirming the trial court, which was concerned about “a substantial danger of undue prejudice and confusion because of its aura of special reliability and trustworthiness.”) and Purham, 725 F.2d at 454(citing the unfair prejudice that might result from the “aura of reliability and trustworthiness.”).
make jurors overly skeptical of an eyewitness' testimony as a result of the expert's testimony.\textsuperscript{182} Though the courts may differ concerning the result they expect to be engendered by the expert and his/her "aura", they are in agreement with their concern that the perceived status of the expert will have a negative, exaggerated impact on jurors.

This objection is paternalistic and does not attribute much confidence in the intelligence and the integrity of the lay persons making up our juries. But the concern also reflects an ignorance -- whether unintentional or selectively intentional -- of the psychological research examining the effect of the expert on juror decisionmaking, namely that jurors are not likely to overbelieve or to be overskeptical. At the least, this concern does not represent an even presentation of the dispute between the majority and minority positions.

Furthermore, courts raising this objection do not explain why this concern yields exclusion of eyewitness experts but not other expert testimony. For example, if jurors are so vulnerable that they need protection in order to prevent their overbelieving or underbelieving as a result of the expert's testimony, why do they not need similar protection from the testimony of, say, the epidemiologist rendering an expert opinion about the causal connection between asbestos exposure and asbestosis or the expert linking rollovers to tire tread deficiencies? Courts espousing this concern do not explain why eyewitness experts are unique in their impact on juries and why jurors need this protection from eyewitness experts but not from other experts.

To briefly summarize, courts that have considered the admissibility of eyewitness expert testimony have relied on a variety of justifications to support their decisions to exclude the evidence or to affirm lower courts' decisions to exclude the testimony. These

\textsuperscript{182} Rincon, 984 F.2d at 1005 (citing United States v. Christophe, 833 F.2d 1296, 1300, n. 1 (9th Cir. 1987)).
justifications include evidentiary rationales, procedural rationales, and juror rationales, and more often than not, the justification given draws from more than one, if not all, of these rationales. Nonetheless, each of these justifications is wanting as support for the exclusion of eyewitness expert testimony. The decisions in which the courts explicate their rationales reflect a misconstrual or misunderstanding by the courts of the evidence and its underlying discipline. These courts are demonstrating the very ignorance that is, according to the majority of psychologists, necessitating introduction of the expert. In other words, the use of these misguided rationales demonstrates the lack of understanding that the legal system has of the kind of assistance offered by an eyewitness expert, the nature of eyewitness testimony, and the lay persons’ awareness or knowledge of the nature of eyewitness testimony.

2. Rationales Supporting Admission

Not all courts, however, offer reasons or justifications for excluding eyewitness expert evidence. Some courts are not averse to the introduction of eyewitness experts and offer justifications for their admissibility.

These reasons offered for admissibility do not fall neatly into groupings based upon focus or orientation like the rationales for exclusion. In fact, for the most part, rather than offer independent justifications for admissibility, these courts instead frequently respond to and counter the reasons for exclusion offered by courts excluding eyewitness expert testimony, discussed above. Most frequently taken to task are the excluding courts’ conclusions that the proffered expert testimony is not scientifically valid and does not assist the jury; one court also cites the liberal admissibility standard of Rule 702. And, just as the courts affirming exclusion frequently rely on more than one justification,
the courts that appear amenable to the admission of eyewitness experts similarly counter
with more than one reason why the evidence might be admissible and, hence, why the
multiple justifications set forth by the excluding courts are erroneous.

An example can be found in a seemingly prescient opinion of the Supreme
Court's Daubert decision, decided eight and a half years prior to Daubert, in United
States v. Downing. In Downing, the United States Court of Appeals for the Third
Circuit vacated and remanded a conviction based solely on the testimony of eyewitnesses
in which the district court held that the testimony of the proffered expert in memory and
perception was inadmissible because it believed that "such testimony can never meet the
'helpfulness' standard of Fed. R. Evid. 702."185

While determining the admissibility of the proffered expert testimony under Rule
702, the Third Circuit noted that, despite the fact that the rule usually favors
admissibility, "courts of appeals have upheld the exclusion of expert testimony on
eyewitness perception and memory because the testimony would involve questions that
'can be adequately addressed in cross examination and that the jury can adequately weigh
... through common-sense evaluation.'"186 The court explained further, in footnote:

In fact, a majority of the federal courts that have addressed the issue have
depended on the court rulings excluding expert testimony similar to that
proffered in this case. There appear to be two other major bases for excluding the
evidence. First, some courts have upheld the exclusion of evidence of this type on
the ground that no reliable scientific basis exists for it.... Other courts have
concluded that the introduction of such testimony would lead to an unduly

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183 The Daubert court even acknowledges that part of its discussion draws on Downing, Daubert, 509 U.S.
at 594, n. 12.
184 United States v. Downing, 753 F.2d 1224, 1226 (3rd Cir. 1985).
185 Downing, 753 F.2d at 1226. The two grounds given by the district court for exclusion of the expert
testimony are that "(1) the witness would usurp the 'function of the jury'; and (2) there was additional
evidence 'such as fingerprints [and] handwriting.'" Id. at 1228. The appellate court noted that the
government agreed that the second ground offered by the trial court was erroneous; that is, there was no
additional evidence offered.
186 Id. at 1229.
confusing or time-consuming "battle of the experts" which, in the context of the particular case, would have added little of probative value, but would have increased the risk of unfair prejudice.\textsuperscript{187}

The court expressed its doubt about these conclusions, in light of the liberal admissibility standard of the rule. It concluded that eyewitness expert testimony may meet the helpfulness requirement of Rule 702 and, thus, may be admissible under this rule. As the district court had ruled that eyewitness expert testimony is inadmissible as a matter of law — and, hence, that such testimony is never admissible — the appellate court found error in the lower court's decision and remanded the case.\textsuperscript{188}

So, like the courts supporting exclusion, courts favoring admissibility similarly include multiple justifications when countering the arguments made for exclusion.

\textsuperscript{187} Ibid. at 1230, n. 4.
\textsuperscript{188} In an effort to assist the trial court on remand, the Third Circuit then reviewed and rejected the Frye test and determined the appropriate standard to use, pursuant to Rule 702, when considering novel scientific evidence. After a lengthy and detailed discussion, the court concluded that the Frye general acceptance standard is "neither a necessary nor a sufficient condition for admissibility," although it is one criterion to be considered in determining admissibility. Instead, the court sanctioned a flexible approach in accordance with Rule 702:

\begin{quote}
In our view, Rule 702 requires that a district court ruling upon the admission of (novel) scientific evidence ... conduct a preliminary inquiry focusing on (1) the soundness and reliability of the process or technique used in generating the evidence, (2) the possibility that admitting the evidence would overwhelm, confuse, or mislead the jury, and (3) the proffered connection between the scientific research or test result to be presented, and particular disputed factual issues in the case.
\end{quote}

Dow.ing, 753 F.2d at 1237.

The court sanctioned a flexible approach to reliability and stated that a reliability inquiry might include analysis of such factors as general acceptance, litigation "track record", the novelty of the technique, the existence of a specialized literature, the qualifications of the expert, non-judicial uses of the technique, and the frequency of erroneous results.

Admissibility is then determined by balancing the reliability assessment against the chance that the evidence might confuse or mislead the jury. During balancing, the court is to consider the presumption of helpfulness of expert testimony and the amount of notice afforded to the other party, so that that party could conduct its own tests or produce its own witnesses. Furthermore, for expert testimony to be admissible, there must be a "fit", or a sufficient tie, between the testimony and the facts of the case. Even evidence that meets these criteria, however, my nonetheless be properly excluded if it fails the Rule 403 balancing test, that is if the probative value is substantially outweighed by other dangers. As this analysis was not performed by the trial court, and the appellate court could not conclude that the error was harmless, the judgment was vacated and remanded.
Despite the fact that the justifications often are run together, like the rationales for exclusion, each is considered separately.

a. Scientific Validity

Not all appellate courts question the scientific validity of the theory underlying the substance of eyewitness expert testimony. For example, what remains as the Fifth Circuit has disagreed with the circuits that question the validity or general acceptance of the underlying science. In *United States v. Moore*, a case in which the court noted that the bizarre factual background read like, and actually was based on, a movie script, the court reviewed the trial judge's exclusion of Dr. Loftus's testimony on the basis of his determination that it was not a matter on which expert testimony was required. Dr. Loftus would have testified about, *inter alia*, the forgetting curve, the assimilation factor, and the feedback factor.

The appellate court first noted that the practice had been to exclude expert eyewitness testimony; it also noted the modern trend of accepting such experts. Then, it adopted this latter trend:

This Court accepts the modern conclusion that the admission of expert testimony regarding eyewitness identifications is proper, and we have no prior contrary authority which binds us. We cannot say such scientific data is inadequate or contradictory. "The scientific validity of the studies confirming the many weaknesses of eyewitness identification cannot be seriously questioned at this point."

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189 *United States v. Moore*, 786 F.2d 1308 (5th Cir. 1986).
190 The court noted that the main actors in this scenario were inspired by a movie they had viewed, namely "Loophole". *Id.* at 1310, n. 1.
191 "Until recently, courts were uniformly skeptical about admitting expert testimony concerning the reliability of eyewitness identifications." *Id.* at 1311 (citing cases and various rationales for exclusion).
192 "Recent decisions, however, do indicate a new willingness to uphold a trial judge's admission of such testimony and a willingness to evaluate the adequacy of reasons for justifying exclusion of such testimony in particular cases." *Id.* at 1312.
193 *Id.* (citations omitted).
The court went on to explain that this was not such a case as there was other overwhelming evidence of guilt; however, "in a case in which the sole testimony is casual eyewitness identification, expert testimony regarding the accuracy of that identification is admissible and properly may be encouraged."\textsuperscript{194} Finding no abuse of discretion, the exclusion was affirmed.

b. Assistance To Jury

Another reason offered by courts in support of their position that eyewitness expert testimony may be admissible is that, contrary to the conclusion of some other courts, it might be helpful to the jury in carrying out its duties. These courts recognize that there are psychological data from the memory and perception studies that contradict our common beliefs.

The \textit{Moore} court, for example, pointed out that the substance of the eyewitness expert's testimony is not commonsensical:

\begin{quote}
Expert testimony on eyewitness reliability is not simply a recitation of facts available through common knowledge. Indeed, the conclusions of the psychological studies are largely counter-intuitive, and serve to "explode common myths about an individual's capacity for perception..."...We therefore recognize that the admission of this type of testimony is proper, at least in some cases.\textsuperscript{195}
\end{quote}

The United States Court of Appeals for the Sixth Circuit in \textit{United States v. Smith},\textsuperscript{196} a bank robbery case in which the prosecution evidence consisted of the eyewitness testimony of three bank employees and a fingerprint expert's testimony, also recognized the need for the eyewitness expert's assistance. The expert proffered in \textit{Smith}, Dr. Fulero, would have testified about the negative effect of stress, unconscious transference, cross-racial identification, and the effect of the presence of a weapon. The \textit{Smith} court applied

\textsuperscript{194} \textit{Id.} at 1313.

\textsuperscript{195} \textit{Id.} at 1312.

the four criteria review used in the circuit and concluded that, despite the trial judge’s contrary findings, the testimony may be a proper subject and that it did have probative value. In its analysis, the court stated:

Dr. Fulero’s science has gained reliability. Moreover, his testimony would not only “surpass” common-sense evaluation, it would question common-sense evaluation. This Circuit has been particularly mindful of the dangers of misperception in criminal cases and has itself relied upon psychological studies of the problems of misidentification and suggestion. ... [T]he clear trend in federal courts is toward admission of expert testimony whenever it will aid the trier of fact...  

The appellate court affirmed the trial court’s judgment even though it disagreed with the lower court’s exclusion of the expert testimony.  

One of the points made by the Third Circuit in the Downing decision is that expert testimony on eyewitnesses might meet the helpfulness requirement of Rule 702. A federal district court within the Third Circuit followed the Downing criteria as it considered the admissibility of Dr. Leippe’s testimony. Dr. Leippe would have testified about cross-racial identifications, weapon focus, the effect of stress, the forgetting curve, the relation back phenomenon, the lack of a relationship between confidence and accuracy, the suggestiveness of the photo array used in the case, and exposure duration. The district court, in United States v. Norwood, concluded that the eyewitness expert testimony would be helpful and that the proffered eyewitness expert testimony was

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197 Id. at 1106-1107.
198 The Smith court stated:

We emphasize that in a case in which the sole testimony is casual eyewitness identification, expert testimony regarding the accuracy of that identification is admissible and properly may be encouraged. In the present case, we find no abuse of discretion in not admitting such evidence. This was not a case where casual eyewitness identifications were at all critical.

Id. at 1313.
admissible. The judge found Dr. Leippe to be qualified as an expert in eyewitness identification and, after applying Daubert and Downing, concluded that the proffered testimony was reliable. The court then considered each topic to which Dr. Leippe planned to testify, for fit and helpfulness, and held that each satisfied the requirements. Hence, defendant’s motion was granted, and he was permitted to introduce, at trial, Dr. Leippe’s expert testimony on each of the proffered topics.

c. Liberality of Rule 702

In its Downing decision, the Third Circuit also cited the liberal admissibility standard of Rule 702 as justification for its break with the circuits that ruled that eyewitness expert testimony is inadmissible. This was not one of the Downing court’s primary justifications for its holding, and this justification cannot explicitly be found in many other opinions supporting admissibility. Nonetheless, this rationale is of much more significance than perhaps even the Downing court recognized.

The trend in both the content of the Federal Rules of Evidence and their interpretation is a more liberal policy toward admissibility. Our common law system appears to be moving a bit closer to the civil law systems as the evolution of the evidentiary rules is toward “letting it all in”, as civil law systems do. Our system, of course, has a long way to go before it can be equated with a civil law admissibility standard. However, the rules have “loosened up”, and the trend is toward admissibility. Hearsay, for example, is being admitted pursuant to more and more exceptions. Experts, as another example, are now permitted in a number of fields, not just science; the
qualifications for being an expert have also been loosened such that one can be deemed an expert based only on a great deal of experience.200

Although courts are proceeding cautiously and slowly, the trend is unmistakably in the liberal direction, supporting admissibility. This trend will, expressly or impliedly, play an important part in the admissibility considerations of proffered eyewitness expert testimony.

C. A Difficulty

A difficulty arises with attempting to understand the positions taken by the various courts by looking at their holdings. Every federal appellate court – that is, every circuit – has affirned a lower court’s exclusion of a proffered expert on eyewitness evidence. Thus, it appears as if the courts are overwhelmingly – in fact, unanimously –

200 One court of appeals gave an example of a beekeeper:

[I]f one wanted to explain to a jury how a bumblebee is able to fly, an aeronautical engineer might be a helpful witness. Since flight principles have some universality, the expert could apply general principles to the case of the bumblebee. Conceivably, even if he had never seen a bumblebee, he still would be qualified to testify, as long as he was familiar with its component parts.

On the other hand, if one wanted to prove that bumblebees always take off into the wind, a beekeeper with no scientific training at all would be an acceptable expert witness if a proper foundation were laid for his conclusions. The foundation would not relate to his formal training, but to his firsthand observations. In other words, the beekeeper does not know any more about flight principles than the jurors, but he has seen a lot more bumblebees than they have.


McCormick explains further:

[T]he witness must have sufficient skill or knowledge related to the pertinent field or calling that his inference will probably aid the trier in the search for truth. The knowledge may be derived from reading alone in fields (education), from practice alone in other fields (experience), or as is more commonly the case from both. While the court may rule that a certain subject of inquiry requires that a member of a particular profession, such as a doctor, engineer, or chemist be called, usually a specialist in a particular branch of a profession is not required. The question is not whether the witness is more qualified than other experts in the field; rather, the issue is whether the witness is more competent to draw the inference than the lay jurors and judge. The practice in respect to experts’ qualifications has not for the most part crystallized in specific rules, but is entrusted to the trial judge’s discretion reviewable only for abuse. Reversals for abuse are rare.

_Strong, supra note 111, at § 13, p. 24._
opposed to the introduction of eyewitness experts. Such a conclusion, however, is
mistaken. A simple summation of the number of courts affirming the exclusion of these
experts yields a misleading conclusion as it does not take into consideration the nature of
appellate review.

Appellate review involves different standards by which an appellate court must
abide in its review. When an appellate court reviews the decision of a lower court, it is
bound by the standard of review applicable to the question presented to it. This standard
determines the amount of deference that the appellate court is required to give to the
lower court findings. The standard employed by the reviewing court is very important; it
determines “how much deference the appellate court must give to the actions of the trial
court that the appellant seeks to challenge. Ultimately, it affects the probability that the
appellate court will either affirm or reverse the trial court.”

The standards to which the court must adhere in reviewing the lower court’s
actions – that is, the amounts of deference that the court must give – vary depending on
the matter under consideration on review. The standard ranges from clearly erroneous,
the very restrictive standard employed when reviewing findings of fact, to de novo
review, the least restrictive standard utilized when the court is reviewing questions of
law. In other words, when findings of fact are being reviewed, the reviewing court must
give a great deal of deference to the trial court’s findings, as the trial judge is close to the
witnesses and other evidence; the trial judge is in a better position to observe the parties
and witnesses and to make factual determinations. The trial judge’s interpretation of law,
on the other hand, is given no deference, as the appellate courts are the guardians of the

law for the circuits in which they sit; the appellate court is in a better position to evaluate and set forth the law that is applied in that circuit.

The standard that is used when an appellate court reviews a lower court’s decision to exclude eyewitness expert testimony lies between these extremes, the abuse of discretion standard. That is, the lower courts are afforded a great deal of discretion when making the decision whether or not proffered eyewitness experts are to be admitted. The reviewing courts, then, will not disturb the decisions of the lower courts, under this standard, unless they determine that the decisions constituted an abuse of this discretion.

The lower court’s discretion must be a sound discretion. One court explained the abuse of discretion standard:

Although abuse of discretion is a somewhat nebulous standard:

[The term ‘discretion’ denotes the absence of a hard and fast rule….When invoked as a guide to judicial action, it means a sound discretion, that is to say, a discretion exercised not arbitrarily or willfully, but with regard to what is right and equitable under the circumstances and the law, and directed by reason and conscience of the judge to a just result.]

The lower court’s having discretion does not mean that it can do whatever it wants: “The phrase means instead that the court has a range of choice, and that its decision will not be disturbed as long as it stays within that range and is not influenced by any mistake of law.”

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202 Kennedy v. Cardwell, 487 F.2d 101, 110 (6th Cir. 1973) (quoting Langnes v. Green, 282 U.S. 531, 541 (1931)). The Kennedy court also quoted a definition provided by the First Circuit:

“Abuse of discretion” is a phrase which sounds worse than it really is. All it need mean is that, when judicial action is taken in a discretionary matter, such action cannot be set aside by a reviewing court unless it has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors.

Id. at 110, n. 19 (quoting In re Josephson, 218 F.2d 174, 182 (1st Cir. 1954)).

203 Kern v. TXO Product Corp., 738 F.2d 968, 970 (8th Cir. 1984). The Kern court added:
Consequently, when the courts of appeals determine that the lower court has not abused its discretion, it is finding, essentially, that it has not exceeded the permissible range. It does not mean that the appellate court is in agreement with the conclusion reached by the lower court. In fact, some appellate courts might state that it would have found otherwise but that the finding was within the trial judge’s discretion. The appellate court is reviewing the lower court’s decisionmaking process and giving deference to that court’s factual findings, as it has direct contact with the witnesses. An affirmation on appeal means that the reviewing court does not find that the lower court exceeded its permissible range or, alternatively, abused its discretion.

This distinction is apparent in the Third Circuit. In *Downing*, the appellate court appears amenable to eyewitness expert evidence. In a later case, *United States v. Dowling*, an appeal of bank robbery convictions from the United States District Court for the Virgin Islands, however, the court affirmed the lower court’s exclusion of an eyewitness expert. The trial court had conducted an extensive hearing, pursuant to *Downing*, and concluded that the expert was qualified but that his testimony would nonetheless be excluded as the prosecution had only five days notice of the proposed testimony, the testimony would not be of assistance to the jury, and the requisite fit had

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An abuse of discretion, on the other hand, can occur in three principal ways: when a relevant factor that should have been given significant weight is not considered; when an irrelevant or improper factor is considered and given significant weight; and when all proper factors, and no improper ones, are considered, but the court, in weighing those factors, commits a clear error of judgment. And in every case we as an appellate court must be mindful that the district courts are closer to the facts and the parties, and that not everything that is important about a lawsuit comes through on the printed page.

*Id.*

204 *United States v. Dowling*, 855 F.2d 114 (3rd Cir. 1988), aff’d, 493 U.S. 342 (1990). The *Dowling* decision was not the first case in which the Third Circuit again faced the eyewitness expert issue. In *United States v. Sebestich*, 776 F.2d 412 (3rd Cir. 1985), cert. denied, 484 U.S. 1017 (1988)(mem.), for example, the court concluded that because the lower court had not had the benefit of its *Downing* decision, and as the eyewitness identification was the sole evidence against the one defendant, the decision was vacated and remanded for a hearing in accordance with the *Downing* standards.
not been demonstrated. As it found adequate support for the district court’s decision, the Third Circuit did not find an abuse of discretion. Despite its apparent amenability to eyewitness expert testimony, it affirmed the lower court judgment.\footnote{A subsequent case, United States v. Stevens, 935 F.2d 1380 (3rd Cir. 1991), is another example of a Third Circuit review of the introduction of eyewitness expert testimony. In Stevens, the lower court applied Downing and permitted Dr. Steven Penrod to testify concerning cross-racial identification, weapon focus, and stress, but disallowed his testimony on suggestiveness of the wanted board, the relation-back question, and the relationship between confidence and accuracy. The appellate court agreed with the lower court’s decision to exclude the first two of these three topics, but it disagreed with the judge’s decision to exclude the confidence-accuracy testimony because of a lack of fit.}

Similarly, many of the circuits considering the exclusion of eyewitness expert testimony have affirmed the lower court’s decision to exclude the expert by noting that the lower court’s decision did not constitute an abuse of discretion. Unless the reviewing court makes a clear statement – as did the Eleventh Circuit when it noted that eyewitness expert testimony was inadmissible as a matter of law in that circuit\footnote{Subsequent to the split, the United States Court of Appeals for the Eleventh Circuit held that eyewitness expert testimony should always be excluded. In United States v. Holloway, 971 F.2d 675 (11th Cir. 1992), cert. denied, 507 U.S. 962 (1993), the appellate court quickly disposed of the appellants’ contention that the trial court erred by disallowing the introduction of an eyewitness expert. Without considering the issue on its merits, the court stated that “[t]he established rule of this circuit is that such testimony is not admissible…. We see no reason to depart from our precedent in this case.” Id. at 679 (citations omitted). This circuit has remained adamant in its position that eyewitness expert testimony is inadmissible per se. In a more recent review of the issue, the Eleventh Circuit handed down an even stronger statement of its position against admissibility of eyewitness experts. In United States v. Smith, 122 F.3d 1355 (11th Cir.), cert. denied, 522 U.S. 1021 (1997), the defendant asked the court to reconsider its position, in light of Daubert, when reviewing the lower court’s exclusion of Dr. Cutler as an expert on the reliability of the identification. The court declined, affirming the lower court’s exclusion of Dr. Cutler’s testimony and stating that it “has consistently looked unfavorably on such testimony.” Id. at 1357. The court made clear its position that “expert testimony regarding eyewitness reliability is inadmissible per se.” Id. at 1358. After a brief analysis, the court concluded that this position is consistent with Daubert because the reason for exclusion is that the testimony does not assist the jury. Furthermore, “defendants who want to attack the reliability of eyewitness recollection are free to use the powerful tool of cross-examination to do so. They may also request jury instructions that highlight particular problems in eyewitness recollection.” Id. at 1359. Consequently, the Eleventh Circuit firmly held its exclusionary policy and affirmed the conviction.} – the court’s holding could be misconstrued as an opposition to the testimony itself while the court is intending only a reference to the trial court’s abuse of discretion.\footnote{The Eleventh Circuit presents an example of this. In Smith, the court stated that its position – from Thevis to Holloway through Smith – was supported by “the nearly unanimous stance taken by other circuits in affirming the exclusion of such testimony.” Id. at 1357. Although those other circuits may have affirmed exclusion of proffered eyewitness expert testimony, the Eleventh Circuit incorrectly interprets these holdings as supporting its position of per se inadmissibility. Many of the circuits cited found no abuse of} Hence, caution is
advised when considering, or tallying, on which side of the eyewitness expert issue an appellate court falls.

In summary, the problem, as identified by the psychologists, derives from the fallibility of eyewitness evidence. Eyewitnesses, in general, are unreliable, yet their evidence is heavily relied on in legal proceedings. The problem identified is actually two problems: first, the perceptions and memories of eyewitnesses – like those of all of us – are subject to the influence of numerous factors which render the evidence less reliable; second, most lay persons are unaware of the influence of those factors and erroneously believe that eyewitness evidence is reliable. The legal system relies heavily on testimony from eyewitnesses, even giving eyewitness evidence a presumption of reliability, and, hence, many errors, including convictions of innocent persons, frequently occur. The next section considers solutions to the problem.

discretion and, hence, affirmed the lower court decision to exclude the expert; this affirmation, however, was not necessarily a condonation of a per se rule of exclusion. The Eleventh Circuit court misinterprets the courts' affirmations as demonstrating approval of the exclusion of the expert instead of as reflecting recognition that discretion was not abused.
PART II: SOLUTIONS
CHAPTER IV
AN ARGUMENT FOR THE ADMISSIBILITY OF EYEWITNESS EXPERT TESTIMONY

Part I set forth some problems associated with eyewitness evidence. The psychologists point to the expansive research demonstrating the shortcomings of human perceptions and memories. Although some of the variables affecting accuracy are obvious, others are counterintuitive. Chapter II detailed six of these counterintuitive factors. In addition to the shortcomings inherent in eyewitness evidence, the other part of the difficulty is that most people are unaware that eyewitness evidence is unreliable. Eyewitness evidence is used a great deal by the legal system. Chapter III discussed the various responses that the courts have taken with regard to eyewitness evidence and to proposed eyewitness expert testimony. As this latter chapter revealed, the courts have been reluctant to embrace proffered experts on the reliability of eyewitnesses, and they have offered an assortment of rationales to support their reluctance. Some of these reasons include concerns that the expert would usurp the function of the jury, prejudice the jury, and offer superfluous testimony that is within the common knowledge of jurors.

This section, on the other hand, considers possible solutions. The present chapter sets forth the argument promulgated by psychologists working in this area in support of their position concerning eyewitness experts; the next chapter focuses on other alternative solutions.

In the first section of this chapter, the argument offered by the majority of psychologists, supporting their contention that the use of eyewitness testimony in a trial mandates the introduction of an eyewitness expert, is reconstructed. The second section raises some objections to the argument.
A. Argument For Admissibility

The majority of psychologists who have an opinion on the issue support the admissibility of eyewitness experts as the best resolution to the problems encountered by unreliable eyewitness testimony. Most of the arguments for admissibility draw from the shortcomings of the other proposed solutions and from the offensiveness of the conviction of the innocent. Woocher provides a nice summary:

The safeguards discussed in the preceding Parts of this Note fail to provide suitable protection against the dangers of erroneous conviction due to mistaken identification. The remedies fashioned by the Supreme Court in Wade and Stovall address only the abuses created by improper pretrial confrontations and disregard those hazards caused by the inherent unreliability of eyewitness testimony. The other traditional solutions provide a poor balance between protecting the innocent and convicting the guilty. Exclusion and corroboration, on the other hand, afford too drastic a remedy, forcing the court to draw rigid lines that may exclude probative, albeit possibly unreliable evidence; cautionary instructions, on the other hand, do not go far enough, pointing the jurors in the right direction but abandoning them to evaluate the evidence without any guidance. The optimal solution must steer a middle ground and direct the remedy to the varied, multifaceted problems posed in each trial by eyewitness identification evidence. It should allow the trier of fact to hear all the relevant evidence in a case but also should give the factfinder enough information on which to evaluate that evidence properly. For these reasons, presentation to the trier of fact of expert psychological testimony about the unreliability of eyewitness testimony provides the proper safeguard for the problems identification evidence poses.\footnote{Woocher, supra note 17, at 1005-1006 (footnotes omitted).}

Woocher further explains that the introduction of eyewitness experts not only meets the admissibility criteria for expert testimony, but it also provides “a valuable safeguard against wrongful conviction.\footnote{Id. at 1011.}”

Loftus concurs with Woocher’s summary. After noting that the Supreme Court trilogy deals only with pretrial confrontation and that exclusion, corroboration, and jury instructions are insufficient, she proposes that an alternative solution is expert testimony on the reliability of eyewitness testimony, in which a psychologist explains to the
factfinder the factors that may affect the reliability – and, hence, the evaluation – of the eyewitness testimony. She summarizes the position:

The number of mistaken identifications leading to wrongful convictions, combined with the facts that eyewitness testimony is accepted too unquestioningly by juries, presents a problem for the legal community. The Supreme Court addressed a portion of the problem when it decided to consider the issues of right to counsel and due process protection at pretrial identification. However, recent decisions indicate that the protection offered by the court against a mistaken identification is minimal. Excluding unreliable identifications, requiring corroborating evidence, and issuing cautionary instructions to the jury are three partial solutions which fail to provide an adequate answer. Allowing the jury to hear expert testimony on the factors affecting the reliability of eyewitness identification evidence appears to be a more satisfactory solution in many respects. But its merits have yet to be consistently recognized by our legal system.  

Woocher's and Loftus's positions epitomize the arguments typically offered when the introduction of expert testimony on eyewitness reliability is posited.

This argument in support of the admissibility of eyewitness expert testimony begins, then, with the implicit understanding that our legal system relies heavily upon eyewitness testimony; that is, for the system to function as intended, testimony from eyewitnesses is required:

(1) Eyewitness testimony is a necessary and key component of the legal system. Premise (1) is a historical fact about the legal system that is empirically verifiable. No one involved in the dispute regarding eyewitness experts has questioned the veracity of this premise or argued that the system could function as it is presently designed to without resort to eyewitness testimony.

The next two steps in the pro-admissibility argument rely on the vast psychological literature detailing the unreliability of this type of testimony. Proponents first point out that:

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210 Loftus, supra note 8, at 201.
(2) An eyewitness’s perceptions and subsequent memories are subject to error and to influence during acquisition, retention, and retrieval.

From this, they infer that:

(3) Hence, the testimony of an eyewitness, drawn from these perceptions and memories, may be inaccurate, and thus, its reliability is suspect.

Although not all eyewitness testimony is inaccurate, the potential is there. Furthermore, though the influencing factors and situations can be identified, it is often difficult to discern the reliable testimony from the unreliable. Because of this, all eyewitness testimony is suspect.

The next premise, unlike the previous three, is contentious. Based on a number of psychological studies, the majority assert that:

(4) The ordinary individual, including most of the venire from which juries are selected, lacks an understanding of many of the factors and situations that can affect the reliability of eyewitness testimony; although the ordinary individual understands some of the factors and situations that can influence eyewitness accuracy, he/she often lacks an understanding of the extent of that influence.

Loftus, for example, states that “[l]aypersons...have given every indication that they do not have this understanding [of the hazards involved in eyewitness testimony]. Rather, most continue to place great faith in an eyewitness account, even one that is weak.”

Members of the legal profession, however, might question this premise. As was demonstrated in Chapter III, many of the federal appellate courts that have reviewed proffered eyewitness experts believe that evaluating eyewitness recollection is within the common knowledge and experience of the average juror and do not believe that the ordinary person is lacking in knowledge of the factors and their influence.

The majority of psychologists, however, not only accept premise four, but they take it one step further and conclude:

\[211\] *Id.* at 180.
(5) Hence, in many trials involving eyewitness testimony, the jurors may erroneously evaluate an eyewitness’s testimony to be accurate and reliable, and an incorrect verdict may result.

Some proponents might disagree with the phraseology of this premise, arguing that ‘incorrect verdict’ is too vague; they might even argue that the premise should instead be stated:

(5’) Hence, in many trials involving eyewitness testimony, the jurors may erroneously evaluate an eyewitness’s testimony to be accurate and reliable, and conviction of an innocent person may result.

However, a criminal trial is not the only place where eyewitness testimony may be relied upon and incorrectly influence the outcome. A personal injury case, for example, might turn on the eyewitness’s testimony concerning which party had the green light. To include situations such as this, the more vague ‘incorrect verdict’ is employed, where ‘incorrect verdict’ =$_{df}$ a verdict that differs from the verdict that would have been rendered had the jury been aware of the inaccuracies or missing information. With this clarification, the wording of Premise (5), rather than Premise (5’), is used in the general argument set forth herein.

The admissibility proponents also point out that the various options employed to resolve the problems are not satisfactory:

(5) The various solutions utilized by the courts are partial solutions which do not provide an adequate resolution to the problem posed by eyewitness testimony.

Although different admissibility advocates may spell out the options employed differently, they all agree that the non-expert solutions only partially, if at all, resolve the reliability problem and, hence, are not adequate. For example, Loftus presents and rejects
three alternative solutions raised by Woocher – excluding unreliable eyewitness
evidence, requiring corroborating evidence, and requiring cautionary jury instructions.\(^{212}\)

Not only do the proposed alternatives fail to satisfactorily resolve the problem,
according to these proponents, but the introduction of an eyewitness expert does provide
an adequate answer:

(7) The introduction of testimony by an expert in issues of perception and
memory in eyewitnesses is the only solution that remedies the problem of
unreliable eyewitness testimony.

When the eyewitness expert advocate asserts the substance of this premise, he/she
generally does not expressly claim that the introduction of an eyewitness expert is the
only solution that works; without this limitation, however, the argument for admissibility
does not work. That an eyewitness expert is held to be the only viable solution is often
found implicit in the advocate’s argument.\(^ {213}\) The Woocher quote with which this

\(^{212}\) Id. at 187-190.
\(^{213}\) For example, Loftus states:

The Supreme Court decisions are concerned only with the properness of a pretrial confrontation,
and do not address inherent unreliability in eyewitness testimony itself. Outright exclusion of
unreliable testimony and requirement of corroboration are not ideal solutions because they take the
decision out of the hands of the jury and might prevent the conviction of many who are truly
guilty. Special jury instructions, although a step in the right direction, do not go far enough. They
offer no guidance to the jurors on how to evaluate eyewitness testimony.

Another solution would be to allow the judge and especially the jury to hear an expert
witness present psychological testimony about the factors that affect the reliability of eyewitness
accounts. The psychologist could describe the studies that have been conducted on people’s ability
to perceive and recall complex events, and report the results. Factors that may have affected the
accuracy of the particular identification in the case at hand could be related to the jury. In this way
the jurors would have enough information with which to evaluate the identification evidence fully
and properly

Id. at 191.

Implicit in Loftus’s comments is the suggestion that eyewitness expert testimony is the only solution that
can adequately resolve the problems that courts encounter with unreliable eyewitness testimony. Another
example comes from Doyle, who notes:

experiments with mock jurors indicate that expert testimony is the most effective way to modulate
the jurors’ reliance on eyewitness confidence. It tends to direct jurors attention away from
subsection began, however, explicitly states this claim. So, premise (7) is intended to posit eyewitness expert testimony as the exclusive remedy for the problems arising from eyewitness unreliability.

Furthermore, premise (7) is often broken down further by expert advocates:

(7') The introduction of testimony by an expert in issues of perception and memory in eyewitnesses is the only solution that sufficiently informs the jury of the factors and circumstances that impact eyewitness reliability.

(7'') An informed jury does a better job of evaluating eyewitness testimony and is more likely to discern accurate, reliable eyewitness testimony from problematical testimony.

(7''') An informed jury is less likely to convict an innocent person on the basis of faulty eyewitness testimony.

(7'''') Thus, having an informed jury resolves the problems raised by eyewitness testimony.

Whether the proponent explicitly spells out something analogous to (7')-(7'''') or not, these premises are often what is meant by premise (7).

In light of these clarifications and interpretations, (7) is broken down into two premises:

(7) The introduction of testimony by an expert in issues of perception and memory in eyewitnesses remedies the problem of unreliable eyewitness testimony.

(8) The introduction of testimony by an expert in issues of perception and memory in eyewitnesses is the only solution that remedies the problem or, alternatively, is the only solution to satisfactorily resolve the problems associated with eyewitness testimony.

From these premises, the expert advocate draws the conclusion:

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inappropriate and misleading confidence estimates and towards witnessing and identification conditions (such as weapon focus) that are genuinely related to reliability.

Doyle, supra note 67, at 13-14.
(9) Expert testimony on eyewitness reliability must be admitted in cases where there is eyewitness testimony.

There are variations on this conclusion. Some proponents, for example, might instead conclude:

(9') Expert testimony on eyewitness reliability must be admitted in cases where there is eyewitness testimony and there is no corroborating evidence.

Others might try to limit the conclusion just to criminal proceedings, where the defendant's freedom or life is at stake, or to those cases where the primary evidence against the party arises from the testimony of an eyewitness. Nonetheless, (9) is the conclusion that follows from the general argument and the one that is most often invoked; hence, (9) is the conclusion utilized throughout the remainder of this thesis.

In summary, then, the basic argument for the introduction of expert testimony on eyewitness reliability can be reconstructed as follows:

1. Eyewitness testimony is a necessary and key component of the legal system.
2. An eyewitness's perceptions and subsequent memories are subject to error and to influence during acquisition, retention, and retrieval.
3. Hence, the testimony of an eyewitness, drawn from these perceptions and memories, may be inaccurate, and thus, its reliability is suspect.
4. The ordinary individual, including most of the venire from which juries are selected, lacks an understanding of many of the factors and situations that can affect the reliability of eyewitness testimony; although the ordinary individual understands some of the factors and situations that can influence eyewitness accuracy, he/she often lacks an understanding of the extent of that influence.
5. Hence, in many trials involving eyewitness testimony, the jurors may erroneously evaluate an eyewitness's testimony to be accurate and reliable, and an incorrect verdict may result.
6. The various solutions utilized by the courts are partial solutions which do not provide an adequate resolution to the problem posed by eyewitness testimony.
(7) The introduction of testimony by an expert in issues of perception and memory in eyewitnesses remedies the problem of unreliable eyewitness testimony.

(8) The introduction of testimony by an expert in issues of perception and memory in eyewitnesses is the only solution that remedies the problem or, alternatively, is the only solution to satisfactorily resolve the problems associated with eyewitness testimony.

.: (9) Expert testimony on eyewitness reliability must be admitted in cases where there is eyewitness testimony.

A cursory evaluation of this argument is undertaken below.214

B. Problems With The Argument

The argument for the admissibility of an eyewitness expert set forth above, however, does not resolve the problem arising from eyewitness testimony. The main difficulty with

214 The position taken by the majority, of course, is not without detractors. The heated debate between this minority and the majority whose position is set forth above is most vociferously advocated by McCloskey and Egeth. Their argument against admissibility runs as follows:

(1) It has not been established that jurors are too willing to believe, or overbelieve, the testimony of eyewitnesses.

(2) Jurors do have difficulty discriminating accurate from inaccurate eyewitnesses.

(3) Thus, jurors could use assistance in discriminating accurate from inaccurate eyewitnesses.

(4) Expert psychological testimony does not improve jurors’ ability to evaluate eyewitness testimony, specifically to discriminate between accurate and inaccurate eyewitnesses.

(5) Additional research is needed to evaluate eyewitness testimony, juror evaluation of eyewitness testimony, and the effects of different types of eyewitness expert testimony on jurors.

(6) Expert psychological testimony may be mandated if the results of this research reflect that jurors overbelieve eyewitnesses or that the testimony improves jurors’ ability to discriminate.

(7) At this time, however, that evidence is lacking.

.: (8) Eyewitness expert testimony should not be utilized at this time.

Consequently, McCloskey and Egeth conclude that eyewitness experts should not be permitted, at least at this time. For more on this debate, see, e.g., Michael McCloskey and Howard E. Egeth, Eyewitness Identification: What Can a Psychologist Tell a Jury? 38 AM. PSYCHOLOGIST 550 (1983); Michael McCloskey and Howard E. Egeth, A Time to Speak, or a Time to Keep Silence? 38 AM. PSYCHOLOGIST 573 (1983); and Howard E. Egeth and Michael McCloskey, Expert Testimony About Eyewitness Behavior: Is It Safe and Effective? in Wells and Loftus, eds., supra note 9, at 283.
the argument – the objections focused on in this section – arises from premises (7) and (8), the claims that the introduction of an expert remedies the problems raised by eyewitness testimony and that this proffered solution is the only workable remedy. Two specific objections are considered.

1. Timing Problem

One difficulty with simply positing the admissibility of eyewitness expert testimony as a sort of panacea to the eyewitness reliability problem involves the timing of the introduction of the testimony. In our legal system, the plaintiff, in a civil case, or the government, in a criminal case, presents his/her/its case first; the defendant then presents his/her/its case, and there is then an opportunity for rebuttal by each side. If most of the eyewitness testimony introduced during trial is for the government or plaintiff, the jury hears the testimony of the eyewitness at or near the beginning of the trial.\(^\text{215}\)

After the plaintiff/government rests, then the defense case begins, and the defendant can then introduce the expert to counter the eyewitness. By this time, however, the jury has already evaluated the eyewitness’s testimony; the eyewitness has already made an impression on the jurors, and they have already assessed the credibility of the witness and the accuracy of the testimony, without the benefit of the expert’s advice. After hearing the expert’s testimony, they are unable to go back and re-evaluate the witness’s demeanor or experiences in light of the factors explained to them by the expert. The jurors no longer have the opportunity to apply the information imparted by the expert to the eyewitnesses who testified earlier; if at all, they can only apply the information to

\(^{215}\) The jury most likely has heard about the eyewitness’s testimony during open argument and even during voir dire. But, the impressions left about the witness and testimony are set during the witness’s testimony, when the jury not only hears the testimony directly from the witness, but also has the opportunity to observe the witness’s demeanor.
the recollection of the witnesses and testimony held in their memory. Their impressions of the witnesses, however, have already been made.

A similar problem results, on the other hand, in the less typical case wherein the eyewitness testifies during the defense case and the expert testimony is presented during either the government’s/plaintiff’s case-in-chief or rebuttal. In either case, the testimony of the expert is removed, time-wise, from the testimony of the eyewitness to which it is to be applied.

To work in the manner anticipated by the majority of psychologists proposing eyewitness experts, the ideal order is to have the eyewitness testify regarding influencing factors and then to have the eyewitness testify next, so that the jurors can assess the eyewitness testimony in light of the factors whose influence is still fresh in their minds.\footnote{This is presuming, of course, that they can accurately remember and apply the information received from the expert.} This ideal, however, is contrary to how the system works in reality.\footnote{And it is doubtful that the system could – or ever would – be changed to accommodate this ideal.}

Thus, simply adding an expert is unlikely to resolve the problems arising from the unreliability of eyewitness testimony. With the timing issue, the introduction of expert testimony may yield limited improvement, if any, in juror discrimination of accurate from inaccurate eyewitness testimony; the testimony will not eradicate the evaluation difficulties. Incorrect verdicts, though perhaps occurring in slightly reduced number, would still occur subsequent to the introduction of the expert.

2. Integration Problem

A second difficulty with the claim that eyewitness expert testimony resolves the problems with juror discernment of eyewitness credibility or accuracy is the lack of integration. The integration problem is the difficulty resulting when the jurors who hear
the testimony of the expert, about the factors that can affect the accuracy of the perceptions and memories of an eyewitness, do not make use of the information they learn. Though the jurors know of the influencing factors from the testimony of the eyewitness expert, they do not apply this new-found knowledge when assessing the credibility or accuracy of an eyewitness’s testimony.218

If jurors do not utilize the information that they receive from an eyewitness expert, the introduction of testimony from such an expert will not resolve the problem. Introduction of expert testimony, in that case, does not differ from the solutions currently employed by the courts: a partial solution that does not provide an adequate resolution to the problem.

In summary, then, the psychologists’ argument does not support the anticipated conclusion, namely that eyewitness expert testimony must be admitted when eyewitness testimony is admitted. Within the context of our legal system, there is a problem with the timing of the introduction of the expert testimony and the effect of that timing on the influence of that testimony. Furthermore, even if the timing problem could be resolved, there remains a problem with integration; although the fact-finders can be informed of the various influencing factors, there is a question whether they can integrate what they learn and apply it in their role as fact-finder.

218 See, e.g., Cutler and Penrod, raising this issue during their discussion of juror sensitivity:

Thus, sensitivity contains two components: knowledge and integration. Knowledge refers to awareness of the manner in which a factor influences eyewitness memory, including the direction and magnitude of the effect for a given factor. Integration, in this context, refers to the ability to render decisions that reflect knowledge....[E]ven if jurors are aware of the relative effects of a given factor on eyewitness memory, the magnitude of that effect might be attenuated in the juror’s integration of the evidence. In other words, the jurors’ judgments might not reflect their a priori beliefs. Decision-making research in a variety of psychological domains...shows that integration is quite difficult to achieve, even by trained experts.

Cutler and Penrod, supra note 11, at 217.
CHAPTER V
ALTERNATIVE REMEDIES

As the last chapter demonstrated, the majority of psychologists argue that eyewitness expert testimony must be admitted whenever eyewitness testimony is admitted because expert testimony is the only solution that adequately resolves the problem arising from eyewitness testimony. Although the argument proposed by the majority might support the conclusion that eyewitness expert testimony is a solution to the problem, it is problematic when offered in support of the stronger conclusion that the expert testimony is the only solution to the problem. Are there alternative, existing procedures – or as yet nonexistent mechanisms that are simpler and less contentious – that are equally capable of remedying the problem? If so, then there is no need to turn to expert testimony in order to resolve the eyewitness testimony problem.

This chapter reviews the potential alternative remedies that may resolve the problem, thereby obviating the need for an eyewitness expert.\textsuperscript{219} Some of the below suggestions are for modifications of existing rules and procedures to address the problem; other suggested modifications propose new procedures or mechanisms in an attempt to remedy the problem. As the following discussion demonstrates, none of these proposed alternatives is successful.

Before considering potential alternative remedies, though, it is useful to remember the clarification made earlier about the problem itself. There are two separate questions

\textsuperscript{219}The use of cross-examination, argument by counsel, and instructions to the jury – as well as modifications to the timing of these procedures – are alternatives. They have been employed by courts, as justifications for excluding eyewitness expert testimony, and were considered above during the discussion of rationales for exclusion. These alternatives are not discussed again. In addition, the use of court-appointed eyewitness experts or the introduction of documents containing eyewitness expert opinions are not considered as alternatives as they are simply the use of an eyewitness expert albeit introduced in a different manner. Furthermore, existing alternatives – such as impeaching the eyewitness by inquiring about his or her eyesight, the visibility on a foggy night, or the like – are also not addressed here.
involved with the problem of eyewitness testimony; in a sense, there really are two
problems when it comes to eyewitness evidence. The first question or problem is the
reliability, or witness, question: how reliable or unreliable is the evidence presented by an
eyewitness? The second focuses, on the other hand, on the jury: given that the answer to
the first question is “not very” – that is, that eyewitness evidence is unreliable – is the
ejury able to accurately evaluate the testimony offered by an eyewitness?

Even though both the witness and the jury questions are frequently bandied about
and used interchangeably during discussions of eyewitness evidence, they are quite
distinct though admittedly interrelated. The inquiry posed by each differs from the other.
The frequent blurring of their boundaries and intermixing yield confusion during
discussions of “the problem”.

It can be helpful to keep the distinction between these two questions in mind
when evaluating proposed solutions to eyewitness evidence difficulties. There does not
appear to be a real solution to the witness problem,\textsuperscript{220} hence, unless otherwise noted, the
proposed remedies discussed below address the jury problem.

First, the problem with eyewitness evidence might be resolved by the abolition of
the one witness rule. The \textit{Telfaire} court discussed the one witness rule:

\begin{quote}
Anglo-American jurisprudence has accepted the “one witness” rule, declining to follow the rule of canon and civil law requiring a greater number of
witnesses or corroboration, with exceptions requiring corroboration for particular
crimes, notably “sex” offenses, where the urge to fantasize or motive to fabricate
makes the risk of unjust conviction high.
\end{quote}

\textsuperscript{220} A good part of the witness problem results from the human perceptual apparatus and method of
processing sensory data. If, however, research were to resolve the coexistence versus alteration controversy
in favor of coexistence, then it would be possible, at least in theory, to uncover the “true” memories of the
perceptions of the eyewitness. Recent research, however, suggests that this will not come about, as earlier
memories appear to be replaced as the alteration theory proposes. \textit{See, e.g.,} Sandra Blakeslee, \textit{Brain-
Updating Machinery May Explain False Memories}, \textit{N.Y. Times}, Sept. 19, 2000, at D7. For more on the
coexistence versus alteration controversy, \textit{see} Loftus, \textit{supra} note 8, at 112-133.
The one witness rule recognizes that certain crimes are solitary, and as to such crimes both the deterrence of punishment and the rehabilitation of offenders are proper concerns of the state. Moreover, Anglo-American jurisprudence – with its strong presumption of innocence, and adversary system – has safeguards which dilute the danger of conviction of the innocent, a problem that concerns every civilized system of justice.\(^{221}\)

There are two different ways in which modification of the one witness rule can be proposed. First, one might suggest that a solution to the eyewitness evidence problem is to require that there be more than one eyewitness who testifies, if eyewitness testimony is to be introduced at all; second, one might propose a solution that requires that there be corroborating evidence of any kind before an eyewitness be permitted to testify.

The first version of this modification – that the testimony of an eyewitness would be inadmissible unless there would be another eyewitness who would also be called to testify – is itself problematic. First, it would need to be clarified whether the additional witness must be a corroborating eyewitness, introduced by the same party, or whether it could be an opposing eyewitness, introduced by the adverse party. The idea is usually proposed in terms of a corroborating eyewitness. Nonetheless, an eyewitness testifying for the opposing side could also be of assistance to the jury in carrying out its function of evaluating witness credibility, as contrary testimony by an adverse eyewitness may raise questions about the accuracy of the eyewitness’s testimony. The difficulty, of course, with permitting the additional witness to be introduced by the opposing side is that the side introducing the original eyewitness has no control over the other side and its decision whether to present an eyewitness; though permitting the additional eyewitness to be presented by the other side is acceptable in theory, it is practicably unworkable.

\(^{221}\) Telfaire, 469 F.2d at 554 (footnotes omitted).
Second, both witnesses could be wrong.\textsuperscript{222} Although corroborating testimony appears to bolster the credibility of the eyewitness, it does not follow that it makes the eyewitness's testimony more accurate; the introduction of a corroborating eyewitness may increase the probability of accuracy, but it can never assure accuracy. Both eyewitnesses could have been adversely affected by one or more of the variables and yet reached similar, erroneous conclusions. For example, simply because the witnesses report the same or similar recollections does not mean that they have the same memories or that they had the same perceptual experience or that they are both right.

Third, the restriction imposed by this modification would have the negative effect of reducing the number of prosecutions, and hence conviction, of one-on-one crimes -- crimes involving only the victim and the perpetrator, where the only evidence may be the victim's word against the perpetrator's word, such as rape. The result would be that many persons guilty of one-on-one crimes would go unconvicted and unpunished for their crimes. As the trend has been toward making it easier for such crimes to be prosecuted, it is doubtful that our society as a whole would prefer this consequence to one in which a few innocent persons are erroneously convicted of crimes that they did not commit.

Fourth, even with more than one witness, the jury remains ill-equipped to evaluate the testimony of the eyewitnesses. Even if this solution adequately addressed the problem involving the reliability of the eyewitness's testimony, it has no effect on the jury and its ability to carry out its function of evaluating the credibility of the witnesses. The jury remains misinformed -- or uninformed, depending on the variable in question -- and is in

\textsuperscript{222} See Robert Buckhout, \textit{Eyewitness Testimony}, 231 \textit{Scientific American} 23, 28 (1974): "Conformity is another troublesome influence. One might expect that two eyewitnesses -- or 10 or 100 -- who agree are better than one. Similarity of judgment is a two-edged sword, however: people can agree in error as easily as in truth."
no better position to distinguish accurate from inaccurate testimony. It is as easy for the jury to perform an erroneous evaluation of the accuracy of two eyewitnesses as it is of one.

The second version of the modification – that the testimony of an eyewitness would be inadmissible absent any other evidence – is also problematical. As with the other version, the first difficulty would be to clarify whether the additional evidence must be corroborating evidence, introduced by the same party, or whether it could be contrary evidence, introduced by the adverse party. Though again this version is usually proposed in terms of other corroborating evidence, negating evidence introduced by the opposing side could also be of assistance to the jury in carrying out its function of evaluating the credibility of the eyewitness. Though also, like the other suggested version, extending this to evidence by the adverse party would work in theory but would be unworkable in practice.

Second, if there is sufficient corroborating evidence, the testimony of the eyewitness may be superfluous. For example, DNA evidence linking the defendant with the crime can be used to establish the defendant’s presence at the crime scene rather than as corroborating evidence; in this case, the eyewitness’s testimony is not needed. Although the corroborating evidence may not always be sufficient on its own, there are times when this modification would obviate the need for eyewitnesses.

So, neither version of this proposed modification resolves the eyewitness problem without difficulty. And, neither modification suggestion actually resolves the problem. Eliminating the one witness rule does not eliminate the inaccuracy of the eyewitness’s perceptions and recollections. Even if corroborating evidence were to successfully render
the eyewitness more credible and the testimony more reliable, it would not impact the further difficulty concerning the jury’s ignorance of the problem and its difficulty accurately distinguishing accurate from inaccurate testimony. Furthermore, eliminating the one witness rule might even hurt defendants as it restricts their ability to present witnesses and evidence in their own defense. Although the modification attempts to control the prosecution’s conviction of a defendant based upon a lone eyewitness, unless it were carefully constructed, it could also preclude the defendant from introducing eyewitness testimony on his own behalf.223

A second modification that might remedy the problem arising from eyewitness testimony focuses on the selection of jurors. This proposal is concerned with the method or process by which jurors are selected and attempts to modify the makeup of the jurors actually empanelled. There are two versions that this proposal might take. The first version suggests that the method of obtaining jurors remain the same, but that “undesirable” jurors are “weeded out” or eliminated, while the second version proposes a modification to the selection process itself.

In the first version of this proposal, the method utilized in putting together a jury venire remains unaltered; whether the jurisdiction draws its venire from registered voters, licensed drivers, or some alternative method, this version is unconcerned with how the venire is established. Rather, this version suggests that the method of selecting the actual panel from the venire be modified. Specifically, according to this suggestion, the venire members would first be given an examination to test each individuals’ knowledge of the factors that can influence the reliability of eyewitness evidence and his/her ability to

223 There is the further question whether the modification would similarly apply to non-eyewitness witnesses. If it does not, proponents of the modification must explain why eyewitnesses are singled out and precisely how the restriction is to be drawn to distinguish the one type from another.
distinguish accurate from inaccurate eyewitness evidence. The venire members who receive a score above a certain to-be-determined amount are then placed in a new venire from which the panel is selected.²²⁴

In the second version, the venire is no longer selected from the lists currently used. Instead, for cases in which there will be eyewitness testimony, the venire would be selected from a specialized group – such as research psychologists working in human perception and memory – whose members have a clear understanding of the nuances and difficulties inherent in eyewitness evidence. No one without this knowledge would be permitted on the venire, and the panel would then be selected from this specialized venire.

There are three difficulties with this modification that apply to both suggested versions. First, the legal system experiences difficulty as it is, under the present system, in obtaining a sufficient number of individuals in the pool to empanel juries to meet all its needs. People in general do not see jury duty as a privilege and responsibility accompanying living in our society; rather, they view it as a burden and try in many ways to avoid it. Both of the proposed modifications would further erode the number of available individuals who are available to be considered for jury service.

Both of the suggestions also suffer from a second difficulty, namely that there does not appear to be a good reason why eyewitness evidence should be singled out to warrant this specialized treatment. In other words, in other situations wherein the jury might have difficulty with the subject matter – such as the relationship, if any, between, say, bendectin and birth defects – we do not modify the manner in which the venire is

²²⁴ A similar alternative is that the panel is asked very specific questions to determine the extent of their knowledge about eyewitness reliability; those who exhibit little or no knowledge may, for instance, be stricken for cause.
selected or modify the process so that the "first cut", so to speak, is a test weeding out those who lack the specialized information. Instead, we introduce expert testimony to educate and inform the jury panel about that information. There is no apparent reason why cases involving eyewitness evidence should be treated differently.

Third, it is not clear that either suggested version would remedy the problem. Even if those passing the exam or having the specialized knowledge were to have knowledge of all the variables that can affect the eyewitness testimony and were to be informed of all the factors that were present for that particular witness, there is no guarantee that the jurors would apply this knowledge when evaluating the eyewitnesses. As noted above, the integration problem often precludes those with knowledge from applying what they do know. And, even if the knowledge were applied, there would still be no guarantee that all influencing factors could ever be fully known; the impact of factors of which even the eyewitness is unaware – such as the influence of past experiences and expectations and the implementation of unconscious transference – is unlikely to ever be revealed.

So, not only is this suggestion, in either version, impracticable, but it does not adequately resolve the problem. Thus, modification of the jury selection process fails as an alternative remedy to the eyewitness evidence problem.225

The third potential alternative remedy also pertains to the jury. Instead of focusing on the method of selecting jury panels, however, this modification is focused on the jury panel after it is selected from the venire. There are two very similar versions that this alternative might take.

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225 Another version of this proposal might be some scheme to educate the public at large about the difficulties with eyewitness evidence; this version would be similarly unwieldy and unsuccessful.
The first version of this suggestion requires that the newly empaneled jury take a short course in which it is informed of the vagaries of eyewitness evidence. The course could be given by an eyewitness expert, selected and paid by the courts. This suggestion suffers from some shortcomings.

First, it is questionable whether there would be enough time, prior to the start of the trial, to teach the jurors everything they had to know. Perhaps teaching them something is better than teaching them nothing, but if they are not given all the information that they need, this suggestion is inadequate as a solution to the eyewitness problem.

Some might counter that if the jurors can receive what they need during trial, through the testimony of an eyewitness expert, surely there is enough time in a course to give them the information they need. This, obviously, is an empirical question. Results of empirical study on the question might show that this difficulty also constitutes an objection to the use of an eyewitness expert; if not, the course suggestion nonetheless is inadequate for other reasons.

A second difficulty with the suggestion of a preliminary course for the jury is the great expenditure of time and expense that would be added. The judicial system is already overloaded; this suggestion would undoubtedly slow things down even more. And, the expense of hiring an eyewitness expert to teach a course to each panel, even if panels were combined, would likely be an enormous drain on the system.

A second version of this alternative is very similar to the first. Specifically, on this version, before the trial, the jury panel would be required to sit and view a videotape concerning the problems associated with eyewitness evidence. This version would avoid
the great financial cost associated with the first version, as the court could hire one expert, make the tape, copy the tape and show it to many panels at one time. However, depending on the tape, this version might also incur a great expenditure of time, posing a problem for an overburdened judicial system.

There are, however, two additional difficulties that are applicable to both versions of this suggestion. First, this method of remedying the eyewitness problem would suffer from the timing problem, discussed above. That is, on either version, the information would be presented prior to the start of the trial, before the jury is presented with any eyewitness testimony. The jurors would receive the information in a vacuum and might not remember the information during the later time when the eyewitness actually testifies. Placing the playing of the video around the testimony of the eyewitness could severely disrupt the trial procedure; and, if the video were played immediately before the prosecution’s eyewitness testified but a long time before the defense case wherein a defense eyewitness testifies, the difficulty would remain. Perhaps this problem could be solved by playing the video at the beginning of the trial and having the judge give continuing instructions on the topic, drawing from the video, at the beginning and end of the trial and during the trial, say before and after each eyewitness testifies.

Even if this were to resolve the timing problem, however, there remains another difficulty, namely the integration problem, discussed above. According to the integration problem, even if the information were presented to the jurors at perfect time intervals, they would still not apply the information; although they would learn and know the information, they would be unable to integrate their knowledge and apply it to the

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226 Harris County, Texas uses a similar procedure to convey information to its jury pool. The individuals called for jury duty must view a videotape, prior to being called to a venire, explaining the process and what is expected of them.
testimony they hear from the eyewitness. Regardless of the method of presentation of the information – be it through a live expert, through taped experts, or through documents – the integration problem remains an obstacle to successfully resolving the eyewitness evidence problem.

A fourth modification is the suggestion that we abandon the system as we know it and move to a system that is similar to the civil law systems. In these systems, the lawyers are not responsible for elucidating testimony from the witnesses. The court calls witnesses that it believes can contribute information, after a court appointed investigator thoroughly investigates the facts of the case, and performs the questioning of the witness to obtain the necessary information prior to rendering a decision. Although the civil system is not without its drawbacks, it has been deemed to be veritistically superior to our common law tradition.227

Turning to a civil law format will not, of course, obviate the part of the eyewitness problem that is inherent in the witness itself. However, the suggestion is also problematic when used to resolve the jury portion of the eyewitness problem. As the psychological research has shown, judges are no different from lay persons when it comes to understanding and evaluating the accuracy of eyewitness evidence.

One way to avoid this drawback might be for the court to appoint, in addition to an investigator, an eyewitness expert to educate it about eyewitness evidence. But this proposal, of course, is simply the proposal to remedy the problem through the introduction of an eyewitness expert, not an alternative at all.

Another possible way to avoid this difficulty might be for the system to have the witnesses called and questioned by a law judge and a non-law judge, the latter being an

eyewitness expert. Although it is questionable whether this form is the introduction of an eyewitness expert in another form, it remains that the law-judge, the ultimate arbiter in the case, lacks the requisite knowledge to accurately assess eyewitness evidence.

Even if this were resolvable, there is another, more practical concern. Specifically, it would be impractical, if not impossible, for our common law system to change to a civil law system; such a system would be violative of important fundamental rights. Upholding these rights is at least as important as finding the truth in a dispute.\textsuperscript{228} The common law tradition seems preferable as a method of protecting these important rights.

A fifth suggested remedy focuses on the judge. There are two versions that this modification can take.

First, the judge could be required to perform an \textit{in camera} inspection of all eyewitness testimony. For this option, the judge would be required to listen to all eyewitnesses present their testimony, prior to the start of trial, and then to determine whether or not the evidence is sufficiently accurate for presentation to the jury. The judge would be given a gate-keeper role, similar to that ascribed in the \textit{Daubert} case.

There are two obvious difficulties with this option. First, as noted above, judges are no better equipped to evaluate eyewitness testimony than are jurors; they, too, lack the requisite understanding. Second, this proposal would require a great deal of judicial time, further overloading an already overburdened system. Presentation of eyewitness testimony, unlike expert testimony discussed in \textit{Daubert}, is a common occurrence.

\textsuperscript{228} A clear example showing that upholding the rights might even surpass, in importance, discovering the truth is when we suppress extremely inculpatory evidence – for example, the drugs that the defendant was holding and in the process of injecting into his arm – because the police obtained the evidence through an illegal search and seizure, in violation of the Fourth Amendment to the United States Constitution.
The second version of this proposal would require the judge to comment on the eyewitness evidence.\textsuperscript{229} Judges in Britain, another common law country, frequently comment on the evidence. Although judges in our country rarely do so, they are permitted to so comment.

The problem with this requirement, of course, like with the first version, is that this requires that the judge first have an understanding of the nuances of eyewitness evidence and be able to accurately assess this evidence themselves. Research shows that they do not have this knowledge and ability. Furthermore, the judge is not as credible as a source of information concerning the nuances of eyewitness testimony as is a research psychologist; jurors are likely to give more credence to the information if the source were a psychologist who works in the field.

For both of these versions to work, then, it appears as though the court would require an eyewitness expert to assist the judge in this gate-keeping function. This seems like eyewitness expert evidence all over again, just being introduced in a different manner. Furthermore, although the second version might reduce the timing problem, that difficulty would remain under the first version; and, both version would be subject to the integration problem.

Sixth, the system could be modified to require all eyewitnesses to take a polygraph test prior to being permitted to testify.\textsuperscript{230} The results of the exam could then be examined by the court, in an in camera inspection, or told to the jury. The latter alternative would require a warning to the jury that polygraph evidence is generally not admissible.

\textsuperscript{229} Thanks to William L. Wilks for this suggestion.  
\textsuperscript{230} Thanks to William L. Wilks for the suggestion.
Furthermore, the accuracy of polygraph evidence is highly dependent on the skill of the polygraph examiner and the manner in which questions are posed. For this solution to work, the polygraph examiner would be required to have a thorough understanding of the nuances of eyewitness evidence so that he or she could pose the questions in such a manner that the test would actually be useful in assessing the accuracy of the witness's testimony.

The major problem with this proposal, however, is that the polygraph is designed to identify the dishonest witness, not the mistaken witness. Many inaccurate eyewitnesses are testifying truthfully; that is, they believe that what they are testifying that they perceived is, in fact, what they did actually perceive. Most are not intending to deceive or to testify falsely. The polygraph results would show that they pass; that is, they are testifying truthfully that they believe that they perceived what they are testifying to when they relate their memories of what they perceived. They are not lying; nonetheless, they can be wrong. Though their perceptions were askew or their memories of accurate perceptions are mistaken, they may nonetheless feel highly confident that they are testifying truthfully and relating veridical memories of veridical perceptions. As they are not lying, the polygraph will not be able to assess that their honest belief is inaccurate.

The seventh and last possible solution to the eyewitness problem, the most draconian resolution to the eyewitness problem that can be suggested, is to eliminate the use of all eyewitness testimony from the judicial system. According to a proponent of this solution, eyewitness testimony is inherently unreliable; it is impossible to render the evidence reliable, and it is difficult to distinguish accurate from inaccurate eyewitness
evidence. So, like other evidence that is inherently unreliable, all eyewitness evidence should be excluded from trials.

In our legal system, all relevant evidence is admissible except that proscribed by Constitution, Congress, or the Supreme Court. Nonetheless, we often exclude relevant evidence—despite its relevance—because there is another, conflicting, goal. For example, we exclude some inculpatory evidence because it was obtained through an illegal search, in violation of the Fourth Amendment to the United States Constitution; in this instance, upholding the Fourth Amendment “trumps” the introduction of highly relevant evidence. We also exclude hearsay evidence, an out-of-court statement offered to prove the truth of the matter asserted. Despite the fact that these evidentiary materials are relevant—even damning—they are inadmissible at trial due to more important, conflicting goals within the legal system. We do not, for example, permit the hearsay evidence and then present expert testimony to explain to the jury that this sort of

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231 “Relevant evidence” 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.”

FED. R. EVID. 401.

232 FED. R. EVID. 402:

All 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. Evidence which is not relevant is not admissible.

233 The Fourth Amendment states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST., AMEND. IV.

234 “Hearsay” is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.”

FED. R. EVID. 801(c).

The introduction of hearsay evidence is, of course, subject to its many exceptions.
evidence is unreliable and not subject to cross-examination; rather, we exclude the
evidence in toto.\textsuperscript{235}

Another example where highly relevant, truth-implicating evidence is excluded is
the polygraph test. In our system, polygraph results are generally not admissible. Despite
the facts that polygraphs are more frequently accurate than inaccurate\textsuperscript{236} and are highly
relevant, evidence about the taking of a polygraph test and the results is typically
inadmissible.\textsuperscript{237} We do not introduce expert testimony about the polygraph and its
limitations so that the jury can utilize the test results in an informed manner; instead, we
preclude the admission of the evidence.

The exclusion proponent argues that eyewitness testimony should be similarly
treated. Instead of introducing expert eyewitness testimony, to inform the jury about the
unreliability of eyewitness testimony as the argument concludes, eyewitness testimony
should be excluded in toto. Despite the fact that the eyewitness’s testimony is highly
relevant, its questionable reliability mandates that this sort of evidence, like polygraph
evidence, be inadmissible. Expert testimony on eyewitnesses may improve the jurors’
ability to evaluate their testimony, but it cannot ever eradicate jurors’ reliance on
inaccurate testimony. If preventing the conviction of an innocent person is the motivating
factor in introducing this sort of expert, the only solution that can resolve the problem is
exclusion of the suspect evidence. Introducing expert testimony instead will not achieve
the desired goal. And, opponents to this possible remedy do not explain why the legal

\footnotesize{\textsuperscript{235} Unless, of course, the evidence falls into one of the exceptions to the hearsay rule.}
\footnotesize{\textsuperscript{236} See, e.g., Shauna Fleming Askins, Comment, United States v. Scheffer: An Anomaly In The Military Or
A Return To The Per Se Ban Of Polygraph Evidence?, 37 Hous. L. Rev. 175 (2000); see also, Doran D.
Peters, Comment, Per Se Prohibitions Of The Admission Of Polygraph Evidence As Upheld In Scheffer Are
Both Violative Of The Constitution And The Federal Rules Of Evidence As Applied By Daubert, 27 Am. J.
Crim. L. 249 (2000); Michael J. Ligons, Comment, Polygraph Evidence: Where Are We Now?, 65 Mo. L.
Rev. 209 (2000).}
\footnotesize{\textsuperscript{237} See, e.g., Askins, supra note 236.
system should differentiate eyewitness testimony from other evidence and treat it in a
disparate fashion. If we continue to exclude polygraph evidence, hearsay evidence, and
other unreliable though relevant types of evidence, why should the unreliable-though-
relevant eyewitness testimony be excepted from this rule and be admitted, with the
assistance of eyewitness expert testimony?

The conclusion, to treat eyewitness evidence like other relevant-but-unreliable
evidence and exclude it, of course, is practically untenable. The legal system relies quite
heavily on eyewitness evidence. Our system is set up in such a fashion that it would
essentially be unworkable without eyewitness testimony. By eliminating eyewitnesses,
the system would no longer be able to function effectively. Eliminating this sort of
evidence would undoubtedly reduce the number of convictions of innocent persons;
however, it would also result in an unacceptably high number of acquittals of many guilty
persons. For these reasons, this simplistic alternative, though successful in resolving the
eyewitness problem, is impracticable to try to implement.

Consequently, there does not seem to be an alternative, unproblematic resolution
to the eyewitness evidence problem. Each alternative – like the proposed solution of
introducing an eyewitness expert – seems fraught with difficulties. None of the
alternatives, including the introduction of expert testimony, appears clearly preferable to
procedures presently employed.
EPILOGUE
CHAPTER VI
CONCLUSION

It is quite clear, from the above analysis, that there is disagreement between many psychologists and many legal professionals concerning the value and appropriate use of eyewitness evidence. It is also quite apparent that neither the solution proposed by the psychologists – namely, introduction of eyewitness expert testimony – nor any of the possible modifications to existing or new procedures is viable as a solution to the problem.

Several alternatives arise at this point. The first – and the only apparent way to remedy the concerns raised by the psychologists – is to totally exclude all eyewitness evidence. Although this proposal “works” in theory, it must be rejected as it is impractical and unworkable. It is unclear how the legal system would function without evidence received by eyewitnesses – at least, function in a manner that would not be violative of many of our fundamental beliefs.\textsuperscript{238} Furthermore, eyewitness evidence is not the only procedural difficulty leading to erroneous convictions; as we do not employ such a draconian approach with other types of unreliable evidence, why should we single out eyewitness evidence? This option must be rejected.

A second alternative is accepting a partial solution. Permitting the introduction of eyewitness expert evidence, for example, could raise juror awareness of the fallibility of eyewitness evidence and, perhaps, could decrease the number of erroneous convictions of innocent persons. However, many of the alternative modifications considered in Chapter V could also raise juror awareness a little and hence, might be useful in reducing the

\textsuperscript{238} For example, we can imagine eliminating eyewitness evidence and resolving conflicts by, say, flipping a coin or by deciding whose attire the judge prefers that day. But these options would violate many of the rights that we deem to be fundamental and would not yield what we think of as just results.
number of convictions of innocent persons. This partial solution – improvement, not
resolution – was rejected by the eyewitness expert advocate; in fact, that other attempts to
resolve the eyewitness problem only partially resolved the difficulty was one of the
premises in the argument in support of expert eyewitness testimony.239

A third alternative is to do nothing; this extreme version advocates leaving
everything as is, to continue using eyewitness evidence as we do and to refrain from
making any changes. According to this proposal, there is no reason to introduce
eyewitness expert testimony or to make any other modification to “resolve” the
eyewitness problem. The existing procedural protections are adequate, according to this
alternative, to render eyewitness evidence as reliable as needed for the system to achieve
its goals.

A proponent espousing this position might reach this conclusion because he or she
does not accept the psychological research and, therefore, does not believe that there is a
need to make any modification in the system at all. Such a position, however, is in
disregard of the extensive, well-established psychological research.

Alternatively, a proponent might subscribe to this position because he or she
believes that, even accepting the psychological findings, there is not a problem. This
proponent agrees that the research demonstrates that eyewitnesses frequently err in their
memories of their prior perceptions and that lay persons, in general, are not sufficiently
aware of the nuances involved with eyewitness evidence; nonetheless, the proponent does
not view these shortcomings as a “problem” as do the psychologists.

239 There is another alternative, namely employing some combination of the modifications. This, however,
is merely a variant of this partial alternative; though a combination might lead to a further reduction of
erroneous convictions, it still does not resolve the problem.
According to this last view, the difficulties inherent in eyewitness testimony do not constitute a problem. Although the reported recollections of eyewitnesses are not always accurate, this evidence is no different, according to this view, than other sorts of evidence, for instance character evidence whereby the witnesses testify concerning the defendant’s character or alibi witnesses who testify as to the defendant’s whereabouts at the time of the crime. These other types of evidence are not always accurate. Eyewitness evidence is simply another type of evidence, and it is for the jury to evaluate the credibility of the evidence. Juries inaccurately assess other sorts of evidence at times, and there is no movement to ensure that the jurors clearly understand the nuances impacting accuracy in those cases. Hence, there is no need, according to this view, to distinguish eyewitness evidence and to treat it differently.

In addition, we do not expect each individual juror to remember everything, to know everything that is needed, or to evaluate everything correctly. Jurors frequently do not remember testimony or the law charged by the judge; they frequently are inaccurate in their assessment of witnesses and the weight afforded different portions of testimony. Our system, however, does not view this as a problem. Instead, we leave it to the jury, as a collective whole, to remember all of the testimony and the law and to correctly evaluate the credibility of the witnesses. The psychological research on the jury looked at each juror individually, not as a group. Though no individual remembers all or correctly assesses all, the jury as a whole is presumed to remember all and to correctly assess all. On this view, the fact that each juror does not know all the subtleties of eyewitness evidence and is sometimes mistaken in assessing credibility, does not rise to the level of a “problem”.
There has been no evidence or argument distinguishing eyewitness evidence from other sorts of evidence, such as alibi witnesses, character witnesses, polygraph evidence, and the like. Why should we select the introduction of expert testimony, particularly as we do not do so to remedy other difficulties, such as hearsay testimony? As expert testimony is not introduced when jurors individually lack knowledge of important information or incorrectly evaluate witness credibility in these other areas, there does not appear to be a reason for introducing it in the case of eyewitness evidence. It is not clear that there is a problem in need of resolution.

Nonetheless, the majority of psychologists believe that there is a problem in need of resolving; the conviction of any innocent person, they insist, demonstrates that there is a problem in need of a remedy. Is adopting a laissez faire attitude – leaving the system as is – tacitly condoning the conviction of innocent persons? Why, given the problem clearly demarcated by the psychologists, is there no satisfactory solution?

The difficulty lies, it seems, in the nature of the concern and the particular system in question. In other words, the fallibility of eyewitness evidence per se is not a problem. There are not, for the most part, dire consequences as a result of my filling in the gaps or incorrectly recalling what I in fact perceived. Many of the factors causing inaccuracies can actually be quite useful: for example, filling in the gaps supplements my limited perceptual abilities, and retrograde amnesia helps to protect me from perceptions and memories that are extremely traumatic. But it is in application in the legal system that difficulties arise.

The perceived difficulties, however, appear to arise from differing conceptions of the legal system held by the two disciplines. The psychologists, on the one hand, appear
to assume that the purpose of the legal system is quite simply to find the truth; the legal profession, on the other hand, sees the system as a complex, multi-purposed system wherein the search for the truth is only one facet. In fact, we often sacrifice the truth in pursuit of other goals, like the example raised above, showing that Fourth Amendment search and seizure provisions can render inadmissible some very inculpatory evidence.

Although no one condones the conviction of an innocent person, legal professionals seem to accept this as an unfortunate, undesirable side-effect of a system that pursues other goals in addition to the truth in a conflict. So, perhaps the legal professionals are not characterizing this side-effect as a “problem” while the psychologists are. What exactly do the psychologists mean by ‘problem’?

Perhaps, in other words, the reluctance of the courts in admitting eyewitness expert testimony does not reflect a lack of understanding of the problem on the part of the judges and lawyers, as the psychologists suggest; perhaps instead the reluctance stems from holding a different perspective about the difficulty. Courts may be reticent to see the vagaries of eyewitness evidence as a “problem” as the psychologists do because their focus goes beyond merely determining the “truth” within the controversy.

Furthermore, it appears that the psychologists and the lawyers are assuming different senses or different standards of ‘reliable’. According to the psychologists, eyewitness evidence is not reliable. The legal profession appears to employ different standards or senses of reliability, and eyewitness evidence is not considered to be unreliable. On this more expansive definition of reliability, eyewitness evidence might not be unreliable.
In addition, the *credibility* of the witness is a prime concern of the legal profession. Although the introduction of expert testimony requires a consideration of the reliability of the proffered evidence, by the judge in his/her gate-keeping role, jurors are expected to evaluate the credibility of witnesses. Witnesses are excluded if they are not competent – for example, very young children or incompetents – or if their testimony is not relevant. The legal system is concerned about competency, relevance, and credibility. Although the legal profession often appears paternalistic toward jurors, it also trusts that juries are capable of evaluating witnesses and their testimony. The system also greatly relies on cross-examination to bring out the truth. Courts are concerned that the witness is competent and is subject to cross-examination and that the witness’s testimony is relevant. The psychologists’ focus on the reliability of the testimony appears to be a different concern. Credibility, competence, relevance, and reliability are all different. Not only are the concepts distinct, but the manner in which they are used by the two professions differs.

Further examination into these differences and the differing underlying assumptions held by the two disciplines is needed to clarify precisely why one discipline believes that there is a serious problem that does not particularly trouble the other discipline. Such analysis must be left for another time.