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ARTICLE

The Admissibility of Expert Testimony on the Issue of Eyewitness Identification in Criminal Trials

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One might be surprised that the courts have done so little to protect litigants—and especially criminal defendants—from the dangers of unreliable eyewitness testimony.

—Professor John Kaplan†

INTRODUCTION

The Reverend Bernard T. Pagano might well be among those defendants in criminal cases who wonder at the lack of legal protection from unreliable eyewitness testimony.¹ In February 1979,

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The authors wish to thank George Philip Maxey, a third-year law student at The John Marshall Law School, for his assistance in researching this article.

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1. The United States Supreme Court in Stovall v. Denno, 388 U.S. 293, 302 (1967), and Foster v. California, 394 U.S. 440 (1969), held that identifications which result from confrontations which are unnecessarily suggestive and conducive to irreparable mistaken identification violate due process. In Stovall, the Court held that, under the totality of the circumstances in that case, the showing of the suspect singly to the victim who was recovering in a nearby hospital was reasonable. However, in Foster, the Court said that the suggestive elements in the lineup and showup procedures utilized in that case made it all but inevitable that the defendant would be identified, and vacated the conviction. Likewise, the Illinois Supreme Court has vacated a number of convictions based upon eyewitness
Father Pagano, a Roman Catholic priest, was arrested and charged
testimony secured under unnecessarily suggestive circumstances. See People v. Blumenshine, 42 Ill. 2d 508, 250 N.E.2d 152 (1969); People v. Lee, 44 Ill. 2d 161, 254 N.E.2d 469 (1969); People v. Holiday, 47 Ill. 2d 300, 266 N.E.2d 634 (1970). See also People v. Owen, 54 Ill. 2d 286, 296 N.E.2d 728 (1973). Nonetheless, recent decisions routinely permit in-court identifications by eyewitnesses even though the initial confrontations were suggestive. In Mason v. Braithwaite, 432 U.S. 98, 106 (1977), the Supreme Court held that identification testimony is admissible if under "the totality of the circumstances" the identification is reliable, even though the confrontation procedure was suggestive. Reliability is determined by evaluating the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation and the time interval between the crime and the confrontation. Id. at 114. See also Neil v. Biggers, 409 U.S. 188, 199 (1972); People v. Manion, 67 Ill. 2d 564, 367 N.E.2d 1313 (1977), cert. denied, 435 U.S. 937 (1978) (where the Illinois Supreme Court upheld a prompt showup, even though suggestive, because it was necessary for the police to determine whether or not to continue their search).

Efforts to protect against suggestive confrontations in United States v. Wade, 388 U.S. 218 (1967), and Gilbert v. California, 388 U.S. 263 (1967), by allowing defense counsel to view the procedures, were emasculated in Kirby v. Illinois, 406 U.S. 682 (1972), which held that there is no right to have counsel present if the confrontation occurs before formal charges are filed against the accused. Generally Levine & Tapp, The Psychology of Criminal Identification: The Gap From Wade to Kirby, 121 U. PA. L. Rev. 1079 (1973). But cf. Moore v. Illinois, 434 U.S. 220 (1977) (holding that the right to counsel attaches where the first identification is made at a preliminary hearing).


In Great Britain, more significant steps have been taken to protect against unreliable eyewitness testimony. See Report to the Secretary of State for the Home Department of the Departmental Committee on Evidence of Identification in Criminal Cases, House of Commons, April 26, 1976, Chairman: Rt. Hon. Lord Devlin [hereinafter cited as the Devlin Report], which states by way of summary: "We . . . wish to insure that in ordinary cases prosecutions are not brought on eyewitness evidence only and that, if brought, they will fail. We think that they ought to fail, since in our opinion it is only in exceptional cases that identification evidence is by itself sufficiently reliable to exclude a reasonable doubt about guilt." See also Regina v. Trumbull, [1977] 2 Q.B. 224 (setting forth the extent to which the Devlin Report has been adopted by the English courts); Williams, Evidence of Identification: The Devlin Report, 1976 CRIM. L. REV. 407; Grayson, Identifying Turnbull, 1977 CRIM. L. REV. 509. See generally Psychology in Legal Contexts (S. Lloyd-Bostock ed. 1981); P. Wall, Eye-Witness Identifications in Criminal Cases (1965).
with the armed robbery of six northern Delaware stores. Seven store clerks identified the clergyman as the “gentleman bandit” who had pointed a chrome-plated handgun at them. Following the unwavering testimony of these seven eyewitnesses, the trial had become what is known at the criminal bar as a “slow plea.” Few persons doubted the outcome would be a guilty verdict—until the trial judge announced to a stunned courtroom that another man had just confessed to the robberies.

Father Pagano was one of the lucky ones. Scarcely a week goes by that the newspapers do not report the release of an innocent person who had been convicted and imprisoned on the basis of eyewitness misidentification. The literature is replete with examples of those who not only have been jailed, but also executed, on
the basis of erroneous eyewitness testimony.⁵
Nevertheless, it is beyond doubt that juries accord enormous
weight to eyewitness testimony.⁶ The scientific community, on the
other hand, views eyewitness testimony as generally unreliable, for
two reasons: (1) the normal and universal fallibility of perception
and memory, and (2) the susceptibility of the mind to suggestive
influences.⁷ Professors of psychology regularly stage “mock” crimes
to demonstrate to their classes the unreliability of the eyewitnesses’ accounts.⁸

Psychologists have for some time been relating their findings
about perception, memory and the suggestibility of the human
mind to the problem of eyewitness misidentification.⁹ In some
cases, a significant number of which have resulted in acquittals,
trial judges have allowed expert witnesses to testify to these find-
ings on behalf of the criminally accused.¹⁰ In other cases, perhaps
the majority, the jury has not been allowed to hear the proffered
expert testimony.¹¹ The purpose of this article is to examine the

5. E.g., E. Loftus, Eyewitness Testimony 1-8 (1979); P. Wall, Eye-Witness
8. E.g., Dr. Buckhout reports that he staged an assault on a professor in front
   of 141 witnesses and videotaped the occurrence. After the attack, he took a sworn
statement from each witness, asking for everything the witness could remember
about the attack. The descriptions were quite inaccurate: the elapsed time was
overestimated by almost two and one half to one; the attacker’s weight was over-
estimated by an average of 14 percent; and the attacker’s age was underestimated
by two years. After seven weeks, 60 percent of the witnesses, including the profes-
sor who had been attacked, chose the wrong man from a group of photographs, 25
percent choosing an innocent bystander. In a similar incident involving a staged
purse-snatching, only seven of 52 witnesses correctly identified the purse-snatcher
out of a videotaped lineup. Buckhout, Eyewitness Testimony, 231 Scientific
9. See, e.g., E. Loftus, Eyewitness Testimony (1979); A.D. Yarmey, The
Psychology of Eyewitness Testimony (1979); B. Clifford and R. Bull, The
Psychology of Person Identification (1978); Psychology in Legal Contexts
(S. Lloyd-Bostock ed. 1981); see also P. Wall, Eye-Witness Identifications in
Criminal Cases (1965); T. Sannito, Discrediting Eyewitness Testimony (1979).
See generally the extensive bibliographies in all of the above works.
10. In a letter to Professor Arnolds on file at the offices of the Northern Illi-
inois University Law Review, Dr. Buckhout cited 25 cases in which he was permit-
ted to testify, 14 of which resulted in acquittals. See also cases cited in Buckhout,
Nobody Likes a Smartass: Expert Testimony by Psychologist, 3 Soc. Act. & L.
11. See Part B infra for a discussion of these cases.
cases wherein the use of expert testimony on the issue of eyewitness identification has been discussed, and to explore further the question of whether expert testimony ought to be permitted on that issue.

I. THE REPORTED CASES

Reported judicial opinions generally uphold the exclusion of expert testimony on eyewitness identification despite the almost universal view of commentators that experts should be allowed to testify in order to demonstrate the general unreliability of the memories of identification witnesses, and despite the liberal approach to the admissibility of expert testimony taken by the Federal Rules of Evidence.


Several of the reported cases have affirmed the exclusion of an expert’s testimony, partially on the ground that a proper offer of proof had not been made in the trial court. E.g., United States v. Brown, 540 F.2d 1048, 1053 (10th Cir. 1976), cert. denied, 429 U.S. 1100 (1977); United States v. Brown, 501 F.2d 146, 150 (9th Cir. 1974), rev’d on other grounds, 422 U.S. 225 (1975). Instead of offering the expert’s testimony itself, the attorneys had merely given a general summary of the expert’s proposed testimony; the courts found this offer insufficient.


14. The Federal Rules of Evidence provide that a witness qualified as an expert because of his knowledge, skill, experience, training or education may testify in the form of an opinion or otherwise if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a matter of fact. Fed. R. Evid. 702. The rule appears to be similar in Illinois: generally expert testimony is admissible if the subject matter involved is beyond the ken of the average juror and the witness has sufficient knowledge to aid the trier of fact in its search for truth. Miller v. Pillsbury, 33 Ill. 2d 514, 211 N.E.2d 733 (1965); Carlson v. Hudson, 19 Ill. App. 3d 576, 578, 312 N.E.2d 19, 21 (3d Dist. 1974) ("[T]he trend of recent decisions is that an expert may testify as to matters of common knowledge where the expert’s testimony itself would be helpful to a jury."). See also 7 J. Wigmore, Evidence § 1923 (Chadbourn rev. 1978); Ibn-Tamas v. United States, 407 A.2d 628 (D.C. 1979). Cf. Fed. R. Evid. 403 (The court may exclude relevant evidence "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."). Wigmore has urged that all opinion testimony be admissible subject only to the trial court’s discretion to exclude it upon considerations of trial convenience. 7 J. Wigmore, Evidence § 1929 (Chadbourn rev. 1978).
A. A Typical Case

In *People v. Johnson*, a rape case involving a black defendant and a white victim, the jury was not permitted to hear expert testimony on the issue of eyewitness identification. When the victim first saw her assailant outside her building, she thought he was a neighbor. Her only other chances to see him occurred immediately afterwards inside the building when he grabbed her from behind, knocked off her glasses and blindfolded her, and for a few seconds during the act when she pushed up the blindfold.

A half hour after the attack the defendant was arrested and taken to the victim's residence where he was required to stand handcuffed next to a uniformed policeman in the middle of the street while the upset victim identified him from her second-story window about ninety feet away. He then was taken to the police station and made to appear in a series of lineups in which he was the only bald man and the only bearded one. He was again identified by the victim, and also by a 15-year-old babysitter who had been raped a week before. The babysitter, when she first viewed the lineup, saw one man who looked like her assailant and another who sounded like him. When she viewed the lineup a second time, after a conversation with police from which an attorney for the defendant was excluded, she too identified the defendant as her assailant. Both women identified the defendant in court.

In a hearing outside the presence of the jury, the defense offered the testimony of Dr. Robert Buckhout, an expert in eyewitness identifications. Dr. Buckhout, whose field is experimental psychology and human behavior, had tested over 7,000 persons to evaluate influences on visual perception and eyewitness identifications. He emphasized that the time a witness actually sees the
face of an assailant is most important in an identification. Frequently, he said, a witness will see only the general features of an assailant but will construct a detailed, though erroneous, facial description based on those general features. He also stated that when a person moves from a lighted area into a darker area, it can take as long as seven minutes for his eyes to adjust to the difference.

Dr. Buckhout noted that people who wear glasses are less likely to give accurate descriptions than other persons, and that persons who are under stress are less likely to remember details. He also testified that people tend to recall stereotypes rather than actually observed details, this being especially true in interracial identifications.

Dr. Buckhout cited studies which show that the more often a person repeats a story the more detailed but less accurate it becomes. He noted that witnesses generally desire to cooperate and therefore feel pressure to identify someone, and that a test conducted by someone in uniform is more likely to produce an identification than is one conducted by someone not in uniform. Studies also show, he testified, that a person who stands out in a photo array or in a lineup, even if innocent, is more likely to be picked out by a witness. Finally, Dr. Buckhout emphasized that the first identification test conducted must be the best, all subsequent identifications being affected by the first.

The trial court disallowed the testimony of Dr. Buckhout because the study of eyewitness identifications was not a “science” and because it would invade the province of the jury, be confusing, and not resolve any of the issues involved. The Illinois Appellate

mary of the extent to which some courts have allowed Dr. Buckhout to testify see Buckhout, Nobody Likes a Smartass: Expert Testimony by Psychologists, 3 Soc. Actr. & L. 41 (1976).

26. See Transcript, supra note 25, at 1042.
27. Id.
28. Id. at 1043-44.
29. Id. at 1045-47.
30. Id. at 1048-50.
31. Id.
32. Id. at 1050-52.
33. Id. at 1052-55.
34. Id. at 1055.
35. Id. at 1053.
36. Id. at 1055.
37. Id. at 1065-66; 97 Ill. App. 3d at 1061, 423 N.E.2d at 1211.
Court affirmed, holding that it was not error to exclude the expert's testimony because "the question of the trustworthiness of an eyewitness identification is not beyond the common knowledge and experience of the average juror so as to be a proper subject for expert testimony." The court also noted that the question of the accuracy of the defendant's identification was a subject for cross-examination and closing argument and had been fully explored by the defendant's attorney at trial.

B. An Analysis of the Reported Decisions

_People v. Johnson_ provides a good example of how the reported decisions justify the exclusion of expert testimony on eyewitness identifications. Although the trial court questioned whether the study of eyewitness identifications was really a "science," neither the trial court nor the appellate court questioned Dr. Buckhout's qualifications. A survey of the reported decisions shows that only rarely have courts excluded expert testimony on eyewitness identifications on the ground that the witness was not properly qualified as an expert.

The trial court in _Johnson_ also excluded the testimony of Dr. Buckhout on the ground that it would invade the province of the jury. A number of reported decisions rely upon this explanation to exclude eyewitness identification testimony by expert witnesses. This rationale, however, is not appropriate in the courts.

38. 97 Ill. App. 3d at 1069, 423 N.E.2d at 1216.
39. _Id._, 423 N.E.2d at 1217.
42. See State v. Brown, 17 Wash. App. 587, 594, 564 P.2d 342, 346 (1977), where the trial court held that Dr. Loftus was not an expert and the appellate court affirmed on the ground that the trial court had not abused its discretion. In _People v. Suleski_, 58 A.D.2d 1023, 1027, 397 N.Y.S.2d 280, 282 (1977), the appellate court agreed that a witness who had never previously testified regarding eyewitness identification and who acknowledged that he could not testify about what was wrong with the lineup utilized in that case was not proven to be qualified as an expert.
44. United States v. Brown, 540 F.2d 1048, 1054 (10th Cir. 1976), _cert. denied_, 429 U.S. 1100 (1977); United States v. Brown, 501 F.2d 146, 150 (9th Cir. 1974), _rev'd on other grounds_, 422 U.S. 225 (1975); United States v. Fosher, 449
of Illinois or in the federal courts. The Illinois Supreme Court has ruled that expert testimony does not invade the province of the jury so long as the jurors are free either to accept or reject the expert’s opinion. Likewise, the Federal Rules of Evidence permit an expert’s opinion to embrace an “ultimate issue” to be decided by the trier of fact.

The court’s exclusion of the testimony was particularly inappropriate in Johnson because the expert was not asked to give his opinion or impression on whether the eyewitness in that case made a proper identification, or to answer a hypothetical question.


45. In Merchant’s Nat’l Bank of Aurora v. Elgin, J. & E. Ry. Co., 49 Ill. 2d 118, 122, 273 N.E.2d 809, 811 (1971), the Illinois Supreme Court held that an expert can state his opinion on an ultimate fact and that his opinion does not usurp the function of the jury because the jury is not required to accept the opinion of the expert. The court also rejected the argument that expert testimony was not needed in that case because the average juror could understand the hazards of a railroad crossing. Similarly, in Spence v. Commonwealth Edison Co., 34 Ill. App. 3d 1059, 340 N.E.2d 550 (1st Dist. 1975), the court reversed a judgment for a defendant in a civil case because the jury was not allowed to hear the opinion of an expert on whether the failure to insulate an electric wire could have been the proximate cause of the plaintiff’s injury. And in People v. Carbone, 27 Ill. App. 3d 988, 1002-03, 327 N.E.2d 546, 560 (1st Dist. 1975), the court held that it was not error to permit a physician to testify that in his opinion the victim’s death could not have been caused by an accident, although that question was an ultimate issue of fact for the jury to decide.


47. In People v. Valentine, 53 A.D.2d 832, 385 N.Y.S.2d 545 (N.Y. App. 1976), the court commented that for an expert to apply the general principles relating to eyewitness vagaries to the facts of a case would invade the domain of the jury. In People v. Suleski, 58 A.D.2d 1023, 397 N.Y.S.2d 280 (1977), the court excluded the testimony of an expert who admitted that he had no opinion to offer as an aid to the jury concerning the impropriety of the lineup in question and who could only conjecture that the lineup must have been faulty. In Hampton v. State, 92 Wis. 2d 450, 285 N.W.2d 868 (1979), the court allowed a psychologist to testify to factors which could influence an identification, but not to apply those factors to the concrete circumstances of the case. See also United States v. Brown, 540 F.2d 1048, 1054 (10th Cir. 1976), where the court commented in dicta that an expert could not testify that a defendant, within the factual setting of a case, would have signed a document placed before him regardless of the truth or falsity of its contents.
based on the facts in evidence.48 Rather, the identification expert was questioned about those factors which affect the reliability of eyewitness identifications in general and about specific difficulties relevant to the Johnson case, such as problems in cross-racial identifications or identifications made under stress; he was not asked to analyze specific evidence in the case.49 None of the cases which exclude expert eyewitness identification testimony on the ground that it invades the province of the jury analyze why the testimony of a psychologist on the vagaries of eyewitness identifications should be treated differently from, for example, the testimony of an FBI identification specialist who is allowed to give opinion testimony on the issue of identification by comparing pictures of people’s ears.50

The more common explanation given for excluding expert testimony on eyewitness identifications is that the matter is within the experience of the average juror. The Illinois Appellate Court ruled in Johnson, virtually as a matter of law, that the subject

48. Where a hypothetical question regarding the validity of an eyewitness identification was asked, the courts have generally held that such testimony would invade the province of the jury. Porter v. State, 94 Nev. 142, 148, 576 P.2d 275, 278 (1978); Criglow v. State, 183 Ark. 481, 36 S.W.2d 400 (Ark. 1931); Jones v. State, 232 Ga. 762, 208 S.E.2d 850 (1974).

49. See also United States v. Collins, 395 F. Supp. 629, 635 (M.D. Pa.), aff’d, 523 F.2d 1051 (3rd Cir. 1975), where similar testimony was excluded. But see Nelson v. State, 362 So. 2d 1017, 1021 (Fla. Dist. Ct. App. 1978) (the court rejected Dr. Loftus’ testimony on the grounds that it dealt with theory and speculation and because Dr. Loftus had not personally examined the identification witness); United States v. Fosher, 449 F. Supp. 76 (D. Mass. 1978) (the court rejected an expert’s testimony because it was not directed to the actual eyewitness accounts).

50. In United States v. Cairns, 434 F.2d 643 (9th Cir. 1970), the court held admissible the testimony of an FBI identification specialist who compared a photograph taken by a bank’s surveillance camera at the time of a robbery and a police photograph taken ten days prior to the trial and testified that the individual in the surveillance photograph was the same individual in the police photograph. The court rejected the defendant’s argument that the testimony invaded the province of the jury. See also United States v. Snow, 552 F.2d 165 (6th Cir. 1977). But see United States v. Brown, 501 F.2d 146, 149 (9th Cir. 1974), rev’d on other grounds, 422 U.S. 225 (1975). The court distinguished Cairns noting that the expert in the Cairns case testified in great detail and focused on particular characteristics in the photographs which were “distinctive” and “unusual.” In contrast, the expert testimony in Brown focused only on generalized characteristics and the court held that it was error, although harmless in light of the facts, for the trial judge to have allowed the FBI identification expert to state his opinion that the faces in the police photographs were the same as the faces in the surveillance photographs.
matter of the inquiry is within the experience and skill of the average juror and hence is not a proper subject of expert testimony.\textsuperscript{51} The Illinois Appellate Court decision, similar to the other opinions which have ruled in this way, contains no analysis beyond the mere assertion of this conclusion.\textsuperscript{52} Other courts, perhaps the majority, simply state that the matter is within the sound discretion of the trial judge and that the question of eyewitness reliability is not beyond the experience of the average juror.\textsuperscript{53} Again, none of the cases contain a detailed analysis of the particular testimony being offered in terms of those factors which may or may not be known to the average layman.\textsuperscript{54} Most courts merely assert that it is so.

The proposition that the reliability of identification testimony is within the ken of the average juror, and is, therefore, not a

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52. In United States v. Fosher, 449 F. Supp. 76 (D. Mass. 1978), the court commented that it does not take an expert to tell a juror that a person under stress is likely to make a mistake. In fact, however, there is much confusion among lay persons on just how stress will affect the reliability of an identification. See E. Loftus, Eyewitness Testimony 171-77 (1979). Loftus cites studies which show that many people wrongly believe that cross-racial identifications are more likely to be accurate, that many people wrongly believe that stress enhances one's ability to perceive, and that most people wrongly believe that witnesses will remember more clearly the details of a violent crime than a nonviolent crime.

Common misconceptions are reflected even in some appellate court decisions. E.g., Commonwealth v. Roddy, 184 Pa. 274, 290, 39 A. 211, 213 (1898), where the court noted that a dying declaration by a crime victim was particularly reliable. See generally, Note, Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification, 29 Stan. L. Rev. 969 (1977).


54. An exception is United States v. Fosher, 449 F. Supp. 76, 77 (D. Mass. 1978), where the court, relying on its own observation, said that an expert should not be allowed to testify on the effects of stress on an eyewitness identification. The court noted that jurors could make a proper evaluation based on their own life experiences and common sense and that an expert's testimony is not needed to inform a juror that persons acting under stress can make mistakes. But see the studies cited by Professor Loftus, note 5 supra.
proper subject for expert testimony, has a superficial appeal. One needs no special scientific training to be aware that people often err in their perception of events. It is equally common knowledge that memory plays tricks with the passage of time. What is not generally known is the pervasiveness of such errors of perception and the astonishing degree to which one can misperceive or erroneously recall events occurring in full view. Yet, in recent years the sciences concerned with the processes of perception and recall have been attempting, mostly in vain, to alert the legal community to the findings of their research in these areas.\(^5\)

It seems cavalier for courts to assert without further examination that such findings are within the knowledge of the average juror. Studies show the contrary to be true.\(^6\) Again, the standard of the Federal Rules is simply whether the expert testimony will assist the jury in evaluating or determining a fact in issue.\(^7\) It is difficult to see how expert testimony concerning the findings of experimental research about perception and memory could fail to assist a jury. This is especially true in light of the numerous areas where courts have allowed expert testimony.\(^8\)

\(^5\) See note 9 supra.
\(^6\) See note 52 supra.


The Illinois courts have admitted expert testimony in a multitude of situations: to reconstruct an accident, Miller v. Pillsbury, 33 Ill. 2d 514, 211 N.E.2d 733 (1965); to estimate automobile speeds, Diedrick v. Walters, 65 Ill. 2d 95, 357 N.E.2d 1128 (1975); to establish the proper procedure for cutting a tree limb, including the use of a ladder, Carlson v. Hudson, 19 Ill. App. 3d 576, 312 N.E.2d 19 (3d Dist. 1974); to show that it would have been physically impossible for a victim to shoot himself, People v. Carbona, 27 Ill. App. 3d 988, 327 N.E.2d 546 (1st Dist.
The Federal Rules of Evidence also provide that the probative value of the evidence must be weighed against the danger of unfair prejudice, confusion of the issues or misleading the jury, as well as considerations of undue delay, waste of time or needless presentation of cumulative evidence. The trial court in Johnson cited as a reason for excluding Dr. Buckhout’s testimony the danger that the evidence would confuse the jury. Nevertheless, the court made no attempt to articulate how the testimony would confuse the jury, and this explanation for exclusion was not relied upon by the appellate court. Some courts have excluded expert testimony on the ground that the probative value of such evidence is insignificant because the expert is simply expounding his own speculative thesis. Others assert that such evidence will not significantly aid the jury. Some decisions note that such evidence would confuse the jury, which would then give it too much weight because of the expert’s aura of special reliability. Other cases say that the testimony would be “too time-consuming,” would “open the floodgates” and would lead to “battles of the experts.”

A few decisions limit their reasoning to the specific case under review, finding that it presents no circumstances calling for special caution by the jury in evaluating eyewitness testimony. For instance, in United States v. Watson, the Court of Appeals for the Seventh Circuit noted that the expert testimony would have been of little use to the jury under the circumstances because the eyewitness had made a prompt and positive identification. But more often, the decisions rely on mere assertions, without analysis, to exclude the testimony.

Each of these objections to the use of eyewitness experts is difficult to understand. Juries are asked daily to weigh expert testimony on matters far more complex. Moreover, the time involved in presenting such testimony—a couple of days at most, but more likely only a few hours—is minimal, especially in light of the stakes involved in a criminal trial.

The final rationale given by the Johnson court—that the defendant was fully able to explore any deficiencies in the eyewitness testimony by cross-examination and in closing argument—is frequently recited in the reported cases. The argument that the procedural safeguards of cross-examination, jury instruction and the exclusionary rules obviate the necessity of expert testimony about the reliability of identification assumes too much. As noted elsewhere, eyewitness testimony will almost inevitably be admitted,

275 N.W.2d 736, 742 (Iowa 1979) (concurring opinion).

65. See United States v. Collins, 395 F. Supp. 629 (M.D. Pa.), aff'd, 523 F.2d 1051 (3d Cir. 1975) (record does not disclose those factors which usually form the basis for opinion evidence); United States v. Amaral, 488 F.2d 1148, 1153 (9th Cir. 1973) (cross-examination revealed no reasons why an expert was needed); Porter v. State, 94 Nev. 142, 150, 576 P.2d 275, 279 (1978) (witness not under stress when he viewed the suspect prior to the crime); State v. Porraro, 404 A.2d 465, 471 (R.I. 1979) (subject matter of testimony proffered in this case, dealing with trustworthiness in general, is not beyond the ken of the average juror).

66. 587 F.2d 365 (7th Cir. 1978).

67. See, e.g., In re Financial Securities Litigation, 609 F.2d 411 (9th Cir. 1979), cert. denied, 446 U.S. 929 (1980). But see In re Japanese Electronic Products Litigation, 631 F.2d 1069 (3d Cir. 1980).

even if suggestive procedures were utilized to secure it, and the
defense is then faced with the problem of how best to discredit
that testimony.\textsuperscript{69}

Although direct and cross-examination will expose the facts
which lead up to the identification, examination of occurrence wit-
tnesses alone will not generally articulate to the jury precisely why
these facts render the identification suspect. The problem is fur-
ther exacerbated because lay persons are not necessarily aware of
the complex physiological and psychological factors which influ-
ence identification; indeed, they may have serious misconceptions
about what factors are conducive to an inaccurate identification.\textsuperscript{70}
While counsel may request the court to instruct the jury to evalu-
ate carefully any eyewitness testimony, this instruction alone will
not educate the jury to those factors which make eyewitness testi-
mony vulnerable.\textsuperscript{71} Furthermore, the common instruction which

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  \item \textsuperscript{69} See note 1 supra.
  \item \textsuperscript{70} See note 52 supra and studies cited in note 9 supra.
  \item \textsuperscript{71} The Court of Appeals for the Seventh Circuit has held that a special in-
struction on witness identification must be given in each case when identification
is at issue. United States v. Hodges, 515 F.2d 650 (7th Cir. 1975). Accord United
States v. Holley, 502 F.2d 273 (4th Cir. 1974); State v. Warren, 635 P.2d 1236
(Kan. 1981); Commonwealth v. Rodriguez, 378 Mass. 296, 391 N.E.2d 889 (1979);
App. 1980). The recommended instruction used in the Seventh Circuit is:

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The reliability of eyewitness identification has been raised as an is-
issue in this case and deserves your attention. Identification testimony is
an expression of belief or impression by the witness. Its value depends
upon the opportunity the witness had to observe the offender at the time
of the offense and later to make a reliable identification, and upon the
influences and circumstances under which the witness made the
identification.

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

The government has the burden of proving beyond a reasonable
doubt that the defendant was the person who committed the crime.
\end{quote}

\begin{itemize}
  \item Federal Criminal Jury Instruction, No. 3.06 (Committee on Federal Criminal
Jury Instructions of the Seventh Circuit 1980). The committee rejected the more
detailed instruction recommended by the Court of Appeals for the District of Co-
lumbia in United States v. Telfaire, 469 F.2d 552 (D.C. Cir. 1972), believing that
elaboration on the specific circumstances surrounding the identification was best
left to argument. Some federal courts of appeal have ruled that the giving of an
identification instruction lies within the discretion of the trial judge. United
States v. Sambrano, 505 F.2d 284 (9th Cir. 1974); United States v. Evans, 484
states that jurors may take into consideration their own life experiences and common knowledge may actually aggravate error if their common knowledge is erroneous. While defense counsel is free to argue the inconsistencies and vagaries of the testimony in his closing argument, he may well not succeed in convincing the jury if scientific data to back up his argument is not in the record.

More importantly, this argument seems to ignore the defendant's sixth amendment right to a fair trial. Cross-examining the prosecution's witnesses is only part of the right; the defendant also has a right to present a defense. One would expect this right to

F.2d 1178 (2d Cir. 1973).

The rule in Illinois is somewhat ambiguous. In People v. Ricili, 400 Ill. 309, 79 N.E.2d 509 (1948), the Illinois Supreme Court held it to be reversible error for a trial court to refuse an instruction covering the question of identification in a case where the defendant was identified by only one of four eyewitnesses to the crime. Nonetheless, the Illinois Judicial Conference Committee on Pattern Jury Instructions in Criminal Cases recommends that no instruction be given on the circumstances of identification on the ground that it is more properly a subject of closing argument. ILLINOIS PATTERN JURY INSTRUCTIONS-CRIMINAL 13.15 (1981). See also Hampton v. State, 92 Wis. 2d 450, 285 N.W.2d 868 (1979).

In any event, a cautionary instruction on the question of the reliability of eyewitness testimony is not an acceptable alternative to expert testimony. Aside from the question of how much importance juries actually give to such instructions, there is the question of what to include in the instruction. See Bruton v. United States, 391 U.S. 123 (1968). There are legitimate reasons for courts to go slowly in adopting uncritically the results of empirical studies in this area. Compare the concurring opinion of Chief Judge Bazelon in United States v. Telfaire, 469 F.2d 552 (D.C. Cir. 1972), regarding the advisability of giving a special instruction on the reliability of interracial identifications where studies show that whites are more easily identified than blacks, even by blacks, with that of Judge Leventhal. Cross-examination of the expert, and allowing other experts to present opposing views where they exist, would seem to be much more feasible than attempting to devise a comprehensive cautionary instruction.

72. U.S. Const. amend. VI, provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defense.

73. Washington v. Texas, 388 U.S. 14, 19 (1967); Chambers v. Mississippi, 410 U.S. 284 (1973); People v. Manion, 67 Ill. 2d 564, 576, 367 N.E.2d 1313, 1319 (1977). In People v. Watson, 36 Ill. 2d 228, 232, 221 N.E.2d 645, 647-48 (1966), the Illinois Supreme Court emphasized: "A person charged with a crime should be allowed to make all proper defense and if the evidence offered is competent, it
tip the balance in favor of the defendant in nearly every case.

There has been only one reported case in which a trial court allowed an identification expert to testify. In *People v. Galloway,* a concurring opinion, in which seven justices joined, addressed the issue of whether the expert had been properly allowed to testify. Dr. Elizabeth Loftus had testified to the danger involved in having a witness identify a murder suspect by photograph three years after the murder was committed. Her testimony was based in part on studies by Dr. Robert Buckhout. The concurring justices noted that while they were affirming the discretion of the trial court to admit this testimony, it would not have been an abuse of discretion to deny it. In their opinion, the matter was within the common experience of the jurors, and the expert testimony did not really aid in resolving the issues. The concurring justices believed that once an identification was found to be admissible under constitutional standards, its efficacy should not be "diminished" by expert testimony. These judges stressed that the public was concerned about the time and cost of trials, and that courts should therefore be hesitant in approving the use of experts. This concurrence, like most of the reported opinions, leaves no doubt that even where trial judges are given discretion to admit expert testimony on the issue of eyewitness identification, appellate courts will readily affirm when that discretion is exercised against admissibility.

should be permitted to go to the jury for all it is worth." In *People v. Johnson,* 97 Ill. App. 3d 1055, 423 N.E.2d 1206 (1st Dist. 1981), cert. denied, 50 U.S.L.W. 3669 (U.S. Feb. 22, 1982) (No. 81-5845), the defendant did not take the stand, and the whole defense was the unreliability of the eyewitness' identifications.

74. 275 N.W.2d 736 (Iowa 1979).
75. *Id.* at 738. The *en banc* opinion merely addressed the issue whether the expert could rely on reports compiled by another expert in her testimony. The court held that she could.
76. *Id.* at 741 (Reynoldson, C.J., concurring).
77. *Id.*
78. *Id.* at 742 (Reynoldson, C.J., concurring).
79. While appellate courts seldom reverse criminal cases on the ground that expert testimony was improperly excluded, some recent decisions have done so. In *Ibn-Tamas v. United States,* 407 A.2d 626 (D.C. 1979), the court held that the testimony of a clinical psychologist regarding the "battered-wife syndrome," which was offered to support a defense to a charge of murder, did not invade the province of the jury. The court concluded, as a matter of law, that its probative value outweighed any countervailing considerations. The court noted that "in exercising its discretion, the trial court must be guided by the principle that 'the defense should be free to introduce appropriate expert testimony' and that such
II. A FURTHER EXAMINATION OF THE ISSUE

Underlying the rather superficial "short answers" outlined above, which the courts have routinely given, there seem to be other reasons which explain the judicial reluctance to admit expert testimony on the issue of eyewitness identification. One such reason may be a generally unarticulated belief that identification science is not science at all. A second underlying reason may be a fear that if the courts allow this testimony, they will be bogged down with "battles of the experts" in even the most routine criminal cases where identification of the defendant is an issue.

A. The Study of Perception, Memory and Recall is a Science.

As noted above, few courts have disallowed the testimony of psychologists on the ground that the witnesses were not experts. Furthermore, the Federal Rules of Evidence provide that a witness qualified as an expert because of his knowledge, skill, experience, training or education may testify, in the form of an opinion or otherwise, if scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a matter of fact in issue. Yet, courts reject the use of expert testimony on the issue of identification saying it "invades the province of the jury," "is within the ken of the average juror," "will confuse the jury and delay the trial," and "is not required given cross-examination and other procedural safeguards." Reading between the lines, those courts seem to be saying, "I don't care who she is, how many doctorates she has, where she teaches or how many experi-

evidence should be admitted if 'the opinion offered will be likely to aid the trier in the search for truth.'" Id. at 632. See also cases cited note 58 supra.

Similarly, in United States v. Hill, 655 F.2d 512 (3d Cir. 1981), where the defendant was convicted of distributing heroin, the trial court had refused to allow a clinical psychologist to testify concerning the defendant's entrapment defense. The expert would have testified to the defendant's psychological characteristics, subnormal intelligence and resulting susceptibility to persuasion and psychological pressure. The court of appeals reversed, noting that:

'[I]f the expert can reach a conclusion, based on an adequate factual foundation, that the appellant, because of his alleged subnormal intelligence and psychological profile, is more susceptible and easily influenced by the urgings and inducements of other persons, such testimony must be admitted as relevant to the issues of inducement and predispositions. Id. at 516 (emphasis added).

80. See note 42 supra.
81. FED. R. EVID. 702. See also note 13 supra.
ments she has done. I don’t believe in this stuff.”

Historically, the law has been aloof to the findings of empirical psychology. At a time when this discipline was in its infancy, several scholars attempted to gain a hearing in legal circles for the results of research that bore on evidentiary issues. John Henry Wigmore was influential in scotching those attempts. He argued that the findings and theories were insufficiently verified. Moreover, since most of the critical literature on the subject was in foreign languages (mainly German), the American bench and bar were not in a position to evaluate properly the data.

Wigmore’s observations undoubtedly had merit at the time. Modern empirical psychology dates back hardly a hundred years to the first laboratory at the University of Leipzig, Germany. The early experimentalists had been trained in the “hard” sciences of physics, chemistry, physiology, neurology and anatomy. Their early studies in sensory perception reflected the methodology of those sciences. When they first turned their attention to memory and recall, however, they stepped away from this tradition and adopted a “softer” methodology. The methodology used in the study of memory and recall at this initial stage (and still dominant at the time Wigmore wrote) was “introspection.”

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82. J. RAM, A TREATISE ON FACTS (1873); S. FREUD, Psycho-Analysis and the Establishment of Facts in Legal Proceedings, in 9 THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 103 (J. Strachey ed. 1959), H. MUNSTERBERG, ON THE WITNESS STAND (1908); W. STERN, BEITRAGE ZUR PSYCHOLOGIE DER AUSSAGE. (1903).

83. Wigmore, Professor Muensterberg and the Psychology of Testimony, 3 ILL. L. REV. 399 (1909).

84. Psychologists were not called to testify in English Courts before the Second World War, but after that they were allowed a much wider role than in American Courts. Howard, The Psychologist as Expert Witness, in PSYCHOLOGY, LAW AND LEGAL PROCESSES 45 (Farrington, Harkins, & Lloyd-Bostock eds. 1979).


86. See id.; D. SCHULTZ, A HISTORY OF MODERN PSYCHOLOGY (1975). The experimental method came to psychology through physiology. The earliest experimentalists were concerned with the organs of sense and the transmission of information from these organs to the brain via the nervous system. Herman von Helmholtz (1821-1894), trained as a physicist, was concerned with the processes of vision and hearing. He measured the speed of the nervous impulse from the external receptor point to the brain. Before his time, everyone assumed, for example, that light falling on the retina was perceived in the conscious brain instantaneously. Helmholtz demonstrated a time lapse, that the impulse travelled the optic nerve at the rate of fifty meters per second; he also discovered that other, unobserved factors can interfere with this process. Ernst Weber (1795-1878), orig-
report internal experiences while physical and physiological variables were systematically altered. This, of course, was a highly subjective procedure. By the first decades of this century, however, the empirical study of memory and recall in this country was returning to the methodology of the so-called "hard" sciences. Objective measurement, mathematical expression and predictability became norms, and by 1913 Wigmore himself was calling attention to some

inally an anatomist and physiologist, determined that measurable differences in the stimulation of the senses would not be consciously detected unless the difference reached a certain magnitude. This discovery came to be known as Weber's Law of the Just Noticeable Difference. Gustav Fechner (1801-1887) introduced "psycho-physics" and turned his attention to color vision and the phenomenon of the after-image. Wilhelm Wundt (1832-1920), who came to psychology from physiology and medicine, believed that the experimental method could be applied only to perception and not to memory and recall. As a result, he introduced a methodology to study unobservable processes such as memory which he called "introspection." In this procedure the experimental subject was asked to report his internal, conscious experiences. This clinical approach, to be followed later in other branches of psychology, was rejected as "unscientific" by others in the field; it was considered too unreliable because no two subjects reported the same thing.

A student of Wundt, Bradford Titchener (1867-1927), brought the introspective method to America. He opened a laboratory at Cornell University and pursued the study of perception and recall after the fashion of his German mentor, Wundt. The methodology was very suspect to pragmatic American psychologists; consequently research in this area of memory and recall for a time was not highly regarded here in scientific circles. It was against this background that Wigmore made his disparaging comments about expert psychological testimony. See note 83 supra. By 1920, the introspective method had run its course, and the more rigorous experimental method had come to be applied to the study of perception and recall. Herman Ebbinghaus (1850-1909) had shown in his book, ON MEMORY (1885), that complex psychological phenomena such as memory and recall were indeed susceptible to the experimental method. John Watson, then of Johns Hopkins University, published a paper in 1913 in which he showed how the experimental method could be used to measure human behavior under controlled circumstances in such a way that unobservable, conscious processes such as memory could be indirectly but reliably studied. Since then, the experimental method has dominated the study of perception and memory. There is a recognized continuum in the field of psychology that has at one end those subspecialties in which the methodologies are akin to those of physics and chemistry and at the other end those subspecialties for which art is perhaps the more appropriate model. Mitroff and Kilman, On Evaluating Scientific Research: The Contribution of the Psychology of Science, 8 TECH. FORECASTING AND SOCIAL CHANGE 163-74 (1975); B. KANTOWITZ & H. ROEDIGER, EXPERIMENTAL PSYCHOLOGY: UNDERSTANDING PSYCHOLOGICAL RESEARCH 14 (1978). At the "soft-shelled" end are found the clinicians and therapists. The experimental psychologists—such as those who work on perception and recall—are generally accepted in the field as being located toward the extreme "hard-shelled" end of the continuum.
psychological data.\textsuperscript{87}

The proper test for the admission of expert testimony is whether the methodology relied upon by the expert is generally accepted as reliable and valid, not whether the experts in the field agree in their conclusions.\textsuperscript{88} The methodology of that subspeciality  

87. J. Wigmore, \textit{Science of Judicial Proof} (1913). Wigmore himself explained the basis for this shift: "When the psychologist is really ready for the courts, the courts are ready for him." 3 J. Wigmore, \textit{Evidence} 368 (3d ed. 1940).

88. For example, in United States v. Alexander, 526 F.2d 161 (8th Cir. 1975), the court refused to admit an unstipulated polygraph test, offered by the defendant, on the ground that the scientific community generally found the test to be unreliable and invalid. Reliability refers to the question whether the test will yield substantially the same results if repeated again and again under the same controlled circumstances. See L. Tyler, \textit{Tests and Measurements: Foundations of Modern Psychology} Series 32 (1963). The \textit{Alexander} court noted that research indicated that a polygraph test could be wrong more than once in four tries. 526 F.2d at 165. Validity refers to the question whether the test really does measure what it purports to measure. See L. Tyler, \textit{supra}, at 28. Again, the \textit{Alexander} court noted that there were opportunities in the polygraph procedure for the tester's biases to affect the outcome and that the results of the test could also be influenced by other extrinsic and uncontrolled factors. 526 F.2d at 165-67. The court did state that polygraph tests might be admissible in the future should they find greater acceptability in the scientific community. \textit{Id.} at 166. As an additional reason for excluding the polygraph test, the court stated that it feared the test would pervade the fact-finding process and have an exaggerated effect on the jury. \textit{Id.} at 168. In Ibn-Tamas v. United States, 407 A.2d 626, 639 (D.C. 1979), where the court held that the testimony of a psychologist on the "battered-wife syndrome" should have been admitted, the court explained that those cases which had excluded expert testimony had done so not because the scientific knowledge in itself was deficient, but rather because either the method of scientific inquiry was not generally accepted (citing, e.g., Brown v. United States, 384 A.2d 647 (D.C. 1978) (voice prints inadmissible); Frye v. United States, 293 F. 1013 (D.C. Cir. 1910) (polygraph results inadmissible); United States v. Hearst, 412 F. Supp. 893 (N.D. Cal. 1976), \textit{aff'd}, 563 F.2d 1331 (9th Cir. 1977) (stylistic comparison of defendant's known writings and utterances with later writings and tape recordings inadmissible)), or the testimony failed to meet the threshold test of believability in that the state of scientific knowledge was so meager as to reflect the conclusion that no reliable methodology for making the inquiry had been discovered. Tonkovich v. Dept. of Labor & Industries, 31 Wash. 2d 220, 195 P.2d 638 (1948) (testimony that cancer caused by on-the-job injury inadmissible). The court illustrated the comparison by reference to two \textit{Hearst} opinions. In the first, United States v. Hearst, 412 F. Supp. 889 (N.D. Cal. 1976), the qualifications of and the methodology used by a psychologist who testified to the impact of kidnapping and related incarceration on the defendant's mental state when she allegedly committed a crime were not questioned and the testimony was admitted. In the second \textit{Hearst} opinion, United States v. Hearst, 412 F. Supp. 893 (N.D. Cal. 1976), \textit{aff'd}, 563 F.2d 1331 (9th Cir. 1977), the methodology utilized in psychol-
of experimental psychology which deals with perception and memory is currently accepted as reliable. The experimenter takes control over all the factors which might influence the outcome of the test, so that those factors not under study are neutralized. The one factor which is the focus of the study is thus allowed to exert its influence, and it is then observed and measured—sometimes in relationship to another factor under control.88

An example of this methodology is illustrated in an experiment designed to determine if there was any reason to give special consideration to the sex of a witness recalling a violent event.89 Two groups of witnesses were selected randomly, one male and one female. The groups were matched so that the only functional difference between the two groups was gender. Each group was exposed to the same violent event in a standardized way. Later, recall was solicited from members of each group in a standardized way. The results showed that the ability of both the males and the females to recall witnessed events deteriorated with the increased violence and emotionality of the event. The experimenter could

inguistics was challenged and testimony comparing the defendant's earlier writings and utterances with her later writings and tape recordings was not admitted. The Court of Appeals explained that the different results in the two opinions could not be explained on the ground that the trial judge believed that the psychologist was more knowledgeable than the psycholinguist. Rather, the trial judge had determined that there was a generally accepted methodology in the field of psychology which could be utilized to explain the effects of a kidnapping on one's mental state, but that there was no generally accepted methodology in the field of psycholinguistics to explain differences in a person's writing and voice patterns. This distinction makes good sense. A trial judge can readily determine by objective data whether an expert relied on a generally accepted methodology to formulate his opinion. But, realistically, a trial judge is generally not in a position to determine whether or not a sufficient quantum of knowledge exists in a given field so that an expert's opinion can be said to be generally accepted. See J. Weinstein, Evidence 1702[02] (1981).


90. Clifford & Scott, Individual and Situational Factors in Eyewitness Testimony, 63 J. of Applied Psychology 352-58 (1978). Research into the sex factor has been pursued by many others. See, e.g., Siegel & Loftus, Impact of Anxiety and Life Stress Upon Eyewitness Testimony, 12 Bulletin of the Psychonomic Society 479-80 (1978); Powers, et al., The Eyewitness Accounts of Females and Males, 64 J. of Applied Psychology 339-47 (1979). The methodology used to determine sex differentials in perception does not differ significantly from the methodology used in the biological sciences to determine, for example, whether a certain drug affects the blood pressure of women differently than that of men. Two different groups are selected and all factors that might affect blood pressure other than the drug and gender are kept constant.
state that this observation was applicable to persons generally with a reliability factor of one chance in a thousand of being wrong. The results also showed that women were significantly poorer than men at recalling facial features, but that women tended to be better at recalling events accurately. The women were also significantly more susceptible to the misleading suggestions of the person soliciting the recall. The researchers stated that these characteristics were true of women generally, with a reliability factor of two chances in a hundred of being wrong.

Researchers have reported with similar degrees of reliability that a witness (whether male or female) who expresses the most certainty about the accuracy of his recollections is no more likely to be correct than one who is hesitant and tentative. The same method of inquiry has also established, at the same confidence levels, that an intelligent witness is no more likely to be accurate in his perception and recall of an incident than a person of lesser intelligence. Other examples abound.

It is ironic that the courts have generally permitted the testimony of clinical psychologists, but have shown more skepticism

90.1 This contrasts with some findings suggesting that under normal conditions women are more attentive to facial features than men. See, e.g., Goldstein & Chance, Visual Recognition Memory for Complex Configurations, 9 Perception and Psycho-Physics 237-41 (1970).

91. Experimentalists normally do not believe that test results warrant making serious life decisions unless the mathematical analysis indicates that there are no more than five chances in a hundred that they may be wrong. Some decisions may require that the odds be even more favorable. See R. Hyman, supra note 89, at 72. For a more readable discussion of how statistical inferences interact with real life decisions, see B. Kantowitz & H. Roediger, supra note 86, at ch. 2. For a thorough mathematical analysis of the procedure, see Q. McNemar, Psychological Statistics (4th ed. 1969). The experimental method, which employs controlled factors and statistical analysis, is at the heart of modern science, both theoretical and applied, and frequently it is employed to support life and death decisions, such as in cancer research and treatment.

92. See note 90 supra.


94. See generally the studies cited in note 9 supra.

95. For example, clinicians are allowed in court to testify at to matters concerning: competency, Blunt v. United States, 389 F.2d 545 (D.C. Cir. 1967); People v. Crawford, 66 Mich. App. 581, 239 N.W.2d 670 (1976); disability under insurance policies, Hidden v. Mutual Life Ins. Co., 217 F.2d 818 (4th Cir. 1954);
about admitting the testimony of experimental psychologists. Unlike clinical opinions based on interviews and projective tests, which are so dependent on subjective impressions that testing of their reliability and validity is almost impossible, the findings and methodology of experimental psychological studies are published in technical journals for all to scrutinize. A published report of such a study describes in detail the manner in which the subjects were chosen, how extrinsic factors were identified and controlled, how the tester's biases were eliminated and how the judgment as to the level of reliability and validity was achieved. An experimental psychologist testifying in a court of law can be closely cross-examined on procedures and inferences, since all the data of the experiments upon which he relies are available to the world.

It might be argued, of course, that the findings of experimental psychologists show only that certain characteristics are found with a certain statistical frequency in a particular population, but not necessarily in every individual in that group, whereas the clinician's findings usually relate to an individual he has examined who is involved in the case in which the clinician is testifying. What is the relevance, one might ask, of a group characteristic if there is no disability under workmen's compensation acts, Bilbrey v. Industrial Comm'n., 27 Ariz. App. 473, 556 P.2d 27 (1976); the causal connection between tortious action and perceived mental conditions, Reese v. Naylor, 222 So. 2d 487 (Fla. 1969); civil commitment, United States v. McNeil, 434 F.2d 502 (D.C. Cir. 1970); and responsibility for criminal behavior, Jenkins v. United States, 307 F.2d 637 (D.C. Cir. 1962); People v. Felton, 26 Ill. App. 3d 395, 325 N.E.2d 400 (3d Dist. 1975).

96. A number of critics have pointed out the methodological weaknesses in clinical procedures. See generally J. ZISKIN, COPING WITH PSYCHIATRIC AND PSYCHOLOGICAL TESTIMONY (3d ed. 1981); Comment, The Psychologist as Expert Witness: Science in the Courtroom, 33 Md. L. Rev. 539 (1979). The psychologists (and psychiatrists) who come to testify as to mental conditions and to forecast future behavior lean heavily upon the clinical interview and projective and non-projective tests. The Minnesota Multiphasic Personality Inventory (MMPI) is the popular non-projective test, while the Rorschack (ink blot) and Thematic Apperception Test (TAT) are examples of the projective tests used. Wade & Baker, Opinions and Use of Psychological Tests: A Survey of Clinical Psychologists, 32 Am. Psychologist 874-75, 879 (1977). The reliability of these techniques has never been properly demonstrated. The validity of the projective tests is said to approach zero. Comment, The Psychologist as Expert Witness: Science in the Courtroom, 38 Md. L. Rev. 539, 572 n.169, 573 n.170 (1979). Clinical practitioners, nonetheless, find them extremely helpful in arriving at their admittedly subjective evaluations.

97. See B. KANTOWITZ & H. ROEDIGER, supra note 86, at ch.4, "How to Read a Journal Article."
conclusive way of showing that this characteristic is present in this witness? For example, how does one know that this woman is not the exception, that her recall of facial features after a violent attack is not superior to ninety-eight percent of women in the general population?

The fact is, one does not know. There are policy reasons, however, which favor giving even the general findings of experts to jurors to help them weigh the accuracy of conflicting testimony. "Beyond a reasonable doubt" in the final analysis is obviously a probability judgment. When the jury is instructed to rely on its knowledge of human nature in weighing testimony and reaching its verdict, it is being directed to engage in a probability consideration. "Human nature" is not individualized. It is a perception of how people, or people of a certain class, act under given conditions. Each juror is invited by the court to apply a generalization that he has come by in his own subjective way. Basic fairness to the accused requires that the jury's "knowledge" of human nature be informed. If a juror is inclined to generalize that one who has been the victim of aggression will "never forget the face," or if a juror is inclined to generalize that a witness who is "certain" is more likely to be accurate than one who is tentative, then ought not the juror be exposed to reliable information which will balance these questionable generalizations and allow him to come to a fairer evaluation of the testimony?

B. The Courts will not be Bogged Down with Battles of the Experts.

The second reason underlying why the courts are reluctant to admit expert testimony on the issue of eyewitness identification may be a pragmatic fear of establishing a rule which would permit defendants routinely to call experts on the issue. Once the gates are opened the arena might become flooded with battling experts. The cases in which the prosecution presents eyewitness testimony are numerous. If it became routine for defendants in eyewitness cases to call experts to testify on that issue, the additional amount of court time spent on such cases would, in the aggregate, indeed be significant. Of more concern, if a significant number of indigent defendants in such cases demanded the services of an expert, is the additional cost to the government would be substantial. One

98. See, e.g., People v. Watson, 36 Ill. 2d 228, 221 N.E.2d 645 (1966) (state required to pay fees for indigent's questioned-document examiner).
might wonder, also, whether the pool of experts in the field of perception, memory and recall is large enough to supply the demand that could be expected to result, although one suspects this problem would quickly be remedied.

Perhaps courts that leave the admissibility question in this area to "the sound discretion of the trial judge" are really indicating that the expert testimony ought to be allowed in certain eyewitness cases, but are afraid to lay down a rule which would open the floodgates. The obvious problem with leaving this question to the unguided discretion of the trial judge, however, is that such a manner of proceeding necessarily results in an unguided and unequal application of the law. Certainly, part of the work of appellate courts is to give guidelines to lower courts regarding their exercise of discretion.

In the problem under discussion, it seems clear that where there is abundant evidence which corroborates the eyewitness testimony, or where the witness knew the defendant well, the introduction of expert testimony on the issue might well be a waste of time and resources. On the other hand, where eyewitness testimony of a stranger (or strangers) is the only evidence, it is very difficult to justify not allowing the expert to testify.

A question arises, however, about the quantum of corroborative evidence which should be required before a trial court could disallow the expert testimony. A useful criterion might be:

Where the corrobative evidence alone is sufficient to take the case to the jury, no expert testimony on the issue of the reliability of eyewitness identification need be permitted; but where except for the eyewitness testimony the court would be required to direct a verdict in favor of the defendant, and where the defendant was not well known to the witness, the expert should be permitted to testify.

Such a rule would be very similar to the approach courts take in determining whether or not a particular jury instruction ought to be given.

99. Once a court allows one side to present expert testimony, then it must normally permit the opposition to counter that evidence through its own experts. Cf. United States v. Sellers, 566 F.2d 884, 886 (4th Cir. 1977).

100. The usual test for a directed verdict is whether a reasonable jury could find guilt beyond a reasonable doubt based on the evidence. See, e.g., United States v. Telfaire, 469 F.2d 552 (D.C. Cir. 1972).

101. See, e.g., People v. Redmond, 59 Ill. 2d 328, 320 N.E.2d 321 (1974) (defendant has right to an insanity defense instruction only where the evidence on
CONCLUSION

Great Britain, recognizing the great fallibility of eyewitness identifications, has taken steps to insure that in ordinary cases prosecutions are not brought on eyewitness evidence only, and that, if brought, the judge directs a verdict for the accused. American courts, on the other hand, routinely allow cases based solely on the testimony of a single eyewitness to go to the jury. To safeguard the accused from unreliable out-of-court identifications, certain procedural rights are afforded him under the United States Constitution. In-court identifications, however, are not suppressed if they can be shown to have an "independent basis." By permitting expert testimony on the question of the reliability of eyewitness identification in cases where the eyewitness was a stranger to the accused and where there is little or no corroborating evidence, the danger of sending an innocent person to jail or death can be lessened. If we opt to allow such cases to go to juries, can we continue to prevent defendants from informing those juries about research findings in the area of perception, memory and recall?

that issue raises a reasonable doubt of guilt).

102. See the Devlin Report, supra note 1, and related materials therein. In Regina v. Turnbull, [1977] 2 Q.B. 224, 229-30, the Court of Appeals explained:

In our judgment when the quality [of the identification evidence] is good, as for example when the identification is made after a long period of observation, or in satisfactory conditions by a relative, a neighbor, a close friend, a workmate and the like, the jury can safely be left to assess the value of the identifying evidence even though there is no other evidence to support it: provided always, however, that an adequate warning has been given about the special need for caution. Were the courts to adjudge otherwise, affronts to justice would frequently occur.

When, in the judgment of the trial judge, the quality of the identifying evidence is poor, as for example when it depends solely on a fleeting glance or on a longer observation made in difficult conditions, the situation is very different. The judge should then withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification. This may be corroboration in the sense lawyers use that word; but it need not be so if its effect is to make the jury sure that there has been no mistaken identification.