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Bryan S. Ryan

*Washington University School of Law*

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# ALLEVIATING OWN-RACE BIAS IN CROSS-RACIAL IDENTIFICATIONS

BRYAN SCOTT RYAN\*

## ABSTRACT

*Over the past 80 years, courts, social scientists, and legal scholars have come to agree that eyewitness testimony is largely unreliable due to a variety of confounding factors. One prominent factor that makes eyewitness testimony faulty is own-race bias; individuals are generally better at recognizing members of their own race and tend to be highly inaccurate in identifying persons of other races. This instance, where a witness of one race attempts to identify a member of another race, is referred to as a cross-racial identification. Own-race bias in cross-racial identifications creates racial discrimination in the American judicial system, where a majority of defendants in criminal cases are minorities. Courts have traditionally ignored the problem of own-race bias in the courtroom, believing that traditional safeguards such as cross-examination and summation effectively resolve racial discrimination in the judicial system.*

*Critical race theorists, however, argue that this response not only fails to address own-race bias, but actually contributes to racial discrimination by reinforcing ordinariness—the idea that racism and racial discrimination are ordinary experiences, not abnormalities. In response, academics have proposed multiple solutions, including allowing expert testimony, issuing jury instructions, or eliminating eyewitness testimony altogether, to address the problem of own-race bias. Applying ordinariness, and balancing the concerns of the judiciary, the optimal solution to alleviate own-race bias is to issue a jury instruction. I argue, though, that the few cross-racial identification jury instructions that are currently in place have critical flaws. Applying critical race theory and, more specifically, ordinariness, I argue that an optimal jury instruction must be mandatory in all situations where a cross-racial identification has occurred, drafted using objective language, and issued before the identifying witness*

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\* Editor in Chief, *Washington University Jurisprudence Review*; J.D. Candidate (2016), Washington University School of Law; B.A. (2013), Southern Illinois University Edwardsville. I would like to thank my wife, Kelsey, my family, and my friends for their continued love, support and encouragement.

*testifies against the defendant and separate from the general eyewitness testimony jury instruction.*

## INTRODUCTION

Racial tensions are an undeniable part of America's past, but such strains are far from history. Over the last eighteen months, we have seen racialized conflicts and social unrest arise in Ferguson, Missouri; Staten Island, New York; Baltimore, Maryland; Cleveland, Ohio; and Dallas, Texas, among others.<sup>1</sup> Each of these incidents constitutes a single example of larger recurring national problems. Complex racial disparities exist in nearly every facet of American life: legally, culturally, and socially.<sup>2</sup> Race affects each of our lives.<sup>3</sup> Racism is not dead, and race-based

1. See *The Lessons of Ferguson*, THE ECONOMIST (Aug. 23, 2014), <http://www.economist.com/news/leaders/21613261-there-no-excuse-rioting-smarter-policing-would-make-it-less-likely-lessons>; Ray Sanchez, *Choke Hold by Cop Killed NY Man, Medical Examiner Says*, CNN.COM (Aug. 2, 2014), <http://www.cnn.com/2014/08/01/justice/new-york-choke-hold-death/>; Oliver Laughland & Jon Swaine, *Six Baltimore Officers Suspended Over Police-Van Death of Freddie Gray*, THE GUARDIAN (Apr. 20, 2015), <http://www.theguardian.com/us-news/2015/apr/20/baltimore-officers-suspended-death-freddie-gray>; Elahe Izadi & Peter Holley, *Video Shows Cleveland Officer Shooting 12-Year-Old Tamir Rice within Seconds*, WASH. POST (Nov. 26, 2014), <http://www.washingtonpost.com/news/post-nation/wp/2014/11/26/officials-release-video-names-in-fatal-police-shooting-of-12-year-old-cleveland-boy/>; Kim Bellware, *Cop Placed on Leave After Video Emerges of Brutal Arrests at Teen Pool Party*, HUFFINGTON POST (June 8, 2015), [http://www.huffingtonpost.com/2015/06/07/mckinney-police-pool-party\\_n\\_7530164.html](http://www.huffingtonpost.com/2015/06/07/mckinney-police-pool-party_n_7530164.html).

2. See, e.g., John P. Rutledge, *They All Look Alike: The Inaccuracy of Cross-Racial Identifications*, 28 AM. J. CRIM. L. 207, 214 (2001) ("One in three black males between the ages of twenty and twenty-nine is under judicial supervision in this country. And while only five percent of the U.S. population, black males make up more than half of America's prisoners."); Catherine Hill, *How Does Race Affect the Gender Wage Gap?*, HUFFINGTON POST (Apr. 14, 2014), [http://www.huffingtonpost.com/catherine-hill/how-does-race-affect-the-gender-wage-gap\\_b\\_5087132.html](http://www.huffingtonpost.com/catherine-hill/how-does-race-affect-the-gender-wage-gap_b_5087132.html) (stating that African American women, on average, earn 12% less than white women for the same job).

One of the most compelling, and currently relevant thanks to the release of the New Line Cinema biopic *Straight Outta Compton*, examples of racial unrest due to perceived disparities is the 1988 NWA song, "Fuck Tha Police." In 1989, songwriter Ice Cube addressed the lyrics to the song, which discussed, rather explicitly, racial disparities perpetuated by law enforcement: "Our people been wanting to say, 'Fuck the police' for the longest time. If something happened in my neighborhood, the last people we'd call was the police. Our friends get killed; they never find the killer. 387 people were killed in gang activity in L.A. in 1988. Nothing was said about that. But when this Korean girl got killed in Westwood, a white neighborhood, now it's a gang problem. As long as [black Americans] was killing each other, there wasn't nothing said." John Leland, *Kick the Ballistics*, SPIN, Sept. 1989, at 12.

3. See generally *Criminal Justice Fact Sheet*, NAACP (2015), <http://www.naacp.org/pages/criminal-justice-fact-sheet> (discussing vast difference in incarceration rates between white and minority populations); Joseph W. Rand, *The Demeanor Gap: Race, Lie Detection, and the Jury*, 33 CONN. L. REV. 1 (2000) (discussing gaps in credibility given to eyewitnesses based on race).

discrimination, both intentional and unintentional, is still rampant in American culture.<sup>4</sup>

With the express intention of changing inherently discriminatory systems, critical race theory studies the convergence of racial biases with social, political, and economic power structures.<sup>5</sup> Critical race theory stands out from other social science fields, however, in its focus on individual and social narratives rather than defined factors or goals, allowing critical race theorists to adopt significantly varied ideologies.<sup>6</sup> As such, it is difficult to address a singular, agreed-upon tenet of critical race theory. One of the few shared opinions by the majority of critical race theorists, though, is that racism and racial discrimination are “ordinary, not aberrational” experiences.<sup>7</sup> This belief, referred to as “ordinariness,” argues that race, while generally acknowledged, is not specifically understood within society.<sup>8</sup> Our failure to consider the specific effects of race makes both racism and racial discrimination, especially unintentional inequities, especially difficult to cure.<sup>9</sup>

In contrast to ordinariness, the judiciary has consistently applied the theory of colorblindness—a formal legal conception of equality that “insists on treatment that is the same across the board.”<sup>10</sup> Because

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4. RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* 26 (2d ed. 2012) (“Some have even managed to convince themselves that with the election of Barack Obama, we have arrived at a post-racial stage of social development.”). As the authors note, “Studies show that blacks and Latinos who seek loans, apartments or jobs are much more apt than similarly qualified whites to suffer rejections, often for vague or spurious reasons . . . chief executive officers, senators, surgeons, and university presidents are almost all white. Poverty, however, has a black or brown face: black families command, on the average, about one-tenth of the assets of their white counterparts . . . People of color lead shorter lives, receive worse medical care, complete fewer years of school, and occupy more menial jobs than do whites.” *Id.* at 11–12.

5. *Id.* at 3. It is important to differentiate between racism, “a belief that race is the primary determinant of human capacities in fixed racial patterns of superiority and inferiority,” and race discrimination, “treating members of different races differently, regardless of whether racism is the antecedent.” Martha Minow, *Law and Social Change*, 62 *UMKC L. REV.* 171, 178 (1993). While the word “racism,” is retained in quoted material in the text, the primary focus of this Note, own-race bias, is an example of race discrimination.

6. DELGADO & STEFANCIC, *supra* note 4, at 7 (“[N]ot every writer would subscribe to every tenet set out in this [discussion of critical race theory].”).

7. *Id.* (“[R]acism is . . . ‘normal science,’ the usual way society does business, the common, everyday experience of most people of color in this country.”).

8. *Id.* at 8.

9. *Id.*

10. *Id.* The theory of colorblindness is taken from Justice Harlan’s famous dissent in *Plessy v. Ferguson*, 16 S. Ct. 1138 (1896), in which he stated: “in view of the constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our constitution is color-blind, and neither knows nor tolerates classes among citizens.” *Id.* at 1146 (Harlan, J., dissenting). Justice Harlan’s dissent was cited in several major cases throughout the civil

colorblindness does not address the differing circumstances and specific problems minorities face, it can “remedy only the most blatant forms of discrimination,” such as intentional racism.<sup>11</sup> Critical race theorists have pontificated that colorblindness not only ignores less obvious forms of discrimination, but “when applied to the complexity of civil society, actually materializes into a disguised form of racial privileging.”<sup>12</sup> Unintentional and inconspicuous discrimination, in this manner, continues to disadvantage minorities.<sup>13</sup>

To remedy the specific, unseen effects of racial discrimination on minorities, it is imperative to directly address race wherever possible.<sup>14</sup> Increased attention to discriminatory results is especially important within the criminal justice system, where the consequence of unintentional racial bias is the loss of life and liberty for a citizen of a country founded on those very rights. Too often, Courts have found that the complicated issues of racial discrimination and prejudice fall “within the ambit of jurors’ general knowledge and life experience.”<sup>15</sup> This belief, that the general populace understands the complex subconscious biases and institutional prejudices that exist externally in our society and internally, to some degree, in every individual, is patently false.

rights movement as the antithesis of affirmative action. *E.g.*, *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 287 (“Our Constitution is color-blind.”) (citing *Plessy*, 16 S. Ct. 1138).

11. DELGADO & STEFANCIC, *supra* note 4, at 8. The writers include as examples of blatant forms of discrimination caught by “colorblind” rules the decision to hire a white college dropout over a black Ph.D. and the targeting of Latino workers through the use of an immigration dragnet in a food-processing plant. *Id.*

12. Harvey Gee, *Cross-Racial Eyewitness Identification, Jury Instructions, and Justice*, 11 *Rutgers Race & L. Rev.* 70, 95 (2009) [hereinafter Gee, *Justice*] (internal quotations marks omitted).

13. DELGADO & STEFANCIC, *supra* note 4, at 27 (“[I]f racism is embedded in our thought processes and social structures as deeply as many [critical race theorists] believe, then the ‘ordinary business’ of society—the routines, practices, and institutions that we rely on to do the world’s work—will keep minorities in subordinate positions.”).

14. *Id.* (“Only aggressive, color-conscious efforts to change the way things are will do much to ameliorate misery.”).

15. *People v. Carrier*, 777 N.Y.S.2d 627, 628 (N.Y. Sup. Ct. 2004). *See, e.g.*, *Burgess v. United States*, 953 A.2d 1055, 1059 n.5 (D.C. 2008) (“Interracial identification . . . [is not] beyond the ken of a jury to figure [out]. . . . Whether it’s white people or black people or Asians . . . lots of people understand that when you are making an identification across racial lines, it’s harder than within racial lines.”); *State v. Cromedy*, 727 A.2d 457, 463–64 (N.J. 1999) (refusing to allow expert testimony because difficulty in accurately identifying members of another race is a “commonsense view”). *See also* Joy L. Lindo, *New Jersey Jurors Are No Longer Color-Blind Regarding Eyewitness Identification*, 30 *SETON HALL L. REV.* 1224, 1252 (2000) (“The [Cromedy] court specifically disallowed expert testimony because of the widely held commonsense view that members of one race have greater difficulty in accurately identifying members of a different race—thus concluding that expert testimony on the topic would not assist the jury in any meaningful way.”) (internal quotation marks omitted).

This lack of public understanding regarding intricate racial issues becomes clear when analyzing cross-racial identifications. Cross-racial identifications are a form of eyewitness testimony in which the witness and the identified individual are different races.<sup>16</sup> Cross-racial identifications have been shown to be particularly unreliable due to “own-race bias,” the unintentional tendency of individuals to less accurately identify members of other races. There has been significant research indicating that juries do not understand the science behind eyewitness testimony generally. It is therefore unreasonable to assume that jurors comprehend the sub-factors (such as own-race bias) that affect eyewitness accuracy in specific circumstances. Juries, as a result of their lack of understanding, occasionally rely on faulty testimony, leading to wrongful convictions.<sup>17</sup> As minorities are per capita more likely to be brought into the courtroom as criminal defendants, wrongful convictions based entirely or in part on faulty cross-racial identifications almost certainly disproportionately affect persons of color.<sup>18</sup>

According to the rationale of ordinariness, a more race-specific approach must be taken to correct this unintentional discrimination.<sup>19</sup> This Note will apply the theory of ordinariness to address the fallibility of cross-racial identifications and assess potential solutions to alleviate own-race bias in these situations. Critical race theorists have not directly addressed cross-racial identification jury instructions, thus much of this analysis will hypothesize how critical race theorists would react to the solutions and situations addressed.

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16. See *Smith v. State*, 880 A.2d 288, 294 (Md. 2005).

17. Juries often feel the need to convict an identified party due to a moral sense of justice. See Rutledge, *supra* note 2, at 208 (“Juries naturally want to punish [someone for] a vicious crime, [and] may well be unschooled in the effects that the subtle compound of suggestion, anxiety, and forgetfulness in the face of the need to recall often has on witnesses.”) (internal quotation marks omitted).

18. Report of the Sentencing Project to the United Nations Human Rights Committee Regarding Racial Disparities in the United States Criminal Justice System, THE SENTENCING PROJECT (Aug. 2013), available at [http://sentencingproject.org/doc/publications/rd\\_ICCPR%20Race%20and%20Justice%20Shadow%20Report.pdf](http://sentencingproject.org/doc/publications/rd_ICCPR%20Race%20and%20Justice%20Shadow%20Report.pdf) (last visited Oct. 7, 2015) (“[R]acial disparity . . . pervades the U.S. criminal justice system. Racial minorities are more likely than white Americans to be arrested; once arrested, they are more likely to be convicted; and once convicted, they are more likely to face stiff sentences.”). See also Rutledge, *supra* note 2, at 212 (When viewing the issues present in cross-racial identification with the “belief that blacks are treated disparately in the criminal justice system, it is easy to see that the problem is complex and not easily allocated for or rectified.”).

19. Behavioral and Social Science has historical precedent in being used to support legal conclusions. See *Cromedy*, 727 A.2d at 463–64 (“The Court’s finding [in *Brown v. Board of Education*, 347 U.S. 483 (1954)] was not based simply on [intuition] or common-sense . . . [but] was attributed to . . . seven social science studies.”) (internal quotation marks omitted).

Part I of this Note will discuss the general frailty of eyewitness testimony and, more specifically, cross-racial identifications. Part II will address the four commonly proposed solutions to alleviate the cross-racial misidentifications: (1) excluding eyewitness testimony entirely; (2) relying on traditional safeguards of justice, e.g., cross-examination and summation; (3) utilizing expert testimony; and (4) implementing cautionary jury instructions. Part II will conclude that, balancing the beneficial effects of the solution per ordinariness with the willingness of the judiciary to enact a proposed remedy, cautionary jury instructions are the most feasible solution. Part III will analyze current cross-racial identification jury instructions and argue that future cautionary instructions should: (1) be mandatory in all cases where a cross-racial identification occurs; (2) use objective language; and (3) be administered separate from the general eyewitness testimony instruction and prior to the testimony which includes the cross-racial identification.

#### I. THE FALLIBILITY OF CROSS-RACIAL IDENTIFICATIONS

“[M]istaken identifications have been responsible for more miscarriages of justice than any other factor—more so perhaps than all other factors combined.”<sup>20</sup> For over 80 years, social scientists have analyzed the fallibility of eyewitness testimony.<sup>21</sup> Thanks to these researchers and the work of the Innocence Project, an organization that uses DNA evidence to exonerate wrongfully convicted persons, the faulty nature of eyewitness testimony has been consistently verified.<sup>22</sup> One study found that mistaken identifications factor in more than 75% of all overturned convictions, which is especially disconcerting considering the consequences of wrongful convictions: the incarceration and or death of

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20. John C. Brigham et al., *Disputed Eyewitness Identification Evidence: Important Legal and Scientific Issues*, 36 COURT REVIEW 12 (1999) (quoting PATRICK WALL, EYEWITNESS IDENTIFICATION IN CRIMINAL CASES (1964)).

21. For one of the earliest known studies of eyewitness testimony frailty, see EDWIN M. BORCHARD, CONVICTING THE INNOCENT (1932). In his research, Borchard noted 65 instances of wrongful conviction, finding that mistaken eyewitness identification was one of the most prominent causes. *Id.* at xiii; see also Christian A. Meissner & John Brigham, *Thirty Years of Investigating the Own-Race Bias in Memory for Faces: A Meta-Analytic Review*, 7 PSYCHOL. PUB. POL'Y & L. 3 (2001).

22. *The Innocence Project*, INNOCENCE PROJECT, [www.innocenceproject.org](http://www.innocenceproject.org) (last accessed Jan. 10, 2015); Stephen J. Saltzburg, *Report to House of Delegates*, 104D A.B.A. SEC. CRIM. J. 1, 6 (2008) (“Approximately three-quarters of more than 200 wrongful convictions in the United States overturned through DNA testing resulted from eyewitness misidentifications.”); see also Samuel R. Gross, *Convicting the Innocent*, 4 ANN. REV. L. & SOC. SCI. 173, 174–76 (2008).

innocent individuals.<sup>23</sup> While courts have spent significant breath and ink discussing the many issues eyewitness testimony poses though, little has been done to actually prevent or correct wrongful convictions.<sup>24</sup>

### A. Eyewitness Testimony

Justice Frankfurter famously stated in 1927 that “the identification of strangers is proverbially untrustworthy . . . the hazards of such testimony are established by a formidable number of instances in the records of

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23. Sandra Guerra Thompson, *Beyond a Reasonable Doubt? Reconsidering Uncorroborated Eyewitness Identification Testimony*, 41 U.C. DAVIS L. REV. 1487, 1490-91 (2008); Sandra Guerra Thompson, *Wrongful Conviction Issues: Judicial Blindness to Eyewitness Misidentification*, 93 MARQ. L. REV. 639, 639 (2009) [hereinafter Thompson, *Wrongful Conviction*] (“As of this writing, 252 people have been exonerated by means of DNA evidence, most leaving prison cells after many years in prison. These exonerations represent only the ‘tip of the iceberg’—the actual number of wrongly convicted people are undoubtedly much higher.”); see also *Understand the Causes: Eyewitness Misidentification*, INNOCENCE PROJECT, <http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php> (last visited Nov. 1, 2014).

24. See generally *United States v. Wade*, 388 U.S. 218, 228 (1967) (“[T]he vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification.”); *White v. State*, 926 P.2d 291, 294 (Nev. 1996) (“Courts have long recognized that eyewitness testimony is highly unreliable.”); *State v. Cromedy*, 727 A.2d 457, 463–64 (N.J. 1999) (citing *Jackson v. Fogg*, 589 F.2d 108, 112 (2d Cir. 1978)) (“[C]enturies of experience in the administration of criminal justice have shown that convictions based solely on testimony that identifies a defendant previously unknown to the witness is highly suspect. Of all the various kinds of evidence it is the least reliable, especially where unsupported by corroborating evidence.”). See also *Commonwealth v. Zimmerman*, 441 Mass. 146, 154 (Mass. 2004) (citing Meissner & Brigham, *supra* note 21); *Commonwealth v. Walker*, 92 A.3d 766, 775–76 (Pa. 2014) (citing research conducted by the Amici Innocence Network and the Pennsylvania Innocence Project asserting the prominence of mistaken eyewitness identifications); *State v. Long*, 721 P.2d 483, 488 (Utah 1986) (“There is no significant division of opinion on the issue. The studies lead inexorably to the conclusion that human perception is inexact and that human memory is both limited and fallible.”); *Cromedy*, 727 A.2d at 461 (N.J. 1999) (“[F]or more than forty years, empirical studies concerning the psychological factors affecting eyewitness cross-racial or cross-ethnic identifications have appeared with increasing frequency in professional literature of the behavioral and social sciences.”).

See Thompson, *Wrongful Conviction*, *supra* note 23, at 640 (“Studies led to numerous proposals for the reform of police procedures, yet we see little progress toward minimizing eyewitness identification error, a major cause of failure in our criminal justice systems.”). This lack of willingness to confront the problems inherent in eyewitness testimony is apparent in both trial and appellate courts. See *id.* at 642 (“The courts often overlook other indicia of reliability . . . [D]ubious eyewitness identification evidence continues to be admitted, and appellate courts continue to turn a blind eye to defense challenges based on suggestiveness and unreliability of evidence.”). And while even incremental change would be expected over time, studies of appellate holdings regarding eyewitness identification challenges are unreasonably bleak. See *id.* at n.22 (“A study of cases involving exonerations showed that constitutional challenges to eyewitness identifications had been rejected in 100% of the cases. . . . Apparently, even a heightened awareness of wrongful convictions and the perils of eyewitness identifications have not caused most appellate courts to review identification claims more generously.”). This leads to the ultimate conclusion that “reform in the criminal justice system will always be resisted.” Robert Buckhout, *Nobody Likes a Smartass: Expert Testimony by Psychologists*, 3 SOC. ACTION & L. 39, 49 (June 1976).



English and American trials.”<sup>25</sup> In stark contrast to Justice Frankfurter’s concession, eyewitness testimony continues to be one of the most persuasive forms of evidence to jurors. In a sociological study regarding the power of eyewitness testimony, jurors in a simulated criminal trial were presented with facts and conditions and then were asked to vote on whether to convict the defendant.<sup>26</sup> As expected, the study found that only 18% of jurors were in favor of conviction when there were no eyewitnesses to the crime, while 72% voted to convict when at least one credible witness saw the crime occur.<sup>27</sup> Disturbingly, though, 68% of jurors still voted to convict the defendant when the eyewitness was clearly and thoroughly discredited by counsel.<sup>28</sup> In criminal trials, this misplaced faith in eyewitnesses is the result of two unique, compounding problems: (1) human memory is inaccurate and changes over time, thus actual witness testimony is often inaccurate; and (2) juries tend to believe and rely heavily on eyewitness testimony when the witness appears confident in her recollection.<sup>29</sup> Compound this with the “one-witness rule”—which allows a conviction based upon a single witness’s identification of the defendant, despite the lack of any corroborating evidence—and the results are terrifying.<sup>30</sup>

Human memory is complex, and the procedural aspects of memory are often misunderstood. Laymen incorrectly believe that the mind operates like a video camera, recording events as they occur and storing them for

25. *Wade*, 388 U.S. at 228 (quoting FELIX FRANKFURTER, *THE CASE OF SACCO AND VANZETTI* 30 (1927)); see also *United States v. Smith*, 563 F.2d 1361, 1365 (9th Cir. 1977) (Hufstедler, J., concurring) (“[Eyewitness identification] is at best, highly dubious, given the extensive empirical evidence that eyewitness identifications are not reliable.”).

26. *Long*, 721 P.2d at 488 (citing *Buckhout*, *supra* note 24, at 189–90).

27. *Id.*

28. *Id.*; see also Aaron H. Chiu, “*We Can’t Tell Them Apart*”: *When and How the Court Should Educate Jurors on the Potential Inaccuracies of Cross-Racial Identifications*, 7 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 415, 419 (2007) (“[J]urors generally tend to believe eyewitness accounts and take them at face value, even in ‘extremely doubtful’ circumstances.”).

29. See generally Harvey Gee, *Book Review: Eyewitness Testimony and Cross Racial Identification*, 35 NEW ENG. L. REV. 835 (2001) [hereinafter Gee, *Eyewitness Testimony*]; *Cromedy*, 727 A.2d 457, 461 (N.J. 1999) (“[J]urors tend to place great weight on eyewitness identifications, often ignoring other exculpatory evidence.”).

30. See Thompson, *Wrongful Conviction*, *supra* note 23; see also Rutledge, *supra* note 2, at 207 (“Many cases are based entirely upon uncorroborated eyewitness IDs.”). In a Maryland case, a Hispanic eyewitness made a pretrial statement identifying the defendant, who was African American, as the perpetrator. At trial, the eyewitness pointed to a different individual, the African American law student who was representing the defendant, and identified him as the perpetrator of the crime, despite the defendant being in the courtroom. The charges against the defendant were ultimately dismissed. See David E. Aaronson, *Proposed Maryland Jury Instruction on Cross-Racial Identification*, 3 CRIM. L. BRIEF 2 (Spring 2008).

perfect playback at a later date. Human memory, though, does not operate in this manner; the “human brain cannot receive and store all the stimuli simultaneously presented to it, . . . forc[ing] individuals to be selective in what they perceive of any given event.”<sup>31</sup> Events are recorded and stored in three unique stages, each with the potential for flaws and errors.<sup>32</sup> This makes memories “more like physical trace evidence, which can be altered, mishandled, contaminated, or degraded.”<sup>33</sup>

Despite the flaws in memory, eyewitnesses are often confident in their recollection of an event. Educated members of the legal community—especially prosecutors—believe that confident witnesses are more likely to be accurate in their recollections and jurors, unsurprisingly, are equally persuaded, regardless of the actual accuracy of the identification.<sup>34</sup> As noted by the Sixth Circuit, “of all the evidence that may be presented to a jury, a witness’ [sic] in-court statement that ‘he is the one’ is probably the most dramatic and persuasive.”<sup>35</sup> Unfortunately, “the correlation between confidence and accuracy in eyewitness identifications is far lower than people probably would expect.”<sup>36</sup> Even under the “best of circumstances, eyewitness confidence is only a modest predictor of eyewitness accuracy,” due to confounding factors, such as own-race bias in cross-racial identifications.<sup>37</sup>

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31. See *Long*, 721 P.2d at 488, 489 (citing Buckhout, *Eyewitness Testimony*, 15 JURIMETRICS J. 171, 172–81 (1975)); see also John C. Brigham et al., *supra* note 20, at 12.

32. See *id.* at 488–90. The “memory process” consists of three stages: 1. the acquisition of information; 2. the storage of information; and 3. the retrieval and communication of information. *Id.*; see also Joseph F. Savage Jr. & James P. Devendorf, *Conviction After Misidentification: Are Jury Instructions A Solution?*, 35 CHAMPION 30, 30 (2011) (“[T]he processes underlying eyewitness memory are dynamic and prone to error. Memory is an unconscious process that includes three stages—acquisition or encoding, retention, and recall or retrieval. Numerous physical and psychological factors can influence memory accuracy at each stage.”).

33. Savage & Devendorf, *supra* note 32, at 30.

34. Steven Pernod & Brian Cutler, *Witness Confidence and Witness Accuracy: Assessing Their Forensic Relation*, 1 PSYCHOL. PUB. POL’Y & L. 817, 817 (1995). In one study, 75% of prosecutors surveyed incorrectly believed that the eyewitness identification of a confident witness was more likely to be accurate. *Id.* In the same study, 56% of jury-eligible citizens reported the incorrect belief that the eyewitness identification of a confident witness was more likely to be accurate. *Id.* at 818. See also Rutledge, *supra* note 2, at 223.

35. *United States v. Russell*, 532 F.2d 1063, 1066–67 (6th Cir. 1976).

36. *United States v. Stevens*, 935 F.2d 1380, 1401 (3d Cir. 1991).

37. Savage & Devendorf, *supra* note 32, at 31 (internal quotation marks omitted). A plethora of psychological factors affect the accuracy and reliability of eyewitness identifications, including the “forgetting curve,” which explains how memory decreases over time, and the “feedback factor,” which theorizes that individual witnesses unconsciously reinforce mistaken identifications in discussing the case. See Gee, *Eyewitness Testimony*, *supra* note 29, at 838. For information on additional psychological variables and their effect on eyewitness identifications, see Thompson, *Wrongful*

### B. Cross-Racial Identification

A cross-racial identification occurs when an individual of one race attempts to identify an individual of another race.<sup>38</sup> Eyewitnesses are more accurate in identifying members of their own race than they are in identifying member of other races.<sup>39</sup> This phenomenon is known as “own-race bias.”<sup>40</sup> Courts first began examining the problems of own-race bias in 1972.<sup>41</sup> While at that time the science behind cross-racial identifications was still relatively undeveloped, own-race bias is now scientifically accepted.<sup>42</sup>

Courts are, in fact, “painfully aware of miscarriages of justice caused by wrongful identification. Those experienced in criminal trial work or familiar with the administration of justice understand that one of the great problems of proof is posed by eyewitness identification, especially in

*Conviction*, *supra* note 23, at 640, 643 and *Savage & Devendorf*, *supra* note 32 (citing Saul M. Kassin et al., *On the ‘General Acceptance’ of Eyewitness Testimony Research*, 56 AM. PSYCHOL. 405 (2001)).

38. *See generally* *Smith v. State*, 880 A.2d 288, 294 (Md. 2005); *Garden v. State*, 815 A.2d 327, 340 (Del. 2003); *Rutledge*, *supra* note 2, at 211.

39. *See generally* *Molly Donnelly, Smith v. State*, 880 A.2d 288 (Md. 2005), 12 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 359, 361 (2006); *Aaronson*, *supra* note 30; *Rutledge*, *supra* note 2; *John C. Brigham et al., Accuracy of Eyewitness Identifications in a Field Setting*, 42 J. PERSONALITY & SOC. PSYCHOLOGY 673 (1982). Multiple courts have chosen to recognize this research as valid when discussing cross-racial identifications. *See State v. Long*, 721 P.2d 483, 489 (Utah 1986); *State v. Cromedy*, 727 A.2d 457, 461 (N.J. 1999) (“[E]yewitnesses experience a cross-racial impairment when identifying members of another race.”) (internal quotation marks omitted).

40. *See generally* *Nelson v. State*, 914 S.W.2d 670 (Tx. Crim. App. 1996) (“[S]cientific studies support a finding that cross-racial identifications are less accurate than the same-race identifications. This is generally referred to as the own-race effect.”) (Grant, J., concurring) (citation omitted); *Gary L. Wells & Elizabeth A. Olson, The Other Race Effect in Eyewitness Identification: What Do We Do About It?*, 7 PSYCHOL. PUB. POL’Y & L. 230, 230 (Mar. 2001); *Smith*, 880 A.2d at 294.

41. *See United States v. Telfaire*, 469 F.2d 552, 559 (D.C. Cir. 1972) (“The available data, while not exhaustive, unanimously supports the widely held commonsense view that members of one race have greater difficulty in accurately identifying members of a different race.”) (Bazelon, J., concurring).

42. *See Commonwealth v. Zimmerman*, 441 Mass. 146, 154 (Mass. 2004) (“While the data supporting what social scientists call ‘own-race bias’ may have been ‘meager’ when the *Telfaire* court first weighed in on the theory in the early 1970’s, more than thirty years of research have provided an abundance of reliable data for judicial consideration.”) (Cordy, J. concurring); *see also* *State v. Cromedy*, 727 A.2d 457, 461 (N.J. 1999) (“For more than forty years, empirical studies concerning the psychological factors affecting eyewitness cross-racial or cross-ethnic identifications have appeared with increasing frequency in professional literature of the behavioral and social sciences.”). *See Smith*, 880 A.2d at 296 (citing *Wells & Olson*, *supra* note 40, at 230) (“[I]t is reasonable to conclude that there is internal validity to the studies showing the other-race effect.”); *Nelson*, 914 S.W.2d at 672 (“[S]cholarly literature attacking the trustworthiness of cross-racial identification is legion. Most scientific studies support a finding that cross-racial identifications are less accurate than the same-race identifications.”); *Cromedy*, 727 A.2d at 467 (“[T]here is an impressive consistency in results showing that problems exist with cross-racial eyewitness identification.”).

cross-racial identification.”<sup>43</sup> Yet few attempts have been made to resolve the racial disparities that own-race bias creates within the legal system.<sup>44</sup> Courts have expressed two primary concerns regarding the validity of own-race bias theory: (1) apprehension regarding the legitimacy of cross-racial identification research due to the existence of extant questions as to why own-race bias occurs;<sup>45</sup> and (2) anxiety over the prominence of own-race bias in real-world situations, since the vast majority of the research on the subject has been conducted in controlled, laboratory experiments.<sup>46</sup>

Courts have questioned the legitimacy of own-race bias research due to open questions in the field as to why the phenomenon occurs.<sup>47</sup> One theory—the personal bias theory—suggests that own-race bias is caused

43. Rutledge, *supra* note 2, at 212 (citing *Brown v. Davis*, 752 F.2d 1142, 1146 (6th Cir. 1985)).

44. *See id.* at 210 (“Cross-racial eyewitness IDs have yet to receive more than a cursory discussion in our legal journals and classrooms.”).

45. *See generally* *People v. Carrieri*, 777 N.Y.S.2d 627, 628 (N.Y. 2004) (“While scientists generally agree that some witnesses experience “own-race” bias, they disagree about the extent to which it affects identification and to which racial groups it applies.”); *Nelson*, 914 S.W.2d at 672 (“[I]t is true that the precise explanation for the own-race effect is still evolving, but according to the Cornell Law Review, the existence of the phenomenon is universally accepted.”); *Cromedy*, 727 A.2d at 463–64 (“Although researchers generally agree that some eyewitnesses exhibit an own-race bias, they disagree about the degree to which own-race bias affects identification.”); Gee, *Eyewitness Testimony*, *supra* note 29, at 844 (“It is still unclear whether this cross-racial identification problem is due to the fact that people have greater prejudices or less experiences with members of the other races. Psychologists do not really have the answer.”).

46. *See* Siegfried Ludwig Sporer, *The Cross-Race Effect, Beyond Recognition of Faces in the Laboratory*, 7 PSYCHOL. PUB. POL’Y & L. 170, 170–73 (Mar. 2001). The majority of laboratory experiments have been evaluated using a “facial recognition paradigm.” *Id.* This style of experiment consists of showing subjects a number of photographs of faces, then after a period of time, showing the subjects a new set of faces that also includes a several of the pictures from the previous set. *See* Sheri Lynn Johnson, *Cross-Racial Identification Errors in Criminal Cases*, 69 CORNELL L. REV. 934, 938 (June 1984). The subject is then asked to select the first set of faces from the second grouping. *Id.* Scores are recorded as “hits” or “false alarms.” *Id.* These scores are then divided into relevant categories (such as race) and measured for statistical significance. *Id.*

As of 2005, only three field studies investigating own-race bias had been published. *Smith*, 880 A.2d at 296. These studies, performed on subjects in various locations, reproduced the results of the laboratory experiments addressed above. *See generally* Brigham et al., *supra* note 39, at 681 (study in which black and white store clerks were asked to identify photographs of black and white subjects who posed as customers); Stephanie J. Platz & Harmon M. Hosch, *Cross-Racial/Ethnic Eyewitness Identification: A Field Study*, 18 J. APPLIED SOC. PSYCHOLOGY 972, 977–78 (1988) (modeled after the Brigham study, though with the inclusion of Hispanic participants as both customers and clerks); Daniel Wright et al., *Eyewitness Identification, A Field Study of Own-Race Bias in South Africa and England*, 7 PSYCHOL. PUB. POL’Y & L. 119 (2001) (black and white subjects asked to view black and white individuals in lineup then required to identify photos of same individuals from collection of photographs).

47. *See* Aaronson, *supra* note 30, at 3 (discussing proposed theories regarding the cause of own-race bias).

by the witness's intentional bigotry and intolerance.<sup>48</sup> Studies have consistently indicated, however, that “whites who are free from conscious racial animus do not perform better at facial recognition than those who hold prejudiced attitudes.”<sup>49</sup> In rejecting the personal bias theory, the term “own-race bias does not refer to racial prejudice” in modern research.<sup>50</sup>

A competing theory—ethnocentric homogeneity—suggests that individuals develop physical triggers when analyzing members of their own race that do not apply to members of other races.<sup>51</sup> Based on the idea that individuals of the same race have similar characteristics, researchers believe individuals learn to focus on unique racialized traits that help differentiate the members of their race.<sup>52</sup> These triggers do not translate well to other races, causing those same individuals to struggle when confronted with the challenge of identifying a member of a different racial group. Supporters of ethnocentric homogeneity point to the United States, where Caucasians are the predominant racial group in many parts of the country, as proof of the theory. Studies performed in the United States have indicated that “whites have trouble recognizing unfamiliar African-American faces . . . because they fail to focus on salient facial cues for recognition” of black individuals.<sup>53</sup> Unlike the personal bias theory,

48. See generally *Smith*, 880 A.2d at 297 (citing Meissner & Brigham, *supra* note 21, at 7) (“[e]arly research indicated that racial attitudes appeared to influence the degree of stereotyping assigned to other-race members, [but this theory] has not garnered wide support in the scientific community because researchers have failed to find a correlation between racial attitudes and the own-race effect.”); Gee, *Eyewitness Testimony*, *supra* note 29, at 844 (“[C]ontrary to widely held assumptions, racial attitudes and the amount of interracial experience were found not to be related systematically to recognition accuracy for subjects of their race.”).

49. Rand, *supra* note 3, at 35.

50. *Commonwealth v. Zimmerman*, 441 Mass. 146, 154 (Mass. 2004) (Cordy, J., concurring) (citing Sporer, *supra* note 46, at 170); see also Brigham et al., *supra* note 39, at 24 (“[W]hite witnesses who are not racially prejudiced are just as likely to be mistaken in making cross-racial identification as those who are prejudiced.”).

51. See Gee, *Justice*, *supra* note 12, at 102 (quoting Interview with Elizabeth Loftus, Forensic Psychologist, available at <http://www.pbs.org/wgbh/pages/frontline/shows/dna/interviews/loftus.html>. (last visited Jan. 10, 2015)) (“If you’re looking at the face of an Asian person and you’re Caucasian maybe you notice those eyes because they are a little bit unusual. Later you go to a lineup and those unusual eyes are present in all the cases because you’ve got a lineup that’s full of Asians and that doesn’t help you very much in making that discrimination—which particular face did I see.”); see also Aaronson, *supra* note 30, at 3 (citing ELIZABETH F. LOFTUS ET AL., *EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL* 103, 105 (4th ed. 2007)) (“[P]eople make more mistakes on a cross-racial identification for a number of reasons, including, but not limited to . . . time spent encoding features that are less useful in discriminating people from other groups.”).

52. *Smith*, 880 A.2d at 297 (citing Johnson, *supra* note 46, at 945).

53. Rand, *supra* note 3, at 36; Gee, *supra* note 29, at 838 (“[W]ith regard to white recognition of African-American faces, the researchers noted that whites tended to ‘deploy their attention more widely over black faces,’ and did not focus on features that would be probative of identification of a particular African-American face.”); see also Rand, *supra* note 3, at 36.

physiognomic homogeneity still has traction within the field of own-race bias theory.

The most widely accepted theory, though, suggests that own-race bias is due to a lack of quality interaction with individuals of other races.<sup>54</sup> This explanation is known as the “interracial contact theory,”<sup>55</sup> and builds off of physiognomic homogeneity. Research has shown that “persons who primarily interact within their own racial group, especially if they are in the majority, will better perceive and process the subtlety of facial features of persons within their own racial group than persons of other racial groups.”<sup>56</sup> Thus, “the subject will only improve at facial recognition if she has significant, long-term, quality contacts with [other races].”<sup>57</sup> The ability to accurately identify members of another race under the interracial contact theory is dependent on the quality, not quantity, of time spent with and around members of that race.<sup>58</sup> The interracial contact theory is gaining wide acceptance in the social science community, with several studies validating its hypothesis.<sup>59</sup> The theory is gaining traction judicially as well, as several courts have cited the theory in regards to cross-racial identifications.<sup>60</sup> Until researchers reach a stronger consensus regarding the source of own-race bias though, courts are likely to maintain their apprehension.

The judiciary is also concerned that controlled, clinical studies of own-race bias may not translate to the actual courtroom. One of the most

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54. See generally Aaronson, *supra* note 30, at 3; Rand, *supra* note 3, at 35 (“[S]tudies have shown that the own-race phenomenon is particularly caused by a lack of familiarity with people from other ethnic groups, not from racial animus.”).

55. Smith, 880 A.2d at 297 (citing Meissner & Brigham, *supra* note 21, at 7).

56. Aaronson, *supra* note 30, at 2 (citing Johnson, *supra* note 46).

57. Rand, *supra* note 3, at 36 (citing Paul J. Lavrakas et al., *A Perspective on the Recognition of Other-Race Faces*, 20 PERCEPTION & PSYCHOPHYSICS 475, 480 (1976)); see also James M. Doyle, *Discounting the Error Costs: Cross-Racial False Alarms in the Culture of Contemporary Criminal Justice*, 7 PSYCH., PUB POL’Y & L. 253, 256 (Mar. 2001) (“[T]he ability to identify faces of another race is a function not simply of the absolute amount of exposure one has had to members of that race but also of the quality of that exposure.”) (citation omitted).

58. Rand, *supra* note 3, at 36 (citing Lavrakas et al., *supra* note 57) (“[E]ven basic experience with people from other races would not be enough to improve recognition.”) Due to this finding, “being white and having African-American friends would improve recognition more than simply having grown up in an ‘integrated neighborhood or having gone to school with blacks.’” *Id.*

59. See Doyle, *supra* note 57, at 256 (citing Roy S. Malpass et al., *Basketball Fandom and Cross-Racial Identification among European-Americans: Another Look At The Contact Hypothesis*, presented at the biennial meeting of the American Psychology-Law Society, Redondo Beach, CA (Mar. 1988). The Malpass study indicated that non-black hardcore basketball fans performed better when identifying black subjects than did the general populace. *Id.*

60. See, e.g., State v. Walker, 8 A.3d 844, 847 (N.J. App. Div. 2010) (The trial court judge noted that white witness was “an individual who had substantial contacts with the urban community.”).

widely cited laboratory studies compared two racially unique student bodies: Howard University, a predominantly black university, and the University of Illinois, a predominantly white university.<sup>61</sup> Photographs of both black and white males were shown to the test subjects. After several hours, each subject was given a new set of photographs and asked to pick out the faces he or she recognized from the original set of pictures.<sup>62</sup> At both universities, the subjects accurately identified faces matching their own race at an incredibly high rate and struggled to identify faces of the other race.<sup>63</sup>

Although studies of cross-racial identification, such as the one performed at Howard University, have largely been confined to laboratories, there is “no particular reason to think that the other-race effect . . . does not apply [to] eyewitnesses in actual criminal cases.”<sup>64</sup> And in a disturbing real-life case study, the Innocence Project determined that 150 of the 200 wrongful convictions which the organization had overturned through DNA testing resulted from eyewitness misidentifications.<sup>65</sup> Of these egregious mistakes, roughly 50% were cross-racial misidentifications.<sup>66</sup> There is no denying that criminal convictions “hinged upon a cross-racial identification . . . pose a significant problem in the American justice system.”<sup>67</sup>

61. See Aaronson, *supra* note 30, at 3.

62. *Id.*

63. *Id.* While both groups were inaccurate identifying members of another race, the students from University of Illinois made nearly three times more false identifications when identifying the photographs of black males than their counterparts at Howard University did when identifying the photographs of white students. *Id.* See also Aaronson, *supra* note 30, at 3 (citing Terrence S. Luce, *The Role of Experience in Inter-Racial Recognition*, 1 PERSONALITY & SOC. PSYCHOL. BULL. 39, 40 (1974)). Aaronson discusses a study showing that Japanese and Chinese Americans performed much better at identifying Asian American faces than African American Faces. The study additionally showed that Japanese Americans performed slightly better at identifying Japanese American faces than Chinese American faces, and vice versa for the Chinese Americans. *Id.*

64. *Smith*, 880 A.2d at 297 (quoting Deborah Bartolomey, *Cross-Racial Identification Testimony and What Not To Do About It*, 7 PSYCHOL. PUB. POL’Y & LAW 247, 249 (Mar. 2001)).

65. See Aaronson, *supra* note 30, at 3 (citing *Eyewitness Misidentification and Facts on Post-Conviction DNA Exonerations*, INNOCENCE PROJECT, <http://www.innocenceproject.org> (last accessed Jan. 10, 2015)).

66. *Id.* Some of the cases of cross-racial identification are extremely disturbing. See Chiu, *supra* note 28, at 417 (discussing WALL, *supra* note 20, at 26). One particular case stands out. Five victims were kidnapped, raped, and robbed. The victims had spent several hours with their attacker. For trial, they were asked to identify the perpetrator. *Id.* Each victim independently identified the same man as the attacker. *Id.* It was later discovered and verified that the man identified had been several hundred miles away at the time of the attack, and could not have been the perpetrator. *Id.* The attacker, when finally apprehended, shared little in common with the suspect identified by the victims outside of his skin color. *Id.*

67. Chiu, *supra* note 28, at 416; see generally Aaronson, *supra* note 30, at 2 (“An inaccurate

### C. Judicial Responsiveness

While courts historically recognized the affects race had on the legal system, judges were hesitant to directly address these shortcomings in the courtroom and rarely took special measures to prevent racial disparities.<sup>68</sup> Juries, as a result of the reluctance to address race in the courtroom, were themselves hesitant to discuss racial concerns they felt were important to particular legal matters.<sup>69</sup> In the past fifteen years, however, courts have slowly begun to confront the existence of own-race bias.<sup>70</sup> While recognition and discussion of the problem is an important first step, judges have yet to implement protective measures in the courtroom to alleviate own-race bias. Courts have instead relied, incorrectly, on the belief that jurors understand the inaccuracy of cross-racial identifications, and thus can “sniff out” false identifications themselves during trial.<sup>71</sup> Relying on this belief, courts have rejected measures to resolve own-race bias that extend beyond traditional safeguards of justice.<sup>72</sup> In allowing counsel to

identification due to the so-called ‘own race’ effect may result in higher wrongful conviction rates when defendants are of different races than the witnesses who identify them.”); Gee, *Eyewitness Testimony*, *supra* note 29, at 840 (2001) (“The own-race effect is strongest and most consistent where white subjects attempt to identify white faces, and the risk of misidentification is greatest where the victim is white and the defendant is African American.”).

68. See, e.g., *Garden v. State*, 815 A.2d 327, 340 (Del. 2003) (addressing *State v. Cromedy*, 727 A.2d 457, 463–64 (N.J. 1999)) (“The New Jersey court reviewed an impressive mass of social science and legal authority on the issue [of own-race bias] and concluded that an instruction was necessary to alert the jury that it should pay close attention to the possible influence of race.”); Rutledge, *supra* note 2, at 210 n.29 (quoting *Cunningham v. Peters*, 941 F.2d 535, 541 (7th Cir. 1991) (Easterbrook, J. dissenting)) (“All eyewitness testimony is problematic, given the frailties of human memory. Identification by members of other races is especially so.”). See *United States v. Telfaire*, 469 F.2d 552, 559 (D.C. Cir. 1972) (“[W]e have developed a reluctance—almost a taboo—to even admit the existence of the problem, let alone provide the jury with the information necessary to evaluate its impact. This reluctance apparently grows out of a well-intentioned effort to insulate criminal trials from base appeals to racial prejudice.”). See generally *United States v. Watson*, 587 F.2d 365 (7th Cir. 1978) (holding expert testimony on cross-racial identification inadmissible because it would not be of probative value to jurors); *United States v. Hudson*, 884 F.2d 1016, 1024 (7th Cir. 1989) (holding cross-racial identification is an “issue of which the jury generally is aware.”); *People v. Dixon*, 410 N.E.2d 252 (Ill. App. 1980) (holding expert testimony on cross-racial identification inadmissible because own-race bias is within the common knowledge of the average juror).

69. See *Nelson v. State*, 914 S.W.2d 670, 672 (Tx. Crim. App. 1996) (concurring opinion) (“Many jurors and lay persons, however, may be inhibited by the fear that acknowledging [own-race bias] might be considered stereotyping or bigotry.”).

70. See *Cromedy*, 727 A.2d at 461 (“The reliability of [cross-racial] identification, though discussed in many cases throughout the country, is an issue of first impression in New Jersey.”).

71. “[S]ome courtroom observers have commented that the ordinary person’s difficulty of cross-racial recognition is so commonplace as to be the subject of both cliché and joke: ‘they all look alike.’” *Id.* at 467; See *Nelson*, 914 S.W.2d 670.

72. Common safeguards of justice, as far as addressed here, indicate cross-examination and closing argument. See *Cromedy*, 727 A.2d at 463–64 (noting the reluctance of other courts to install



discuss own-race bias in closing arguments, one court reasoned, “jurors may be reminded of what everyone else knows, and they may . . . take notice of those facts which are of such general notoriety as to be matters of common knowledge. Thus, during closing argument, counsel may state and discuss the evidence and argue matters of common knowledge.”<sup>73</sup>

Courts confound express racism (e.g., burning a cross in Georgia or the use of racial slurs) with nuanced implicit racial discrimination in holding that own-race bias is within “the ambit of jurors’ general knowledge.”<sup>74</sup> While overt racial tension is easy to recognize and consistently observed by most Americans, the average citizen does not know of or understand own-race bias.<sup>75</sup> The judiciary’s myopic determination that own-race bias is within “the ambit of jurors’ general knowledge” therefore exacerbates the problem of ordinariness—which states that race discrimination “is difficult to address or cure because it is not acknowledged.”<sup>76</sup> Courts that have attempted to remedy own-race bias have stated as much, correctly noting that the general populace does not recognize or understand the subconscious biases of cross-racial identifications.<sup>77</sup>

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additional protections against own-race bias as “cross-examination and summation are adequate safeguards to highlight unreliable identifications.”). Courts have rejected further remedies, such as expert testimony, holding that own-race bias can and should be resolved internally by the jury. *See Nelson*, 914 S.W.2d at 672 (“In the case of *People v. Dixon*, 87 Ill. App. 3d 814 (Ill. App. 1980), the court ruled that expert testimony was not admissible on cross-racial identification because the matter was of common knowledge.”). As support for this holding, the court stated, “We have all heard, I am sure, of the notion that to whites all blacks look alike and all Asians look alike and similar folk notions . . . [based on studies] there seems to be some validity to this notion.” *Id.* (internal citation omitted). Thus, the proposed expert testimony “resulted in a verification of an already common belief.” *Id.*

Interestingly, the court contradicted itself by claiming that beliefs regarding racial homogeneity were “folk notions.” As noted by the folklorist Alan Dundes, “folk ideas” are defined as “traditional notions that a group of people have about the nature of humanity, the world, and life in general,” or “unstated premises which underlie the thought and action of a given group of people.” Jay H. Bernstein, *Folk Concepts*, in *21ST CENTURY ANTHROPOLOGY: A REFERENCE HANDBOOK* 848 (2010). They are necessarily “part of the unconscious or un-self conscious culture of a people.” *Id.* However, for a matter to be common knowledge, as the court believed cross-racial identifications were, “the thought itself should be conscious.” *Id.*

73. *Smith v. State*, 880 A.2d 288, 299 (Md. 2005) (citations omitted).

74. *Carrieri*, 777 N.Y.S.2d at 628.

75. *See State v. Long*, 721 P.2d 483, 488 (Utah 1986); Gee, *Eyewitness Testimony*, *supra* note 29.

76. *Carrieri*, 777 N.Y.S.2d at 628; DELGADO & STEFANCIC, *supra* note 4, at 8.

77. *See generally State v. Walker*, 8 A.3d 844, 848 (N.J. App. Div. 2010) (“[T]he Court’s holding in *Cromedy* was based upon the fact that eyewitnesses experience a cross-racial impairment when identifying members of another race, with decreased accuracy in the recognition of other-race faces [that] is not within the observer’s conscious control.”) (citations omitted); *Commonwealth v. Zimmerman*, 804 N.E.2d 336, 344 (Mass. 2004) (concurring opinion) (“Modern studies also persuasively undermine the contention . . . that the reliability of cross-racial identifications is not beyond the ordinary experience and common knowledge of the average juror.”) (citations omitted); *United States v. Smith*, 621 F. Supp. 2d 1207, 1215 (M. D. Ala. 2009) (“The potential inaccuracies of

Courts must recognize that “the average person thinks that eyewitness testimony generally is more accurate than it actually is.”<sup>78</sup> Laypersons are not aware of the inaccuracy of eyewitness testimony and appear to be “insensitive to . . . the impact of cross-racial identifications on eyewitness accuracy.”<sup>79</sup> Understanding this lack of awareness, courts should then specifically address own-race bias and find a solution tailored to correct disparities created by cross-racial identifications.

## II. PROPOSED SOLUTIONS: THE INTERSECTION OF CRITICAL RACE THEORY AND THE JUDICIARY

Critical race theorists assert, through ordinariness, that because race is not specifically acknowledged, the problem of race discrimination is difficult to cure.<sup>80</sup> Applying this theory to own-race bias, the best way to prevent further conviction and incarceration of innocent individuals due to cross-racial misidentifications is with a race-specific approach.<sup>81</sup> There are four commonly proposed solutions: (1) excluding eyewitness testimony entirely; (2) relying on traditional safeguards of justice such as cross-examination and summation; (3) utilizing expert testimony; and (4) implementing cautionary jury instructions.

While critical race theorists would promote the solution which best alerts the jury to the racial complications of own-race bias, the judiciary is slow to adopt change and unlikely to apply radical measures.<sup>82</sup> Courts will weigh several concerns in determining whether to implement a proposed solution, including procedural interests (e.g., the use of limited resources including time and money) and substantive worries (e.g., the risk that race would inappropriately affect the outcomes of trials).<sup>83</sup> A realistic solution

cross-racial identifications are not necessarily within the common knowledge of the average juror or, for that matter, the average judge.”).

78. *Zimmerman*, 804 N.E.2d at 344.

79. *Id.* (citation omitted).

80. *See DELGADO & STEFANCIC*, *supra* note 4, at 7.

81. *See Saltzburg*, *supra* note 22, at 2 (“There is a need to take prophylactic action on the front-end rather than take action many years down the road when mistakenly identified persons have served time in prison.”); *see also Rutledge*, *supra* note 2, at 214 (“Innocent people have been, and continue to be, stripped of their liberty simply because ‘they all look alike.’”) (citation omitted).

82. *See Long*, 721 P.2d at 491 (“[D]espite judicial recognition of the documented unreliability of eyewitness identification, courts have been slow both to accord the problem the attention it deserves and to fashion ways of minimizing its potentially unjust effects. The fault probably lies with the narrowness of the vision of most lawyers and judges. We tend to comfortably rely upon settled legal precedent and practice . . . and to largely ignore the teachings of other disciplines.”).

83. In 2010, a research team at Iowa State University calculated that a murder trial—the most expensive criminal trial—cost the society on average \$17.25 million. This included costs of the victim

must reconcile educating the jury on the scientifically proven fallibility of cross-racial identifications with the legitimate procedural and substantive concerns of the court.

#### A. *Excluding Eyewitness Testimony*

Radical opponents of eyewitness testimony have called for the exclusion of such evidence where the identification is uncorroborated.<sup>84</sup> However, “[t]o date, no court has excluded an eyewitness’ identification from trial based solely on its unreliability due to the human memory process. Because eyewitness identifications are often correct, in fairness to the interests of the crime victims, it would be unadvisable and unrealistic to expect courts to exclude them.”<sup>85</sup> In response, some scholars have

and the criminal, as well as services by the state. *ISU Team Calculates Societal Costs of Five Major Crimes; Finds Murder at \$17.25 million*, IOWA STATE UNIVERSITY (Sept. 27, 2010), <http://www.news.iastate.edu/news/2010/sep/costofcrime#sthash.24D5aklo.dpuf>. A burglary trial—the least costly of the five crimes researched in the study—still cost an average of \$41,288. *Id.* As courts around the country encounter fiscal trouble, cuts must be made, and the costs of trial are scrutinized more intensely. *See Budget Cuts Start to Hurt Courts*, BLOG OF LEGAL TIMES BY AMERICAN LAWYER MEDIA (Mar. 29, 2013), <http://legaltimes.typepad.com/blt/2013/03/budget-cuts-start-to-hurt-courts.html> (mandatory furloughs are now being imposed in states across the country, including Colorado, Utah, California, New York, Missouri, and Washington. Eric Holder, then-U.S. Attorney General, has ordered federal departments to “to heighten our scrutiny of all spending and redouble our efforts to reduce expenses.”); *see also Is Eyewitness Testimony Too Unreliable to Trust*, THE WEEK (Nov. 4, 2011), <http://theweek.com/article/index/221008/is-eyewitness-testimony-too-unreliable-to-trust> (“Some argue that evaluating eyewitness testimony with more complex procedures will further slow trials in already overextended courts.”).

As a simple hypothetical to illustrate the courts’ substantive concern, consider a black victim who, while having spent little time around Caucasians, accurately identifies the perpetrator of a crime against her as a white male. There is never any question within the trial of explicit racism, and, due to the accuracy of her identification, implicit problems associated with race such as those discussed in this analysis did not affect the victim’s ability to accurately identify the accused. In this case, discussion of race and the failures of cross-racial identification may cloud the jury’s ability to assess the facts of the case, resulting in increased focus on the racial composition of the parties, which here is irrelevant. In the worst-case scenario, this science alone could motivate the jury to incorrectly dismiss the victim’s testimony altogether, resulting in the guilty accused going free. *See Chiu, supra* note 28, at 419 (“Given the lack of conclusive factual data, many judges are reluctant to allow the issue of cross-racial identification to be introduced at trial. In addition, courts also hesitate to allow discussion of the issue due to its possibly racially inflammatory nature.”); Brigham et al., *supra* note 39, at 19 (“Concerned about the conviction of innocent persons on the basis of erroneous eyewitness identifications, the courts have struggled in recent years to balance the rights of defendants threatened by the specter of incorrect eyewitness identification with the need to prosecute cases based upon disputed eyewitness identification evidence.”). An additional concern is that telling jurors to question the racial implications of a victim’s identification will only further validate the current culture of “victim-blaming” many believe is prevalent in the United States. *Is Eyewitness Testimony Too Unreliable to Trust, supra*.

84. *See* Gee, *Eyewitness Testimony, supra* note 29.

85. *Id.* at 845–46 (citing Cathy M. Holt, *Expert Testimony on Eyewitness Identifications: Invading the Province of the Jury?*, 26 ARIZ. L. REV. 399 (1984)).

called for a less radical plan in which eyewitness testimony would be excluded only where the identification is “likely to cause unfair prejudice, confuse the issue, or mislead the jury.”<sup>86</sup> However, this solution leaves the arbitrary decision to exclude evidence in the hands of the court, and ultimately does not provide any more safety than the protections currently afforded under the Federal Rules of Evidence and similar state procedural guidelines.<sup>87</sup>

Critical race theory opposes the exclusion of eyewitness testimony. While excluding eyewitness testimony prevents wrongful convictions caused by faulty cross-racial identifications in specific situations, it does little to address the underlying problem of unintentional racial discrimination. Excluding eyewitness testimony does not educate courts or juries on own-race bias, or the racial disparities it creates in the legal system. Additionally, where other evidence corroborates a cross-racial identification, testimony would be allowed without judicial comment regarding own-race bias. This holds true even if the corroborated identification is inaccurate.

The judiciary would reject, and has rejected, the exclusion of eyewitness testimony. While excluding eyewitness testimony does not aggravate the procedural concerns of the judiciary, the substantive concerns of the court are violated. The exclusion of eyewitness testimony makes it difficult to prosecute guilty individuals, especially when the witness’s identification is uncorroborated. Eyewitness testimony, while flawed, is often necessary to a criminal case, and the exclusion of such evidence would result in significant injustice to the victim.<sup>88</sup> Courts would not adopt such a radical change.

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86. Gee, *Eyewitness Testimony*, *supra* note 29, at 845–46.

87. See Fed. R. Evid. 403 (“The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, [or] misleading the jury.”).

88. See Aaronson, *supra* note 30, at 4 (“Eyewitness identifications are often reliable and persuasive evidence, [but] thirty years of social science research and the contributions of the Innocence Project . . . have shown that erroneous eyewitness identifications are the single greatest cause of wrongful convictions nationwide.”). See Gee, *supra* note 29; see also *United States v. Jones*, 689 F.3d 12, 18 (1st Cir. 2012) (“[I]t is only in extraordinary cases that identification evidence should be withheld from the jury.”); *contra State v. Long*, 721 P.2d 483, 491 (Utah 1986) (citing U.K. Special Committee, which determined “trial judges should be required to instruct juries that an uncorroborated visual identification alone could not be a sufficient basis for convicting a defendant of a crime unless special circumstances were present.”); *United States v. Smith*, 621 F. Supp. 2d 1207, 1217 (M.D. Ala. 2009) (citing Ralph Norman Haber & Lyn Haber, *Experiencing Remembering and Reporting Events*, 6 PSYCHOL. PUB. POL’Y & L. 1057, 1091–92 (2000)) (“[R]ecommending that eyewitness testimony be excluded if . . . there is no corroborating testimony.”).

### B. *Reliance on Traditional Safeguards of Justice*

Courts most often rely on existing trial protections to resolve own-race bias, primarily trusting cross-examination and summation.<sup>89</sup> Courts rely on these protections because cross-examination and summation conserves judicial resources. The increased time and expense of summation or cross-examination are *de minimis*, as cross-examination and summation are already available during trial. Additionally, cross-examination and summation avoid unnecessary focus on race in situations where it is supposed inapplicable, as traditional safeguards for defendants are only available when an issue has already been raised on direct examination.<sup>90</sup>

Critical Race Theorists argue that, due to ordinariness, traditional safeguards do not prevent cross-racial misidentifications. Juries are simply not aware of the unreliability of cross-racial identifications, and traditional safeguards do little to educate them.<sup>91</sup> To resolve own-race bias

89. See Rutledge, *supra* note 2, at 209, 214 (“Traditionally, cross-examination has been the only method available for defense counsel to expose these considerations . . . [A] defendant is usually left with only cross-examination, closing argument and summation to address the issue [of faulty eyewitness identification]” and “The adversarial system has traditionally relied upon cross-examination as a mechanism to alert the jury to any inaccuracies or inconsistencies in the testimony of an eyewitness and, when coupled with proper cautionary instructions regarding eyewitness testimony, the jury is presumed to be able to assess the credibility and reliability of each witness.”); see also Chiu, *supra* note 28, at 421 (“Traditionally, cross-examination was one of the only available methods in many jurisdictions that allowed the defense to expose issues of cross-racial identification.”). Other common protections of the court system include voir dire (the process of jury selection), suppression hearings, and traditional jury instructions, which not only ignore the unreliability of eyewitness testimony generally but do not indicate the increased inaccuracies of cross-racial identifications. See Aaronson, *supra* note 30.

90. See *State v. Smith*, 880 A.2d 288, 300 (Md. 2005) (holding defense entitled to address the difficulty of cross-racial identifications where witness held herself out as being “extremely good with faces.”); see also Chiu, *supra* note 28, at 422 (internal quotation marks omitted) (“Courts . . . may prohibit the defense from mentioning the difficulties of cross-racial identification because they deem it racially inflammatory. Additionally, there may also be a lack of factual foundation for such arguments as both defense attorneys and prosecutors are limited to arguments of facts in evidence or inferences from those facts.”).

91. See also Gee, *Eyewitness Testimony*, *supra* note 29, at 844–45 (“[S]uppression hearings, cross-examinations and closing arguments, the three traditional protections against erroneous identifications, fail to adequately protect against cross-racial recognition impairment. . . . Although cross-examination can test veracity and probe sources of unreliability, it is unlikely to reveal cross-racial recognition impairment.”). Cross-examination is especially futile largely because “there is no known and commonly understood correlation for the own-race effect . . . [thus] cross-examination will never illicit facts from which the jury can infer the impairment.” *Id.* at 845; see also Chiu, *supra* note 28, at 421–22 (internal quotation marks omitted) (“[R]esearch indicates that [cross-examination] may not be as effective as intended. While this approach may call into question the reliability of eyewitness identification, it is unclear whether jurors’ decisions are improved as a result. In addition, cross-examination proves to be ineffective if the eyewitness believes that he or she has a good memory of faces of other races.”).

disparities, courts must realize that “the reliability of eyewitness identifications cannot be adequately questioned through either cross-examination or closing argument and . . . that jurors are not capable of understanding apparent indicia of reliability without the aid of [other protections].”<sup>92</sup> Research studies performed through mock trials have shown that, even when eyewitnesses are cross-examined in front of the jury by skilled trial attorneys, jurors are unable to differentiate between accurate and inaccurate eyewitnesses.<sup>93</sup>

Further, for cross-examination and summation to be reliable tools, the defense attorney must be knowledgeable regarding the unreliability of cross-racial examinations.<sup>94</sup> This is, sadly, not the case. “Lawyers are subject to the same misconceptions about [witness] evaluation as lay jurors . . . [and] are unlikely to appreciate the dangers inherent particularly in cross-racial [witness] evaluation.”<sup>95</sup> In rejecting the traditional safeguards of justice as a tool to alleviate own-race bias, critical race theorists would note that race discrimination “is ordinary, not aberrational . . . the usual way society does business, the common, everyday experience

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Additionally, defense counsel must avoid reemphasizing an erroneous identification. Juries often base their determination of witness reliability on the confidence of the witness, regardless of influencing factors such as own-race bias. *See id.* at 415. Defense counsel may be hesitant to cross-examine even if the witness is inaccurate as “[a] witness can bolster her credibility with regard to people recognition, and the jurors thus may be influenced to credit the witness with greater reliability than they may have been inclined to credit before.” *Id.* at 430.

This is not to say that traditional safeguards are never effective. Cross-examination can at times be used to parse out whether an identification is unreliable based on own-race bias, such as in *Janey v. State*, 891 A.2d 355 (Md. Ct. Spec. App. 2006), where the witness expressly stated that he had trouble identifying African Americans. *See Chiu, supra* note 28, at 430 (discussing *Janey v. State*). In such a case, “where the eyewitness testimony is not the sole charging evidence and the witness has already volunteered that the identification may not be reliable, the defense counsel has adequate means to protect itself from inaccurate testimony.” *Id.* However, as addressed previously, inaccurate cross-racial identifications are rarely this apparent at trial. *See Aaronson, supra* note 30. Closing arguments are just as futile, as “jurors may feel pressured to ignore even the most persuasive arguments addressing cross-racial identifications because of a lack of testimony or other evidence supporting such claims.” *Chiu, supra* note 28, at 431.

92. Rutledge, *supra* note 2, at 215–16 (“Scholars are arguing in increasing numbers that evidence suggests “the use of special judicial instructions that focus on factors known to influence eyewitness identifications . . . [to] assist jurors with their judgments by providing information that is not within their commonsense knowledge.”).

93. *See Brigham et al., supra* note 39, at 22–23; *see also Saltzburg, supra* note 22, at 7 (“Traditional trial protections . . . do not adequately address the special recognition impairments often present in cross-racial eyewitness identifications . . . [M]uch of the reason for juries’ erroneous convictions based on faulty eyewitness identifications is that jurors are not very sensitive to the factors that determine eyewitness accuracy.”).

94. *See Brigham et al., supra* note 39, at 23 (“[I]n order to effectively cross-examine, the attorney would need to have the opportunity to identify the factors that were likely to affect the identification, be aware of their influence, and be able to inform the judge and jury of these effects.”).

95. Rand, *supra* note 3, at 74.

of most people of color in this country.”<sup>96</sup> Adhering to the current protections is the very definition of “business as usual,” and perpetuates the failure of the courts to address the racial disparities created by own-race bias.<sup>97</sup>

### C. Expert Testimony

Many scholars have supported the allowance of expert testimony regarding the effects of own-race bias in cases involving a cross-racial identification. Expert testimony is the best educational tool for the jury, adequately informing laypersons of the frailty of cross-racial identifications.<sup>98</sup> The American Bar Association, for this reason, propagated expert testimony as a potential remedy to alleviate own-race bias.<sup>99</sup> Beyond the educational benefits, researchers have noted that “[j]urors are more apt to comfortably discuss racial differences without fear of discord in the jury room when they have received testimony from an expert considering the possible influence of racial differences as affecting the accuracy of the identification.”<sup>100</sup> While expert testimony is highly touted by academia though, few courts have permitted, or are likely to permit, this solution.<sup>101</sup>

Courts argue that “the reliability of eyewitness identification is within the knowledge of jurors and expert testimony generally would not assist them.”<sup>102</sup> Aside from this erroneous belief, the use of expert testimony

96. DELGADO & STEFANCIC, *supra* note 4, at 7.

97. *Id.*

98. See Saltzburg, *supra* note 22, at 3 (“[I]f a jury is to be given any information about the cross-racial nature of the identification, an expert witness is preferable to a cross-racial jury instruction.”).

99. The American Bar Association noted that it is “crucial to the deliberative process that jurors are educated on the potential errors in cross-racial identifications.” *Id.* at 15. While realistically there are resource and access problems to the use of expert testimony, “[t]he Committee [on cross-racial identification impairment] supports the use of expert testimony where resources are available.” *Id.* at 3. See also Brodes v. State, 551 S.E.2d 757, 759 (Ga. Ct. App. 2002) (holding that expert testimony would have provided necessary assistance to the jury in determining the accuracy of the identification where the victim testimony included cross-racial identifications made while at gunpoint).

100. Saltzburg, *supra* note 22, at 15.

101. See Chiu, *supra* note 28, at 421 (“[M]any courts reject expert psychological testimony as a superfluous attempt to put the gloss of expertise, like a bit of frosting, upon inferences which lay persons were equally capable of drawing from the evidence.”); see also Rutledge, *supra* note 2, at 215 (“[E]xpert testimony has not been warmly received by the judiciary.”).

102. See Rutledge, *supra* note 2, at 219 (citing State v. McClendon, 730 A.2d 1107, 1114 (Conn. 1999)); see also State v. Cromedy, 727 A.2d 457, 463–64 (N.J. 1999) (refusing to allow expert testimony because difficulty in accurately identifying members of another race is a “commonsense view”); see also Lindo, *supra* note 15, at 1252 (“The [Cromedy] court specifically disallowed expert testimony because of the widely held commonsense view that members of one race have greater

raises valid practical concerns, including problems of access and allocation of judicial resources. While beneficial in theory, expert testimony is impractical because “only a relatively small number of persons [are] qualified to testify as an expert . . . on cross-racial identifications in the United States.”<sup>103</sup> Even where experts are accessible, few individuals can afford the additional trial costs that would be incurred by including such testimony. The average cost of non-medical expert testimony is \$248 per hour, without including other expenses such as witness preparation, travel costs, etc.<sup>104</sup> Addressing own-race bias is most important in criminal cases, where the potential consequences of an erroneous identification are a criminal record, incarceration, and worse. The majority of people accused of criminal conduct, though, are indigent, unable to afford experts to testify on their behalf.<sup>105</sup> The courts are in no better position to assist. Due to lean state judicial budgets, “[t]here is insufficient funding to provide expert witnesses to most indigent defendants who need them, especially when there is a problem in many States of having adequate funds to pay attorneys [to] represent the indigent accused.”<sup>106</sup> Courts are also wary that experts will subsume the role of the jury, with jurors regarding expert testimony as fact, rather than skilled opinion.<sup>107</sup> Expert testimony regarding the faulty nature of cross-racial identifications risks overcompensating for own-race bias, persuading the jury to disbelieve an accurate witness where race played no part in the identification.<sup>108</sup>

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difficulty in accurately identifying members of a different race thus concluding that expert testimony on the topic would not assist the jury in any meaningful way.”). Interestingly, the court in *Cromedy* took note of the debate between researchers regarding own-race bias in eyewitness identifications, seemingly contradicting their own assertion that the own-race bias was a “widely held commonsense view.” *Id.* at 1253–53.

103. Saltzburg, *supra* note 22, at 3 (“Council recently stated that there are less than a handful of such experts in Los Angeles, California, and that no expert witnesses are available in many rural areas.”).

104. *Expert Witness Fee Study*, SEAK, INC. (2004), <http://www.seak.com/expert-witness-fee-study/>.

105. See Rutledge, *supra* note 2.

106. Saltzburg, *supra* note 22, at 15 (“[E]xperts may be costly, confuse the jury rather than clarify the issues, and take up time.”); see also *Commonwealth v. Zimmerman*, 441 Mass. 146, 154 (Mass. 2004) (denying motion for funding for an eyewitness identification expert due to the “expense given the questionable admissibility of this type of evidence.”).

107. See Rutledge, *supra* note 2, at 219 (“The Second Circuit holds that expert psychological testimony likely usurps the jury’s role of determining witness credibility.”). Because expert testimony focuses on the potential errors in eyewitness, many attorneys have argued that such testimony is necessarily more prejudicial than probative, and should therefore be excluded. See *id.* at 222; see also *Fed. R. Evid.* 403.

108. See Saltzburg, *supra* note 22, at 4 (“[I]t is impossible to know in an individual case whether the cross-racial identification actually had an effect on the identification.”); see also Donnelly, *supra*



Due to the overwhelming opposition of the judiciary, this method is an unrealistic solution.<sup>109</sup> In addition to judicial opposition, expert testimony continues to be subject to significant discretionary barriers of entry through the Federal Rules of Evidence.<sup>110</sup> As it currently stands, “expert testimony may never become widely accepted because it carries with it an aura of reform, and reform in the criminal justice system will always be resisted.”<sup>111</sup>

#### *D. Cautionary Jury Instructions*

Perhaps the “most productive thing the defense can do is obtain cautionary instructions about identification evidence that will alert jurors to potential problems and provide a guide to evaluating the evidence.”<sup>112</sup> Critical race theorists support cautionary instructions as a viable solution because they alert jurors to own-race bias and resolve, at least partially, the ordinariness of cross-racial identifications. While conceding that this solution is not as informative as expert testimony, jury instructions do not implicate the concerns that hamper expert testimony and are therefore more likely to be adopted by the judiciary.<sup>113</sup> In the absence of a better tool, cautionary instructions still allow defense counsel to educate jurors and, in contrast to cross examination, can be issued even if race was not raised on direct examination.<sup>114</sup> A cautionary instruction, most

note 39, at 364 (“[The] primary concerns [in admitting expert testimony on eyewitness identifications] are that there is no description of which factors would be relevant, no definition of ‘races,’ and no legal analysis of whether the findings of this scientific research is [sic] credible enough to be admissible in court.”).

109. See Chiu, *supra* note 28, at 429–30 (“Of the four remedies . . . expert testimony is the least likely [to be allowed].”).

110. See Fed. R. Evid. 702, 703 (restricting use of expert testimony in federal trials).

111. Rutledge, *supra* note 2, at 223 (internal quotation marks omitted); see also Savage & Devendorf, *supra* note 32, at 31 (2011) (“Although expert testimony is probably the most effective way to educate jurors about eyewitness identification issues, many courts will not allow such testimony, or will strictly limit it to specific topics.”).

112. Savage & Devendorf, *supra* note 32, at 30 (“Viable instructions are evolving in some jurisdictions that are starting to recognize the developed body of scientific evidence about eyewitness identification.”).

113. Critics will note that in some situations, juries have even been shown to have less sensitivity to issues such as cross-racial identification when presented in a jury instruction. See Gee, *Justice*, *supra* note 12. However, the American Bar Association concluded that cross-racial jury instructions ensure “fairness and confidence in the criminal justice system.” Saltzburg, *supra* note 22, at 16.

114. See Savage & Devendorf, *supra* note 32, at 31; see also K. Suzanne Heisinger, *State v. Cromedy*: 727 A.2d 457 (N.J. 1999), 6 WASH. & LEE RACE & ETHNIC ANC. L.J. 155, 160 (2000) (internal quotation marks omitted) (In New Jersey, “trial courts are obligated to provide a jury instruction to focus the jury’s attention on how to analyze and consider the trustworthiness of the eyewitness identification.”).

importantly, enhances the jury's decision-making ability.<sup>115</sup> Similar to expert testimony, "jurors are more apt to comfortably discuss racial differences with [after a cautionary] instruction."<sup>116</sup>

Judicially, case-specific jury instructions are gaining acceptance, especially in comparison to requests for expert testimony.<sup>117</sup> There are few, if any, resource costs to including an additional jury instruction, and courts have not raised any such concerns when opposing their addition. Courts have, though, raised subjective concerns, arguing that a jury instruction usurps the jury's ability to determine credibility and allows race to improperly determine a trial.<sup>118</sup> Leading progressive states that have addressed these arguments have largely discredited both propositions.<sup>119</sup> Well-written instructions do not direct the jury as to whether the witness is or is not credible. Rather, such instructions warn the jury that the cross-racial identification is a central issue in the specific case and informs the jurors as to what effect own-race bias *may play* in the current witness's identification.<sup>120</sup> The determination to apply the information presented in the cautionary instruction is still within the discretion of the jurors. As jury instructions effectively reconcile the judiciary's concerns with the goals of critical race theory, they are the

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115. See *United States v. Smith*, 621 F. Supp. 2d 1207, 1215 (M.D. Ala. 2009) ("The jury's decision-making process can be enhanced by learning how these factors combine to impact perception and memory.").

116. Saltzburg, *supra* note 22, at 16 ("[T]he additional safeguard of a jury instruction on cross-racial identification is an important tool to help protect against the heightened risk of eyewitness misidentification and wrongful conviction.").

117. See *Savage & Devendorf*, *supra* note 32, at 31 ("In many situations, case-specific cautionary instructions may play the same educational role, but may be easier to obtain than expert testimony.").

118. See *State v. Walker*, 8 A.3d 844, 847 (N.J. Super. Ct. App. Div. 2010) (holding a cross-racial jury instruction was not necessary because, "it might inject some racial aspects to this case which [the judge] really did not see at all in any of the testimony from the victim or any of the witnesses."); see also *People v. Carrieri*, 777 N.Y.S.2d 627, 629 (N.Y. 2004) ("Absent a general agreement in the scientific community regarding the effects of 'own-race' bias . . . expanded jury instruction[s] regarding cross-racial identification should not be employed in criminal trials."); *Miller v. State*, 759 N.E.2d 680, 684 (Ind. Ct. App. 2001) ("An instruction directed to the testimony of one witness erroneously invades the province of the jury when it intimates an opinion on the credibility of a witness or the weight to be given to [her] testimony.") (quoting *Perry v. State*, 541 N.E.2d 913, 917 (Ind. 1989)).

119. See *State v. Long*, 721 P.2d 483, 492 (Utah 1986) ("It is true that some state courts have refused to give cautionary instructions on the ground that they constitute improper judicial comment . . . or suggest the weight that should be accorded certain testimony. . . . We see little merit to this argument.").

120. See *United States v. Telfaire*, 469 F.2d 552, 554 (D.C. Cir. 1972) ("I cannot agree that because any discussion of this identification problem necessarily refers to racial differences, such discussion is . . . prejudicial and divisive. . . . [A] narrowly drawn instruction dealing with a familiar, albeit racial, phenomenon can hardly be equated with a broad appeal to racial prejudice.").

most realistic solution to alleviate own-race bias in cross-racial identifications.<sup>121</sup>

### III. DRAFTING A CAUTIONARY JURY INSTRUCTION

As of this writing, cautionary instructions have not been a prevalent solution to correcting own-race bias. The few states that do provide pattern jury instructions for cross-racial identifications have done so in widely varying manners.<sup>122</sup> A few courts have drafted long, detailed instructions specifically addressing own-race bias, while others name cross-racial identification in a laundry list of factors that affect eyewitness testimony generally.<sup>123</sup> Some jury instructions are mandatory under specified circumstances, such as when the eyewitness identification is uncorroborated by other evidence.<sup>124</sup> Others are permissive, left to the discretion of the court in all situations.<sup>125</sup> In attempting to determine what characteristics are most important for a cautionary instruction to carry out the goals of critical race theorists, it is imperative to discuss the currently existing cross-racial cautionary instructions.

Section A briefly addresses the cross-racial identification jury instructions that have been applied in the District of Columbia, New

121. Courts are most likely to allow cautionary jury instructions, especially in light of the still-growing body of research surrounding cross-racial identifications, because it is a non-radical, yet progressive step in the process of eliminating racial disparities. The Court in *State v. Long* noted as much in declaring, “[s]uch a bold departure [as excluding eyewitness testimony entirely] will have to await further empirical evidence that less radical alternatives do not ameliorate the problem. However, we do consider ourselves compelled by the overwhelming weight of the empirical research to take steps to alleviate the difficulties inherent in any use of eyewitness identification testimony.” *Id.* (“[A]n instruction both respects the jury’s function and strikes a reasonable balance between protecting the innocent and convicting the guilty.”).

122. Currently only California, Utah, New Jersey, and Massachusetts specifically authorize or require a cross-racial identification jury instruction. *See* Saltzburg, *supra* note 22, at 12; *see also* Chiu, *supra* note 28, at 424 (“Currently, only a handful of jurisdictions have pattern instructions for cross-racial identification situations. These jurisdictions vary in their approaches to formulating pattern instructions. Some jurisdictions include long and detailed instructions, while other jurisdictions only include a single line.”).

123. *Compare* United States v. Telfaire, 469 F.2d 552, 558–59 (D.C. Cir. 1972) (appending a twelve-paragraph model special instruction on identification) *with* Saltzburg, *supra* note 22, at 5 (discussing the California jury instruction, which “includes the cross-racial instruction in a short laundry list of items that may be considered” while primarily focusing on the frailty of eyewitness testimony generally) (internal quotation marks omitted).

124. *See* Long, 721 P.2d at 492.

125. *See* Heisinger, *supra* note 114, at 160 (“[T]he majority of courts that allow cross-racial identification jury instructions have left the decision to provide the instruction to the trial judge’s discretion.”); Miller v. State, 759 N.E.2d 680, 682 (Ind. Ct. App. 2001) (“The giving of jury instructions is a duty entrusted to the discretion of the court, and the trial court’s decision will not be disturbed except where there is an abuse of that discretion.”).

Jersey, and Utah, as well as the American Bar Association's 2008 proposed model jury instruction. Section B proposes three necessary factors of any cautionary instruction to effectively address own-race bias: (1) mandatory application in all situations where a cross-racial identification is at issue; (2) use of objective language; and (3) administration of the cautionary instruction separate from the general eyewitness testimony instruction and prior to the testimony which includes the cross-racial identification.

A. *The History of Cross-Racial Identification Cautionary Jury Instructions*

The first judicial attempt to address own-race bias through a cautionary instruction was Judge Bazelon's 1972 concurrence in *United States v. Telfaire*.<sup>126</sup> The *Telfaire* court primarily focused on developing a general cautionary instruction emphasizing concerns about the accuracy of eyewitness testimony. Judge Bazelon proposed an additional instruction focused entirely on cross-racial identification that was ultimately rejected by the majority.<sup>127</sup> Since that time, "[t]he *Telfaire* instructions, which were based on legal precedent, not science, have been . . . criticized" for their failure to address factors that have since been scientifically proven to affect the reliability of eyewitness identification.<sup>128</sup> As the science surrounding own-race bias has developed, it has become clear that "*Telfaire*-like instructions have little positive effect on juror sensitivity to eyewitness identification evidence . . . [and] may even reduce juror sensitivity."<sup>129</sup>

Despite these criticisms, the outdated *Telfaire* instruction has continued to be one of the most widely utilized cautionary instructions.<sup>130</sup> There are, however, indications that courts are willing to replace the *Telfaire*

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126. See *Telfaire*, 469 F.2d at 559–61 (Bazelon, J., concurring).

127. *Id.* at 561. The Bazelon Instruction reads:

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

*Id.*

128. Savage & Devendorf, *supra* note 32, at 32.

129. *Id.* at 32 n.40.

130. See Brigham et al., *supra* note 39, at 23.

instruction with an improved option if one is developed. In a survey of 52 judges, 78% felt that the *Telfaire* instruction is not satisfactory.<sup>131</sup>

While the easy response would be to adopt the proposed Bazelon instruction, Bazelon's draft also had significant defects. Specifically, the Bazelon instruction directed jurors to consider the effects of own-race bias only if the juror subjectively believed that own-race bias was their "own experience."<sup>132</sup> This led many jurors, who did not believe they experienced difficulty recognizing members of other races, to deemphasize the instruction.<sup>133</sup> Worse still, the subjective language of that instruction, which effectively allows the juror to determine whether or not own-race bias exists, leads jurors to falsely assume that own-race bias is not scientifically supported.

In 1994, New Jersey created a task force to study the effects of own-race bias and propose solutions for the state's courts to implement.<sup>134</sup> After five years of extensive research, the task force concluded that own-race bias posed a serious problem in New Jersey courts and recommended a jury instruction as the preferred corrective measure.<sup>135</sup> The Supreme Court of New Jersey finally had the chance to implement the findings of the task force in 1999, in *State v. Cromedy*.<sup>136</sup> Expressly citing the task force's findings, the Court proposed a model jury instruction to be applied "when eyewitness identification is a central issue and no corroborating evidence exists."<sup>137</sup>

131. *Id.*

132. *Telfaire*, 469 F.2d at 561 (Bazelon, J., concurring).

133. See Aaronson, *supra* note 30, at 5.

134. See *State v. Cromedy*, 727 A.2d 457, 465–66 (N.J. 1999); see also Heisinger, *supra* note 114, at 160. The Task Force included trial and appellate judges, defense and prosecution attorneys, social scientists, laypersons, and consulted with respected legal scholars. *Cromedy*, 727 A.2d at 465. In addition, the task force examined a substantial amount of professional literature on the topic. *Id.* Aside from a single prosecutor, the panel unanimously agreed that the problem of cross-racial identification existed within the New Jersey court system and demanded corrective action by the courts. *Id.*

135. *Id.*

136. *Id.* at 465–66.

137. Lindo, *supra* note 15, at 1229; see also Savage & Devendorf, *supra* note 32, at 32 n.35 ("A cross-racial instruction should be given only when . . . identification is a critical issue in the case, and an eyewitness's cross-racial identification is not corroborated by other evidence giving it independent reliability."). The Model Jury Instruction proposed by the New Jersey Task Force reads:

[T]he fact that an identifying witness is not of the same race as the perpetrator and/or defendant, and whether that fact might have had an impact on the accuracy of the witness' original perception, and/or the accuracy of the subsequent identification. You should consider that in ordinary human experience, people may have greater difficulty in identifying members of a different race.

See Saltzburg, *supra* note 22, at 6.

To its credit, the *Cromedy* instruction focused solely on cross-racial identification and was delivered separate from the general eyewitness testimony instruction.<sup>138</sup> Unfortunately though, the *Cromedy* court left administration of the instruction to the discretion of the court and placed significant restrictions on when the instruction was permitted.<sup>139</sup> The “no-corroboration” requirement made application of the cautionary instruction practically non-existent.<sup>140</sup> As a result, scholars and activists began demanding mandatory application of the instruction almost immediately following the decision.<sup>141</sup>

The *Cromedy* court, and the New Jersey task force, needed only to research Utah’s mandatory cautionary instruction, which had been adopted thirteen years prior in *State v. Long*.<sup>142</sup> *Long* made Utah the only state with a mandatory jury instruction, to be administered “whenever eyewitness identification is a central issue in a case and such an instruction is requested by the defense.”<sup>143</sup> *Long*’s shortcoming, though, was that it did not separate its cross-racial identification instruction from the general eyewitness testimony instruction, diminishing the importance and visibility of the safeguard.<sup>144</sup>

The American Bar Association most recently addressed own-race bias in an extensive 2008 report, which assessed the jury instructions currently in use and drafted a new model cautionary instruction for uniform adoption:<sup>145</sup>

In this case, the identifying witness is of a different race than the defendant. You may consider, if you think it is appropriate to do so, whether the fact that the defendant is of a different race than the witness has affected the accuracy of the witness’ original perception or the accuracy of a later identification. You should consider that in

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138. See *Cromedy*, 727 A.2d 457.

139. *Id.*

140. Cf. *State v. Long*, 721 P.2d 483, 487 (Utah 1986) (“We have also been advised that this Court’s de facto failure to ever require such an instruction has resulted in trial courts rarely, if ever, giving cautionary instructions.”).

141. See Heisinger, *supra* note 114, at 162 (“The impact of *Cromedy* will not be felt unless the Supreme Court of New Jersey broadens its holding to require a cross-racial identification charge in every case in which cross-racial identification is at issue.”).

142. *Long*, 721 P.2d at 487.

143. *Id.*

144. *Id.* The relevant portion of the Utah model jury instruction reads: “You should also consider whether the witness is of a different race than the criminal actor. Identification by a person of a different race may be less reliable than identification by a person of the same race.” *Id.*

145. See Saltzburg, *supra* note 22.

ordinary human experience, some people may have greater difficulty in accurately identifying members of a different race than they do in identifying members of their own race.<sup>146</sup>

In contrast to the *Telfaire* instruction, the ABA model correctly implemented objective language, emphasizing that “in ordinary human experience” individuals generally struggle to accurately identify members of a race different than their own.<sup>147</sup> Despite focused analysis on the topic, though, the ABA—like the *Cromedy* Court—recommended that administration of the instruction be left to judicial discretion. The ABA overlooked that courts rarely, if ever, administer permissive instructions.<sup>148</sup>

### *B. Building a Better Model Jury Instruction*

Ordinariness indicates that “racial discrimination is a perpetual legal and social problem that has rendered the color-blind principle a fallacy.”<sup>149</sup> Building an optimal jury instruction is a difficult process, as exemplified by the varying instructions currently in use.<sup>150</sup> Critical race theory supports a model instruction that “sensitize[s] the jury to the factors that empirical research have shown to be of importance in determining the accuracy of eyewitness identifications, especially those that laypersons most likely would not appreciate,”<sup>151</sup> such as the fallibility of cross-racial identifications. To effectively alert and sensitize the jury to this concern, an optimal jury instruction should: (1) be mandatory in all situations in which a cross-racial identification is at issue; (2) use objective language; and (3) be administered separate from the general eyewitness testimony instruction and prior to the testimony which includes the cross-racial identification.

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146. *Id.* at 4–5.

147. *Id.*

148. *Id.* at 3. See *State v. Long*, 721 P.2d 483, 487 (Utah 1986) (“We also have been advised that this Court’s de facto failure to ever require such an instruction has resulted in trial courts rarely, if ever, giving cautionary instructions.”).

149. Gee, *From Hallway Corridor to Homelessness: Tenants Lack Right to Counsel in New York Housing Court*, 17 GEO. J. ON POVERTY L. & POL’Y 87, 95 (2010).

150. See Chiu, *supra* note 28.

151. *Long*, 721 P.2d at 492.

*1. An Optimal Cross-Racial Identification Jury Instruction Should be Mandatory in All Situations in which a Cross-Racial Identification is at Issue*

A cross-racial identification jury instruction should be mandatory in all situations where a witness has identified an individual of a different race than her own. The *Cromedy* Court held that a cross-racial jury instruction is important where: (1) identification is a central issue in the case; (2) little or no corroborating evidence of the identification is presented; and (3) the circumstances raise doubt concerning the reliability of the identification.<sup>152</sup> However, researchers have noted that “imposing [a] requirement that there be no corroborating evidence of the defendant’s guilt . . . severely limit[s] the utility of the cross-racial identification instruction.”<sup>153</sup> An own-race bias instruction should not be limited by additional prerequisites such as corroboration. Other cautionary instructions are not contingent upon proof of qualifying factors such as whether evidence was corroborated.<sup>154</sup> Cross-racial jury instructions should not be treated differently, as they “do no more than apprise the jury of the inherent limitations of eyewitness identification.”<sup>155</sup> The result of this and similar obstacles to administration is judicial hypocrisy, as “the cross-racial identification instruction is, in theory, a step toward counterbalancing the effects of ‘own-race’ bias . . . [while] in practice, the court sets forth a standard that is extremely difficult to meet.”<sup>156</sup>

Aside from legal theory, the corroboration requirement should be removed simply as a logical improvement. A thought experiment will be helpful. Consider a “no-corroboration” state where one Asian witness identifies a Caucasian defendant as the perpetrator of a crime. In this scenario, a cross-racial jury instruction would be permitted so long as there was no corroborating evidence. However, if two Asian witnesses both identified the same Caucasian defendant as the perpetrator of the crime, a jury instruction would not be available, even if no other corroborating evidence existed.<sup>157</sup> Nonetheless, the existence of a second

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152. See *Cromedy*, 727 A.2d at 457; see also *Long*, 721 P.2d at 492 (discussing situations in which cautionary instructions are necessary).

153. Heisinger, *supra* note 114, at 161.

154. See Saltzburg, *supra* note 22, at 4.

155. *Long*, 721 P.2d at 492.

156. *Id.* Additionally, where corroborating evidence exists, there should be little concern that a jury instruction will, on its own, cause the jury to incorrectly find a guilty party innocent.

157. *Id.*



eyewitness of a different race than the accused does not resolve the inherent own-race bias of both witnesses.

This hypothetical, unfortunately, is not far from reality. In one case, five white victims of a burglary individually identified the same black male as their attacker.<sup>158</sup> After investigation, police determined that the accused had not even have been in the victims' city on the date the crime occurred. In fact, the unanimously identified suspect was several hundred miles away from the victims' home at the time of the crime.<sup>159</sup> Police eventually arrested the responsible party; the previously accused and the guilty individual had little in common other than having a similar skin tone.<sup>160</sup> The number of witnesses does not affect the individual potential for own-race bias in cross-racial identifications.<sup>161</sup> As such testimony is questionable regardless of corroboration, cross-racial identification jury instructions must be mandatory whether or not the identification is corroborated.<sup>162</sup>

The *Long* Court required defense counsel to expressly request the cautionary instruction, though this condition should also be avoided in an optimal cautionary instruction.<sup>163</sup> This "ask and you shall receive" requirement places the burden of requesting the instruction on the defense attorney, and "[t]he jury's knowledge of the relevant factors should not turn on the inadvertence or inexperience of trial counsel"<sup>164</sup> Rather, the jury should be exposed to "all relevant information so that it can decide for itself whether race should be considered. . . . By denying many defendants this instruction, the court . . . deprives them of their right to a fair trial . . . [and] also denies jury members of their right to decide cases based on the totality of the circumstances."<sup>165</sup> Courts should "either abandon any pretext of requiring a cautionary eyewitness instruction or make the requirement meaningful."<sup>166</sup> An optimal cautionary instruction should be

158. *See* Chiu, *supra* note 28, at 417.

159. *Id.*

160. *Id.*

161. *See* Heisinger, *supra* note 114, at 162 ("If race impairs one's ability to accurately identify members of another race, as the court [in *Cromedy*] recognized, the mere existence of corroborating evidence does not make it less likely that the witness was affected by 'own race' bias.").

162. *But see* Saltzburg, *supra* note 22, at 3 ("[The ABA Committee] recommends that trial judges should have the discretion to give an instruction on cross-racial identification in certain cases where there is a heightened risk of misidentification.").

163. *State v. Long*, 721 P.2d 483, 492 (Utah 1986).

164. *United States v. Telfaire*, 469 F.2d 552, 560 (D.C. Cir. 1972).

165. Heisinger, *supra* note 114, at 163.

166. *Long*, 721 P.2d at 487.

mandatorily read to the jury, regardless of whether it has been requested by counsel.

2. *An Optimal Cross-Racial Identification Jury Instruction Should use Objective Language*

A cautionary jury instruction should be drafted with objective language to prevent jurors from deemphasizing the fallibility of cross-racial identifications. Subjective, *Telfaire*-like instructions tell jurors “that they should use their ‘common sense’ in evaluating credibility, even though most jurors’ common sense would lead them to focus on the same fallacious stereotypical correlates of deception.”<sup>167</sup> As such, these instructions do not effectively communicate the scientific consensus that cross-racial identifications are especially inaccurate due to own-race bias.<sup>168</sup>

The *Long* instruction is a template for effective objective language, as it states clearly and succinctly: “[y]ou should also consider whether the witness is of a different race than the criminal actor. Identification by a person of a different race may be less reliable than identification by a person of the same race.”<sup>169</sup> The purpose in adopting a cautionary instruction is to educate jurors about the potential unreliability of cross-racial identifications. It is important that the language persuades jurors to set aside commonly held beliefs regarding the accuracy of cross-racial identification for the purpose of justice. To confront the ordinary aspects of racial discrimination, “[o]nly aggressive, color-conscious efforts to . . . will do much to ameliorate [the effects].”<sup>170</sup> Objective language is assertive in alerting jurors to the unreliability of cross-racial identifications due to own-race bias and should be used in all cross-racial identification jury instructions.

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167. Rand, *supra* note 3, at 72.

168. See *Telfaire*, 469 F.2d at 561 (“In the experience of many it is more difficult to identify members of a different race than members of one’s own. *If this is also your own experience*, you may consider it in evaluating the witness’s testimony.”) (emphasis added).

169. *State v. Long*, 721 P.2d 483, 494 n.8 (Utah 1986).

170. DELGADO & STEFANCIC, *supra* note 4, at 26.

3. *An Optimal Cross-Racial Identification Jury Instruction Should be Administered Separate from the General Eyewitness Testimony Instruction and Prior to the Testimony which Includes the Cross-Racial Identification*

Certain procedural measures should be taken to optimize the effectiveness of cross-racial identification instructions. Cautionary instructions do little to affect the jury's ability to evaluate a witness if given after testimony. The mandatory instruction, therefore, should be read "before eyewitness evidence is presented so that [the jurors] have the relevant factors in mind while listening to the testimony."<sup>171</sup>

Additionally, the cautionary instruction should be separate and unique from the general eyewitness testimony instruction. According to ordinariness, the instruction must specifically highlight race to effectuate any significant change in the discriminatory pattern of the judicial system.<sup>172</sup> Unlike the *Long* instruction, which included a sentence on cross-racial identification within a larger, general eyewitness testimony instruction, or the California instruction, which included "cross-racial identification" in a laundry list of eyewitness accuracy factors, an optimal cautionary instruction should be administered individually.<sup>173</sup> This requires legislatures or judges to draft a unique cross-racial identification jury instruction that specifically addresses the unreliability of such identifications due to own-race bias. In this manner, the *Cromedy* instruction is an excellent template and should be followed in drafting a better model instruction of a short, succinct, and exclusive cross-racial identification jury instruction that is separate from the general eyewitness testimony instruction.<sup>174</sup>

#### CONCLUSION

"When [the] loss of liberty and [life] . . . are at stake, the additional safeguard of a jury instruction on cross-racial identification . . . is an important tool to help protect against the heightened risk of eyewitness

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171. Savage & Devendorf, *supra* note 32, at 31; *see also* Aaronson, *supra* note 30, at 2 ("[I]nstructions addressing the enhanced risk of cross-racial misidentification should be given after the general instructions regarding identification and credibility of witnesses so that jurors have the means to evaluate the accuracy of the identification.").

172. *See* DELGADO & STEFANCIC, *supra* note 4.

173. *See Long*, 721 P.2d at 487; Saltzburg, *supra* note 22, at 5.

174. *See State v. Cromedy*, 727 A.2d 457 (N.J. 1999).

misidentification and wrongful conviction.”<sup>175</sup> To resolve the ordinariness of own-race bias, juries must be directly and effectively educated on the inaccuracy of cross-racial identifications. Cautionary jury instructions inform the jury of the growing legion of scientific studies verifying the negative impact of own-race bias on eyewitness accuracy. Cautionary jury instructions neither deplete judicial resources nor subsume the role of the jury in assessing the credibility of witnesses at trial. And while courts are hesitant to address race in the courtroom, a jury instruction opens the door for jurors to consider and discuss race during deliberation with less fear of stereotyping or bigotry. Academically, cross-racial identification jury instructions allow social scientists and the judiciary to enhance their studies of own-race bias and its effects, and “[p]erhaps, over time, the lessons of experience will demonstrate the inherent superiority of one type or form of cautionary instruction.”<sup>176</sup> Most importantly, a well-written cross-racial identification jury instruction has the potential to keep an innocent individual from being wrongfully convicted of a crime they did not commit.

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175. Aaronson, *supra* note 30, at 7.

176. Long, 721 P.2d at 494–45.