

# “CURING” OWN RACE BIAS: WHAT COGNITIVE SCIENCE AND THE *HENDERSON* CASE TEACH ABOUT IMPROVING JURORS’ ABILITY TO IDENTIFY RACE-TAINTED EYEWITNESS ERROR

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*This article examines the role eyewitness identifications tainted by the own race bias may play in jury deliberations. It discusses the causes of own race bias in eyewitness identifications, and provides recommendations for how jurors should be informed about own race bias in order to identify race-tainted eyewitness error. It argues that both parts of the holding regarding the other race bias in State v. Henderson are incorrect. The article contends that the cautionary Cromedy instruction recommended in Henderson has inadequacies that limit its impact on jurors’ ability to identify eyewitness identifications tainted by the other race bias. It draws on research on eyewitness jury instructions in other areas to suggest criteria for drafting effective cautionary instructions regarding that other race bias. It additionally argues that eyewitness testimony regarding the other race bias should be employed to allow jurors to recognize the other race bias.*

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## INTRODUCTION

Eyewitness misidentifications are the most common contributor to wrongful convictions.<sup>1</sup> The major types of identification procedures police use are live lineups (putting several persons in a row), photographic lineups (using a row of photographs), and live showups (asking a witness to identify a single person).<sup>2</sup> Studies of actual criminal cases reveal that witnesses pick the suspect only forty-five percent of the time.<sup>3</sup> Witnesses pick no one thirty-five percent of the time, and an innocent filler the remaining twenty percent.<sup>4</sup> Most of this data is from the United Kingdom, which uses superior identification procedures to those in the United States.<sup>5</sup> But archival studies in the United States reveal similar real-world numbers.<sup>6</sup> If these numbers are correct, eyewitnesses who identify someone are choosing innocent persons as the alleged criminal culprit almost one-third of the time (20% out of 65% of identifications made).<sup>7</sup>

Yet in real-world cases, we cannot know that the “suspect” is in fact guilty.<sup>8</sup> Experimental studies reveal similarly troubling numbers

1. See PAUL B. CARROLL & KEN PATENAUE, *EYEWITNESS IDENTIFICATION: A POLICE PERSPECTIVE* 26 (2011); BRIAN L. CUTLER & MARGARET BULL KOVERA, *EVALUATING EYEWITNESS IDENTIFICATION* 5 (2010) (“Consistently, authors of these studies [of convictions of the innocent] found *mistaken identification* to be the most common feature of erroneous conviction cases.”) (emphasis in original).

2. See ANDREW E. TASLITZ, MARGARET L. PARIS, & LENESE A. HERBERT, *CONSTITUTIONAL CRIMINAL PROCEDURE* 886–87 (5th ed. 2010).

3. See DAN SIMON, *IN DOUBT: THE PSYCHOLOGY OF THE CRIMINAL JUSTICE PROCESS* 53 (2012); Tim Valentine, Alan Pickering & Stephen Darling, *Characteristics of Eyewitness Identification That Predict the Outcome of Real Lineups*, 17 *APPLIED COGNITIVE PSYCH.* 970 (2003) (finding twenty-two percent foil selection); Daniel B. Wright & Anne T. McDaid, *Comparing System and Estimator Variables Using Data from Real Line-Ups*, 10 *APPLIED COGNITIVE PSYCH.* 79 (1996) (finding twenty percent innocent foils); Daniel B. Wright & Elin M. Skagerberg, *Postidentification Feedback Affects Real Eyewitnesses*, 18 *PSYCHOL. SCI.* 175 (2007) (finding twenty-one percent foil selection).

4. See SIMON, *supra* note 3, at 53. Even using these numbers, this means of course that there is a one-in-five chance that an innocent suspect will be chosen. See *id.* at 263 n.9.

5. See *id.* at 263 n.9.

6. See Bruce W. Behrman & Sherrie L. Davey, *Eyewitness Identification in Actual Criminal Cases: An Archival Analysis*, 25 *LAW & HUM. BEHAV.* 475 (2001) (studying live lineups in Sacramento, California in 271 cases, with 374 perpetrators and 623 identification procedures).

7. See *supra* text accompanying notes 2–3. Experimental data reaches similar conclusions. See SIMON, *supra* note 3, at 53–54, 263 n.9.

8. See SIMON, *supra* note 3, at 262 n.6 (“The true rate of accuracy in real-world cases is likely to be lower than the archival data would indicate. Given that police investigators do not always know with certainty who the perpetrator is (the ‘ground truth’), picking out the police’s suspect does not mean that the identification is necessarily correct.”).

albeit even when the actual perpetrator is present in the lineup.<sup>9</sup> When the perpetrator is not present in the experimental lineup—akin to the real-world situation of the arrested suspect in fact being innocent—eyewitnesses choose the incorrect person fifty percent of the time.<sup>10</sup> Indeed, in the 250 cases of exoneration by DNA evidence in the United States, seventy-six percent involved eyewitness error.<sup>11</sup> Although eyewitness testimony is not the only means by which to identify a criminal,<sup>12</sup> eyewitnesses identify 77,000 criminal suspects in the United States every year.<sup>13</sup> Of course, every time an innocent person is wrongly identified, the true perpetrator escapes justice.<sup>14</sup>

The causes of eyewitness error are many and have been extensively studied.<sup>15</sup> One important contributing factor to error is the “own race bias” (ORB) or “other race effect.”<sup>16</sup> This effect is straightforward: eyewitnesses of one race are more likely to misidentify innocent persons when those persons (and, of course, the perpetrator) are of another race.<sup>17</sup> The ORB’s existence has been repeatedly shown over decades via numerous study methodologies.<sup>18</sup> The bias occurs across

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9. See *id.* at 53 (making this point); *id.* at 262 n.6 (“Knowledge of ground truth is one of the distinct advantages of laboratory research.”).

10. See Steven E. Clark, Ryan T. Howell, & Sherrie L. Davey, *Regularities in Eyewitness Identification*, 32 LAW & HUM. BEHAV. 197 (2008); Gary Wells & Amy L. Bradford, “Good, You Identified the Suspect”: Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience, 83 J. APPLIED PSYCH. 360 (2006) (finding innocent foil selections in target-absent experimental lineups can be as high as 95 percent if biasing instructions and poor lineup design are involved).

11. BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTORS GO WRONG 48 (2011).

12. See SIMON, *supra* note 3, at 50.

13. See Alvin G. Goldstein, June E. Chance & Gregory R. Schneller, *Frequency of Eyewitness Identification in Criminal Cases: A Survey Of Prosecutors*, 21 BULL. OF THE PSYCHONOMIC SOC’Y 71 (1989).

14. See AM. BAR ASS’N, ACHIEVING JUSTICE: FREEING THE INNOCENT, CONVICTING THE GUILTY, REPORT OF THE ABA CRIMINAL JUSTICE SECTION’S AD HOC INNOCENCE COMMITTEE TO ENSURE THE INTEGRITY OF THE CRIMINAL PROCESS xv-xx (2006) [hereinafter AM. BAR ASS’N, INTEGRITY OF THE CRIMINAL PROCESS REPORT].

15. See *id.* at 23–46 (summarizing many of those causes). See generally REFORM OF EYEWITNESS IDENTIFICATION PROCEDURES (Brian L. Cutler ed. 2013) (collecting essays on the current state of the research for the most important “system variables” – those within the control of police and prosecutors).

16. See CUTLER & KOVERA, *supra* note 1, at 37–40 (using the term “own race bias” and explaining its meaning and supporting data); GARRETT, *supra* note 11, at 72–74 (using the term “other-race effect”); SIMON, *supra* note 3, at 63 (using the term “own-race effect”).

17. See JAMES MICHAEL LAMPINEN, JEFFREY S. NEUSCHATZ & ANDREW D. CLING, THE PSYCHOLOGY OF EYEWITNESS IDENTIFICATION 98 (2012).

18. See *id.* at 98–100; Sam R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 548 (2005); Christian A. Meissner & John C. Brigham, *Thirty Years of Investigating Own-Race Bias in Memory for*

all races studied, though the bias might be somewhat worse when whites are identifying persons of other races.<sup>19</sup> The effect does not mean that a cross-racial identification is necessarily wrong. But the risk of error is increased.<sup>20</sup> If there are still other risks of error present, such as poor directions given to the witness, non-blind lineup methods (in which the witness is in the investigating officer's presence and can gauge his approval or disapproval of her tentative choices), officer feedback confirming a witness's choice, poor conditions for observing the perpetrator at the time of the crime, or a host of other factors, the ORB magnifies the existing chances of a mistake even further.<sup>21</sup>

Police cannot control the respective races of the victim and suspect. There is thus, as of yet, no way to create an identification procedure that eliminates, reduces or adequately corrects for the ORB. Protecting against error stemming from that bias therefore requires improving the performance of the judges or jurors in determining whether the ORB has rendered the risk of eyewitness error such that the jurors should have a reasonable doubt about the suspect's guilt. In more common sense terms, can science devise procedures that make it more likely that jurors will acquit the factually innocent when the ORB is present?

Two major solutions have been suggested to improve jury performance: instructions cautioning jurors about the risks of mistake stemming from the ORB and expert testimony informing jurors about those risks in more vivid detail.<sup>22</sup> The choice between these options, or the third one of using both remedies, was recently considered by the

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*Faces: A Meta-Analytic Review*, 7 PSYCHOL. PUB. POL'Y & L. 3 (2001); Siegfried Ludwig Sporer, *Recognizing Faces of Other Ethnic Groups: An Integration of Theories*, 7 PSYCHOL. PUB. POL'Y & L. 36 (2001); Gary Wells, *The Other-Race Effect in Eyewitness Identification: Systematic Reforms*, 7 PSYCHOL. PUB. POL'Y & L. 230 (2001).

19. See Tara Anthony, Carolyn Copper & Brian Mullen, *Cross-Racial Facial Identification: A Social-Cognitive Interaction*, 18 PERSONALITY & SOC. PSYCH. BULL. 299 (1992) (finding white participants accounted for 2.5 times the variance in the ORB relative to black participants).

20. See LAMPINEN, NEUSCHATZ & CLING, *supra* note 17, at 99–100 ("False identifications are more than 1.5 times more common for other-race faces than for own-race faces.").

21. See, e.g., AM. BAR ASS'N, INTEGRITY OF THE CRIMINAL PROCESS REPORT, *supra* note 14, at 23–46 (summarizing factors contributing to eyewitness error).

22. See AM. BAR ASS'N, CRIMINAL JUSTICE SECTION, REPORT TO HOUSE OF DELEGATES IN SUPPORT OF CROSS-RACIAL IDENTIFICATION PROCEDURES 41–44 (2008) [hereinafter AM. BAR ASS'N, CROSS-RACIAL IDENTIFICATION REPORT] (suggesting a choice between primarily these two remedies); David E. Aaronson, *Cross-Racial Identification of Defendants in Criminal Cases: A Proposed Model Jury Instruction*, 23 CRIM. JUST. 4 (2008).

Supreme Court of New Jersey in *State v. Henderson*.<sup>23</sup> The *Henderson* case quickly became a landmark in the development of the law on eyewitness identification<sup>24</sup> because the Court, albeit by relying on the New Jersey Constitution, replaced the old *Manson v. Braithwaite*<sup>25</sup> test articulated by the United States Supreme Court for suppressing unnecessarily suggestive eyewitness identifications as violative of due process. *Manson* held that such identifications were suppressible only when they created a very substantial likelihood of misidentification.<sup>26</sup> The case identified several factors for courts to consider in determining the risk of unreliability of an identification.<sup>27</sup>

But *Manson* has been widely criticized as incomplete and outdated in light of the scientific developments in the field of eyewitness research in the decades since the court decided the case.<sup>28</sup> *Henderson* corrected many, indeed most, of *Manson*'s errors; it articulated a wider array of scientifically-informed factors for courts to consider in determining the unreliability of an identification, which the case outlined with great specificity, partly in the apparent hope of encouraging police to update their procedures to avoid suppression.<sup>29</sup> Moreover, the court in *Henderson* did so only after having appointed a special master who held hearings to collect the most thorough and complete judicial record yet on the factors affecting and correcting for eyewitness error.<sup>30</sup>

The massive record in *Henderson* and the thoroughness of the court's analysis created hope that the United States Supreme Court would follow suit.<sup>31</sup> The Supreme Court did not, however, and instead

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23. 27 A.3d 872 (N.J. 2011).

24. See Andrew E. Taslitz, *Innocence Developments*, in THE STATE OF CRIMINAL JUSTICE 241, 241–53 (2012).

25. 432 U.S. 98 (1977).

26. See TASLITZ, PARIS, & HERBERT, *supra* note 2, at 910–12.

27. See *id.* at 912.

28. See, e.g., Gary L. Wells & Deah S. Quinlivan, *Suggestive Identification Procedures and the Supreme Court's Reliability Test in Light of Eyewitness Science: 30 Years Later*, 33 LAW & HUM. BEHAV. 1 (2009) (detailing the scientific flaws in the *Manson* test); Miko M. Wilford & Gary L. Wells, *Eyewitness System Variables*, in REFORM OF EYEWITNESS IDENTIFICATION PROCEDURES 23 (Brain L. Cutler ed. 2013) (“The *Manson v. Braithwaite* criteria have been largely discredited in eyewitness research literature . . . .”); Ruth Yaona, *Manson v. Braithwaite: The Supreme Court's Misunderstanding Of Eyewitness Identification*, 39 J. MARSHALL L. REV. 539 (2006) (arguing that *Manson* was based on flawed science and suggesting a flat rule of exclusion for suggestive identifications).

29. See Taslitz, *Innocence Developments*, *supra* note 24, at 241–52.

30. See *Henderson*, 27 A.3d at 877.

31. See *id.* (“After granting certification and hearing oral argument, we remanded the case and appointed a Special Master to evaluate scientific and other evidence about eyewitness identifications. The Special Master presided over a hearing that

indicated that it may be reconsidering the wisdom of any due process restrictions on identification procedures.<sup>32</sup> That high Court's reticence makes *Henderson* all that much more important as a potential model for reforming eyewitness procedures in the states.<sup>33</sup>

Yet the *Henderson* Court's approach to the ORB ultimately proved enormously conservative in its results. The Court had recognized the ORB as a problem several years earlier and mandated giving a brief cautionary jury instruction on the point, but only in the subset of cross-racial identification cases where the identification was critical to the case and uncorroborated by other evidence.<sup>34</sup> The *Henderson* Court concluded these "*Cromedy* instructions," named after the case in which they were mandated, or an improved variant of such, should be given in *every* cross-racial identification case.<sup>35</sup> However, the

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probed the testimony by seven experts and produced more than 2,000 pages of transcripts along with hundreds of scientific studies. He later issued an extensive and very fine report, much of which we adopt."); cf. Wilford & Wells, *supra* note 28, at 33 ("Going into . . . [*Perry v. New Hampshire*], eyewitness researchers hoped that the Court would revise its previous stance regarding the criteria with which to judge eyewitness accuracy; instead, the outcome of the decision was decidedly narrow in scope.").

32. See *Perry v. New Hampshire*, 132 S. Ct. 716, 730, 734 (2012) (Sotomayor, J., dissenting) ("The majority does not simply hold that an eyewitness identification must be the product of police action to trigger our ordinary two-step inquiry. Rather, the majority maintains that the suggestive circumstances giving rise to the identification must be 'police-arranged,' 'police rigged[,],' 'police-designed,' or 'police-organized.' Those terms connote a degree of intentional orchestration or manipulation. . . . The majority thus appears to graft a *mens rea* requirement onto our existing rule.") (quoting *id.* at 720, 726–27); *id.* at 737 ("Third, the majority emphasizes that we should rely on the jury to determine the reliability of evidence. . . . But our cases are rooted in the assumption that eyewitness identifications upend the ordinary expectation that it is 'the province of the jury to weigh the credibility of competing witnesses.' As noted, jurors find eyewitness evidence unusually powerful and their ability to assess credibility is hindered by a witness' false confidence in the accuracy of his or her identification. That disability in no way depends on the intent behind the suggestive circumstances.") (citations omitted).

33. Another important new case recently came out of Oregon: *State v. Lawson*, 352 P.3d 724 (Or. 2012). But the Supreme Court of Oregon decided the case entirely under the state's rules of evidence, which are ultimately largely within the control of the legislature in both states and federally. See Taslitz, *Innocence Developments*, *supra* note 24, at 241–52. Only a constitution-based approach permits the courts to trump legislative and executive reticence to reform eyewitness procedures. Such reticence has been rampant, although there are important exceptions. See DAVID A. HARRIS, *FAILED EVIDENCE: WHY LAW ENFORCEMENT RESISTS SCIENCE* 57–127 (2012). It is for this reason that I consider the *Henderson* case more important than Oregon's *Lawson* case. Nevertheless, if it proves feasible, the procedural changes addressed here can be addressed via evidence-rule changes by the courts or legislative action, and I have no preference among these options. Whatever route to change proves politically feasible in a particular state should be the route taken.

34. See *State v. Cromedy*, 727 A.2d 457, 467 (1999).

35. See *Henderson*, 27 A.3d at 926.

Court instructed its Criminal Practice Committee and Committee on Model Criminal Charges to revise the general jury instructions on eyewitness identifications, and specifically to consider whether the *Cromedy* instructions should be revised in light of modern science.<sup>36</sup>

Those committees ultimately concluded that no significant revision to the *Cromedy* instructions was necessary.<sup>37</sup> A number of states have crafted similar cautionary instructions<sup>38</sup> but the *Cromedy* instructions, although brief, are most likely the best, and certainly most well-known, variant.<sup>39</sup>

Nevertheless, these instructions leave much to be desired.<sup>40</sup> Expert testimony will likely rarely be used under the *Henderson* Court's approach to ameliorating the *Cromedy* instructions' weaknesses because the court declared, "with enhanced jury instructions, there will be less need for expert testimony."<sup>41</sup> Moreover, the court praised instructions as the preferable remedy because they are authoritative (coming from the judge), spare jurors the task of choosing between battling experts, are cost-free, and "eliminate the risk of an expert invading the jury's role or opining on any eyewitness's credibility."<sup>42</sup>

This brief article takes issue with both parts of the *Henderson* court's holding concerning the ORB. There is little, if any, research specifically on the value of the *Cromedy* instruction in helping the jury better assess eyewitness accuracy in light of the ORB.<sup>43</sup> But there is analogous research on eyewitness jury instructions in other areas,<sup>44</sup>

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36. *See id.*

37. *See* SUPREME COURT COMM. ON MODEL CRIMINAL JURY CHARGES, REPORT OF THE SUPREME COURT COMMITTEE ON MODEL JURY CHARGES ON THE REVISIONS TO THE IDENTIFICATION MODEL CHARGES 32–33 (2012). The only change that the Committee recommended was that the footnote to the instruction should say the instruction "must," rather than "should," be given whenever there is a cross-racial identification. *See id.* at 33.

38. *See* CROSS-RACIAL IDENTIFICATION REPORT, *supra* note 22, at 5–6 (summarizing instructions given in certain federal districts, California, Utah, and Massachusetts).

39. My conclusion that the *Cromedy* instructions are best-known is based on my experience working on the ABA Criminal Justice Section Subcommittee on Eyewitness Identification of the Innocence Committee and as the Reporter for the Uniform Law Commission Study Committee on a Uniform Statute on Eyewitness Identification, where I served with judges, defense counsel, prosecutors, and legislators, as well as read widely. The *Cromedy* instructions were the instructions most-often referenced in our conversations and in the literature, while few, if any, other instructions were known by name outside of the jurisdiction adopting them. In any event, none of the current cautionary instructions are very different from one another. *See id.*

40. *See infra* Part IIIA.

41. *Henderson*, 27 A.3d at 925.

42. *Id.*

43. *See infra* Part IIIA.

44. *See id.*

and there is ample research concerning instructions to disregard evidence that suggests that the more-consistent use of the cautionary *Cromedy* instruction mandated by *Henderson* will not do an adequate job in compensating for the ORB.<sup>45</sup> Part IA of this article explains the likely causes of the ORB and their relevance to crafting better jury instructions. Part IB discusses the analogous research just noted, drawing on its suggestion of criteria for drafting effective cautionary instructions—criteria that, this article argues, *Cromedy* fails. Those same criteria suggest ways to draft a superior instruction. Nevertheless, it is this article’s position that even an improved instruction will often not be sufficient. Part II thus addresses why reliance on expert testimony should be expanded, while Part III summarizes this piece’s main conclusions and suggests other specific reforms.

## I.

### CAUSES OF OWN-RACE BIAS

The ORB does not result from differences in skin color but rather from differences in racial features.<sup>46</sup> Studies relying on self-reports of conscious racial bias have found no correlation, however, between such conscious bias and the ORB.<sup>47</sup> On the other hand, there is mixed evidence, some supportive, some not, that implicit or unconscious racial bias, as measured by the implicit association test, may be correlated with the ORB.<sup>48</sup>

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45. *See id.*

46. *See* Yair Bar-Heim, Talia Saidel & Galit Yovel, *The Role of Skin Color in Face Recognition*, 38 PERCEPTION 145 (2009) (finding Caucasian observers recognized Caucasians with white skin better than those altered in photographs to have black skin but recognized both better than when observing African faces, whether or not the African faces’ color was black or altered to be white).

47. *See* Christian A. Meissner & John C. Brigham, *Thirty Years of Investigating the Own-Race Bias in Memory for Faces: A Meta-Analytic Review*, 7(1) PSYCHOL. PUB. POL’Y & L. 3, 7, 17 (2001). Meissner and Brigham discuss “attitudes,” which can be of two types: explicit (conscious) and implicit (unconscious). *See id.*; *see also* GREG MAIO & GEOFF HADDOCK, *THE PSYCHOLOGY OF ATTITUDES AND ATTITUDE CHANGE* 10–20 (2010). Many of the studies they cite involve explicit bias, which is conscious or readily accessible to consciousness and involves in one way or another self-reports of evaluations of target objects (the very definition of an attitude (*see id.* at 3–5)) or of behaviors suggesting an attitude of which one can readily be aware. *See id.* at 11 (noting also that the “vast majority of attitude measures can be conceptualized as direct (explicit) indicators of attitude.”).

48. *Compare* Diane P. Ferguson et al., “*They All Look Alike to Me*”: *Prejudice and Cross-Race Face Recognition*, 92 BRIT. J. PSYCHOL. 567 (2001) (finding no relationship between the ORB’s effect size and implicit or self-reported measures of bias), *with* Pamela M. Walker & Miles Hewstone, *The Influence of Social Factors and Implicit Racial Bias on a Generalized Own-Race Effect*, 22 APPLIED COGNITIVE

More thorough research has been done concerning two other explanations of the ORB: the contact hypothesis and the social categorization hypothesis.<sup>49</sup> The contact hypothesis holds that the degree of an individual's contact with other races explains the ORB,<sup>50</sup> while the social categorization hypothesis maintains, in effect, that we choose not to pay attention to individuating features of persons we classify as being of another race.<sup>51</sup> There is mixed support for the contact hypothesis,<sup>52</sup> although the data overall suggests it plays an important role under certain circumstances.<sup>53</sup> But the contact hypothesis is certainly not the whole explanation for the ORB; social categorization has been consistently and strongly supported as playing a critical role.<sup>54</sup>

### A. *The Contact Hypothesis*

#### 1. *The Quantity and Quality of Inter-Racial Contact Matters*

A number of studies find that less interracial contact means a greater ORB while more means a lesser ORB,<sup>55</sup> but several studies do

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PSYCHOL. 441 (2008) (finding a positive association between the size of the ORB effect and racial bias as measured by the implicit association test).

49. See BELL CHEUK FAI CHUNG, *CROSS-RACIAL EYEWITNESS IDENTIFICATION: LINEUP SUPERIORITY EFFECTS* 13, 16, 22 (2011) (concluding that there are two basic models explaining the ORB: the "perceptual learning model," which includes the contact hypothesis as well as other means of developing perceptual expertise, and the social categorization model); CUTLER & KOVERA, *supra* note 1, at 39 (emphasizing the contact hypothesis).

50. See CHUNG, *supra* note 49, at 16.

51. See *id.* at 23; *infra* text accompanying notes 94–151.

52. See LAMPINEN, NEUSCHATZ & CLING, *supra* note 17, at 103 ("Despite these [impressive] findings, it is important to note that some research has failed to find evidence for the contact hypothesis.").

53. See *id.* at 104 ("Overall, the data are consistent with the hypothesis that the other-race effect is partly moderated by experience with members of other races. However, it may be that not all types of experience matter equally."); Agatha White Carroo, *Recognition of Faces as a Function of Race, Attitudes, and Reported Cross-Racial Friendships*, 64 PERCEPTUAL & MOTOR SKILLS 319 (1987) (arguing that the contact hypothesis may require, for example, contact in close inter-racial relationships).

54. See CHUNG, *supra* note 49, at 28 ("In my perspective, the evidence from recent research tends to provide strong support for the social categorization model.").

55. See *id.* at 8 ("Literature reviews of the OR[B] have shown the general agreement regarding the robustness of the phenomenon. Over the past three decades, psychologists have conducted extensive research on this robust phenomenon. The findings generally indicate that people are more accurate and show superior performance in recognizing faces of individuals of their own race."). These findings have been found "reliable and universally applicable across different cultural and racial groups." *Id.* at 9. The ORB means weaker memory, poorer perception, poorer change recognition, and weaker estimates of age and gender in cross-racial identifications. See *id.* at 8–9. Witnesses in a cross-race situation are much more likely to make false positive identifications. See GRAHAM HOLE & VICTORIA BOURNE, *FACE PROCESSING:*

not find this correlation.<sup>56</sup> However, a pattern seems to underlie many of those studies: it is not only the quantity, but rather the quality of interracial interaction that matters.<sup>57</sup> Restated, interaction must occur under circumstances where one group is motivated to learn to differentiate members of the other group as individuals.

For example, a 1995 study of black and Caucasian students in Zimbabwe found that the black high-interracial-contact group performed equally well in identifying white and black faces but that was not true for the white high-interracial-contact group.<sup>58</sup> Zimbabwe was then a country only recently freed from mandatory racial segregation in a system dominated by whites.<sup>59</sup> That history suggests that whites simply did not care to learn to differentiate blacks as individuals.<sup>60</sup> Such a conclusion is also consistent with the substantial evidence that status-inferior group members pay more attention in general to status-superior group behavior, though the converse is not true.<sup>61</sup> The explanation generally offered for this observation is that status-inferior group members' fates turn on being attentive to the superior groups' needs, thoughts, and behavior, while the status-superior group's fate is not perceived by its members as turning on paying similar attention to the status-inferior group.<sup>62</sup>

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PSYCHOLOGICAL, NEUROPSYCHOLOGICAL, AND APPLIED PERSPECTIVES 294 (2010). Witnesses' degree of confidence in their identifications are also less diagnostic of accuracy in cross-race relative to same-race identifications. *See id.*

56. *See* LAMPINEN, NEUSCHATZ & CLING, *supra* note 17, at 103–04.

57. *See* HOLE & BOURNE, *supra* note 55, at 295, 297; CHUNG, *supra* note 49, at 16 ("In line with the perceptual learning process, the quality and/or quantity of interracial contact may play an important role in acquiring the differential expertise.").

58. *See* Patrick Chiroro & Tim Valentine, *An Investigation of the Contact Hypothesis of the Own-Race Bias in Face Recognition*, 48 Q. J. EXPERIMENTAL PSYCHOL. 879 (1995).

59. *See* HOLE & BOURNE, *supra* note 55, at 295.

60. *See id.* Another study of white and black students from Bristol University in England and the University of Cape Town in South Africa found similar results. *See* Daniel B. Wright, Catherine E. Boyd & Colin G. Tredoux, *Inter-racial Contact and the Own-race Bias for Face Recognition in South Africa and England*, 17 APPLIED COGNITIVE PSYCHOL. 365 (2003) (concluding that for black students in the study, whose interracial contact with whites varied (unlike the whites, who had little interracial contact), such contact was positively correlated with cross-race accuracy).

61. *See* Andrew E. Taslitz, *Why Did Tinkerbell Get Off So Easy?: The Roles of Imagination and Social Norms in Excusing Human Weakness*, 42 TEX. TECH. L. REV. 419, 433, 452, 455, 466, 472 (2009) [hereinafter *Social Norms*]; ANDREW E. TASLITZ, RAPE AND THE CULTURE OF THE COURTROOM 67–80 (1999) [hereinafter RAPE AND CULTURE].

62. *See* Taslitz, *Social Norms*, *supra* note 61, at 433, 452, 455, 466, 472; TASLITZ, RAPE AND CULTURE, *supra* note 61, at 67–80.

## 2. *The Age of Exposure to Primarily Own-Race Faces Matters*

The age of initial substantial exposure to other-race faces also may matter.<sup>63</sup> Even nine-month-old, although not three-month-old, infants seem to show the ORB.<sup>64</sup> Substantial evidence supports the idea that “perceptual narrowing” occurs with age during this critical period.<sup>65</sup> Infants are normally exposed to own-race faces, consequently developing a preference for them.<sup>66</sup> Because of this preference, they do not pay as careful attention to other-race faces, even when exposed to them.<sup>67</sup> The *de facto* narrowing of experience and practice means that the growing infant develops expertise with individuating own-race but not other-race faces.<sup>68</sup>

One interesting study supporting this view is of three-to-nine-year-old Korean children adopted by Caucasian parents in Europe.<sup>69</sup> Those children became adept at differentiating among Caucasian faces but not Korean faces.<sup>70</sup> “Overall, these developmental studies suggest that early experience with faces of a particular race normally produces an enduring bias towards better recognition of that race, although that bias can be eliminated or reversed given sufficient [quality future] experience with other races.”<sup>71</sup>

Importantly, the age-developmental literature again emphasizes the importance not only of the quantity, but of the quality of interracial contact.<sup>72</sup> A large multinational study of children in the United States, South Africa, and Norway thus found the ORB in older age groups, but it was as pronounced in South Africa, a racially diverse country, as it was in Norway—a racially homogenous country.<sup>73</sup> As one leading author put it, “[t]o ameliorate the other-race effect, it seems it is not

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63. See HOLE & BOURNE, *supra* note 55, at 296; LAMPINEN, NEUSCHATZ & CLING, *supra* note 17, at 104 (“A more promising account may be that early experiences matter more than later experiences. It is well known that some perceptual abilities show *critical periods* in development.”) (emphasis in original).

64. See David J. Kelly et al., *The Other-Race Effect Develops During Infancy: Evidence of Perceptual Narrowing*, 18(12) PSYCHOL. SCI. 1084 (2007).

65. See HOLE & BOURNE, *supra* note 55, at 297.

66. See *id.*

67. See *id.*

68. See *id.*

69. See S. Sangrioli et al., *Reversibility of the Other-Race Effect in Face Recognition During Childhood*, 16 PSYCHOL. SCI. 440 (2005).

70. See *id.*

71. HOLE & BOURNE, *supra* note 55, at 297.

72. See generally Chiroro & Valentine, *supra* note 58 (emphasizing the importance of quality interaction).

73. See Gail S. Goodman et al., *The Development of Memory for Own-and-Other-Race Faces*, 98 J. EXPERIMENTAL CHILD PSYCHOL. 233 (2007).

enough to be surrounded by members of another race: one has to pay attention to them too."<sup>74</sup>

### 3. *Encoding and Configural Versus Featural Processing*

Poor recognition theoretically might stem from one of two sources: poor memory (poor recall) for other-race faces or the failure to encode differences when exposed to other-race faces in the first place.<sup>75</sup> The available evidence is most supportive of the failure-to-encode explanation—that is, that members of one race, at least if having little contact with members of another race, simply do not pay attention to differentiating other-race features upon initial exposure.<sup>76</sup> Thus if a white person with little inter-racial contact sees a black person commit a crime, the white person does not focus adequately on the black offender's unique features. Rather, the white victim "encodes" the stereotypical features of the black offender, making it hard later to differentiate one black member of a lineup from another member other than by guessing or because certain flaws in the lineup procedure draw attention to one black face over others.<sup>77</sup>

A variety of studies suggest that members of one race are more likely to use "configural" than "featural" processing of own-race faces, and do the opposite with other-race faces.<sup>78</sup> "Configural" processing takes in the configuration of the face as a whole, including the way that its features inter-relate.<sup>79</sup> It is a more holistic method of perception.<sup>80</sup> Featural processing just focuses on selected individual

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74. HOLE & BOURNE, *supra* note 55, at 298.

75. *See id.* at 298–99.

76. *See id.* at 309 ("Valentine's (1991) Multidimensional Face Space model suggests that the difficulties in recognizing other-race faces arise from them being encoded with respect to inappropriate own-group norms so that they form a tight cluster of 'distinctive' faces in face space.").

77. This example is mine, but it follows from the logic of encoding discussed above and from discussion to follow of the impact of suggestion in identification procedures infected by the ORB. *See infra* text accompanying notes 78–82, 116–21.

78. *See* HOLE & BOURNE, *supra* note 55, at 36–39 (defining "configural" and "featural" processing), 299–302 (discussing empirical data concerning these two types of processing in the context of the ORB); LAMPINEN, NEUSCHATZ & CLING, *supra* note 17, at 106.

79. *See* CHUNG, *supra* note 48, at 2–7 (summarizing empirical data supporting configural processing as key to face recognition and recall); HOLE & BOURNE, *supra* note 55, at 36–39 (defining the term).

80. *See* CHUNG, *supra* note 48, at 3 (noting that configural and holistic processing are "closely related," since holistic processing involves the "simultaneous integration of the multiple features of a face into a single perceptual representation."); *id.* at 2 (defining configural processing as referring to the "perception of special relations between face features, not just the shape of individual features."); HOLE & BOURNE, *supra* note 55, at 38.

features of a face (for example, the breadth of the nose) in isolation from other features or the whole.<sup>81</sup> At least one study suggests that same-race individuals engage in both configural and featural processing of own-race faces, but only featural processing of other-race faces.<sup>82</sup>

#### 4. Curative Training

Intensive training in recognizing specific other-race faces appears to be a way to moderate or eliminate the ORB.<sup>83</sup> McKone and colleagues, for example, trained white Australians for one hour in differentiating four other-race (Chinese) and four own-race faces.<sup>84</sup> The researchers exposed the white participants to each face 220 times, which resulted in ORB being eliminated for those faces and holistic processing rising substantially.<sup>85</sup> The researchers concluded that holistic processing is normally automatically “turned off” for other-race faces but can be switched on under the right circumstances, such as familiarity with specific other-race faces.<sup>86</sup> Other research suggests that training can extend beyond recognizing specific other-race faces to improving other-race face recognition generally where that training teaches students, for example, to notice differences between a particular feature or groups of features of other-race faces.<sup>87</sup>

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81. See CHUNG, *supra* note 48, at 3 (“Featural processing refers to the perception of individual face components, such as eyes, nose, and mouth, which is also called componential processing.”).

82. See William G. Hayward, Gillian Rhodes & Adrian Schwaninger, *An Own-Race Advantage for Components As Well As Configurations in Face Recognition*, 106 COGNITION 1017 (2008); see generally CHUNG, *supra* note 48, at 17–20 (summarizing much of the evidence for an own-race advantage in configural processing); HOLE & BOURNE, *supra* note 55, at 302 (concluding that, at least for unfamiliar faces, the “weight of the evidence . . . suggests that other-race faces may be processed less ‘holistically’ or ‘configurally’ than faces of one’s own race.”).

83. See *infra* text accompanying notes 84–93.

84. Ellinor McKone et al., *Familiar Other-Race Faces Show Normal Holistic Processing and Are Robust to Perceptual Stress*, 36 PERCEPTION 224 (2007).

85. See *id.*

86. See *id.*

87. See Paul J. Lavrakas, John R. Buri & Mark S. Mayzner, *A Perspective on the Recognition of Other-Race Faces*, 20 PERCEPTION & PSYCHOPHYSICS 475 (1976) (explaining that participants were trained in recognizing one, then the relationship between two, features of African-American faces using an “Identi-Kit,” which is ordinarily a collection of features that a witness can use to try to create a facial composite of a perpetrator); see also Elaine S. Elliott, Elizabeth J. Wills & Alvin G. Goldstein, *The Effects of Discrimination Training on the Recognition of White and Oriental Faces*, 2 BULL. PSYCHONOMIC SOC’Y 71 (1973) (finding cross-race training improved cross-race recognition performance).

The visual aspect of these training methods must be stressed. Thus at least one study found that verbal training designed to reduce or eliminate the ORB was ineffectual;<sup>88</sup> ORB declines only when the words were combined with visual training in other-race faces.<sup>89</sup>

### 5. *Curative Pre-Observation Instructions*

Interestingly, an important relatively new study found that giving certain warnings to perceivers *before* they observed an other-race face that they would later be asked to recognize eliminated the ORB.<sup>90</sup> Specifically, observers were told about the ORB, urged to do what they could to avoid it, and instructed to pay close attention to features differentiating one face from another—especially for other-race faces.<sup>91</sup> Conversely, an instruction that was silent as to the ORB, but explained the frequent errors in eyewitness identifications and urged participants to do their best to avoid them did not eliminate the ORB.<sup>92</sup> The researchers interpreted these results thus: motivating accuracy was insufficient to promote it, but motivating accuracy and instructing observers about the ORB effect and how to compensate for it while observing faces did improve accuracy to the extent of eliminating the ORB.<sup>93</sup> This study was, it should be noted, in the social categorization rather than the contact-hypothesis tradition.<sup>94</sup>

Indeed, much of the contact-hypothesis research is also consistent with a role for social categorization. It is to exploring that role in more detail to which this article next turns.

## B. *Social Categorization*

### 1. *The Categorization Process*

The social categorization approach is well illustrated by an experiment by Professors Otto Maclin and Roy Malpass.<sup>95</sup> They used ra-

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88. See Roy S. Malpass, Henry Lavigneur & David E. Welden, *Verbal and Visual Training in Face Recognition*, 14 PERCEPTION & PSYCHOPHYSICS 283 (1973).

89. See *id.*

90. See Kurt Hugenberg, Jennifer Miller & Heather M. Claypool, *Categorization and Individuation in the Cross-Race Recognition Deficit: Toward a Solution to an Insidious Problem*, 43 J. EXPERIMENTAL SOC. PSYCH. 334 (2007).

91. See *id.* at 336–37, 339–40.

92. See *id.* at 338–40.

93. See *id.* at 339–40.

94. See *id.* at 335–36, 339–40 (also noting that social contact experience likely plays a role).

95. See Otto H. Maclin & Roy S. Malpass, *Racial Categorization of Faces: The Ambiguous Race Face Effect*, 7 PSYCHOL. PUB. POL'Y & L. 98 (2001) [hereinafter Maclin & Malpass, *Racial Categorization*]; see also Otto H. Maclin & Roy S.

cially ambiguous, computerized faces, manipulating primarily racially stereotypical hairstyles between those expected of darker-skinned Hispanics and those expected of African-Americans. The facial features, however, remained the same.<sup>96</sup> The researchers found an increase in false positive identifications for faces characterized as African-American but not for those characterized as Hispanic when the ambiguous faces were shown to non-African-American Hispanic observers.<sup>97</sup> The hairstyle manipulation affected not only recognition memory but also visual and social perceptions. Purportedly African-American faces were perceived as narrower and darker-skinned, with wider mouths and less-protruding eyes, than purportedly Hispanic faces even though none of these features had changed.<sup>98</sup>

Moreover, supposed African-Americans were described as more suspicious and tense, less warm, than supposed Hispanic faces.<sup>99</sup> Other researchers found similar effects simply from varying the names associated with a face between stereotypically European and stereotypically Asian names.<sup>100</sup> Merely categorizing a face at initial perception as either in the in-group or the out-group thus alters social perceptions and whether the ORB is triggered.<sup>101</sup>

A phenomenon akin to the ORB has even been triggered by grouping persons based upon perceived attendance at one university or another.<sup>102</sup> Students were shown faces with different colored backgrounds. Students were also told that one color represented those attending the students' own university, the other color represented those attending a different university. The student participants were better able to recognize their "own-university" faces than other-university faces compared to a control group whose members were told that the background colors were irrelevant.

Likewise, in another study, these researchers found that giving participants a phony personality test, then telling the participants that one background color was for the faces of people with the same per-

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Malpass, *Last But Not Least: The Ambiguous-Race Face Illusion*, 32 PERCEPTION 249 (2003) [hereinafter Maclin & Malpass, *Face Effect*].

96. See Maclin & Malpass, *Racial Categorization*, *supra* note 95, at 104–12.

97. See *id.* at 110–11.

98. See Maclin & Malpass, *Face Effect*, *supra* note 95.

99. See *id.*

100. See Kirin F. Hilliar & Richard I. Kemp, *Barack Obama or Barry Dunham? The Appearance of Multiracial Faces is Affected by the Names Assigned to Them*, 37 PERCEPTION 1605 (2008).

101. See CHUNG, *supra* note 49, at 24–25 (discussing the in-group/out-group model).

102. See Michael J. Bernstein, Steven G. Young & Kurt Hugenberg, *The Cross-Category Effect: Mere Social Categorization is Sufficient to Elicit an Own-Group Bias in Face Recognition*, 18(8) PSYCHOL. SCI. 706 (2007).

sonality as the observers’ and another background color was for the faces of people with a different personality type, achieved similar results.<sup>103</sup> The observers recognized purported same-personality faces more accurately than purported other-personality faces.<sup>104</sup>

There may indeed also be a “social-class bias.” Another experiment showed middle-class white observers photographs of white faces but in circumstances suggesting either a middle-class-to-wealthy or a poor economic background.<sup>105</sup> The observers were better at recognizing those faces perceived to be of persons closer to the observers’ own social class than to faces of the apparently lower-class observed.<sup>106</sup>

## 2. *Missing Features and Cognitive Disregard*

Another line of research builds on the idea that it is harder to notice what is missing than what is present.<sup>107</sup> This applies to “missing” facial features as well.<sup>108</sup> Caucasians, these researchers argue, view Caucasian features as the standard ones.<sup>109</sup> But the race of Caucasians viewed by other Caucasians is not encoded because their race is simply assumed as the default.<sup>110</sup> “Whiteness” as a race is effectively a missing—an invisible—feature, thus not readily noticed. Conversely, “blackness,” is processed as a highly noticeable and present feature, namely race, because “blackness” is not a feature assumed by Caucasian experience and self-concept.<sup>111</sup> This other-race categorization interferes with encoding individuating information because sudden recognition of “race” as a relevant feature takes up much of memory available for processing information.<sup>112</sup>

103. *See id.*

104. *See id.*

105. *See* Edwin R. Shriver et al., *Class, Race, and the Face: Social Context Modulates the Cross-Race Effect in Face Recognition*, 34(2) *PERSONALITY & SOC. PSYCHOL. BULL.* 260 (2008).

106. *See id.*

107. *See* LAMPINEN, NEUSCHATZ & CLING, *supra* note 17, at 107.

108. *See id.* at 107–08.

109. *See* Daniel T. Levin, *Race as a Visual Feature: Using Visual Search and Perceptual Discrimination Tasks to Understand Face Categories and the Cross-Race Recognition Deficit*, 129 *J. EXPERIMENTAL PSYCHOL.: GEN.* 559 (2000) [hereinafter *Visual Feature*].

110. *See* LAMPINEN, NEUSCHATZ, & CLING, *supra* note 17, at 107–08.

111. *See id.*; *see also* Levin, *supra* note 109.

112. *See* Levin, *supra* note 109; *see also* LAMPINEN, NEUSCHATZ & CLING, *supra* note 17, at 107 (“Thus, when viewing a Caucasian individual, no feature is recorded for race. However, when viewing an African American individual, Caucasian participants will record race (i.e., “black”) as a feature, which takes up part of their memory and leaves them less capacity available in memory to encode other [more individuating] features.”).

This last occurrence, individuals ceasing to process much information about a person after observing that person's race, is known as "cognitive disregard."<sup>113</sup> A process of "cognitive disregard" occurs when observers seeing other-race faces quickly categorize them based on stereotypical information, which brings any effort to process individuating attributes promptly to a halt.<sup>114</sup> Experiments showing that participants are faster at categorizing other-race faces as black or white than same-race faces, and that black faces stand out promptly from a field of white faces when observed by whites but white faces do not stand out as quickly adds further support to this theory.<sup>115</sup> This quick reaction time shows that observers are noticing individuals' different race as "present" or unusual; as such, race is standing out to and grabbing the attention of observers, which impedes their recognition of other facial features.<sup>116</sup>

These encoding processes likely reflect the same configural versus featural processing strategies discussed earlier.<sup>117</sup> Observers categorizing faces as other-race pay attention only to stereotypical racial features, ignoring individual differentiating information that includes a more holistic processing of the entire face.<sup>118</sup> Again, under this view, it is not that other-race faces cannot be individually differentiated, but rather that observers do not bother to do so.<sup>119</sup> Reducing persons to stereotypes rather than seeing them as unique individuals is also, of

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113. See Miriam J. Rodin, *Who Is Memorable to Whom? A Study of Cognitive Disregard*, 5 SOC. COGNITION 144 (1987).

114. See LAMPINEN, NEUSCHATZ & CLING, *supra* note 17, at 304 (explaining that with cognitive disregard, "we categorize someone as being part of an 'out-group' because they are different from us in some way, . . . [making them] representative of a stereotype and we fail to engage in any further processing of information about their individual attributes.").

115. See *id.* at 305; see also Levin, *Visual Feature*, *supra* note 109; Daniel T. Levin, *Classifying Races by Face: The Structure of Face Categories*, 22(6) J. EXPERIMENTAL PSYCHOL.: LEARNING, MEMORY & COGNITION 1364 (1996).

116. See sources cited *supra* notes 114–15.

117. See HOLE & BOURNE, *supra* note 55, at 305.

118. See Siegfried Ludwig Sporer, *Recognizing Faces of Other Ethnic Groups: An Integration of Theories*, 7(1) PSYCHOL. PUB. POL'Y & L. 36 (2001).

119. Professors Hole and Bourne summarize this point well, noting that social categorization theories

are quite compatible with demonstrations of reduced configural processing for other-race faces. They suggest that this occurs not because viewers are unable to use configural processing for these faces, but because they do not use it for strategic reasons: they use an alternative, feature-based processing strategy instead. This latter strategy is good for specifying the race of a face, but not so useful for remembering it. In effect, people encode the wrong facial characteristics for the task at hand (other-race face recognition).

HOLE & BOURNE, *supra* note 55, at 305.

course, a mechanism that reduces empathy (understanding of others) and sympathy (the desire to reduce others' suffering).<sup>120</sup> Perhaps that is one explanation for the negative personality-attributions described earlier made when non-African-Americans observe African-American faces.<sup>121</sup> When the other-race group is a social out-group and therefore has an inferior social status, this process can also lead to greater perceptions of that out-group as both dangerous and untruthful. This, in turn, can have consequences in the assessment of witnesses at a trial.<sup>122</sup>

### 3. *The ORB Harms Detective Performance in Creating Fair Lineups*

The other-race effect may have a further ill consequence. It may affect the quality of identification procedure design in the first place.<sup>123</sup> One group of researchers notably found that lineups were less fair when organized by individuals of a different race than the suspect than when organized by individuals of the same race as the suspect.<sup>124</sup> In the study, the subjects, who were neither actual detectives nor witnesses to the crimes, were asked to create lineups of faces that were reasonably similar to the face of the suspect. Researchers gave the subjects a photograph of the suspect and asked them to select five photographs of reasonably similar faces from a much larger group of photographs.<sup>125</sup> This procedure was done twice, once for a white suspect and once for a black suspect, and employed both white and black subjects.<sup>126</sup> Each larger group of photographs was organized such that any four photos viewed in sequence contained a photo of a face that was very similar, one merely similar, one dissimilar, and one very dissimilar to the face of the suspect (as established by independent raters).<sup>127</sup> The fairness of the proposed lineup was assessed by

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120. See Taslitz, *Social Norms*, *supra* note 61, at 431–37, 450–55.

121. See *supra* text accompanying notes 102–03.

122. See Andrew E. Taslitz, *Racial Blindsight: The Absurdity of Color-Blind Criminal Justice*, 5 OHIO ST. J. CRIM. L. 1 (2007); Andrew E. Taslitz, *Wrongly Accused: Is Race a Risk Factor in Convicting the Innocent?*, 4 OHIO ST. J. CRIM. L. 121 (2006).

123. See LAMPINEN, NEUSCHATZ & CLING, *supra* note 17, at 108.

124. See John C. Brigham & David J. Ready, *Own-Race Bias in Lineup Construction*, 9 L. & HUM. BEHAV. 415 (1985). Another study supports a similar conclusion based upon the efforts of a real police lineup constructor, but this study is merely suggestive because it only involved a single detective subject. See John C. Brigham et al., *The Accuracy Of Eyewitness Identifications In A Field Setting*, 42(4) J. PERSONALITY & SOC. PSYCHOL. 673 (1982).

125. Brigham & Ready, *supra* note 124, at 418–19.

126. See *id.*

127. See *id.*

the extent to which the subjects surveyed all (rather than just a subset or a few) of the photographs to find those most similar to the suspect, the number of photos actually chosen as reasonably similar (not all subjects selected the full five reasonably similar photographs requested), and the time taken in selecting each photograph ultimately chosen.<sup>128</sup> The researchers concluded: “lineup constructors were significantly more selective about which photos went into their own-race lineups than their other-race lineups. They spent more time to find fewer photos on their own-race lineups than on their other-race lineups.”<sup>129</sup> The authors further explained: “Both blacks and whites acted as if they perceived more similarity in outgroup members’ appearance than in ingroup members’ appearance.”<sup>130</sup> Consequently, the lineups they constructed were more likely to be unfair.<sup>131</sup>

Lineup fairness is usually measured by giving non-eyewitnesses the suspect’s description and a photo spread. They are asked from the description alone to identify the suspect. If the subjects disproportionately pick the suspect from the series of faces indicated, that means that the foils’ faces did not match the eye-witness’s description of the suspect as well as the suspect’s face did; the foils’ faces were thus substantially different from the suspect’s face.<sup>132</sup> Where the foils’ faces do not correspond to the witness’s description nearly as much as the suspect’s face does, the lineup procedure actually suggests whom the observers should pick even if they are just guessing based upon no more information than the witness’s description of the suspect.<sup>133</sup> The study’s determination that some of the lineups were less fair as a result of the lineup constructors’ ORB supports the authors’ prediction that

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128. *See id.* at 419–22.

129. *Id.* at 422.

130. *Id.* at 423. Blacks were, however, more selective than whites overall, even in selecting white suspect photographs, although blacks were far more selective with black suspect than white suspect lineup construction. *See id.* at 422–23.

131. *Id.*

132. *See* CUTLER & KOVERA, *supra* note 1, at 95–96 (defining “functional size” of a lineup as “an index of how many lineup members are plausible picks from the lineup given the description of the perpetrator.”); Roy S. Malpass, Colin G. Tredoux & Dawn McQuiston-Surrett, *Lineup Construction and Fairness*, in 2 THE HANDBOOK OF EYEWITNESS PSYCHOLOGY: MEMORY FOR PEOPLE 155 (Rod C. L. Lindsey et al. eds., 2007) (defining “effective size” as an alternative measure of lineup fairness).

133. Witnesses’ tendency to assume the perpetrator is present in the lineup and consequently to guess, even if doing so unconsciously, due to witnesses’ lack of a strong basis for recognizing the perpetrator is discussed in Steven Penrod, *Eyewitness Identification Evidence*, 18 CRIM. JUST. 36 (2003); *see also* Nancy K. Steblay, *Lineup Instructions*, in REFORM OF EYEWITNESS IDENTIFICATION PROCEDURES 65, 74–75 (Brian L. Cutler ed. 2013) (suggesting that guessing results from “relative judgment processes,” meaning the “comparison of lineup members with one another to select the one who looks most like the offender relative to the other lineup members.”).

the lineups would fail the test for fairness because the lineups were too casually constructed.

Other research shows that Caucasians are less accurate in estimating the age of other-race faces, again making it harder for a detective designing a lineup to choose faces that all appear to be of persons of a similar age.<sup>134</sup> Still other research suggests that Caucasians who have limited contact with persons from other races are more likely to associate new other-race faces with the context in which other-race faces were initially observed, which can also bias recognition.<sup>135</sup>

#### 4. *The Need to Design "Extra-Fair" Lineups Where the ORB is Present: Blank, Larger, and Double-Blind Lineups*

Some researchers have suggested that the additional risks of error in different-race cases require not only ordinary safeguards to ensure fair lineups, but also extra reliability protections not provided in same-race cases.<sup>136</sup> Professor Gary Wells, one of the "fathers" of eyewitness research in psychology, and his colleague, Elizabeth A. Olson, have recommended two special procedures: a larger size lineup and the use of the "blank lineup" procedure.<sup>137</sup> Wells and Olson explained the logic of having larger lineups this way:

Let's assume, for example, that 30% of the eyewitnesses in other-race cases identify someone from a lineup in which the suspect is not the actual perpetrator and only 15% do so in an own-race case. Assume further that there are six members in the lineup, one of which is the suspect and [the] other five are fillers. Assuming that the lineup is fair, the innocent suspect has a 5.0% chance of being misidentified (1/6 of 30%) in the other-race case and a 2.5% chance in the own-race case. If lineup size were doubled in the other-race case, the chances of misidentification in the other-race and own-race cases would be equal (each at 2.5%).<sup>138</sup>

The blank lineup procedure would add further protection against witness guessing. This procedure involves first administering a "blank lineup" containing only known-innocent fillers to the other-race witness, which the witness can only "correctly" respond to by answering,

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134. See Hedwige Dehon & Serge Bredart, *An "Other-Race" Effect in Age Estimation from Faces*, 30 PERCEPTION 1107 (2001).

135. See Ruth Horry & Daniel B. Wright, *I Know Your Face But Not Where I Saw You: Context Memory Is Impaired for Other-Race Faces*, 15 PSYCHONOMIC BULL. & REV. 610 (2008).

136. See 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 (2001).

137. See *id.* at 241–43.

138. *Id.* at 241–42.

“I do not recognize anyone.”<sup>139</sup> If the witness gives that answer, the witness is unlikely to guess or to too easily render identification. Consequently, police should next proceed to the “true” lineup, that is, one containing the suspect.<sup>140</sup> If the witness indeed identifies the suspect at the true lineup, we can have some confidence in that identification’s reliability.<sup>141</sup> The success of this procedure of course depends upon a witness not having learned in advance that blank lineups were standard procedure in other-race cases. But it seems unlikely that most witnesses would have learned or remembered this point from the media,<sup>142</sup> and the matter can be explored on cross-examination at any suppression hearing or trial.

Wells and Olson also worry that unconscious racial bias so permeates the criminal justice system that the chances of inadvertent detective “cueing” (e.g., subtly smiling or head-nodding when the witness looks at the suspect) demand double-blind procedures.<sup>143</sup> In double-blind procedures, neither the detective administering the lineup

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139. See *id.* at 242–43.

140. See *id.*

141. See *id.*; see also Gary L. Wells, *The Psychology of Lineup Identifications*, 14 J. APPLIED SOC. PSYCHOL. 89 (1984) (more broadly addressing the virtues of the blank lineup procedure).

142. Studies of media coverage of criminal cases support this conclusion by analogy. Few criminal cases ever receive media coverage, and most of those that make it into the press are covered minimally. Research psychologists Brusckhe and Loges reviewed pretrial newspaper reports of 134 murders over two years, and found that 46% of those cases received no media coverage. Of the cases that were covered, 19% received one-to-five mentions, 18% received six-to-ten mentions, and only 165 of the cases resulted in eleven-or-more references. See Jon Brusckhe & William E. Loges, *Relationship between Pretrial Publicity and Trial Outcomes*, 49 J. OF COMM. 104 (1999). Furthermore, even though *Miranda* rights are widely publicized, suspects routinely waive their *Miranda* rights in the stress of being subjected to police procedures. See RICHARD LEO, *POLICE INTERROGATION AND AMERICAN JUSTICE* 126 (2007) (noting that American police are enormously successful in obtaining waivers of *Miranda* rights and subsequent confessions). By analogy, even if suspect identification procedures were widely publicized, witnesses are unlikely to intentionally manipulate the procedure. Both lines of research, by analogy, suggest that there may be some media coverage of new routine eyewitness procedures when they are first adopted, but that is no guarantee that audiences will pay attention or remember what they have seen, nor that individuals will recall the relevant details, in the stress of making an identification in an actual crime. (I make this last point recognizing that there is a difference between being a criminal suspect in the *Miranda* situation and being a victim or eyewitness, but these latter two roles are quite stressful in themselves). Similarly, media references are likely to be few, to fade quickly over time, and to give way to the juicy details of heinous facts of high-profile crimes themselves. Moreover, it would seem to make sense that a witness or victim who wants to “get the guy who did this” will take a chance on assuming that the offender is not in the first lineup rather than look to see whether he genuinely recognizes someone.

143. See Wells & Olson, *supra* note 136, at 243 n.3; James M. Doyle, *Discounting the Error Costs: Cross-Racial False Alarms in the Culture of Contemporary Criminal*

nor the witness knows who the suspect is.<sup>144</sup> Although larger lineups, blank lineups, and double-blinding would improve the reliability of all identification procedures, financial and especially time costs may discourage police from using these methods routinely.<sup>145</sup> Limiting identification procedures to cross-racial identifications reduces the relative cost.<sup>146</sup>

##### 5. *Post-Dictors of Lineup Accuracy Fail in the ORB Situation*

The importance of minimizing the risk of error at the time of a cross-racial identification cannot be overstated. Importantly, there is research concerning the “post-dictors” of eyewitness identification accuracy, that is, those factors that, after an identification has been made, can retrospectively be viewed as increasing the likelihood that an identification was reliable.<sup>147</sup> For example, quick witness decision time in making an identification and the witness’s use of an absolute rather than a relative judgment strategy, discussed earlier, are factors suggesting greater reliability of the identification in the same-race situation.<sup>148</sup> But none of the identified post-dictors of accuracy work in the cross-race case.<sup>149</sup> It is thus far more difficult after the fact to give

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*Justice*, 7(1) PSYCHOL. PUB. POL’Y & L. 253 (2001) (articulating the grounds supporting Wells and Olson’s worry about inter-racial case cueing).

144. See Jacqueline L. Austin et al., *Double-Blind Lineup Administration: Effects of Administrator Knowledge on Eyewitness Decisions*, in REFORM OF EYEWITNESS IDENTIFICATION PROCEDURES 139 (Brian L. Cutler ed., 2013) (defending use of double-blind procedures more generally).

145. See Wells & Olson, *supra* note 136, at 243.

146. See *id.*

147. See Steven Smith et al., *Postdictors of Eyewitness Errors: Can False Identifications Be Diagnosed in the Cross-Race Situation?*, 7(1) PSYCHOL. PUB. POL’Y & L. 153 (2001).

148. See *id.* at 155–56, 164–67.

149. See *id.* at 165–67. Indeed, these authors worried that sequential lineups might be of little value in the cross-race situation, although such lineups generally have other considerable benefits. See *id.* at 167. Sequential procedures involve showing a witness a person or photograph one-at-a-time. This requires the witness to use an “absolute judgment” strategy: he or she either recognizes the face or does not. See Scott D. Gronlund, Shannon M. Andersen & Colton Perry, *Presentation Methods*, in REFORM OF EYEWITNESS IDENTIFICATION PROCEDURES 113, 114–17 (Brian L. Cutler ed. 2013). But in the more common simultaneous lineup, the witness is simultaneously shown a line of persons or photos. The witness is thus unconsciously tempted to assume that the perpetrator must be in the lineup and to use a “comparative judgment” strategy: which person in the line looks most like the image of the perpetrator that the witness remembers. See *id.* One recent study indeed found that sequential procedures are inferior to simultaneous ones in the cross-race situation. See CHUNG, *supra* note 49. Given what I see as the overwhelming evidence in favor of sequential methods generally, however, I am reluctant to suggest abandoning them in cross-racial identifications. I thus express no view on the matter. But this new study does advise caution and further research on the role of judgment strategy in cross-racial situations.

juries useful information about the reliability of an other-race identification in a particular case.

### C. *Summing Up*

It is likely that the ORB stems both from contact experience with persons of other races and from social categorization processes. The contact hypothesis researchers demonstrate that the ORB takes root early in a child's life and has a continuing powerful grip on the adult's identification accuracy. But these same researchers have discovered that even contact with other races is insufficient. The contact must be of a high quality; that is, persons of one race must be motivated to come to know persons of other races as individuals, and consequently to recognize those individuals' individuating features.

Social categorization also plays an extremely important role. Minor stereotypical features like hair style and texture can lead to quick categorization of a face as same- or other-race. Other-race faces are processed, however, largely based upon stereotypical racial features rather than upon individuating features or holistic processing of the entire face. Once such categorization occurs, the differentiating features of the other race are ignored. Perhaps even worse, categorization can actually alter perceptions of other race-associated features, such as skin color.

The resulting processes are automatic, unconscious, and can be highly resistant to change. Nevertheless, the ORB can sometimes be overcome in experimental settings. Crucially, however, one primary aspect of the ORB is the failure to encode, that is, to process features of a face at the time that it is initially observed. The ORB might also affect memory accuracy, but memory simply cannot exist for features never encoded at the time of observation. Overcoming the ORB therefore requires altering initial encoding.

This alteration can be done in two ways: first, by training observers to pay more attention to different features of other-race faces that can be the basis for differentiation; second, by explaining the ORB to those observers, urging them to overcome it, and telling them to look for unique differentiating features. But note that both solutions require altering perceptions at the time the other-race face is initially observed. Widespread training of hundreds of millions of Caucasians on how to differentiate other-race faces is impractical. Instructing crime victims on how to observe other-race assailants *before* the crime occurs is impossible. Unlike the detectives in the film *Minority Report*, we cannot predict when, where, and to whom crime will occur. We cannot say,

Mr. White Person, in five minutes, you will be robbed by someone of another race. There is something called the ORB that leads crime victims to be more inaccurate in recognizing other-race faces than own-race faces. We need you, therefore, to pay careful attention to all the features of your assailant in an effort to differentiate his face from all other faces, and we need you to do your best to see him as an individual rather than as a stereotype. That way, if we show you a later lineup or photo spread, you are more likely to identify only someone you recognize rather than to guess because persons of that other race "all look alike."

The ORB is thus for practical purposes hard to prevent, hard to correct for once it has occurred. Reducing the resulting risk of error might, however, be possible, by enhancing other safeguards, such as using larger lineups and blank lineups to weed out witnesses who merely guess.

Of course, in theory it might help a jury, whether via jury instructions or an expert, to understand the science in assessing the effect of the ORB. For example, if the state presents uncontradicted evidence that the witness had much contact with persons of another race and that that contact was quality contact, that factor might weigh against believing that the ORB had been triggered in the first place. However, if and when jury instructions or expert testimony is likely to be effective is another question, to be discussed shortly. It should be clear, however, that a jury cannot fairly and fully consider whether the ORB was triggered and its significance for identification accuracy if the jury's members are ignorant of the underlying science.

The ORB of the witness is also not the only ORB that matters. A detective of another race might, because of the ORB, construct a less fair lineup, as discussed above, which is an inequity not readily evident without expert data. The procedure for measuring lineup fairness described in the research literature can be applied to any photo spread or recorded live lineup to gauge its fairness. Using that procedure in an individual case obviously requires expert experimentation, not merely giving jury instructions on general ORB principles. When the ORB is triggered, it can alter witnesses' and detectives' perception of the suspect by causing them to perceive the suspect's nature as per racial stereotypes; consequently, witnesses and detectives, perhaps unconsciously, may view the suspect as both more dangerous and less credible, if he should testify, than if the suspect were a same-race person. Those processes may themselves contribute to a wrongful conviction.

tion in ways that I have detailed elsewhere.<sup>150</sup> Moreover, a jury, especially a non-diverse jury, might itself be susceptible to such racial stereotyping or not fully appreciate how racial perception can blind witnesses, police, and jurors alike to the true state of affairs.<sup>151</sup>

With this background, we are therefore better equipped to consider the sufficiency of jury instructions, expert witnesses, and other solutions to the ORB problem. That is the task of this article's next section.

## II.

### THE FAILURES OF THE CROMEDY INSTRUCTION

Part II of this article begins by reviewing the analogous literature on the impact of cautionary instructions about eyewitness identifications generally, which suggests that ORB-specific cautionary instructions modeled after *Cromedy* are unlikely to be effective. Part III next reviews the psychological literature on drafting and using jury instructions to disregard evidence as a guide to drafting better ORB-cautionary instructions. Part II concludes by examining literature suggesting that expert witnesses would be more effective in reducing the ill effects of the ORB on juries than jury instructions alone.

#### A. *Analogous Research on Eyewitness Jury Instructions*

The results concerning the ability of jury instructions to reduce convictions based upon eyewitness error have been discouraging. Two leading experimental psychologists in this area, Brian Cutler and Steven Penrod, indeed concluded in 1995—a conclusion that still stands today—that “the experiments we have reviewed . . . provide little evidence that judge’s instructions concerning the reliability of eyewitness identification enhance juror sensitivity to eyewitness identification evidence.”<sup>152</sup> Changing the timing and content of instructions did not improve juror performance.<sup>153</sup> In a few instances juror skepticism was enhanced by cautionary instructions, “but the effect

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150. See Andrew E. Taslitz, *Wrongly Accused Redux: How Race Contributes to Convicting the Innocent: The Informants’ Example*, 37 SW. U. L. REV. 101 (2009); Andrew E. Taslitz, *Wrongly Accused: Is Race a Risk Factor in Convicting the Innocent?*, 4 OHIO ST. J. CRIM. L. 121 (2006).

151. For more on this, see Jonathan A. Rapping, *Implicitly Injust: How Defenders Can Affect Systemic Racist Assumptions*, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 999, 1022–1042 (2013).

152. BRIAN L. CUTLER & STEVEN D. PENROD, *MISTAKEN IDENTIFICATION: THE EYEWITNESS, PSYCHOLOGY, AND THE LAW* 263 (1995).

153. See *id.*

. . . [was] not systematic.”<sup>154</sup> Moreover, the most well-known judicially-crafted instruction, the *Telfaire* instruction,<sup>155</sup> in fact had *ill* effects. Cutler and Penrod explain,

[T]he evidence indicates that the *Telfaire* instructions—perhaps because they confuse jurors—actually *reduced* juror sensitivity to witnessing and identification conditions compared to uninstructed jurors. Indeed, to the cynical reader, careful scrutiny of these results—especially a comparison of conviction rates in good eyewitnessing conditions for uninstructed versus instructed jurors—will suggest that the defense should be especially eager to request *Telfaire* instructions when an identification has been made *under good witnessing conditions!*<sup>156</sup>

Accordingly, these researchers conclude, “judges’ instructions do not serve as an effective safeguard against mistaken identifications and convictions . . . .”<sup>157</sup> Although Penrod and Cutler wrote these words in 1995, the current state of the research continues to support their conclusions. Thus one 2005 study involved an experiment in which cautionary eyewitness instructions enhanced juror memory of the factors they should consider in evaluating eyewitness testimony, *yet jurors still accurately remembered only twenty-nine percent of those factors!*<sup>158</sup> A literature review published in 2009 more broadly concluded:

In sum, judicial cautionary instructions, in their present state, may be an ineffective safeguard against erroneous convictions resulting from mistaken eyewitness identifications, and, at best, their effectiveness is questionable. In fact, psychological research suggests that the cautionary instructions currently relied on by the courts (i.e., *Telfaire* instructions) either have no effect or enhance juror skepticism rather than juror sensitization to eyewitnessing and identification conditions.<sup>159</sup>

A 2012 analysis of the literature attributes the weakness of such instructions to problems endemic to jury instructions, such as juror inability to understand them, even when allowed to take notes during

154. *Id.*

155. *See* United States v. Telfaire, 469 F.2d 552, 558–59 (D.C. Cir. 1972).

156. CUTLER & PENROD, *supra* note 152, at 263 (emphasis added).

157. *Id.*

158. James R. P. Ogloff & V. Gordon Rose, *The Comprehension of Judicial Instructions*, in *PSYCHOLOGY AND LAW: AN EMPIRICAL PERSPECTIVE* 427–28 (Neil Brewer & Kipling D. Williams eds., 2005).

159. Jennifer L. Devenport, Christopher D. Kimbrough & Brian L. Cutler, *Effectiveness of Traditional Safeguards Against Erroneous Conviction Arising from Mistaken Eyewitness Identification*, in *EXPERT TESTIMONY ON THE PSYCHOLOGY OF EYEWITNESS IDENTIFICATION* 63–64 (Brian L. Cutler ed., 2009).

trial and given written copies of the instructions.<sup>160</sup> Nevertheless, some researchers speculate that better-designed instructions, both made more understandable and more closely mirroring expert testimony, might do a better job.<sup>161</sup>

*B. Principles for Drafting Cautionary Instructions: Lessons from the Instruction-to-Disregard Literature*

*1. Why The Instruction-to-Disregard Literature Outside the Eyewitness Context Matters*

Guidance for how to do a better job can be found in the literature on instructions to disregard evidence. Instructions to disregard evidence are instructions to jurors not to pay attention to evidence they hear at trial but that they should not have.<sup>162</sup> The evidence may have been revealed because a witness spoke too quickly—before lawyers or the court could silence him—because of intentional attorney effort to ignore the evidence codes, or because of simple error by the attorneys in eliciting inappropriate information or by the judge in temporarily permitting it, then realizing her mistake. Instructions to disregard evidence are often distinguished from limiting instructions and cautionary or weight instructions. Limiting instructions tell jurors that they may use evidence for one purpose but not another.<sup>163</sup> For example, character evidence may not ordinarily be used to prove in a criminal case that the defendant committed the currently charged criminal act.<sup>164</sup> But character evidence can be used to prove a defendant's mental state at the time of the crime.<sup>165</sup> Jurors might be instructed that they may use the character evidence in deciding whether defendant acted with the requisite state of mind, but they may not use the evidence to prove that the defendant—and not someone else—committed the criminal act in the first place.<sup>166</sup> Weight or cautionary instructions tell jurors to be skeptical of certain evidence, to avoid giving it too much weight, and perhaps offer them guidance on the factors to consider in determining what weight the evidence does deserve in the

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160. See LAMPINEN, NEUSCHATZ & CLING, *supra* note 17, at 248–49.

161. See Devenport, Kimbrough & Cutler, *supra* note 159, at 64; Meissner & Brigham, *supra* note 47, at 3, 25.

162. David Sklansky, *Evidentiary Instructions and the Jury as Other*, 65 STAN. L. REV. 407, 408 (2013).

163. See *id.*

164. See STEVEN I. FRIEDLAND, PAUL BERGMAN & ANDREW E. TASLITZ, EVIDENCE LAW AND PRACTICE 102–07 (5th ed. 2012).

165. See *id.*

166. See *id.*

particular case.<sup>167</sup> The eyewitness instructions discussed here cautioning jurors about the ORB affecting eyewitness identification accuracy would be an example.

But the distinction among these three types of instructions may be overblown. If an instruction to disregard evidence is viewed as an instruction to "forget" the evidence, that is a psychologically untenable option.<sup>168</sup> Indeed, telling someone not to remember something can sometimes have the perverse effect of improving her memory on the matter.<sup>169</sup> A better way to conceptualize the instruction is to tell jurors to give the item of evidence they have wrongly heard zero weight.<sup>170</sup> Arguably, they could consciously struggle to forget what they have heard entirely, though subconsciously they are likely to be less effective.<sup>171</sup> Still research shows that instructions to disregard may lead

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167. See, e.g., 89 JUDT ZELLIN, OHIO JURISPRUDENCE 3D TRIAL § 337 (West 2013) ("[T]he court may give the jury cautionary and other instructions of law relating to trial procedure, credibility and weight of evidence, and the duty and function of the jury and may acquaint the jury generally with the nature of the case."); Andrew E. Taslitz, *Prosecuting the Informant Culture*, 109 MICH. L. REV. 1077, 1077–78 (2011) (discussing and illustrating cautionary instructions in the informants' context).

168. See Sklansky, *supra* note 162, at 414.

169. See Nancy Steblay et al., *The Impact on Juror Verdicts of Instructions to Disregard Inadmissible Evidence: A Meta-Analysis*, 30 L. & HUM. BEHAV. 469, 487 (2006).

170. Professor Sklansky put it this way:

But we need to draw two distinctions. The first is between forgetting and not using. No one thinks that jurors can erase their memories of evidence that they have seen or heard. Human minds do not work that way. But jurors generally are not asked to *forget* what they have heard; they are asked to disregard it or to limit their use of it. It is not at all obvious that instructions of this kind are impossible to obey.

In fact, there are reasons to suspect just the opposite. All of law is built on the assumption that people—judges, at least—can put certain facts to one side and base their decisions on other, identified considerations; and that they can give particular, prescribed significance to certain facts, and not treat those facts as significant in various other ways. This is how all legal rules purport to operate. If human beings were truly incapable of following directions about which facts to rely upon and what significance to give them, it would not just be jury trials that would be in trouble. It would be the very idea of law.

Sklansky, *supra* note 161, at 414–15. Although Sklansky does not use the term "weight," I understand this to be what he is really talking about—weight defined in the common sense way that lawyers use it to mean "degree of probative value" rather than in any more technical sense. See Andrew E. Taslitz, *Cyber-Surveillance without Restraint? The Meaning and Social Value of the Probable Cause and Reasonable Suspicion Standards in Governmental Access to Third Party Electronic Records*, 103 J. CRIM. L. & CRIMINOLOGY 870, 897–904 (discussing different meanings of the term "weight").

171. See Sklansky, *supra* note 162, at 415 ("There are some things that are hard to put out of one's mind at all, and many other things that, even if one consciously disregards them, may influence decisionmaking in subtle, subconscious ways. It is

some jurors in deliberation to stop other jurors from discussing the evidence, thus denying one side in the internal jury debates a persuasive tool.<sup>172</sup> That can be understood as an effort to limit the weight given the evidence.

Limiting instructions likewise can be viewed as instructions to “give this evidence zero weight for purpose A but whatever weight you believe it deserves for purpose B.”<sup>173</sup> So understood, limiting instructions are partial instructions to disregard the weight of evidence—partial in that the weight is to be treated as zero but only as to one use of the evidence, not as to another.

Finally, cautionary or weight instructions are expressly about what weight jurors should give the evidence, or at least how to determine what weight to give it.<sup>174</sup> The three types of instructions can all therefore fairly be understood as a spectrum of instructions about weight. Add into the mix that there are many psychological principles common to all three types of instructions—for example, the use of language that laypersons can understand<sup>175</sup>—and it is logical to believe that research on one type of instruction may be helpful in understanding how to improve the other types. The most extensive research has been done concerning instructions to disregard, while a good deal less has been done on limiting instructions and little research on cau-

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precisely because some things seem particularly hard to disregard that courts refuse to trust evidentiary instructions to cure certain kinds of errors or to address certain kinds of limited admissibility.”).

172. See, e.g., Thomas R. Carretta & Richard L. Moreland, *The Direct and Indirect Effects of Inadmissible Evidence*, 13 J. APPLIED PSYCHOL. 291, 307–08 (1983).

173. See *supra* text accompanying notes 162–65 (defining limiting instructions).

174. See Zellin, *supra* note 167 (defining cautionary instructions). Some limited, subject-matter-specific research has been done on cautionary instructions suggesting that under certain circumstances they might have the effect of reducing the weight jurors give to questionable evidence. See, e.g., Eugene Borgida, *Legal Reform of Rape Laws*, 2 APPLIED SOC. PSYCHOL. ANN. 211 (1981) (finding mock jurors in rape cases more likely to convict if cautioned about giving weight to a complainant’s prior sexual history); Ann Cavoukian & Ronald J. Heselgrave, *The Admissibility of Polygraph Evidence in Court: Some Empirical Findings*, 4 L. & HUM. BEHAV. 117 (1980) (cautioning mock jurors about relying on polygraph (lie-detector) evidence and explaining to them that it was accurate no more than 80% of the time reduced the weight given it by many jurors). *But see* Richard J. Harris, *The Effect of Jury Size and Judge’s Instructions on Memory for Pragmatic Implications from Courtroom Testimony*, 11 BULL. PSYCHONOMIC SOC’Y 129 (1978) (finding that a judicial instruction about the pitfalls of implied information had no effect).

175. See *infra* text accompanying notes 238–39.

tionary instructions.<sup>176</sup> Therefore, the most extensive body of literature available to draw on here concerns instructions to disregard.

The research on instructions to disregard suggests that content and context matter. In one scholar’s summary “[s]ometimes evidentiary instructions work, sometimes they fail, and sometimes they backfire.”<sup>177</sup> The complexity of this research is often ignored, leading scholars simply to describe the body of research as showing that evidentiary instructions are “generally ineffective.”<sup>178</sup> In fact, a meta-analysis—a quantitative combination of all the data from all the various studies<sup>179</sup>—supports a more nuanced conclusion:

[W]hen inadmissible evidence does make a significant impression on jurors, a corrective judicial admonition does not fully eliminate the impact. Both defense-slanted and prosecution-slanted [evidence] retained a significant impact on verdicts even after judicial admonition. This effect, although small, was quite robust. For prosecution [evidence], a stronger effect (i.e. less success on the instruction) was associated with judicial instructions that failed to provide a reason for inadmissibility or justified the admonition with a statement that indicated that the evidence was illegally obtained. Conversely, a smaller effect size was apparent when judicial instruction provided a reason for inadmissibility, for example when the judge explained that the evidence was not reliable, was hearsay, or had “no bearing” on the case. Clearly, jurors respond to specific information they can understand and appreciate. Smaller effects sizes were also associated with the addition of a general charge at the end of the trial that required jurors to disregard any evidence ruled inadmissible. The four tests in which dependent measures were taken after jury deliberation suggest that deliberations may likewise diminish the influence of otherwise damaging inadmissible information.<sup>180</sup>

In other words, the timing, content (including enumerating reasons for disregarding the evidence), and availability of deliberation all affected whether and the degree to which instructions to disregard affected verdicts. Moreover, at least on average, instructions to disre-

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176. See Sklansky, *supra* note 162 (summarizing the research on instructions to disregard and on limiting instructions); *supra* note 173 (discussing limited and subject-specific nature of research into cautionary instructions).

177. Sklansky, *supra* note 162, at 429.

178. Edith Greene & Mary Dodge, *The Influence of Prior Record Evidence on Juror Decision Making*, 19 L. & HUM. BEHAV. 67, 70 (1995).

179. See, e.g., Lisa A. Bero, *Evaluating Systematic Reviews and Meta-Analyses*, 14 J.L. & POL’Y 569, 570 (2006); Jeremy A. Blumenthal, *Meta-Analysis: A Primer for Legal Scholars*, 80 TEMP. L. REV. 201, 202 (2007).

180. See Steblay et al., *supra* note 169, at 486.

gard, when they work, do not completely eliminate the effect on verdicts of jurors hearing inadmissible evidence.<sup>181</sup> But they do sometimes reduce the effect<sup>182</sup>—and there is reason to believe that the nature of the studies (the often weak, confusing instructions given) led the meta-analysis to underestimate the effect of the instructions.<sup>183</sup> Leading evidence scholar David Sklansky argues that it is wrong to label instructions to disregard “ineffective” simply because they are not wholly effective. In an imperfect world of necessarily flawed human processes like jury trials, instructions that at least make matters better than when the instructions are absent serve an important social function.<sup>184</sup> Perhaps other procedures would be needed to further reduce the ill effects of inadmissible evidence, but properly-drafted jury instructions, at least in certain contexts, are a good first step.

The instructions used in the research on the impact of eyewitness jury instructions have been those instructions actually used by the courts.<sup>185</sup> I see little substantive difference among these instructions, including the *Henderson/Cromedy* instructions, in light of the principles of good instruction drafting.<sup>186</sup> The eyewitness jury instruction research that reaches such pessimistic conclusions about the effect of jury instructions in improving jury accuracy thus does a good job of achieving ecological validity *given the current state of affairs in the courts*. But there is reason to believe that we can do better; we can draft better instructions and use them more effectively in a way that holds more promise for at least improving, if not perfecting, how jurors handle eyewitness identification evidence, including in particular how they take into account the ORB.

## 2. *The Principles for Drafting and Using Good Jury Instructions*

Law and psychology professor Linda J. Demaine has synthesized much of the literature on better drafting instructions-to-disregard to

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181. See Sklansky, *supra* note 162, at 416–17 (“Even here, though, we need to distinguish between working perfectly and working well enough. Debiasing of any kind is unlikely to work perfectly. It is unlikely to restore everyone exposed to a potentially biasing piece of information to exactly the position he or she was in before the exposure. If jurors are apt to rely too heavily on a particular kind of evidence or to react emotionally to it, it may be difficult for admonitions to counterbalance perfectly the unwanted effects. But nothing about jury trials operates perfectly.”).

182. See *id.* at 430–40.

183. See *id.*

184. See *id.* at 440–48.

185. See AM. B. ASS’N, CROSS-RACIAL IDENTIFICATION REPORT, *supra* note 22.

186. Compare *id.* (summarizing instructions) with *infra* text accompanying notes 177–239 (outlining the principles of good instruction-drafting).

craft a series of instruction drafting and use principles on which I partly rely here.<sup>187</sup>

*a. Offer Jurors Persuasive Reasons Justifying Compliance with Instructions*

As noted above, jurors are more likely to comply with instructions than to disregard if they are given persuasive reasons for compliance.<sup>188</sup> It is not always easy to tell what reasons jurors will find persuasive.<sup>189</sup> Nevertheless, research suggests that explaining why evidence is untrustworthy is persuasive.<sup>190</sup> One experiment exposed mock jurors to a police officer's testimony about a taped conversation in which the defendant purportedly confessed to the crime.<sup>191</sup> After defense counsel objected, mock jurors were instructed that the evidence was either admissible, inadmissible because it was obtained without a warrant, or inadmissible because the tape was not clearly audible. Jurors given the last instruction voted guilty in the same percentages as those not exposed to the evidence at all. The authors conclude that this was so because the explanation—that the tape was largely inaudible—offered a persuasive reason to doubt its evidentiary worth or weight.<sup>192</sup> The instruction to disregard the evidence because it was obtained without a search warrant, however, increased the likelihood of guilty verdicts over the evidence-not-presented condition.<sup>193</sup>

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187. See Linda J. Demaine, *Realizing the Potential of Instructions to Disregard*, in MEMORY AND LAW 185 (Lynn Nadel & Walter P. Sinnott-Armstrong eds., 2012) [hereinafter *Instructions*].

188. See *id.* at 189.

189. See *id.*

190. See *id.* at 187–88, 203–04. Demaine uses the word “invalid,” rather than “untrustworthy,” perhaps using the former in its technical sense of measuring what it purports to measure. See *id.* at 203–04. I use the terms invalid and untrustworthy largely synonymously here as embracing the common sense idea that jurors should not give much value (much weight) to evidence obtained through flawed procedures, reliant on flawed data, or that is radically incomplete.

191. See Saul M. Kassir & Samuel R. Sommers, *Inadmissible Testimony, Instructions to Disregard, and the Jury: Substantive Versus Procedural Considerations*, 23 PERSONALITY & SOC. PSYCHOL. BULL. 1046 (1997).

192. See *id.* This is also Demaine's interpretation of the data. See Demaine, *Instructions*, *supra* note 187, at 187–88.

193. The authors thus conclude that jurors are more likely to follow instructions to disregard substantively-flawed (untrustworthy) rather than procedurally-flawed (no warrant) evidence. See Kassir & Sommers, *supra* note 190. However, there is conflicting evidence suggesting that it is not the procedural nature of the no-search-warrant condition, but rather the absence of an adequate justification for the procedure, that matters. See Shari Seidman Diamond & Jonathan D. Casper, *Blindfolding the Jury to Verdict Consequences: Damages, Experts, and the Civil Jury*, 26 LAW & SOC'Y REV. 513 (1992) (finding that jurors who were instructed to avoid reducing antitrust damages awards, in light of those awards being trebled by law, followed

Note that in this experiment, the explanation for the evidence's invalidity (inaudibility) was readily within jurors' common experience. However, asking jurors to discount evidence based on the ORB, an unconscious and unfamiliar psychological phenomenon, should require an explanation with a good deal more information to render the explanation sufficiently persuasive.<sup>194</sup> Part II of this article, which discusses the explanations for the ORB's occurrence, illustrates the type of information jurors should be informed of in order for jury instructions regarding the ORB to be persuasive.<sup>195</sup>

The *Cromedy* instruction fails woefully to give jurors persuasive reasons to follow it effectively. That instruction, in its entirety, tells the jury that it should consider:

**Cross Racial Effects:** The 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's original perception, and/or the accuracy of the subsequent identification. You should consider that in ordinary human experience, people may have greater difficulty in accurately identifying members of a different race.<sup>196</sup>

This instruction does little more than remind jurors about matters supposedly part of common sense and experience. The instruction does not report the consistent convergent findings of decades of research finding the ORB.<sup>197</sup> Nor does the instruction explain the quality-of-contact and social-categorization explanations of the ORB, how those processes might be amplified or dampened under particular facts, how they can interact with sources of suggestion in a lineup procedure, or the processes' inherent resistance to conscious awareness and change.<sup>198</sup> The instruction also gives jurors no guidance on how they are to go about the task of determining whether the ORB was likely present and what its likely impact in this case was. These things can be concisely explained in simple laymen's terms; if anything, the instruction might leave jurors with the impression that the ORB is connected to a person's degree of conscious racial prejudice, which is simply not true—and even its connection to unconscious

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those instructions when they were informed about Congress's policy reasons for the damage-trebling provision).

194. See *infra* text accompanying notes 241–47 (explaining jurors' unfamiliarity with eyewitness research, including on the ORB).

195. See *supra* Part II.

196. See SUPREME COURT COMM. ON MODEL CRIMINAL JURY CHARGES, *supra* note 37, at 33.

197. See Meissner & Brigham, *supra* note 18.

198. See *supra* Part II.

prejudice is subject to debate.<sup>199</sup> That impression is not only incorrect but dangerously misleading. Jurors might look for evidence of the witness's racial bias and, finding none, ignore the ORB.

*b. Extract Commitments from Jurors to Comply with Particular Instructions*

An array of research outside the jury instruction context demonstrates that people are more likely to comply with requested behavioral changes if they publicly commit to the change.<sup>200</sup> Thus persons are more likely to quit smoking or conserve natural resources if they publicly declare that they will do so.<sup>201</sup> Trial judges indeed sometimes poll jurors exposed to particularly prejudicial inadmissible evidence to see whether each juror is willing publicly to comply with the instruction to disregard.<sup>202</sup> At a minimum, such commitment should increase jurors' motivation to do as instructed.<sup>203</sup> There is a risk, however, that they will be less motivated to follow other instructions for which no such polling has occurred.<sup>204</sup> One solution is to have jurors make a general commitment to comply with instructions concerning how to treat all evidence.<sup>205</sup>

The ORB seems of sufficient concern to me, however, that the risks are worth the potential gains from polling jurors after giving the ORB instruction. The fear that repetition and emphasis will simply increase memory of evidence is first, not a worry with an ORB-style weight instruction because the goal is not to get witnesses to ignore evidence but rather to analyze its weight with caution and care;<sup>206</sup> second, even in the instruction to disregard context (rather than the ORB cautionary-instruction context), an instruction should be viewed not as a futile or fictional effort to make jurors forget but rather an effort to make them assign the evidence proper weight, and that result does not necessarily turn on pretending the evidence was never heard in the first place.<sup>207</sup> The *Cromedy* instruction provides no procedures for

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199. See *supra* text accompanying notes 47–48.

200. See Demaine, *Instructions*, *supra* note 187, at 190.

201. See *id.*; see also Morton Deutsch & Harold B. Gerard, *A Study of Normative and Informational Social Influences Upon Individual Judgment*, 51 J. ABNORMAL & SOC. PSYCHOL. 629 (1955).

202. See Demaine, *Instructions*, *supra* note 187, at 190.

203. See *id.*

204. See *id.*

205. See *id.*

206. See *supra* text accompanying notes 159–61.

207. See *supra* text accompanying notes 161–67.

polling or otherwise obtaining juror commitments to follow the instruction's commands.

*c. Debias How Jurors Treat the Evidence*

Professor Demaine has recommended using "debiasing instructions" to disregard.<sup>208</sup> These instructions do not ask jurors to forget evidence heard. Rather, the instructions encourage jurors to adjust for the undue weight they might give to the evidence in reaching verdicts.<sup>209</sup> A debiasing instruction should have four elements:

- (1) Alert jurors that "their views of the case may have been inappropriately influenced by the inadmissible evidence";<sup>210</sup>
- (2) Restate the evidence so that jurors are clear about what it is they are to disregard;<sup>211</sup>
- (3) Offer an explanation for the ruling, for example, "the evidence is flawed in some important way";<sup>212</sup> and
- (4) Suggest a method for debiasing, such as assessing "the degree to which the inadmissible evidence has biased their views," then adjusting for that bias.<sup>213</sup>

As an example, in one experiment, jurors heard a police officer testify in a murder case that a hunting knife with the victim's blood on it was found in the defendant's apartment.<sup>214</sup> Some mock jurors were given this debiasing instruction:

This testimony regarding the knife is inadmissible, and the jury is instructed to disregard it. Now I want to be very clear about something. It is important that you be aware that information sometimes biases our judgments even though we believe we have disregarded it. There is thus a very real danger that [the officer's] testimony regarding the knife may lead you to the wrong verdict unless you

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208. See Demaine, *Instructions*, *supra* note 186, at 195.

209. See *id.* These instructions are crafted based on more general empirical research on how to de-bias judgments. See Duane T. Wegener et al., *The Metacognition of Bias Suppression: Naive Theories of Bias and the Flexible Correction Model*, in METACOGNITION: COGNITIVE AND SOCIAL DIMENSIONS 202 (Vincent Y. Yzerbyt et al. eds., 1998); Timothy D. Wilson & Nancy Brekke, *Mental Contamination and Mental Correction: Unwanted Influences on Judgments and Evaluations*, 116 PSYCHOL. BULL. 117 (1994).

210. Demaine, *Instructions*, *supra* note 187, at 195.

211. See *id.*

212. *Id.*

213. *Id.*

214. See Linda J. Demaine, *In Search of an Anti-Elephant: Confronting the Human Inability to Forget Inadmissible Evidence*, 16 GEO. MASON L. REV. 99 (2008) [hereinafter *Anti-Elephant*].

account for its improper influence on your judgment of [the defendant] and adjust your verdict accordingly.<sup>215</sup>

This debiasing instruction eliminated the effect of the inadmissible evidence on jury verdicts.<sup>216</sup> Typical terse instructions to disregard, given to other mock jurors, failed to achieve that same outcome.<sup>217</sup> Curiously, however, a third type of instruction—a lengthier one emphatically and repeatedly instructing jurors to disregard the evidence was as effective as the debiasing instructions; however, the researcher concluded that the instruction achieved this effect because the emphasis motivated jurors to debias, though not to forget.<sup>218</sup> One apparent advantage of both the debiasing and emphatic instructions was that they helped jurors recall what evidence they were to disregard.<sup>219</sup> Path analyses, a sophisticated statistical technique, also revealed that debiasing instructions helped jurors reduce the impact of the inadmissible evidence on their verdicts in two ways: first, the instructions led them to doubt the validity of the evidence, thus discounting it; second, jurors corrected for the biasing effect of the evidence on their decisions.<sup>220</sup>

There is a risk that overly emphatic instructions can lead to ironic mental processes creating resistance to following the instructions; in effect, jurors, at least unconsciously, saying to themselves, "The judge isn't the boss of me; if I think this is important, it's important!"<sup>221</sup> Some researchers question whether laboratory research on ironic processes would carry over to real trials.<sup>222</sup> Of equal importance, however, is that all of the research described above (on the effect of various instructions on how jurors treat inadmissible or potentially flawed

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215. *See id.* at 118.

216. *See id.* at 121.

217. *See id.*

218. *See id.* at 121, 128–31 (concluding that the success of the emphatic ("Elaborate Forget") instruction is due to jurors' weight-adjustment motivation rather than forgetting because: (i) it is psychologically impossible for jurors to intentionally forget what they have heard and are now reminded of, as is requested by the emphatic instruction, as proven by other research; (ii) those exposed to the emphatic instruction did not report trying to forget the evidence to any greater extent than did subjects under any of the other experimental conditions; and (iii) the neutralization-of-weight process but not the forgetting process is consistent with other research, the data in this experiment, and psychological theory).

219. *See Demaine, Instructions, supra* note 187, at 197.

220. *See id.*

221. *See* Daniel M. Wegener, *Ironic Processes of Mental Control*, 101 *PSYCHOL. BULL.* 34 (1994).

222. *See Demaine, Instructions, supra* note 187, at 196. This questioning likely results from the possibility that jurors facing a real judge and facing the burden of judgment in a real case will be less likely to resent the judge's efforts at control and more likely to respect his authority. *See id.*

evidence) suggests that sometimes courts are not sufficiently emphatic, rather than being too emphatic, in their curative instructions. In particular, there is reason to believe that jurors will not react against even emphatic instructions if they see the wisdom of the instruction; if jurors are offered persuasive reasons to disregard evidence, particularly reasons concerning the validity of the evidence, it is likely jurors will disregard the evidence regardless of the instruction being repeated emphatically.<sup>223</sup>

The *Cromedy* instructions make no effort at debiasing—missing every one of the four elements of a debiasing instruction.<sup>224</sup> The four elements of debiasing instructions to disregard would only need to be slightly modified for the ORB cautionary instruction context. Jurors would need to understand precisely how the ORB makes the validity of cross-racial identifications questionable. Jurors would also need to be told the extent to which ignoring the ORB might bias their verdicts and, ideally, what cognitive processes may lead them to undervalue the ORB's influence.<sup>225</sup> Jurors are also particularly interested in evidence that they perceive as helping them to arrive at a factually correct decision.<sup>226</sup> The more that they view evidence as untrustworthy, the greater the likelihood that they will be able to ignore it or discount its weight.<sup>227</sup> Again, given the lay assumption that eyewitness evidence is trustworthy and the robustness of this belief in the light of contrary

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223. See *supra* text accompanying notes 180–83, 188–94 (finding that jurors disregarded evidence upon receiving instructions that evidence was untrustworthy but not upon receiving instructions that the evidence was collected in violation of criminal procedure).

224. See *supra* text accompanying notes 196–97 (reproducing the current *Cromedy* instruction).

225. Both these points would go to debiasing instruction element one (alerting jurors to how the eyewitness identification and its under-appreciated cross-racial nature may inappropriately influence their view of the case) and to element four (giving jurors guidance as to how to adjust for their bias, which would seem to require some understanding of its roots). See *supra* text accompanying notes 209, 212 (defining elements one and four of debiasing instructions).

226. See Yaacov Schul & Eugene Burnstein, *The Informational Basis of Social Judgments: Memory for Informative and Uninformative Arguments*, 19 J. EXPERIMENTAL SOC. PSYCHOL. 422 (1983).

227. See Steven Fein et al., *Can the Jury Disregard Information? The Use of Suspicion to Reduce the Prejudicial Effects of Pretrial Publicity and Inadmissible Testimony*, 23 PERSONALITY & SOC. PSYCHOL. BULL. 1215 (1997) (finding that mock jurors who were able to successfully disregard evidence perceived the evidence as of questionable validity); see also Demaine, *Anti-Elephant*, *supra* note 214 (mock jurors successfully disregarded evidence because they questioned its validity). The explanation of the greater risk of untrustworthiness of eyewitness evidence tainted by the ORB helps to establish element three of debiasing instructions: explaining the reason for the court's ruling or caution, such as pointing out flaws in the evidence. See *supra* text accompanying note 212 (reciting element three of debiasing instructions).

evidence,<sup>228</sup> persuasively explaining to the jury why they should doubt or discount such evidence in the ORB context is particularly important.<sup>229</sup>

To avoid jurors' overcorrecting, however, they would need to be aware of any case-specific factors that might reduce the ORB's effect on the witness, such as the witness's frequent prior contact with persons of the relevant other race in circumstances where the witness was motivated and given practice opportunities to focus on individually-differentiating facial features of members of the other race.<sup>230</sup> This observation too counsels favoring instructions that give jurors more information about the ORB phenomenon and doing so with careful attention to the science. An ABA effort to improve on the *Cromedy* instruction has thus rightly been criticized for, on the one hand, being both insufficiently emphatic and incomplete about the science while, on the other hand, being wrong in the one piece of science it mentions: suggesting that the mere contact with persons of another race, rather than also its quality, can counteract the ORB.<sup>231</sup>

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228. Michael R. Leippe & Donna Eisenstadt, *The Influence of Eyewitness Expert Testimony on Jurors' Beliefs and Judgments*, in EXPERT TESTIMONY ON THE PSYCHOLOGY OF EYEWITNESS IDENTIFICATION 169 (Brian L. Cutler ed., 2009) ("Jurors typically find confident eyewitness testimony quite convincing, even when the product of a witnessing experience is unfavorable to formation of a good memory," while also noting that this effect is so powerful that traditional safeguards, including cross-examination, cautionary instructions, suppression motions, and attorney presence at identification procedures, have proven ineffective in preventing error).

229. That persuasive explanation also advances element two of debiasing instructions: restating the evidence in a way that makes clear exactly to what jurors are supposed to apply the judge's instruction. See *supra* text accompanying note 211 (stating element two of debiasing instructions).

230. See Demaine, *Instructions*, *supra* note 187, at 198 (discussing the need to avoid overcorrection); *supra* text accompanying notes 55–74 (discussing the importance of the combined quantity and quality of other-race interaction in determining the impact of the ORB).

231. See Zeke Edwards, *Flaws in the ABA's Jury Instruction on Cross-Race*, INNOCENCE PROJECT EYEWITNESS IDENTIFICATION REFORM BLOG (May 16, 2008, 4:30 AM), <http://eyeid.wordpress.com/2008/05/16/abas-flawed-jury-instruction-on-cross-race/> (critiquing the recommended ABA instruction); see also AM. BAR. ASS'N, CROSS-RACIAL IDENTIFICATION REPORT, *supra* note 22, at 4 (reciting the ABA's recommended instruction, phrased in permissive ("may consider") rather than mandatory terms, albeit in a way largely similar to *Cromedy*, but adding language permitting jurors to consider "whether there are other factors present in this case which overcome any such difficulty of identification. [For example, you may conclude that the witness had sufficient contacts with members of the defendant's race that [he][she] would not have greater difficulty in making a reliable identification."]) (alterations in original). The ABA is to be applauded for its early (2008) efforts to encourage courts to give a cross-race instruction, but the instruction reflects too much of lawyers' sensibilities rather than social scientists' when a more equal combination is needed.

*d. Make the Evidence Salient*

Jurors are less likely to be able to debias evidence that is not salient for them.<sup>232</sup> This observation should be especially important in the eyewitness context because hearing a witness make an identification of a defendant is enormously powerful evidence that jurors routinely give undue weight.<sup>233</sup> What is more, at least white jurors are unlikely to consider the role of race in resolving a case unless race is made especially salient.<sup>234</sup> These are two more reasons why cautionary instructions involving the ORB ideally should involve strong language, giving jurors persuasive reasons to comply with the cautions given where the facts so require. The two brief, dry, technical-sounding sentences of the *Cromedy* instruction and its mildly hortatory nature (“should consider”), which seems to merely remind jurors to use their own common sense (“common experience”) hardly constitute the strong, vivid, urgent language needed to make a concept like the ORB fully salient.<sup>235</sup>

*e. Do Not Discourage Discussion of the Evidence During Deliberations*

Discussion breeds salience.<sup>236</sup> It also gives jurors an opportunity to debate the relative weight that the evidence deserves, and for some jurors to attempt to persuade others.<sup>237</sup> More discussion, not less, of the weight to be given eyewitness testimony in light of the ORB is thus likely a good thing. Yet, once again, *Cromedy* says nothing about deliberations.

*f. Give a Cautionary Instruction About the ORB Immediately After Jurors Hear the Eyewitness’s Testimony*

Jurors reason by constructing stories.<sup>238</sup> Once they have integrated evidence into their stories, it is notoriously difficult to get them

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232. See Demaine, *Instructions*, *supra* note 187, at 200 (“[S]alience is essential to the corrective process in which jurors must engage . . . .”); Strack et al., *Awareness of the Influence as a Determinant of Assimilation Versus Contrast*, 23 *EUR. J. SOC. PSYCHOL.* 53, 59 (1993).

233. See Leippe & Eisenstadt, *supra* note 228, at 169.

234. See *infra* text accompanying notes 266–68.

235. See *supra* text accompanying note 196 (reproducing the *Cromedy* instruction).

236. See Demaine, *Instructions*, *supra* note 187, at 201.

237. See *id.*

238. See Nancy Pennington & Reid Hastie, *The Story Model for Juror Decision Making*, in *INSIDE THE JUROR: THE PSYCHOLOGY OF JUROR DECISION MAKING* 192 (Reid Hastie ed. 1993).

to "un-integrate" it.<sup>239</sup> Instructions are given to jurors too late if they are given at a time when jurors are no longer able to discern the degree to which the earlier-presented evidence influenced the evolution of their narrative understanding of a case.<sup>240</sup> The phenomenon of belief perseverance also makes it hard to overcome or discount weight determinations made earlier even when the grounds that led to initially forming the belief are later discredited.<sup>241</sup> Belief perseverance leads to biased interpretation of belief-contradicting evidence, seeing it as less worthy of credence, while viewing belief-supporting evidence as more worthy.<sup>242</sup> Moreover, a person who forms an initial belief may simply craft alternative explanations to support that belief when one of the grounds for the belief is challenged.<sup>243</sup> New information can change old beliefs, but belief perseverance limits the extent of the change.<sup>244</sup> These reasons all counsel in favor of giving prompt rather than delayed instructions. Repeating those instructions after closing arguments should be fine because they remind jurors of earlier instructions and commitments.<sup>245</sup> But skipping the immediate instruction in favor of a delayed instruction alone is inadvisable.

*g. Show Respect for Jurors' Limited Cognitive Resources*

The entire analysis above supports much lengthier, more information-full ORB instructions than *Cromedy* or its cousins embody. But jurors absorb much information and face difficult cognitive tasks in a trial.<sup>246</sup> They must not be overwhelmed.<sup>247</sup> Thus, consistent with the need to provide jurors more information and debiasing guidance,

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239. See Demaine, *Instructions*, *supra* note 187, at 205; Leonard S. Newman & James S. Uleman, *Spontaneous Trait Inference*, in UNINTENDED THOUGHT 155, 175 (James S. Uleman & John A. Bargh eds., 1989).

240. See Demaine, *Instructions*, *supra* note 187, at 205; see also Newman & Uleman, *supra* note 239, at 175.

241. See Craig A. Anderson et al., *Perseverance of Social Theories: The Role of Explanation in the Persistence of Discredited Information*, 39 J. PERSONALITY & SOC. PSYCHOL. 1037, 1045 (1980); Demaine, *Instructions*, *supra* note 187, at 205; Lee Ross et al., *Perseverance in Self-Perception and Social Perception: Biased Attribution Processes in the Debriefing Paradigm*, 32 J. PERSONALITY & SOC. PSYCHOL. 880, 888 (1975).

242. See Demaine, *Instructions*, *supra* note 187, at 205.

243. See *id.* at 205–06.

244. See *id.* at 205.

245. Cf. *id.* at 200 (noting importance of the salience of the evidence to be disregarded and the need to restate the inadmissible evidence).

246. See Leonard L. Martin et al., *Assimilation and Contrast as a Function of People's Willingness and Ability to Expend Effort in Forming an Impression*, 59 J. PERSONALITY & SOC. PSYCHOL. 27 (1990) (discussing in general terms the ill effects of cognitive overload).

247. See Demaine, *Instructions*, *supra* note 187, at 206.

instructions should be as concise and as clear to laypersons as is feasible.<sup>248</sup>

*h. Taking Stock*

The New Jersey Supreme Court's Committee on Model Criminal Jury Charges' decision to retain the *Cromedy* instruction in light of the *Henderson* case resulted from an undue lawyerly respect for precedent and a failure to make inquiry into the best available social science on the drafting of effective jury instructions.<sup>249</sup> Each state should appoint a special committee consisting equally of qualified social scientists, with expertise, as a whole, in both the ORB and in the crafting of jury instructions, and attorneys to craft model instructions that: (i) take into account these drafting principles; (ii) more effectively instruct jurors in the science that underlies the ORB; and (iii) give judges guidance on which factual variations to consider in their jury instructions and how to instruct jurors about these variations when they occur. The *Cromedy* instruction is unlikely to do the job.

### III.

#### THE NEED FOR EXPERT TESTIMONY

Expert testimony supplementing jury instructions holds promise for truly aiding juries in better evaluating the impact of the ORB. Indeed, there is growing recognition of the need for expert testimony whenever the risk of wrongful convictions looms—whether the source of that potential error is an eyewitness's mistake, a false confession, or some other contributing cause.<sup>250</sup> As such, the American Bar Association has included similar provisions meant to encourage expert testimony in the area of eyewitness identifications in the ABA's Innocence Standards.<sup>251</sup> There is indeed cause for cautious optimism in using expert testimony as a remedy based upon empirical research in the eyewitness area. Pre-1996 evaluators of this research concluded that introducing expert testimony on the factors affecting the accuracy of eyewitness identifications substantially improved jurors' sensitivity to

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248. *See id.*

249. *See* CROSS-RACIAL IDENTIFICATION REPORT, *supra* note 22, at 6.

250. *See* AM. BAR ASS'N, ACHIEVING JUSTICE: FREEING THE INNOCENT, CONVICTING THE GUILTY 24, 41–42 (2006) [hereinafter AM. BAR ASS'N, ACHIEVING JUSTICE] (concerning eyewitness identification experts); RICHARD A. LEO, POLICE INTERROGATION AND AMERICAN JUSTICE 314–16 (2008); Roy S. Malpass et al., *The Need for Expert Psychological Testimony on Eyewitness Identification*, in EXPERT TESTIMONY ON THE PSYCHOLOGY OF EYEWITNESS IDENTIFICATION 3 (Brian L. Cutler ed. 2009) (concerning false or involuntary confession experts).

251. AM. BAR ASS'N, ACHIEVING JUSTICE, *supra* note 250, at 24.

the relevance and weight of those factors.<sup>252</sup> This was the case even when the science presented by the experts contradicted jurors' preconceptions; this effect was apparently even greater among jury-eligible adults than among undergraduate jurors.<sup>253</sup> Moreover, according to these researchers, contrary to critics' fears, such expert testimony has not increased acquittals of the guilty.<sup>254</sup>

The authors of a recent literature review, including post-1995 work, were more cautious, finding that expert testimony is most effective under certain conditions. Such circumstances include: (i) eyewitness testimony being central to the case but questionable in quality; (ii) other, circumstantial evidence not being convincingly incriminating isolated from the central identification; and (iii) the expert's testimony being specifically connected to the problems in the case, as well as being salient and memorable.<sup>255</sup> There is also some evidence that the effect of expert testimony is increased when jury instructions are given that remind jurors about what the expert said and where the expert is court-appointed, rather than selected by the defense.<sup>256</sup> Nevertheless, this review concluded as follows:

[O]ur review of the research and consideration of theory suggest that eyewitness expert testimony is more likely than not to have influence—to increase knowledge of eyewitness psychology and

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252. CUTLER & PENROD, *supra* note 151, at 240–41 (1995).

253. *Id.*

254. *See id.*

255. Leippe & Eisenstadt, *supra* note 228, at 188–89, 194–95. Also relevant to the need for expert testimony generally in the area of eyewitness identification are Daniel B. Wright et al., *Turning a Blind Eye to Double Blind Lineups*, 24 APPLIED COGNITIVE PSYCHOL. 849, 863–64 (2010) (finding that laypersons in the study did not appreciate the differences between double blind and single blind lineups), and Tim Valentine & Katie Maras, *The Effect of Cross-Examination on the Accuracy of Adult Eyewitness Testimony*, 25 APPLIED COGNITIVE PSYCHOL. 554, 554 (2011) (finding that cross-examination did not improve subjects' ability to distinguish correct from incorrect identifications). Valentine and Maras themselves explained: "Eyewitness testimony did not become more accurate as a result of cross-examination, as has been assumed by some legal professionals . . . . Witnesses were as likely to change a correct answer to an inaccurate one as they were to change an inaccurate answer to an accurate one." *Id.* This inaccuracy was found both when college-age subjects did not have the chance to confer with other witnesses who saw a slightly different crime and when they did have such a chance to confer. The authors concluded, "The results showed that exposure to misleading information was not necessary for witness testimony to be affected by cross-examination." *Id.* *See* Helen M. Patterson et al., *Cautioning Jurors Regarding Co-Witness Discussion: The Impact of Judicial Warnings*, 19 PSYCHOL. CRIME & L. 287, 287 (2013) (determining that judicial warnings about the risks of contamination from co-eyewitness's discussing a case did not increase subjects' skepticism about the identification and had no effect on verdicts involving eyewitnesses who gave consistent statements).

256. Leippe & Eisenstadt, *supra* note 228, at 183, 193.

[appropriate] skepticism about the eyewitness at trial—when it is needed most as a rectifying safeguard force in cases dominated by questionable but confident eyewitness testimony.<sup>257</sup>

The *Henderson* court's conclusion that jury instructions should make the need for expert testimony rare is thus simply wrong, at least if the jury instructions offered are no better than those used in *Cromedy* or *Telfaire*.

#### IV.

##### JURY COMPOSITION

Even with the above safeguards, non-racially-diverse juries are unlikely to fully appreciate the ORB. Promoting jury diversity in cross-racial identification cases is critical both because of differences in racial attitudes on average and because of jury racial composition effects.

##### A. *Racial Attitudes*

White jurors are unlikely fully to appreciate the ORB or incorporate it into their decision-making. A racially diverse jury is likely to do a better job because jury diversity may affect what the jury sees and how it sees it. In other words, juries with racially diverse members view and discuss evidence in a different light. They pay attention to different evidence, give the same evidence different weight, and see different implications from evidence relative to racially homogenous juries.<sup>258</sup> These differences include offering differing definitions of “reasonable doubt” and perceiving the likelihood of race discrimination differently.<sup>259</sup>

Yet it is not only race but also experience that affects what we see and the light in which we see it.<sup>260</sup> In one well-known experiment, observers were told to count the number of times a ball was passed between two people in a videotape. A man in a gorilla suit entered the frame for some time, pounding his chest. Half of the observers neither

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257. *Id.* at 194–95.

258. Andrew E. Taslitz, *The People's Peremptory Challenge and Batson: Aiding the People's Voice and Vision through the "Representative" Jury*, 97 IOWA L. REV. 1675, 1702–06 (2012) [hereinafter *Representative Jury*].

259. See HIROSHI FUKURAI & RICHARD KROOTH, RACE IN THE JURY BOX: AFFIRMATIVE ACTION IN JURY 184–85, 193–96 (2003) (discussing reasonable doubt, race, and jury diversity); Taslitz, *Representative Jury*, *supra* note 258, at 1702–06 (discussing jury diversity as increasing the likelihood of jurors seeing race discrimination as being at work).

260. See MARK PEFFLEY & JON HURWITZ, JUSTICE IN AMERICA: THE SEPARATE REALITIES OF BLACKS AND WHITES 24–25, 46–53, 65, 75, 90, 109, 188–90 (2010).

saw the faux gorilla nor noticed anything unusual; they were too focused on the matter that interested them—the number of passes between the players.<sup>261</sup> The observers who did not see the gorilla generally refused to believe that the gorilla had appeared when they were told about it, which required them to re-watch the video in order to see the truth.<sup>262</sup> Once these observers were made aware of the gorilla's appearance, they readily saw the primate-costumed figure in their second viewing of the video.<sup>263</sup> Thus, experience and information changed what they saw.

Similarly, there is reason to believe that criminal-justice-system actors often suffer from "racial blindsight," a variant of a psychological blindsight phenomenon: subconsciously seeing something to which the conscious mind is blind.<sup>264</sup> The racial variant of this phenomenon is thus not merely a failure to pay attention to race, but rather a semi-conscious willful refusal to be aware of race when such awareness lurks in the background, affecting decision making.<sup>265</sup> Indeed, experimental evidence suggests that many well meaning whites are nevertheless captured by racial bias even when racial discrimination does not play an overt role in a case.<sup>266</sup> But when whites know that race may be relevant to analyzing the facts of a case, they are better aware of, and more frequently overcome, their own racial biases.<sup>267</sup> The mere fact that a case involves inter-racial contact is not adequate, however, to make race sufficiently salient for whites; something more—something emphasizing race's importance in a vivid way—is apparently required.<sup>268</sup>

Race might also alter how people see and understand facts, because the line between hard "facts" and inferences drawn from them is not clear. For example, whites might readily see an accused's flight

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261. See CHRISTOPHER CHABRIS & DANIEL SIMONS, *THE INVISIBLE GORILLA: AND OTHER WAYS OUR INTUITIONS DECEIVE US* 5–6 (2010).

262. See *id.* at 7.

263. See *id.*

264. See Andrew E. Taslitz, *Racial Blindsight: The Absurdity of Color-Blind Criminal Justice*, 5 OHIO ST. J. CRIM. L. 1, 3 (2007).

265. See *id.* at 9.

266. See *id.* at 4 n.22.

267. See *id.* at 4–7.

268. See, e.g., Samuel R. Sommers & Phoebe Ellsworth, *White Juror Bias: An Investigation of Prejudice Against Black Defendants in the American Courtroom*, 7 PSYCHOL. PUB. POL'Y & L. 201, 214–15, 217–21 (2001) (determining that experiments involving variants on an interracial crime made race salient by having a witness testify about the defendant's difficulties being the minority member of a school sports team) [hereinafter *White Juror Bias*].

from the police as indicating consciousness of guilt.<sup>269</sup> Black observers, on the other hand, are less likely to reach that conclusion from flight alone, or even from flight in a high-crime neighborhood.<sup>270</sup> To the contrary, black observers often recognize that flight might stem from different sources, including fear of: (i) the police themselves; (ii) being mistakenly identified by the police as involved in whatever criminal activity the officers are investigating; or (iii) any danger associated with police activity (after all, the police may be seeking out violent criminals or may spark violence by the attempt to arrest a suspect).<sup>271</sup> Thus while a white observer sees guilty flight, a black observer sees no such thing.

What is more, black jurors are more likely than white jurors are to view facts and draw, or not draw, inferences in light of racial discriminatory treatment of blacks by the police. Many more blacks than whites report experiencing racially discriminatory treatment by police.<sup>272</sup> Blacks tend to perceive these experiences as evidence of broader systemic discrimination, not evidence of a mere rogue officer.<sup>273</sup> Additionally, blacks are more likely than whites to hear stories of such race-based discrimination from friends and family in their neighborhoods and are further exposed to such stories in the media.<sup>274</sup> Consequently, blacks who see the system as unfair are more likely than most whites to suspect race bias and to look for it when police interact with black citizens.<sup>275</sup> Two social scientists who have broadly explored black-white criminal-justice attitudinal differences, including through experiments involving police brutality and a questionable stop-and-frisk scenario, put the point this way:

We are struck by the extraordinary naivety of many whites—a naivety that, in our view, is diagnostic of the type of racial insensitivity labeled as “laissez faire racism” . . . . This phenomenon is marked less by overt racial animosity than a blind eye toward the prevalent discrimination faced by African Americans. For only when information is blatant and unmistakable, as when respondents were asked whether to punish the guilty officer in the police brutality experiment, do whites distinguish between black and white targets. Under other circumstances, when the information is of the

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269. See Andrew E. Taslitz, *Stories of Fourth Amendment Disrespect: From Elian to the Internment*, 70 *FORDHAM L. REV.* 2257, 2297 (2002).

270. See *id.*

271. See *id.* at 2290–91, 2295.

272. See PEFFLEY & HURWITZ, *supra* note 259, at 40–42, 65–66.

273. See *id.* at 65–66, 107–10.

274. See *id.* at 42–44.

275. See *id.* at 136–37. However, whites do see race bias when “hit over the head” with it. *Id.*

ambivalent sort found in the “real world,” many white respondents fail to appreciate what is painfully obvious to African Americans—that is, that the races are treated differently in the halls of justice.<sup>276</sup>

These same researchers noted that blacks observing disparate racial outcomes are more likely than whites to believe that some procedural unfairness or unconscious bias explains the disparity, and are thus more likely to pay attention to evidence of such irregularities.<sup>277</sup> Black jurors may also require a greater quantity of persuasive evidence to convict a black suspect than white jurors do, which thereby effectively equates to black jurors expressing a more muscular definition of the beyond-a-reasonable-doubt standard, at least where race bias seems involved.<sup>278</sup> These differences in racial vision are, of course, generalities, but they do suggest that procedures raising the likelihood of a significant number of African-American jurors serving on a racially diverse jury would create a jury that is more likely to see more evidence in varying ways, including evidence about the ORB.

### B. *Racially-Diverse Deliberations*

There have been relatively few studies examining the effects of racial composition on jury deliberations, but the studies that have been done strongly favor the virtues of diversity.<sup>279</sup> One particularly important 2002 experimental study drew subjects from jury-eligible citizens and jury-pool members in Washtenaw County, Michigan.<sup>280</sup> The mock jurors watched “a videotaped summary of a real rape trial with a black defendant.”<sup>281</sup> They answered written voir dire questions before watching the video, received jury instructions afterward, and then deliberated in six-member juries while being videotaped.<sup>282</sup> Half the mock juries received race-relevant voir dire questions and half did not.<sup>283</sup> Half the juries were all-white and half were racially mixed (with four white and two black jurors).<sup>284</sup> The study reached several conclusions.

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276. *Id.* at 138 (citations omitted).

277. *See id.* at 190–94.

278. *See* FUKURAI & KROOTH, *supra* note 259, at 184–85, 193–96.

279. *See* Samuel R. Sommers & Phoebe C. Ellsworth, *How Much Do We Really Know About Race and Juries? A Review of Social Science Theory and Research*, 78 CHI.-KENT L. REV. 997, 1028 (2003) [hereinafter *Jury Race*].

280. *Id.* at 1026; *see also* Samuel R. Sommers, *Race and Juries: The Effects of Race-Salience and Racial Composition on Individual and Group Decision-Making* (2002) (unpublished Ph.D. dissertation, University of Michigan) (on file with author).

281. Sommers & Ellsworth, *Jury Race*, *supra* note 279, at 1026.

282. *Id.*

283. *Id.* at 1026–27.

284. *Id.* at 1027.

First, jurors of both races were more reluctant to convict when given race-relevant voir dire questions.<sup>285</sup> This finding is consistent with other research showing that making race salient tends to reduce the effects of racial bias on white jurors.<sup>286</sup>

Second, whites on racially mixed juries were more willing to discuss issues of race than were all-white juries.<sup>287</sup> Indeed, "when race or the possibility of racial bias came up during the deliberations of all-white juries, other jurors were likely to change the subject or attempt to dismiss these concerns as irrelevant."<sup>288</sup> Most of these jurors seemed genuinely surprised by any mention of race, unwilling to discuss it further.<sup>289</sup>

Third, and perhaps most importantly:

Analysis of the videotaped deliberations indicated that the racial composition of the jury influenced the content and scope of the discussions. Compared to all-white juries, racially mixed juries tended to deliberate longer, discuss more case facts, and bring up more questions about what was missing from the trial (e.g., physical evidence that was not presented, witnesses who did not testify). Racially mixed juries were also more likely to discuss racial issues such as racial profiling during deliberations, and more often than not, whites on these heterogeneous juries were the jurors who raised these issues.<sup>290</sup>

Fourth, mock jurors were asked to submit their pre-deliberation verdict preferences anonymously.<sup>291</sup> These results revealed that even at that point, whites from diverse juries were less likely than those on all-white juries to vote to convict a black defendant. "In other words, simply knowing that they would be discussing the case with a racially heterogeneous group was sufficient to influence jurors' private judgments."<sup>292</sup>

These results suggest several mechanisms at work. Jury diversity expands the breadth of information and viewpoints expressed during

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285. *Id.*

286. *See, e.g.,* Samuel R. Sommers & Phoebe C. Ellsworth, *Race in the Courtroom: Perceptions of Guilt and Dispositional Attributions*, 26 *PERSONALITY & SOC. PSYCHOL. BULL.* 1367, 1372–74 (2000); Sommers & Ellsworth, *White Juror Bias*, *supra* note 268, at 217–19.

287. *See* Sommers & Ellsworth, *Jury Race*, *supra* note 279, at 1028–29.

288. *Id.* at 1029.

289. *Id.*

290. *Id.* at 1028.

291. *Id.*

292. *Id.*

deliberation.<sup>293</sup> Diversity also "activat[es] jurors' motivations to avoid prejudice"<sup>294</sup> and makes white jurors more attentive to evidence of race bias.<sup>295</sup> Some commentators interpret a wide variety of studies using other methodologies as supporting similar conclusions.<sup>296</sup>

Researchers disagree about whether juror race alters verdicts. Some researchers find that race has little effect,<sup>297</sup> while a significant number of recent studies find differently.<sup>298</sup> What is likely is that race alone is not a good predictor of verdicts, but race can interact with other factors to alter verdicts in specific cases.<sup>299</sup> Perhaps more importantly, racial composition of juries, as opposed to the race of any individual juror, does seem likely to affect verdicts in cases where race matters and the evidence can fairly support different conclusions.<sup>300</sup> Jury deliberations are more likely as well to be fully informed on racially-diverse juries,<sup>301</sup> and the resulting verdicts are more likely to be widely perceived as legitimate and supported by the evidence.<sup>302</sup> Where the ORB's potential to distort verdicts is present, a racially-diverse jury would seem especially important to ensure full and fair consideration of whether, and the degree to which, the ORB combined with other factors in the case to produce a mistaken identification. Such consideration will in turn promote trust in the jury's verdicts.

Reforming jury selection procedures is, however, a politically fraught exercise. Achieving major reforms, including forms of "af-

293. See *id.* at 1024–25, 1028; see also Nancy S. Marder, *Juries, Justice & Multiculturalism*, 75 S. CAL. L. REV. 659, 687–700 (2002).

294. Sommers & Ellsworth, *Jury Race*, *supra* note 279, at 1024.

295. See *id.* at 1030. But see *id.* at 998–1004 (reporting the mixed results of previous non-deliberating mock-jury experiments and critiquing those with contrary conclusions).

296. See, e.g., FUKURAI & KROOTH, *supra* note 259, at 15–16 (discussing mock and actual jury studies of various types supporting many of these authors' conclusions).

297. See JOEL D. LIEBERMAN & BRUCE D. SALES, SCIENTIFIC JURY SELECTION 76 (2007); Joel D. Lieberman, *The Utility of Scientific Jury Selection: Still Murky After 30 Years*, 20 CURRENT DIRECTIONS PSYCHOL. SCI. 48, 49–51 (2011).

298. See SEAN G. OVERLAND, THE JUROR FACTOR: RACE AND GENDER IN AMERICA'S CIVIL COURTS 20–24 (2009) (summarizing and so characterizing the literature in criminal and civil cases).

299. See LIEBERMAN & SALES, *supra* note 297, at 70–71 (noting effects of relative racial composition and racial salience on jury verdicts).

300. See, e.g., Sommers & Ellsworth, *Jury Race*, *supra* note 279; see also William J. Bowers, Benjamin D. Steiner & Marla Sandys, *Death Sentencing in black and white: An Empirical Analysis of Juror's Race and Jury Racial Composition*, 3 U. PA. J. CONST. L. 171, 193–94 (2001) (noting that some, though not all, research supports a "white male dominance effect," in which five or more white male jurors dramatically increase the chances of a death sentence, and a "black male presence effect," in which the presence of even one black male moderates the chances of a death penalty).

301. See *supra* text accompanying notes 275–78.

302. See FUKURAI & KROOTH, *supra* note 259, at 14–17, 83–89.

firmative action” to ensure some minimal presence of minority racial groups on juries in cases where race is especially relevant, is likely highly desirable but seems particularly politically inflammatory, since it would require major changes in most jurisdictions’ systems of jury selection.<sup>303</sup> A modest reform might be to enact a statute to replace the *Batson v. Kentucky*<sup>304</sup> test for invalidating racially skewed juries selected as a result of purposeful racial discrimination. Under *Batson*, trial judges and appellate courts often defer to the most absurd non-racial justifications offered as smokescreens.<sup>305</sup> The new test would view racial disparities on juries as presumptive evidence of improper selection motivations, regardless of whether those motivations are conscious or unconscious, and require truly persuasive, weighty justifications for striking persons of the minority race. The impact of this legislation could be limited by applying it solely to cases involving the ORB. Such legislation would be analogous, albeit far from identical, to the original version of the Racial Justice Act passed in North Carolina, which permitted challenges to death sentences imposed where the penalty-phase jury was overwhelmingly of the majority race, the defendant was of a minority race, and where there was statistical evidence of such disparities in other capital cases in the locality.<sup>306</sup> This tinkering with *Batson* would not ensure a racially-diverse jury, but it would increase the chances of its occurring where the ORB is involved.

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303. See *id.* at 215–23.

304. 476 U.S. 79 (1986).

305. See Jeffrey Bellin & Junichi P. Semitsu, *Widening Batson’s Net To Ensnare More than the Unapologetically Bigoted or Painfully Unimaginative Attorney*, 96 CORNELL L. REV. 1075, 1102 (2011) (“Our survey reveals that in a broad array of cases, as exemplified by *Hamilton* and *Cook*, attorneys articulate and judges accept ‘race-neutral’ explanations for peremptory strikes that either highly correlate with race or are silly, trivial, or irrelevant to the case. Reviewing courts then affirm these determinations. This is significant because if attorneys can avoid *Batson* in this manner, there are only two narrow circumstances in which a *Batson* challenge is likely to succeed: (1) where an attorney admits to a racial motivation and (2) where an attorney’s explanation applies to a virtually identical juror of a different race who was not stricken. As discussed below, these two scenarios in which *Batson* will likely smoke out a racially discriminatory strike are exceedingly unlikely.”) (footnote omitted).

306. See generally Robert Mosteller, *Responding To McCleskey And Batson: The North Carolina Racial Justice Act Confronts Racial Peremptory Challenges In Death Cases*, 10 OHIO ST. J. CRIM. L. 103 (2012).

V.  
CONCLUSIONS

In summary, this article recommends the following procedural changes in cases of inter-racial eyewitness identification to reduce the risk that the ORB will lead to mistaken identifications:

1. The *Henderson/Cromedy* instructions should be redrafted by an appointed committee to embrace the teachings of the principles for drafting and using jury instructions discussed above.<sup>307</sup> Once any one jurisdiction has done this task well, of course, the task will be much easier for others.<sup>308</sup>
2. Whenever feasible, identification procedures in inter-racial cases should be administered by an officer or detective of the same race as the suspect. These procedures should be double-blind.<sup>309</sup>
3. Although there is no objective way to know the "right" size for a lineup, a larger size lineup is needed in cross-racial identification cases to avoid witness "lucky" guesses in identifying the suspect even though he is not the perpetrator. Doubling the usual lineup size, at least in cases of photographic identifications, from the usual six persons (one suspect, five foils) to twelve persons seems like a wise choice. It would cut the chances of a lucky guess in half, and it should not be unduly burdensome on police where the mere selection of photos is involved.<sup>310</sup> New software promises to make this task even easier,<sup>311</sup> and the vast majority of identifications are

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307. See *supra* text accompanying notes 178–239.

308. This task may soon be aided by the work of Steven Penrod and his colleagues, who have obtained a National Science Foundation grant to study the effect of detailed, scientifically informed eyewitness identification instructions, including instructions concerning the ORB, on juries. Though this will be but one study (hopefully prompting a line of further research) and though it may be some time before the study is completed and its results published, it will nevertheless do much to advance the ball in the right direction as it incorporates many of the suggestions made here based on research in analogous areas. See E-mail from Steven Penrod, Distinguished Professor of Psychology, John Jay Coll. of Criminal Justice, to author (including attached Grant Proposal from Steven Penrod, Distinguished Professor of Psychology, John Jay Coll. of Criminal Justice, to National Scientific Foundation) (May 26, 2013, 1:37 EST) (on file with author). There is also an unpublished dissertation that suggests that more scientifically informed instructions might do better than the sort currently used by the courts. See Diana Renee Moore, *The Effect of Research-Informed Jury Instructions on Potential Jurors' Verdicts in Eyewitness Case Vignettes* (Apr. 29, 2010) (unpublished Ph.D. dissertation, Alliant International University) (on file with California School of Professional Psychology, Alliant International University, Fresno Campus).

309. See *supra* text accompanying notes 123–29.

310. See *supra* text accompanying notes 130–33.

311. See Otto H. Maclin et al., *PCE Basic: A Computerized Framework for the Administration and Practical Application of Research in Eyewitness Psychology* (March 2004) (unpublished paper presented at the 2004 Annual Conference of the American

now done by photographs.<sup>312</sup> In England, a standard size of ten lineup members has not proven a difficult obstacle for police to overcome,<sup>313</sup> in Canada, twelve standard lineup members have similarly proven workable,<sup>314</sup> and the twelve-person lineup-size requirement proposed here would only apply in the relatively rare instance of inter-racial crimes.<sup>315</sup>

4. In all cross-racial identifications, blank lineups in which the suspect is absent should first be used. Only if the witness correctly identifies no one in that lineup should the case proceed to a “true” lineup.<sup>316</sup>

5. Contrary to the court’s position in *Henderson*, use of expert testimony on the ORB should be encouraged, at least in close cases where there is substantial reason to question the validity of an identification.<sup>317</sup> The numbers of qualified experts will increase as market forces create demand for their services.

6. In cases involving the ORB, legislation should be enacted to mandate new procedures for jury selection that will be more likely to result in a racially-diverse jury.<sup>318</sup>

There are start-up costs to each of these reforms. But once implemented, there is no reason to believe that they will be unduly costly or difficult. Yet they should significantly reduce the chances of identification error based on the ORB while increasing the perceived legitimacy of the process. When dealing with racial bias, which has such a long history of undermining fair criminal justice and which still does its work, albeit most often through invisible, unconscious processes, these sorts of reforms seem especially urgent.<sup>319</sup>

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Psychology and Law Society) (on file with author) (discussing the availability of software for quickly creating fair photospreads).

312. See SERGEANT PAUL B. CARROLL & CAPTAIN KEN PETENAUDE, EYEWITNESS IDENTIFICATION: A POLICE PERSPECTIVE 98 (2011).

313. Avraham M. Levi & R. C. L. Lindsay, *Lineup and Photo Spread Procedures: Issues Concerning Policy Recommendations*, 7 PSYCHOL. PUB. POL’Y & L. 776, 787 (2001) (noting that standard lineups in England include nine or ten persons, and lineups in Canada include twelve persons or photographs).

314. See *id.*

315. See, e.g., Mike S. Adams & Reid C. Toth, *The Unanticipated Consequences of Hate Crime Legislation*, 90 JUDICATURE 129, 132 (2006) (“Department of Justice Statistics have consistently indicated that about 80 percent of violent crimes are intra-racial while about 20 percent are inter-racial.”).

316. See *supra* text accompanying notes 130–38.

317. See *supra* text accompanying notes 241–47.

318. See *supra* text accompanying notes 268–94.

319. See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2012).