

I AM CERTAIN HE IS THE MAN...I THINK

By Tim Harris*

Eyewitness misidentification is the leading cause of all wrongful convictions in this country. According to The Innocence Project, of the first 130 exonerations by DNA evidence, 78% involved mistaken identity.¹ “Own-race bias” exacerbates this problem as people of one race prove to be less accurate witnesses when asked to identify people of another race.² Race is a significant impairment to eyewitness accuracy. Empirical studies demonstrate that own-race bias is most apparent when White-American witnesses try to identify an African-American suspect.³ In criminal cases, White-American witnesses inaccurately identify an African-American suspect approximately 60% of the time.⁴ This has led to the wrongful incarceration and, potentially, the wrongful execution of African-American defendants. Unless the legal community takes action, more innocent defendants may be incarcerated due to mistaken identity.

This article discusses how own-race bias compounds problems pertaining to the unreliability of cross-racial identifications. Racial segregation may be responsible for this high inaccuracy rate experienced when White Americans try to identify African Americans. Next, this article evaluates how America’s racial history influences own-race bias in the criminal justice system. Finally, this article recommends actions which the legal community should take in order to mitigate the impact of own-race bias and reduce misidentifications.

OWN RACE BIAS IS STRONGEST WHEN WHITE-AMERICAN WITNESSES ATTEMPT TO IDENTIFY AFRICAN-AMERICAN SUSPECTS

Cross-cultural research indicates that people have far superior memories for faces of their own race than for other racial groups. One such study specifically evaluated White-American witnesses’ ability to accurately identify African-American suspects. In this study, approximately 160 White-American students were shown a series of five brief videos of the same staged crime with different assailants -- three of the videos included an African-American assailant and two included White-American assailants.⁵ In the videos, a woman withdraws money from an ATM, the assailant snatches the money from her hands, and as the assailant takes the money, he briefly faces the camera before running away. Then, the different assailants stood in profile position.⁶

Each student subsequently viewed two, simultaneous six-photo lineups with the perpetrator standing in only one of the two lineups. Each lineup contained six individual color photographs taken against the same background and included only individuals of the same race as the perpetrator.⁷ The “fillers” were chosen for their resemblance to the perpetrator to mirror how police choose members for a lineup or photo spread.⁸ This experiment also used simultaneous lineups instead of sequential

lineups to replicate the format typically used by most police departments.⁹ Overall, 54% of the witnesses falsely identified someone from the lineup where the perpetrator was not even present.¹⁰ However, when White-American witnesses attempted to identify an African-American perpetrator from lineups, the rate of error rose to 60%.¹¹ This study further indicates that own-race bias impairs a White-American witness’ ability to identify African-American suspects.

INCREASED FAMILIARITY WITH A RACIAL GROUP INCREASES CROSS-RACIAL WITNESS ACCURACY

Statistics from wrongful convictions based on cross-racial misidentifications demonstrate a correlation between familiarity and accuracy. The Innocence Project reviewed the first 74 erroneous convictions ever made on the basis of eyewitness misidentification and found that White-American witnesses misidentified African-American defendants in 44% of those cases.¹² Also, White-American witnesses misidentified Latino defendants in only 1% of the cases.¹³ These disparities are likely the result of varying levels of segregation among racial groups.

Latinos can be broken down into diverse racial categories – ranging from White Latinos to Black Latinos. White-American witnesses may identify White Latinos more accurately, which may account for the relatively low rate of misidentifications between White Americans and Latinos. Accordingly, there may be more familiarity between White Americans and White Latinos, which could account for the higher accuracy of identifications.¹⁴ On the other hand, African-American witnesses have less difficulty identifying White-American faces.¹⁵ Most studies demonstrate that African Americans identify both African-American and White-American subjects with essentially the same degree of accuracy.¹⁶ African Americans may more accurately identify White-American faces because Whites Americans comprise the majority in America and African Americans are more familiar with a wide variety of White-American faces.¹⁷ White Americans may rarely see or interact with African Americans, whereas African Americans are exposed to White Americans through the media and in the workplace. Consequently, this disparity in familiarity correlates to a decrease in accuracy when White Americans attempt cross-racial identifications.¹⁸

OWN-RACE BIAS EXACERBATES PROBLEMS IN THE CRIMINAL JUSTICE SYSTEM

Own-race bias is extremely problematic in the criminal justice system, which often convicts defendants on the basis of eyewitness testimony when physical evidence is insufficient. Though one might expect to find DNA evidence in sexual assault and rape cases, many jurisdictions report significant portions of rape cases are prosecuted without DNA evidence.¹⁹ In the recent Duke University lacrosse rape case, District Attorney Mike Ni-

fong stated that between 75% and 80% of rape cases in his jurisdiction have no DNA to test. He then explained that a rape case is built most often on “testimony from the alleged victim and other witnesses.”²⁰ Therefore, eyewitness identification evidence remains one of the most persuasive forms of evidence available in serious criminal proceedings.

In a significant number of interracial crimes, cross-racial witness identification is the only evidence directly linking a specific suspect to the crime.²¹ In 2003, the Department of Justice reported that African Americans were accused of committing 393,963 violent crimes against White-American victims. Of these crimes, African Americans were accused of committing 20,903 single-offender sexual assaults and 43,336 group sexual assaults against White-American victims.²² However, judges, prosecutors, and jurors were often forced to rely only on cross-racial witness identifications to decide a defendant's guilt or innocence.²³

Even under ideal conditions, eyewitness identifications are often mistaken. Own-race bias, however, increases the risk that a witness will inaccurately identify a suspect of another race. When presented with a lineup or photo-spread containing faces of other-race subjects, own-race bias impairs a witness' accuracy similarly. Own-race bias poses a particular risk of erroneous conviction where physical evidence is lacking and the eyewitness remains confident, but nonetheless mistaken.

RACISM AND SEGREGATION IN AMERICA LEAVES MANY WHITE AMERICANS UNFAMILIAR WITH AFRICAN-AMERICAN FACES

Both racism and segregation contribute to White Americans' lack of familiarity with African-American images. This increases the likelihood that White Americans will misidentify African-American faces.²⁴ African Americans and White Americans have not lived or interacted with each other in significant numbers since the abolishment of slavery in the 1860s.²⁵ Anti-miscegenation and Jim Crow laws reinforced this racial separation by preventing the mixture of the races. Even though these laws have since been repealed, society still functions on a largely segregated basis.

Today, African Americans make up a relatively small percentage of the workplace, higher-level academic settings, and suburban residential areas.²⁶ When African Americans and other minorities acquire economic resources, these minority groups often settle in same-race communities.²⁷ As a result of self-segregation, many White Americans still do not interact with minorities outside of limited work, or school related encounters. Further, many White Americans are unfamiliar with the unique features that distinguish African-American faces because a broad range of African-American and minority images

are not available through other mediums.

On the other hand, White Americans form the dominant majority and White-American faces are seen regularly on television, billboard ads, in academic settings, and in the workplace.

Overall, 54% of the witnesses falsely identified someone from the lineup where the perpetrator was not even present. However, when White-American witnesses attempted to identify an African-American perpetrator from lineups, the rate of error rose to 60%.

The studies this article discusses suggest that familiarity with faces of other races will increase a person's ability to accurately recognize faces from that racial group. This explains why own-race bias in America does not cut both ways.

Accordingly, the visceral comment, “they all look alike,” can be attributed to the fact that many White Americans are not familiar with other racial groups. As previously discussed, studies demonstrate that White

Americans indeed have difficulty ascertaining differences in other-race faces. Due to America's history of racial intolerance and self-segregation, many White Americans remain unfamiliar with people of other races, and this lack of racial familiarity increases the likelihood of error in a cross-racial identification.

JURIES HAVE OFTEN CONVICTED AFRICAN-AMERICAN DEFENDANTS BASED SOLELY ON A MISIDENTIFICATION MADE BY A WHITE-AMERICAN WITNESS

An African-American defendant is more likely to be convicted on the basis of a White-American eyewitness's testimony due to racial prejudices and stereotypes.²⁸ In fact, since African Americans were thought to be incapable of delivering informed and honest testimony, early American legal codes completely excluded the testimony of an African-American person against a White American.²⁹ Though not expressly sanctioned, these prejudices that White Americans are credible and African Americans are not credible still prevail in the minds of some prosecutors, judges, and jurors.³⁰ Thus, juries often believe a White-American witness when they identify an African-American defendant. Stereotypes that depict African Americans as uncivilized and violent make White-American witnesses, who confidently believe their identification of an African-American attacker, even more believable to a jury.³¹

For example, Jennifer Thompson, a young, White-American, college student and former homecoming queen was brutally raped by an African-American male.³² Hours after the rape, Thompson underwent a rape-kit analysis where she was swabbed for semen. She later identified Ronald Cotton from a photo-spread of African-American suspects.³³ Cotton already had a criminal record and had served 18 months in prison for attempted sexual assault.³⁴ When Thompson picked Cotton out of a live lineup, the prosecutor was positive that she identified the right man.³⁵ Cotton was then tried and convicted of raping the 22-year-old woman.³⁶

However, police learned that another rape occurred in the same neighborhood just hours after Jennifer Thompson was

raped. Although the two rapes were similar, and police suspected that only one perpetrator committed each crime, the evidence of the second rape was not allowed at Cotton's trial.³⁷ Cotton appealed his conviction to the higher court arguing that the evidence of the second rape should have been allowed. The appellate court determined that the evidence of the similar rape should have been allowed and ordered a new trial. At his second trial, the evidence surrounding the other rape was admitted, but Thompson again identified Ronald Cotton as the man who raped her and Cotton was convicted and sentenced to a second life term.³⁸

Ronald Cotton contacted the Innocence Project and convinced them that DNA evidence could exonerate him. Although Cotton was incarcerated for over a decade, he was fortunate that the rape kit provided sufficient evidence to perform a DNA test on semen taken hours after Thompson's rape. DNA tests confirmed that the rapist was another man, Bobby Poole, who had committed several other rapes in a similar manner to Thompson's rape.

Despite Ronald Cotton's innocence, he was convicted *twice* by jury. In both trials, no physical evidence linked Cotton to the crime and circumstantial evidence suggested that another man raped Thompson. Yet, two different juries on two separate occasions managed to send an innocent man to prison based on Thompson's mistaken testimony.

THE RACES OF VICTIMS AND DEFENDANTS IMPACT SENTENCING

African-American defendants who are wrongfully convicted of a serious offense are more likely to be put to death when the victim is a White American.³⁹ Racism and prejudice is demonstrated when facially neutral death penalty statutes are enforced in a racially discriminatory manner.⁴⁰ Studies also show a victim's race directly affects whether the prosecution seeks the death penalty against African-American defendants.⁴¹ In general, prosecutors seek the death penalty more often in murder cases involving White-American victims.⁴² Conversely, when the victim is African-American, there is a reduced likelihood that the defendant will face the death penalty, regardless of the defendant's race.⁴³ Simply, capital punishment is most frequently sought when the victim is White-American *and* the defendant is African-American.⁴⁴ Since 1976 when the death penalty was reinstated, 161 African-American inmates have been executed for killing White Americans compared to only 11 White Americans executed for killing African Americans.⁴⁵ In federal cases, prosecutors sought the death penalty twice as often for African Americans who killed White Americans than for African Americans accused of killing other African Americans.⁴⁶ These statistics demonstrate that race inappropriately influences a prosecutor's decision to seek the death penalty and how jurors determine which defendants to sentence to death.⁴⁷

Studies further indicate that the death penalty is being applied in a racially discriminatory manner.⁴⁸ In the Baldus Study, Professor Baldus reviewed the application of death penalty stat-

utes in Pennsylvania and Georgia and found that the race of the victim heavily influenced the decision to apply the death penalty.⁴⁹ Specifically, African-American defendants accused of killing a White-American victim, were four to five times more likely to receive the death penalty than all other defendants in murder cases.⁵⁰ Professor Baldus estimates that an African-American defendant accused of committing a violent crime against a White-American victim is twice as likely to receive the death penalty.⁵¹ Shockingly, sentencing trends show jail time for individuals who rape or murder African Americans, while the rapist or murderer of White-American victims is met with capital punishment.⁵²

Not only are White-American witnesses more likely to inaccurately identify an innocent African-American suspect,⁵³ innocent African-American defendants are more likely to be convicted and sentenced to death when charged with a crime against a White-American victim.⁵⁴ In many interracial crimes in which there is no physical evidence, tenuous, cross-racial witness identifications serve as the only basis for prosecution. Moreover, the confident but mistaken testimony of a White-American witness against an African-American defendant effectively persuades juries. Witness mistakes in cross-racial identifications compound racial bias in the application of the death penalty as well as serves to create a serious injustice that disproportionately affects innocent African-American defendants.

WHAT CAN BE DONE TO PREVENT THIS PHENOMENON FROM AFFECTING AFRICAN AMERICANS IN THE CRIMINAL JUSTICE SYSTEM

To minimize the likelihood of cross-racial misidentification, police identification procedures should be changed to include the following: the use of double-blind and sequential lineup techniques in all identification procedures; larger numbers of fillers in a lineup or photo spread; and warning the witness that the culprit might-or might not be present.⁵⁵ Safeguards at the trial stage should also include allowing expert testimony on cross-racial identification evidence and special jury instructions in cases involving cross-racial identifications.⁵⁶

SEQUENTIAL LINEUPS WOULD MINIMIZE CROSS RACIAL MISIDENTIFICATIONS

Simultaneous lineups prove particularly dangerous when White-American witnesses simultaneously view a culprit-absent lineup consisting of African-American faces resembling each other in general appearance.⁵⁷ Due to own-race bias, White-American witnesses will continue to unintentionally misidentify African-American suspects when simultaneously shown African-American faces that all resemble a description of the culprit. Law enforcement entities across the nation should understand the heightened likelihood that simultaneous lineups not only encourage relative judgment, but they are also inherently risky in cross-racial situations.⁵⁸

However, conducting lineups with members of different races also fails to solve this problem. Rather, such lineups

might aggravate problems of misidentifications since including lineup members of different races would make African-American participants stand out even more, particularly when the witness is certain that the perpetrator is African American.⁵⁹ Implementing sequential lineups during identification would encourage witnesses to use absolute judgment—the best manner in which to minimize cross-racial misidentifications. Although studies indicate that White-American witnesses have difficulty recognizing African-American faces, empirical data shows that all witnesses are much less likely to identify a person from a culprit-absent lineup when viewing lineup members individually.⁶⁰

WITNESS SHOULD BE WARNED THAT THE CULPRIT MIGHT NOT BE PRESENT

Warning the witness that the culprit might not be present discourages the witness from identifying someone in culprit-present lineups. However, this also reduces the chance that the witness will identify someone from a culprit-absent lineup.⁶¹ This instruction warns the person not to compare members of a lineup to one another even when viewing the photos in isolation. In sequential procedures, witnesses may still attempt to use relative judgment by comparing the photo or person they are viewing to a photo or person that they previously viewed. However, this warning reduces the likelihood that witnesses will identify someone from a culprit-absent lineup because those witnesses know that the true culprit may not even be present.

IDENTIFICATION PROCEDURES SHOULD CONTAIN MORE SUBJECTS

Lineup procedures should contain the maximum number of fillers as possible.⁶² Empirical research indicates that as the number of people or photos in the lineup increases, so does the accuracy of witness identifications.⁶³ Currently, many police departments present witnesses with a lineup or photo spread containing an average of six people or photographs.⁶⁴ Police departments should also increase the number of people or photos in an identification procedure to increase the accuracy of witness identifications.⁶⁵ Adopting sequential lineup procedures, including a warning that the culprit might not be present, and increasing the number of lineup members will markedly increase the accuracy of all witness identifications, including those made across racial lines.

SAFEGUARDS AT TRIAL TO MITIGATE UNRELIABILITY OF CROSS-RACIAL IDENTIFICATIONS

So long as expert testimony meets judicially sanctioned scientific and expertise requirements, judges should allow eyewitness experts to testify at criminal trials. Put simply, the expert cannot come to trial and testify on scientific theory that has not been rigorously tested and recognized by other scholars and professionals in that field. Even if the expert seeks to testify on an adequately recognized field of science, that expert may not offer any testimony that the trial judge determines to be

“common sense” or not useful to assist the jury in making an informed determination.

Currently, jurisdictions differ on this admissibility of eyewitness expert testimony. Some judges exclude the testimony altogether, opining that it is common knowledge that an eyewitness may have been mistaken, thus no expert is needed to advise the jury in what they already know.⁶⁶ There are many aspects of eyewitness identifications that actually contradict common perceptions about witness accuracy. Moreover, in the context of cross-racial identifications, many people have not been exposed to the extensive scientific findings that may impact the way in which a juror processes cross-racial witness identification.

The expert should not only be allowed to testify on the factors that impact the reliability of witness identifications generally, but they should be allowed to inform jurors of the significant probabilities that other-race identifications are inaccurate and the scientific bases for these conclusions. In the majority of cases that lack DNA evidence, expert testimony may be one of the few prophylactic measures available to prevent a false identification from leading to a wrongful conviction.

SPECIAL JURY INSTRUCTIONS WILL HELP JURORS EVALUATE CROSS-RACIAL IDENTIFICATION TESTIMONY

The judge should instruct the jury to consider all relevant factors that undermine the credibility of cross-racial witness identifications. In addition to changing identification procedures and allowing experts to assist jurors in processing cross-racial identification evidence, the jury instructions further provide an added assurance against wrongful convictions. This instruction is most critical in situations where no other evidence exists. Jurors should be reminded that while witnesses' confidence in identifying suspects can be used to evaluate their overall credibility, such confidence is not synonymous with accuracy - particularly in cross-racial identifications.⁶⁷

AS SOCIAL INTERACTION AND FAMILIARITY INCREASES BETWEEN THE RACES THE IMPACT OF THE OWN-RACE EFFECT SHOULD FADE

Though judges, lawyers, and legislators cannot improve witnesses' ability to accurately remember faces of other races, studies indicate that witness ability to identify faces of other races will increase as witnesses' familiarity with members of that race increases.⁶⁸ Increased social interaction among the races in America will ameliorate the effect of own-race bias in the criminal justice system. As mentioned above, White-American witnesses show the greatest susceptibility to own-race bias when attempting to identify members of an unfamiliar racial group. In addition, individuals who expressed higher levels of familiarity with members of another race were more likely to recognize faces of individuals from that race.⁶⁹ As White Americans become more familiar with a greater variety of African-American faces, their ability to accurately identify African-American suspects should also improve.

CONCLUSION

Even under ideal circumstances, witness identification can be difficult. Race only exacerbates the inherent inaccuracies in eyewitness identifications. Own-race bias is most prevalent when White-American witnesses attempt to identify a suspect from an unfamiliar race and jurors are more likely to convict and sentence African-American suspects to death when identified by a White-American witness. Accordingly, this dichotomy compounds racial prejudice in the criminal justice system. Although a White-American witnesses' identification of an African-American suspect is more likely to be erroneous, it is also more likely to be believed by a jury. In order to adequately redress this problem, the legal system must collectively implement safeguards to keep innocent defendants out of prison and *off* of death row.

Police departments must also recognize own-race bias and take aggressive remedial actions. Lineup and photo spread procedures should be conducted double-blind and sequentially to minimize the chance that a witness will use their relative judg-

ment. Prosecutors, defense attorneys, and judges must also act to prevent cross-racial misidentifications. Specifically, defense attorneys must thoroughly pursue this cause through zealous cross-examination as well as use expert testimony to explain the vagaries of cross-racial identifications. Also, prosecutors should use caution when considering whether to prosecute cases that lack corroborative physical evidence and are based solely on cross-racial identification. Finally, judges should allow expert testimony and should provide jury instructions on how to evaluate eyewitness identifications during deliberations.

From slavery to the civil rights movement, African Americans and White Americans have been unable to equally coexist. Since own-race bias is linked to racial familiarity, the problem of cross-racial misidentifications will recede as African Americans and White Americans overcome racial divisions in America. Nonetheless, demanding accountability in law enforcement, ending prejudice, and self-segregation are all necessary measures to avoid wrongful convictions based on cross-racial misidentification.

ENDNOTES

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¹ See SCHECK, NEUFELD & DWYER, *ACTUAL INNOCENCE* 365 (New American Library 2003) (2000) (Stating that studies of DNA exoneration cases show 10 categories of factors leading to wrongful convictions and of these factors Mistaken ID is by far the most prevalent cause of wrongful convictions leading to 101 of the 130 erroneous convictions in the study).

² John P. Rutledge, *They All Look Alike: The Inaccuracy of Cross-Racial Identifications*, 28 AM. J. CRIM. L. 207, 210 (2001).

³ *Id.*

⁴ *Id.*

⁵ *Id.*; see e.g., Gary L. Wells, Mark Small, Steven Penrod, Roy S. Malpass, Solomon Fulero & C.A.E. Brimacombe, *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 LAW & HUM. BEHAV. 603, 612 (1998), available at <http://www.innocenceproject.org/docs/whitepaper.pdf> [hereinafter *Recommendations*] (stating that many police departments ignore the recommendations that encourage the use of sequential lineup procedures instead of simultaneous lineup procedures).

⁶ Wells, *Recommendations*, *supra* note 5.

⁷ Wells, *Recommendations*, *supra* note 5.

⁸ Wells, *Recommendations*, *supra* note 5.

⁹ Wells, *Recommendations*, *supra* note 5.

¹⁰ See Wells, *Recommendations*, *supra* note 5 (stating that 54% of the witnesses attempted to make an identification procedure overall and a significant number of witnesses made an identification from the lineup where the true culprit was not even present).

¹¹ See Wells, *Recommendations*, *supra* note 5 (showing that the rate of misidentifications rose when White-American witnesses attempted to identify an African-American suspect from a lineup containing only African-American faces).

¹² SCHECK et al., *supra* note 1, at 366.

¹³ "Latino" is being used with deference to the sensitivity of the issue of using the label "Hispanic" versus "Latino." See Christine Granados, *Hispanic vs Latino*, HISPANIC MAGAZINE, Dec. 2000, <http://www.hispanicmagazine.com/2000/dec/Features/latino.html> (explaining generally, those who call themselves Hispanic are more assimilated, conservative, and young, while those who choose the term Latino tend to be liberal and older. The U.S. government derived the word "Hispanic" from *España*. The word "Latino" traces its roots back to ancient Rome and some say it's more inclusive, encompassing Latin American countries such as Cuba, Puerto Rico, the Dominican Republic, Mexico, and others).

¹⁴ See James W. Tanaka, Markus Kiefer, & Cindy M. Bukach, *A Holistic Account of the Own-Race Effect in Face Recognition: Evidence from a Cross-Cultural Study*, 93(1) COGNITION 1, 1-4 (2004) (suggesting that familiarity with members of another racial group correlate with a witness' ability to accurately

identify faces from that group and supporting the notion that increasing familiarity will also increase identification accuracy and reliability).

¹⁵ See Sheri L. Johnson, *Cross-Racial Identification Errors in Criminal Cases*, 69 CORNELL L. REV. 934, 940 (1984) (citing studies that find African-American eyewitnesses identified both White American and African-American subjects in identification procedures with a similar degree of accuracy in contrast to the larger disparity when White Americans attempt to identify an African-American suspect).

¹⁶ See Barkowitz & Brigham, *Recognition of Faces: Own Race Bias, Incentive, and Time Delay*, 12(4) J. APPLIED SOC. PSYCHOLOGY 255, 261 (1982); Brigham & Barkowitz, *Do "They all look alike?" The Effect of Race, Sex, Experience and Attitudes on the Ability to Recognize Faces*, 8 J. APPLIED SOC. PSYCHOLOGY, 314 (1978); Chance, Goldstein & McBride, *Differential Experience and Recognition Memory for Faces*, 97(2) J. SOC. PSYCHOLOGY 243, 249, 250-51 (1975) (reporting on two experiments); Cross, Cross & Daly, *Sex, Race, Age and Beauty As Factors In Recognition of Faces*, 10(6) PERCEPTION & PSYCHOPHYSICS 393, 394 (1971); Galper, *"Functional Race Membership" and Recognition of Faces*, 37 PERCEPTUAL & MOTOR SKILLS 455, 458 (1973); Luce, *The Role of Experience in Inter-Racial Recognition*, 1 PERSONALITY & SOC. PSYCHOLOGY BULL. 39, 40 (1974); Malpass, *Racial Bias in Eyewitness Identification*, 1 PERSONALITY & SOC. PSYCHOLOGY BULL. 42, 43 (1974); Malpass & Kravitz, *Recognition for Faces of Own and Other Race*, 13(4) J. PERSONALITY & SOC. PSYCHOLOGY 330, 333 (1969); Malpass, Lavigneur & Weldon, *Verbal and Visual Training in Face Recognition*, 14 PERCEPTION & PSYCHOPHYSICS 285, 288 (1973).

¹⁷ See U.S. Census Bureau, *Population by Sex and Age, for Black Alone and White Alone, Not Hispanic* (March 2004), available at <http://www.census.gov/population/www/socdemo/race/pp1-186.html> (stating that African Americans comprise roughly 12.5% of the US population while White Americans comprise over 67.5% of the U.S. Population).

¹⁸ Tanaka et al., *supra* note 14, at 1-4.

¹⁹ See National Institute of Justice, *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial*, (June 2006), available at <http://www.ncjrs.gov/txtfiles/dnaevid.txt> (last visited Oct. 26, 2006).

²⁰ Tim Whitmire, *Prosecutor Promises Duke Rape Case "Is Not Going Away,"* CHI. SUN-TIMES, Apr. 12, 2006, available at http://www.findarticles.com/p/articles/mi_qn4155/is_20060412/ai_n16176064 (last visited Oct. 26, 2006).

²¹ SCHECK et al., *supra* note 1, at 368.

²² U.S. Department of Justice, *Criminal Victimization in the United States, 2003 Statistical Tables* (July 2005), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cvus03.pdf>.

²³ Robert J. Hallisey, *Experts on Eyewitness Testimony in Court-A Short Historical Perspective*, 39 HOW. L. J. 237, 238 (1995); see e.g., *State v. Cromedy*, 727 A.2d 457 (N.J. 1999) (finding defendant guilty of a crime based exclusively upon the victim's ID made eight months after she was brutally raped).

ENDNOTES CONTINUED

²⁴ See Tanaka et al., *supra* note 14, at 1-4 (2004) (suggesting that familiarity with members of another racial group correlate with a witness' ability to accurately identify faces from that group and supporting the notion that increasing familiarity will also increase identification accuracy and reliability).

²⁵ C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW*, 192 (Rev. ed 2002).

²⁶ U.S. Census Bureau, *supra* note 17.

²⁷ WOODWARD, *supra* note 25, at 192 (stating that after reconstruction there was a rapid advance of de facto segregation and increases in the African-American population is followed by White American's retreat to the suburbs).

²⁸ See Helen O'Neill, *The Perfect Witness*, WASH. POST, Mar. 4, 2001, at B1 (stating that Jenifer Thompson, a White-American, college student was viewed by many as the perfect witness and convinced two juries to convict an innocent African-American defendant).

²⁹ See Mississippi Black Codes of 1865 §4 (repealing slave codes that prohibited both slaves and free African Americans from testifying against White-American defendants and witnesses and allowing freedmen and mulattoes to testify against White Americans), available at http://afroamhistory.about.com/library/blmississippi_blackcodes.htm.

³⁰ See O'Neill, *supra* note 28.

³¹ See M. Janofsky, *Under Siege, Philadelphia's Criminal Justice System Suffers Another Blow*, N.Y. TIMES, April 10, 1997, at A14 (mentioning how Jack McMahon revealed that he carefully instructed new prosecutors in his office on the importance of keeping many African Americans off high level criminal cases. His training video for prosecutors stated that young African-American women are very bad on the jury for a prosecutor, and that African Americans from low-income areas are less likely to convict).

³² O'Neill, *supra* note 28, at B1.

³³ O'Neill, *supra* note 28, at B1.

³⁴ O'Neill, *supra* note 28, at B2.

³⁵ O'Neill, *supra* note 28, at B3.

³⁶ O'Neill, *supra* note 28, at B3.

³⁷ O'Neill, *supra* note 28, at B3.

³⁸ O'Neill, *supra* note 28, at B3.

³⁹ SCHECK et al., *supra* note 1, at 368.

⁴⁰ See *Callins v. Collins*, 114 S. Ct. 1127, 1135 (1994) (stating that race influences how the death penalty is applied).

⁴¹ Richard C. Dieter, *The Death Penalty Information Organization* (June 1998), available at <http://www.deathpenaltyinfo.org/article.php?scid=45&did=539> (citing the Baldus study which found that black defendants were 4 to 5 times more likely to receive the death penalty).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Richard C. Dieter, *The Death Penalty Information Organization* (June 1998), available at <http://www.deathpenaltyinfo.org/article.php?scid=45&did=539> (citing the Baldus study which found that black defendants were 4 to 5 times more likely to receive the death penalty).

⁴⁷ *Id.*

⁴⁸ David C. Baldus, *Statement of David C. Baldus*, (June 11, 2001), available at <http://www.deathpenaltyinfo.org/article.php?scid=18&did=252>.

⁴⁹ *Id.*

⁵⁰ See Dieter, *supra* note 46 (citing the Baldus study which found that black defendants were 4 to 5 times more likely to receive the death penalty).

⁵¹ *Id.*

⁵² See U.S. General Accounting Office, *Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities* (1990), at 4, <http://archive.gao.gov/t2pbat11/141293.pdf> (noting that, "in 82% of the studies, ... race of victim was found to influence the likelihood of being charged with capital murder or receiving the death penalty," i.e., *those who murdered White Americans were found to be more likely to be sentenced to death than those who murdered African Americans*. "This finding was remarkably consistent across data sets, states, data collection techniques and quality of studies").

⁵³ SCHECK et al., *supra* note 1, at 368.

⁵⁴ U.S. General Accounting Office, *supra* note 52, at 4.

⁵⁵ Wells et al., *Recommendations*, *supra* note 5, at 616-17, 629, 634-35, 639.

⁵⁶ Johnson, *supra* note 15, at 955.

⁵⁷ Wells et al., *Recommendations*, *supra* note 5, at 617.

⁵⁸ Wells et al., *Recommendations*, *supra* note 5, at 617.

⁵⁹ Wells et al., *Recommendations*, *supra* note 5, at 617.

⁶⁰ Wells et al., *Recommendations*, *supra* note 5, at 617.

⁶¹ Wells et al., *Recommendations*, *supra* note 5, at 615, 629.

⁶² Wells et al., *Recommendations*, *supra* note 5, at 634-635.

⁶³ Wells et al., *Recommendations*, *supra* note 5, at 634-635.

⁶⁴ Wells et al., *Recommendations*, *supra* note 5, at 634-635.

⁶⁵ The author proposes that the target number be 10.

⁶⁶ Rutledge, *supra* note 2, at 215.

⁶⁷ Wells et al., *Recommendations*, *supra* note 5, at 621-25.

⁶⁸ Tanaka et al., *supra* note 14, at 1-4.

⁶⁹ Tanaka et al., *supra* note 14, at 1-4.