
THE PROVINCE OF THE JURIST: JUDICIAL
RESISTANCE TO EXPERT TESTIMONY ON
EYEWITNESSES AS INSTITUTIONAL RIVALRY

I. INTRODUCTION

Expert testimony on eyewitness identifications is one of the most controversial issues in evidentiary procedure today.¹ With false identifications recognized as a leading cause of wrongful convictions in the United States,² numerous commentators have urged courts to expand the use of expert testimony to educate jurors about the shortcomings of eyewitnesses.³ The Supreme Court's recent decision in *Perry v. New Hampshire*⁴ heightened the stakes of the debate, identifying the availability of expert testimony among its reasons for refusing to strengthen judicial filters against admittedly unreliable identifications.⁵ Yet admission of expert testimony on eyewitness identifications remains the exception rather than the rule.⁶ Because the unreliability of eyewitness testimony is a matter of "common knowledge" among lay jurors, courts insist, juries are competent to evaluate eyewitnesses without the benefit of any specialized expertise — to impeach faulty evidence "using their common-sense and faculties of observation" alone.⁷

¹ See, e.g., Henry F. Fradella, *Why Judges Should Admit Expert Testimony on the Unreliability of Eyewitness Testimony*, 2 FED. CTS. L. REV. 1 (2007); Chelsea Moore, *Is Perception Reality?: An Argument Against the Use of Rule 403 for the Exclusion of Eyewitness Identification Expert Testimony*, 6 FIU L. REV. 163 (2010); George Vallas, *A Survey of Federal and State Standards for the Admission of Expert Testimony on the Reliability of Eyewitnesses*, 39 AM. J. CRIM. L. 97 (2011); Matthew J. Reedy, Note, *Witnessing the Witness: The Case for Exclusion of Eyewitness Expert Testimony*, 86 NOTRE DAME L. REV. 905 (2011); Christian Sheehan, Note, *Making the Jurors the "Experts": The Case for Eyewitness Identification Jury Instructions*, 52 B.C. L. REV. 651 (2011).

² See Steven E. Clark, *Blackstone and the Balance of Eyewitness Identification Evidence*, 74 ALB. L. REV. 1105, 1106 (2011) (suggesting that eyewitness identifications figure in seventy-five percent of wrongful convictions overturned through DNA testing).

³ See, e.g., Fradella, *supra* note 1, at 24; Moore, *supra* note 1, at 192–93.

⁴ 132 S. Ct. 716 (2012).

⁵ *Id.* at 728–29.

⁶ Among federal courts today, for example, only two circuits actively favor admission of eyewitness expert testimony, while eight favor exclusion in the absence of certain narrowly defined circumstances and one exercises a per se exclusionary rule. See Lauren Tallent, Note, *Through the Lens of Federal Evidence Rule 403: An Examination of Eyewitness Identification Expert Testimony Admissibility in the Federal Circuit Courts*, 68 WASH. & LEE L. REV. 765, 787–93 (2011).

⁷ *United States v. Rodriguez-Felix*, 450 F.3d 1117, 1125 (10th Cir. 2006); see also Jeremy C. Bucci, *Revisiting Expert Testimony on the Reliability of Eyewitness Identification: A Call for a Determination of Whether It Offers Common Knowledge*, 7 SUFFOLK J. TRIAL & APP. ADVOC. 1, 1 (2002) ("The vast majority of cases dealing with expert testimony on the reliability of eyewitness identification have excluded [it] largely because it does not offer assistance to the trier of fact in acquiring relevant knowledge that is outside the scope of common knowledge.").

While courts formally justify their exclusion of experts based on the sufficiency of the jury's common-sense authority over eyewitness evidence, even judges who acknowledge the dramatic deficiencies in jurors' knowledge on eyewitness identifications resist admitting expert testimony on the subject.⁸ Instead, these judges insist on addressing the limitations of lay juror knowledge through traditional safeguards, most notably cross-examination by opposing counsel⁹ and cautionary jury instructions issued by trial judges.¹⁰ Especially in light of emerging research on the substantive shortcomings of such procedures, courts' insistence on the inability of scientific experts to contribute meaningfully to the trial process presents a marked contrast to courts' typical humility about their institutional competence.¹¹

This Note suggests that the traditional concern with preserving the so-called "province of the jury" — that is, with defending the lay competence of the jury against the denigrations of scientific expertise — may not be the only, or even the leading, motive behind courts' continued aversion to expert testimony on eyewitness identifications. While presented as a core site of the lay jury's democratic authority in the courtroom, eyewitness testimony in fact provides a central arena for courts to affirm the rarefied expertise of trained jurists at trial — to defend the professional authority of lawyers and judges against encroachment by a rival body of experts in their traditional sphere of competence. Commentators have characterized courts' traditional resistance to expert testimony, and the continuing exclusion of eyewitness experts specifically, as a struggle against the "professionalization" by scientists of factfinding duties formally vested in the lay jury.¹² This Note suggests that the continuing exclusion of expert testimony may seek less to protect the lay authority of the jury within the American trial system than to affirm the professionalization of American trial procedure by lawyers and judges.

Before continuing, a word on methodology. This Note examines a set of federal opinions on eyewitness identifications as a case study of the role of expertise and professionalization in the courtroom.¹³ It does

⁸ See, e.g., *United States v. Jones*, 689 F.3d 12, 19–20 (1st Cir. 2012) (affirming the exclusion of an expert witness despite agreeing that the proposed testimony "bearing on the effects of stress, witness confidence and cross-racial identification would be helpful to the jury").

⁹ See, e.g., *Rodriguez-Felix*, 450 F.3d at 1125; *United States v. Langan*, 263 F.3d 613, 624 (6th Cir. 2001); *United States v. Smith*, 122 F.3d 1355, 1357 (11th Cir. 1997) (per curiam); *United States v. Labansat*, 94 F.3d 527, 530 (9th Cir. 1996).

¹⁰ See, e.g., *Jones*, 689 F.3d at 15–17; *United States v. Smithers*, 212 F.3d 306, 327–29 (6th Cir. 2000) (Batchelder, J., dissenting); *United States v. Rincon*, 28 F.3d 921, 925–26 (9th Cir. 1994).

¹¹ For further discussion of federal courts' typical institutional humility, see *infra* pp. 2395–96.

¹² See generally Ric Simmons, *Conquering the Province of the Jury: Expert Testimony and the Professionalization of Fact-Finding*, 74 U. CIN. L. REV. 1013 (2006).

¹³ By nature, this mode of analysis necessarily involves a certain degree of extrapolation from a limited data pool. The cases in this Note are limited almost entirely to federal appellate claims,

not attempt to suggest that the broader trends of professionalization or institutional rivalry examined are limited to the context of eyewitness identifications. As discussed below, however, eyewitness identification provides a particularly salient window into these trends due to the mass of accumulating scientific research on the subject, the persisting assumption that visual memory is a uniquely common-sense phenomenon, and courts' traditional authority over witness credibility.¹⁴

The remainder of this Note proceeds in four parts. Part II examines the traditional justification for excluding expert testimony on eyewitness identifications: protecting the province of the jury. Part III analyzes a set of federal cases on eyewitness identifications to argue that courts' continuing exclusion of expert testimony may defer less to the presumed competence of lay jurors than to the professional expertise of lawyers and judges. Part IV suggests that courts' continuing resistance to eyewitness scientists may best be understood not as a resistance to the expanding role of expertise in the courtroom per se, but as an attempt to preserve a sphere of specifically legal expertise — to rebut the pretensions of outside (scientific) authorities to improve upon procedures traditionally considered to be within the unique competence of the courts. Part V concludes by suggesting a more accurate standard for judicial screenings of expert testimony going forward.

II. THE COMMON SENSE OF THE LAY JURY

The reluctance of courts to admit expert testimony on eyewitness identifications has been attributed primarily to one concern: defending the competence of lay jurors to evaluate witness credibility against intrusion from self-identified experts. Despite a general trend toward admitting expert evidence on factual matters and mounting scientific research challenging jurors' ability to assess eyewitness evidence reliably, courts continue to affirm the sufficiency of the jury's lay knowledge in order to deny the utility of more rarefied knowledge on eyewitness identifications.

A. *The Province of the Jury*

The requirement that expert testimony impart some specialized knowledge beyond the jury's common sense has long been a guiding principle of American evidentiary law.¹⁵ The basic structure of the jury trial depends on the assumption that findings of fact are best en-

a restriction that aims to provide a sample size that is diverse but also sufficiently narrow to allow for close comparison and analysis.

¹⁴ See *infra* Part II, pp. 2383–87; *infra* Part IV, pp. 2395–400.

¹⁵ See Simmons, *supra* note 12, at 1016–17 (describing the requirement's emergence in the eighteenth century).

trusted not to trained judges, but to lay factfinders drawing on their basic experience of the world.¹⁶ Because expert testimony functions largely by instructing juries on the proper conclusions to draw from a set of facts, American courts have hesitated to admit such testimony unless it contributes information that is absolutely necessary to help a jury resolve a dispute.¹⁷ Expert testimony on matters that a jury could evaluate through its common sense, courts have reasoned, does not assist a jury in its decisionmaking role so much as usurp it.¹⁸

In recent decades, courts' devotion to protecting the "province of the jury" from expert intrusion has undergone a process of "slow erosion."¹⁹ Judges have increasingly welcomed expert witnesses to testify on matters once considered squarely within the scope of the jury's factual determinations.²⁰ In the realm of eyewitness identifications, however, while some courts have demonstrated an increasing hospitality toward experts in certain narrowly defined circumstances,²¹ the general trend of exclusion remains robust. Courts have explained their aversion to expert testimony on numerous grounds — not least, that experts prolong trials and multiply costs,²² that technical testimony distracts or confuses the jury,²³ and that the prestige associated with scientific researchers may unduly influence jurors.²⁴ Yet the most consistent explanation has remained that expert testimony is, simply put,

¹⁶ See *id.* at 1013–14.

¹⁷ See *Salem v. U.S. Lines Co.*, 370 U.S. 31, 35 (1962) (excluding expert testimony if jurors, "as men of common understanding, are as capable of comprehending the primary facts and of drawing correct conclusions from them as are [proposed experts]" (quoting *U.S. Smelting Co. v. Parry*, 166 F. 407, 415 (8th Cir. 1909))); FED. R. EVID. 702 advisory committee's note (1972 Proposed Rules) ("There is no more certain test for determining when experts may be used than . . . whether the untrained layman would be qualified to determine intelligently . . . the particular issue without enlightenment from those having a specialized understanding" (quoting *Mason Ladd, Expert Testimony*, 5 VAND. L. REV. 414, 418 (1952)) (internal quotation mark omitted)).

¹⁸ See *Simmons, supra* note 12, at 1018–20.

¹⁹ *Id.* at 1015. For the origin of the concept of the "province of the jury," referring to factfinding functions best relegated to the jury's discretion, see *id.* at 1018–23.

²⁰ *Id.* at 1024–27. Some courts have even begun admitting expert testimony on credibility issues, such as the psychological effects of trauma on a witness's demeanor on the stand, but this approach remains a minority rule. See *Roger B. Handberg, Expert Testimony on Eyewitness Identification: A New Pair of Glasses for the Jury*, 32 AM. CRIM. L. REV. 1013, 1044–50 (1995).

²¹ See, e.g., *United States v. Rodriguez-Felix*, 450 F.3d 1117, 1124 (10th Cir. 2006) (noting "a trend in recent years to allow such testimony under circumstances described as narrow" (quoting *United States v. Smith*, 156 F.3d 1046, 1053 (10th Cir. 1998)) (internal quotation mark omitted)); *United States v. Smith*, 122 F.3d 1355, 1359 (11th Cir. 1997) (per curiam) (noting a trend toward admitting testimony "under 'narrow' or 'certain' circumstances" (quoting *United States v. Harris*, 995 F.2d 532, 535 n.3 (4th Cir. 1993))).

²² E.g., *United States v. Jones*, 689 F.3d 12, 19 (1st Cir. 2012); *United States v. Langan*, 263 F.3d 613, 621 (6th Cir. 2001); *United States v. Brien*, 59 F.3d 274, 277 (1st Cir. 1995); *United States v. Brown*, 540 F.2d 1048, 1054 (10th Cir. 1976).

²³ E.g., *Jones*, 689 F.3d at 19; *Langan*, 263 F.3d at 621; *Brien*, 59 F.3d at 277.

²⁴ E.g., *United States v. Smithers*, 212 F.3d 306, 318–19 (6th Cir. 2000) (Batchelder, J., dissenting); *United States v. Foshier*, 590 F.2d 381, 382 (1st Cir. 1979).

unnecessary.²⁵ As numerous courts have insisted, the basic proposition that eyewitnesses interviewed months or years after the fact may provide unreliable testimony is an insight “within the ordinary knowledge of most lay jurors.”²⁶ As a result, an average juror drawing on his or her lay knowledge is fully qualified to adjudge the credibility of eyewitness testimony without the benefit of any specialized research — to “adequately weigh these problems through common-sense evaluation.”²⁷

Setting aside the objective quality of the typical juror’s knowledge on eyewitness testimony, courts have questioned whether the offerings of scientific experts provide any comparative advantage. In a seminal 1979 case, the First Circuit cautioned that “a trial court can, in its discretion, conclude that scientific evaluation either has not reached, or perhaps cannot reach a level of reliability such that scientific analysis of a question of fact surpasses the quality of common-sense evaluation inherent in jury deliberations.”²⁸ Although respect for social science research into eyewitness credibility has grown markedly in the decades since, courts have continued to dismiss proposed expert testimony on eyewitness credibility as “rather pedestrian,”²⁹ “susceptible of elucidation without specialized scientific knowledge,”³⁰ or adding “almost nothing beyond what common sense and argument would supply.”³¹

In short, most courts justify the exclusion of expert testimony on eyewitness identifications primarily as a matter of deference to the intelligence of the lay jury. Dismissing expert testimony as infringing on the jury’s common-sense competence to evaluate eyewitnesses, they endeavor to ensure, as the Tenth Circuit once exhorted, that “expert testimony . . . [not] invade the field of common knowledge, experience and education of men”³²: to defend the authority of the lay jury against the elite denigrations of scientific experts.

²⁵ See, e.g., *Rodriguez-Felix*, 450 F.3d at 1126 (denying that expert testimony can measurably “assist the trier of fact” in evaluating eyewitnesses); *United States v. Martin*, 391 F.3d 949, 953–54 (8th Cir. 2004); *United States v. Hall*, 165 F.3d 1095, 1105 (7th Cir. 1999); *Smith*, 156 F.3d at 1053; *Smith*, 122 F.3d at 1358; *United States v. Angleton*, 269 F. Supp. 2d 868, 877–78 (S.D. Tex. 2003).

²⁶ *Langan*, 263 F.3d at 624; see also, e.g., *Smith*, 122 F.3d at 1357; *Harris*, 995 F.2d at 534; *United States v. Hudson*, 884 F.2d 1016, 1024 (7th Cir. 1989); *United States v. Purham*, 725 F.2d 450, 454 (8th Cir. 1984); Bucci, *supra* note 7, at 1 n.2.

²⁷ *Smith*, 122 F.3d at 1357 (quoting *United States v. Thevis*, 665 F.2d 616, 641 (5th Cir. Unit B 1982)); see also *Rodriguez-Felix*, 450 F.3d at 1125; *Harris*, 995 F.2d at 535; *United States v. Smith*, 736 F.2d 1103, 1105 (6th Cir. 1984) (per curiam).

²⁸ *Fosher*, 590 F.2d at 383.

²⁹ *United States v. Stevens*, 935 F.2d 1380, 1399 (3d Cir. 1991).

³⁰ *Id.*

³¹ *United States v. Brien*, 59 F.3d 274, 277 (1st Cir. 1995).

³² *United States v. Brown*, 540 F.2d 1048, 1054 (10th Cir. 1976).

B. *Declining Faith in the Province of the Jury*

In fact, statistical and sociological evidence has confirmed that juries are woefully incompetent at evaluating eyewitness testimony. Overreliance on eyewitness identifications is the leading cause of wrongful convictions in the United States today: false eyewitness identifications play some role in roughly seventy-five percent of convictions overturned through DNA testing and provide the central evidence against defendants in half of those convictions.³³

While courts once questioned the reliability of social science studies on eyewitnesses,³⁴ judges are now encountering an increasingly sophisticated and rigorous body of research.³⁵ Experts come prepared to testify on numerous technical, often-counterintuitive factors affecting eyewitness credibility,³⁶ including interracial bias,³⁷ stress,³⁸ suggestive identification procedures,³⁹ repeated exposure to suspects,⁴⁰ the influence of post-event information,⁴¹ and reinforcement effects from discussing a case with fellow witnesses.⁴² Some courts have acknowledged the potential of such research to facilitate more precise assessments of eyewitness credibility.⁴³ Indeed, at least one scientific insight — the lack of correlation between a witness's confidence and

³³ Vallas, *supra* note 1, at 101; *see also* Timothy P. O'Toole & Giovanna Shay, *Manson v. Brathwaite Revisited: Towards a New Rule of Decision for Due Process Challenges to Eyewitness Identification Procedures*, 41 VAL. U. L. REV. 109, 110 (2006) (noting the high incidence of convictions obtained through eyewitness identifications among those that are later overturned).

³⁴ *See, e.g.*, *United States v. Fosher*, 590 F.2d 381, 383 (1st Cir. 1979).

³⁵ *See* Simmons, *supra* note 12, at 1030 (“[O]ver the past thirty years, empirical studies and scientific doctrines used to explain [mistakes in perception and memory] have become far more sophisticated.”); Reedy, *supra* note 1, at 907 (“[T]he field of cognitive psychology has made dramatic strides in understanding the way the brain encodes and stores memories.”).

³⁶ *See, e.g.*, *United States v. Jones*, 689 F.3d 12, 15–16 (1st Cir. 2012); *United States v. Brownlee*, 454 F.3d 131, 140 n.5 (3d Cir. 2006); *United States v. Hall*, 165 F.3d 1095, 1101 n.1 (7th Cir. 1999).

³⁷ *See, e.g.*, *Jones*, 689 F.3d at 15–16; *Brownlee*, 454 F.3d at 140 n.5; *United States v. Rincon*, 28 F.3d 921, 922–23 (9th Cir. 1994).

³⁸ *See, e.g.*, *Jones*, 689 F.3d at 15–16; *Brownlee*, 454 F.3d at 140 n.5; *Hall*, 165 F.3d at 1101 n.1; *United States v. Smith*, 156 F.3d 1046, 1052 (10th Cir. 1998); *United States v. Brien*, 59 F.3d 274, 276 (1st Cir. 1995); *United States v. Harris*, 995 F.2d 532, 534 (4th Cir. 1993); *United States v. Downing*, 753 F.2d 1224, 1230–31 (3d Cir. 1985).

³⁹ *See, e.g.*, *Jones*, 689 F.3d at 15–16; *Brownlee*, 454 F.3d at 140 n.5; *United States v. Smithers*, 212 F.3d 306, 310 (6th Cir. 2000); *Hall*, 165 F.3d at 1101 n.1; *Brien*, 59 F.3d at 276.

⁴⁰ *See, e.g.*, *Hall*, 165 F.3d at 1101 n.1; *Smith*, 156 F.3d at 1052; *Harris*, 995 F.2d at 534.

⁴¹ *See, e.g.*, *Brownlee*, 454 F.3d at 140 n.5; *Smithers*, 212 F.3d at 310; *Smith*, 156 F.3d at 1052; *United States v. Curry*, 977 F.2d 1042, 1051 (7th Cir. 1992); *Downing*, 753 F.2d at 1230–31.

⁴² *See, e.g.*, *Brownlee*, 454 F.3d at 140 n.5; *Smithers*, 212 F.3d at 310; *Harris*, 995 F.2d at 534; *Downing*, 753 F.2d at 1230–31.

⁴³ *See, e.g.*, *United States v. Rodriguez-Felix*, 450 F.3d 1117, 1123–24 (10th Cir. 2006) (noting that “modern research . . . recognizes that an eyewitness’s identification may be subject to significant witness error,” *id.* at 1123, and listing key factors); *Smithers*, 212 F.3d at 312 n.1 (noting that “[a] plethora of recent studies show that the accuracy of an eyewitness identification depends on how the event is observed, retained and recalled” and citing key factors).

her accuracy — has led some courts to renounce a once-central assumption in their legal frameworks for assessing eyewitness evidence.⁴⁴

Courts have acknowledged that the average juror’s “common-sense” intuitions lag markedly behind this growing body of research.⁴⁵ Jurors often incorrectly believe that stress enhances rather than decreases a witness’s memory for faces⁴⁶ and that a witness’s confidence correlates with accuracy.⁴⁷ They are unfamiliar with the effects of race⁴⁸ or repeated exposure to a suspect⁴⁹ on identifications. And they vastly overestimate the ability of witnesses to retain memories over time.⁵⁰ As a result, jurors remain inordinately deferential to eyewitness testimony.⁵¹ As some courts have recognized, the growing gap between jurors’ assumptions and scientific research suggests the utility of that research, not only in sharpening jurors’ evaluations of eyewitness evidence,⁵² but also in defraying jurors’ entrenched misconceptions.⁵³

III. THE TRAINED COMPETENCE OF THE PROFESSIONAL JURIST

Few courts today deny the gaps between scientific expertise and lay juror knowledge on eyewitness identifications. Far from embracing

⁴⁴ See *Phillips v. Allen*, 668 F.3d 912, 916–17 (7th Cir. 2012) (noting that scientific research “call[s] . . . into very serious question” the idea that “eyewitness confidence correlates with accurate identifications” (quoting Brief for Amicus Curiae American Psychological Association in Support of Petitioner at 19 n.14, *Perry v. New Hampshire*, 132 S. Ct. 716 (2012) (No. 10-8974) [hereinafter APA Brief])). The Supreme Court had earlier identified a witness’s certainty as a factor supporting the reliability of her testimony. See *Manson v. Brathwaite*, 432 U.S. 98, 115 (1977).

⁴⁵ See, e.g., *Phillips*, 668 F.3d at 916 (“[M]ost people’s intuitions on the subject of identification are wrong.”); *Brownlee*, 454 F.3d at 142 (noting that eyewitness science “often contradicts jurors’ ‘commonsense’ understandings” (quoting Rudolf Koch, Note, *Process v. Outcome: The Proper Role of Corroborative Evidence in Due Process Analysis of Eyewitness Identification Testimony*, 88 CORNELL L. REV. 1097, 1105 n.48 (2003))); *Smithers*, 212 F.3d at 312 n.1 (acknowledging that “many jurors’ assumptions” about eyewitness evidence “are actively wrong”).

⁴⁶ *United States v. Owens*, 682 F.3d 1358, 1363 (11th Cir. 2012) (Barkett, J., dissenting from denial of rehearing en banc); *Downing*, 753 F.2d at 1231–32.

⁴⁷ Vallas, *supra* note 1, at 108.

⁴⁸ Jennifer L. Overbeck, Note, *Beyond Admissibility: A Practical Look at the Use of Eyewitness Expert Testimony in the Federal Courts*, 80 N.Y.U. L. REV. 1895, 1903 (2005).

⁴⁹ *Id.* at 1903–04.

⁵⁰ *Id.* at 1904.

⁵¹ Vallas, *supra* note 1, at 107 (“[T]he general population is still unjustifiably trusting of eyewitness testimony.”); *cf.* *Watkins v. Sowders*, 449 U.S. 341, 352 (1981) (Brennan, J., dissenting) (“[T]here is almost *nothing more convincing* than a live human being who takes the stand, points a finger at the defendant, and says ‘That’s the one!’” (quoting ELIZABETH F. LOFTUS, EYEWITNESS TESTIMONY 19 (1979)) (internal quotation mark omitted)).

⁵² See *United States v. Downing*, 753 F.2d 1224, 1230–31 (3d Cir. 1985) (“Each of these ‘variables’ goes beyond what an average juror might know as a matter of common knowledge, and indeed some of them directly contradict ‘common sense.’”).

⁵³ See *United States v. Hall*, 165 F.3d 1095, 1118 (7th Cir. 1999) (Easterbrook, J., concurring) (deeming scientific evidence “especially valuable when jurors are sure that they understand something, for these beliefs may be hard for lawyers to overcome with mere argument and assertion”).

expert testimony as a way to remedy those deficiencies, however, the majority of courts insist that the jury's epistemic gaps are better remedied through the internal procedures of the courtroom — specifically, cross-examination by defense attorneys and jury instructions issued by the presiding judge.⁵⁴ This Part examines how courts increasingly defend the exclusion of scientific testimony based on the sufficiency of trained lawyers' and judges' professional skills in the courtroom. More than a democratic commitment to the competence of the lay jury, courts' continuing resistance to expert testimony may better reflect a professional pride in the authority of the trained jurist.

A. *Cross-Examination and the "Competent" Defense Lawyer*

American courtroom procedure has never entrusted credibility determinations to the jury alone. Rather, attacking the credibility of an adverse witness's testimony has long been recognized as among a lawyer's core duties at trial. Cross-examination is one of the experienced litigator's most specialized skills: an integral tool in the adversary system's pursuit of truth⁵⁵ and a central justification behind the Sixth Amendment right to counsel.⁵⁶

Unsurprisingly, then, even courts that acknowledge the limits of jurors' lay knowledge on eyewitness evidence often dismiss expert testimony by insisting that a competent defense lawyer can effectively challenge faulty identifications. "[S]killful cross-examination," courts insist, "provides an equally, if not more, effective tool for testing the reliability of an eyewitness at trial."⁵⁷ A foundational case on the admissibility of expert testimony, the Ninth Circuit's 1973 *United States v. Amaral*⁵⁸ included a robust defense of the role of cross-examination

⁵⁴ See Jules Epstein, *The Great Engine That Couldn't: Science, Mistaken Identifications, and the Limits of Cross-Examination*, 36 STETSON L. REV. 727, 755 (2007) ("It is in the area of conditional approval of expert testimony in identification cases that courts have nominally adopted the finding of science while simultaneously extolling and exalting the power of cross-examination.").

⁵⁵ See *Watkins*, 449 U.S. at 349 (declining to abandon "the time-honored process of cross-examination as the device best suited to determine the trustworthiness of testimonial evidence"); *Davis v. Alaska*, 415 U.S. 308, 316 (1974) ("Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested.").

⁵⁶ See *Coleman v. Alabama*, 399 U.S. 1, 9 (1970) (plurality opinion) (finding a constitutional right to counsel at preliminary hearings because "the skilled interrogation of witnesses by an experienced lawyer can fashion a vital impeachment tool for use in cross-examination of the State's witnesses at the trial, or preserve testimony favorable to the accused of a witness who does not appear at the trial").

⁵⁷ *United States v. Rodriguez-Felix*, 450 F.3d 1117, 1125 (10th Cir. 2006); accord *United States v. Ginn*, 87 F.3d 367, 370 (9th Cir. 1996) (approving the conclusion that cross-examination is "the most efficient method of attacking the credibility of the eyewitness testimony"); see also, e.g., *United States v. Langan*, 263 F.3d 613, 624 (6th Cir. 2001); *United States v. Hall*, 165 F.3d 1095, 1105 (7th Cir. 1999); *United States v. Labansat*, 94 F.3d 527, 530 (9th Cir. 1996); *United States v. Harris*, 995 F.2d 532, 536 (4th Cir. 1993).

⁵⁸ 488 F.2d 1148 (9th Cir. 1973).

in the adversarial system.⁵⁹ “Certainly,” the court concluded, “effective cross-examination is adequate to reveal any inconsistencies or deficiencies in . . . eye-witness testimony.”⁶⁰ Decades later, judges continue to rely on cross-examination to challenge eyewitness identifications on a broad range of grounds, from basic inconsistencies in a witness’s recollections⁶¹ to increasingly specialized attacks on a witness’s confidence,⁶² the erosion of memory over time,⁶³ transference,⁶⁴ and the incorporation of post-event information into past memories.⁶⁵

In many ways, courts’ insistence on the defense lawyer’s professional skills in uncovering weak testimony is directly coextensive with their confidence in the jury’s “common-sense” ability to evaluate eyewitnesses.⁶⁶ Courts commonly note, for example, that an expert’s testimony is not “outside the juror’s common knowledge and experience” because the defense counsel’s “cross-examination amply exposed” a witness’s weaknesses,⁶⁷ or that “jurors using common sense . . . can judge the credibility of an eyewitness identification, especially since deficiencies . . . can be brought out with skillful cross-examination.”⁶⁸ Scholars have suggested that courts’ reliance on cross-examination is a proxy for deferring, once more, to the jury’s competence: an “aid” to buttress the jury’s ability to evaluate witnesses “on its own.”⁶⁹ Yet the conflation might suggest the opposite: that courts’ stock in the jury’s inherent competence to evaluate eyewitness evidence reflects an underlying confidence in the professional duties of trained counsel. These courts may see the vaunted “common knowledge” of the jury less as a common aptitude inherent in the lay public than as a construct of the defense lawyer’s professional skills.

⁵⁹ See *id.* at 1153 (“Our legal system places primary reliance for the ascertainment of truth on the ‘test of cross-examination.’” (quoting *United States v. De Sisto*, 329 F.2d 929, 934 (2d Cir. 1964))).

⁶⁰ *Id.*

⁶¹ See, e.g., *Harris*, 995 F.2d at 536 (noting defense counsel’s attempts to highlight inaccuracies in witness’s descriptions of defendant).

⁶² See, e.g., *id.* (noting defense counsel’s attempt to challenge witnesses’ confidence).

⁶³ See, e.g., *United States v. Labansat*, 94 F.3d 527, 530 (9th Cir. 1996) (noting defense counsel’s attempts to highlight long duration between robbery and subsequent identification).

⁶⁴ See, e.g., *United States v. Langan*, 263 F.3d 613, 624 (6th Cir. 2001) (noting defense counsel’s attempt to cross-examine witness on possible transference from seeing defendant on television).

⁶⁵ See, e.g., *Moore v. Tate*, 882 F.2d 1107, 1110–11 (6th Cir. 1989) (*per curiam*) (noting defense counsel’s attempt to cross-examine witness on her prior identification of the defendant).

⁶⁶ See Handberg, *supra* note 20, at 1038 (arguing that courts’ insistence on the sufficiency of cross-examination to replace expert testimony “is substantively identical to [the objection] raised by courts that reject expert testimony because it is ‘within the jury’s common sense’”).

⁶⁷ *United States v. Rodriguez-Felix*, 450 F.3d 1117, 1126 (10th Cir. 2006).

⁶⁸ *United States v. Harris*, 995 F.2d 532, 535 (4th Cir. 1993); see also *United States v. Fosher*, 590 F.2d 381, 382 (1st Cir. 1979) (holding that a jury was “fully capable of assessing the eyewitnesses’ ability to perceive and remember, given the help of cross-examination”).

⁶⁹ Handberg, *supra* note 20, at 1038.

In fact, courts' faith in cross-examination sometimes seems concerned less with providing the jury with the proper tools to assist its decisionmaking than with preserving the proper role of the attorney in trial proceedings. Explaining its aversion to expert testimony, the Ninth Circuit in *Amaral* insisted that "[i]t is the responsibility of counsel during cross-examination to inquire into the witness' opportunity for observation, his capacity for observation, his attention and interest and his distraction or division of attention."⁷⁰ Three decades later, at least one judge would put the concern more bluntly: "[T]o a certain extent, lawyers are abdicating their own roles when they seek to rely on experts instead of cross-examination to discredit an eyewitness identification."⁷¹ The suggestion is that any self-respecting lawyer would depend on his or her own professional skills to undermine an adverse party's witness. And, for that matter, that any self-respecting lawyer would be able to do so. "[A] reasonably competent attorney," the Ninth Circuit has more recently noted, would "unlikely" bother retaining an expert witness, because "[a]ny weaknesses in eyewitness identification testimony can ordinarily be revealed by counsel's careful cross-examination."⁷² The comment suggests that the work of impeaching an eyewitness's testimony should fall to opposing counsel as a matter of professional self-respect: a minimum bar of professional competence among trained counsel.

In context, it may be notable that courts that rely on cross-examination to fill holes in the jury's lay knowledge on eyewitnesses tend to gloss over substantive shortcomings in cross-examination itself. Courts' confidence in defense attorneys belies growing concerns among scholars,⁷³ and even some courts,⁷⁴ that "cross-examination is an ineffective means of informing jurors about eyewitness identification reliability issues."⁷⁵ Cross-examination is a poor tool for highlighting the biasing effects of factors outside the witness's own awareness, such as stress or suggestiveness.⁷⁶ And it is an entirely ineffectual one for suggesting counterintuitive psychological effects like the disconnect between a witness's confidence and her level of accuracy.⁷⁷ Perhaps understanding as much, lawyers on cross rarely manage or even attempt

⁷⁰ *United States v. Amaral*, 488 F.2d 1148, 1153 (9th Cir. 1973).

⁷¹ *United States v. Smithers*, 212 F.3d 306, 329 (6th Cir. 2000) (Batchelder, J., dissenting).

⁷² *United States v. Labansat*, 94 F.3d 527, 530 (9th Cir. 1996).

⁷³ See, e.g., Epstein, *supra* note 54, at 766; Steven Penrod & Brian Cutler, *Witness Confidence and Witness Accuracy: Assessing Their Forensic Relation*, 1 PSYCHOL. PUB. POL'Y & L. 817, 819-20 (1995) (citing empirical studies).

⁷⁴ See, e.g., *Ferensic v. Birkett*, 501 F.3d 469, 481-82 (6th Cir. 2007).

⁷⁵ Tallent, *supra* note 6, at 776.

⁷⁶ See Epstein, *supra* note 54, at 775-81 (noting failures to reveal cross-race bias, weapons focus, stress, memory drop-off, confidence-accuracy disconnect, and suggestiveness).

⁷⁷ See APA Brief, *supra* note 44, at 18; Tallent, *supra* note 6, at 776.

to cover numerous factors that expert testimony may convey. Consequently, courts routinely insist that an attorney's cross-examination precluded the need for expert testimony in cases where the cross touched on only a fraction of an expert's proposed topics.⁷⁸ While cross-examination may offer logistical advantages over expert testimony, courts' presumption of its substantive sufficiency to impeach eyewitness testimony overlooks a crucial gap between the institutional competences of trained lawyers and trained scientists to impart specialized information at trial.

B. Jury Instructions and the "Province" of the Judge

There is, of course, an inbuilt tension in judges' assurances that a trained defense attorney's cross-examination supplants any need for expert testimony. Most attempts to introduce expert testimony into the courtroom, after all, come from defense attorneys themselves. Courts' insistence on the adequacy of cross-examination to educate jurors on the failings of eyewitness testimony does not reinforce simply the professional skills of trial lawyers in eliciting truth, but also the authority of trial judges in deciding when truth has been sufficiently served.

In fact, the defense lawyer's cross-examination is neither the sole nor the primary site of legal professionalism at the heart of judicial resistance to expert testimony. Especially in light of cross-examination's acknowledged inability to illuminate fully the nuances of eyewitness recollection,⁷⁹ courts are increasingly vesting the task of educating jurors in judges themselves — specifically, in jury instructions issued by a trial judge to guide the jury's deliberations. Courts routinely justify the exclusion of eyewitness experts on the grounds that a trial judge's instructions are sufficient to convey equivalent information.⁸⁰ Carefully crafted instructions, courts insist, can "ably communicate[]" "the

⁷⁸ See, e.g., *Jackson v. Bradshaw*, 681 F.3d 753, 762–63 (6th Cir. 2012) (finding that cross-examination regarding intoxication, stress, relation-back effect, and suggestiveness supplanted need for expert testimony on cross-racial identifications); *United States v. Rodriguez-Felix*, 450 F.3d 1117, 1122–26 (10th Cir. 2006) (finding that cross-examination regarding delay between identifications supplanted need for expert testimony on conditions of observation, incorporation of post-event information, and suggestive procedures); *United States v. Harris*, 995 F.2d 532, 534–36 (4th Cir. 1993) (finding that cross-examination regarding discussion among witnesses, witness confidence, and inconsistencies in witnesses' recollections supplanted need for expert testimony on the effects of witness discussions, stress, transference, and distortion over time).

⁷⁹ See, e.g., *United States v. Smithers*, 212 F.3d 306, 327–32 (6th Cir. 2000) (Batchelder, J., dissenting) (acknowledging that defendants may be "unable to establish . . . counter-intuitive concept[s]," *id.* at 329, like the disconnect between confidence and accuracy, through cross-examination).

⁸⁰ See, e.g., *United States v. Rincon*, 28 F.3d 921, 925–26 (9th Cir. 1994) (excluding expert testimony because "the district court conveyed that same information by providing a comprehensive jury instruction to guide the jury's deliberations," *id.* at 925); see also, e.g., *United States v. Martin*, 391 F.3d 949, 953–54 (8th Cir. 2004); *United States v. Luis*, 835 F.2d 37, 40–41 (2d Cir. 1987).

counter-intuitive concept[s] suggested by psychological research” to the jury.⁸¹ And, as a logistical matter, instructions boast numerous advantages over expert testimony,⁸² allowing for narrow tailoring to each case’s facts,⁸³ avoiding excessive cost and delay,⁸⁴ and preventing credentialed experts from unduly influencing jurors.⁸⁵

More explicitly than others, some judges appear to see the court’s prerogative to issue jury instructions as an opportunity to showcase the judge’s specialized skills within his or her own professional field. When a divided Sixth Circuit reversed a district court’s exclusion of expert testimony, for example, the dissent censured the majority for derogating what it saw as a paradigm of judicial proficiency: “Certainly the utility of jury instructions . . . was aptly demonstrated in this case, where the district court skillfully addressed [the defendant’s] concerns by adopting an instruction specifically tailored to explain the possible deficiencies of the identifications in this case.”⁸⁶ In a sense, indeed, all courts that deem jury instructions preferable to expert testimony because of their narrow tailoring⁸⁷ or their lesser “risk of confusion”⁸⁸ emphasize the extent to which jury instructions draw on a skill set — parsing material and immaterial facts, or communicating technical issues to a lay jury — unique to the legal profession. These courts maintain that judges’ professional skills in walking jurors through complex issues at trial put them in a position to convey scien-

⁸¹ *Smithers*, 212 F.3d at 329 (Batchelder, J., dissenting); see also *United States v. Jones*, 689 F.3d 12, 19–20 (1st Cir. 2012) (approving the conclusion that eyewitness research “could be more reliably and efficiently conveyed by instructions,” *id.* at 20); *Rincon*, 28 F.3d at 925–26.

⁸² See Sheehan, *supra* note 1, at 674–78 (suggesting that jury instructions minimize prejudice, do not increase the costs and duration of trial, and do not discriminate against poor defendants).

⁸³ See *Smithers*, 212 F.3d at 327–32 (Batchelder, J., dissenting); *State v. Henderson*, 27 A.3d 872, 925 (N.J. 2011), *holding modified by* *State v. Chen*, 27 A.3d 930 (N.J. 2011).

⁸⁴ See *Jones*, 689 F.3d at 19–20; *Smithers*, 212 F.3d at 318–23 (Batchelder, J., dissenting); *Rincon*, 28 F.3d at 925; *Henderson*, 27 A.3d at 925.

⁸⁵ See *Smithers*, 212 F.3d at 319, 329 (Batchelder, J., dissenting) (noting that jury instructions come “without the imprimatur of scientific reliability that accompanies expert testimony”). Some courts also point to the possible confusion of jurors by “dueling experts,” see, e.g., *Jones*, 689 F.3d at 19; *Henderson*, 27 A.3d at 925, but eyewitness identification cases rarely feature rival experts introduced by the state.

⁸⁶ *Smithers*, 212 F.3d at 329 (Batchelder, J., dissenting).

⁸⁷ E.g., *id.* (“Instructions have an advantage over experts in that they can be informed by advances in social science research while communicating only those theories that are relevant to the facts of the case . . .”).

⁸⁸ *Jones*, 689 F.3d at 16; see also *Rincon*, 28 F.3d at 926 (“Given the powerful nature of expert testimony, coupled with its potential to mislead the jury, we cannot say that the district court erred in concluding that the proffered evidence would not assist the trier of fact and that it was likely to mislead the jury.”).

tific information on eyewitness identifications more effectively than scientific experts themselves.⁸⁹

Notably, relying on judges to communicate specialized information on eyewitness identifications does not defend the jury's inherent authority to evaluate evidence at trial; rather, it affirms the relative epistemological superiority of judges over jurors themselves. In an extended concurrence denying the utility of eyewitness scientists in *United States v. Hall*,⁹⁰ Judge Easterbrook of the Seventh Circuit lauded the propriety of entrusting judges, not jurors, with the labor of incorporating new scientific research into judicial deliberations.⁹¹ Analogizing judges' capacity to rein in unreliable eyewitness testimony to their unquestioned prerogative to interpret statutes,⁹² Judge Easterbrook insisted that "it is much better for judges to incorporate scientific knowledge about the trial process *into* that process, rather than to make the subject a debatable issue in every case."⁹³ "[P]rofessional adjudicators who attend continuing judicial education programs and read the scholarly literature," he concluded, "are more likely to absorb the lessons of science than are jurors force fed a little information during a trial."⁹⁴ Somewhat remarkably, Judge Easterbrook suggested that jury instructions may be preferable to expert testimony because they exert *greater* influence on the jury than does a scientific expert. As he noted, "[j]urors are more likely to accept [scientific] information coming from a judge than from a scholar, whose skills do not lie in the ability to persuade lay jurors,"⁹⁵ and whose insufficiently authoritative demeanor in the courtroom may be "misunderstood" by the jury as a sign of unreliability.⁹⁶ The contention flies in the face of a key rationale against admitting expert witnesses in the first place: the fear that

⁸⁹ See, e.g., *Jones*, 689 F.3d at 20 ("The [district] judge was fully entitled to conclude that this general information could be more reliably and efficiently conveyed by instructions rather than through dueling experts . . .").

⁹⁰ 165 F.3d 1095 (7th Cir. 1999).

⁹¹ See *id.* at 1119–20 (Easterbrook, J., concurring).

⁹² *Id.* at 1120 ("Linguists and other experts could help jurors to interpret statutes, but judges do that task instead and give the results to the jury. Similarly a judge, recognizing the main conclusions of the scholarly study of memory . . . could block a lawyer from arguing that a given witness is *sure* of his recollection, and therefore is more likely to be right.")

⁹³ *Id.*

⁹⁴ *Id.* Similarly, in *People v. Chuyn*, No. 2707/2010, 2011 WL 6187150 (N.Y. Sup. Ct. Dec. 13, 2011), a New York state trial court held that proposed expert testimony that may be appropriate before a jury is nevertheless gratuitous at a bench trial, *id.* at *19–20. Because "[j]udges understand the research [on eyewitness identifications] substantially better than jurors," the court concluded that, "in the context of a hearing before the court, the need for expert elucidation is greatly diminished." *Id.* at *20 (alterations in original).

⁹⁵ *Hall*, 165 F.3d at 1120 (Easterbrook, J., concurring).

⁹⁶ *Id.* (noting that a "genuine scholar" will likely be discredited by "fidgeting on the stand").

the “imprimatur of scientific reliability”⁹⁷ attaching to credentialed witnesses will impart too strong a bias on the jury’s deliberations.

It is this irony that is echoed, more recently, in the First Circuit’s suggestion that, since jury instructions “more reliably and efficiently” convey new research on eyewitnesses to the jury, “it was within the district court’s province to provide this information through instructions rather than through dueling experts.”⁹⁸ The First Circuit’s choice of words reveals that judges’ resistance to expert witnesses in the courtroom operates to protect not only the deliberative labor of lay jurors but also the professional role of judges from encroachment by scientific experts. Considering that the very concept of the “province of the jury” originated as a concern with protecting the jury’s factfinding duties from undue interference from *judges*,⁹⁹ there is something especially peculiar about courts seeking to defend the jury’s authority against the intrusions of scientific experts by expanding the authority of judges themselves.

Of course, as in the case of cross-examination, federal courts that insist on the value of jury instructions as instructional tools often gloss over their demonstrable shortcomings. Studies suggest that jury instructions have negligible effect in educating jurors on the psychological nuances of eyewitness identifications.¹⁰⁰ Furthermore, there is wide variation in the extent to which jury instructions actually cover the content of proposed scientific testimony. While some judges craft instructions that meticulously parallel an expert’s excluded testimony,¹⁰¹ others replace scientific expert testimony with instructions that cover only a fraction of the witness’s proposed report.¹⁰²

⁹⁷ United States v. Smithers, 212 F.3d 306, 329 (6th Cir. 2000) (Batchelder, J., dissenting).

⁹⁸ United States v. Jones, 689 F.3d 12, 20 (1st Cir. 2012).

⁹⁹ See Simmons, *supra* note 12, at 1020–21.

¹⁰⁰ Critics have noted that jury instructions rarely persuade jurors of information that conflicts with their preconceived assumptions, that overly generalized pattern instructions lack the persuasiveness of expert witnesses, that judges are rarely able to explain the science of memory and perception, that the instructions’ length and technical legal language often make them unintelligible to jurors, and that their introduction at the very end of trial means that instructions often come too late to meaningfully influence a jury’s conclusions. See Fradella, *supra* note 1, at 25; Handberg, *supra* note 20, at 1061; Vallas, *supra* note 1, at 131–32; Tallent, *supra* note 6, at 776.

¹⁰¹ See, e.g., Jones, 689 F.3d at 15–17 (finding that jury instructions adequately substituted for an expert witness where instructions echoed the proposed testimony on cross-racial identifications, stress, fear, distraction, the disconnect between accuracy and confidence, and suggestiveness).

¹⁰² See, e.g., United States v. Hall, 165 F.3d 1095, 1101–07 (7th Cir. 1999) (holding that instructions on conditions of observation and truthfulness sufficiently replaced proposed testimony on the disconnect between confidence and accuracy, reinforcement effects, photo bias and blending, suggestiveness, elapsed time, and transference); United States v. Smith, 122 F.3d 1355, 1359 (11th Cir. 1997) (holding that instructions covering cross-racial bias, transference, stress, and elapsed time sufficiently replaced proposed testimony on racial bias, disguise, stress, weapons focus, suggestiveness, elapsed time, and the disconnect between confidence and accuracy); United States v. Rincon, 28 F.3d 921, 923–26 (9th Cir. 1994) (holding that instructions on duration, conditions of

To be sure, courts that compare the relative values of expert testimony and jury instructions perform a complex cost-benefit analysis that involves numerous factors beyond the breadth of information covered. In and beyond the context of eyewitness reliability, expert witnesses can dramatically drag out trials, present overly complex or confusing testimony, and import partisan bias into the courtroom under the guise of scientific neutrality. Even acknowledging the substantive deficiencies of jury instructions — or, for that matter, of cross-examination — a court may nevertheless conclude that their procedural advantages may suffice to outweigh a limited loss of information. Yet the fact is that courts do not acknowledge these substantive deficiencies. As in the cases above, courts do not weigh the greater comprehensiveness of expert testimony against the logistical benefits of jury instructions or cross-examination, but rather assume that the proposed testimony offers no additional value to begin with. Courts' failure to address the substantive deficiencies of their internal procedures suggests a somewhat myopic faith in those procedures as a safeguard against unreliable eyewitness testimony.

IV. INSTITUTIONAL RIVALRY AND TRADITIONAL SPHERES OF JUDICIAL AUTHORITY

Federal courts' insistence that judicial safeguards obviate the need for expert testimony on eyewitness identifications may seem surprising, since in many respects U.S. courts are defined by their institutional humility. Judges routinely insist on their "lack of competence" to review legislative decisions on matters such as national security,¹⁰³ economic and social regulation,¹⁰⁴ and any number of other topics beyond the judiciary's "specialized" expertise.¹⁰⁵ Courts typically defer to the executive branch on questions of foreign policy,¹⁰⁶ prosecutorial discretion,¹⁰⁷ and prison operations¹⁰⁸ as matters "not within judicial compe-

observation, elapsed time, suggestiveness, and inconsistencies in testimony "conveyed [the] same information," *id.* at 925, as proposed testimony on memory capture and retention, stress, mental condition, suddenness, and cross-ethnic bias).

¹⁰³ See, e.g., *Rostker v. Goldberg*, 453 U.S. 57, 65 (1981) ("[T]he lack of competence on the part of the courts [in this area] is marked.")

¹⁰⁴ See, e.g., *U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 22–23 (1977) ("As is customary in reviewing economic and social regulation, . . . courts properly defer to legislative judgment . . .").

¹⁰⁵ *Lalli v. Lalli*, 439 U.S. 259, 274 (1978) (plurality opinion) (quoting *Mathews v. Lucas*, 427 U.S. 495, 515–16 (1976)).

¹⁰⁶ See, e.g., *United States v. Kin-Hong*, 110 F.3d 103, 110 (1st Cir. 1997) (noting that issues that "implicate questions of foreign policy . . . are better answered by the executive branch").

¹⁰⁷ See, e.g., *United States v. Armstrong*, 517 U.S. 456, 465 (1996) ("Judicial deference to the [prosecutorial] decisions of these executive officers rests in part on an assessment of the relative competence of prosecutors and courts.")

¹⁰⁸ See, e.g., *Kent v. United States*, 383 U.S. 541, 543 (1966) ("[Q]uestions as to the adequacy of custodial and treatment facilities and policies . . . are not within judicial competence . . .").

tence.” They point to the “different institutional competencies of agencies and courts”¹⁰⁹ as grounds to defer to administrative policy choices — and even statutory interpretations — in fields where expert agencies have “more than ordinary knowledge.”¹¹⁰ In short, the American judiciary is built on a deep awareness of and humility about courts’ professional limitations.

Why, then, do courts place such unyielding faith in the power of judicial procedures like cross-examination and jury instruction to educate jurors on the failings of eyewitness identifications, to the exclusion of potentially valuable assistance from specialized scientific authorities? Crucially, courts’ push against scientific experts on eyewitness identifications is not part of a broader resistance against scientific expertise. On the contrary, scientific evidence in general has long enjoyed “a special status in the courtroom.”¹¹¹ As borne out by the Supreme Court’s recent case *Williams v. Illinois*¹¹² — in which Justice Breyer insisted that the presumptive reliability of accredited scientific laboratories justified exempting scientific reports from the mandates of the Confrontation Clause¹¹³ — the judicial system accords the hard sciences a profound level of respect.

This Part suggests that courts’ particular aversion to eyewitness experts may best be seen as a manifestation of institutional rivalry: not a resistance to the authority of scientific expertise per se, but rather a specific aversion to the encroachment of outside authorities on matters traditionally considered within the courts’ unique sphere of competence. Long charged with guaranteeing the accuracy and fairness of evidence at trial, courts remain sensitive to the claims of external experts to improve on their traditional methods for evaluating witness credibility. In the context of eyewitness identifications especially, courts’ staunch defense of traditional judicial procedures as a tool against unreliable evidence reflects a judicial concern with preserving a specifically legal sphere of expertise.

A. *Traditional Judicial Authority over Evidentiary Procedure*

Capable of profound humility on subjects outside their competence, courts nevertheless consider some topics to be squarely within their institutional expertise. The most prominent example has historically

¹⁰⁹ *Negusie v. Holder*, 129 S. Ct. 1159, 1171 (2009) (Stevens, J., concurring in part and dissenting in part).

¹¹⁰ *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) (quoting *United States v. Shimer*, 367 U.S. 374, 382 (1961)).

¹¹¹ Paul S. Milich, *Controversial Science in the Courtroom: Daubert and the Law's Hubris*, 43 EMORY L.J. 913, 915 (1994); see *id.* at 914–15.

¹¹² 132 S. Ct. 2221 (2012).

¹¹³ *Id.* at 2248 (Breyer, J., concurring) (suggesting an exception to the Confrontation Clause that “presumptively would allow introduction of DNA reports from accredited crime laboratories”).

been constitutional interpretation. From policing the separation of powers¹¹⁴ to defending individual rights,¹¹⁵ the judicial system presumes that judgments concerning the scope of constitutional powers lie squarely “within the competence of the courts.”¹¹⁶

Another traditional realm of authority has centered on evidentiary procedure. Courts have taken a strong hand in creating rules to guarantee the integrity of evidence at trial. In the last several decades, the Supreme Court has erected numerous safeguards to ensure the fundamental fairness of admitted evidence,¹¹⁷ including the exclusion of materials obtained through unconstitutional searches and seizures,¹¹⁸ preliminary review of expert testimony,¹¹⁹ and scrutiny of suggestive eyewitness identifications.¹²⁰

Similarly, the bulk of rules aimed at ensuring the *accuracy* of evidence has emerged primarily through the common law pronouncements of courts.¹²¹ Although numerous legislatures in the last decades have displaced this common law system with statutory rules of evidence,¹²² such legislative provisions have not overridden courts’ traditional authority so much as codified the courts’ common law rules.¹²³ The Federal Rules of Evidence “grant broad authority to trial judges to control the proceedings” in their courtrooms¹²⁴ and specifically preserve judges’ rights to recognize new evidentiary privileges “in the light of [their] reason and experience.”¹²⁵ Most notably, the Rules explicitly entrust judges with regulating the examination of evidence to facilitate accurate assessments of witnesses by the jury. As Rule 611(a) provides, courts “should exercise reasonable control over the mode and

¹¹⁴ See, e.g., *Goldwater v. Carter*, 444 U.S. 996, 1007 (1979) (Brennan, J., dissenting).

¹¹⁵ See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 855 (1992).

¹¹⁶ *Goldwater*, 444 U.S. at 1007 (Brennan, J., dissenting); see also *Casey*, 505 U.S. at 855 (“[T]he required determinations fall within judicial competence.”); *U.S. Dep’t of Commerce v. Montana*, 503 U.S. 442, 458 (1992) (“[T]he interpretation of the apportionment provisions of the Constitution is well within the competence of the Judiciary.”).

¹¹⁷ The Supreme Court has even used its constitutional authority to impose on executive officers a duty to observe procedures for guaranteeing fair trials. See, e.g., *Miranda v. Arizona*, 384 U.S. 436 (1966).

¹¹⁸ See *Mapp v. Ohio*, 367 U.S. 643 (1961).

¹¹⁹ See *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

¹²⁰ See *Manson v. Brathwaite*, 432 U.S. 98 (1977); *Neil v. Biggers*, 409 U.S. 188 (1972).

¹²¹ See Joseph W. Rand, Note, *The Residual Exceptions to the Federal Hearsay Rule: The Futile and Misguided Attempt to Restrain Judicial Discretion*, 80 GEO. L.J. 873, 874–75 (1992) (discussing the traditional reliance on judicial discretion to shape hearsay doctrine).

¹²² See, e.g., FED. R. EVID. (enacted 1975).

¹²³ See Glen Weissenberger, *Evidence Myopia: The Failure to See the Federal Rules of Evidence as a Codification of the Common Law*, 40 WM. & MARY L. REV. 1539 (1999).

¹²⁴ *Benedict v. United States*, 822 F.2d 1426, 1430 (6th Cir. 1987) (Guy, J., dissenting).

¹²⁵ *Trammel v. United States*, 445 U.S. 40, 47 (1980) (quoting FED. R. EVID. 501) (internal quotation mark omitted). *But see* *United States v. Benally*, 546 F.3d 1230, 1239 (10th Cir. 2008) (holding that, where Congress has considered an evidentiary issue, “[c]ourts no longer have common law authority to . . . refashion rules of evidence . . . but must enforce the rules as enacted”).

order of examining witnesses and presenting evidence so as to . . . make those procedures effective for determining the truth.”¹²⁶ The Federal Rules of Evidence expressly rely on the professional competence of courts to guarantee the utility of testimony — eyewitness and otherwise — at trial.

B. Institutional Confidence and the Sufficiency of Judicial Procedure

It is impossible to understand courts’ relationship with expert scientific testimony without appreciating the institutional confidence, and possibly even pride, that courts place in their traditional procedures. Federal courts consistently defend their evidentiary procedures against both the aspersions and unsolicited interventions of outsiders. In its recent decision *Perry v. New Hampshire*,¹²⁷ for example, the Supreme Court refused to extend heightened review to all suggestive identifications due largely to the presumptive adequacy of traditional methods for impeaching faulty identifications.¹²⁸ While Perry and his numerous expert amici urged the Court to revise its existing evidentiary procedures in light of the mounting scientific data on the unreliability of eyewitness identifications,¹²⁹ the Court insisted that Perry’s interests were sufficiently protected by the established “safeguards built into our adversary system,”¹³⁰ most notably the right of confrontation, right to effective assistance of counsel, and jury instructions.¹³¹

More than simply refuting the mounting evidence on eyewitness unreliability, courts frequently dismiss the potential relevance of scientific research to debates on courtroom procedure altogether. While judges who question the adequacy of existing procedures devote para-

¹²⁶ FED. R. EVID. 611(a).

¹²⁷ 132 S. Ct. 716 (2012).

¹²⁸ *Id.* at 721 (“When no improper law enforcement activity is involved, . . . it suffices to test reliability through . . . the presence of counsel at postindictment lineups, vigorous cross-examination, protective rules of evidence, and jury instructions on . . . the fallibility of eyewitness identification . . .”).

¹²⁹ *Id.* at 728.

¹³⁰ *Id.*

¹³¹ *Id.* at 728–29. More solicitous of eyewitness experts than many, the *Perry* Court identified expert testimony as a useful tool against faulty identifications “[i]n appropriate cases.” *Id.* at 729. Yet in cursorily dismissing accumulated evidence of the justice system’s failure to root out inaccurate identifications in order to reaffirm the sufficiency of established trial procedures, the Court’s opinion once more defended the internal competencies of the courts against external critique.

For another prominent example, see *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), in which the Court dismissed objections to a broad admissibility standard for expert testimony as “overly pessimistic about the capabilities of the jury and of the adversary system generally,” *id.* at 596. The Court extolled “[v]igorous cross-examination, presentation of contrary evidence, and careful instruction” as “the traditional and appropriate means of attacking shaky but admissible evidence.” *Id.*

graphs (if not pages) of their opinions to relevant scientific studies,¹³² judges who defend the sufficiency of established procedures commonly gloss over the emerging research entirely, despite the attempts of parties or amici to bring it to their attention.¹³³ There is of course nothing remarkable in the observation — effectively, the tautology — that judges who believe that emerging research justifies substantive changes find such research more relevant than judges who do not. Yet it is notable that a court presented with a flood of undisputed research into the failings of existing evidentiary procedures — in the case of *Perry*, indeed, a court anticipated by commentators to address the issue squarely in its disposition¹³⁴ — would not defend its procedures against the weight of mounting evidence, but ignore countervailing research altogether. The approach exemplified in *Perry* is not a matter of courts disagreeing with the conclusions drawn from empirical research into eyewitness identifications, but of downplaying the very existence of this field of research.

In fact, to the extent that the *Perry* majority acknowledged the scientific community's critique of its procedures for screening unreliable identifications, it did so only in order to reaffirm its own superior understanding of the special needs and nuances of evidentiary procedure at trial. When the American Psychological Association submitted an amicus brief charting the failures of existing safeguards against false eyewitness identifications, the majority specifically cited its account of the “many . . . factors bear[ing] on ‘the likelihood of misidentification’” as evidence of the *impracticality* of expanding due process protections for all suggestive identifications.¹³⁵ The majority thus repurposed a scientific argument for heightened due process review into an argument for the propriety, based on the Court's better understanding of the judicial resources at stake, of leaving its existing procedures intact. Even while deferring to the scientific community's superior

¹³² See, e.g., *Perry*, 132 S. Ct. at 738–39 (Sotomayor, J., dissenting) (emphasizing the “vast body of scientific literature,” *id.* at 738, on eyewitness identifications); *United States v. Owens*, 682 F.3d 1358, 1360 (11th Cir. 2012) (Barkett, J., dissenting from denial of rehearing en banc) (reviewing “over two-thousand studies on eyewitness memory” published since the circuit's controlling eyewitness identification holding). For a notable example among state courts, see *State v. Henderson*, 27 A.3d 872 (N.J. 2011), *holding modified by* *State v. Chen*, 27 A.3d 930 (N.J. 2011), which devoted the bulk of its fifty-three-page opinion to methodical reviews of psychological research.

¹³³ Justice Sotomayor censured the majority in *Perry* for relegating the “vast body of scientific literature” on eyewitness identifications to “barely a parenthetical mention” in its opinion. *Perry*, 132 S. Ct. at 738 (Sotomayor, J., dissenting); *cf. id.* at 728 (majority opinion) (citing APA Brief, *supra* note 44, at 14–17).

¹³⁴ See, e.g., Lyle Denniston, *Argument Recap: Eyewitnesses Discredited? Hardly*, SCOTUSBLOG (Nov. 2, 2011, 1:17 PM), <http://www.scotusblog.com/?p=130914> (“[*Perry*] aroused an excited interest in how the Court would react to a veritable mountain of new evidence . . . demonstrating with obvious consistency the deep problem of flawed eyewitness memory.”).

¹³⁵ *Perry*, 132 S. Ct. at 727 (objecting to “a vast enlargement of the reach of due process”).

knowledge about the psychology of eyewitness identification, the Court took it upon itself to reinterpret the primary import of such knowledge within the particular context of the courtroom.

The debates about eyewitness expert testimony itself bear out a similar dynamic. Lower courts that insist on the adequacy of internal judicial procedures to impeach faulty identifications essentially defend the sufficiency of established courtroom procedures — drawing on uniquely legal professional skill sets — as guarantors of fairness and truth at trial. Redressing any inadequacies in the jury's ability to evaluate eyewitnesses through traditional safeguards like cross-examination and jury instructions, such courts deny the ability of or need for experts outside the judicial arena to improve upon courts' own procedures.

Ultimately, then, federal courts' continuing opposition to eyewitness researchers does not reflect a general skepticism of the role of scientific expertise at trial. As exemplified by the Supreme Court's stalwart defense of judge-made evidentiary safeguards in *Perry*, this opposition may better be read as a specific resistance against the claims of scientific experts to intervene in judicial procedures traditionally left to the discretion of the courts.¹³⁶ Faced with the efforts of nonlegal authorities to improve on existing courtroom practices, judges defend the sufficiency of established procedures like cross-examination and jury instructions and intimate the institutional limitations of external experts to understand the judicial system they propose to reform. In this sense, courts that downplay the contributions of eyewitness scientists at trial may be seen as defending the integrity and superiority of a uniquely "legal" expertise in its traditional arena.

V. CONCLUSION

This Note has suggested that solicitude toward the jury's "common-sense" wisdom regarding eyewitness identifications is not the sole, or likely even the key, force behind courts' continuing resistance to expert testimony. While courts continue to defend the jury's lay knowledge on eyewitness testimony against the superior claims of scientific experts, they increasingly frame the jury's competence as the result of specialized legal aids like cross-examination and jury instructions. In this sense, courts' persisting resistance to expert testimony may reflect not a democratic attempt to preserve the authority of the lay jury in the courtroom, so much as an attempt to preserve the authority of professional jurists against intrusions from a rival body of social authorities.

¹³⁶ Cf. Milich, *supra* note 111, at 925 ("While most trial judges are not capable of doing science, they are quite experienced in evaluating issues of credibility.").

To pinpoint the source of courts' resistance to eyewitness experts is not to suggest that such resistance is necessarily out of place. Considering that the American trial system has trusted judges and lawyers to ensure the credibility of witnesses for centuries, it is not unreasonable for courts to defend their acquired expertise in this arena. Nor is it unreasonable for courts to fear that delegating their traditional duties to scientific authorities in one sphere will open the door to an influx of experts telling judges how to do their jobs in any number of others.¹³⁷ This Note does not argue that courts are wrong to hold eyewitness expert testimony to a strict standard of admissibility, permitting experts only when they promise to produce a substantively more accurate record.

Yet this Note suggests that courts would do well to recalibrate the terms of that inquiry. Even assuming that the balance of interests in any given case will rarely favor the admission of expert testimony, courts should be more realistic and honest about the precise nature of those interests. They should admit that the potential benefits of expert testimony are to be measured against not simply the lay jury's common-sense competence to evaluate eyewitnesses, but also trained jurists' professional prerogative to ensure the credibility of testimony at trial. Accordingly, judges performing preliminary screenings should assess not only the extent to which proffered testimony surpasses the substantive limits of lay juror knowledge, but also whether and how it surpasses the pedagogical limits of cross-examination and jury instructions.

Litigants, too, stand to learn from the courts' unique professional investments. As it stands, defendants seeking to introduce eyewitness expert testimony routinely flood courts with detailed empirics on the jury's limited capacity to evaluate eyewitness identifications.¹³⁸ Similarly, parties calling for broader due process reforms to the courts' use of eyewitness identifications have focused on presenting compelling data on the intricacies and weaknesses of eyewitness memory.¹³⁹ Yet the body of research on the limitations of courtroom procedures like cross-examination and jury instructions to counteract faulty eyewitness evidence — much less the attempts of parties to present such research to judges at trial — is far more marginal.¹⁴⁰ As a result, while courts ac-

¹³⁷ Cf. *United States v. Hall*, 165 F.3d 1095, 1119 (7th Cir. 1999) (Easterbrook, J., concurring) (“Much of the adversarial system rests on empirical propositions that may be investigated, and sometimes refuted, through scientific means.”).

¹³⁸ See, e.g., *United States v. Jones*, 689 F.3d 12, 15–16 (1st Cir. 2012); *United States v. Brownlee*, 454 F.3d 131, 140 n.5 (3d Cir. 2006); *Hall*, 165 F.3d at 1101 n.1.

¹³⁹ See, e.g., APA Brief, *supra* note 44, at 6–13 (citing numerous studies on specialized variables affecting the accuracy of eyewitness identifications).

¹⁴⁰ See, e.g., *id.* at 18–21 (citing numerous empirical studies on the inaccuracies of juror evaluations of eyewitnesses, but only a single state case suggesting the ineffectiveness of cross-examination

knowledge of the shortcomings of juror knowledge on eyewitness identifications,¹⁴¹ almost no judges — including those who support admitting expert testimony — acknowledge the structural weaknesses of conventional judicial procedures for educating the jury on eyewitness identifications.¹⁴² Litigants who wish to introduce scientific testimony on eyewitness identifications may thus consider focusing their efforts on establishing not simply the improvements of experts over the common sense of the lay jury, but also their improvements over the persuasive techniques of professional jurists.¹⁴³

Regardless of the next steps, this Note has attempted to introduce a greater degree of self-awareness to the active debates about expert testimony on eyewitness identifications. Greater attention to courts' rationales for excluding expert testimony will help judges and litigants alike see more clearly on an issue in which both, it appears, have profound investments.

and two studies suggesting the ineffectiveness of jury instructions). A key component of the attack on jury instructions was that courts often fail to provide them. *Id.* at 19.

¹⁴¹ See, e.g., *Brownlee*, 454 F.3d at 142; *United States v. Smithers*, 212 F.3d 306, 312 n.1 (6th Cir. 2000).

¹⁴² Of the opinions surveyed in this Note, only one acknowledged the potential limitations of cross-examination to communicate complex psychological factors implicated in eyewitness identifications, see *Smithers*, 212 F.3d at 329 (Batchelder, J., dissenting), and none suggested the potential limitations of jury instructions to communicate information adequately. Cf. *Francis v. Franklin*, 471 U.S. 307, 324 n.9 (1985) (“[W]e adhere to the crucial assumption underlying our constitutional system of trial by jury that jurors carefully follow instructions.”).

¹⁴³ In the realm of jury instructions, the presumption that juries follow instructions may be defeated by an “overwhelming probability” that the jury will be unable to follow the court’s instructions and a strong likelihood that the effect of the evidence would be ‘devastating’ to the defendant.” *Greer v. Miller*, 483 U.S. 756, 766 n.8 (1987) (citation omitted); accord, e.g., *United States v. McCann*, 613 F.3d 486, 496–97 (5th Cir. 2010); *Washington v. Hofbauer*, 228 F.3d 689, 706 (6th Cir. 2000).