Eyewitness Identifications and State Courts as Guardians Against Wrongful Conviction

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Despite a growing awareness that mistaken eyewitness identifications contribute significantly to wrongful convictions, most courts continue to apply federal Due Process criteria for admissibility of eyewitness identification that has proved useless in protecting against the use of highly unreliable evidence. In response, this article reviews the path-breaking decisions of several state supreme courts that have blazed their own trail. It explores the issues that courts have addressed, the rules they have devised, and the legal grounds for their decisions, and from this, concludes that state supreme courts can implement appropriate criteria that would in fact promote accuracy and fairness in the use of eyewitness identification.

> What is it that I do when I decide a case? To what sources of information do I appeal for guidance? In what proportions do I permit them to contribute to the result? In what proportions ought they to contribute? If a precedent is applicable, when do I refuse to follow it?
> BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 10 (1921).

Let's face it—the media reports of wrongly convicted people, released after years in custody, often because eyewitnesses made mistakes in identifying them, are downright terrifying. For advocates of Due Process in the criminal justice system, like those working in innocence projects, it is terrifying to imagine all the innocent people languishing in prisons whose names will never be cleared due to a lack of DNA or other exonerating evidence.[1] For law enforcement officials (many

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[1] Studies of exonerations and the causes of wrongful convictions lead inexorably to the conclusion that countless wrongly convicted people will never be exonerated. For a sampling of the rich literature on wrongful convictions, see, e.g., Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 121 (2008); Samuel R. Gross, *Convicting the Innocent*, 4 ANN. REV. L. & SOC. SCI. 173 (2008) (addressing the rate of false convictions and surveying types of wrongful convictions cases); Samuel R. Gross et al., *Exonerations in the United States, 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 524 (2005) (reporting on study of 340 exonerations); Sandra Guerra Thompson, *Beyond a Reasonable Doubt? Reconsidering Uncorroborated Eyewitness Identification*

of whom are also concerned about wrongful convictions), it is a terrifying prospect that reformers may push through new rules that would make it harder to obtain identification evidence, and hence, convictions.[2] If we take social science seriously and take a hard look at violent crime cases being decided today, the conclusion is irrefutable: erroneous eyewitness identifications continue to bring about wrongful convictions.[3] Some procedural improvements have been made on a statewide basis through legislative reforms, of which North Carolina is the most notable example.[4] Law enforcement authorities have made other significant improvements on a local or statewide basis as well.[5] Clearly, rules adopted at a statewide level will bring about the kind of change needed to raise the quality of identification evidence, whereas waiting for local police departments nationwide to adopt the needed reforms of their own initiative would be sheer folly.[6] In the final

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Testimony, 41 U.C. DAVIS L. REV. 1487, 1491 (2008) (suggesting that "untold numbers of additional innocent people have been punished for crimes they did not commit").

[2] *See* Daniel L. Schacter et al., *Policy Forum: Studying Eyewitness Investigations in the Field*, 32 LAW & HUM. BEHAV. 3, 3 (2008) (discussing Illinois law enforcement's field study findings purporting to contradict laboratory findings on sequential lineups); Andrew M. Siegel, *Moving Down the Wedge of Injustice: A Proposal for a Third Generation of Wrongful Convictions Scholarship and Advocacy*, 42 AM. CRIM. L. REV. 1219, 1221 (2005) (addressing the resistance shown by law enforcement and prosecutors to innocence reforms based on arguments that wrongful convictions are aberrational and that the social costs of reforms outweigh the benefits); Thompson, *supra* note 1, at 1520 (addressing "deeply ingrained culture [within police departments] that resists change and is skeptical of new procedures," especially those that may make it harder to collect usable evidence).

[3] The proof is syllogistic: (1) Police practices and legal rules produced hundreds of wrongful convictions in violent crime cases in the past; (2) Police practices and legal rules remain unchanged; (3) Therefore, wrongful convictions continue to be handed down in violent crime cases. The only difference is that DNA evidence now excludes wrongfully identified suspects in most sexual assault cases. *See* Steven B. Duke, Ann Seung-Eun Lee & Chet K.W. Pager, *A Picture's Worth a Thousand Words: Conversational Versus Eyewitness Testimony in Criminal Convictions*, 44 AM. CRIM. L. REV. 1, 6 & n.21 (2007) (using Justice Department statistics to estimate that eyewitness identification errors account for 4,000 or more false convictions annually in the United States).

[4] *See infra* note 108.

[5] *See* The Innocence Project, Fix the System: Priority Issues: Eyewitness Identification, http://www.innocenceproject.org/fix/Eyewitness-Identification.php (last visited Apr. 7, 2010) (providing links to statement of best practices developed by Wisconsin Attorney General, reformed procedural requirements developed by Attorney General of New Jersey, and reforms implemented by law enforcement in several localities).

[6] As of 2004, there were 17,876 independent state and local law enforcement agencies in the United States and another 513 federal law enforcement agencies. *See* U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF JUSTICE STATISTICS (2007), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/csllea04.pdf. Due to the lack of national accreditation standards for law enforcement, the only other sources of wide-scale implementation are federal constitutional requirements and statewide regulation by legislation or state high court remedies. *See* JOHN KLEINIG, THE ETHICS OF POLICING 36–37 (1996) (noting that only a fraction of police departments have sought accreditation).

analysis, even the steady stream of exonerations has yielded little reform from legislatures and law enforcement.[7]

What can *courts* do to better protect against wrongful convictions? After all, the courts are directly responsible for providing fair trials when prosecutors move forward with criminal charges. Unfortunately, the Supreme Court's Due Process test has utterly failed to provide any meaningful protection against suggestive police practices or the use of otherwise unreliable identification evidence.[8] State supreme courts are, of course, free to depart from the federal standard in interpreting their state constitutions, and they possess other powers to supervise the administration of justice and control the admission of evidence.[9] Yet only a handful of state supreme courts have endeavored to fill the void, doing so in a variety of ways, most of which constitute minor improvements to the Supreme Court's test.[10] Why have the vast majority of state high courts taken such a *laissez faire* position, given the growing awareness of mistaken identifications leading to wrongful convictions?

The answer is complex. One part of the answer lies in the institutional constraints that many judges believe prevent them from participating more actively in improving the quality of identification evidence. Put simply, courts are not in the business of "legislating from the bench."[11]

The second impediment to judicial involvement in setting new requirements for eyewitness identification evidence is the sheer complexity of the problem. Social science sheds light on numerous problems with eyewitness identification,[12] but it is not necessarily clear what rules would best respond to these problems. For

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[7] *See* Sandra Guerra Thompson, *Judicial Blindness to Eyewitness Misidentification*, 93 MARQ. L. REV. (forthcoming 2010) [hereinafter Thompson, *Judicial Blindness*] (reporting that in a year-long study of state appellate decisions on eyewitness identifications and Due Process, all states in the study had adopted the federal standard for purposes of interpreting their state constitutions); Sandra Guerra Thompson, *What Price Justice? The Importance of Costs to Eyewitness Identification Reform*, 41 TEX. TECH L. REV. 33, 33–55 (2008) [hereinafter Thompson, *What Price Justice?*] (reviewing the key reforms that have been proposed and the few states that have implemented them).

[8] *See infra* Part I.

[9] *See infra* notes 109–12, 158 and accompanying text.

[10] *See infra* Part II.

[11] *See infra* notes 173–75 and accompanying text.

[12] I assume the validity of the massive body of social science research in the area of eyewitness identifications, some of it done by leading researchers who have devoted decades to their work. However, at a recent SEALS Conference, Professor Andrew E. Taslitz of Howard University School of Law recounted a story about his having delivered a lecture on eyewitness identifications at a judicial conference. During the question and answer session, one judge rhetorically asked, "When you say 'science,' you actually mean 'social science?'" To this the audience of judges applauded enthusiastically, indicating their lack of faith in the scientific findings of eyewitness identification research. Andrew E. Taslitz, Remarks at the Southeastern Association of Law Schools 62nd Annual Meeting (Aug. 3, 2009). This type of attitude toward the research of psychologists among members of the legal profession dates back at least to the early 20th century, especially as it relates to eyewitness identification research. *See* Wallace D. Loh, *Psycholegal Research: Past and Present*, 79 MICH. L. REV. 659, 660–63 (1981).

example, studies show unequivocally that people of all races are less accurate in identifying strangers of a different race than their own.[13] In addition, researchers have identified numerous other factors that can affect the accuracy of an eyewitness's identification of a stranger in the circumstances that typically attend violent crimes.[14] To make matters worse, often several factors that reduce reliability are at play in a single case at the same time—the victim and defendant are of different races, the witness has a brief period of time for viewing the culprit, the crime is committed at night making viewing more difficult, and the witness has a tendency to focus on a weapon if the culprit brandishes one. Exactly how should the law respond to these problems? Can an eyewitness be relied upon to make an accurate identification under such circumstances at all?[15] Should experts be permitted to testify as a matter of course, do jury instructions remedy the problem, or is some other remedy appropriate?

Further complicating the gathering of identification evidence is the problem of suggestiveness that can be introduced by first-responders and law enforcement officials.[16] For example, when the police show only a single suspect to a witness (what is known as a "show-up"), experts agree this procedure is inherently suggestive,[17] but there may be good reasons such as exigent circumstances for allowing show-ups. Again, the question is: what is the proper legal rule?

The multidimensional nature of the problem with eyewitness identification evidence and the numerous and varied reform proposals[18] make it harder to gain consensus on the correct course of action. Add to the confusion the fear that

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[13] *See infra* note 86.

[14] *See* ELIZABETH F. LOFTUS, JAMES M. DOYLE & JENNIFER E. DYSART, EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL 16–36 (4th ed. 2007) (addressing effects of lighting, violence, stress and fear, and weapon focus); Gary L. Wells & Elizabeth A. Olson, *Eyewitness Testimony*, 54 ANN. REV. PSYCHOL. 277, 280–82 (2003) (eyewitness accuracy can be affected by many factors including lighting conditions, amount of time a subject is viewed, whether the subject wears a disguise, lessened ability to recognize a person of a different race, and presence of a weapon, among others).

[15] Some legal scholars have called for serious restrictions, and even an outright ban, on the use of eyewitness identification testimony to obtain convictions. *See* Noah Clements, *Flipping a Coin: A Solution for the Inherent Unreliability of Eyewitness Identification Testimony*, 40 IND. L. REV. 271 (2007) (proposing blanket exclusion of eyewitness identification testimony in criminal cases); Thompson, *supra* note 1, at 1497 (calling for a corroboration requirement for admission of eyewitness identification testimony).

[16] The Department of Justice's influential guide for law enforcement on eyewitness identification evidence calls for non-suggestive questioning of witnesses throughout the investigation, beginning with conversations with first-responders, as any suggestive questioning can distort a witness's memory of the event. *See* NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUST., EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT 9, 13, 15, 21, 23 (1999).

[17] *See* Bruce W. Behrman & Sherrie L. Davey, *Eyewitness Identification in Actual Criminal Cases: An Archival Analysis*, 25 LAW & HUM. BEHAV. 475, 487 (2001) (finding studies of actual cases to confirm laboratory findings that show-ups are more suggestive than lineups).

[18] *See generally* Thompson, *What Price Justice?*, *supra* note 7 (reviewing reform proposals for eyewitness identification practices).

violent criminals may be wrongly acquitted over doubts regarding identifications if rules become too restrictive or complicated, and it is perhaps no surprise that most state courts take the route of avoidance.[19] But not all do, which is where this article comes in.

This article reviews the path-breaking decisions of several state supreme courts on eyewitness identification evidence. It explores the issues that courts have addressed, the rules they have devised, and the legal grounds for their decisions. While each of these decisions represents a novel (and in some cases politically risky) approach, viewed in totality, the national situation is still bleak. What we find are a handful of cases in which courts take some steps to provide remedies after acknowledging the scientific findings on the problems associated with identification evidence. To date it is a piecemeal and painstakingly slow approach to reform on a national basis: a rule for show-ups in Wisconsin, a change in the Due Process test in Utah, a requirement for certain jury instructions in Georgia, etc.[20] Each of these decisions should be applauded for its contribution in improving the fairness of criminal trials, but so much more is needed, even in those states. The aim of this article is to shed some light on the different ways in which state supreme courts can do their part to set statewide standards that promote accuracy and fairness in the use of eyewitness identification evidence.

Part I of this article briefly outlines and critiques the Supreme Court's jurisprudence on eyewitness identifications and Due Process. It treads on ground well-worn by scholars who have for decades decried the Supreme Court's failure to provide a Due Process test that would protect against the use of highly unreliable identification evidence.[21] Scholars have also noted the inconsistency between the scientific literature on eyewitness identification and the Supreme Court's multi-factor reliability test.[22] This article takes the novel approach of re-

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[19] *See infra* note 106 and accompanying text.

[20] For discussions of each of the state supreme court decisions in these states, see *infra* Part II.

[21] Almost since the moment the Court decided its Due Process cases, some scholars recognized the failures of the federal Due Process test and the danger of wrongful conviction. *See, e.g.*, Joseph D. Grano, Kirby, Biggers, *and* Ash*: Do Any Constitutional Safeguards Remain Against the Danger of Convicting the Innocent?*, 72 MICH. L. REV. 717 (1974). To this day, scholars continue to decry the Court's decisions and to call for change. *See* 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) ("Sadly, the rule of decision set out in *Manson* has failed to meet the Court's objective of furthering fairness and reliability. The results have been tragic."); *Id.* 114 n.39 (citing articles critical of the federal Due Process test); Richard A. Wise, Kirsten A. Dauphinais & Martin A. Safer, *A Tripartite Solution to Eyewitness Error*, 97 J. CRIM. L. & CRIMINOLOGY 807, 812–15 (2007) (noting Supreme Court's decisions favor admission of identification testimony even when suggestive practices are followed).

[22] *See, e.g.*, Michael R. Headley, Note, *Long on Substance, Short on Process: An Appeal for Process Long Overdue in Eyewitness Lineup Procedures*, 53 HASTINGS L.J. 681, 684 (2002) (arguing that courts should incorporate scientific research on eyewitness identifications into Due Process analysis); Ruth Yacona, Comment, Manson v. Brathwaite: *The Supreme Court's Misunderstanding of Eyewitness Identification*, 39 J. MARSHALL L. REV. 539 (2006).

evaluating the facts of the Supreme Court's leading decisions in light of the scientific findings on reliability. More importantly, rather than simply calling for course correction by the Supreme Court, this article takes the position that the situation may be better suited to state actors—judicial, legislative, and executive.[23]

In particular, Part II explores the role that state appellate courts can play in developing a jurisprudence of eyewitness identification evidence that both incorporates social science research and carefully balances the interests of law enforcement and the accused. While state high courts do not have the authority to develop comprehensive guidelines for law enforcement practices in obtaining identification evidence, courts do have vast powers to affect change through the state's constitutional jurisprudence and by other means as well.

Part III argues that state supreme courts are well-suited to take an active part in the "laboratory" model of criminal justice that characterizes our federalist system. Indeed, because judges have ethical and professional responsibilities for protecting constitutional and civil rights as well as protecting the integrity of the administration of criminal justice, it is incumbent on state supreme courts to show leadership in developing solutions to the problems that plague the area of eyewitness identification evidence.

I. THE MANY FAILURES OF FEDERAL DUE PROCESS JURISPRUDENCE

It is fascinating to read the Supreme Court's Due Process jurisprudence on eyewitness identifications—now well over thirty years old—from a perspective which is informed by the lessons of hundreds of wrongful convictions[24] and by the massive body of social science literature that has since developed.[25] Long before the advent of DNA evidence and the release of so many wrongly convicted people,[26] a rich dialogue had existed in the jurisprudence of eyewitness identifications about the risks of misidentification and the role the courts should play in protecting the innocent.[27] In the early 1970's, federal district and circuit

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[23] I have previously called on legislatures to adopt comprehensive reform measures at the state level. *See* Thompson, *What Price Justice?*, *supra* note 7; *see also* Margery Malkin Koosed, *The Proposed Innocence Protection Act Won't—Unless It Also Curbs Mistaken Eyewitness Identifications*, 63 OHIO ST. L.J. 263 (2002) (calling for legislative measures to assure greater reliability of eyewitness identification testimony in capital cases).

[24] *See* The Innocence Project, http://www.innocenceproject.org/know (last visited on Apr. 7, 2010) (citing 252 exonerations by DNA evidence as of April 7, 2010). Hundreds have been exonerated by other means as well. *See* Gross et al., *supra* note 1, at 524 (reporting on study of 340 exonerations, a little less than half cleared by DNA evidence).

[25] For a sample of this literature, see *supra* note 14 and *infra* notes 38, 40, 43–45.

[26] *See supra* note 1.

[27] The Supreme Court in *Manson v. Brathwaite* noted that some courts of appeal had developed a Due Process approach that required exclusion of any identification evidence that was the product of impermissibly suggestive procedures. 432 U.S. 98, 110 (1977). The Court reversed the Second Circuit's decision in which it found error in the admission of identification testimony. *Id.* at 108–09, 117. In *Neil v. Biggers*, the Supreme Court reversed the Sixth Circuit's decision which had

courts were apparently more inclined than now to exclude identification testimony on Due Process grounds.[28] In *Manson v. Brathwaite,* the Supreme Court, clearly signaling its intent to take a hands-off approach, reversed several such decisions and, in the process, set in place a "more lenient"[29] Due Process standard that has failed to provide any meaningful protection against wrongful convictions, despite the fact that the Court declared reliability to be the "linchpin" of its approach.[30]

Upon a showing that the identification procedure is impermissibly suggestive, the Court then considers the "totality of the circumstances" to determine whether the identification is nonetheless reliable.[31] To assess the totality of the circumstances, the Court instructs lower courts to consider five factors (taken from its earlier decision in *Neil v. Biggers*): "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation."[32] The Court also called for the weighing of these factors against "the corrupting effect of the suggestive identification itself."[33] However, courts have generally not undertaken to measure the extent to which suggestive practices might have undermined reliability.[34] The Supreme Court has not revisited this jurisprudence in the three decades since it was established, so it continues to govern in federal courts and is followed in most state courts as well.[35]

In critiquing *Brathwaite*, one useful starting point is to inquire whether the primary purpose of the rule should be to provide adequate protection against mistaken identification or whether Due Process is limited to curbing improper police conduct. In other words, what is the nature of a person's Due Process rights with respect to eyewitness identification evidence? Another issue is whether the Court's test is consistent with the scientific research. Finally, there is the thorny question of institutional competence and the propriety of judicial regulation of the police through rulemaking, as contrasted with a possible legislative solution.

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upheld a district court decision to exclude identification testimony on the grounds of impermissible suggestion. 409 U.S. 188, 190, 201 (1972).

[28] *See Biggers*, 490 U.S. at 190.

[29] *Brathwaite*, 432 U.S. at 110.

[30] *Id.* at 114.

[31] *Id.* at 110–14.

[32] *Id.* at 114.

[33] *Id.*

[34] This view was reinforced by the last paragraph of *Brathwaite*, which reiterated the rule: "We conclude that the criteria laid down in *Biggers* are to be applied in determining the admissibility of evidence offered by the prosecution concerning a post-*Stovall* identification, and that those criteria are satisfactorily met and complied with here." 432 U.S. at 117. The Court makes no mention of balancing these factors against the suggestiveness of the identification procedure, nor does it engage in this type of balancing in its assessment of the facts of the case. *See generally id.*

[35] *See infra* note 106.

The following sections review some of the well-documented problems with the federal Due Process test for admission of eyewitness identification testimony. Again, viewed through the lens of thirty years of additional scientific research and judicial experience applying the Due Process test, the need for jurisprudential course correction is beyond dispute.

A. Brathwaite *Renders Suggestiveness Both a Due Process Requirement and Beside the Point*

The Supreme Court's Due Process test focuses first on the question of police suggestiveness before turning to the question of reliability.[36] If there is no suggestion introduced by the police procedures, then there is no Due Process claim.[37] The test, thus, completely ignores unreliability if there is no evidence of police suggestion. This is a gaping hole in the protection against mistaken identification and erroneous conviction. If the Due Process clause serves to protect against unfair trials due to unreliable evidence, then the *Brathwaite* test applies too narrowly. A great deal of unreliability is caused by factors inherent to the eyewitnesses (age, lighting, weapon-focus, cross-race bias, etc.), which social scientists call "estimator variables."[38] Even if the police follow non-suggestive practices, the circumstances under which an eyewitness observes a perpetrator may be so problematic that the use of the identification evidence at trial could violate principles of fairness. However, the Supreme Court's Due Process protection only applies if the defense first crosses the threshold of suggestive police practices.

On the other hand, the rule does take into account police suggestion. Factors such as police suggestion and other elements of the process that can be controlled or mitigated by the justice system are referred to as "system variables."[39] A witness's memory is malleable and can be permanently distorted by suggestion.[40] Police suggestion can exacerbate the inherent weaknesses of an eyewitness's ability to make an accurate identification. When an individual reports witnessing a

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[36] *See Brathwaite*, 432 U.S. at 110–14 (describing the more lenient approach that it ultimately adopts).

[37] The Supreme Court's Due Process decisions all involved identification procedures employed by law enforcement officers, so the Court has not had occasion to consider suggestive actions on the part of private parties that may affect an eyewitness's identification. Although some courts have applied the federal Due Process suggestiveness/reliability analysis in cases of suggestive conduct by private parties, the better answer is that the Court did not intend for the rule to apply to private conduct. *See* State v. Chen, 952 A.2d 1094, 1101–02 (N.J. Super. Ct. App. Div. 2008) (citing split among federal circuit courts).

[38] *See* Gary L. Wells & Eric P. Seelau, *Eyewitness Identification: Psychological Research and Legal Policy on Lineups*, 1 PSYCHOL. PUB. POL'Y & L. 765, 765–66 (1995); *see also supra* note 14 (citing other scientific literature on various estimator variables).

[39] *See* Wells & Seelau, *supra* note 38, at 766.

[40] *See* ELIZABETH F. LOFTUS, EYEWITNESS TESTIMONY 21–22 (1979) (addressing retention and retrieval stages of long-term memory); LOFTUS ET AL., *supra* note 14, at 65–66 (leading questions during post-event investigation can cause memory distortion).

crime, the police will interact with the witness in a variety of ways. A police officer may suggest—whether consciously or not—that a witness select a certain person in the identification process.[41]

Scientists have shown that other forms of suggestion can also distort a witness's memory of events.[42] Post-identification confirmatory feedback ("Good, you identified the actual suspect.") can affect the witness's level of confidence in the identification.[43] It bears mentioning that scientific research also shows that a witness's initial confidence level in an identification bears no correlation to accuracy in any case.[44] This basic problem is compounded by our misplaced belief that the witness's confidence level indicates reliability and our failure to account for suggestive practices that elevate that confidence level over time.

Thus, the use of suggestion infects the identification process in at least three ways: it can produce false identifications, it can distort a person's memory of the events, and it can artificially heighten the witness's degree of confidence in the identification. In addition, the very nature of the pre-trial process can also cause an eyewitness to feel even more confident in an identification over time, resulting in a higher level of certainty than what is experienced at the time of the identification.[45]

In short, suggestion is merely one *cause* of unreliability, just as a witness's age and the presence of a weapon have a tendency to reduce reliability. Suggestion is one possible source of unreliability, yet for purposes of the Due Process analysis, courts do not reach the reliability question if there is no evidence of unnecessary suggestiveness by the police.[46] Moreover, even if there is unnecessary suggestion, it is not taken into account by courts in assessing the reliability of the identification testimony under the *Biggers* five-factor test.

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[41] *See* NAT'L INST. OF JUSTICE, *supra* note 16, at 9, 13, 15, 21, 23 (calling for non-suggestive questioning by first-responders and police).

[42] *See* Wise et al., *supra* note 21, at 816.

[43] *See* BRIAN L. CUTLER & STEVEN D. PENROD, MISTAKEN IDENTIFICATION: THE EYEWITNESS, PSYCHOLOGY, AND THE LAW 186–90 (1995) (addressing the "malleability of witness confidence"); Amy Bradfield Douglass & Nancy Steblay, *Memory Distortion in Eyewitnesses: A Meta-Analysis of the Post-Identification Feedback Effect*, 20 APPLIED COGNITIVE PSYCHOL. 859, 860 (2006); Gary L. Wells and Amy L. Bradfield, *"Good, You Identified the Suspect": Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience*, 83 J. APPLIED PSYCHOL. 360, 374 (1998); Wells & Murray, *infra* note 54.

[44] Gary L. Wells, R.C.L. Lindsay & Tamara J. Ferguson, *Accuracy, Confidence, and Juror Perceptions in Eyewitness Identification*, 64 J. APPLIED PSYCHOL. 440, 446–47 (1979) (finding that a witness's "self-rated and overtly expressed confidence is largely irrelevant in determining the criminal-identification accuracy of an eyewitness," and that jurors' decisions to believe the witness are highly related to their ratings of the witness's confidence, although the confidence-accuracy relationship is very poor).

[45] Scientists have also found that the nature of the adjudication process and witness preparation for trial can also artificially increase a witness's stated confidence level. *See* John S. Shaw, III & Kimberley A. McClure, *Repeated Postevent Questioning Can Lead to Elevated Levels of Eyewitness Confidence*, 20 LAW & HUM. BEHAV. 629, 630–31, 649–50 (1996).

[46] *See* State v. Chen, 952 A.2d 1094, 1107 (N.J. Super. Ct. App. Div. 2008).

Ostensibly, the Supreme Court aimed to balance three interests in adopting the two-part suggestiveness and reliability rule: (1) to keep unreliable evidence from the jury;[47] (2) to deter the police from unnecessarily suggestive procedures;[48] and (3) to protect the integrity of the criminal justice system.[49] The Court rejected a "*per se* rule" that would exclude all identification evidence that was the product of unnecessarily suggestive police procedures.[50] The Court took the view that even an unnecessarily suggestive procedure could produce reliable evidence, and a *per se* exclusionary rule for such identifications would unnecessarily lead to the exclusion of reliable evidence. As for deterrence, the Court believed its approach would provide adequate deterrence, so a *per se* approach would not be necessary. It was the application of the third factor, however—the concern about the integrity of the criminal justice process—where the Court found "serious drawbacks" with the *per se* exclusionary rule.[51] The majority in *Brathwaite* wrote:

> Since it denies the trier reliable evidence, it may result, on occasion, in the guilty going free. . . . And in those cases in which the admission of identification evidence is error under the *per se* approach but not under the totality approach—cases in which the identification is reliable despite an unnecessarily suggestive identification procedure—reversal is a Draconian sanction. Certainly, inflexible rules of exclusion that may frustrate rather than promote justice have not been viewed recently by this Court with unlimited enthusiasm.[52]

By focusing on the possibility of "the guilty going free" due to the "Draconian sanction" of excluding identifications produced by unnecessarily suggestive means, the majority undercut Due Process procedural fairness and showed less concern for the possibility that the innocent might be convicted.

One might assume that the Supreme Court intended to focus not *only* on suggestiveness but on reliability more broadly, but that is not so. Even the strongest evidence of suggestiveness does not lead to exclusion unless the identification fails the Court's "reliability" standard, which is oddly divorced from the suggestiveness standard. Employing this false dichotomy between suggestiveness and reliability, police suggestion is viewed as a type of wrongdoing to be punished, but only if the evidence was unreliable due to factors relating to the eyewitness and independent of the police. A genuine focus on reliability would

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[47] *See* Manson v. Brathwaite, 432 U.S. 98, 112 (1977).

[48] *Id.*

[49] *Id.* at 112–13.

[50] *Id.* at 110–14. Some federal district courts believed *Stovall v. Denno*, 388 U.S. 293 (1967) had created a *per se* rule for unnecessarily suggestive identifications. *See supra* notes 27–28 and accompanying text.

[51] *Brathwaite*, 432 U.S. at 112.

[52] *Id.* at 112–13.

take into account the degree to which an identification has been so tainted by a suggestive procedure as to have been drained of its probative value. And, of course, this would be only one factor assessed in determining the overall reliability of the identification evidence. By excluding suggestiveness from the reliability analysis, the test skews the analysis in favor of admissibility, and makes suggestiveness a threshold requirement that is ultimately beside the point in the critical reliability assessment.

B. *A Distorted View of Reliability*

The Supreme Court instructs courts to consider the "totality of the circumstances" in determining reliability, but this "totality" turns out to be restricted to a checklist of five factors (which, again, do not include suggestiveness).[53] Some of the estimator variables that scientists have shown to affect identification accuracy do come into play at this point, but the list of factors is problematic.[54] First, it includes the consideration of the witness's level of certainty as an indication of reliability, when scientific studies show witness certainty does *not* correlate with reliability.[55] Second, it fails to include many other important estimator variables such as cross-race identification and weapon-focus, which have a strong impact on reliability.[56] By limiting the courts to a restrictive list of factors, the Supreme Court's test has actually hamstrung the lower courts in their ability to evaluate the true "totality" of the circumstances. The Supreme Court's test, riddled with flaws and contradictions, has long overstayed its welcome. The Due Process test should begin and end with a genuine evaluation of reliability, and police suggestion should be one of many factors in that analysis. Instead, under the federal Due Process test, courts will not hear cases that do not involve suggestive practices, no matter how unreliable the evidence may otherwise be. They do not hear cases that involve suggestive behavior by private parties, only police suggestion satisfies the threshold requirement. And, even if police suggestion is present, they do not evaluate reliability in a scientifically sound manner.[57]

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[53] *See supra* notes 31–32 and accompanying text.

[54] For thorough assessments of how the Supreme Court's five factors measure up to scientific studies, see Gary L. Wells & Deah S. Quinlivan, *Suggestive Eyewitness Identification Procedures and the Supreme Court's Reliability Test in Light of Eyewitness Science: 30 Years Later*, 33 LAW & HUM. BEHAV. 1 (2009); Gary L. Wells & Donna M. Murray, *What Can Psychology Say About the* Neil v. Biggers *Criteria for Judging Eyewitness Accuracy?*, 68 J. APPLIED PSYCHOL. 347 (1983).

[55] *See supra* note 43.

[56] *See supra* note 14 and *infra* note 86.

[57] *See supra* notes 55–56 and accompanying text.

C. *Twisted Logic on the Necessity of Suggestive Practices*

The Supreme Court embraced necessity as a justification for a highly suggestive identification procedure,[58] but then refused to employ a rule of *per se* exclusion for suggestive practices that were unnecessary.[59] Unfortunately, the Court got it wrong on both accounts. First, necessity should not justify the admission of identification evidence obtained by means of a highly suggestive procedure. Instead, the lack of necessity should be considered simply as an aggravating factor in reviewing the propriety of police conduct. As the Supreme Court itself said in *Biggers*, "[s]uggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous."[60]

The Court's first foray into the Due Process protections during identifications, *Stovall v. Denno*, upheld identification evidence obtained by means of a highly suggestive single-person show-up.[61] The Court upheld the show-up on purely pragmatic terms: "Here was the only person in the world who could possibly exonerate Stovall . . . . [T]he police followed the only feasible procedure . . . ."[62]

Unfortunately, the necessity justification is simply wrong for multiple reasons. First, it overlooks the fact that an impermissibly suggestive show-up will have a tendency to cause a victim to *inculpate* a possibly innocent person, not *exculpate* him, precisely because it is suggestive. Second, it assumes that unless a witness can expeditiously exonerate a suspect, the suspect might be wrongly convicted. The Court overlooks the fact that without the witness's identification of the suspect, he might not have been convicted at all![63] Implicitly, the Court's statement suggests that there was sufficient other evidence to convict the suspect, and only the witness could thus exonerate him, but this was hardly the case.

If instead what the Court meant was that an innocent person might be wrongly *arrested*, then the decision to allow the suggestive procedure is wrong for two different reasons. First, we should prefer keeping the innocent person in custody for a longer period until he can exonerate himself (by means of alibi or other means) over the use of a suggestive identification procedure which is likely to result in an erroneous conviction that results in the person being unjustly incarcerated for years. Second, if the police have only enough other evidence to

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[58] Stovall v. Denno, 388 U.S. 293, 301–02 (1967).

[59] Manson v. Brathwaite, 432 U.S. 98, 110–14 (1977); *see also* Neil v. Biggers, 409 U.S. 188, 198–99 (1972).

[60] *Biggers*, 409 U.S. at 198.

[61] *Stovall*, 388 U.S. at 301–02.

[62] *Id.* at 302 (quoting Stovall v. Denno, 355 F.2d 731, 735 (2d Cir. 1966) (en banc)).

[63] The Court does mention other evidence linking the defendant to the scene of the crime—his keys found in a shirt—but it would hardly have sufficed to obtain a conviction of the defendant. *Id.* at 295.

support a reasonable suspicion or probable cause, then what the Court is really saying is that the witness is the only person in the world who can possibly *convict* Stovall. The truth is that without the suggestive identification procedure, the State might not have had sufficient evidence to convict him. In so many violent crime cases, an eyewitness's statement of identification is the crucial identifying evidence against the defendant, and sometimes it is the only evidence linking the defendant to the crime.[64]

Putting aside the faulty premises in the Court's reasoning, there is still the fundamentally flawed assumption that society is equally justified in using a defective procedure to exonerate an innocent person as it is to convict an ostensibly guilty person. The Court assumes without explaining that a procedure that may benefit the innocent can fairly be used against an accused. Does it comport with Due Process to use a witness's statement—knowingly obtained by the State under circumstances that render the statement highly unreliable—as a means of *convicting* a defendant? Evidence must be reliable if it is the basis for depriving someone of his or her life or liberty, but it need not be as reliable if the only question is whether to arrest a person or not.[65] If the witness says, "that's *not* the guy who stabbed me," then there is no cause for holding the defendant, but the converse is not necessarily true. It does not follow that her statement identifying a suspect as the culprit—"that's the guy"—can fairly be used to obtain a conviction. Just because this was the only way to get identification evidence, it does not follow that the exigencies somehow transform the identification testimony into good evidence, or that it comports with fundamental fairness to allow the State to use the evidence. Of course, it may mean that there is no other way to obtain evidence to support a conviction, but that was not the expediency the Court held up as the rationale for condoning the unnecessarily suggestive identification procedure. Not surprisingly, since *Stovall* was decided, the Court's logic of ostensibly using show-ups as a means of exonerating the innocent has instead justified the use of show-ups that have convicted many an innocent person.[66]

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[64] *See* Thompson, *supra* note 1, at 1497 (suggesting a corroborating evidence requirement for eyewitness identification evidence).

[65] For a review of federal case law on suggestiveness and necessity in eyewitness identification evidence, see Ofer Raban, *On Suggestive and Necessary Identification Procedures*, 37 Am. J. Crim. L. 53 (2009).

[66] Although the Supreme Court has long acknowledged that show-ups are "widely condemned" in scientific and legal literature, they continue to be a commonly used form of identification procedure. *See Stovall*, 388 U.S. at 302 (recognizing that the use of show-ups rather than lineups "has been widely condemned"). They also produce more false identifications than line-ups, and they taint later identifications by the same witness by falsely increasing the witness's confidence level. *See* Thompson, *supra* note 1, at 1504–05. Numerous wrongful convictions discovered in the recent past have been based on show-up identifications. *See, e.g.*, Steve McGonigle & Jennifer Emily, *DNA Exoneree Fell Victim to "Drive-By" Identification*, DALLAS MORNING NEWS, Oct. 13, 2008, http://www.dallasnews.com/sharedcontent/dws/dn/dnacases/stories/101308dnproDNAshowups.264c41d.html (last visited Apr. 13, 2010).

In *Brathwaite*, the Court subsequently removed necessity as a consideration and made reliability the "linchpin."[67] Thus, even an unnecessarily suggestive identification procedure can yield admissible identification evidence if it is otherwise found to be reliable under the *Biggers* checklist. Again, the Court missed the mark in not drawing a clear line against highly suggestive practices, especially when they are not necessary.

D. *Viewing* Stovall, Biggers, *and* Brathwaite *Through the Lens of Science*

The reliability problems that attend many eyewitness identifications have to do with the quick and violent nature of the crimes. In re-reading the decades-old Due Process cases today, one is struck by the presence of numerous estimator variables that researchers have shown decrease the accuracy of an identification. Applying the knowledge obtained through scientific research to the Supreme Court's principal decisions—*Stovall v. Denno*, *Neil v. Biggers*, and *Manson v. Brathwaite*—we can now identify many such estimator variables, variables inherent in the witness and that the police cannot correct or control.[68]

For example, the facts in *Biggers* showed that the female victim first viewed the culprit in an unlit kitchen with light from a bedroom that was shining through.[69] She could see that he was young and carried a butcher knife.[70] The assailant led her at knifepoint for a distance of two blocks into some woods where he raped her and then fled. The assault occurred at night illuminated only by a full moon, and took between fifteen minutes and half an hour.[71] These were hardly optimal conditions for observing a stranger's face.[72] Scientific studies, although not conclusive, show that the extreme stress and fear provoked by a violent crime involving this level of danger may reduce the victim's perceptual skills, making an accurate identification less likely.[73] In addition, the presence of a weapon generally causes victims to focus on the weapon rather than on the face of the assailant.[74] The amount of time for viewing the culprit was presumably confined

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[67] Manson v. Brathwaite, 432 U.S. 98, 114 (1977).

[68] *See supra* notes 54–56 and accompanying text.

[69] Neil v. Biggers, 409 U.S. 188, 193–94 (1972).

[70] *Id.* at 193.

[71] *Id.* at 194.

[72] *See supra* note 14.

[73] *See* CUTLER & PENROD, *supra* note 43, at 102–04 (detailing findings that show crime seriousness does not affect accuracy of identifications and that ethical considerations impede the ability to study the stress of violent crimes). Some studies indicate that increased arousal (experienced during the commission of a mock crime) leads to better identifications of persons central to the event, but other researchers have found that when stress levels become too high, such as that felt by a victim facing extreme danger, perceptual skills become debilitated. *Id.* at 103–04.

[74] *See id.* at 101–02; LOFTUS, DOYLE & DYSART, *supra* note 14, at 16–36 (addressing effects of weapon focus, among others that affect eyewitness identification accuracy); Wells & Olson, *supra*

to the short period during which the victim and assailant stood face to face in the darkened room in the house and possibly during the time in which he led her to the woods, although it is not clear that she could see his face at that time. It would seem more likely that he would walk behind her while leading her at knifepoint and that she might catch passing glances.

The Supreme Court disagreed with the district court's conclusion that the identification was not reliable.[75] Some of the disagreement centered on whether there had been sufficient time and lighting to make an accurate identification. Other conclusions reached by the Supreme Court are not consistent with scientific research on identifications. For example, the Court was swayed by the fact that the witness was not a "casual observer, but rather the victim of one of the most personally humiliating of all crimes."[76] Scientific studies, while not refuting this assumption, are inconclusive with regard to the effects on accuracy of a victim's stress of experiencing a violent crime as compared to a casual observer.[77] The Court also puts stock in the fact that the victim was "a practical nurse by profession," perhaps suggesting that this fact somehow made her better able to make an accurate identification.[78] Studies conclude that even individuals in certain professions, such as bank tellers, who are given instruction on facial recognition, are not better able to make accurate identifications.[79] The Court also put its faith in the victim's statements that she had "no doubt" that the defendant was her rapist and that there was something about his face that she did not think she could ever forget.[80] Again, scientific studies show that such expressions of confidence in identifications bear no relation to accuracy, and that a witness's expressed level of confidence will typically increase from the time the identification is made to the time of trial.[81]

In *Stovall v. Denno*, the witness walked into her kitchen at midnight to discover a male intruder who had just fatally stabbed her husband.[82] She then jumped on the intruder, who proceeded to stab her eleven times.[83] She later identified the defendant in a single-suspect show-up, with the defendant handcuffed to a police officer, from her hospital bed the day after life-saving surgery.[84] Like *Biggers*, this case is rife with estimator variables that reduce the

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note 14, at 280–82 (eyewitness accuracy can be affected by many factors, including presence of a weapon).

75 *Biggers*, 409 U.S. at 200.

76 *Id.*

77 *See supra* note 73.

78 *Biggers*, 409 U.S. at 201.

79 *See* CUTLER & PENROD, *supra* note 43, at 85–88.

80 *Biggers*, 409 U.S. at 200–01.

81 *See supra* notes 43–45 and accompanying text.

82 388 U.S. 293, 295 (1967).

83 *Id.*

84 *Id.*

accuracy—extreme stress, use of a weapon, a serious assault, limited time for viewing, and, in this case, a victim who was likely in great pain and sedated at the time of the identification. In addition, the Court notes that during the show-up the defendant was "the only Negro in the room," indicating a cross-racial identification.[85] Scientific findings show conclusively that persons of all races are less accurate in identifying persons of a different race, regardless of their experience with persons of a different race or their feelings toward persons of another race.[86] In both *Biggers* and in this case, the victims based the identifications on a visual inspection of the suspects' appearances as well as by listening to their voices.[87] Voice identification has proved highly unreliable when a witness attempts to identify an unfamiliar voice based on minimal previous interaction under stressful circumstances.[88]

The Supreme Court's third significant Due Process case, *Manson v. Brathwaite*, involved a brief encounter between an undercover police officer and a drug seller.[89] Unlike the other two cases, the eyewitness in this case was not a victim, nor was the crime violent in nature.[90] The crime was initiated by the police officer acting undercover.[91] Thus, factors such as weapon-focus, the stress of fear, and being the victim of a serious assault are not present. This case did involve, however, the unnecessary display of a single photo to the police witness who confirmed that the man in the photo was the drug seller.[92] Although counterintuitive, even people specially trained in eyewitness identification, such as police officers, are not better able to make accurate identifications.[93]

In *Stovall*, there was apparently strong corroborating evidence. The Court said only that a shirt was found on the kitchen floor with keys in a pocket which were traced to petitioner. If these facts are true, we can breathe easier about admitting the identification testimony in this case. *Stovall* does not mention this corroborating evidence in ruling on the admissibility of the evidence. In

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[85] *Id.*

[86] *See* LOFTUS, *supra* note 40, at 136–37 ("It seems to be a fact—it has been observed so many times—that people are better at recognizing faces of persons of their own race than a different race."); *see also* Behrman & Davey, *supra* note 17, at 476 (confirming importance of cross-race factor by means of archival analysis of real cases and determining effects of cross-race bias, among other estimator variables, on "suspect identification rates," or rates at which eyewitnesses identified persons that police had singled out as suspects).

[87] *Stovall*, 388 U.S. at 295.

[88] *See* Lawrence M. Solan & Peter M. Tiersma, *Hearing Voices: Speaker Identification in Court*, 54 HASTINGS L.J. 373, 393–413 (2003) (reviewing scientific literature on voice identification).

[89] 432 U.S. 98, 99–101 (1977).

[90] *Id.* at 101.

[91] *Id.* at 99–100.

[92] *Id.* at 101–02.

[93] *See* CUTLER & PENROD, *supra* note 43, at 85–86 (studies of individuals who are trained in facial recognition for purposes of eyewitness identification during crimes, such as bank tellers, are not shown to be more accurate as eyewitnesses).

Brathwaite, the Court noted that its reliability assessment is "hardly undermined" by the fact that other evidence linked the defendant to the location of the crime; however, the Court did not go so far as to require corroborating evidence. Indeed, the Court stated that this evidence "plays no part in [the Court's] analysis." A corroborating evidence requirement would go a long way to ensure the accuracy of a conviction.[94] Unfortunately, neither Due Process nor any other law requires it, and identification testimony alone suffices to obtain convictions.[95] In *Biggers*, on the other hand, the defendant was convicted on the sole basis of the eyewitness's identification.

E. *Misguided Reliance on Other Safeguards in the Trial Process*

In 1908, Hugo Münsterberg, a prominent psychologist and researcher of eyewitness identification, wrote:

> The time for such Applied Psychology is surely near . . . . The lawyer alone is obdurate.
>
> The lawyer and the judge and the juryman are sure that they do not need the experimental psychologist . . . . They go on thinking that their legal instinct and their common sense supplies them with all that is needed and somewhat more.[96]

Amazingly enough, attitudes among the legal profession do not seem to have changed much in over a hundred years.[97] Instead of adopting a rule that actually results in the exclusion of unreliable eyewitness identification testimony, the Supreme Court has put its trust in juries to sort out reliability issues on its own. The Court in *Brathwaite* justified its less restrictive approach as follows:

> We are content to rely upon the good sense and judgment of American juries, for evidence with some element of untrustworthiness is customary grist for the jury mill. Juries are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature.[98]

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[94] For a discussion of the role that corroborating evidence should play in a Due Process analysis, see 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 (2003) (arguing that corroborative evidence of general guilty should only be considered in post-conviction harmless error analysis).

[95] *See generally* Thompson, *supra* note 1 (proposing corroborating evidence requirement for admission of eyewitness identification evidence).

[96] Loh, *supra* note 12, at 662 (quoting HUGO MÜNSTERBERG, ON THE WITNESS STAND 9–11 (1908)).

[97] *See supra* note 12.

[98] *See* Manson v. Brathwaite, 432 U.S. 98, 116 (1977).

The scientific literature shows clearly that jurors (not to mention judges and lawyers) are not generally equipped to distinguish between reliable and unreliable identification evidence.[99] Thus, the Supreme Court's trust in juries to reject unreliable identification evidence on its own is simply misplaced.

Juror decision making can be improved by means of jury instructions or expert testimony educating them on the types of factors that affect identification accuracy.[100] Trial courts have wide latitude in deciding whether to give requested jury instructions or whether to permit expert testimony.[101] Experience shows that, more often than not, courts deny requests for jury instructions and for admission of expert testimony on eyewitness identifications.[102] Appellate courts uphold these discretionary decisions, often on the ground that the defense adequately raised reliability issues on cross-examination of the eyewitness and in summation.[103] However, lawyers cannot educate jurors about the factors that affect eyewitness identification accuracy as part of their cross-examination, nor may they address matters not in evidence as part of their arguments to the jury. Not surprisingly, scientific studies confirm the inadequacy of cross-examination as a means of juror education,[104] leading legal scholars to urge courts to admit expert testimony instead.[105]

In summary, the federal Due Process test, less restrictive by design, invariably leads to the admission of eyewitness identification testimony by relying on the "good sense and judgment" of jurors to give appropriate weight to the testimony, even though scientific studies now show that jurors are not capable of doing so.

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[99] *See, e.g.*, CUTLER & PENROD, *supra* note 43, at 207–09 (relying on survey studies, prediction studies, and mock juror studies to conclude that "jurors are generally insensitive to factors that influence eyewitness identification accuracy" and are generally unable to detect unreliable identification testimony).

[100] *See* LOFTUS, *supra* note 40, at 191.

[101] *See* Thompson, *supra* note 1, at 1516–17.

[102] *See id.*

[103] *See id.* at 1516 (citing study that found cross-examination to be ineffective in conveying information about problems inherent in eyewitness identifications); LOFTUS, DOYLE & DYSART, *supra* note 14, at 353 ("Although much of the specific information in an eyewitness case—the lighting, the initial descriptions, the duration of the encounter—is available through aggressive cross-examination, the general propositions that must be supplied if the jurors are to use that specific information with appropriate caution usually have to be conveyed in some other way.").

[104] *See* LOFTUS, DOYLE & DYSART, *supra* note 14, at 353.

[105] *See generally* Wise, Dauphinais & Safer, *supra* note 21, at 823–43 (proposing that expert witness be allowed to testify when eyewitness identification testimony is the primary or sole evidence against a defendant, and addressing the shortcomings of other possible remedies such as jury instructions and cross-examination); Henry F. Fradella, *Why Judges Should Admit Expert Testimony on the Unreliability of Eyewitness Testimony*, FED. CTS. L. REV., June 2006, at 28 (taking view that jury instructions are inadequate to educate juries on eyewitness identification issues and urging admission of expert testimony); Fredric D. Woocher, Note, *Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification*, 29 STAN. L. REV. 969 (1977) (arguing that expert psychological testimony is necessary for a competent defense).

While expert witnesses would go a long way in equipping juries with the ability to properly evaluate identification testimony, the testimony is generally not admitted, nor do courts often give clear jury instructions either. Instead, jurors routinely hear questionable eyewitness identification testimony and are left to fend for themselves in evaluating the reliability of the evidence. The result should not surprise us—scores of wrongful convictions.

II. STATE SUPREME COURTS ENGAGE IN INCREMENTAL JURISPRUDENTIAL CORRECTION

"Appellate courts have a responsibility to look forward, and a legal concept's longevity should not be extended when it is established that it is no longer appropriate."
Brodes v. State, 614 S.E.2d 766, 771 (Ga. 2005).

Because federal Due Process law has provided virtually no protection against the use of eyewitness identification evidence, federal courts admit identification evidence even when it is obtained through highly suggestive means or is otherwise highly unreliable. Most state courts have applied the federal standard in interpreting their state constitutions as well.[106] Some state courts, however, have taken the initiative to ensure the reliability of identification evidence—and ultimately the fairness of trials—as have some state legislatures and law enforcement agencies.

To date a small percentage of the reforms addressing these problems have come directly from law enforcement agencies.[107] Reforms have been implemented on a statewide basis through legislation in only a handful of states, with North Carolina serving as the prime example.[108] In the state appellate courts, only a few

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[106] *See* Commonwealth v. Johnson, 650 N.E.2d 1257, 1265–66 & n.2 (Mass. 1995) (Nolan, J., dissenting) (noting that virtually every other state has adopted the federal reliability test under their State constitutions and citing cases); *see also* Thompson, *Judicial Blindness*, *supra* note 7 (providing findings of year-long empirical study of state eyewitness identification Due Process cases and demonstrating that many states follow outdated federal constitutional standards and none in the study required reforms to eyewitness identification practices).

[107] The Innocence Project of the Cardozo School of Law lists three examples of local law enforcement agencies that have changed their identification policies in response to the growing awareness of misidentification problems in wrongful convictions. *See supra* note 5.

[108] *See* N.C. GEN. STAT. § 15A-284.50–.53 (2009); *see also* Christine C. Mumma, *The North Carolina Actual Innocence Commission: Uncommon Perspectives Joined by a Common Cause*, 52 DRAKE L. REV. 647 (2004) (addressing mission and accomplishments of North Carolina Actual Innocence Commission in implementing reforms and reviewing claims of actual innocence). The North Carolina law implementing new police procedures for identifications had its genesis in the recommendations of the commission. *See* N.C. ACTUAL INNOCENCE COMM'N, RECOMMENDATIONS FOR EYEWITNESS IDENTIFICATION, http://www.ncids.org/New%20Legal%20Resources/Eyewitness%20ID.pdf; *see also* Jerome M. Maiatico, Note, *All Eyes On Us: A Comparative Critique of the North Carolina Innocence Inquiry Commission*, 56 DUKE L.J. 1345 (2007) (critiquing North Carolina's unique tribunal for addressing

state supreme courts have taken the initiative to depart from the federal Due Process model. These decisions, however, provide a useful roadmap for other state appellate courts that may be inclined to provide a more rigorous review of identification testimony as a safeguard against wrongful convictions.

It is important to note from the outset that state supreme courts actually have several legal avenues besides enforcing their state constitutions for developing rules that are consistent with scientific research and that require law enforcement to avoid suggestiveness in obtaining identification evidence. Over the years, state high courts have invoked these different legal bases in eyewitness identification cases, grounding their decisions on the supervisory authority of state high courts to ensure the fair administration of justice,[109] on common law principles of fairness,[110] on evidentiary grounds,[111] as well as on state constitutional grounds.[112] In a rare case, the Supreme Court of New Jersey exercised its supervisory role over the court system to require a detailed written record, preferably an electronic recordation, of the pretrial identification procedure.[113] Most of the cases, however, simply use the *Brathwaite* test as the baseline when interpreting State constitutional law.

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claims of actual innocence). Other states have also adopted or considered reforms to eyewitness identification procedures. *See* Scott Ehlers, *Eyewitness Identification: State Law Reform*, 29 CHAMPION 34 (2005) (outlining state legislative reforms).

[109] *See, e.g.*, State v. Delgado, 902 A.2d 888, 896–97 (N.J. 2006). Others have explored the role of the inherent supervisory authority of state supreme courts. *See, e.g.*, Bennett L. Gershman, *Supervisory Power of the New York Courts*, 14 PACE L. REV. 41, 44–45 (1994) (recounting history and applications of New York supervisory power and addressing issues of legitimacy); Jake Sussman, *Suspect Choices: Lineup Procedures and the Abdication of Judicial and Prosecutorial Responsibility for Improving the Criminal Justice System*, 27 N.Y.U. REV. L. & SOC. CHANGE 507, 508 (2002) (arguing that New York trial court should have invoked supervisory power to require sequential lineup). Scholars have also addressed the supervisory power of the federal courts. *See, e.g.*, Sara Sun Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 COLUM. L. REV. 1433, 1434–35 (1984) (concluding that concept of supervisory power should be abandoned in favor of identifying specific constitutional and statutory powers to employ); Matthew E. Brady, Note, *A Separation of Powers Approach to the Supervisory Power of the Federal Courts*, 34 STAN. L. REV. 427, 428 (1982) (proposing least restrictive means approach to exercise of supervisory power to maintain principles of separation of power); Nathan E. Ross, Comment, *The Nearly Forgotten Supervisory Power: The Wrench to Retaining the* Miranda *Warnings*, 66 MO. L. REV. 849, 850 (2001) (addresses Supreme Court's choice to constitutionalize *Miranda* warnings instead of invoking its supervisory power).

[110] *See* Commonwealth v. Jones, 666 N.E.2d 994, 1001 (Mass. 1996) (basing suppression of identification procedure on common law grounds).

[111] *See* State v. Chen, 952 A.2d 1094, 1103 (N.J. Super. Ct. App. Div. 2008) ("The foundation of our evidence rules, at least insofar as jury trials are concerned, is to provide the fact-finder with only reliable and probative evidence."); *id.* at 1105 (citing State v. Hibl, 714 N.W.2d 194, 201–02, 205–06 (Wis. 2006)); People v. Owens, 97 P.3d 227, 233–34 (Colo. App. 2004); State v. Holliman, 570 A.2d 680, 684 (Conn. 1990); People v. Blackman, 110 A.D.2d 596, 488 N.Y.S.2d 395, 397 (1985) (also applying fairness requirement under the 5th Amendment).

[112] *See, e.g.*, State v. Dubose, 699 N.W.2d 582, 595 (Wis. 2005).

[113] *See Delgado*, 902 A.2d at 896–97.

A. *Tweaking* Brathwaite: *Incorporating Scientific Findings and Promoting Best Practices by the Police*

The creative work done by state appellate courts has mostly involved taking the Supreme Court's two-step suggestiveness/reliability test as developed in *Stovall*, *Brathwaite*, and *Biggers*, and tweaking it. No state court has departed completely from the federal model and created an entirely new rule from whole cloth, but the changes are extremely important nonetheless.

After *Stovall*, some courts believed that the federal high court had adopted a per se rule of exclusion for identifications obtained through unnecessarily suggestive means,[114] but *Brathwaite* rejected a per se exclusionary rule in favor of a test that ostensibly hinged on reliability instead.[115] The most dramatic departures from the federal rule were adopted in Massachusetts, New York, and Wisconsin. The Supreme Courts in these states have adopted, as a matter of state constitutional law, a per se exclusionary rule for unnecessarily suggestive identifications.[116] The Wisconsin Supreme Court, the most recent to adopt a per se exclusionary rule, although limited to show-ups, began its assessment by recognizing that "[o]ver the last decade, there have been extensive studies on the issue of identification evidence, research that is now impossible for us to ignore."[117] The Wisconsin Court, influenced by the prominent role of erroneous identifications in wrongful convictions, abandoned the federal reliability test "since it is extremely difficult, if not impossible, for courts to distinguish between identifications that were reliable and identifications that were unreliable."[118]

The Supreme Judicial Court of Massachusetts also took issue with *Brathwaite*, refuting it point-by-point. It expressed concerns about the dangers of mistaken identifications to the truth-finding goal of criminal trials because jurors tend to be "unduly receptive to eyewitness evidence."[119] The Massachusetts court then rejected the Supreme Court's reasoning that the totality test would sufficiently deter the police from using unnecessarily suggestive procedures. The state court wrote, "To the contrary, it appears clear to us that the reliability test does little or nothing to discourage police from using suggestive identification procedures . . . . '[U]nder *Brathwaite,* the showup has flourished . . . . Almost any suggestive lineup will still meet reliability standards.'"[120] Finally, the court disputed the statement in *Brathwaite* that a per se rule would negatively affect the administration of justice by denying the trier reliable evidence and causing, on

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[114] *See supra* notes 27–28 and accompanying text.

[115] *See supra* notes 29–30 and accompanying text.

[116] *See* Commonwealth v. Johnson, 650 N.E.2d 1257, 1261 (Mass. 1995); People v. Adams, 423 N.E.2d 379, 384 (N.Y. 1981); State v. Dubose, 699 N.W.2d 582, 593–94 (Wis. 2005).

[117] *Dubose*, 699 N.W.2d at 591.

[118] *Id.* at 592.

[119] *Johnson*, 650 N.E.2d at 1261.

[120] *Id.* at 1263 (citation omitted).

occasion, "the guilty going free."[121] Instead, the court took the view that "[t]he inverse of this is probably more accurate: the admission of unnecessarily suggestive identification procedures under the reliability test would likely result in the innocent being jailed while the guilty remain free."[122] The Massachusetts court added, "The *Brathwaite* Court disregards the wisdom of Justice Harlan when he wrote: 'it is far worse to convict an innocent man than to let a guilty man go free.'"[123]

The New York Court of Appeals has distinguished a per se exclusionary rule for suggestive identifications from that applicable to other violations of constitutional rights, such as the fruits of illegal searches and seizures. The court explained:

> In [cases excluding the fruits of illegal searches and seizures,] generally reliable evidence of guilt is suppressed because it was obtained illegally. Although this serves to deter future violations, it is collateral and essentially at variance with the truth-finding process. But the rule excluding improper pretrial identifications bears directly on guilt or innocence. It is designed to reduce the risk that the wrong person will be convicted as a result of suggestive identification procedures employed by the police.[124]

Thus, the exclusionary rule for suggestive identifications is justified both on procedural grounds—as a means of deterring the police from improper practices—and on substantive grounds, as a means of preventing consideration of unreliable evidence.

Over time, a per se exclusionary rule for unnecessarily suggestive identification practices tends to create, through a case-by-case method, a set of best practices, although it does so in reverse fashion. By indicating disapproval of certain practices, the courts implicitly require police to do the opposite, thus effectively creating a set of rules for obtaining identification evidence in a non-suggestive manner. The New York high court, for example, found it to be unnecessarily suggestive for the police to conduct identification procedures with several witnesses at once, and with two co-suspects at the same time. In so doing, the court has made clear that it expects the police to keep witnesses separate while conducting identification procedures, and that multiple suspects should not be

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[121] *Id.* (quoting Manson v. Brathwaite, 432 U.S. 98, 112 (1977)).

[122] *Id.*

[123] *Id.* (citing In re Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring)) (internal citation omitted).

[124] *People v. Adams*, 423 N.E.2d 379, 383 (N.Y. 1981) (citation omitted). The Massachusetts Supreme Judicial Court expressed the same rationale, citing *Adams* among other cases, in adopting a per se exclusionary rule. *See Johnson*, 650 N.E.2d at 1264.

shown simultaneously to a witness.[125] The Massachusetts court made clear that show-ups, which are inherently suggestive, should never be used unless done in the immediate aftermath of a crime or in exigent circumstances.[126] In an earlier case, the court had also declared multiple showings of the same suspect to be unnecessarily suggestive.[127] The practices sanctioned in these cases have been recommended by organizations such as the Department of Justice, the American Bar Association, and others, and often the reforming courts refer to the scientific studies and these influential reports.[128]

We see additional examples of rule setting in other state appellate courts. In Connecticut, although the supreme court refused to depart from the *Brathwaite* standard as a state constitutional matter, it nonetheless ruled that the failure to give a witness an admonition that the guilty person may not be present in the photo array should be taken into account as a factor in a totality of the circumstances analysis.[129] The court also ruled that affirmatively telling the witness that the suspect is in the photo array does render the identification procedure unnecessarily suggestive.[130]

The Utah Supreme Court, while not abandoning the *Biggers* reliability test, has tweaked it to make it consistent with scientific principles.[131] The Utah test retains the first two *Biggers* factors: the opportunity of the witness to view the actor during the event and the witness's degree of attention to the actor at the time of the event.[132] It then discards the last three *Biggers* factors: the accuracy of the witness's prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.[133] In their stead the court has adopted three new considerations: (1) "the witness's capacity to observe the event, including his or her physical and mental acuity;" (2) "whether the witness's identification was made spontaneously and remained consistent thereafter, or whether it was the product of suggestion;" and (3) "the nature of the event being observed and the likelihood that the witness

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[125] *Adams*, 423 N.E.2d at 382.

[126] *Johnson*, 650 N.E.2d at 1261.

[127] Commonwealth v. Botelho, 343 N.E.2d 876, 882 (Mass. 1976). The Massachusetts court followed the Supreme Court's lead in *Foster v. California*, a case also involving multiple showings of a suspect, which is the only Supreme Court case in which an identification procedure was found to violate Due Process. 394 U.S. 440 (1969).

[128] *See* Thompson, *What Price Justice?*, *supra* note 7, at 42–54 (reviewing leading reform recommendations).

[129] State v. Ledbetter, 881 A.2d 290, 313, 316 (Conn. 2005).

[130] *Id.* at 316.

[131] State v. Ramirez, 817 P.2d 774, 780–81 (Utah 1991).

[132] *Compare* Neil v. Biggers, 409 U.S. 188, 199 (1972), *with Ramirez*, 817 P.2d at 780–81.

[133] *Biggers*, 409 U.S. at 199–200.

would perceive, remember and relate it correctly."[134] As for this last factor, the court explains that it would encompass "whether the event was an ordinary one in the mind of the observer during the time it was observed, and whether the race of the actor was the same as the observer's."[135] The Utah rule eliminates the scientifically unsound "witness confidence" factor of *Biggers* and incorporates two critical elements: the extent to which police suggestion has affected the witness's recollection and the effect of cross-race identifications.[136]

The Supreme Judicial Court of Maine did not tinker with the legal test, but applied different burdens of proof. If the defendant proves by a preponderance of the evidence that the identification was obtained by "unnecessarily suggestive" means, then the burden shifts to the government to prove by clear and convincing evidence that the corrupting effect of the suggestive procedure is *outweighed* by the reliability of the identification as measured by the factors outlined in *Biggers*.[137] The court put this burden on the government in recognition of the fact that suggestive procedures create a risk of misidentification and that they are contrary to "governmental fair play."[138] The New Hampshire Supreme Court had adopted the same rule the year before.[139]

Some of the changes reflect a concern to broaden the scope of the suggestiveness inquiry. For example, whereas Due Process claims only apply to cases that involve impermissibly suggestive conduct by law enforcement, some state courts have expanded the inquiry beyond the conduct of law enforcement to account for suggestive actions by private parties. In order to reach private conduct, the courts have looked beyond constitutional strictures and relied on evidentiary grounds[140] or common law principles of fairness.[141]

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[134] *Ramirez*, 817 P.2d at 781. The court had previously required that trial courts use these same five factors to instruct jūries on assessing the reliability of eyewitness identification. *See* State v. Long, 721 P.2d 483, 493 (Utah 1986).

[135] *Ramirez*, 817 P.2d at 781.

[136] *Id.*

[137] State v. Cefalo, 396 A.2d 233, 238–39 (Maine 1979). This interpretation of *Brathwaite* is actually consistent with what the Supreme Court decided, but lower courts have generally not considered suggestiveness beyond the threshold inquiry, and the decision has ultimately turned only on reliability as assessed without reference to suggestiveness. *See supra* notes 33–34 and accompanying text.

[138] *Id.* at 237.

[139] State v. Leclair, 385 A.2d 831, 834 (N.H. 1978).

[140] State v. Chen, 952 A.2d 1094, 1101–02 (N.J. Super. Ct. App. Div. 2008).

[141] Commonwealth v. Jones, 666 N.E.2d 994, 1001 (Mass. 1996).

B. *In-Court Identifications and Independent Source Analysis*

When the *Brathwaite* Due Process approach is applied, pretrial identification evidence is rarely excluded.[142] Thus, there is no occasion to determine whether the witness's in-court identification will be admissible, as it goes without saying that it will be.[143] However, as states modify their Due Process standards in such a way that more pretrial identifications may be excluded, the standard for admissibility of in-court identifications becomes all the more important. Based on scientific studies about memory distortion, a strong argument can be made that an earlier suggestive identification procedure will permanently distort any later identification by the same witness, including an in-court identification.[144] Thus, a suggestive pretrial identification procedure renders any in-court identification just as unreliable as the pretrial identification. As the Supreme Court has acknowledged in relation to suggestive photo identification: "Regardless of how the initial misidentification comes about, the witness thereafter is apt to retain in his memory the image of the photograph rather than of the person actually seen . . . ."[145] There is also the argument that an in-court identification is nothing more than a single person show-up,[146] which the Supreme Court has recognized to be inherently suggestive.[147]

Some state supreme courts that have taken a more restrictive approach to suggestive pretrial identifications seem eager to reassure their potential critics that in-court identification evidence will still be available. For example, the New York high court spoke directly to the fears that prosecutors might have about a restrictive rule for pretrial identifications. The court wrote, "Excluding evidence of a suggestive show-up does not deprive the prosecutor of reliable evidence of guilt. The witness would still be permitted to identify the defendant in court if that identification is based on an independent source."[148] The Massachusetts high court has also taken this approach for *all* subsequent identifications, presumably including subsequent pretrial identifications as well as in-court identifications.[149]

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[142] *See, e.g.*, O'Toole & Shay, *supra* note 21, at 126–32 (reviewing federal and state cases applying *Brathwaite* test to admit identification evidence produced by highly suggestive means).

[143] A full discussion of Due Process and in-court identifications is beyond the scope of this article. For a discussion of the subject, *see* Evan J. Mandery, *Legal Development: Due Process Considerations of In-Court Identifications*, 60 ALB. L. REV. 389, 420–422 (1996) (arguing for a per se exclusionary rule for suggestive in-court identifications).

[144] *See* Behrman & Davey, *supra* note 17, at 488 (addressing variety of ways in which earlier identifications affect later ones).

[145] Simmons v. United States, 390 U.S. 377, 383–84 (1968).

[146] *See* Mandery, *supra* note 143, at 390.

[147] Stovall v. Denno, 388 U.S. 293, 302 (1967).

[148] People v. Adams, 423 N.E.2d 379, 384 (N.Y. 1981).

[149] Commonwealth v. Johnson, 650 N.E.2d 1257, 1262 (Mass. 1995) ("[C]ontrary to the *Brathwaite* Court's unsubstantiated claim, the per se approach does not keep relevant and reliable

If excluding suggestive or otherwise unreliable pretrial identifications is to serve, at least in part, a deterrent goal, then admitting in-court identifications (or other subsequent pretrial identifications) that follow a suppressed pretrial identification is counter-productive. The Massachusetts Supreme Judicial Court criticizes the ineffectiveness of the *Brathwaite* reliability test for deterring the police,[150] but then proceeds confidently on the assumption that the per se rule will be superior in deterring police misconduct.[151] However, the Court fails to recognize that admission of subsequent identifications will not prevent the police from obtaining convictions in cases in which they use suggestive procedures. Thus, it is hard to understand how this per se rule will lead to greater deterrence than the *Brathwaite* rule.

In effect, the independent source rule puts the burden on the government to establish the probable accuracy of the eyewitness's ability to identify the culprit in court despite the earlier use of suggestiveness in the pretrial identification procedure.[152] Usually this is based on the quality of the eyewitness's observations during the crime.[153] In practice, this test is the functional equivalent of the *Brathwaite* reliability test.[154] In the same manner in which the Utah Supreme Court has refined the *Biggers* factors for purposes of the Due Process reliability test, the Wisconsin Supreme Court has likewise improved its independent source analysis by incorporating the findings of experimental psychologists on cross-racial identifications and witness confidence.[155] However, simply tightening the test for determining whether there is an independent basis may not suffice to safeguard against the admission of unreliable in-court identifications.

C. *State Court Decisions on Jury Instructions and Expert Witnesses*

As a general rule, courts have denied requests for jury instructions or expert witnesses to assist the jurors in evaluating the reliability of eyewitness identification evidence.[156] In a few cases, however, some state supreme courts have used these tools to make improvements in the trial procedures, and even police procedures.

The Connecticut Supreme Court, for example, while not prepared to abandon the federal Due Process test, did effectively mandate new police procedures by implementing mandatory jury instructions as a remedy in the event that the police

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identification evidence from the jury. Subsequent identifications shown to come from a source independent of the suggestive identification remain admissible under the per se approach.").

[150] *Id.* at 1262–63.

[151] *Id.* at 1263.

[152] *See* LOFTUS, DOYLE & DYSART, *supra* note 14, at 194.

[153] *Id.*

[154] *See id.*

[155] *Id.* at 195 (citing State v. McMorris, 570 N.W.2d 384 (Wis. 1997)).

[156] *See* Thompson, *supra* note 1, at 1514.

fail to follow the procedures.[157] Invoking its supervisory authority over the administration of justice, the court effectively required that police advise eyewitnesses that the perpetrator may or may not be present in the identification procedure, and that the police refrain from telling the witness that the suspect is present in an identification procedure. The court considered this issue of utmost importance in maintaining the integrity of the justice system:

> Appellate courts possess an inherent supervisory authority over the administration of justice . . . . Supervisory powers are exercised to direct trial courts to adopt judicial procedures that will address matters that are of utmost seriousness, not only for the integrity of a particular trial but also for the perceived fairness of the judicial system as a whole . . . .[158]

Should the police fail to follow these guidelines, jurors must be instructed that the failure to give such admonition or the telling of a witness of the suspect's presence "[may increase] the likelihood that the witness will select one of the individuals in the procedure, even when the perpetrator is not present [and thus may] increase the probability of a misidentification."[159]

In the ordinary course of criminal trials, trial courts will sometimes agree to give jury instructions on what factors to consider in assessing the reliability of eyewitness identification. Often mirroring the *Biggers* factors, these instructions will usually include witness certainty as a consideration.[160] The Georgia Supreme Court, upon reviewing the scientific literature refuting witness certainty as an indicator of accuracy, directed lower courts to refrain from giving such an instruction.[161] It also found the instruction to constitute harmful error in a case in which there was no other evidence to corroborate the identification.[162]

The New Jersey Supreme Court, also taking stock of the scientific literature on cross-racial identification, required a jury instruction sensitizing jurors to the possibility that the cross-racial nature of the identification affected its accuracy.[163]

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[157] State v. Ledbetter, 881 A.2d 290, 316 (Conn. 2005). The use of such admonitions is recommended by leading reform proposals. *See* Thompson, *What Price Justice?*, *supra* note 7, at 52 (noting that the reports from all the groups making reform proposals reviewed in the Article called for cautionary instructions that the perpetrator may or may not be present, among other instructions) (citation omitted).

[158] *Ledbetter*, 881 A.2d at 317–18 (citation omitted).

[159] *Id.* at 319.

[160] *See, e.g.*, Brodes v. State, 614 S.E.2d 766, 769 (Ga. 2005) (stating that the reliability criteria in pattern jury instructions appear to have their roots in *Biggers*); *see also* Thompson, *Judicial Blindness*, *supra* note 7, (manuscript at 30, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1515974) (noting that many state courts give jury instruction on witness certainty).

[161] *Brodes*, 614 S.E.2d at 771.

[162] *Id.*

[163] State v. Cromedy, 727 A.2d 457, 461–67 (N.J. 1999).

It required this in a case in which identification played a key role and where there was no corroborating evidence.[164] It was later learned that the defendant in the New Jersey case had been misidentified by the victim and was innocent.[165]

With regard to the admission of expert testimony on specific psychological factors affecting identification accuracy, state supreme courts generally regard the issue as a purely discretionary decision for the trial court.[166] However, the Utah Supreme Court has recently held that expert testimony on factors affecting the accuracy of eyewitness identification should be admitted whenever it meets the requirements of Rule 702 of the state's evidence rules,[167] as has the Supreme Court of Tennessee.[168] Both courts effectively mandated the liberal admission of qualified expert testimony in cases in which an eyewitness is identifying a stranger and when one or more established factors affecting accuracy are present.[169] Most state high courts continue to uphold the exclusion of expert testimony, and uphold trial courts' reliance on cross-examination to highlight matters relating to unreliability.[170] Unfortunately, cross-examination is not an effective means of making jurors aware of some of the counterintuitive facts relating to eyewitness identification accuracy.[171]

In short, some state supreme courts have provided various safeguards against wrongful conviction by means of their jurisprudence on jury instructions and expert testimony. In particular, some courts have incorporated the findings of scientific research to fashion jury instructions that better equip jurors to make informed decisions on identification reliability, and two now restrict trial courts'

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[164] *Id.* at 467.

[165] *See* Thompson, *supra* note 1, at 1512–13 (discussing facts and ultimate exoneration of defendant in the *Cromedy* case).

[166] *See id.* at 1514–15 (discussing fact that trial courts, exercising their discretionary authority, rarely permit eyewitness identification experts to testify).

[167] State v. Clopten, 223 P.3d 1103, 1112 (Utah 2009).

[168] State v. Copeland, 226 S.W.3d 287, 301 (Tenn. 2007) (also applying similar rule 702 of the Tennessee Rules of Evidence).

[169] *Clopten,* 223 P.3d at 1113 n.22 (listing numerous such established factors). This rule is intended to "result in the liberal and routine admission of eyewitness expert testimony," particularly in cases involving identification of a stranger, and it is not limited to cases in which corroborating identification evidence is absent. *Id.* at 1112. The Court found the failure to admit expert testimony in Clopten's case to be an abuse of discretion. *Id.* at 1117. *See also Copeland,* 226 S.W.3d at 299 ("It is the educational training of the experts and empirical science behind the reliability of eyewitness testimony that persuades us to depart from the [more restrictive prior rule]. Times have changed."). In contrast, a court of appeals in Idaho, following an earlier California Supreme Court decision, requires admission of expert testimony on identification issues, but only when identification is the key issue in the government's case and there is no corroborating evidence of identification. *See* State v. Wright, 206 P.3d 856, 864 (Idaho Ct. App. 2009), *following* People v. McDonald, 690 P.2d 709, 727 (Cal. 1984).

[170] *See Wright,* 206 P.3d at 864–65.

[171] *See supra* note 103 and accompanying text.

discretion to exclude expert witness testimony. But many more states do not do either.

III. JUDICIAL RESTRAINT OR DERELICTION OF DUTY?

"It is therefore important to note that the state courts remain free, in interpreting state constitutions, to guard against the evil clearly identified by this case."
Manson v. Brathwaite, 432 U.S. 98, 128–29 (1977) (Marshall, J., dissenting) (citation omitted).

While taking baby steps in improving its identification jurisprudence, state supreme courts betray their apprehension in treading upon the domain of law enforcement in such a way as to imperil the pursuit of criminals. As the Connecticut Supreme Court writes: "The courts are not blind to the inherent risks of relying on eyewitness identification . . . . Nevertheless, we must recognize that eyewitness identification remains a vital element in the investigation and adjudication of criminal acts."[172] Even as it implemented a jury charge requirement that effectively required law enforcement to refrain from suggestive statements to witnesses and instead give prophylactic admonitions, the Connecticut Court declined to actually mandate new protocols for the police, stating that it "remain[ed] convinced, at this time, that such procedural matters should continue to be the province of the law enforcement agencies of this state."[173] In 1977, Justice Stevens, concurring in *Brathwaite,* expressed a similar sentiment, "I am persuaded that this rulemaking function can be performed 'more effectively by the legislative process than by a somewhat clumsy judicial fiat,' and that the Federal Constitution does not foreclose experimentation by the States in the development of such rules [to minimize the dangers of unreliable identification evidence]."[174]

The problem with a deferential judiciary is that legislative change has been far too slow in coming.[175] Thirty-two years after *Brathwaite*, the vast majority of

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[172] State v. Ledbetter, 881 A.2d 290, 317 (Conn. 2005).

[173] *Id.* at 315.

[174] Manson v. Brathwaite, 432 U.S. 98, 118 (1977) (Stevens, J., concurring) (internal citations omitted). In like fashion, the Supreme Court in *United States v. Wade*, the seminal case on the right to counsel at lineups, indicated a preference for legislative reform or judicial remedies:

> Legislative or other regulations, such as those of local police departments, which eliminate the risks of abuse and unintentional suggestion at lineup proceedings and the impediments to meaningful confrontation at trial may also remove the basis for regarding the stage as "critical." But neither Congress nor the federal authorities have seen fit to provide a solution. What we hold today "in no way creates a constitutional straitjacket which will handicap sound efforts at reform, nor is it intended to have this effect."

388 U.S. 218, 239 (1967) (citation omitted).

[175] *See* O'Toole & Shay, *supra* note 21 (arguing that courts should adopt affirmative minimum guidelines for eyewitness identification procedures consistent with reform proposals and scientific literature).

states still employ substantially the same identification practices that they did when *Brathwaite* was written.[176] And yet, so many state supreme courts continue to wait for their state legislatures to act.

In the meantime, those same courts have had the obligations to oversee the administration of justice,[177] to ensure the reliability of evidence, and to uphold the Due Process rights of the criminal defendants who appear before them. The Wisconsin Supreme Court took the unusual approach of "recommend[ing]" that police departments in the state implement "procedures similar to those proposed by the Wisconsin Innocence Project to help make showup identifications as non-suggestive as possible."[178] In so doing, without specifying the exact procedures to be followed, the court signaled to lower courts and the police that it would not tolerate practices that did not conform more closely to state-of-the-art practices proposed by reformers. When the New Jersey Supreme Court required written documentation for lineups, and stated a preference for electronic recording, the political context was favorable to such a decision. The Attorney General of the state had already implemented significant reform procedures on a statewide basis, and the Court noted this important development.[179]

In contrast, most other state high courts have declined to take an active role in developing a jurisprudence that requires the police to follow non-suggestive practices and that excludes otherwise unreliable identification evidence. By turning a blind eye to the scientific findings on eyewitness identification and the problem of wrongful convictions, the majority of state appellate courts have abdicated their constitutional and ethical responsibilities to see that justice is done.[180] Thus, the blame for the hundreds of wrongful convictions that have occurred in the past few decades lies as much with these courts as with law enforcement and legislatures.[181]

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[176] *See* Commonwealth v. Johnson, 650 N.E.2d 1257, 1265–66 (Mass. 1995) (Nolan, J., dissenting).

[177] *See* Commonwealth v. Jones, 666 N.E.2d 994, 999 (Mass. 1996) (addressing literature on courts' supervisory power).

[178] State v. Dubose, 699 N.W.2d 582, 594 (Wis. 2005). The Supreme Court in *Wade* similarly provided a lengthy footnote with one commentator's proposed model statute for lineups. United States v. Wade, 388 U.S. 218, 236–37 n.26 (1967). The Wisconsin Court goes farther than simply pointing out a model statute and actually indicates that anything less than compliance with reform procedures is not likely to be viewed as constitutional.

[179] State v. Delgado, 902 A.2d 888, 895 (N.J. 2006).

[180] Courts have an affirmative duty to see that justice is done by assuring that trials are fair. For a discussion of the ethical and professional duties of judges, see Mary Sue Backus, *The Adversary System is Dead; Long Live the Adversary System: The Trial Judge as the Great Equalizer in Criminal Trials*, 2008 MICH. ST. L. REV. 945 (arguing that trial judges have an ethical and professional obligation to assure that criminal defendants receive effective legal representation).

[181] The rules that govern appeals also have the tendency to create "tunnel vision" in the appellate process that may contribute to the affirmance of wrongful convictions. *See* Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS.

Justice Stevens was right in proposing that states could engage in experimentation to develop optimal rules to guide the police in gathering identification evidence,[182] but he was wrong in suggesting that this was the sole province of the legislature. State supreme courts have multiple sources of authority upon which to rely as they engage in incremental jurisprudential correction. To inform themselves about the science of eyewitness identification, the courts can draw on the testimony of expert witnesses as transcribed in court records, and they can take judicial notice of the massive body of research on eyewitness identification.[183] The Connecticut Supreme Court explained the propriety of its surveying the relevant scientific data:

> [A]n appellate court may take judicial notice of the existence of a body of scientific literature. . . . To ensure consistency in the approach to scientific evidence, a court should examine the foundation evidence received, if any; the scientific literature; and other courts' analyses. . . . Indeed, even when, as in this case, there has been no evidence introduced at the trial level, an appellate court may properly analy[ze] . . . the issues . . . based [only] on consideration of the information gleaned from prior reported cases and published literature on the subject matter.[184]

The Utah Supreme Court also cited a vast array of scientific literature in rendering its decision to alter the *Biggers* factors for assessing the reliability of eyewitness identification evidence.[185]

As the Connecticut court suggests, state appellate courts can also engage in a dialogue with one another in their jurisprudential development, and, of course, they do. When the Massachusetts court rejected *Brathwaite's* reliability test in favor of a per se rule, it did so by citing the reasoning of courts in New York, Utah, and New Hampshire, in addition to a large volume of scholarly literature.[186] The Georgia Supreme Court even cited several courts of appeal from other states on the issue of witness certainty instructions.[187]

L. REV. 291, 348–54 (describing appellate rules that contribute to tunnel vision in wrongful conviction cases).

[182] *See supra* note 174 and accompanying text.

[183] State v. Ledbetter, 881 A.2d 290, 312 (Conn. 2005); *see also* Muller v. Oregon, 208 U.S. 412, 421 (1908) (taking judicial notice of numerous reports brought to its attention by counsel and concluding that "[w]e take judicial cognizance of all matters of general knowledge").

[184] *Ledbetter*, 881 A.2d at 312 (citations omitted).

[185] State v. Long, 721 P.2d 483, 489–91 (Utah 1986) (requiring cautionary instructions on identification reliability factors when identification evidence is central issue).

[186] Commonwealth v. Johnson, 650 N.E.2d 1257, 1260–64 (Mass. 1995).

[187] Brodes v. State, 614 S.E.2d 766, 770–71 (Ga. 2005).

IV. CONCLUSION

The question of whether to admit eyewitness identification testimony does not present a philosophical quandary about principles of fairness or social policy. It is a "yes" or "no" question that should turn on reliability, which is ultimately a fact-intensive inquiry that should be heavily informed by scientific knowledge. Judges can and do turn to science to gauge the probable accuracy of a witness's identification. However, appellate courts are too often overly concerned about the effects of excluding identifications on the ability of the government to obtain convictions, as if *convictions*—regardless of their accuracy—in and of themselves further society's law enforcement goals. They also express concerns about whether it is legitimate for appellate courts to set procedural requirements for the police. Unfortunately, the consequences of not acting to improve the procedures for gathering identification evidence have been disastrous. The time has come for state supreme courts to take affirmative action to effectuate change by jurisprudential means.

The problems associated with eyewitness identifications are multifaceted, as are the proposals for remedying them. As the Supreme Court long ago recognized in *United States v. Wade*: "[W]here so many variables and pitfalls exist, the first line of defense must be the prevention of unfairness and the lessening of the hazards of eyewitness identification at the [pretrial identification] itself."[188] A focus on suggestive practices is correct, as is consideration of other factors that may indicate unreliability. Courts today do not begin from scratch—experts in law enforcement and legal reform have already established recommendations for procedural change that are considered state-of-the-art.[189] Courts need only to take cognizance of those reports and insist that police follow best practices.[190]

The stakes are indeed high. Mistaken identification continues to present a serious danger of convicting innocent persons, especially in violent crime cases, and meanwhile the guilty perpetrators remain at large unbeknownst to the public.[191] As the Innocence Project has shown, in most cases in which mistaken identification played a part in a wrongful conviction, the real perpetrators have yet to be found.[192] The need for reliable evidence of identification for purposes of

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[188] 388 U.S. 218, 235 (1967).

[189] *See* NAT'L INST. OF JUSTICE, *supra* note 16; Thompson, *What Price Justice?*, *supra* note 7, at 46–55.

[190] *See also* O'Toole & Shay, *supra* note 21, at 116 (arguing for a revision of *Brathwaite* to require affirmative minimum guidelines consistent with models such as those proposed by the Department of Justice).

[191] Manson v. Brathwaite, 432 U.S. 98, 127 (1977) (Marshall, J., dissenting).

[192] *See* Innocence Project, Searching the Profiles, *available at* http://www.innocenceproject.org/know/Search-Profiles.php?check=check&title=&yearConviction=&yearExoneration=&jurisdiction=&cause=Eyewitness+Misidentification&perpetrator=&compensation=&conviction=&x=29&y=0 (listing 186 profiles of individuals wrongly convicted at least in part due

convicting the guilty thereby promotes, and does not hinder, the legitimate law enforcement goals of the criminal justice system.

to erroneous identifications, and showing that in 120 of those cases the real perpetrator has yet to be found).