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IRREPARABLE MISIDENTIFICATIONS AND RELIABILITY: REASSESSING THE THRESHOLD FOR ADMISSIBILITY OF EYEWITNESS IDENTIFICATION

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Identification evidence is "significant evidence [but] . . . still only evidence, and . . . not a factor that goes to the very heart—the 'integrity'—of the adversary process."[1]

Substantial research confirms that "people do not perform well at distinguishing between accurate and inaccurate identifications."[2]

FOR forty years it has been settled, as a matter of federal constitutional law applying Due Process principles and protection,[3] that identifications following a suggestive, police-conducted procedure—be it a showup, a lineup, a photo display—shall be admitted as trial evidence notwithstanding any suggestivity as long as the resulting "that's the guy" is reliable.[4] As the Court set forth in *Neil v. Biggers*,[5] "the central question [is] whether under the totality of the circumstances the identification was reliable even though the confrontation procedure was suggestive."[6] The ultimate measure of reliability was that the identification had to be sufficient to ensure that there was not "a very substantial likelihood of irreparable

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1. Manson v. Brathwaite, 432 U.S. 98, 113 n.14 (1977) (citation omitted); *see also* Watkins v. Sowders, 449 U.S. 341, 348 (1981).

2. Dan Simon, In Doubt: The Psychology of the Criminal Justice Process 151 (2012).

3. For a further discussion of states that have implemented more expansive protections, see *infra* notes 72–87 and accompanying text.

4. The precondition of a suggestive procedure to trigger Due Process concerns is largely accepted as necessary to trigger a Due Process analysis. *See, e.g.*, State v. Henderson, 27 A.3d 872, 878 (N.J. 2011) (requiring pre-trial hearings to challenge identification testimony admissibility only upon initial showing of suggestivity); State v. Outing, 3 A.3d 1, 14 (Conn. 2010) (holding that without proof of unnecessarily suggestive identification procedure, suppression court need make no further inquiry into identification reliability).

5. 409 U.S. 188, 199 (1972).

6. *Id.* (quotation omitted).

misidentification."[7] This standard, seemingly *de minimis*, was reaffirmed by the Court in 2012 and limited in its enforceability to only those identification procedures arranged by state actors.[8]

Much has been written about how reliability is to be assessed—whether the five factors set forth in *Manson v. Brathwaite*[9] and *Biggers* are scientific and sufficient,[10] and whether there is actual independence between suggestivity and reliability or whether the former, at times, impacts and distorts the latter.[11] Yet what has generated minimal discussion subsequent to *Manson* and *Biggers* is *how* reliable the proof must be, whatever measures are used for that test. More particularly, few cases discuss whether a finding of reliability equates with accuracy and correctness, or instead need show only a *possibility* that the identification is the result of personal knowledge rather than derivative of police suggestiveness, akin to the authentication threshold of whether a jury could possibly find that the item is what it purports to be.[12]

That the lesser threshold is what the Court intended in *Manson* and *Biggers* cannot be doubted. The Court described the issue as an "evidentiary interest" and proclaimed that only at the extremes would eyewitness evidence be inadmissible:

> [W]e cannot say that under all the circumstances of this case there is "a very substantial likelihood of irreparable misidentification." Short of that point, such evidence is for the jury to weigh. 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.[13]

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7. Manson v. Brathwaite, 432 U.S. 98, 116 (1977).

8. *See* Perry v. New Hampshire, 132 S. Ct. 716 (2012).

9. 432 U.S. 98 (1977).

10. For a discussion of whether the factors set forth in *Manson* and *Biggers* are scientific and sufficient, see *infra* notes 72–104 and accompanying text.

11. By way of illustration, police feedback at a showup or line-up identification may "inflate" an eyewitness's recollection of the length of the event and the attention paid, thereby artificially altering the reliability considerations. *See, e.g.*, Gertrud Hafstad, Amina Memon, & Robert Logie, *Post-identification Feedback, Confidence and Recollections of Witnessing Conditions in Child Witnesses*, 18 APPL. COGNIT. PSYCHOL. 901, 901–912 (2004); Gary L. Wells & Amy L. Bradfield, *Distortions in Eyewitnesses' Recollections: Can the Postidentification-Feedback Effect Be Moderated?*, 10(2) PSYCHOL. SCI. 138, 138–144 (1999); Gary L. Wells & Amy L. Bradfield, *"Good, You Identified the Suspect": Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience*, 83(3) J. APPL. PSYCHOL. 360, 360–376 (1998).

12. *See* FED. R. EVID. 901(a) (providing that "[t]o satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is").

13. *Manson*, 432 U.S. at 116 (citation omitted).

This satisfied Due Process, which requires only a modicum of *potential* reliability for the evidence to be admissible for jury scrutiny, with cross-examination, contrary proof, or jury instructions providing sufficient tools for testing and evaluation.[14] *Perry v. New Hampshire*[15] restated this with emphasis, holding that Due Process restricts admissibility "[o]nly when evidence is so extremely unfair that its admission violates fundamental conceptions of justice . . . ."[16] Said otherwise, the direction to suppression courts is not to conclude that an identification is actually reliable in terms of being correct, but that there is a basis by which a jury that heard that identification testimony could weigh it intelligently through the adversary trial process and conclude that it was in fact accurate.

What warrants examination is the linkage of evidentiary admissibility ("evidentiary interest") to the risk of "substantial likelihood of irreparable misidentification." The Court's premise was that the adversary process would, in all but the most exceptional cases, "correct" for any error in a witness's claim of identification, describing eyewitness testimony in a post-*Biggers* holding as "significant evidence [but] . . . still only evidence, and . . . not a factor that goes to the very heart—the 'integrity'—of the adversary process."[17] The process due was the adversary trial with its guarantee of cross-examination[18] which would permit the "intelligent[ ]" weighing of the evidence envisioned by the *Manson* Court.[19]

History has proved otherwise. Cross-examination, even vigorous, skilled cross-examination, has not been curative for mistaken eyewitness testimony,[20] a fact borne out persuasively by more than 260 DNA exonerations.[21] If that is the case, and if Due Process mandates some assurance that irreparable misidentification does not occur, then the Due Process reliability threshold must be increased or redesigned from that of mere "evidentiary interest."

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14. *Id.* at 113 ("*Biggers* . . . did not . . . establish a strict exclusionary rule or new standard of due process. Judge Leventhal . . . correctly has described *Stovall* as protecting an evidentiary interest and, at the same time, as recognizing the limited extent of that interest in our adversary system." (citation omitted)).

15. 132 S. Ct. 716 (2012).

16. *Id.* at 723 (citation omitted).

17. Watkins v. Sowders, 449 U.S. 341, 348 (1981) (quoting *Manson*, 432 U.S. at 113 n.14).

18. *Id.* at 349 ("[U]nder our adversary system of justice, cross-examination has always been considered a most effective way to ascertain truth.").

19. *Manson*, 432 U.S. at 116. For a discussion of the ways in which the adversary process satisfies Due Process, see *supra* note 14 and accompanying text.

20. *See* Jules Epstein, *The Great Engine that Couldn't: Science, Mistaken Identifications, and the Limits of Cross-Examination*, 36 STETSON L. REV. 727, 727–88 (2007).

21. *See* BRANDON L. GARRETT, CONVICTING THE INNOCENT 45 (Harvard Univ. Press 2011); *Eyewitness Misidentification*, http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php (last visited Oct. 9, 2012) ("Eyewitness misidentification is the single greatest cause of wrongful convictions nationwide, playing a role in nearly [seventy-five percent] of convictions overturned through DNA testing.").

This Article commences with an overview of reliability decisional law, and continues in Section II with a critical assessment that deems the standard "threadbare" and surveys criticisms of it as a-scientific. Section III surveys Due Process jurisprudence concerning the admission of evidence in cases other than eyewitness identification-based prosecutions, and identifies core components of a constitutional threshold for evidentiary reliability. Section IV explains why traditional trial safeguards have proved inadequate in eyewitness cases. Section V concludes with a proposal for a reformulated Due Process approach to eyewitness evidence—one that sets a "sliding scale" for admissibility with the stringency of the reliability determination dependent upon the availability and quality of trial safeguards other than cross-examination, such as improved jury instructions and the utilization of expert testimony, to ensure against what the Court purported to address in its reliability decisions: irreparable misidentifications.

I. TOWARD A RELIABILITY STANDARD

The Court's jurisprudence on eyewitness identification began not with Due Process concerns but with instances of the outright, unequivocal denial of a constitutional protection: the presence of counsel at post-indictment lineups.[22] But acknowledgment of the potential limitations of eyewitness testimony came even earlier when, in a decision involving a prosecutor's knowing presentation of false testimony (the claim that no promise had been made to a cooperating witness), the Court emphasized that "the passage of time and the dim light in the cocktail lounge made eyewitness identification very difficult and uncertain . . . ."[23]

This was followed in 1967 by the commencement of the constitutionalization of aspects of the identification process. In companion cases, *Gilbert v. California*[24] and *United States v. Wade*,[25] the Court determined that a post-indictment lineup was a critical stage of a criminal prosecution and that where it occurred "without notice to and in the absence of the accused's appointed counsel[,]" a resulting out-of-court identification would be automatically excluded, regardless of the reliability of the resulting identification.[26]

It was not that reliability concerns did not influence the Court's analysis. To the contrary, what made counsel's presence essential was the risk of error, one captured in the oft-repeated pronouncement that "[t]he vagaries of eyewitness identification are well-known; the annals of criminal

22. For a discussion of the right to counsel at post-indictment lineups, see *infra* notes 23–29 and accompanying text.

23. Napue v. Illinois, 360 U.S. 264, 266 (1959).

24. 388 U.S. 263 (1967).

25. 388 U.S. 218 (1967).

26. *Id.* at 223, 239–43. *See* Stovall v. Denno, 388 U.S. 293, 299 (1967) ("[W]hile we feel that the exclusionary rules set forth in *Wade* and *Gilbert* are justified by the need to assure the integrity and reliability of our system of justice, they undoubtedly will affect cases in which no unfairness will be present.").

law are rife with instances of mistaken identification."[27] Yet the remedy was not dependent on the unreliability of the particular lineup identification; rather, it emerged as a bright-line rule of exclusion.[28] The same was subsequently applied to out-of-court identifications that are "fruits" of a Fourth Amendment violation.[29]

Of particular relevance to this Article is the Court's test for determining whether an in-court, time-of-trial identification would be permitted following an out-of-court identification that violated the Sixth Amendment. Rather than address "evidentiary interests," the focus of the Court's analysis in the subsequent Due Process cases,[30] the denial of counsel cases, mandated a prosecution showing of actual independent source:

> [T]he proper test to be applied in these situations is . . . [w]hether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint. Application of this test in the present context requires consideration of various factors; for example, the prior opportunity to observe the alleged criminal act, the existence of any discrepancy between any pre-lineup description and the defendant's actual description, any identification prior to lineup of another person, the identification by picture of the defendant prior to the lineup, failure to identify the defendant on a prior occasion, and the lapse of time between the alleged act and the lineup identification. It is also relevant to consider those facts which, despite the absence of counsel, are disclosed concerning the conduct of the lineup.[31]

This judicial factual determination, because it is measured at the level of clear and convincing evidence, is a far cry from that in a Due Process inquiry.[32]

In *Stovall v. Denno*,[33] there was again a claim of the denial of counsel, as Stovall had been subjected to a post-arraignment uncounseled identification procedure: a hospital showup. Because his case was on collateral

27. *Wade*, 388 U.S. at 228.

28. *See Gilbert*, 388 U.S. at 273 ("Only a per se exclusionary rule as to such testimony can be an effective sanction to assure that law enforcement authorities will respect the accused's constitutional right to the presence of his counsel at the critical lineup.").

29. United States v. Crews, 445 U.S. 463 (1980).

30. For a discussion of Due Process rights regarding identification procedures, see *infra* notes 33–66 and accompanying text.

31. *Wade*, 388 U.S. at 241 (quotation and citation omitted).

32. *Id.* at 240 ("We do not think this disposition can be justified without first giving the Government the opportunity to establish by clear and convincing evidence that the in-court identifications were based upon observations of the suspect other than the lineup identification.").

33. 388 U.S. 293 (1967).

review rather than direct appeal, he was not entitled to retroactive application of the *Wade/Gilbert* protection, which was held to apply only prospectively.[34] Lacking the protection of the Sixth Amendment, the Court nonetheless recognized a separate right to Due Process in the identification procedure utilized.

The Court found this right supported by but one prior holding, that of the Fourth Circuit in *Palmer v. Peyton*.[35] There, a voice identification was deemed to have been secured in violation of Due Process because the "opportunity for suggestion inherent in the procedure used . . . [was] manifest."[36] The witness was advised that the police had a suspect, was shown a shirt that matched the color of that worn by the perpetrator, and after having previously had to attend a voice lineup involving several people, was this time in a one-person voice demonstration.[37] The Court of Appeals described this as having "destroyed the possibility of an objective, impartial judgment by the prosecutrix as to whether Palmer's voice was in fact that of the man who had attacked her."[38]

Yet the *Stovall* Court cited none of this language, instead adopting it only implicitly but then modifying it in two critical fashions: 1) focusing the inquiry on whether it was "imperative" that the procedure take place, and 2) a consequent evaluation of whether Due Process was violated in light of the totality of the circumstances.[39] The suggestivity of a one-person showup was but one factor, albeit one recognized as being a practice "widely condemned."[40] At the same time, "totality" remained undefined, but there was no apparent reference to consideration of circumstances extrinsic to the challenged identification process itself.[41] Stovall himself was denied relief, as the hospitalization of the crime victim rendered "imperative" the prompt, in-handcuffs showup.[42]

What came next in the application of the Due Process guarantee to eyewitness identification was an approval of pre-arrest photo identifications, even when conducted suggestively. In *Simmons v. United States*,[43] po-

34. *Id.* at 297–99.

35. 359 F.2d 199 (4th Cir. 1966).

36. *Id.* at 201.

37. *Id.*

38. *Id.* at 202.

39. *Stovall*, 388 U.S. at 302.

40. *Id.*

41. *See* Steven P. Grossman, *Suggestive Identifications: The Supreme Court's Due Process Test Fails to Meet Its Own Criteria,* 11 U. BALT. L. REV. 53, 55 (1981); Yale Kamisar, *The Warren Court and Criminal Justice: A Quarter-Century Retrospective*, 31 TULSA L.J. 1, 29–30 (1995) ("This is an elusive, unpredictable case-by-case test that, as might be expected, has not turned out to be any more manageable for the courts or any more illuminating for law enforcement officers than the pre-*Miranda* 'totality of the circumstances'-'voluntariness' test.").

42. *Stovall*, 388 U.S. at 302.

43. 390 U.S. 377 (1968).

lice showed multiple photographs of Simmons to witnesses to a robbery.[44] The Court held that before identification testimony would be disallowed at trial, it would have to be shown that the identification process "was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."[45] What made *Simmons* significant were several changes to, or elaborations on, the *Stovall* standard.

First, *Stovall* forbade "unnecessarily suggestive" practices;[46] a threshold raised to "impermissibly suggestive" in *Simmons*.[47] Second, *Simmons* raised the bar to require "a very substantial likelihood of irreparable misidentification"[48] from *Stovall*'s lower requirement of a risk "conducive to irreparable mistaken identification."[49] Finally, the *Simmons* majority made clear that factors extrinsic to the identification process—specifically, the circumstances of the crime and the opportunity to observe the perpetrator(s)—were appropriate considerations in the Due Process totality analysis.[50]

One last point warrants emphasis. Essential to the Court's setting of a Due Process standard was its conclusion that cross-examination at trial could offset any erroneous identification resulting from suggestivity: "The danger that use of the technique may result in convictions based on misidentification may be substantially lessened by a course of cross-examination at trial which exposes to the jury the method's potential for error."[51]

Two remaining decisions completed the initial delineation of the Due Process standard. In *Biggers* the Court first made clear that the *Simmons* standard of impermissible suggestivity leading to "a very substantial likelihood of irreparable misidentification[,]" designed for in-court identifications, applied equally to the admissibility of out-of-court identifications "with the deletion of 'irreparable.'"[52] What the Court seemed to be saying is that trial tools, particularly cross-examination, offered some opportunity for "repair" after a suggestive identification. The Court then diminished the "unnecessarily suggestive" standard announced in *Stovall*, explaining that even when better (less suggestive) options were available to police,

44. *Id.* at 380–81.
45. *Id.* at 384.
46. *Stovall*, 388 U.S. at 302.
47. *Simmons*, 390 U.S. at 384.
48. *Id.*
49. *Stovall*, 388 U.S. at 302.
50. *Simmons*, 390 U.S. at 385. The Court noted:
> [T]here was in the circumstances of this case little chance that the procedure utilized led to misidentification of Simmons. The robbery took place in the afternoon in a well-lighted bank. The robbers wore no masks. Five bank employees had been able to see the robber later identified as Simmons for periods ranging up to five minutes. Those witnesses were shown the photographs only a day later, while their memories were still fresh.

Id.
51. *Id.* at 384.
52. Neil v. Biggers, 409 U.S. 188, 198 (1972).

the resort to an "unnecessarily suggestive" one would not, without more, establish a Due Process violation.[53]

Finally, and for the first time, the Court identified those factors to be considered in its "totality" assessment:

- the opportunity of the witness to view the criminal at the time of the crime,
- the witness's degree of attention,
- the accuracy of his 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.[54]

The Court made one final ruling in its 1960s-1970s Due Process cases, holding in *Manson* that the *Biggers* factors applied even to cases that post-dated *Stovall*.[55] For the Court there was a single determinant in all identification cases—"reliability is the linchpin in determining the admissibility of identification testimony . . . ."[56] Despite the dissent's emphasis on "the unusual threat to the truth-seeking process posed by the frequent untrustworthiness of eyewitness identification,"[57] the Court had constructed only a limited barrier to admitting eyewitness testimony.

Any question about the validity and endurance of the *Biggers* test was laid to rest by the Court in 2012 in *Perry*.[58] Ostensibly limited to deciding whether the *Biggers* test applied when the arguably suggestive procedure was not arranged by state actors,[59] there was anticipation that the Court would re-examine *Biggers* in light of the nearly forty years of science and lessons from exonerations—points urged by various *amici*.[60]

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53. *Id.* at 199.

54. *Id.* at 199–200.

55. Manson v. Brathwaite, 432 U.S. 98, 114 (1977).

56. *Id.* (holding *Biggers* factors are to be applied and "[a]gainst these factors is to be weighed the corrupting effect of the suggestive identification itself").

57. *Id.* at 119 (Marshall, J., dissenting).

58. Perry v. New Hampshire, 132 S. Ct. 716 (2012).

59. *See id.* at 723 ("We granted certiorari to resolve a division of opinion on the question whether the Due Process Clause requires a trial judge to conduct a preliminary assessment of the reliability of an eyewitness identification made under suggestive circumstances not arranged by the police.").

60. *See, e.g.*, Brief for American Psychological Association as Amici Curiae Supporting Petitioner, Perry v. New Hampshire, 132 S. Ct. 716 (2012) (No. 10-8974), 2011 WL 3488994, at *2–3 (urging Court to "take account of extensive psychological research, much of it conducted since 1977, which shows that the presence or absence of state action in creating any suggestiveness is frequently irrelevant to the primary evil to be avoided, *i.e.*, the likelihood of . . . misidentification") (quotation omitted); Brief for Wilton Dedge, Herman Atkins, Jennifer Thompson, and Michele Mallin as Amici Curiae Supporting Petitioner, Perry v. New Hampshire, 132 S. Ct. 716 (2012) (No. 10-8974), 2011 WL 3584756, at *3 ("Three decades of robust scientific research has abundantly demonstrated . . . [that] suggestive circumstances, whatever their source, can produce unreliable eyewitness identifications

The contrary proved to be the case. The *Perry* majority, in the course of restricting the Due Process protection in eyewitness cases to instances in which there was "the taint of improper state conduct[,]"[61] emphatically restated the minimal threshold of reliability.[62] There was no explicit mention of the "evidentiary interest" language of *Manson*, but the Court made its vitality clear by linking it to "[t]he Constitution . . . protect[ing] a defendant against a conviction based on evidence of questionable reliability, not by prohibiting introduction of the evidence, but by affording the defendant means to persuade the jury that the evidence should be discounted as unworthy of credit."[63] For the *Perry* majority, reliability is a constitutional issue only when police arranged a suggestive initial identification;[64] and in those instances it remains an easily surmounted barrier, a "good enough for jury consideration" test.

Nonetheless, *Perry* lends support to a somewhat invigorated Due Process analysis, as key to that holding was the perception that the process due an accused was found in the varying protections available at trial, be they rights available in every trial—a jury as factfinder, the benefit of cross-examination, the provision of effective representation, and the beyond a reasonable doubt standard[65]—and some state-created protections particular to eyewitness cases, especially targeted jury instructions and, in some

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that pose serious and unique threats to the fairness and integrity of a criminal trial, and cause a substantial likelihood of misidentification and wrongful conviction.").

61. *Perry*, 132 S. Ct. at 728.

62. *Id.* at 724–25. It is arguable that the *Perry* majority did acknowledge that the *Biggers* factors might not comport with science, as the Court described them as "among" the considerations in a reliability assessment, rather than as a finite list. *Id.* at 725 n.5.

63. *Id.* at 723. The dissent made clear that the interest was "evidentiary." *Id.* at 733 (Sotomayor, J., dissenting).

64. Partly motivating the Court in its decision to limit Due Process claims to cases involving state action was fear of a veritable Pandora's box, one where virtually every identification could be challenged as a constitutional violation:

> There is no reason why an identification made by an eyewitness with poor vision, for example, or one who harbors a grudge against the defendant, should be regarded as inherently more reliable, less of a "threat to the fairness of trial," than the identification Blandon made in this case. To embrace Perry's view would thus entail a vast enlargement of the reach of due process as a constraint on the admission of evidence.

Id. at 727. While beyond the focus of this Article, the perceived need to link Due Process to police-induced suggestivity is incompatible with holdings in areas as diverse as victim impact evidence in death penalty cases and challenges to non-testimonial hearsay where the Due Process protection applies to unreliable or inflammatory evidence without regard to state action. *See, e.g.*, Michigan v. Bryant, 131 S. Ct. 1143, 1162 n.13 (2011) (acknowledging that non-testimonial hearsay, albeit outside reach of Confrontation Clause, may be excluded due to unreliability on Due Process grounds); Payne v. Tennessee, 501 U.S. 808, 831 (1991) ("If, in a particular case, a witness'[s] testimony or a prosecutor's remark so infects the sentencing proceeding as to render it fundamentally unfair, the defendant may seek appropriate relief under the Due Process Clause of the Fourteenth Amendment.").

65. *Perry*, 132 S. Ct. at 728.

cases, expert witness testimony.[66] The Court did not mandate either of the latter, but its including them as factors pertinent to whether Due Process protections would suffice lends support to this Article's thesis—that the admissibility determination for eyewitness evidence is inextricably linked to whether a trial can ensure against or substantially prevent "a very substantial likelihood of irreparable misidentification." Before turning to how that linkage occurs and what it demands, this Article first explores current "reliability" standards.

II. THE THREADBARE NATURE OF THE RELIABILITY STANDARD

Assessing the stringency of the reliability standard is in part difficult, as trial court decisions suppressing eyewitness testimony, unless subject to a prosecutor's interlocutory appeal, are often unreported and therefore unmeasurable. Yet review of appellate decisions affirming a finding of reliability and denying suppression shows the rule to be one of inclusion rather than a barrier to proof.

This is easily demonstrated. Cases abound where the opportunity to observe is limited to seconds yet found to be sufficient to permit a finding of reliability;[67] where the limited opportunity to view is compounded by a

66. *Id.* at 728–29.

67. *See, e.g.*, State v. Mitchell, 16 A.3d 730, 735–36 (Conn. App. Ct. 2011) ("Even if the victim only saw the defendant's face for a second, as the defendant suggests, that is still sufficient to support the court's finding that the victim had a substantial opportunity to view the defendant."); State v. McCarthy, 939 A.2d 1195, 1203 (Conn. App. Ct. 2008) (finding that witness viewed defendant for few seconds under chaotic conditions from 300 feet away); State v. Lopez, 911 A.2d 1099, 1121 (Conn. 2007) (finding that witness saw masked attacker for two or three seconds); State v. Ledbetter, 881 A.2d 290, 304 (Conn. 2005) (finding that witness focused on assailant's faces for "a matter of seconds" during struggle); State v. Morgan, 877 A.2d 739, 804 (Conn. 2005) (reiterating witness testimony that she briefly observed two individuals' faces as they ran through door and pulled down masks); State v. Vega, 537 A.2d 505, 508 (Conn. App. Ct. 1988) (finding off-duty officer's view of alleged burglar during nighttime pursuit sufficient "*despite* its brevity"); State v. Ledbetter, 441 A.2d 595, 600 (Conn. 1981) (finding that witness's view of robber for fifteen or twenty seconds "will pass muster"); State v. Salgado, 974 P.2d 661, 668 (N.M. 1999) (finding that ten second viewing of shooter in evening was sufficient); McElrath v. Commonwealth, 592 A.2d 740, 743–44 (Pa. Super. Ct. 1991) (finding five second viewing of assailant in gunpoint robbery sufficient).

partial or complete masking of the face;[68] or where the initial description differed radically from the defendant.[69]

Another way to assess the stringency of the reliability standard is in its failure to screen out demonstrably erroneous identifications. A study of the first 250 DNA exonerations showed that of the 190 in which eyewitness testimony was part or the entirety of the inculpatory proof, only fifty-six percent involved appeals challenging admissibility or other aspects of the identification evidence; and of the thirty-nine who objected on grounds of police impropriety in the identification process none was granted relief.[70] This comports with general appellate acceptance of reliability determinations.[71]

Whether because of the *de minimis* protection or because of its a-scientific origins, the *Manson/Biggers* test has been repudiated by several states. Utah began this trend, "improving" the *Biggers* factors with a "more empirically based approach" and coupling the increased scrutiny with a mandated jury instruction in cases where the suspect identification was admitted.[72] Kansas followed, adopting both the revised reliability criteria

68. *See, e.g.*, United States v. Domina, 784 F.2d 1361, 1370 (9th Cir. 1986). The court noted:

> Bishoff testified that she had an opportunity to observe the robber for 20 seconds . . . . She stated that although the robber was masked, she was able to identify Domina because of the forward protrusion of his nose, the shape of his face, the lower portion of his face not covered by the mask, and other facial features, as well as his general build and body features.

Id. *See also In re* N.K.M., Nos. 04–09–00717–CV, 04–09–00718–CV, 2010 WL 3443210, at *5 (Tex. Ct. App. Sept. 1, 2010) (approving identification after robbery by perpetrator with mask that showed only robber's eyes and subsequent "eyes-only" photographic array).

69. *See, e.g.*, State v. Sanchez, 15 A.3d 1182, 1187 (Conn. App. Ct. 2010) (finding identification reliable where witness initially described perpetrator "as a young black male possibly with a tattoo on his arm[,]" but defendant was "forty-two years old, having no tattoo on his arm and, at least as the defendant attempts to describe him, Hispanic"); Ibarra v. State, 11 S.W.3d 189, 196 (Tex. Crim. App. 1999) (finding no error in allowing identification testimony where witness "did not notice [defendant] had a full beard instead of just a mustache").

70. *See* GARRETT, *supra* note 21, at 187.

71. *See* State v. Henderson, 27 A.3d, 872, 919 n.9 (N.J. 2011) ("[W]ith the exception of one case reversed on appeal, we have found no reported Appellate Division decision since 1977 that reversed a conviction because the trial court failed to suppress identification evidence.").

72. State v. Ramirez, 817 P.2d 774, 780–81 (Utah 1991). *Ramirez*'s reconfigured reliability criteria are:

> (1) The opportunity of the witness to view the actor during the event; (2) the witness's degree of attention to the actor at the time of the event; (3) the witness's capacity to observe the event, including his or her physical and mental acuity; (4) whether the witness's identification was made spontaneously and remained consistent thereafter, or whether it was the product of suggestion; and (5) the nature of the event being observed and the likelihood that the witness would perceive, remember and relate it correctly. This last area includes such factors as whether the event was

and the concomitant commitment to utilizing a jury instruction to ensure Due Process.[73]

Massachusetts and New York sidestepped the reliability quandary at least in part, holding inadmissible out-of-court identifications that were "unnecessarily or impermissibly suggestive"[74] or freighted with "unacceptable suggestiveness."[75] Wisconsin made the threshold for using a showup more stringent, essentially an exigency standard.[76] Wisconsin explained this repudiation of the federal standard on two grounds: the volume of scientific knowledge that became available after 1976, and the impact that suggestivity has on the reliability factors, an impact that makes it "extremely difficult, if not impossible, for courts to distinguish between identifications that were reliable and identifications that were unreliable."[77]

In a recent and extensive rejection of the federal reliability factors, the New Jersey Supreme Court explicitly embraced and incorporated the scientific research. In *State v. Henderson*,[78] the Court rejected the absolute or automatic exclusion approach of Massachusetts, New York, and Wisconsin, but invigorated the reliability inquiry of Utah and Kansas with a strong focus on science.[79] A Due Process inquiry would be triggered by proof of *some* suggestivity,[80] after which a reliability determination is to incorporate both estimator and systems variables.[81] *Henderson* recognized that even

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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.

Id. (citation omitted).

73. *See* State v. Hunt, 69 P.3d 571, 577 (Kan. 2003) ("We conclude that the *Ramirez* factors should be adopted as the model for examining such issues and that when requested or where such identification is a central issue in a case, a cautionary instruction regarding eyewitness identification should be given.").

74. Commonwealth v. Martin, 850 N.E.2d 555, 560 n.3 (Mass. 2006).

75. People v. Duuvon, 77 N.Y.2d 541, 543 (N.Y. 1991).

76. State v. Dubose, 699 N.W.2d 582, 584–585 (Wis. 2005). The court stated:

> [A] showup will not be admissible unless, based on the totality of the circumstances, the showup was necessary. A showup will not be necessary, however, unless the police lacked probable cause to make an arrest or, as a result of other exigent circumstances, could not have conducted a lineup or photo array.

Id.

77. *Id.* at 592.

78. 27 A.3d 872 (N.J. 2011).

79. *Id.* at 878.

80. *Id.* at 920.

81. *Id.* The terms "estimator" and "systems" variables were developed by eyewitness researcher Professor Gary Wells. *See* Gary L. Wells, *Applied Eyewitness-Testimony Research: System Variables and Estimator Variables*, 36 J. PERSONALITY & SOC. PSYCHOL. 1546 (1978). The former term includes those factors attendant to the crime, the criminal and the observer—duration, race, the presence of a weapon, levels of stress, degree of attention, lighting—which may affect perception and memory but the impact of which can only be estimated; and the latter references the responsive mechanisms of the "system"—the police interview, line-up instructions, blind or non-blind administration—that can be controlled and the impact of which can more readily be quantified. *Id.* The New Jersey Supreme Court identi-

this expanded reliability inquiry would result in few exclusions,[82] but linked the admissibility to other trial protections, in particular "enhanced" jury instructions, both at trial's end and "during trial if warranted . . . ."[83]

Following *Henderson*, the Oregon Supreme Court similarly incorporated the body of eyewitness research into its evidentiary rules (rather than a Due Process analysis) and made reliability the linchpin of evidentiary admissibility.

> When there are facts demonstrating that a witness could have relied on something other than his or her own perceptions to identify the defendant, the state—as the proponent of the identification—must establish by a preponderance of the evidence that the identification was based on a permissible basis rather than an impermissible one, such as suggestive police procedures.[84]

The Oregon Supreme Court added that even where the suggestivity does not preclude a finding of the eyewitness having relevant information drawn from personal knowledge, application of Rule 403 considerations of "unfair prejudice, confusion of the issues [or] misleading the jury" may warrant exclusion or limitations on the testimony.[85] Yet even with this invigorated evidentiary screening, the Oregon Court concluded that there would still be admitted "most eyewitness identifications."[86] However, a strong role for expert testimony was urged to enable "judges and jurors to evaluate eyewitness identification testimony according to relevant and meaningful criteria."[87] This trial "offset" to the admissibility decision, like the enhanced jury instruction mandate of *Henderson*, is returned to in Section V.

This limited array of states repudiating the strictures of the federal standard finds strong support in academic literature in both psychology and law. The most trenchant scientific criticism of the *Manson* standards comes from Professor Gary Wells, perhaps the leading researcher on eyewitness identification in the United States. As Wells explained in 2009:

> Perhaps the biggest difference between the views of psychological scientists and those in the legal system is the legal system's be-

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fied nine estimator and thirteen systems variables in its non-exclusive list. *Henderson*, 27 A.3d at 920–22.

82. *Id.* at 919 ("[W]e recognize that most identifications will be admitted in evidence.").

83. *Id.* at 924.

84. State v. Lawson, 352 Or. 724, 755 (Or. 2012) (en banc).

85. *Id.* at 762.

86. *Id.* ("That is so because, although possible, it is doubtful that issues concerning one or more of the estimator variables that we have identified will, without more, be enough to support an inference of unreliability sufficient to justify the exclusion of the eyewitness identification.").

87. *Id.* at 761.

> lief . . . that concerns about suggestive identification procedures can be trumped by the types of considerations used in the second prong (the reliability test using the *Manson* criteria).[88]

The specific scientific criticisms of the *Manson* test are its reliance on witness "retrospective self-reports because of well-known tendencies for such reports being at odds with objective facts[;] . . . the precarious nature of the relation between the *Manson* factors and eyewitness identification accuracy[;] . . . [and] that at least three of the *Manson* factors are not independent of the suggestive procedure itself."[89] Of particular concern is that suggestive procedures may "augment" the witness's memory of the event, in effect inflating the self-report of how long the event occurred, the witness's degree of attention, and the opportunity for viewing the perpetrator(s).[90]

If there is an ultimate concern expressed by Wells and seen as the disconnect between the Court's reliability determination and the findings of more than three decades of scientific research, it is the Court's view that errors occasioned by suggestiveness can be repaired. As Wells explains, "Eyewitness scientists generally believe that a mistaken identification taints the witness'[s] memory toward the identified person."[91]

The scientific disquiet with the Supreme Court's reliability analysis, and its categoric separation from suggestiveness, is echoed in the academic literature. Other commentators have proposed a radical restructuring of the admissibility determination,[92] one based on a three-pronged assessment:

- whether the interview of the eyewitness gathered maximum information, avoided contamination of the witness's memory, and did not inflate the witness's confidence;[93]
- if the identification procedures in the case were fair and unbiased, an assessment to be made using varying scientific criteria proposed by the commentators;[94] and

88. 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, 9 (2009).

89. *Id.*

90. *Id.*

91. *Id.* at 15.

92. *See* Richard A. Wise, Clifford S. Fishman & Martin A. Safer, *How to Analyze the Accuracy of Eyewitness Testimony in a Criminal Case*, 42 CONN. L. REV. 435, 442 (2009).

93. *Id.* at 470.

94. *Id.* at 471. These factors include lineups or photo arrays only upon a showing of probable cause, and only when conducted with blind administration, in a sequential manner, and with proper filler selection and instructions. *Id.* at 485–94.

- what factors increased or decreased the likelihood of accurate eyewitness testimony and identification.[95]

For these commentators, with law and science backgrounds, this methodology "provides a comprehensive analytical framework for identifying and organizing the myriad of disparate factors that affect the accuracy of eyewitness testimony" and incentivizes the police to use fair and reliable procedures.[96]

Another proposal was to replace the *Manson* test with rules of identification procedure administration, the theory being that this would provide guidance to police, deter the use of unduly suggestive conduct, and avoid arbitrariness.[97] As the commentators urge:

> These guidelines would be selected to address major issues affecting the structural integrity of the procedures—not to dictate every step . . . . However, courts also would remain free in extraordinary cases to exclude identifications that are the products of procedures that, while complying with the minimum guidelines, are nonetheless so suggestive as to render the identification unreliable.[98]

Part of the ultimate justification for this rule is its ease of application, as it determines whether the process was problematic, not the unanswerable question of whether any particular identification is reliable.[99]

A third approach is that espoused over the course of a decade's writing and advocacy by Professor Margery Koosed.[100] At its core, and based on the conclusion that the *Manson* test may actually encourage the use of suggestive identification procedures because it places a premium on secur-

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95. *Id.* at 471.

96. *Id.* at 473–474. Even under this proposed regime, however, the authors urge admissibility where the identification procedure "was prompted by investigative necessity" or where the prosecution can prove that an in-court identification is "the product of the eyewitness's memory of the crime, unaffected by the contamination." *Id.* at 506.

97. *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 (2006).

98. *Id.* at 138.

99. *Id.* at 141. The authors proceed to acknowledge that the proposed rule would "under-enforce" Due Process, *i.e.*, not necessarily ensure that all resulting identifications meet the Due Process minimum. *Id.* Yet absent from the article is a clear definition of what Due Process requires, other than "furthering fairness and reliability." *Id.* at 110.

100. Margery Malkin Koosed, *Reforming Eyewitness Identification Law and Practices to Protect the Innocent*, 42 CREIGHTON L. REV. 595 (2009); Margery Malkin Koosed, *The Proposed Innocence Protection Act Won't—Unless It Also Curbs Mistaken Eyewitness Identifications*, 63 OHIO ST. L.J. 263, 276–78 (2002).

ing an identification expressed with certainty and confidence,[101] Koosed urges a strict exclusionary rule for out-of-court identifications:

> The *Stovall* per se exclusionary rule would apply when any impermissibly suggestive eyewitness identification occurred, even if neither the police nor the prosecutors planned or conducted the encounter between the eyewitness and the defendant. Under my approach, an in-court eyewitness identification would be allowed only if the prosecution could prove by clear and convincing evidence that the prior identification was not conducive to irreparable mistaken identification.[102]

Koosed proposed this in 2002, and acknowledged appropriate modifications in her 2009 article: the additional elements are to place the burden of proving independence and admissibility of any in-court identification on the prosecution, "a requirement that the prosecution cannot use self-reporting matters unless the prosecution demonstrates these are reliable" to establish independence, and "[t]ightly construing the accuracy of the *Manson* prior description factor, so as to include only a truly prior description of the perpetrator . . . ."[103]

Regardless of the merits of these proposals, and their strong foundation in "gold standard" science,[104] the Court's reaffirmance of *Manson* in *Perry* eliminates the prospect of any of these tests being adopted as a federal constitutional mandate in the foreseeable future. Whether, as this Article proposes, *Perry* instead adds consideration of whether the trial process enhances (or at least informs) the reliability test, is dependent first on an understanding of the Due Process threshold for admitting evidence, addressed in the next section.

III. DUE PROCESS AND A CONSTITUTIONAL THRESHOLD FOR THE ADMISSION OF EVIDENCE

There is no specific formulation of what Due Process guarantees in the criminal trial setting, particularly as to the admission of evidence. At its most general, the Due Process guarantee assures a right to "reasonable notice and an opportunity to be heard . . . ."[105] The "opportunity to be

101. Koosed, *Reforming Eyewitness Identification Law and Practices to Protect the Innocent, supra* note 100, at 626.

102. *Id.* at 624.

103. *Id.* at 631.

104. State v. Henderson, 27 A.3d 872, 916 (N.J. 2011) ("The research . . . is not only extensive, but . . . represents the gold standard in terms of the applicability of social science research to the law." (quotation omitted)).

105. Oyler v. Boles, 368 U.S. 448, 452 (1962).

heard" includes a "meaningful" opportunity to respond to and challenge the Government's proof.[106]

As a barrier to the admission of evidence other than out-of-court identifications, the Due Process threshold is again a low one.[107] To survive a Due Process challenge of evidentiary insufficiency, the test is "whether after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."[108] As recently elaborated, and emphasizing the importance of jurors drawing appropriate inferences from evidence, "*Jackson* leaves juries broad discretion in deciding what inferences to draw from the evidence presented at trial, requiring only that jurors 'draw reasonable inferences from basic facts to ultimate facts.'"[109]

Of more limited utility in the eyewitness context is the Court's sentencing Due Process jurisprudence. What is clear at a minimum, at least in the capital case setting, is that evidence on which a sentence of death is to be based must be disclosed to the defendant, rather than submitted to the sentencing judge(s) for *ex parte* evaluation.[110] The right to "explain" evidence is critical:

> [T]he argument rests on the erroneous premise that the participation of counsel is superfluous to the process of evaluating the relevance and significance of aggravating and mitigating facts. Our belief that debate between adversaries is often essential to the truth-seeking function of trials requires us also to recognize the importance of giving counsel an opportunity to comment on facts which may influence the sentencing decision in capital cases.[111]

The third area where Due Process restrictions have been imposed on evidentiary matters involves quasi-criminal proceedings where a revocation of probation or parole is being sought by the government. The Court has approved admissibility of a wide range of evidence, including materials that "would not be admissible in an adversary criminal trial" because of the narrow nature of the inquiry and the attendant "right to confront and cross-examine adverse witnesses (unless the hearing officer specifically

106. Jackson v. Virginia, 443 U.S. 307, 314 (1979) ("[A] person cannot incur the loss of liberty for an offense without notice and a meaningful opportunity to defend.").

107. The following text, surveying the various Due Process formulations for evidentiary admissibility or sufficiency, draws heavily on Jules Epstein, *Avoiding Trial By Rumor: Identifying the Due Process Threshold for Hearsay Evidence After The Demise of the* Ohio v. Roberts *"Reliability" Standard*, 77 UMKC L. REV. 119, 131–47 (2008).

108. *Jackson*, 443 U.S. at 319.

109. Coleman v. Johnson, 132 S. Ct. 2060, 2064 (2012) (quoting *Jackson*, 443 U.S. at 319).

110. Gardner v. Florida, 430 U.S. 349, 360 (1977).

111. *Id.*

finds good cause for not allowing confrontation) . . . ."[112] Yet even in these circumstances, courts applying this Due Process test have incorporated a reliability assessment,[113] albeit one demanding only "minimal indicia of reliability."[114] That threshold lacks further definition, but seemingly must be sufficient that a trained judge or revocation authority could meaningfully assess its weight. This is essential to meet the command that there be "an informal hearing structured to assure that the finding of a parole violation will be based on verified facts . . . ."[115]

It warrants mention that this low threshold finds parallels in the law of evidence, particularly regarding the admission of expert testimony. The Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[116] set the admissibility threshold as that of "evidentiary reliability," explaining that "evidentiary reliability will be based upon *scientific validity*."[117] Although the Court made clear that "validity" is measured by whether "the principle support[s] what it purports to show[,]" this was a tolerant approach, as it acknowledged the admissibility of "shaky" evidence.[118] The Court stated, "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence."[119] That tolerance of "shaky" evidence mirrors the Due Process standard—admit testimony if there is some foundational basis, and if the factfinder has sufficient means to parse and weigh it.

Taken together, these Due Process cases support a threshold where evidence must have minimal reliability in a system where the accused has the opportunity to meaningfully respond and explain such that factfinders—in particular jurors—may meaningfully "draw reasonable inferences from basic facts to ultimate facts."[120] Given the clear deficiencies

112. Morrissey v. Brewer, 408 U.S. 471, 489 (1972).

113. *See, e.g.*, United States v. Kelley, 446 F.3d 688, 692 (7th Cir. 2006) ("[W]e have interpreted *Morrissey* and *Gagnon* to permit the admission of *reliable* hearsay at revocation hearings . . . ."); United States v. Klatt, No. 2:07-cr-13, 2010 WL 5178115, at *2 (W.D. Mich. Dec. 3, 2010) (collecting cases applying "reliability" standard to hearsay admitted at revocation proceedings).

114. United States v. Reme, 738 F.2d 1156, 1167 (11th Cir. 1984).

115. *Morrissey*, 408 U.S. at 484.

116. 509 U.S. 579 (1993).

117. *Id.* at 599–600 (quotation omitted).

118. *Id.* at 590 n.9, 596.

119. *Id.* at 596. *See also* Deputy v. Lehman Bros., 345 F.3d 494, 506 (7th Cir. 2003). The court explained:

> [I]ssues of credibility and persuasiveness . . . are relevant only in valuing the testimony, not in determining its admissibility . . . . [I]t is not the trial court's role to decide whether an expert's opinion is correct. The trial court is limited to determining whether expert testimony is pertinent to an issue in the case and whether the methodology underlying that testimony is sound.

Id. (citation and quotation omitted).

120. Coleman v. Johnson, 132 S. Ct. 2060, 2064 (2012) (citation and quotation omitted).

in eyewitness identification testimony, and the demonstrated weakness shown by factfinders charged with measuring the accuracy of such proof, that threshold requires either enhanced screening or more substantial compensatory tools at trial.

IV. THE FAILURE OF THE TRIAL PROCESS IN ASSESSING EYEWITNESS RELIABILITY

The chronicity of eyewitness error, across at least a century of American criminal prosecutions, cannot be doubted. Judicial recognition of the problem is over a century old: in a homicide trial in the late 1800s, the jury was instructed that "[q]uestions concerning the identity of persons, animals, and vehicles are liable to confusion, uncertainty, and mistake[,]"[121] and in 1967 the Supreme Court penned its famous lines emphasizing the "vagaries of eyewitness identification."[122] Every survey of wrongful convictions, beginning early in the twentieth century and continuing on to the present, has emphasized and catalogued proven cases of mistaken identification.[123]

Along with the documenting of eyewitness error in judicial decisions, government reports, and scholarship, there have been recurrences of well-publicized cases of alleged or proven eyewitness error. In the early part of the twentieth century, the prosecution and conviction of Sacco and Vanzetti raised serious questions about eyewitness reliability, concerns promulgated by then-law professor Felix Frankfurter in his 1927 article, *The Case*

121. Commonwealth v. Clemmer, 42 A. 675, 677 (Pa. 1899). The phenomenon was discussed decades earlier:

> No one, however, of professional experience in trials at law, who has had opportunities of observing the errors which witnesses, of the best character, innocently fall into in delivering their testimony, not only of long past, but of recent transactions, will be willing to say that any evidence, from whatever witness it may come, may not be founded in some mistake. On the subject of the identity of persons, instances have occurred of the most surprising description. They have occurred in relation to brute animals, as well as to men.

In re Williams, No. 17,701, 1839 U.S. Dist. LEXIS 3, at *17–18 (E.D. Pa. Mar. 8, 1839). *See also* Lincoln v. People, 20 Ill. 364 (Ill. 1858) (granting new trial based on risk of mistaken identification).

122. United States v. Wade, 338 U.S. 218, 228 (1967) ("[T]he vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification.").

123. *See* EDWIN M. BORCHARD, CONVICTING THE INNOCENT 13–15 (Garden City Publ'g Co. 1932); JEROME FRANK & BARBARA FRANK, NOT GUILTY (Doubleday & Co. 1957); GARRETT, *supra* note 21; EDWARD RADIN, THE INNOCENTS 9 (Tower Publ'n 1964); EDWARD CONNORS ET AL., CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL (Nat'l Inst. of Just. 1996), *available at* https://www.ncjrs.gov/pdffiles/dnaevid.pdf; Report of the Governor's Commission on Capital Punishment, Capital Punishment (Apr. 2002), http://www.law.northwestern.edu/wrongfulconvictions/issues/deathpenatly/clemency/complete_report.pdf; Report on the Prevention of Miscarriages of Justice, FPT Heads of Prosecutions Committee Working Group (Sept. 2004), http://www.justice.gc.ca/en/dept/pub/hop/toc.html.

of Sacco and Vanzetti.[124] Frankfurter wrote "[w]hat is the worth of identification testimony even when uncontradicted[,]"[125] and quoted at length from a Boston psychiatrist's 1926 letter to the editor describing at least one of the trial identifications as "psychologically impossible."[126]

In 1979, it was the case of Father Pagano, a priest accused of having committed seven armed robberies in which the description was of a "gentleman bandit."[127] It was only when a man of similar appearance confessed that charges were withdrawn. Newspaper accounts detailed the eyewitness errors and the fact that the actual perpetrator passed a lie detector test but that some of the eyewitnesses nonetheless persisted in their belief that Pagano was the perpetrator.[128] Occasional articles brought attention to other cases of mistaken identification.[129] A televised experiment in the mid-1970s, where viewers were asked to watch a video of a crime and then identify the perpetrator, again publicized the risk of eyewitness error—only seventeen percent gave the right answer.[130]

What brought eyewitness error to the fore more clearly and pervasively were the recurring and highly publicized exonerations brought about by DNA analysis. Nearly one thousand print media articles addressed this issue between 1996 and 2012,[131] and various news and feature television programs documented the same.[132]

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124. *See* Felix Frankfurter, *The Case of Sacco and Vanzetti*, ATLANTIC MONTHLY, Mar. 1927, at 409–32; *see also* FELIX FRANKFURTER, THE CASE OF SACCO AND VANZETTI: A CRITICAL ANALYSIS FOR LAWYERS AND LAYMAN (1927). Frankfurter's book was not an academic tome of restricted circulation; rather, it was published first in the Atlantic Monthly magazine and has been described as a "hugely significant moment in the public history" of this case that "sparked a growing focus" on the trial. MOSHIK TEMKIN, THE SACCO-VANZETTI AFFAIR: AMERICA ON TRIAL 30–31 (Yale Univ. Press 2009).

125. FRANKFURTER, THE CASE OF SACCO AND VANZETTI, *supra* note 124, at 30.

126. *Id.* at 14 (quoting letter of Dr. Morton Prince, published in Boston Herald October 30, 1926).

127. *See* Noah Clements, *Flipping a Coin: A Solution for the Inherent Unreliability of Eyewitness Identification Testimony*, 40 IND. L. REV. 271, 275 (2007).

128. *See, e.g.*, Judith Valente, *1 Charge Left Against Priest; Pennsylvania May Drop Case*, WASH. POST, Sept. 1, 1979, at C3. The coverage was national. *See* Melinda Beck, *The Polite Bandit: A Priest on Trial*, NEWSWEEK, Aug. 20, 1979, at 26. The Father Pagano publicity continued into the mid-1980s as news media reported on his unsuccessful attempt to sue police over his wrongful arrests. *See, e.g.*, *"Bandit" Priest Loses Case Against Police*, UNITED PRESS INT'L, Apr. 4, 1984.

129. *See, e.g.*, Ted Gest, *When Nightmare of False Arrest Comes True*, U.S. NEWS & WORLD REPORT, Dec. 17, 1984, at 45.

130. *Id.* The experiment and its outcome were not limited to a regional television market, but were described to a national audience in Scientific American. *See* Robert Buckhout, *Eyewitness Testimony*, 231 SCIENTIFIC AMERICAN 23 (1974).

131. A June 14, 2012 search of the LEXIS "News, All" (English Full text) database with parameters "dna w/18 eyewitness w/22 exonera! and date aft 1/1/1996" produced 929 results.

132. *See, e.g.*, *Frontline: What Jennifer Saw* (PBS television broadcast Feb. 25, 1997), transcript *available at* http://www.pbs.org/wgbh/pages/frontline/shows/dna/ (highlighting wrongful conviction of Ronald Thompson); *Sixty Minutes: Eye-*

The recurring and at times pervasive and even sensational publicity surrounding eyewitness error has not translated into juror, or even judicial, comprehension of the foibles of eyewitness testimony and the abundant psychological research explaining the triggers and conditions that generate erroneous identifications. To the contrary, myths and misperceptions about eyewitness accuracy remain pervasive.[133]

The persistence of the view that memory is immutable and the claim "I'll never forget that face" has scientific validity cannot be questioned. In *Juror Understanding of Eyewitness Testimony: A Survey of 1000 Potential Jurors in the District of Columbia*, data were amassed from a representative pool of prospective jurors showing a significant "disconnect" between scientific research and layperson beliefs.[134] The findings included the following:

- Juror Misunderstandings of Memory in General: "Almost two-thirds of the respondents [sixty-six percent] thought the statement 'I never forget a face' applied 'very well' or 'fairly well' to them."[135]
- Weapon Focus: "Thirty-seven percent . . . thought the presence of a weapon would make a witness'[s] memory for event details *more* reliable, while thirty-three percent believed that the presence of a weapon either would have no effect or were not sure of what effect a weapon would have."[136]
- The Impact of Violence and/or Stress: "Thirty-nine percent [concluded] . . . that event violence . . . make[s] a witness's memory for event details *more* reliable, while thirty-three percent . . . thought that event violence either would have no effect or were not sure of what effect event violence would have."[137]
- Duration of the Incident: "Over [forty percent] . . . thought that witness time estimates were accurate or were not sure whether such estimates were accurate . . . . [Almost twenty-five percent] believed that witnesses *underestimate* the actual time."[138]

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witness: How Accurate Is Visual Memory? (CBS television broadcast July 11, 2009), *available at* http://www.cbsnews.com/2100-18560_162-4848039.html.

133. *See* ALISON WINTER, MEMORY: FRAGMENTS OF A MODERN HISTORY (Univ. of Chicago Press 2012) (discussing potential by-product of persistence, within medicine, psychiatry, psychology and public discourse, of belief that at least some memories—particularly those of significant events—are stored as "flashbulb moments," are immutable, and may be recovered).

134. *See* Elizabeth F. Loftus et al., *Juror Understanding of Eyewitness Testimony: A Survey of 1000 Potential Jurors in the District of Columbia*, http://www.pdsdc.org/SpecialLitigation/SLDSystemResources/Article%20by%20Dr.%20Elizabeth%20Loftus%20and%20Tim%20O'Toole.pdf; *see also* State v. Henderson, 27 A.3d 872, 896–910 (N.J. 2011) (detailing science contradicting these perceptions).

135. Loftus et al., *supra* note 134, at 6.

136. *Id.* at 8.

137. *Id.* at 9 (footnote omitted).

138. *Id.* at 11.

These were not the only conflicts between lay beliefs and the findings of eyewitness researchers. Few prospective jurors understood the only slight correlation between confidence and accuracy, nearly half thought racial differences between the percipient witness and the perpetrator had no impact on accuracy, and further data showed the respondents' unfamiliarity with the potential suggestivity in showup and lineup procedures.[139]

The results of this survey are not idiosyncratic. A 2011 study, surveying over 1,800 persons in the United States, had stark findings as to eyewitness reliability.[140] According to the study, "63% agreed that 'human memory works like a video camera, accurately recording the events we see and hear so that we can review and inspect them later.' . . . 47.6% agreed that 'once you have experienced an event and formed a memory of it, that memory does not change.'"[141] Other surveys report similar findings,[142] and some courts have drawn the same conclusion.[143]

The knowledge deficit is compounded by the limited efficacy of traditional adversarial trial tools, in particular cross-examination. Notwithstanding the contention that cross-examination is the "greatest legal engine ever invented for the discovery of truth[,]"[144] it has limited utility

139. *Id.* at 13–20.

140. Daniel J. Simons & Christopher F. Chabris, *What People Believe About How Memory Works: A Representative Survey of the U.S. Population*, PLoS ONE (2011), *available at* http://www.plosone.org/article/info%3Adoi%2F10.1371%2Fjournal.pone.0022757.

141. *Id.*

142. J. Don Read & Sarah L. Desmarais, *Expert Psychology Testimony on Eyewitness Identification: A Matter of Common Sense?*, *in* EXPERT TESTIMONY ON THE PSYCHOLOGY OF EYEWITNESS IDENTIFICATION 115–41 (Brian Cutler ed., Oxford Univ. Press 2009). *See, e.g.*, Richard A. Wise & Martin A. Safer, *What US Judges Know and Believe About Eyewitness Testimony*, APPL. COGNIT. PSYCHOL. 427, 427–43 (2004) (positing that knowledge deficit is not limited to lay jurors, as many judges have similar beliefs).

143. *See* State v. Clopten, 223 P.3d 1103, 1108 (Utah 2009) ("[T]here is little doubt that juries are generally unaware of these deficiencies in human perception and memory and thus give great weight to eyewitness identifications. Indeed, juries seemed to be swayed the most by the confidence of an eyewitness, even though such confidence correlates only weakly with accuracy.") (footnote omitted) *see also* State v. Henderson, 27 A.3d 872, 911 (N.J. 2011) (noting that studies "reveal generally that people do not intuitively understand all of the relevant scientific findings [and as] a result, there is a need to promote greater juror understanding of those issues"); Tillman v. State, 354 S.W.3d 425, 442 (Tex. Crim. App. 2011) (citing to expert testimony that "research reveals that jurors do not understand eyewitness identification completely and do not know how to apply what they do know to a particular case").

144. *See* California v. Green, 399 U.S. 149, 158 (1970) (quoting JOHN H. WIGMORE, EVIDENCE § 1367, at 29 (Little, Brown & Co., 3d ed. 1940)).

in eyewitness identification cases[145] and at times works at cross-purposes.[146]

The inadequacy of cross-examination derives from a number of factors. In individual cases, it may arise from the lack of knowledge regarding eyewitness research that many defense lawyers still have.[147] More importantly, given the origin of cross-examination as a tool for exposing deceit and corrupt motives,[148] this mechanism for adversarial examination has significantly diminished utility with a witness who has only the purest of motivations—identifying the criminal—and is not prevaricating even when making a mistaken identification. Because jurors have a "nearly religious faith in the accuracy of eyewitness accounts[,]" the hurdle is raised higher.[149]

This inutility of cross-examination in the eyewitness identification context is well-documented,[150] and goes beyond anecdotal accounts.[151] Mock jury studies have shown, for example, there was no significant difference in the results obtained by the tyros and those obtained by the professionals, when the skill of the cross-examiner was varied to test for outcome effect.[152] A more daunting result was obtained when the variable was not attorney skill but eyewitness capacity—when a mock crime scenario was

145. *See* State v. Cabagbag, 277 P.3d 1027, 1038 (Haw. 2012) ("Cross-examination may not adequately apprise the jury of the factors it should consider in assessing the reliability of eyewitness identification testimony or of the deficiencies of eyewitness identification testimony.").

146. *See* Epstein, *supra* note 20, at 727 (detailing limited potential for cross-examination in mistaken identification cases).

147. *See* Jennifer L. Devenport, Christopher D. Kimbrough & Brian L. Cutler, *Effectiveness of Traditional Safeguards Against Erroneous Conviction Arising From Mistaken Eyewitness Identification*, *in* EXPERT TESTIMONY ON THE PSYCHOLOGY OF EYEWITNESS IDENTIFICATION 57–59 (Brian Cutler ed., Oxford Univ. Press 2009) (noting research showing varying levels of knowledge among defense counsel and that "attorneys may not always use the factors they know . . . ."). The limits of cross-examination may be further restricted in cases where no expert testimony is allowed and the state's jury instruction does not provide the basics of eyewitness science, as attempts to cross-examine the lay witness about issues in identification psychology may be barred because they are not based on record evidence.

148. *See* JOHN H. LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL (A.W. Brian Simpson ed., Oxford Univ. Press 2003).

149. ELIZABETH F. LOFTUS & JAMES M. DOYLE, EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL §§ 10-1 (Lexis, 3d ed. 1997).

150. *See* Epstein, *supra* note 20, at 770–74.

151. This author has found, from observing trials, reading trial transcripts, and speaking with attorneys at lectures on eyewitness identification law and strategies, that the lawyers often proceed in disregard of the scientific research and in ways that reinforce juror misconceptions about the reliability of identification testimony. By way of illustration, there is often a desire to *extend* the time of viewing, if there is some discrepancy in the description (as when a witness fails to describe a mustache or scar), even though jurors do not focus on such variances and instead rely on the greater opportunity to observe.

152. *See* R. C. L. Lindsay, Gary L. Wells & Fergus J. O'Connor, *Mock-Juror Belief of Accurate and Inaccurate Eyewitnesses: A Replication and Extension*, 13 LAW & HUM. BEHAV. 333 (1989).

presented to "jurors," a seventy-two percent conviction rate based on eyewitness identification dropped only four percentage points when the scenario was altered to include the partial blindness of the witness.[153]

Finally, the skilled cross-examination, which identifies the system and estimator variables as being present in the case, may inadvertently reinforce juror misperceptions. Despite the consistent findings that the presence of a weapon may detract from identification reliability, as the victim's or witness's attention is drawn away from the perpetrator's face and toward the dangerous implement,[154] many juror-eligible adults believe that the presence of a weapon *enhances* attention and reliability.[155] Thus, a skilled cross-examination, derived from reliable science, risks an incorrect determination of eyewitness reliability and accuracy.[156]

This diminished value of cross-examination is not automatically offset by either expert testimony or jury instructions. As to the former, the great majority of jurisdictions permit expert testimony.[157] However, there are

153. *See* Elizabeth F. Loftus, *Reconstructing Memory: The Incredible Eyewitness*, 8 PSYCHOL. TODAY 116 (1974). Later studies with similar scenarios had lower rates, but still showed juror belief even when the witness was discredited. *See also* BRIAN L. CUTLER & STEVEN D. PENROD, MISTAKEN IDENTIFICATION: THE EYEWITNESS, PSYCHOLOGY AND THE LAW 194–95 (Cambridge Univ. Press 1995).

154. *See* Nancy M. Steblay, *A Meta-Analytic Review of the Weapon Focus Effect*, 16 LAW & HUM. BEHAV. 413, 415–17 (1992).

155. *See* Loftus, *supra* note 134, at 8 (discussing study of more than jury-service-eligible adults in Washington, D.C. area where "thirty-seven percent of the respondents actually thought the presence of a weapon would make a witness'[s] memory for event details *more* reliable, while thirty-three percent thought that the presence of a weapon either would have no effect or were not sure of what effect a weapon would have").

156. *See id.* at 9 (noting that laypersons similarly assume that stress of event may actually enhance accuracy). Yet, studies confirm stress and violence as factors that degrade eyewitness reliability. *See* Kenneth A. *Deffenbacher* et al., *A Meta-Analytic Review of the Effects of High Stress on Eyewitness Memory*, 28 LAW & HUM. BEHAV. 687, 687, 699 (2004); Charles A. Morgan III et al., *Accuracy of Eyewitness Memory for Persons Encountered During Exposure to Highly Intense Stress*, 27 INT'L J. L. & PSYCH. 265 (2004).

157. Federal decisions include: United States v. Brownlee, 454 F.3d 131 (3d Cir. 2006); United States v. Smithers, 212 F.3d 306 (6th Cir. 2000); United States v. Kime, 99 F.3d 870 (8th Cir. 1996); United States v. Daniels, 64 F.3d 311 (7th Cir. 1995); United States v. Brien, 59 F.3d 274 (1st Cir. 1995); United States v. Rincon, 28 F.3d 921 (9th Cir. 1994); United States v. Harris, 995 F.2d 532 (4th Cir. 1993); United States v. Curry, 977 F.2d 1042 (7th Cir. 1992); United States v. George, 975 F.2d 1431 (9th Cir. 1992); United States v. Moore, 786 F.2d 1308 (5th Cir. 1986); United States v. Brown, 540 F.2d 1048 (10th Cir. 1976).

State courts admitting such evidence include: Ex parte Williams, 594 So. 2d 1225 (Ala. 1992); State v. Chapple, 660 P.2d 1208 (Ariz. 1983); Jones v. State, 862 S.W.2d 242 (Ark. 1993); People v. Campbell, 847 P.2d 228 (Colo. App. 1992); State v. Kemp, 507 A.2d 1387 (Conn. 1986); McMullen v. State, 714 So. 2d 368, 370 (Fla. 1998); State v. Gaines, 926 P.2d 641 (Kan. 1996); Commonwealth v. Christie, 98 S.W.3d 485 (Ky. 2002); People v. Enis, 564 N.E.2d 1155 (Ill. 1990); Commonwealth v. Santoli, 680 N.E.2d 1116 (Mass. 1997); White v. State, 926 P.2d 291 (Nev. 1996); People v. LeGrand, 867 N.E.2d 374 (N.Y. 2007); State v. Gardiner, 636 A.2d 710 (R.I. 1994); State v. Whaley, 406 S.E.2d 369 (S.C. 1991); State v. Copeland, 226

those that bar it categorically.[158] In jurisdictions which allow such testimony, its admission (or exclusion) is governed by an "abuse of discretion" standard, which often supports exclusion when there is some corroborating evidence of guilt.[159] Beyond the discretion accorded to judges in determining admissibility, it is simply prohibitive in terms of both cost and witness availability to field experts in all or even most eyewitness identification prosecutions,[160] especially in light of the estimate of nearly 80,000 eyewitness-based prosecutions per year.[161]

Jury instructions also are not a uniform and potent compensatory mechanism for the inadequacies of cross-examination and the persistent phenomenon that "juries are generally unaware of [the] deficiencies in human perception and memory . . . ."[162] Again, not all states require such instructions, and some bar them categorically as an improper comment on evidence.[163] In those federal and state courts that require an eyewitness "cautionary" instruction, it is often generic, telling jurors nothing more than "[t]estimony of witnesses as to identity must be received with caution and scrutinized with care."[164] The instructions often have their genesis in cases decided years or even decades before the explosion in eyewitness

S.W.3d 287 (Tenn. 2007); State v. Clopten, 223 P.3d 1103 (Utah 2009). State v. Percy, 595 A.2d 248 (Vt. 1990); State v. Moon, 726 P.2d 1263 (Wash. Ct. App. 1986); Engberg v. Meyer, 820 P.2d 70 (Wyo. 1991).

158. *See, e.g.*, State v. Young, 35 So. 3d 1042, 1050 (La. 2010); Commonwealth v. Simmons, 662 A.2d 621, 631 (Pa. 1995). *But see* Commonwealth v. Walker, 17 A.3d 921, 921 (Pa. 2011) (granting appeal on whether trial court had discretion to permit petitioner to present "testimony of a nationally recognized expert in the field of human memory, perception and recall where the sole evidence to establish his guilt was the testimony of victim who was under extreme duress when assaulted at gunpoint by a stranger of another race").

159. *See* Jules Epstein, *Expert Testimony: Legal Standards for Admissibility*, *in* EXPERT TESTIMONY ON THE PSYCHOLOGY OF EYEWITNESS IDENTIFICATION 76–79 (Brian Cutler ed., Oxford Univ. Press 2009).

160. *See* Roger C. Park, *Eyewitness Identification: Expert Witnesses Are Not the Only Solution*, 2 LAW, PROBABILITY & RISK 305, 307 (2003); Christian Sheehan, Note, *Making the Jurors the "Experts": The Case for Eyewitness Identification Jury Instructions*, 52 B.C. L. REV. 651, 675 (2011).

161. Alvin G. Goldstein et al., *Frequency of Eyewitness Identification in Criminal Cases: A Survey of Prosecutors*, 27 BULL. PSYCHONOMIC SOC'Y 71, 73 (1989).

162. *Clopten*, 223 P.3d at 1108.

163. *See, e.g.*, Roberson v. State, 852 S.W.2d 508, 511 (Tex. Crim. App. 1993) ("[A] charge on mistaken identity is an improper comment on the weight of the evidence and should not be given." (citation omitted)); Conley v. State 607 S.W.2d 328, 330 (Ark. 1980); Lewis v. State, 363 N.E.2d 1230, 1231 (Ind. 1977).

164. United States v. Angiulo, 897 F.2d 1169, 1205 n.19 (1st Cir. 1990) (quoting United States v. Kavanagh, 572 F.2d 9, 11 (1st Cir. 1978)) (alteration in original). The much-heralded *Telfaire* instruction, cited by numerous courts as a model offers little more. *See* United States v. Telfaire, 469 F.2d 552, 558 (D.C. Cir. 1972) (telling jurors that identification must be proved beyond reasonable doubt, that identification is dependent upon opportunity and capacity of witness to observe, and without guidance asks jurors to be "satisfied that the identification made by the witness subsequent to the offense was the product of [the witness's] own recollection"); *see also* Sheehan, *supra* note 160, at 673.

psychology research.[165] Finally, because some courts impose narrow triggering conditions as a prerequisite, in many identification cases not even the generic language will be proffered to the jury. These circumstances, without scientific foundation or validity, include "where no corroboration of the testimony exists, or where the witness'[s] memory has faded by the time of trial, or where there was a limited opportunity for observation."[166]

This is not to say that no jury instruction is adequate, or that no court gives focused and informative charges.[167] A small but significant movement in that direction is apparent, with the Hawaii[168] and New Jersey[169] Supreme Courts recently mandating the use of science-based, detailed instructions in eyewitness identification trials. Yet the generic instructions so

165. Pennsylvania, for example, uses a jury instruction developed in the 1950s. *See* Commonwealth v. Ali, 10 A.3d 282, 303 (Pa. 2010) (affirming that cautionary instruction to be provided in eyewitness cases is that found in Commonwealth v. Kloiber, 106 A.2d 820 (Pa. 1954)). The *Kloiber* instruction requires caution only in cases of witness uncertainty or limited opportunity to observe, and has no play when various estimator variables are present:

> [W]here the witness is not in a position to clearly observe the assailant, or he is not positive as to identity, or his positive statements as to identity are weakened by qualification or by failure to identify defendant on one or more prior occasions, the accuracy of the identification is so doubtful that the Court should warn the jury that the testimony as to identity must be received with caution.

Kloiber, 106 A.2d at 826–27.

166. Heath v. Hill, No. 07-669-TC, 2009 U.S. Dist. LEXIS 124624, at *32 (D. Or. Nov. 17, 2009) (quotation and citation omitted).

167. *See, e.g.*, United States v. Jones, 762 F. Supp. 2d 270, 278 n.5 (D. Mass. 2010) (detailing supplemental instruction provided at trial that emphasized problems with cross-racial identification and potential degrading impact on eyewitness reliability occasioned by stress of criminal act).

168. *See* State v. Cabagbag, 277 P.3d 1027, 1038–39 (Haw. 2012) (mandating prospectively that "when eyewitness identification is central to the case, circuit courts must give a specific jury instruction upon the request of the defendant to focus the jury's attention on the trustworthiness of the identification"). The approved instruction includes some estimator variables, particularly stress and own-race bias, and the Hawaii Court encouraged "modification of this instruction or the development of other related instructions . . . [and referred] this instruction to the Committee on Pattern Criminal Jury Instructions for future comments, suggestions, and any recommended modifications." *Id.* at 1039.

169. *See* State v. Henderson, 27 A.3d 872, 924 (N.J. 2011). The New Jersey Supreme Court held:

> [E]nhanced instructions [must] be given to guide juries about the various factors that may affect the reliability of an identification in a particular case.
>
> Those instructions are to be included in the court's comprehensive jury charge at the close of evidence. In addition, instructions may be given during trial if warranted. For example, if evidence of heightened stress emerges during important testimony, a party may ask the court to instruct the jury midtrial about that variable and its effect on memory.

Id. On July 19, 2012, the new eyewitness jury instructions were approved by the New Jersey Supreme Court. *See* Press Release, New Jersey Courts, Eyewitness Identification Criteria for Criminal Cases (Jul. 19, 2012), *available at* http://www.judiciary.state.nj.us/pressrel/2012/jury_instruction.pdf.

often used, and the risk that they can actually reinforce jurors' mistaken beliefs about eyewitness reliability,[170] show that a blanket notion that having *some* instruction provides a meaningful tool for the assessment of eyewitness testimony is mistaken and contradicted by substantial research.[171]

Whatever reforms may be occurring in particular states, and however effective these safeguards and improvements may be in a particular case, as a system the adversary trial process offers no assurance that a factfinder will be able to meaningfully assess the reliability of eyewitness testimony and properly ensure against irreparable misidentifications, precisely be-

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170. *See, e.g.*, Commonwealth v. Santoli, 680 N.E.2d 1116, 1121 (Mass. 1997) (changing state's eyewitness instruction regarding witness's confidence in identification because "there is significant doubt about whether there is any correlation between a witness's confidence in her identification and the accuracy of her recollection"); Sheehan, *supra* note 160, at 679 ("[I]nstructions can aggravate error by reinforcing erroneous assumptions about eyewitnesses.").

The risk of juror misdirection as a result of a-scientific jury instructions is demonstrated in the *Telfaire* charge itself, which advises jurors that "you must consider the credibility of each identification witness in the same way as any other witness, consider whether he is truthful . . . ." United States v. Telfaire, 469 F.2d 552, 559 (D.C. Cir. 1972). Rarely is truthfulness a concern in an eyewitness case, as the witness testifies without malice or corrupt motive; rather, the issue is that of an honest mistake. A jury instruction that redirects the focus to honesty obscures this concern.

171. Devenport et al., *supra* note 147, at 63–64. After surveying juror instruction efficacy research, the authors conclude:

> [J]udicial cautionary instructions, in their present state, may be an ineffective safeguard against erroneous convictions resulting from mistaken eyewitness identifications, and at best, their effectiveness is questionable . . . . [R]esearch suggests that the cautionary instructions currently relied on by the courts . . . either have no effect or enhance juror skepticism rather than juror sensitization . . . .

Id.

Two additional concerns arise when analyzing jury instructions as a remedial tool—timing and language. Instructions at trial's end have a diminished ability to inform juror understanding and increase sensitivity. *See* Gabriella Ramirez et al., *Judges' Cautionary Instructions on Eyewitness Testimony*, 14 AM. J. FORENSIC PSYCHOL. 31, 45 (1996). The New Jersey Supreme Court seemingly recognized this when it reminded judges of their discretion to give jury instructions "during trial if warranted." *Henderson*, 27 A.3d at 924 ("For example, if evidence of heightened stress emerges during important testimony, a party may ask the court to instruct the jury midtrial about that variable and its effect on memory.").

The stilted language of many jury instructions is a compounding factor, limiting comprehension and understanding even when the timing factor is not in play. *See* American Law Institute, *ABA Principles For Juries and Jury Trials*, 2005 A.B.A. 753, 867–69 (discussing how pattern jury instructions are typically drawn from case law or statutes that lay jurors are not familiar with and which they do not understand); Molly Armour, Comment, *Dazed and Confused: The Need for a Legislative Solution to the Constitutional Problem of Juror Incomprehension*, 17 TEMP. POL. & CIV. RTS. L. REV. 641, 642 (2008); J. Brittany Cross, Note, *Juror Incomprehension: Advocating for a Holistic Reform of Jury Instructions*, 98 KY. L.J. 355 (2010); Denis J. Devine et al., *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 PSYCHOL. PUB. POL'Y & L. 622, 667 (2001) ("It is clear from 20 years of research that jurors have difficulty wading through the technical jargon, convoluted logic, and stilted structure that characterize many pattern instructions.").

cause of this wide variation in how identification cases are tried. The Court's 1981 pronouncement that "[while] identification testimony is significant evidence, such testimony is still only evidence[,]"[172] one made before the impact of both scientific research and compelling DNA exonerations was felt, rings hollow and misses the more important question—is this "only evidence," or evidence that needs either greater screening before its admission or admission conditioned upon ensuring that factfinders have the tools to critically and reliably assess its value? It is a Due Process threshold cognizant of system deficiencies, proposed in the next section of this Article, which may provide that capacity.

V. A "SLIDING SCALE" DUE PROCESS THRESHOLD

For more than a century, it has been clear that the mandates of Due Process are variable, dependent upon the nature of the proceeding and the particulars of the case. In 1909 the Court noted, "[W]hat is due process of law depends on circumstances. It varies with the subject-matter and the necessities of the situation."[173] If the "necessities of the situation" are ensuring at least the possibility of an accurate determination of whether the statement "that's the person" is correct, then the variability must account for the particular jurisdiction's (or trial's) available tools. Therefore, whether couched in terms of avoiding "irreparable misidentification"[174] (the specific language for eyewitness identification suppression challenges) or the more generic Due Process right to confront and "explain" adverse evidence,[175] the admissibility threshold should vary depending upon the tolerance of expert evidence and the nature and language of the approved jury instructions.

This conclusion follows from the inadequacies of the trial process detailed in Section IV above[176] and is compatible with the evidentiary relia-

172. Watkins v. Sowders, 449 U.S. 341, 348 (1981) (quoting Manson v. Brathwaite, 432 U.S. 98, 113 n.14 (1977)) (alteration in original).

173. Moyer v. Peabody, 212 U.S. 78, 84 (1909). *See also* Mathews v. Eldridge, 424 U.S. 319, 334 (1976) ("[D]ue process . . . is not a technical conception with a fixed content unrelated to time, place and circumstances . . . [but] is flexible and calls for such procedural protections as the particular situation demands.") (citation and quotation omitted).

174. *Manson*, 432 U.S. at 116.

175. For a discussion of the Due Process right to confront and "explain" adverse evidence, see *supra* notes 105–20 and accompanying text.

176. The contrast with the admission of "shaky" expert testimony is informative. The *Daubert* Court approved of a low admissibility threshold because of the availability in the adversarial process of "contrary evidence," *i.e.*, a counter-expert. For a further discussion of *Daubert*, see *supra* notes 116–19 and accompanying text. Eyewitness cases typically lack that "contrary evidence," as there is no category of witness who can say "that identifying witness was wrong, and here's why." The eyewitness expert may list factors that call accuracy into question, but may not directly refute the eyewitness's testimony. *See, e.g.*, United States v. Smithers, 212 F.3d 306, 317 n.3 (6th Cir. 2000) ("[N]o expert may testify as to what witness did or did not see."); Epstein, *supra* note 159, at 79–80.

bility threshold intended by the Court in its seminal holdings from *Stovall* through *Manson* and *Biggers*.[177] The goal was the admission of evidence subject to traditional trial safeguards, which would permit factfinders to weigh identification evidence found evidentiarily "reliable" and make sound determinations as to its accuracy.

What was unknown, and perhaps unknowable, when the initial Due Process identification "reliability" standard was pronounced (1967-1976) was the inability of those traditional mechanisms to work. To the contrary, state supreme courts did not begin to approve the use of expert testimony until almost a decade later,[178] jury instructions were generic and a-scientific, the "explosion" in eyewitness research had barely commenced, and the confirmation of juror error by DNA exonerations was unknown.

The incapacity of factfinders to prevent irreparable misidentifications without appropriate screening tools is now manifest. It is demonstrated (over and beyond the DNA exonerations) by extensive research. In one reported study, researchers presented individuals with crime scenarios derived from previous empirical studies. The study's participants estimated an average accuracy rate of seventy-one percent for a highly unreliable scenario in which only 12.5 percent of eyewitnesses had in fact made an accurate identification.[179] Rather than a truth-ascertaining process, the eyewitness accuracy determination was a matter of chance absent some particularly corroborating evidence or an especially strong opportunity to observe and resulting reliable memory of the event.[180] As one commenta-

177. For a further discussion of these seminal cases, see *supra* notes 34–60 and accompanying text.

178. *See* People v. McDonald, 690 P.2d 709, 719–21 (Cal. 1984); State v. Chapple, 660 P.2d 1208, 1218 (Ariz. 1983).

179. *See* John C. Brigham & Robert K. Bothwell, *The Ability of Prospective Jurors to Estimate the Accuracy of Eyewitness Identifications*, 7 LAW & HUM. BEHAV. 19, 22-24 (1983). This study was relied upon by the Hawaii Supreme Court in its 2012 decision mandating science-based jury instructions in eyewitness identification cases. *See* State v. Cabagbag, 277 P.3d 1027, 1036 (Haw. 2012).

180. The term "chance" is not meant to convey the notion that every eyewitness identification assessment by a jury is random in terms of accuracy. Juror accuracy will vary depending upon the particular eyewitness, the circumstances of the case, the presence of corroborating evidence, and the available (expert and jury instruction) safeguards. Rather, "chance" connotes a risk of guessing at eyewitness accuracy, a phenomenon resulting from the lack of requisite knowledge as to how to weigh eyewitness claims. There is substantial support for the related proposition that eyewitnesses themselves "guess" at the right choice. One commentator has remarked on evidence of the possibility of increased other-race guessing in cross-racial identifications. *See* James M. Doyle, *The Other-Race Effect and Contemporary Criminal Justice: Eyewitness Identification and Jury Decision Making*, 7 PSYCH. PUB. POL. AND L. 253, 254 (2001); *see also* Michael R. Leippe, *The Case for Expert Testimony About Eyewitness Memory*, 1 PSYCHOL. PUB. POL'Y & L. 909, 909 (1995) ("A great upsurge in eyewitness memory research began in the early 1970s, and much of this research has revealed a disturbingly high error rate . . . ."); Jeffrey Philip Ouellet, Note, *Posado and the Polygraph: The Truth Behind Post-*Daubert *Deception Detection*, 54 WASH & LEE L. REV. 769, 802 (1997) ("[R]esearchers consistently find a high level of error in lay eyewitness identification testimony."). The risk of "chance" identifi-

tor concluded upon reviewing ample research on this issue, "The key finding in this body of research is that people do not perform well at distinguishing between accurate and inaccurate identifications."[181]

That something more than traditional trial tools—in particular something more than cross-examination and argument—is necessary to ensure the possibility of accurate evaluation of eyewitness testimony is at the core of the recent Hawaii and New Jersey Supreme Court decisions mandating science-based jury instructions in identification-based prosecutions. Although not decreed as a requisite of Due Process jurisprudence, each court made clear that without such information, the traditional trial process made the risk of unreliable verdicts too great. The New Jersey Court stated this cogently as "the court's obligation to help jurors evaluate evidence critically and objectively to ensure a fair trial."[182] The Hawaii Court expanded upon this, making clear the link between the now-mandatory instructions and the need for some mechanism to permit a reliable adjudication:

> Cross-examination may not adequately apprise the jury of the factors it should consider in assessing the reliability of eyewitness identification testimony or of the deficiencies of eyewitness identification testimony . . . .
>
> Without appropriate instructions from the court, the jury may be left without sufficient guidance on how to assess critical testimony, sometimes the only testimony, that ties a defendant to an offense.[183]

If the Hawaii and New Jersey Courts are correct that some essential information must be provided to prevent irreparable mistaken identifications, then in one sense the Due Process reliability threshold is easily ascertained—it is the continued use of the low-level evidentiary test envisioned

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cations is confirmed in studies using perpetrator-absent lineups, *i.e.*, lineups where witnesses view a group that does not include the actual doer. The results often show high percentages identifying a lineup participant as the criminal. *See* Gary L. Wells, *What Do We Know About Eyewitness Identification?*, 48 AM. PSYCHOLOGIST 553, 560–61 (1993). The risk of selecting an innocent person in a perpetrator-absent lineup is exacerbated when the process is simultaneous (viewing all participants at the same time) rather than sequential (viewing one lineup participant at a time). *See* Nancy K. Steblay, Jennifer E. Dysart & Gary L. Wells, *Seventy-Two Tests of the Sequential Lineup Superiority Effect: A Meta-Analysis and Policy Discussion*, 17 PSYCHOL. PUB. POL'Y & L. 99, 100 (2011). Yet all of the witnesses who "guessed" wrong may be trial witnesses who jurors must assess the accuracy of.

181. SIMON, *supra* note 2, at 151.

182. State v. Henderson, 27 A.3d 872, 924 (N.J. 2011). On July 19, 2012, the new eyewitness jury instructions were approved by the New Jersey Supreme Court. *See* New Jersey Courts, *supra* note 169.

183. *Cabagbag*, 277 P.3d at 1038. The Hawaii Supreme Court did recognize that the *Perry* decision seemed to link the jury instruction "safeguard" to a Due Process guarantee, but did not describe its holding as constitutionally-mandated. *Id.* at 1036.

by the Court in *Manson* in trials where expert testimony is provided, scientific principles and cautions are adduced through adequate instruction, or both.[184]

However, where the trial structure does not ensure that jurors receive sufficient information, through experts, jury instructions, or both, to be able to "measure intelligently the weight of identification testimony that has some questionable feature[,]"[185] the compensatory measure must be more stringent admissibility criteria for the challenged identification. Defining these criteria are not easy, as they can only be whatever strictures are necessary in a particular case to ensure that the ensuing assessment of the identification involves more than guessing or chance and thus is not likely to lead to an irreparable mistaken identification and resulting erroneous conviction.

In practice, what will this look like? Consider two eyewitness scenarios, both in trials where expert testimony will not be available and the jurisdiction either bans eyewitness jury instructions or uses ones which are generic or fail to elucidate the relevant science. In the first, the witness and perpetrator are of the same race, and the variables that might call into question the accuracy of the identification are ones easily grasped and measured—a brief incident, poor lighting, and the intoxication of the percipient witness. In that scenario, Due Process is satisfied when the original *Manson* evidentiary interest threshold is met.

In the second scenario, however, the potentially-degrading variables are those found to be counter-intuitive or beyond general knowledge—the witness and perpetrator are of different races, the presence of a weapon and the resulting high stress, and the impact of post-identification confirming feedback.[186] Here, in deciding admissibility, the pre-trial hearing judge must weigh how these factors increase the likelihood of an irreparable mistaken identification, and determine whether there are sufficient offsetting factors—for example, a lengthy and unobstructed opportunity to observe or a particularly detailed description including salient features—to permit juror consideration of the identification evidence. There will be no easy or quantifiable formula, but the qualitative assessment will require judicial understanding of both the science of eyewitness identification and the limits of lay factfinder awareness of the same, and a consideration of whether the particular identification evidence can be "measure[d] intelligently."[187]

184. For a discussion the *Manson* evidentiary test, see *supra* notes 55–57 and accompanying text.

185. Manson v. Brathwaite, 432 U.S. 98, 116 (1977).

186. *See Henderson*, 27 A.3d at 900 (explaining that "feedback affects the reliability of an identification in that it can distort memory, create a false sense of confidence, and alter a witness'[s] report of how he or she viewed an event"); *see also* C. A. Elizabeth Luus & Gary L. Wells, *The Malleability of Eyewitness Confidence: Co-Witness and Perseverance Effects*, 79 J. APPL. PSYCHOL. 714, 717–18 (1994).

187. *Manson*, 432 U.S. at 116.

That the proposed test is somewhat amorphous cannot be denied, but it is no less so than the reliability determination itself, where a judge weighs various factors to determine the identification's independence—whether the courtroom claim "that's the guy" is a product of the witness's unadulterated memory rather than of the suggestive identification process.[188] It is akin to a Rule 403 analysis, where a judge has "[n]o mechanical solution . . . [and] [t]he determination must be made whether the danger of undue prejudice outweighs the probative value of the evidence in view of the availability of other means of proof and other facts . . . ."[189]

VI. CONCLUSION

This Article addresses only a late stage in the eyewitness-based prosecution process—the adversary trial. Given the number of variables—estimator and system—that may have impacted and degraded the eyewitness's memory before trial, a remedy there may be "too little, too late," and the true remedial actions are those implemented at the investigation stage as police gather and process identification evidence. That this is occurring cannot be denied and must be appreciated. There has been impetus from within the law enforcement community,[190] as well as from legislatures[191] and government agencies,[192] to establish better practices, particularly in witness interviewing and identification procedures.

188. For a delineation of the origins and current configuration of the weighing analysis for admitting eyewitness testimony following a suggestive identification procedure, see *supra* notes 22–66 and accompanying text.

189. FED. R. EVID. 404 advisory committee's note. *See* Old Chief v. United States, 519 U.S. 172, 184–85 (1997) ("[J]udgment may be informed not only by assessing an evidentiary item's twin tendencies, but by placing the result of that assessment alongside similar assessments of evidentiary alternatives."); Douglas R. Richmond, *Regulating Expert Testimony*, 62 MO. L. REV. 485, 523–24 (1997) (describing such weighing as "unremarkable" while nature of balancing "defies generalization"). Intriguingly, in *Perry* the Court acknowledged that Rule 403 may also be a tool for excluding unreliable identification evidence, without noting that states are not required to have such a rule in their evidence codes. *See* Perry v. New Hampshire, 132 S. Ct. 716, 729 (2012).

190. *See* Mark Hansen, *Show Me Your ID: Cops and Courts Update Their Thinking on Using Eyewitnesses*, 98 A.B.A.J. 18, 18 (2012). Reforms include the issuance of "model" policies by the International Association of Chiefs of Police and the Commission on Accreditation for Law Enforcement Agencies. *See* Val Van Brocklin, *Defending Your Lineup In Court*, OFFICER (July 18, 2011), http://www.officer.com/article/10300765/defending-your-lineup-in-court.

191. Several states have laws mandating specific identification procedures, or requiring police departments to develop such policies. These include North Carolina, Connecticut, Ohio, and Virginia. *See* Zinie Chen Sampson, *Va. Police Required to Have Eyewitness ID Policies*, WASH. EXAMINER, July 5, 2012, http://washingtonexaminer.com/va-police-required-to-have-eyewitness-id-policies/article/feed/2009142#.UHnAdPl24bs. Texas passed legislation requiring police departments to adopt their own policies or a "model" developed by the Law Enforcement Management Institute of Texas. *See* TEX. CODE CRIM. PROC. ANN. art. 38.20 (West 2011).

192. *See, e.g.*, Beth Schuster, *Police Lineups: Making Eyewitness Identification More Reliable*, 258 NAT'L INST. JUST. J. 2 (2007), *available at* http://www.nij.gov/journals/258/police-lineups.html; Vermont Department of Public Safety Law Enforcement

Such changes, even if applied uniformly across the nation, cannot prevent all erroneous convictions in eyewitness-based prosecutions, if only because factors intrinsic to the crime—estimator variables—will continue to result in degraded memory and mistaken identifications. The New Jersey Supreme Court recognized this in *Henderson*, finding essential the remedy of science-based jury instructions in a state that for a decade has enforced police best practices in eyewitness investigations. Thus, trial courts must continue to serve a gate-keeping function, and in the context of identifications arising from a suggestive state-created process that vehicle is the reliability determination initiated forty-plus years ago.

It is "imperative that the jury's decisionmaking abilities are supported by the best information available."[193] Where that imperative is not met because of inadequate jury instructions, the absence of expert evidence, or both, the gate-keeping function must be more stringent. To that end, the Due Process reliability assessment must be rethought to weigh the risk of irreparable mistaken identifications in light of the deficiencies in factfinder—juror—knowledge, and only those identifications that can be intelligently weighed should be admitted.

Advisory Board, Summary Report 2011, 17, 18–31, *available at* http://www.leg.state.vt.us/reports/2012ExternalReports/277888.pdf (proposing model eyewitness policy for police departments); Letter from the Office of the Attorney General, State of New Jersey, Attorney General Guidelines for Preparing and Conducting Photo and Live Lineup Identification Procedures (Apr. 18, 2001), *available at* http://www.state.nj.us/lps/dcj/agguide/photoid.pdf.

193. State v. Clopten, 223 P.3d 1103, 1118 (Utah 2009) (emphasizing that cross-examination is inadequate tool in eyewitness cases).