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Rethinking the Right to Due Process in Connection With Pretrial Identification Procedures: An Analysis and a Proposal

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INTRODUCTION

Eyewitness identifications are notoriously unreliable. The Supreme Court has observed that "[t]he vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification."[1] Numerous other courts have expounded upon the unreliability of eyewitness identification evidence,[2] and scholarly commentators and psychologists have dem-

[1] United States v. Wade, 388 U.S. 218, 228 (1967).

[2] *See, e.g.*, United States v. Downing, 753 F.2d 1224, 1230-31 (3d Cir. 1985); People v. Riley, 522 N.Y.S.2d 842, 846 (N.Y. 1987); State v. Warren, 635 P.2d 1236, 1241 (Kan. 1981); *see also* United States v. Butler, 636 F.2d 727, 733 (D.C. Cir. 1980) (Bazelon, C.J., dissenting) ("memory is an active, constructive process that often introduces inaccuracies by adding details not present in the initial representation or in the event itself."), *cert. denied*, 451 U.S. 1019 (1981).

onstrated that the courts' concerns are well-placed.[3] Eyewitness identification evidence "has been thought by many experts to present what is conceivably the greatest single threat to the achievement of our ideal that no innocent man shall be punished."[4] Yet, notwithstanding its well-recognized unreliability, eyewitness identification testimony is featured frequently and prominently in criminal trials.

To avoid the injustice that might occur on account of the unreliability and prevalence of such testimony, in the 1967 case of *Stovall v Denno*,[5] the Supreme Court held that a criminal defendant has a due process right to exclude evidence derived from improper pretrial identification procedures. In a series of cases following *Stovall* and culminating in *Manson v Brathwaite* in 1977,[6] however, the Supreme Court considerably weakened the right to due process.[7] Since these later cases, the lower federal courts and state courts have enforced the defendant's right only in the most egregious situations.[8] Today, the due process right is little more than a dead letter and affords criminal defendants almost none of the protections that it was originally intended to provide.

The purposes of this Article are to survey the demise of the right to due process, to analyze the problems that beset it today, and to set forth a new role for the right. Part I surveys the Supreme Court cases from *Stovall* to *Brathwaite* and demonstrates that, originally, the right to due process protected the criminal defendant's rights to fair pretrial procedures, but over time the Supreme Court began to focus less on the fairness of the pretrial procedures

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[3] *See, e.g.*, E. LOFTUS, EYEWITNESS TESTIMONY (1979); J. SHEPHERD, H. ELLIS & G. DAVIES, IDENTIFICATION EVIDENCE: A PSYCHOLOGICAL EVALUATION (1982); P WALL, EYEWITNESS IDENTIFICATION IN CRIMINAL CASES (1965); G. WELLS & E. LOFTUS, EYEWITNESS TESTIMONY (1984); Gross, *Loss of Innocence: Eyewitness Identification and Proof of Guilt*, 16 J. LEGAL STUD. 395, 395 (1987); Levine & Tapp, *The Psychology of Criminal Identification: The Gap from Wade to Kirby*, 121 U. PA. L. REV. 1079, 1079 (1973); A. YARMEY, THE PSYCHOLOGY OF EYEWITNESS TESTIMONY (1979).

[4] McGowan, *Constitutional Interpretation and Criminal Identification*, 12 WM. & MARY L. REV 235, 238 (1970) (citing authority); *see also* Jonakait, *Reliable Identification: Could the Supreme Court Tell in Manson v. Brathwaite?*, 52 U. COLO. L. REV 511, 528 (1981).

[5] 388 U.S. 293 (1967).

[6] 432 U.S. 98 (1977).

[7] Unless the context clearly requires a different reading, references to the "right to due process" should be understood to mean the right to due process in connection with pretrial identification procedures, and not the right to due process in general or in any other situation.

[8] *See infra* notes 102-49 and accompanying text.

and more on the reliability of the outcomes of those procedures.[9] The Court, rather than asking whether pretrial identification procedures were fair, asked simply whether the evidence produced was reliable. As long as the Court determined that the evidence was reliable, no due process violation existed.

Part II identifies three problems with the Supreme Court's approach that render it unworkable.[10] The first problem is that the method that the Supreme Court has developed for determining the accuracy of eyewitness evidence is founded upon incorrect scientific principles and upon purported facts that are both inaccurate and misleadingly incomplete. The divergence between the Supreme Court's precepts and the lessons of science creates an unsound legal doctrine. The second problem is that, because the Supreme Court has given almost no instruction as to how the right is to be applied, it has been confusingly and inconsistently applied by the lower federal courts and state courts. The courts' treatment of the right creates a doctrinal chaos, the principal result of which is a right that is of little value for criminal defendants. The third problem with the right to due process is that, because it focuses exclusively on the reliability of evidence rather than the method used to collect the evidence, it ignores important values that the Constitution must protect, in particular the value of procedural fairness. Part II also includes a brief discussion of the development of the criminal defendant's right to confront the witnesses against him. The discussion demonstrates that the right to due process in connection with pretrial identification procedures and the right to confrontation have developed along similar lines, and their current weaknesses may have similar origins.

Part III proposes a new formulation of the right to due process in connection with pretrial identification procedures, one that would avoid the problems identified in Part II.[11] The proposed formulation has two parts. First, it bars from evidence any testimony that is derived from unnecessarily suggestive pretrial identification procedures. This part of the formulation protects the defendant's right to procedural fairness. Second, it gives the defendant a right to introduce expert testimony to enable the jury to better evaluate eyewitness identification testimony. This part of the formulation

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[9] *See infra* notes 12-73 and accompanying text.

[10] *See infra* notes 74-189 and accompanying text.

[11] *See infra* notes 190-244 and accompanying text.

protects the defendant's right to have used against him only such evidence as may be rationally evaluated by the jury.

I. THE DEVELOPMENT OF THE RIGHT TO DUE PROCESS IN CONNECTION WITH PRETRIAL IDENTIFICATION PROCEDURES

This Part briefly reviews the development of the right to due process in the Supreme Court. Though the right as initially conceived was intended to uphold the fairness of pretrial identification procedures, the focus of the Court has gradually shifted away from procedural fairness to the reliability of the evidence denied from the pretrial procedures. Currently, if the evidence bears sufficient indicia of reliability, no due process violation has occured.

A. The Supreme Court's Decisions from Stovall v Denno Through Coleman v Alabama

1. *Stovall v. Denno*

Until 1967, the Supreme Court had never considered whether a pretrial identification procedure could implicate the defendant's right to due process. *Stovall v Denno*[12] was the first case in which the Court considered whether, and under what circumstances, pretrial procedures might raise due process issues. In *Stovall*, the defendant, who was suspected of murder, was exhibited on the day after the crime, alone and handcuffed, before the only living eyewitness of the crime.[13] Since the eyewitness had been stabbed eleven times and was in the hospital for major surgery, the confrontation was held in the eyewitness's hospital room. The eyewitness identified the defendant, and that pretrial identification was admitted into evidence at the subsequent trial, as well as an in-court identification by the same witness.[14]

The defendant was not represented by counsel at the hospital, and the main issue in the case was whether the defendant's right to counsel at certain pretrial identification procedures—which right had been announced the same day as the *Stovall* decision, in *United States v Wade*,[15] and *Gilbert v California*[16]—had been violated.

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[12] 388 U.S. 293 (1967).

[13] A confrontation in which only one suspect is shown to a witness is called a "show-up." BLACK'S LAW DICTIONARY 1380 (6th ed. 1980).

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

[15] 388 U.S. 218 (1967).

[16] 388 U.S. 263 (1967).

After extensive analysis, the Court held that the newly minted right to counsel should not be applied retroactively, and thus the defendant's right to counsel had not been violated.[17]

Following that analysis, the Court turned to the issue of whether the pretrial identification "was so unnecessarily suggestive and conducive to irreparable mistaken identification that [the defendant] was denied due process of law."[18] The Court asserted that denial of due process "is a recognized ground of attack upon a conviction independent of any right to counsel claim,"[19] and it observed that "[t]he practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned."[20] Nevertheless, the Court held that the existence of a due process violation "depends on the totality of the circumstances" and that the totality of the circumstances did not indicate that a due process violation occured.[21] The Court noted that although the show-up had been suggestive, it was necessary because the eyewitness was the "'only person in the world who could possibly exonerate'" the defendant, and no one knew how long the eyewitness would live,[22] because of her injuries suffered during the crime. Significantly, given the subsequent development of the law, the Court did not consider whether the eyewitness's pretrial or in-court identifications were reliable or to what degree they had been improperly influenced by the show-up.

Stovall was a landmark case. The Supreme Court had never before applied due process analysis to the admissibility of eyewitness identification testimony Indeed, the Court observed, "[t]he overwhelming majority of American courts have always treated the evidence question not as one of admissibility but as one of credibility for the jury "[23] Although the Court's application of due process to pretrial identification procedures was novel, the Court presented it almost casually, stating that due process was a "rec-

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[17] *See Stovall*, 388 U.S. at 296-301.

[18] *Id.* at 301-02.

[19] *Id.* at 302 (citing Palmer v. Peyton, 359 F.2d 199 (4th Cir. 1966)).

[20] *Id.* (footnote omitted).

[21] *Id.*

[22] *Id.* (quoting the lower court opinion, United States v. Denno, 355 F.2d 731, 735 (2d Cir. 1966) (*en banc*)).

[23] *Id.* at 299-300; *see also* Simmons v. United States, 390 U.S. 377, 382-83 (1968) (noting that until *Stovall* and its companion cases, "the matter of an extra-judicial identification affect[ed] only the weight, not the admissibility, of identification of testimony at trial").

ognized ground"[24] for excluding the results of suggestive pretrial identification procedures. The Court cited only one lower court case for the proposition that due process was a "recognized ground,"[25] and that case was outweighed by numerous cases holding that pretrial identification procedures went to the weight of identification testimony, not its admissibility.[26] Perhaps inevitably the ramifications of *Stovall* were not immediately clear. Two issues in particular called for elucidation.

First, on account of the terseness of the Court's enunciation of the right to due process in connection with pretrial identification procedures, it was hard to discern the rationale or theoretical basis for the new right. On the one hand, the rationale might be simply that the admission of unreliable evidence violated due process; the right might be protecting an evidentiary interest. On the other hand, the Court's emphasis on the distinction between necessarily and unnecessarily suggestive procedures suggested that another factor was at work. If the reliability of the evidence were the only interest at stake, it would not matter whether a pretrial procedure was necessarily or unnecessarily suggestive; that it was suggestive would be the only thing that counted. The Court never explained what additional factor was at work.

The second issue was whether the same constitutional test would apply to the admissibility of pretrial identifications and in-court identifications. In *United States v Wade* and *Gilbert v California*, the Court held that a *pretrial* identification of a suspect that was the product of an identification procedure conducted without counsel was inadmissible *per se*, but that a subsequent *in-court* identification would be admissible if the government could demonstrate "by clear and convincing evidence" that the witness had an "independent source" for the identification, *i.e.*, a source independent of the unconstitutional pretrial identification procedure.[27] *Stovall* dealt with the introduction into evidence of both types of identification and never expressly distinguished between them. Thus,

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[24] *Stovall*, 388 U.S. at 302.

[25] *Id.* (citing Palmer v. Peyton, 359 F.2d 199 (4th Cir. 1966)).

[26] *See, e.g.*, United States v. Denno, 355 F.2d 731, 735-36 (2d Cir. 1966) (*en banc*) ("As a matter of law, the method of identification inside or outside the courtroom would go to the weight to be attributed to the identification; not to the admissibility or constitutionality of testimony relating thereto."), *aff'd on other grounds sub nom.* Stovall v. Denno, 388 U.S. 293 (1967).

[27] *See* United States v. Wade, 388 U.S. 218, 239-43 (1967); Gilbert v. California, 388 U.S. 263, 269-74 (1967).

some courts interpreted *Stovall* as imposing a single test on all identification testimony: If the testimony was reliable, it would be admissible.[28] Other courts, preferring to read *Stovall* consistently with *Wade* and *Gilbert*, interpreted *Stovall* as establishing a two-tiered constitutional test analogous to the *Wade/Gilbert* formulation: a pretrial identification would be inadmissible if it was the product of an unnecessarily suggestive procedure, but a subsequent in-court identification would be admissible if it had an independent source.[29]

2. *Simmons v United States*

The next case in which the Court applied the principles set forth in *Stovall v Denno* was *Simmons v United States*.[30] In *Simmons*, the Court upheld a robbery conviction based on in-court identifications even though the in-court witnesses had been shown photographs of the defendant before trial in suggestive circumstances that might have tainted the in-court identifications.[31] *Simmons* considered the question of whether the suggestive pretrial procedure had irreparably tainted the in-court identification so as to make the identification at trial unreliable. In finding that the in-court identification was not irreparably tainted by the suggestive pretrial identification procedure, the Court relied on the circumstances surrounding the bank robbery and the details of the suggestive photo display.[32]

Although *Simmons* purported to apply *Stovall* straightforwardly, it modified the *Stovall* analysis in two ways. First, *Sim-*

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[28] *See* Note, *Identification: Unnecessary Suggestiveness May Not Violate Due Process*, 73 COLUM. L. REV. 1168, 1174 & n.48 (1973) (citing cases).

[29] *See, e.g.*, Brathwaite v. Manson, 432 U.S. 98 (1977); Smith v. Comer, 473 F.2d 877, 880-83 (4th Cir. 1973), *cert. denied sub nom.*, Wallace v. Smith, 414 U.S. 1115 (1973); Rudd v. Florida, 477 F.2d 805, 809 (5th Cir. 1973); Clemons v. United States, 408 F.2d 1230, 1237 (D.C. Cir. 1968), *cert. denied*, 394 U.S. 964 (1969); United States v. Clark, 294 F Supp. 44 (D.D.C.), *aff'd sub nom.*, Wright v. United States, 404 F.2d 1256, 1262 (D.C. Cir. 1968) (Bazelon, J., dissenting); Commonwealth v. Choice, 235 A.2d 173, 174 (Pa. 1967) (Hoffman, J., dissenting); *see also* United States *ex rel.* Phipps v. Follette, 428 F.2d 912, 914 n.3 (2d Cir. 1970) (noting the issue but not deciding it); Note, *supra* note 28, at 1172-74 ("the difficult question is whether 'conducive to irreparable mistaken identification' is to be a criterion independent of 'unnecessarily suggested'") (quoting *Stovall v. Denno*, 388 U.S. 293, 302 (1967)).

[30] 390 U.S. 377 (1968).

[31] Simmons v. United States, 390 U.S. at 382-83, 386 n.6. (1968) (the pretrial photo identification had not been admitted into evidence).

[32] *Id.* at 385.

mons cast doubt on the relevance of the distinction between "necessarily suggestive" and "unnecessarily suggestive" procedures. In *Stovall*, the Court's analysis ended when the Court determined that the show-up procedure had been necessary, and the finding in *Simmons* that the photo identification procedure was necessary might have ended its analysis, too. That the *Simmons* Court nevertheless continued its analysis suggested that the distinction was not constitutionally significant. Furthermore, in *Stovall*, the suggestive show-up had been held to be necessary because the eyewitness was the only one to the crime and was in imminent danger of dying.[33] No similarly compelling circumstance existed in *Simmons*, yet the Court was satisfied that the photo identification procedure, although suggestive, was necessarily so:

> [I]t is not suggested that it was unnecessary for the FBI to resort to photographic identification in this instance. A serious felony had been committed. The perpetrators were still at large. The inconclusive clues which law enforcement officials possessed led to [the defendants]. It was essential for the FBI agents swiftly to determine whether they were on the right track so that they could properly deploy their forces in Chicago and, if necessary, alert officials in other cities.[34]

Clearly the factors cited by the Court—the seriousness of the felony, the fact that the defendants were still at large, and the need for the FBI to "properly deploy their forces"—are far broader than the circumstances in *Stovall*. If applied consistently they would cloak many suggestive pretrial procedures under the protective mantle of necessity

Second, *Simmons* had a different tone than *Stovall* and suggested that the Court would not vigorously uphold the defendant's right to due process. The *Simmons* Court noted that the danger of misidentification could be "substantially lessened" by cross-examination at trial before a jury [35] This statement signalled a retreat to the pre-*Stovall* doctrine that the suggestiveness of pretrial identification procedures went to the weight, not the admissibility, of the evidence produced.[36] Whereas the *Stovall* Court had inveighed against unnecessarily suggestive procedures that were "conducive"

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[33] *Stovall*, 388 U.S. at 301-02.
[34] *Simmons*, 390 U.S. at 384-85.
[35] *Id.* at 384.
[36] *Stovall*, 388 U.S. at 299-300.

to irreparable mistaken identifications, *Simmons* stated that the due process clause proscribed only evidence that was the product of unnecessarily suggestive procedures that "give rise to a very substantial likelihood" of irreparable misidentification.[37] "Conducive" is a lesser standard than "very substantial likelihood," and therefore *Simmons* appeared to signal a weakening of the right to due process announced in *Stovall*.[38]

3. *Foster v California*

Foster v California[39] was the next case in which the Court applied the due process analysis to pretrial identification procedures. It was the first—and to date only—case in which the Court reversed a conviction on due process grounds because of pretrial identification procedures. In *Foster*, the defendant had been exhibited in two lineups. The first lineup included only three people, the defendant was at least six inches taller than the other two, and only the defendant wore a leather jacket as the assailant was alleged to have worn. The witness could not positively identify the defendant, although the witness "thought" that the defendant was the assailant. After the lineup, the witness met with the defendant alone, face-to-face, and was still unsure whether the defendant was the assailant. The next week, the defendant was in a second lineup with five participants; the defendant was the only person in the second lineup who had also been in the first lineup. At the second lineup, the witness was certain that the defendant was the assailant. The witness testified to both of these identifications and made an in-court identification of the defendant.[40] Relying on *Stovall v Denno*, the Court held that the defendant's right to due process had been violated because "the pretrial confrontations clearly were so arranged as to make the resulting identifications virtually inevitable."[41]

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[37] *Compare Stovall*, 388 U.S. at 302 (the relevant inquiry in *Stovall* was whether the conduct was "unnecessarily suggestive and conducive to irreparable mistaken identification") *with Simmons*, 390 U.S. at 382 (The case turned on whether the act was so impermissibly suggestive as to "give rise to a very substantial likelihood of irreparable misidentification.").

[38] *See* Pulaski, *Neil v. Biggers: The Supreme Court Dismantles the Wade Trilogy's Due Process Protection*, 26 STAN. L. REV 1097, 1108 (1974).

[39] 394 U.S. 440 (1969).

[40] Foster v. California, 394 U.S. 440, 440-42 (1969).

[41] *Id.* at 443 ("The suggestive elements of this identification procedure made it all but inevitable that [the witness] would identify petitioner whether or not he was in fact 'the man.'").

Perhaps because the underlying facts were so extreme, *Foster* was a short, almost cursory, opinion. The pretrial procedures were undoubtedly suggestive, and their suggestiveness was clearly unnecessary Although *Foster* did not clarify the analysis, it served to highlight two issues in the *Stovall-Simmons* right to due process. The first issue, raised by the *Foster* Court in a footnote, was the relationship between the right to due process and the role of the jury.

> The reliability of properly admitted eyewitness identification, like the credibility of other parts of the prosecution's case, is a matter for the jury But it is the teaching of *Wade*, *Gilbert*, and *Stovall* that in some cases the procedures leading to an eyewitness identification may be so defective as to make the identification constitutionally inadmissible as a matter of law [42]

The problem is that *Stovall*, *Simmons* and *Foster* did not identify when the jury could hear the evidence and when it could not, or what procedures were "so defective" that they were unconstitutional and what ones were, although defective, not so egregious as to bar the jury from receiving the evidence that they produced. None of the cases had reconciled the right to due process in connection with pretrial identification procedures and the historical and constitutional role of the jury in criminal trials. As Justice Black argued in dissent, the Court's application of the due process analysis to pretrial identification procedures threatened to usurp the constitutionally established role of the jury [43]

The second issue concerned the distinction between pretrial identifications and in-court identifications. The Court remanded the case, but it was not clear whether, on retrial, the prosecution would be entitled to enter the witness's in-court identification into

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[42] *Foster*, 394 U.S. at 442 n.2 (1969).

[43] *Id.* at 447 (Black, J., dissenting):

> Of course it is an incontestable fact in our judicial history that the jury is the sole tribunal to weigh and determine facts. That means that the jury must, if we keep faith with the Constitution, be allowed to hear eyewitnesses and decide for itself whether it can recognize the truth and whether they are telling the truth. It means that the jury must be allowed to decide for itself whether the darkness of the night, the weakness of the witness' eyesight, or any other factor impaired the witness' ability to make an accurate identification. To take that power away from the jury is to rob it of the responsibility to perform the precise functions the Founders most wanted it to perform.

Justice Black had made the same point in *Simmons*. *See Simmons*, 390 U.S. at 395 (Black, J., concurring in part and dissenting in part) ("The weight of the evidence is not a question for the Court but for the jury ").

evidence, or whether the pretrial lineup identifications had so tainted the in-court identification that the in-court identification was also inadmissible. This problem, also noted by Justice Black in his dissent,[44] suggested that perhaps the Court was not dedicated to applying separate tests to pretrial and in-court identifications.

4. *Coleman v Alabama*

In *Coleman v. Alabama*,[45] the Court applied a due process analysis and held that a pretrial lineup in which a witness made an identification of the defendants was not so unduly prejudicial so as "fatally to taint"[46] the witness's in-court identifications of the defendants. The defendants argued that the lineup procedure was unconstitutional for a number of reasons;[47] of particular relevance here, one of the defendants argued that the lineup procedure violated his right to due process because he was the only lineup participant wearing a hat, as had one of the attackers.[48] The Court rejected the defendants' arguments on the ground that the trial court "could find" that the witness's in-court identifications had been "entirely based upon [his] observations at the time of the assault and not at all induced by the conduct of the lineup."[49] The Court rejected the argument about the hat on the grounds that even though the hat may have made the lineup suggestive, the defendant wore the hat of his own volition, and, in any event, the record suggested that the hat was not important to the witness's selection of that defendant.[50] This represented a retreat from *Fos-*

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[44] *Foster*, 394 U.S. at 444-45 (Black, J., dissenting).

[45] 399 U.S. 1 (1970).

[46] Coleman v. Alabama, 399 U.S. 1, 4 (1970) (as in *Simmons*, the pretrial identification was apparently not entered into evidence, and the only issue therefore, was whether the pretrial identification "tainted" the subsequent in-court identification); *see* Coleman v. State, 211 So.2d 917, 921 (Ala. 1968), *vacated and remanded sub nom.*, Coleman v. Alabama, 399 U.S. 1 (1970).

[47] In particular, the defendants based their constitutional argument on the facts that (1) the witness testified that when he went in for the line-up he was under the assumption the police had apprehended his attackers, and (2) the defendants were the only lineup participants who were forced to say the same words as the assailant.

[48] *Coleman*, 399 U.S. at 6.

[49] *Id.* at 5-6. The Court also rejected the arguments on the grounds that (1) even if the witness believed that there were suspects in the lineup, the police had not prompted the witness to select the defendants, and (2) the record was unclear whether only the defendants or all of the lineup participants spoke the words that the assailant had allegedly spoken. In any event the record suggested that the witness might have identified the defendants even before they had said anything.

[50] *Id.* at 6.

ter, in which the Court had found that the defendant's leather jacket was one of the factors making the lineup unconstitutionally suggestive, even though there had been no evidence that the police had forced the defendant to wear the jacket.[51] The Court's second argument about the hat—that the record suggested that the hat was not important to the witness's selection of the defendant—was contrary to the Court's expressed concerns in *Wade*. The only evidence that the hat might not have been important to the witness's selection of the defendant was the witness's own testimony [52] But in *Wade*, the Court had observed that witnesses could not be counted upon to identify what made them select a person in a pretrial identification procedure.[53]

Coleman, like *Foster*, did not contain substantial analysis, and therefore generally has been glossed over by commentators.[54] But *Coleman* demonstrated how precipitously the right to due process was weakened in the three years after its inception. For example, in addition to the Court's treatment of the issue of the hat, the Court's statement that the trial court "could find" that the lineup was irrelevant to the witness's in-court identification contrasts sharply with the *Wade* Court's insistence just three years before that the pretrial identification was a "critical step" in the trial that could affect subsequent identifications.[55]

Coleman left the right to due process in a state of weakness. Soon after the right's inception in *Stovall*, signs indicated that the Court was becoming less concerned about the dangers of improper procedures and erroneous identifications. The contrast in treatment of the articles of clothing in *Foster* and *Coleman*, and the contrast between *Wade*'s and *Coleman*'s degree of concern about the effect of a suggestive pretrial procedure on a subsequent in-court identification, attest to the declining status of the right.

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[51] *See Foster*, 394 U.S. at 443.

[52] *Coleman*, 399 U.S. at 6.

[53] *See* United States v. Wade, 388 U.S. 218, 230 ("Neither witnesses nor lineup participants are likely to be schooled in the detection of suggestive influences.").

[54] *See, e.g.*, Pulaski, *supra* note 38, at 1110-11.

[55] *Id.* at 229 (once a witness has selected a person from a pretrial identification procedure, "he is not likely to go back on his word later on"). Scientific evidence confirms that once an eyewitness makes a selection, he tends to "anchor" to it, and is unlikely to change his mind. *See, e.g.*, Hall, Loftus & Tousignant, *Postevent Information and Changes in Recollection for a Natural Event*, in G. WELLS & E. LOFTUS, *supra* note 3, at 128; Gross, *Loss of Innocence: Eyewitness Identification and Proof of Guilt*, 16 J. LEGAL STUD. 395, 401 (1987).

In addition to doctrinal weakness, the analysis of the right was also confused. At the core of the confusion was the question that had been unanswered since *Stovall*: whether the purpose of the right was to guarantee the reliability of eyewitness identifications or to protect against abusive procedures. Did the right focus on the outcomes of procedures or on the procedures themselves? This unresolved question led to additional questions. The first such question concerned the role of the concept of necessity in the due process analysis: if the right was focused on outcomes rather than procedures, then the concept of necessity would have no place, but if it was a procedural right, then necessity could be a significant factor in the analysis. A second question concerned the relationship between the right to due process and the role of the jury The Court had never responded to Justice Black's argument that the reliability of all testimony, including eyewitness testimony, was for the jury to decide, and therefore, judicial exclusion of pretrial identifications usurped the role of the jury A third question was whether the same standard applied to pretrial identifications and in-court identifications. *Stovall*—interpreted in light of *Wade* and *Gilbert*—suggested that different standards existed for these two situations, but *Foster* had muddied the waters

The Court's next two cases helped resolve some of these issues. Most importantly, the cases definitively established that the right to due process focused solely on the reliability of the outcome, not procedural fairness. These cases also established that whether a pretrial procedure was necessarily suggestive or unnecessarily suggestive was irrelevant. Additionally, they established that the same standard applied to both pretrial and in-court identifications.

B. Neil v Biggers and Manson v Brathwaite

The issue in *Neil v Biggers*[56] was whether a show-up identification procedure in the police station was so suggestive that the admission into evidence of the resulting identification violated the defendant's right to due process. The only question in the case concerned the admissibility of the pretrial identification of the defendant; the in-court identification was not challenged.[57] In answering this question, the Court reviewed *Stovall*, *Simmons*, *Foster*, and *Coleman* and purported to draw "guidelines" from them

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[56] 409 U.S. 188 (1972).

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

concerning the relationship between suggestiveness and misidentification.[58] In fact, the Court did not draw guidelines from those cases, but erased many of the distinctions that those cases had suggested, and inserted a single test for all eyewitness identification evidence.

The most important new rule established by *Biggers* was that the right to due process would focus solely on outcomes, not on pretrial procedures. The Court stated, "It is the likelihood of misidentification which violates a defendant's right to due process . Suggestive confrontations are disapproved because they increase the likelihood of misidentification. . ."[59] Having established the outcome-focus of the right, it followed that no basis to distinguish between necessarily suggestive procedures and unnecessarily suggestive ones existed, because the necessity of the suggestiveness is irrelevant to the reliability of the identification.[60] It also followed that no different standard was to be applied to pretrial identifications and in-court identifications,[61] and that due process did not require that every pretrial identification that was the product of an unnecessarily suggestive pretrial identification procedure be excluded from evidence.[62] Instead, the Court held that due process required the exclusion of pretrial identifications only if (a) the pretrial identification procedure was suggestive (regardless whether it was necessarily or unnecessarily so) *and* (b) the identification was unreliable.[63] The Court indicated that whether a pretrial identification was reliable depended upon a "totality of the circumstances" test,[64] and identified five factors to be considered in applying that test:

> [T]he factors to be considered in evaluating the likelihood of misidentification include [1] the opportunity of the witness to view the criminal at the time of the crime, [2] the witness' degree of attention, [3] the accuracy of the witness' prior description of the criminal, [4] the level of certainty demonstrated by the witness at the confrontation, and [5] the length of time between the crime and the confrontation.[65]

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[58] *Id.* at 198.
[59] *Id.* at 198.
[60] *Id.* at 198-99.
[61] *Id.* at 198.
[62] *Id.* at 199.
[63] *Id.* at 198-99.
[64] *Id.* at 199.
[65] *Id.* at 199-200. Although the Supreme Court stated that the factors to be considered

Applying the test in *Biggers*, the Court held that although the show-up had been suggestive, the witness's pretrial identification was not unreliable and could be admitted into evidence without violating due process.[66]

In *Manson v Brathwaite*,[67] the Court reaffirmed *Biggers*' emphatic focus on the reliability of all identifications—both pretrial and in-court—as the sole determinant of their admissibility [68] The Court also reaffirmed that the two-step test enunciated in *Biggers* was applicable to all pretrial identifications because it best achieved the goal of due process analysis of pretrial identification procedures—promoting reliable eyewitness identifications.[69] The Court stated definitively: "[R]eliability is the linchpin in determining the admissibility of identification testimony The factors to be considered are set out in *Biggers*."[70]

In addition to reaffirming the lesson of *Biggers*, *Manson* demonstrated that the Court did not believe that reliability was a value of great constitutional significance. The Court stated that the right to due process in connection with pretrial identification procedures "protect[ed] an *evidentiary* interest" and noted "the limited extent of that interest in our adversary system."[71] The reason that reliability was not an important constitutional value, the Court ex-

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"include" the five enumerated factors, the lower federal courts have almost unanimously relied upon only those factors set forth in *Biggers*. *See infra* note 117 and accompanying text.

[66] *Id.* at 199-201.

[67] 432 U.S. 98 (1977).

[68] At issue in *Manson* was whether the *Biggers* two-step analysis applied to pretrial identifications that occurred after *Stovall*, or whether a stricter, one-step test—pursuant to which any pretrial identifications that were the product of unnecessarily suggestive procedures would be excluded from evidence regardless whether the identifications were reliable—was applicable to such identifications. *See* Manson v. Brathwaite, 432 U.S. 98, 107 (1977). The issue arose out of an ambiguous passage in *Biggers*, in which the Court had observed that applying the strict, one-step rule to procedures that occurred pre-*Stovall* (as did the one in *Biggers*) would not be appropriate. *See Biggers*, 409 U.S. at 199. This led the petitioners in *Manson* to argue that *Biggers* had implied that the stricter rule was appropriate for procedures occurring post-*Stovall*. *See Manson*, 432 U.S. at 109.

[69] *Manson*, 432 U.S. at 114.

[70] *Id.*, *see also* Watkins v. Sowders, 449 U.S. 341, 347 (1981) ("It is the reliability of identification evidence that primarily determines its admissibility") (citing Manson v. Brathwaite, 432 U.S. at 113-14 and United States *ex rel.* Kirby v. Sturges, 510 F.2d 397, 402-04 (7th Cir. 1975)). The *Manson* Court also refined slightly the *Biggers* five-factor test by noting that "[a]gainst these [five] factors is to be weighed the corrupting effect of the suggestive identification itself." *Manson*, 432 U.S. at 114.

[71] *Manson*, 432 U.S. at 113 (emphasis in original), referred to Clemons v. United States, 408 F.2d 1230, 1251 (D.C. Cir. 1968) (Leventhal, J., concurring), *cert. denied*, 394 U.S. 964 (1969).

plained, was that "[c]ounsel can both cross-examine the identification witnesses and argue in summation as to factors causing doubts as to the accuracy of the identification including reference to any suggestability in the identification procedure and any countervailing testimony such as an alibi."[72] Echoing Justice Black's opinions in *Foster* and *Simmons*, the Court observed that "evidence with some degree of untrustworthiness is customary grist for the jury mill."[73]

II. THE FAILURE OF THE FIVE-FACTOR RELIABILITY TEST

This Part discusses several problems concerning the right to due process as formulated by the Supreme Court. These problems may be divided into three categories.

The first category of problems concerns the five reliability factors identified by the Supreme Court in *Neil v Biggers*[74] and *Manson v Brathwaite*.[75] Overwhelming scientific evidence demonstrates that these factors are not valid predictors of the reliability of eyewitness testimony. Based upon incorrect scientific principles, the Supreme Court's test demonstrates the danger in erecting a constitutional right upon a scientific foundation that is unstable and evolving.

The second category of problems concerns the application of *Biggers* and *Manson* by the inferior federal courts and the state courts, whose applications have often been confused and doctrinally troubling. In particular, (1) because the Supreme Court failed to define the concept of suggestiveness, the inferior federal courts and state courts have been inconsistent about the threshold question of when a procedure is suggestive, (2) the courts also have been inconsistent in their determinations of when identification evidence is reliable, and have frequently admitted evidence even in egregious circumstances, (3) the courts have often confused (a) their determinations of whether identification testimony could constitutionally be admitted into evidence with (b) their evaluations of whether the defendant was guilty, thus violating the cardinal principle that both the guilty and the innocent are entitled to the same constitutional rights, and (4) the courts have occasionally failed to distinguish

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[72] *Manson*, 432 U.S. at 113 n.14 (*quoting Clemons*, 408 F.2d at 1251 (Leventhal, J., concurring)).

[73] *Id.* at 116.

[74] 409 U.S. 188 (1972).

[75] 432 U.S. 98 (1977).

whether their analyses were pursuant to the right to due process or the Federal Rules of Evidence.

Third, even if the Supreme Court could develop a scientifically unassailable reliability test, and the inferior federal courts and the state courts could apply that test flawlessly, the right to due process in connection with pretrial identification procedures still would be fatally defective because it would be radically incomplete. Since the Supreme Court has held that the sole value underlying the right is reliability, the critically important interest of procedural fairness in pretrial identification procedures is unprotected.

A. The Infirmities of the Five-Factor Reliability Test

The five-factor reliability test that the Supreme Court set forth in *Biggers* and *Manson* is not a satisfactory method of measuring reliability Psychological studies demonstrate that each of the factors identified by the Court, and subsequently applied by the inferior federal courts and state courts, is either unsupported as a scientific matter or dangerously incomplete. Moreover, a host of other factors exist, not all of which are understood, that may influence the reliability of an eyewitness identification.[76]

1. *The Certainty of Eyewitness Identification*

According to the Supreme Court, the more certain the eyewitness is of an identification, the more likely the identification is reliable.[77] Lower courts have relied upon this factor in carrying out their due process analyses.[78] Scientific evidence conclusively establishes, however, that there is absolutely no correlation between an

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[76] The following account of the infirmities of each of the factors of the five-factor test is by no means exhaustive. There is considerable scientific literature about the unreliability of, and factors relating to, eyewitness identifications. *See, e.g.*, Wells & Murray, *What Can Psychology Say About the Neil v. Biggers Criteria for Judging Eyewitness Accuracy?*, 68 J. APP PSYCH. 347 (1983); Jonakait, *Reliable Identification: Could the Supreme Court Tell in Manson v. Brathwaite?*, 52 U. COLO. L. REV. 511 (1981); Levine & Tapp, *The Psychology of Criminal Identification: The Gap from Wade to Kirby*, 121 U. PA. L. REV 1079 (1973) (citing authorities). This section presents only a small sample of that literature but is sufficient to demonstrate the scientific invalidity of the five-factor test.

[77] *See Manson*, 432 U.S. at 115; *Biggers*, 409 U.S. at 199.

[78] *See, e.g.*, Dickerson v. Fogg, 692 F.2d 238, 245-47 (2d Cir. 1982); Solomon v. Smith, 645 F.2d 1179, 1185-86 (2d Cir. 1981).

eyewitness's level of certainty in an identification and the correctness of an identification.[79]

2. *The Accuracy of the Eyewitness's Description*

A second factor identified by the Supreme Court and relied upon by other courts is the "accuracy of the witness's prior description of the criminal."[80] As stated, this factor is circular: it assumes that the defendant is in fact the assailant. To avoid the problem of circularity, this factor must be interpreted to mean that an identification that is the product of a pretrial identification procedure is more reliable if the witness's description of the assailant before viewing the identification procedure matches the person that the witness selects at the procedure.[81] Put differently, "[t]he prior description criterion should be rephrased so that it refers to similarity between prior description and defendant characteristics."[82]

Even so interpreted, the prior description criterion fails to conform to scientific evidence, which suggests that there is not an "appreciable relationship between a person's prior description of a face and the person's accuracy in identifying the face."[83] As one study notes, "[a]lthough faces easily evoke verbal labels as word associates, ease of labeling was not related to accuracy of facial recognition. [O]bservers' ability to verbally describe faces is not predictive of their ability to recognize these faces."[84]

3. *The Eyewitness's Degree of Attention*

The eyewitness's degree of attention during the criminal incident is unquestionably an important factor in the reliability of any

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[79] *See, e.g.*, Cutler, Penrod & Martens, *The Reliability of Eyewitness Identification*, 11 L. & HUM. BEHAV 233, 234 (1987); Deffenbacher, *Eyewitness Accuracy and Confidence*, 4 L. & HUM. BEHAV 243, 258 (1980); Wells & Murray, *Eyewitness Confidence* in G. WELLS & E. LOFTUS, *supra* note 3, at 155.

[80] *Manson*, 432 U.S. at 115; *Biggers*, 409 U.S. at 199.

[81] *See* Wells & Murray, *supra* note 76, at 354.

[82] *Id.*

[83] *Id.*, *see also* Goldstein, Johnson & Chance, *Does Fluency of Face Description Imply Superior Face Recognition?*, 1979 BULL. PSYCHONOMIC SOC'Y 13, 15-18; Howells, *A Study of Ability to Recognize Faces*, 33 J. OF ABNORMAL AND SOC. PSYCH. 124, 124-27 (1938).

[84] A.D. YARMEY, THE PSYCHOLOGY OF EYEWITNESS TESTIMONY 138-39 (1979) (quoted in Jonakait, *Reliable Identification: Could the Supreme Court Tell in Manson v. Brathwaite?*, 52 U. COLO. L. REV 511, 520 (1981)).

subsequent identification by the eyewitness.[85] It appears, however, that the factors that courts have applied in determining the eyewitness' degree of attention may be misleading. For example, many courts appear to believe that a person in danger will be more attentive than a person who is not in danger, and thus the endangered person would provide a more reliable identification.[86] The scientific evidence, however, demonstrates that, to the contrary, people in stressful situations—such as victims of crimes—are significantly less reliable than those who see their subjects in comparatively calm surroundings.[87] Some courts also apparently believe that certain people, police officers in particular, are better able to attend to the details of a person's face and make a reliable identification.[88] However, studies demonstrate that police are no more reliable than other people in making identifications.[89]

4. *The Eyewitness's Opportunity to View the Assailant*

The eyewitness's opportunity to view the assailant, is another important factor in evaluating the reliability of the eyewitness's subsequent identification. Like the degree of attention criterion, the opportunity criterion is not fully understood or correctly applied by courts. Although scientific studies demonstrate that people systematically overestimate the duration of an event,[90] and although this appears to be especially true when the person estimating the duration is under stress,[91] courts do not take witnesses' overestimation "biases" into account when evaluating their opportunity to view assailants. Moreover—as in the case of the degree-of-

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[85] *Manson*, 432 U.S. at 115; *Biggers*, 409 U.S. at 199; Wells & Murray, *supra* note 79, at 155-70.

[86] *See, e.g.*, Moore v. Illinois, 434 U.S. 220, 234-35 (Blackmun, J., concurring) ("One need only observe another person's face for 10 seconds by the clock To the resisting woman, the 10 to 15 seconds would seem endless.").

[87] *See* Ellis, *Practical Aspects of Face Memory*, in G. WELLS & E. LOFTUS, *supra* note 3, at 20.

[88] *See, e.g.*, *Manson*, 432 U.S. at 115 (noting that the identifying witness was "a trained police officer"); Marsden v. Moore, 847 F.2d 1536, 1546 (11th Cir. 1988); United States v. Robinson, 782 F.2d 128, 131 (8th Cir. 1986); United States v. Flickinger, 573 F.2d 1349, 1358 (9th Cir. 1978) (voice identification), *cert. denied*, 439 U.S. 836 (1978); United States v. Bothwell, 465 F.2d 217, 220 (9th Cir. 1972).

[89] *See* Clifford, *Police as Eyewitnesses*, 36 NEW SOCIETY 176, 176-77 (April 1976); Tickner & Poulton, *Watching for People and Actions*, 18 ERGONOMICS 35 (1975).

[90] Cutler, Penrod & Martens, *supra* note 79, at 253; Gross, *Loss of Innocence: Eyewitness Identification and Proof of Guilt*, 16 J. LEGAL STUD. 395, 398 (1987).

[91] Sarason & Stoops, *Test Anxiety and the Passage of Time*, 46 J. CONSULTING AND CLINICAL PSYCH. 102 (1978).

attention criterion—courts have not given specific content to this criterion, which would guide litigants. Courts have not established whether there is a minimum threshold duration that is satifactory for subsequent reliable identifications, or whether there is a "sliding scale" of durations, or exactly how one is to work the opportunity-to-view criterion into the constitutional test.

5. *The Time Elapsed Between the Criminal Incident and the Pretrial Identification Procedure*

Witnesses' memories do not decline in a linear fashion over time. Rather, it appears that the accuracy of most peoples' memories declines sharply shortly after an event, but then declines very little over an extended period of time.[92] Evidence further indicates that just as important as the passage of time is what the eyewitness experiences during the interval between the criminal incident and the identification procedure. Activities like viewing mugshots[93] or hearing another person's description of the assailant[94] may influence the reliability of an identification. Since these points were not mentioned by the Court in *Manson* or *Biggers*, and because so many courts simply follow those decisions to the letter, the constitutional test that these courts apply may be deficient.[95]

6. *Additional Relevant Factors*

A variety of additional factors may influence the reliability of identifications, but the Supreme Court did not mention them, and they have been largely ignored by other courts. For example: it is established that people are more accurate in identifying people of their own race than they are in identifying people of different races;[96] the presence of a weapon makes people less reliable ob-

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[92] E. LOFTUS, *supra* note 3, at 53; J. SHEPHERD, H. ELLIS & G. DAVIS, IDENTIFICATION EVIDENCE: A PSYCHOLOGICAL EVALUATION 80-86 (1982); Gross, *supra* note 90, at 399.

[93] Gorenstein & Ellsworth, *Effect of Choosing an Incorrect Photograph on a Later Identification by an Eyewitness*, 65 J. APP. PSYCH. 616 (1980); Davies, Shepherd & Ellis, *Similarity Effects in Face Recognition*, 92 AM. J. PSYCH. 507 (1979).

[94] Loftus & Greene, *Warning: Even Memory for Faces May be Contagious*, 4 L. & HUM. BEHAV. 323 (1980).

[95] Notably, the dissent in *Manson* was aware that memory for faces declines rapidly immediately after the incident but then holds comparatively stable for a period of time. *See Manson*, 432 U.S. at 131 (Marshall, J., dissenting). Courts generally have not sought to develop the implications of this point.

[96] *See, e.g.*, Johnson, *Cross-Racial Identification Errors in Criminal Cases*, 69 CORNELL L. REV. 934, 938 and n.18 (1984) (citing authorities).

servers of faces;[97] one study suggests that—contrary to what most people and courts believe—the more accurate a person's memory for peripheral details, the less reliable the person's selection in an identification procedure;[98] and, it is well-established that the questions witnesses are asked by the police before the witnesses attempt identification procedures may affect their selection.[99] None of these points is considered by most courts applying the constitutional test for reliability

One potential solution to the scientific shortcomings of the Supreme Court's due process test would be to refine the test to take into account the various factors noted above. For example, the test could be revised to excise any reliance on a witness's certainty about her identification, to elaborate the factor that relates to the time elapsed between incident and procedure, and generally to take into account all of the refinements and insights that appear to be scientifically justified. These changes would improve the reliability test, but would not lead to a satisfactory outcome. To be scientifically respectable, any constitutional test adopted by the Supreme Court would necessarily be extremely lengthy, detailed and cumbersome. The factors that influence the reliability of an identification are too numerous to be encapsulated in a single, easily stated and applied standard.

Moreover, the science of eyewitness identification is developing dramatically It is not a settled field, and a great deal of research remains to be done. Erecting a constitutional standard upon shifting grounds such as these invites the danger—already realized in *Biggers* and *Manson* and their progeny—that the constitutional test will not be scientifically valid. This places inferior federal courts and state courts in the awkward position of being required to apply a test mandated by the Supreme Court that is scientifically invalid. A constitutional test lacking an adequate basis in scientific findings divorces law from accuracy and impedes the law's promotion of justice.[100] Of course, this is not to suggest that scientific develop-

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[97] L. TAYLOR, EYEWITNESS IDENTIFICATION 32 (1982); Loftus, Loftus & Messo, *Some Facts About Weapons Focus*, 11 L. & HUM. BEHAV. 55 (1987).

[98] Wells & Leippe, *How Do Triers of Fact Infer the Accuracy of Eyewitness Identification? Using Memory for Peripheral Detail Can Be Misleading*, 66 J. APP. PSYCH. 682 (1981); *see also* Wells & Murray, *supra* note 81, at 353.

[99] *See* G. WELLS & E. LOFTUS, *supra* note 3, at 129-30.

[100] *Cf.* Pine, *Speculation and Reality: The Role of Facts in Judicial Protection of Fundamental Rights*, 136 U. PA. L. REV 655, 659-68 (1988) (noting importance of empirical truth to development of constitutional standards); Davis, *"There is a Book Out ". An*

ments have no role to play in constitutional adjudication. Obviously they do, and scientific developments have been instrumental in the definition and establishment of certain constitutional rights.[101] The point is simply that given the emergent state of scientific knowledge about eyewitness identifications, the Supreme Court's adoption of the five factors test was not a sound application of scientific principles to constitutional adjudication.

B. The Muddled Legacy of Manson v Brathwaite

Since *Manson*, the inferior federal courts and state courts have applied the right to due process extremely narrowly, and their analyses of the right often have evidenced confusion and conflict with one another on almost every point. The poor performance of the lower courts and the state courts in applying the right to due process demonstrates the inadequacy of the Supreme Court's formulation of the right.

1. *The Definition of Suggestiveness*

The inferior federal courts and the state courts have been inconsistent about the elemental question of what circumstances rendered a pretrial procedure suggestive. For example, in the lineup situation, some courts have disapproved of lineups in which the defendant had a distinguishing feature that was not shared by the other members of the lineup.[102] Other courts have been more lenient, indicating that some characteristics, but not others, make a difference in determining whether a lineup was suggestive.[103] At

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Analysis of Judicial Absorption of Legislative Facts, 100 HARV. L. REV 1539 (1987) (describing questionable decisions arising from courts' practice of taking judicial notice of a controversial scientific theory); *see also* O'Brien, *The Seduction of the Judiciary: Social Sciences and the Courts*, 64 JUDICATURE 8 (1980) (noting dangers of judicial reliance on social science data in formulating constitutional rights).

[101] *See, e.g.*, Brown v. Board of Educ., 347 U.S. 483, 494 n.11 (1954); Roe v. Wade, 410 U.S. 113, 148-49 & n.44 (1973).

[102] *See, e.g.*, United States v. Bice-Bay, 701 F.2d 1086, 1089 n.3 (4th Cir. 1983) ("[I]t was suggestive to show [the witness] only one photograph, that of [defendant] portraying a woman with dred locks and a head covering."); People v. Owens, 543 N.Y.S.2d 372, 541 N.E.2d 401 (N.Y. 1989) (lineup suggestive where defendant's jacket stood out from other jackets in lineup); People v. Tatum, 129 Misc. 2d 196, 204-05, 492 N.Y.S.2d 999, 1003 (N.Y. Sup. Ct. 1985) (lineup suggestive where only defendant had a glass eye); *see* cases cited *infra* at note 122.

[103] *See, e.g.*, United States v. Alexander, 868 F.2d 492, 495 (1st Cir. 1989) (photospread unobjectionable although defendant was the only person pictured with an earring); Jarrett v. Headley, 802 F.2d 34, 41 (2d Cir. 1986) ("It is not required, however, that all of the

least one court has held that a lineup is not suggestive unless it is "virtually inevitable" that the witness will select the defendant.[104] As a consequence of having different standards, courts reach different conclusions on almost identical facts. For example, in *United States v Thurston*,[105] the court held that a photo lineup in which the defendant was the only one of six "which had a beard and whose hair was braided" was not unduly suggestive.[106] By contrast, in *People v Moore*,[107] the court reversed a conviction on the ground that the defendant was the only one in the lineup with braided hair.[108] Similar confusion exists in courts' analyses of show-ups. Some courts have held that show-ups are presumptively suggestive, whereas other have held that show-ups are unobjectionable absent aggravating circumstances.[109] There are numerous other examples of courts reaching contrary conclusions on almost identical facts.[110]

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photographs in the array be uniform with respect to a given characteristic."); United States v. Jackson, 509 F.2d 499, 505-06 (D.C. Cir. 1974) (lineup not suggestive although only defendant had a "bush hairstyle," as the witness had described the assailant as wearing); State v. Haymon, 639 S.W.2d 843, 844-45 (Mo. App. 1982) (lineup not suggestive even though defendant was the only person in the lineup with a "scarred face" and disfigured chin).

[104] Caver v. State, 537 F.2d 1333, 1335 (5th Cir. 1976); *see also* United States v. Monks, 774 F.2d 945, 956 (9th Cir. 1985) (upholding photo identification: "[I]t cannot be said that [defendant's] picture would inevitably be selected whether or not he was in fact the robber, despite the fact that his picture was the only one that resembled the robber's description.") (citations omitted); Clay v. Vose, 599 F Supp. 1505, 1522 (D. Mass. 1984) (eyewitness identification admissible unless there is a "very substantial likelihood" of misidentification), *aff'd*, 771 F.2d 1 (1st Cir. 1985), *cert. denied*, 475 U.S. 1022 (1986).

[105] 771 F.2d 449 (10th Cir. 1985).

[106] United States v. Thurston, 771 F.2d 449, 453 (10th Cir. 1985).

[107] 533 N.Y.S.2d 602 (N.Y. App. Div. 1988).

[108] People v. Moore, 533 N.Y.S.2d 602, 603 (N.Y. App. Div. 1988).

[109] *Compare* People v. Adams, 53 N.Y.2d 241, 251, 423 N.E.2d 379 (N.Y. 1981) (show-up identifications are presumptively excluded) *with* Johnson v. Dugger, 817 F.2d 726, 729 (11th Cir. 1987) ("show-ups are not unnecessarily suggestive unless the police aggravate the suggestiveness of the confrontation") (citation omitted).

[110] *Compare* United States v. Ricks, 817 F.2d 692, 697 (11th Cir. 1987) (photo spread not suggestive although defendant was the only person wearing glasses) *with* Israel v. Odom, 521 F.2d 1370, 1374 n.7 (7th Cir. 1975) (lineup unconstitutional because defendant was the only person in it wearing glasses); *compare* Harker v. Maryland, 800 F.2d 437, 444 (4th Cir. 1986) (identification unobjectionable even though defendant was the only person wearing a "plaid flannel shirt over another shirt" as the assailant had worn) *and* Davis v. United States, 367 A.2d 1254, 1265 (D.C. App. 1976) (lineup evidence admissible even though defendant was the only person wearing a dashiki, as had the assailant) *with* People v. Owens, 543 N.Y.S.2d 372, 541 N.E.2d 401 (N.Y. 1989) (finding lineup impermissibly suggestive where defendant wore distinctive coat) *and* People v. Sapp, 469 N.Y.S.2d 803 (N.Y. App. Div. 1983) (same).

Courts also have been uncertain about what obligation the police have to avoid or correct potentially suggestive procedures. *Coleman*,[111] for example, suggested that as long as the police did not actively cause a procedure to be suggestive the defendant's right to due process was not violated, but some lower courts have ruled that procedures were suggestive even if the source of the suggestiveness was not created by the police.[112] The confusion of the inferior federal courts and the state courts is directly attributable to the Supreme Court's failure to provide a definition of suggestiveness in pretrial identification procedures and the Court's wavering treatment of the topic, as exemplified by the sharp contrast between *Wade*[113] and *Coleman*.[114] The absence of a workable definition of suggestiveness and the lack of a clear statement about the responsibility of the police to prevent suggestive procedures from taking place have led at least one court to exasperation:

> [T]here can be an infinite variety of differing situations involved in the conduct of a particular lineup. The police are not required to conduct a search for identical twins in age, height, weight or facial features. If an Eskimo were to be involved in a burglary, it is not to be expected that the sheriff will seek to locate or to send to the Arctic for tribesmen who could pass as brothers.[115]

2. *Inconsistency in Courts' Evaluations of Reliability*

When the inferior federal courts and state courts find that pretrial procedures are suggestive, and thus embark on the second step of the *Manson* test, their analyses are equally problematic.

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[111] 399 U.S. 1 (1970).

[112] *See, e.g.*, *Odom*, 521 F.2d at 1374 n.6; *Owens*, 541 N.E.2d 372, 401 (N.Y. 1989); *Moore*, 533 N.Y.S.2d at 603 (lineup suggestive where police did not cover defendants' hair even though defendant was the only person in the lineup with braided hair and braided hair had "figured prominently in [the witness'] description of the robber").

[113] 388 U.S. 218 (1967).

[114] 399 U.S. 1 (1970).

[115] Wright v. State, 174 N.W.2d 646, 652 (1969), *quoted in* United States *ex rel.* Crist v. Lane, 745 F.2d 476, 479 n.1 (7th Cir. 1984); *see also* United States v. Bubar, 567 F.2d 192, 199 (2d Cir. 1977) ("The due process clause does not require law enforcement officers to scour about for a selection of photographs so similar in their subject matter and composition as to make subconscious influences on witnesses an objective impossibility."); United States v. Lewis, 547 F.2d 1030, 1035 (8th Cir. 1976) ("Police stations are not theatrical casting offices; a reasonable effort to harmonize the lineup is normally all that is required."), *cert. denied*, 429 U.S. 1111 (1977).

Although the five factors are not scientifically sound,[116] and the Supreme Court stated that the five factors it identified in *Biggers* were not the only factors that a court could consider in making its reliability determination, most courts have applied the five factors exclusively [117] And, although the Supreme Court stated expressly that the five reliability factors are to be "weighed [against] the corrupting effect of the suggestive identification" procedure,[118] most courts have not done so. Instead, if the courts determine that the pretrial identification procedure is suggestive, they simply move to the five-factor test and ignore the corrupting effects of the pretrial procedure.[119] The lower courts' failure to include the suggestive procedure in their reliability analysis is a serious omission because, as the Supreme Court has recognized and scientific evidence demonstrates, a suggestive procedure may have a considerable effect on the reliability of any subsequent identification.[120]

A result of the confusion has been that courts almost invariably find that identifications are admissible regardless of the procedures or circumstances.[121] Courts are reluctant to exclude eyewitness evidence on due process grounds. Repeatedly, confronted by suggestive identification procedures, courts conclude that eyewitness evidence cannot be excluded on due process grounds unless the pretrial procedure caused a "very substantial likelihood of irreparable misidentification."[122] The courts almost invariably find that

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[116] *See supra* notes 76-99 and accompanying text.

[117] *See, e.g., Alexander*, 868 F.2d at 492-96; McFadden v. Cabana, 851 F.2d 784, 790 (5th Cir. 1988); Cooley v. Lockhart, 839 F.2d 431-32 (8th Cir. 1988); Thigpen v. Cory, 804 F.2d 893, 895-97 (6th Cir. 1986); *Dickerson*, 692 F.2d at 244-47; *Solomon*, 645 F.2d at 1185-86.

[118] *Manson*, 432 U.S. at 114.

[119] *See, e.g., McFadden*, 851 F.2d at 790; United States v. Wilson, 787 F.2d 375, 385-86 (8th Cir. 1986); Minetos v. Scully, 625 F Supp. 815, 819-20 (S.D.N.Y. 1986).

[120] *See Wade*, 388 U.S. at 229 (once a witness has made a choice, "he is not likely to go back on his word later on. "); Gorenstein & Ellsworth, *supra* note 93 at 621-22.

[121] *See, e.g., Cooley*, 839 F.2d at 431-32; Johnston v. Makowski, 823 F.2d 387, 391 (10th Cir. 1987); United States *ex rel.* Kosik v. Napoli, 814 F.2d 1151, 1155-61 (7th Cir. 1987); Cotton v. Armontrout, 784 F.2d 320, 321-23 (8th Cir. 1986); Williams v. Lockhart, 736 F.2d 1264, 1266-67 (8th Cir. 1984); *see also* Grano, *Kirby, Biggers and Ash: Do Any Constitutional Safeguards Remain Against the Danger of Convicting the Innocent?*, 72 MICH. L. REV 717, 780 (1974) ("[T]he Supreme Court should have anticipated that courts generally would use every conceivable method to avoid finding due process violations except in the most outrageous situations."); Seidman, *Soldiers, Martyrs and Criminals: Utilitarian Theory and the Problem of Crime Control*, 94 YALE L.J. 315, 328 n.43 (1984) ("The lower courts have applied the *Stovall-Manson* rule in a manner that routinely permits identifications secured by all but the most outrageous procedures.").

[122] *See, e.g.*, State v. Tresize, 623 P.2d 1, 4 (Ariz. 1980); State v. Hagen, 275 N.W.2d 49, 50 (Minn. 1979); *In re* L.W., 390 A.2d 435, 437 (D.C. App. 1978).

this has not occurred. As one commentator stated, the lower courts interpret the right to due process "in a manner that routinely permits identifications secured by all but the most outrageous procedures."[123] A few examples will demonstrate the courts' attitudes towards the right to due process in connection with pretrial identification procedures.[124]

In *McGuff v Alabama*,[125] the court upheld the admission of in-court identifications against a due process challenge where the defendant (a) was displayed to the eyewitness the day after the crime as he sat alone in a police car in which he was being driven "from place to place to have various witnesses identify him," and (b) "was viewed in his cell by a number of persons for the sole purpose of making identification."[126] Although the court condemned the procedure, it found that the identifications were probably reliable because the defendant's "rude and unprovoked conduct assured that he would have the [witness'] undivided attention," and the witnesses "adamantly testified as to the certainty of their identification."[127]

In *Cotton v Armontrout*,[128] in-court identifications by three eyewitnesses were admitted even though (a) one of the witnesses could not select the defendant's photograph from an array of photos that he was shown immediately after the criminal incident, (b) a month later, he selected the defendant's photo from an array in which the defendant was the only person shown wearing jail clothing, but only after being told by the police that the suspect's picture was in the array, and (c) the other two eyewitnesses identified the defendant two weeks after the criminal incident at a show-up that the court found was unnecessary because the police could and should have used a lineup.

In *United States v Hadley*,[129] a bank robbery suspect was shown, in handcuffs and surrounded by police, to four witnesses simultaneously; the witnesses had been told before viewing the suspect that the robber had been caught, but the court found that the identifications were sufficiently reliable to be admissible.

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[123] Seidman, *supra* note 121, at 328 n.3.

[124] *See also* Gross, *supra* note 3, at 403-04 n.41 (listing some startling examples).

[125] 566 F.2d 939 (5th Cir. 1978).

[126] McGuff v. Alabama, 566 F.2d 939, 940 (5th Cir. 1978).

[127] *Id.* at 941.

[128] 784 F.2d 320 (8th Cir. 1986).

[129] 671 F.2d 1112 (8th Cir. 1982).

In *Wilkins v Sumner*,[130] an in-court identification did not violate due process even though the witness had viewed a pretrial display of four photos in which the defendant's photo clearly stood out and even though the police had told the witness before he viewed the photos that they believed they had the suspect.

An in-court identification was permitted in *Bankston v State*[131] even though the witness had identified the defendant at a pretrial display of photographs in which the defendant was the only person in the photographic display with a mustache, and the witness had told the police previously that the assailant had a mustache.

Undoubtedly, one of the reasons that courts have treated the right to due process in such a cavalier fashion is their belief that a jury is capable of evaluating the identification evidence. Notwithstanding the observation by the Supreme Court in *United States v Wade*[132] and the numerous psychological studies to the contrary, courts consistently rule that the eyewitness testimony is "well-within the ordinary experience of a jury "[133]

3. *Courts' Improper Considerations of Extraneous Factors Relating to Reliability*

Lower federal courts and state courts also have tended to confuse their assessments of the probable guilt of the defendant with their evaluations of his right to due process. In particular, courts' determinations of whether an eyewitness identification is reliable have been influenced by whether *other* evidence of the defendants' guilt exists. The right has thus become intertwined with the court's judgment of the defendant's guilt or innocence. The case of *Mullen v Blackburn*[134] is typical:[135]

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[130] 475 F Supp. 495 (E.D. Va. 1979).

[131] 391 So. 2d 1005, 1007-09 (Miss. 1980).

[132] 388 U.S. 218 (1967).

[133] Johnson v. Wainwright, 806 F.2d 1479, 1486 (11th Cir. 1986); *see also* Harker v. Maryland, 800 F.2d 437, 443 (4th Cir. 1986) ("[S]uch evidence is for the jury to weigh for evidence with some element of untrustworthiness is customary grind for the jury mill.") (citation omitted); United States v. Sebetich, 776 F.2d 412, 418 (3d Cir. 1985) ("[I]t could be argued to the trier of fact that [the identification] has little independent probative value."); People v. Castellano, 145 Cal. Rptr. 264 (Cal. App. 1978) (permitting photo identification, notwithstanding that defendant was the only person pictured with a birthmark, because the photos could be shown to the jury, which could determine the weight to give the identification).

[134] 808 F.2d 1143 (5th Cir. 1987).

[135] *See also* United States v. Lau, 828 F.2d 871, 875 (1st Cir. 1987), *cert. denied*, 486 U.S. 1005 (1988); United States v. DiTomasso, 817 F.2d 201, 214 n.17 (2d Cir. 1987);

> [Defendant's] first claim is that the eyewitness identifications made by three eyewitnesses at trial should have been excluded from evidence. He concedes, however, that he was apprehended while committing the robbery and was, in fact, guilty as charged. Thus, he effectively concedes that the identifications were reliable. [136]

This passage demonstrates that, to the *Mullen* court, the defendant's right to due process was extinguished once it became clear that he "was, in fact, guilty as charged."[137] In effect, the Court reasoned as follows: (1) The defendant is probably guilty, and therefore, (2) the identification is probably reliable, and consequently (3) its admission into evidence is not a violation of due process. This reasoning puts the cart before the horse: one should derive a defendant's guilt from an identification, not the other way around. One can scarcely imagine a court speaking the same way about a defendant's fourth amendment right to be free from illegal searches and seizures or his fifth amendment right against self-incrimination.[138] The reasoning is contrary to the principle that all defendants have equal constitutional rights, regardless of whether they are ultimately found guilty by the trier of fact.[139]

United States v. Bell, 812 F.2d 188, 193 (5th Cir. 1987); United States v. Ivory, 563 F.2d 887, 889 (8th Cir. 1977) ("The circumstances surrounding the confrontation make the likelihood of misidentification extremely slight. [The defendant] was taken into custody near the scene of the robbery and police officers testified that he was in continuous custody until the time of the confrontation. The district court found that these facts provided a separate basis for identifying [the defendant] as the perpetrator We find no error in the admission of the identification testimony. "); United States *ex rel.* Gonzalez v. Zelker, 477 F.2d 797, 803-04 (2d Cir. 1973) ("Moreover, in determining whether or not the suggestive photographic identification procedure resulted in misidentification, we may properly consider the other factors which were before the jury and were properly admissible which tend to establish that there was not substantial likelihood of misidentification.") (citations omitted), *cert. denied*, 414 U.S. 924 (1973); Bennett v. State, 530 S.W.2d 511, 515 (Tenn. 1975) (upholding identification procedure under "totality of the circumstances," which included "the fact that seven days after the commission of the offense here involved, the defendant was apprehended, late at night, on the same night of the week, at the same motel, attempting to enter an adjoining room while armed with a pistol of the same calibre used to inflict the wound on the victim's companion").

[136] *Mullen*, 808 F.2d at 1145 (5th Cir. 1987).

[137] *Id.*

[138] *See* Idaho v. Wright, U.S. , 110 S. Ct. 3139, 3150 (1990) (in determining whether an out-of-court statement is sufficiently reliable for Confrontation Clause purposes to be admitted, a court should consider only the circumstances that surround the making of that statement and not other corroborative evidence).

[139] Justice Marshall focused on precisely this problem in his dissent in Manson v. Brathwaite, in which he argued that the Court's reliability analysis "suggests a reinterpretation of the concept of due process of law in criminal cases. *By relying on the probable*

It is important to understand the nature of this problem, which is practical rather than logical. A court *can* know that an identification is reliable from evidence other than evidence about the crime itself by focusing exclusively on the circumstances surrounding the identification, and not on any extraneous factors as the *Mullen* court did.[140] However, *in practice*, courts often look beyond the circumstances surrounding the identification itself; when they do, with their evaluation of his probable guilt or innocence, they are improperly compromising the defendant's constitutional right to due process.

One can hardly blame the lower courts for being confused. As noted above, the Supreme Court itself confused probable guilt and constitutional analysis when it set forth the third *Neil v Biggers* factor: "[T]he accuracy of the witness' prior description of the *criminal.* ."[141] It is telling that few courts have ever noted this obvious error by the Supreme Court.

4. *The Redundancy of the Right to Due Process and the Law of Evidence*

Both the right to due process and the rules of evidence provide for the exclusion of unreliable evidence.[142] This identity of purpose has led at least one court to treat a defendant's claim arising under the due process clause as presenting merely an evidentiary problem.[143] The failure to distinguish between constitutional analysis and evidentiary analysis may be of considerable importance to the criminal defendant, for the harmless error standard for constitutional errors is more stringent—that is, more favorable to the defendant—than the harmless error standard for nonconstitutional

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accuracy of a challenged identification, instead of the necessity for its use, the Court seems to be ascertaining whether the defendant was probably guilty." *Manson*, 432 U.S. at 128 (Marshall, J., dissenting) (emphasis added).

[140] Professor Seidman is therefore wrong when he criticizes Manson v. Brathwaite, arguing that "[a] court can know that the identification is reliable only from evidence about the crime." Seidman, *supra* note 121, at 328 n.42. A court may be able to determine that an identification is reliable from factors surrounding the identification process, not just the crime itself.

[141] *Biggers*, 409 U.S. at 199 (emphasis added); *see supra* notes 80-82 and accompanying text (discussing circularity problems).

[142] *See* FED. R. EVID. 403.

[143] *See* State v. Lutz, 398 A.2d 115, 121 (N.J. Super. Ct. App. Div. 1979) (applying Neil v. Biggers test and evidentiary analysis simultaneously).

errors.[144] By analyzing a due process error as a nonconstitutional evidentiary error, a court may protect its judgment from the comparatively harsh standard of harmless error review for constitutional errors.

Although *United States v Dowling*[145] did not deal with eyewitness testimony, it demonstrates this problem. In *Dowling*, the defendant alleged that the admission into evidence of testimony about a prior crime for which the defendant had been acquitted was so prejudicial that it violated his right to due process.[146] The circuit court held that the admission of the testimony was indeed error, but applied the lesser harmless error standard applicable to nonconstitutional errors, and upheld the conviction.[147] The Supreme Court affirmed. While it recognized the possibility of prejudice from the introduction of evidence of the prior crime, the Court found no constitutional error because "it is acceptable to deal with the potential for [undue prejudice] through nonconstitutional sources like the Federal Rules of Evidence," rather than through constitutional interpretation.[148] In other words, the defendant's constitutional claim was transmuted into a nonconstitutional evidentiary issue, and then disposed of through the relatively weak nonconstitutional harmless error rule.

The lesson is not that Dowling's claim, or the claim of a defendant confronted by unreliable evidence, should necessarily be cognizable under the due process clause rather than the Federal Rules of Evidence. Rather, the lesson is that, unless courts clearly distinguish whether they are engaged in constitutional analysis or evidentiary analysis, the overlap between constitutional and evidentiary standards will lead to confusion and, ultimately, to the weakening of the constitutional right.[149]

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[144] *See* United States v. Dowling, 855 F.2d 114, 122-23 (3d Cir. 1988), *aff'd on other grounds*, U.S. , 110 S. Ct. 668 (1990); McQueeney v. Wilmington Trust Co., 779 F.2d 916, 925 n.14 (3d Cir. 1985) (citing authorities); United States v. Valdez, 722 F.2d 1196, 1204 (5th Cir. 1984).

[145] 855 F.2d 114 (3d Cir. 1988), *aff'd*, U.S. , 110 S. Ct. 668 (1990).

[146] *Id.* The defendant also argued that the testimony about the prior crime violated the double jeopardy clause, but the Supreme Court rejected this argument. *See Dowling*, U.S. at , 110 S. Ct. at 671-74.

[147] *Dowling*, 855 F.2d at 122-24.

[148] *Dowling*, ____ U.S. ____, 110 S. Ct. at 674-75 ("Dowling contends that the use of this type of evidence creates a constitutionally unacceptable risk that the jury will convict the defendant on the basis of inferences drawn from the acquitted conduct; we believe that the trial court's authority to exclude potentially prejudicial evidence [*i.e.*, FED. R. EVID. 403] adequately addresses this possibility.").

[149] *Cf.* Jonakait, *Restoring the Confrontation Clause to the Sixth Amendment*, 35

C. *Due Process and Procedural Fairness*

Biggers and *Manson* established that the fairness of pretrial identification procedures was irrelevant to the right to due process, and that the only relevant question for constitutional analysis of pretrial identification procedures concerned the reliability of the evidence that resulted from those procedures.[150] The focus on reliability rather than fairness differed from the focus that the Court had given the due process clause in applying it to other aspects of criminal procedure. The difference is troubling because the Court had consistently assigned to the due process clause in other circumstances the role of serving as a guarantor of standards of fairness and decency. Such a role is called for as well in pretrial identification procedures.

Before *Stovall v Denno*, the Supreme Court had established that due process required criminal trials and pretrial procedures to adhere to societal standards of fairness and decency, even though adherence to these standards might sacrifice the accuracy of the trial in some cases. Thus, for example, the Court held that the due process clause proscribes criminal procedures that violate "fundamental conceptions of justice"[151] or "offend the community's sense of fair play and decency"[152] even if those procedures led to reliable evidence.[153] The Court also had established that "the community's sense of fair play and decency" is not identical to the rights enumerated in the Constitution, but exists independent of those rights. Accordingly, the Court had held that some practices are mandated or proscribed by due process even in the absence of another, more specific, constitutional provision.[154] And, of course, the Court has historically insisted that the due process clause of the fourteenth amendment does not merely incorporate each of the

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UCLA L. REV. 557, 576-80 (1988) (criticizing the accuracy-based focus of the Supreme Court's interpretation of the confrontation clause on the grounds that it "causes the constitutional provision's subordination to the evidence law").

[150] *See supra* notes 56-73 and accompanying text.

[151] United States v. Lovasco, 431 U.S. 783, 790 (1977) (quoting Mooney v. Holohan, 294 U.S. 103, 112 (1935) (*per curiam*)).

[152] Rochin v. California, 342 U.S. 165, 173 (1952), *overruled in* Forte v. State, 778 S.W.2d 70 (Tex. Ct. App. 1989); *see* United States v. Russell, 411 U.S. 423, 431-32 (1973) (recognizing "fundamental fairness" standard in evaluating law enforcement conduct).

[153] *See Rochin*, 342 U.S. at 165.

[154] *See, e.g., In re* Winship, 397 U.S. 358, 359 (1970) (including standard of proof beyond a reasonable doubt "among the 'essentials of due process and fair treatment'"); *see supra* notes 151-52 (citing cases).

provisions of the Bill of Rights but instead embodies another, independent standard that is not coterminous with the Bill of Rights.[155]

"The community's sense of fair play and decency" is, admittedly, difficult to define, and depends for its content more on intuition than logic. A strong argument exists, however, that unnecessarily suggestive pretrial identification procedures violate the community's sense of fair play and decency Unnecessarily suggestive pretrial identification procedures differ from most other improper law enforcement activities because they do not further any valid law enforcement interest. Although a violation of a suspect's fourth or fifth amendment rights—for example, a warrantless search or an interrogation without a lawyer present—is plainly wrong, it might at least further the valid law enforcement objective of collecting relevant evidence. By contrast, an unnecessarily suggestive identification procedure simply creates unreliable evidence where reliable evidence could have been gathered.[156] It is not a case where good ends justify bad means—the end result of an unnecessarily suggestive procedure is worthless precisely because of the means used.

Unnecessarily suggestive identification procedures thus *gratuitously* injure the defendant. Such gratuitous injury to the defendant is contrary to any conceivable notion of fairness in our criminal system. As one commentator has said, "Surely a system historically dedicated to protecting the innocent from wrongful conviction cannot tolerate such gratuitous risks."[157]

The sting of gratuitous harm to the defendant is especially sharp in the context of pretrial identification procedures, because such procedures place the state in a delicate role in relation to the defendant. In most situations the state simply *collects* preexisting evidence about a crime; through pretrial identifications the state *creates* a piece of evidence that would not otherwise exist. The creation of evidence, rather than its collection, should impose a special obligation on the state to behave correctly, because the creation of evidence presents heightened opportunity for wrongdoing and unfairness by the state and to the detriment of the

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[155] *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145, 148-49 (1968); Palko v. Connecticut, 302 U.S. 319, 326 (1937).

[156] *See* Seidman, *supra* note 121, at 327.

[157] Grano, *supra* note 121, at 782.

defendant.[158] In this context, the threat of gratuitous injury to the defendant is intolerable.

The unfairness of unnecessarily suggestive identification procedures (rather than the reliability of evidence derived from such procedures) lay at the heart of *Stovall*, in which the Court recognized that the show-up procedure at issue in the case was suggestive but held that because the suggestive procedure was unavoidable there was no due process violation.[159] The Court's holding makes sense only if the issue at stake is fairness, not accuracy Moreover, the only case cited by *Stovall* in its analysis of the due process issue was *Palmer v Peyton*,[160] which had relied upon the line of cases establishing that the due process clause did not simply promote accuracy, but also protected values of fairness and decency [161] Even *Neil v Biggers* acknowledged that unnecessarily suggestive procedures are more problematic than, and different from, necessarily suggestive ones. The Court stated, "Suggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the *further* reason that the increased chance of misidentification is *gratuitous*."[162]

The law pertaining to the destruction of evidence further demonstrates the relevance of principles of fairness in the context of identification procedures. Conducting an unnecessarily suggestive pretrial identification procedure is analogous to creating one piece of evidence, the identification that results from the procedure, and destroying another piece of evidence, the identification, or failure of identification, that would have resulted from a correctly conducted process. Indeed, an unnecessarily suggestive procedure threatens to compromise all of the subsequent identification testimony by the witness who experienced the procedure, because all such later testimony might be tainted. Given the powerful anchoring effects of the suggestive procedure on any subsequent identi-

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[158] There may be an analogy between pretrial identification procedures and entrapment. In each case, the state takes an active role in creating evidence, and in the case of entrapment, creating a crime. Notably, courts have repeatedly expressed concerns about defendants' rights to fundamental fairness in the entrapment context. *See* Hampton v. United States, 425 U.S. 484, 489 (1976) (plurality opinion); United States v. Luttrell, 889 F.2d 806, 811-14 (9th Cir. 1989).

[159] *See supra* notes 20-22 and accompanying text.

[160] 359 F.2d 199 (4th Cir. 1966) *cited in* Stovall v. Denno, 388 U.S. 293, 302 (1967).

[161] Palmer v. Peyton, 359 F.2d 199, 202 (4th Cir. 1966).

[162] *Biggers*, 409 U.S. at 198 (emphasis added). Of course, the Court did not require any different test for unnecessarily and necessarily suggestive procedures.

fication,[163] as a practical matter a non-suggestive procedure cannot be conducted after a suggestive one. Even though a court may find that the subsequent testimony has an "independent basis" in the criminal incident itself, given the complexity of the memory process and courts' general ignorance about that process, one can hardly be confident of the independence of the subsequent testimony.

The Supreme Court has established that the bad faith destruction of evidence by the state may violate a defendant's right to due process.[164] The meaning of "bad faith" in this context is unclear,[165] but its inclusion may indicate that, insofar as the state's handling of evidence is concerned, the Court is especially concerned with the integrity of the criminal process, not just with its accuracy An unnecessarily suggestive pretrial identification procedure, because it gratuitously injures a defendant, may be said to demonstrate bad faith on the part of the police. The destruction of evidence cases provide an analogy that the courts could use to find an unnecessarily suggestive pretrial identification procedure a violation of due process.

In *Manson v Brathwaite*, the Court gave three reasons for its exclusive focus on reliability rather than fairness. The first reason was that a suggestive identification procedure did not "itself intrude upon a constitutionally protected interest."[166] Although the Court did not identify "constitutionally protected interest[s]," it

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[163] *See id.*

[164] *See, e.g.*, Arizona v. Youngblood, 488 U.S. 51, 109 S. Ct. 333, 336-37 (1988); California v. Trombetta, 467 U.S. 479, 488 (1984). The other factors are whether the defendant had other means of exoneration, and whether the evidence likely would have been exculpatory. *Id. Youngblood*, 488 U.S. at 56 n.*, 109 S. Ct. at 336-37; *see also* J. GORELICK, S. MARZEN & L. SOLUM, DESTRUCTION OF EVIDENCE §§ 6.4 - 6.8 (1989) [hereinafter DESTRUCTION OF EVIDENCE] (discussing constitutional limits on evidence destruction).

[165] *Compare Youngblood*, 488 U.S. at 57-59, 109 S. Ct. at 336 (Presence or absence of bad faith "must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed.") *with id.* at 56 n.*, 109 S. Ct. at 342 (Blackmun, J., dissenting):

> What constitutes bad faith for these purposes? Does a defendant have to show actual malice, or would recklessness, or the deliberate failure to establish standards for maintaining and preserving evidence, be sufficient? Does 'good faith police work' require a certain minimum of diligence, or will a lazy officer, who does not walk the few extra steps to the evidence refrigerator [to preserve the evidence], be considered to be acting in good faith?

See also J. GORELICK, S. MARZEN & L. SOLUM, DESTRUCTION OF EVIDENCE (Wiley 1988 & Supp.) at Supplement § 6.8 at 20-21 (discussing *Youngblood*'s bad faith standard).

[166] *Manson*, 432 U.S. at 113 n.13; *see also* United States *ex. rel* Kirby v. Sturges, 510 F.2d 397, 406 (7th Cir. 1975) (holding "show up" not inherently a violation of the Constitution), *cert. denied*, 421 U.S. 1016 (1975).

contrasted identification procedures with warrantless searches, and intimated that such searches might invade a defendant's "constitutionally protected interest" in privacy [167] By making this comparison, the Court implied that "constitutionally protected interest[s]" meant those interests protected by specific provisions of the Bill of Rights, and thus appeared to be saying that fairness was a constitutional value only insofar as some specific provision of the Bill of Rights was implicated. This reasoning implies that the only rights that a defendant has are the rights specifically enumerated in the Bill of Rights, and allows no additional or independent significance to the due process clause. This is plainly not the law.[168]

The second reason given by the Court for its focus on reliability was its belief that the right to due process in connection with pretrial identification procedures was of less importance than other constitutional rights, like the right to counsel, that "go to the very heart—the 'integrity'—of the adversary process."[169] The Court stated that the right to due process in connection with pretrial identification procedures merely "protects an *evidentiary* interest."[170] But the Court's bifurcation of constitutional rights between those that go to the heart of the adversarial process and those that do not is misguided. It is hard to imagine any reason for believing that the right to be free of unnecessarily suggestive procedures is not "integral" to our criminal justice system. Protecting innocent defendants from wrongful conviction is the centerpiece of that system, and that value is unjustifiably threatened by unnecessarily suggestive identification procedures.

Finally, *Manson* cited with approval[171] the case of *United States ex rel. Kirby v Sturges*,[172] which stated that the right to due process in connection with pretrial identification procedures was of lesser value than certain other of the criminal defendants' constitutional rights because "if a constitutional violation results from a showup, it occurs in the courtroom, not in the police station."[173] This language has been repeated by several inferior federal courts,[174]

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[167] *Manson*, 432 U.S. at 113 n.13.

[168] *See supra* notes 154-55 and accompanying text.

[169] *Manson*, 432 U.S. at 113-14 n.14; *see supra* notes 68-70 and accompanying text.

[170] *Manson*, 432 U.S. at 113 (emphasis in original).

[171] *Id.* at 113 n.13.

[172] 510 F.2d 397 (7th Cir. 1975), *cert. denied*, 421 U.S. 1016 (1975).

[173] United States *ex rel.* Kirby v. Sturges, 510 F.2d 397, 406 (7th Cir. 1975), *cert. denied*, 421 U.S. 1016 (1975).

[174] *See, e.g.*, United States v. Bouthot, 878 F.2d 1506, 1515 (1st Cir. 1989).

and it appears that the *Manson* Court also focused on this language. Upon inspection, however, the "reasoning" of *Kirby v Sturges* falters.

All that *Kirby v Sturges* appears to say is that an unnecessarily suggestive identification procedure violates a defendant's right to due process only if and when the identification derived from that procedure is admitted into evidence; if the state never sought to have the identification admitted into evidence, then a defendant could not claim that his right to due process had been violated. This is true, of course, but it does not make the right to due process less important than or different from other constitutional rights of a criminal defendant, and it does not justify the Court's exclusive focus on reliability as the sole value underlying the right to due process. The fifth amendment right against self-incrimination, for example, protects a defendant from having certain statements used as substantive evidence against him; if the state does not seek to use those statements against the defendant then the defendant cannot assert that his fifth amendment rights have been violated.[175] However, it is absolutely beyond dispute that there are values other than reliability underlying the right against self-incrimination. Similarly, a defendant's sixth amendment right not to be interrogated in certain circumstances without counsel protects against having statements made during such interrogations entered into evidence against the defendant, but if the state does not seek to have those statements entered into evidence, then the defendant's sixth amendment rights have not been violated.[176] Once again, the Supreme Court has never suggested that reliability is the only value underlying the sixth amendment.[177]

D. The Right to Due Process and the Right to Confrontation

The development of the right to due process was not unique. At approximately the same time that the right to due process was

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[175] Indeed, statements that could not be admitted into evidence on account of the defendant's fifth amendment right against self-incrimination can be used to impeach the defendant. *See* Harris v. New York, 401 U.S. 222, 225-26 (1971).

[176] As with the defendant's fifth amendment rights against self incrimination, statements that could not be introduced into evidence against the defendant without violating her sixth amendment right to counsel may be used to impeach her. *See* Michigan v. Harvey, ___ U.S. ___, 110 S. Ct. 1176, 1178 (1990).

[177] On the distinction between unconstitutionally obtained evidence and unconstitutionally used evidence, see generally Loewy, *Police-Obtained Evidence and the Constitution: Distinguishing Unconstitutionally Obtained Evidence from Unconstitutionally Used Evidence*, 87 MICH. L. REV. 907 (1989).

being transformed from *Stovall* to *Brathwaite*, the sixth amendment right to confrontation[178] was undergoing similar changes. It is instructive to compare the metamorphoses of these two rights.

Until the late 1960's, the Supreme Court had little opportunity to interpret the confrontation clause,[179] and in the first few cases that the Court decided in the 1960s and early 1970's, the Court did not clearly articulate a theory of the confrontation clause.[180] Eventually, the Court developed a theory of the right to confrontation, and it looked very much like the Court's theory of the right to due process:

> Just as the Court determined that the "linchpin" of the right to due process was reliability,[181] it also determined that the "mission" of the confrontation clause was to promote reliability in criminal trials;[182]
>
> just as the Court countenanced the weakening of the right to due process on the ground that factors at trial—including the defendant's opportunity for cross-examination, and the supposed ability of the jury to discern trustworthy from untrustworthy testimony[183]—would adequately protect the defendant, it also permitted the erosion of the right to confrontation on the ground that it was unnecessary given other factors, most importantly, "indicia of reliability"[184] surrounding the evidence in question and the opportunity to cross-examine the witness;[185] and,
>
> just as the Court disregarded the distinction between the right to due process and Federal Rule of Evidence 403,[186] so did it gradually diminish the distinction between the right to confrontation and the rules of hearsay, eventually holding that the right to confrontation was satisfied so long as the evidence in question "falls within a firmly rooted hearsay exception."[187]

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[178] U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him.").

[179] Until Pointer v. Texas, 380 U.S. 400 (1965), the leading Supreme Court case on the confrontation clause was Mattox v. United States, 156 U.S. 237 (1895).

[180] *See* Dutton v. Evans, 400 U.S. 74 (1970); California v. Green, 399 U.S. 149 (1970); *Pointer*, 380 U.S. 400.

[181] *Manson*, 432 U.S. at 114.

[182] Tennessee v. Street, 471 U.S. 409, 415 (1985) quoting *Dutton*, 400 U.S. 74; *see also, e.g.*, Bourjaily v. United States, 483 U.S. 171, 181-84 (1987); Kentucky v. Stincer, 482 U.S. 730, 737 (1987); Ohio v. Roberts, 448 U.S. 56, 65 (1980).

[183] *See supra* notes 72-73 and accompanying text.

[184] *Roberts*, 448 U.S. at 65-66.

[185] *See* Delaware v. Fensterer, 474 U.S. 15, 18-22 (1985) (*per curiam*).

[186] *See supra* notes 148-49 and accompanying text.

[187] *Bourjaily*, 483 U.S. at 183 (quoting *Roberts*, 448 U.S. at 66).

In short, several of the salient features that have been identified in analyzing the right to due process were also present in the development of the right to confrontation.

The similarity between the developments of these two rights may alert us to similar evolution in other constitutional rights in the future. More important for present purposes is *Coy v Iowa*,[188] virtually the only modern case in which the Supreme Court has upheld a defendant's assertion that his right to due process had been violated. The Court departed from its prior decisions' exclusive focus on reliability, and based the right to confrontation on "something deep in human nature that regards face-to-face confrontation between the accused and the accuser as 'essential to a fair trial in a criminal prosecution.'"[189] This suggests that any revival of the right to due process likewise would be grounded upon a value other than reliability

III. A PROPOSED REFORMULATION OF THE RIGHT TO DUE PROCESS IN CONNECTION WITH PRETRIAL IDENTIFICATION PROCEDURES

The foregoing analysis of the current formulation of the right to due process in connection with pretrial identification procedures demonstrates that the right needs to be rethought. This Part sets forth an outline of a new formulation of the right to due process. The proposed formulation has two parts. The first part focuses on the propriety of police procedures, rather than on the reliability of the evidence derived from them. It provides that testimony derived from unnecessarily suggestive pretrial procedures is inadmissible *per se*, without regard to reliability, because such procedures violate the defendant's right to procedural fairness. The second part of the proposed right derives from the defendant's right to restrict the evidence used against him to evidence that is capable of being rationally evaluated by the jury; the second part provides that testimony that is not excluded by the first part of the proposed right may be admitted so long as it meets some minimum standards of probativeness. Additionally, the second part provides that the

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[188] 487 U.S. 1012 (1988).

[189] *Id.* at 1017 (quoting *Pointer*, 380 U.S. at 404). Elsewhere in its opinion, the Court relied upon sources as diverse as the Bible, Shakespeare, and President Eisenhower in support of its analysis of the right to confrontation. *Id.* at 1015-16. The very diversity of sources demonstrates that the Court believed there was some value underlying the right to confrontation other than the reliability of the criminal trial.

defendant has the right to expert testimony about this evidence. These parts are discussed in Sections III.B. and III.C., respectively Part III.A. deals with a preliminary matter—a definition of suggestiveness in pretrial identification procedures.

A. A Proposed Definition of Suggestiveness in Pretrial Identification Procedures

All courts agree that pretrial identification procedures should not be suggestive, but they have not always agreed on what makes a pretrial identification procedure suggestive. As demonstrated above,[190] courts have differed on whether certain features of pretrial procedures—for example, features relating to clothing, hair, tattoos and race—make such procedures suggestive. At the root of the courts' confusion is their assumption that procedures are suggestive if one person is "distinctive," or stands out from others.[191] Such an account of suggestiveness is plainly inadequate because it leads to a slippery-slope definitional problem: people are recognizable *because* they are distinctive. Unless a procedure contains only identical twins (triplets, quadruplets, etc.), it cannot avoid being "distinctive" to one degree or another. Similarly, to incant that members of a lineup must be "similar in appearance"[192] is unhelpful; the question inevitably posed is "how similar must they be?"

To avoid this flaw, the following definition of suggestiveness in pretrial identification procedures should be considered: a pretrial identification is suggestive if and only if the witness is in some way apprised of which person in the pretrial identification procedure the police believe to be the perpetrator. If the witness is "tipped off" in this way, then the witness's selection of a person from the

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[190] *See supra* notes 102-15 and accompanying text.

[191] *See, e.g.*, United States v. Alexander, 868 F.2d 492, 495 (1st Cir. 1989), *cert. denied*, 110 S. Ct. 507 (1989) (photo lineup not suggestive even though defendant was the only person with an earring); Judd v. Voss, 813 F.2d 494, 498 (1st Cir. 1987) (photo array roughly representative of defendant's age and appearance); O'Brien v. Wainwright, 738 F.2d 1139, 1141 (11th Cir. 1984), *cert. denied*, 469 U.S. 1111 (1985) (photo array was suggestive where defendant's picture "stuck out like a 'sore thumb'"); Blanco v. Dugger, 691 F Supp. 308, 312 (S.D. Fla. 1988) (lineup was not impermissibly suggestive because defendant was not "substantially distinguishable from the others"); People v. Anthony, 109 Misc.2d 433, 435, 440 N.Y.S.2d 149, 151 (1980) (appearance of defendant and lineup stand-ins must be "reasonably similar"); *cf.* United States v. Barron, 575 F.2d 752, 755 (9th Cir. 1978) ("[I]t would be unduly burdensome to require police officials to find five or six very similar individuals for a lineup.").

[192] *See, e.g.*, United States v. Love, 746 F.2d 477, 479 (9th Cir. 1984) ("Further, all of the photographs were reasonably similar in appearance to Love.").

pretrial identification procedure would be the result not simply of the process of recognition, but of the witness's inference about the police's behavior. In other words, the witness may think not only that, "I believe that X is the assailant because I recognize him," which is a perfectly acceptable chain of thinking, but might also think, "I believe that X is the assailant because I recognize him *and the police think that he is the assailant*," which is plainly an improper method of identification for the witness to employ

There is precedential support for the proposed definition. In *Foster v California*, the Supreme Court held that the identification procedure employed was suggestive: "The suggestive elements in this identification procedure made it all but inevitable that [the witness] would identify petitioner whether or not he was in fact 'the man.' *In effect, the police repeatedly said to the witness 'This is the man.'*"[193] Some lower courts also have noted that a lineup may be suggestive if only one person in it fits the witness's description of the assailant.[194] The courts have not articulated the underlying reasoning for their positions, but it is clear enough: if only one person in the lineup fits the witness's description of the assailant, then the witness viewing the lineup may infer that the police believe the person to be the assailant. Moreover, some courts have held that where an identification by a witness occurred in circumstances that the police did not create—for example, if the witness saw the suspect on the courtroom steps, or going into the police station—there is no issue of suggestiveness.[195] This accords

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[193] Foster v. California, 394 U.S. 440, 443 (1969) (citation omitted) (some emphasis added); *see also* Biggers v. Tennessee, 390 U.S. 404, 407 (1968) (Douglas, J., dissenting) ("Whatever may be said of lineups, showing a suspect singly to a victim is pregnant with prejudice. The message is clear: the police suspect *this* man.") (emphasis in original).

[194] *See, e.g.*, Baca v. Sullivan, 821 F.2d 1480, 1482 (10th Cir. 1987) (only defendant wore leather jacket); United States v. Sanders, 479 F.2d 1193, 1197 (D.C. Cir. 1973) (only defendant had goatee); People v. Owens, 74 N.Y.2d 677, 678, 543 N.Y.S.2d 371, 372 (N.Y. 1989) (Defendant "was the only person wearing the distinctive clothing—a tan vest and a blue snorkel jacket—which fit the description of the clothing allegedly worn by the perpetrator of the crime. In these circumstances, the lineup was unduly suggestive. "); People v. Moore, 143 A.D.2d 1056, 533 N.Y.S.2d 602, 603 (N.Y. App. Div. 1988) (lineup suggestive where police did not cover defendants' hair even though defendant was the only person in the lineup with braided hair and braided hair had "figured prominently in [the witness'] description of the robber.").

[195] *See, e.g.*, Kimble v. State, 539 P.2d 73, 77 (Alaska 1975) (holding that there is no due process violation when an accidental pretrial confrontation is not prearranged by the State); Hill v. United States, 367 A.2d 110, 115 (D.C. 1976) (holding that suppression of identification testimony on grounds of suggestiveness is proper only as a tool to curtail improper police procedure); State v. Greathouse, 694 S.W.2d 903, 907 (Mo. Ct. App. 1985)

with the proposed definition of suggestiveness: if there was no police involvement in the identification, then the police could not have prejudiced the situation or tipped the witness.

The proposed definition makes intuitive sense. Consider a lineup in which only one of the participants, the suspect, has green eyes. The suspect is "distinctive" because he stands out from the others by virtue of his eye color The lineup may not be suggestive, however; in the simplest case, if the witness had not seen the assailant's eyes, then the suspect's eye color would not be important. By contrast, if the witness had seen the assailant's eyes, and if the assailant had green eyes, then the lineup might be suggestive depending upon whether the witness viewing the lineup had told the police that the assailant had green eyes. If she had not told the police, then the lineup would not be suggestive; the witness might see the assailant's green eyes, and might even select the suspect because of his eye color, but that is simply part of the process of recognition: a person is recognized because of his features. If, however, the witness did tell the police that the assailant had green eyes, then the lineup would be suggestive: not only would that witness recognize the lineup participant because of his green eyes, but the witness also might *infer*—perhaps erroneously—that the suspect was the assailant. The witness might think, "I told the police that the assailant had green eyes, and since only one person here has green eyes, *the police must believe this person is the assailant*, and that reinforces my belief that this person is the assailant." It is this chain of inference, in which the witness tries to divine who the police suspect, that renders the pretrial procedure suggestive.

The focus on avoiding police influence also accords with scientific evidence. There is a well-documented tendency, called the "Rosenthal effect," for witnesses to identify people in pretrial lineups simply because they believe that the assailant must be in the lineup or else the police would not conduct it.[196] Tipping would exacerbate the Rosenthal effect, because witnesses who are already inclined to identify someone in the lineup would be especially

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(stating that no due process issue was raised by accidental confrontation because it was not compelled by the police); People v. Graham, 67 A.D.2d 172, 415 N.Y.S.2d 714, 717 (N.Y. App. Div. 1979) (same). This argument was rejected in United States v. Bouthot, 878 F.2d 1506, 1515-16 n.10 (1st Cir. 1989).

[196] Jonakait, *Reliable Identification: Could the Supreme Court Tell in Manson v. Brathwaite*, 52 U. COLO. L. REV 511, 525 (1981); A. YARMEY, *supra* note 3, at 154-56.

susceptible to a tip from the police about which one of the lineup participants the police suspect is the assailant.[197]

The proposed definition of suggestiveness is a better guide in the difficult situations commonly found in the pretrial identification context than is the "suggestiveness-as-distinctiveness" standard. Rather than forcing the police, attorneys, and courts to ask themselves in each situation, "was the defendant unduly 'distinctive' in the pretrial identification procedure?"—a question that is impossible to answer coherently—the proposed standard asks the more concrete question, "did the witness have reason to believe when she viewed the pretrial identification procedure, that the police suspected the defendant?" Putting the question this way yields clear answers in many situations. For example, it would condemn the practice of showing a witness multiple sets of photos or lineups in which only one person, the defendant, is shown in each set. Although the Supreme Court ruled this practice unconstitutional in *Foster v California*, it continues to be used, and courts regularly hold that it is not suggestive.[198] The proposed standard shows that the practice of showing one person repeatedly to a witness is suggestive, because the witness will almost inevitably think, "the police are telling me that 'this is the person,'" and such thinking is the very essence of suggestiveness.

The proposed definition also suggests an answer to the question of whether the police have an affirmative duty to avoid suggestive influences in the pretrial identification procedures or simply not to create such influences. The analysis suggests that the police have an obligation to avoid such influences. Consider the facts of *Coleman*, in which the defendant wore a hat similar to a hat that the witness had described the assailant as having worn. Under the proposed analysis, this clearly would be suggestive: the witness may have thought to himself, "because I described that hat to the police and only one person in the lineup has such a hat, that person must

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[197] One method for mitigating the Rosenthal effect is through the use of a "blank lineup" in which a witness to a crime is shown two lineups, one of which has the suspect in it and the other of which does not. *See, e.g.*, United States v. Tyler, 878 F.2d 753, 755 (3d Cir. 1989), *cert. denied*, 110 S. Ct. 254 (1989). No one has ever suggested, however, that blank lineups may be constitutionally required.

[198] *Compare Foster*, 394 U.S. at 443 (showing suspect in two lineups is unconstitutional) *with* United States v. Johnson, 859 F.2d 1289, 1295-96 (7th Cir. 1988) (showing defendant's picture in two successive photo arrays was not suggestive) *and* United States v. Dowling, 855 F.2d 114, 117 (3d Cir. 1988) (upholding procedure in which defendant's picture was shown in three successive photo arrays), *aff'd on other grounds*, 110 S. Ct. 668 (1990).

be the one that the police suspect." The fact that the police had not forced the defendant to wear the hat—which was the salient fact for the *Coleman* Court—is irrelevant to the witness's chain of inference.

Since the proposed definition provides a relatively concrete standard, it also would protect the police from after-the-fact criticism by defense attorneys who assert that the police should have noticed some distinguishing feature of the procedure, or that the pictures were not sufficiently similar.[199] Rather than simply arguing that the defendant was "too distinctive" or that he "stood out from" the other pictures or lineup participants, the defendant's attorney would have to argue that the witness had reason to believe, when he viewed the pretrial identification procedure, that the police believed that the defendant was the criminal. This is a relatively narrower point, which should spare the police from some unfair second guessing by defense counsel.

The proposed standard also provides guidance for police conducting lineups. It supports a proposal, first made by Professor Elizabeth Loftus, that a lineup may be said to be non-suggestive if a reasonable person who did not witness the crime, but who heard the same description of the assailant that the police heard from the witness of the lineup, would pick each person in the lineup with the same frequency.[200] Professor Loftus's guide accords perfectly with the proposed analysis of suggestiveness, for by focusing solely on what the witness told the police, it avoids extraneous and irrelevant factors about the lineup and concentrates on the danger that the witness will infer what the police suspect instead of simply recognizing a lineup participant. Professor Loftus's guide would avoid the danger that the police use a pretrial identification procedure simply to allow the witness to confirm what the witness already knew, or that they signal to the witness that they believe they have the assailant who fit the witness's description. It also would protect the police from after-the-fact criticism by defense attorneys who may assert that the police should have noticed some

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[199] *See, e.g.*, Cikora v. Dugger, 840 F.2d 893, 896 (11th Cir. 1988) (rejecting defendant's claim that photo array was suggestive because only the defendant's photo had height markings in the background); United States v. Russo, 796 F.2d 1443, 1452 (11th Cir. 1986) (rejecting defendant's claim that photo array was suggestive because defendant's photo had a yellow tint); United States v. Love, 746 F.2d at 479 (rejecting defendant's claim that photo array was suggestive because some pictures were larger than others).

[200] *See* E. LOFTUS, *supra* note 3, at 145; *see also* Jonakait, *supra* note 196, at 526 (adopting Professor Loftus's view).

distinguishing feature of the defendant even if the witness had not mentioned it to them.

B. Unnecessarily Suggestive Procedures, the Right to Procedural Fairness, and a Per Se Exclusionary Rule

Eyewitness identification evidence derived from pretrial procedures may be divided into three types: evidence derived from unnecessarily suggestive procedures, evidence derived from necessarily suggestive procedures, and evidence derived from properly conducted procedures. Different due process considerations apply to the first type of eyewitness evidence than apply to the second and third type of eyewitness evidence. In particular, considerations of procedural fairness apply to evidence that is the product of unnecessarily suggestive procedures.

The first part of the proposed right to due process is a *per se* exclusion of evidence that is the product of unnecessarily suggestive pretrial identification procedures. This part distinguishes between necessarily and unnecessarily suggestive identification procedures and thus respects the non-evidentiary values underlying the due process clause and protects the defendant's right to fundamental fairness.

The focus of the *per se* rule on the necessity of the harmful procedure makes the rule analogous to due process rules that have evolved in other areas. The question of necessity is an inquiry about the state of mind of the police; in effect, the question is whether the police could have conducted a non-suggestive procedure and whether they acted negligently, recklessly, or intentionally in conducting an unfair procedure. This inquiry is a familiar one to courts, because the state of mind of state actors is often relevant to the analysis of due process claims in other contexts. For example, courts regularly seek to determine whether alleged deprivations of property by the state are intentional or accidental, and the due process clause is implicated only if they are intentional.[201]

This approach, in conjunction with the proposed definition of suggestiveness, would bar some evidence that might be admissible

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[201] *See, e.g.*, Daniel v. Williams, 474 U.S. 327, 328 (1977) ("deprivation" of life, liberty or property prohibited by the due process clause means intentional deprivation, not negligent deprivation); Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 265 (1977) (equal protection clause protects against intentional discrimination, not mere disproportionate impact); Washington v. Davis, 426 U.S. 229, 246 (1976) (same); *supra* notes 164-65 and accompanying text (discussing bad faith in context of governmental evidence destruction).

under current law For example, because show-ups are unquestionably suggestive under the proposed definition of suggestiveness, evidence derived from them would be barred unless the police could demonstrate that it was necessary to conduct a show-up rather than a lineup.[202] Similarly, evidence derived from suggestive lineups also would be barred because, if the police have the time to conduct a lineup, they probably also have the time to conduct it non-suggestively This approach would have no effect on properly conducted, non-suggestive procedures or on procedures that are unavoidably suggestive.

The exclusion of evidence derived from unnecessarily suggestive procedures is an appropriate method of protecting the defendant and punishing the government for its procedurally unfair actions. As noted above, exclusion was the remedy contemplated by *Stovall*, and it is consistent with *Stovall*'s companion cases, *United States v Wade* and *Gilbert v California*, which applied a *per se* rule of exclusion to pretrial identifications obtained from procedures when the defendant's right to counsel was violated.[203]

One objection to the *per se* rule is that it would keep out potentially reliable evidence.[204] But in this, the proposed rule is no different from any other constitutional rule protecting the criminal defendant. Simply put, unfair procedures, like any other kind of unconstitutional action by the government, require the exclusion of evidence obtained thereby, regardless of the reliability of the evidence. The rule is hardly draconian: the admission into evidence of an in-court identification after an unnecessarily suggestive pretrial procedure would not violate due process so long as the state could demonstrate that the in-court identification had an independent basis. The *per se* rule thus prevents the state from deriving any evidence from its own wrongful acts, but does not prevent the state from putting on a case. Finally, if a *per se* rule were enforced, the police would soon stop using unnecessarily suggestive procedures.[205]

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[202] Of course, if the standard of necessity were lax, as it was in *Simmons*, *see supra* note 23, then the prohibition on unnecessarily suggestive procedures would be weak. A stricter standard of necessity, such as that suggested in *Stovall*, *see supra* note 12, would be more appropriate.

[203] *See supra* notes 12-29 and accompanying text. It is also the rule currently applied by the New York State Court of Appeals in the interpretation of the New York Constitution's own due process clause. *See* People v. Adams, 423 N.E.2d 379, 384, 440 N.Y.S.2d 902, 907 (N.Y. 1981).

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

[205] *Id.* at 126-27 (Marshall, J., dissenting).

A second objection is that the *per se* test is unnecessary because the *Manson* reliability test sufficiently deters police from undertaking unnecessarily suggestive procedures.[206] The facts belie this objection: cases in which the police use suggestive procedures abound in the lower courts and the state courts.[207] And, as noted above, lower courts usually do not weigh the suggestiveness of the procedure against the five *Biggers* and *Manson* reliability factors, but simply consider those five factors alone if they find that the pretrial procedure was suggestive.[208] Consequently, there is even less of a deterrent against the use of suggestive procedures than there would be if the courts followed *Manson* properly, because so long as the five factors are satisfied, the police have nothing to lose by conducting a suggestive pretrial procedure.

A further argument against the proposed *per se* rule may be that it has little chance of being adopted by the Supreme Court because the trend in recent years has been away from *per se* exclusionary rules, and towards more flexible standards applicable to police conduct.[209] But, as discussed above, the right to due process is different than other constitutional rights because innocent defendants are the beneficiaries of the right; thus the due process right may be treated differently from other rights without fear of contradiction. Moreover, numerous state constitutions have due process clauses that have been invoked in challenges to pretrial identification procedures in state prosecutions.[210] The interpretation of these states' constitutional provisions is not controlled by decisions of the United States Supreme Court, and the state supreme courts may interpret the due process clauses in state constitutions more broadly than the United States Supreme Court has interpreted the due process clause of the federal constitution.[211]

C. Reliability, Evaluability and Due Process

The two remaining types of eyewitness identification evidence—evidence derived from necessarily suggestive procedures and evidence derived from properly conducted (*i.e.*, non-suggestive) pre-

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[206] *Id.* at 112.

[207] *See supra* notes 102-49 and accompanying text.

[208] *See supra* notes 76-149 and accompanying text.

[209] *See, e.g.*, United States v. Leon, 468 U.S. 897 (1984).

[210] *See, e.g., Adams*, 53 N.Y.2d at 251-52, 440 N.Y.S.2d at 907.

[211] *See, e.g., id., see also* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV L. REV. 489 (1977).

trial procedures—do not raise any issue concerning the defendant's right to procedural fairness. The problem of reliability remains, however: the identification evidence may not be accurate and may be overvalued by juries. This is a problem of constitutional dimension, for it is recognized that the defendant has a due process right to have used against him only evidence that can be rationally evaluated by the jury,[212] and the introduction into evidence of either of these types of testimony may infringe upon that right.

There are four measures most often suggested by commentators by which courts might avoid the danger that eyewitness identification testimony will violate the defendant's right to have only rationally evaluable evidence used against him:[213] (1) excluding unreliable identification evidence, (2) requiring corroboration of any eyewitness identification testimony, (3) providing the jury with cautionary jury instructions about the vagaries of eyewitness identification testimony, and (4) admitting the testimony of expert witnesses about the vagaries of eyewitness identification testimony These methods shall be considered in turn.

1. *Excluding Unreliable Identification Evidence*

The first method is essentially the one mandated by the Supreme Court in *Manson v Brathwaite*.[214] It would require courts to preview eyewitness testimony that is derived from pretrial identification procedures and assure that it passes a threshold of reliability before it may be presented to the jury We have already seen that the five-factor test is an inadequate method of previewing the testimony; a better method, or "screen," could presumably be developed by a better informed court, based upon more sound scientific principles. It is beyond the scope of this Article to provide the details of the method. Plainly, the five-factor test would have to be revised to, for example, eliminate the reference to the witness's confidence in her identification; the improved method also would have to take into account additional relevant factors, such

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[212] *See* Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 HARV L. REV 567, 598 (1978) (citing authority).

[213] *See, e.g.*, E. LOFTUS, *supra* note 3, at 187; Note, *Eyewitness Identification Testimony and the Need for Cautionary Jury Instructions in Criminal Cases*, 60 WASH. U.L.Q. 1387, 1400 (1983); Note, *Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification*, 29 STAN. L. REV. 969, 1000-28 (1977); Weinstein, Book Review, 81 COLUM. L. REV. 441, 454-55 (1981) (Judge Weinstein suggests nine additional steps that might increase the reliability of eyewitness identification evidence).

[214] 432 U.S. at 112.

as whether the eyewitness and the defendants are of the same race.[215]

An improved method of evaluating the reliability of testimony would enable the court to exclude testimony that had a low probative value—in effect, it would exclude those identifications that the court believed were so likely to be wrong that they would be misleading or a waste of the jury's time to consider—and would leave for the jury's consideration only such testimony as had more than some minimal probative value. Such a process would be a substantial benefit to the promotion of justice. It serves no one's interests to have misleading testimony before the jury, and the process would help to avoid this from happening.

This approach would not, however, be a sufficient response to the problem of unreliable eyewitness evidence, no matter how sophisticated the courts' screen. In the first place, as seen above, courts are generally reluctant to keep evidence from juries for fear of usurping their historical and constitutional role as weighers of the evidence;[216] thus, the exclusion approach—even with a screen of finely-woven mesh—would likely permit into evidence much testimony that is only marginally probative. Moreover, because the screen would serve the same exclusionary function as the law of evidence, there is the continued danger of confusion between the constitutional and evidentiary tests.[217]

A further problem with the exclusionary approach can be appreciated by distinguishing between two elements of reliability, probativity and evaluability Probativity is the tendency of a piece of evidence to prove the matter for which it is offered into evidence; evaluability is the degree to which a jury can assess the probativity of a piece of evidence. Probativity and evaluability are not necessarily correlated; highly evaluable evidence may not be highly probative, and vice versa.[218] Because juries consistently overstate the probative value of eyewitness identification testimony,[219]

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[215] *See generally supra* notes 96-101 and accompanying text.

[216] *See supra* notes 122-33 and accompanying text.

[217] *See supra* notes 142-49 and accompanying text.

[218] For example, technically abstruse material may be highly probative but virtually incomprehensible to the jury and thus not highly evaluable. On the other hand, the alibi testimony of the defendant's friend or lover may have little probative value on account of the witness's special relationship with the defendant, but it could be highly evaluable because the jury could easily weigh for itself the various factors that would lead it to believe or disbelieve that testimony.

[219] *See* Brigham & Bothwell, *The Ability of Prospective Jurors to Estimate the Accuracy*

such testimony tends to have low evaluability The exclusionary approach does not address this problem because it does not help the jury evaluate the eyewitness testimony correctly Thus marginally probative evidence that passed through the court's screen would be presented to a jury that would systematically mistake it for valuable and highly probative evidence.

2. *Requiring Corroboration*

Some commentators have suggested that eyewitness identification testimony should not be admitted unless it can be corroborated by non-eyewitness evidence supporting the identification.[220] No court has accepted this proposal, and it is unsound. As Judge Weinstein has pointed out, a mandatory corroboration rule "raises the difficult issue of determining how much corroborating evidence is enough."[221] A corroboration requirement also would foster the confusion already experienced by some courts between the constitutional standard of reliability and the courts' own evaluation of the probable guilt of the defendant.[222] Moreover, it may be too harsh, for an eyewitness identification may be probative, and the mandatory corroboration rule would exclude it on account of the fortuity that there is no non-eyewitness corroborating evidence.[223] Finally, like the screen approach, the mandatory corroboration rule deals only with the probativeness of eyewitness evidence but does not deal with the evaluability problem.

3. *Using Cautionary Jury Instructions*

Some commentators propose a right to due process according to which, whenever eyewitness identification testimony derived from pretrial identification procedures is admitted into evidence, the defendant would be entitled to an instruction by the court to the jury cautioning it about the vagaries and unreliability of eyewitness

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of Eyewitness Identifications, 7 L. & HUM. BEHAV 19 (1983); Wells, *How Adequate is Human Intuition for Judging Eyewitness Testimony?*, in G. WELLS & E. LOFTUS, *supra* note 3, at 258.

[220] *See, e.g.*, E. LOFTUS, *supra* note 3, at 188-89; Comment, *Possible Procedural Safeguards Against Mistaken Identification by Eyewitnesses*, 2 UCLA L. REV 552, 557 n.23 (1955).

[221] Weinstein, *supra* note 213, at 454.

[222] *See supra* notes 74-95 and accompanying text.

[223] *Id.*, *see also* Note, *Did Your Eyes Deceive You?*, *supra* note 213, at 1002.

testimony [224] Such a cautionary instruction, it has been argued, would permit the jury to evaluate the eyewitness evidence more intelligently than it otherwise would, and would avoid the problem of jury "overestimation" of the evidence that implicates the defendant's right to reliability Several courts have permitted the use of such instructions at the discretion of the trial court,[225] and a few courts have held that such instructions are required as a matter of due process.[226] Unlike the screen approach and the mandatory corroboration rule, mandatory jury instructions focus exclusively on the problem of evaluability rather than probativity

Although the use of jury instructions would be a sound advance, it is questionable whether such instructions sufficiently protect the defendant against the dangers of eyewitness identification evidence. In the first place, because judges are not experts in psychology, their instructions cannot always explain all of the various and subtle influences bearing on the reliability of eyewitness identification evidence. For example, the instruction approved in the seminal case of cautionary jury instructions on eyewitness evidence, *United States v Telfaire*, is little more than an admonition to jurors to consider eyewitness evidence cautiously, and a reminder of the applicability of the reasonable doubt standard.[227] As we have seen, there is much more detail and many more nuances that must go into the proper evaluation of eyewitness identification evidence. Even if the court's instruction is detailed, it might be wrong: like jurors, judges who are not sophisticated about the

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[224] *See, e.g.*, Note, *Eyewitness Identification Testimony and the Need for Cautionary Jury Instructions in Criminal Cases, supra* note 213, at 1434; *see also* Saltzburg, *A Special Aspect of Relevance: Countering Negative Inferences Associated with the Absence of Evidence*, 66 CALIF. L. REV. 1011, 1059-60 (1978) (concluding that instructions are better than testimony about unreliability).

[225] *See, e.g.*, United States v. Luis, 835 F.2d 37, 41 (2d Cir. 1987); United States v. Thoma, 713 F.2d 604, 607-08 (10th Cir. 1983), *cert. denied*, 464 U.S. 1047 (1984); United States v. Masterson, 529 F.2d 30, 32 (9th Cir. 1976), *cert. denied*, 426 U.S. 908 (1976).

[226] The courts that have mandated the use of cautionary jury instructions have not articulated the legal foundation for their orders, but it appears to be the due process clause. *See, e.g.*, United States v. Hodges, 515 F.2d 650, 652-53 (7th Cir. 1975); United States v. Holley, 502 F.2d 273, 275 (4th Cir. 1974); United States v. Telfaire, 469 F.2d 552, 555-58 (D.C. Cir. 1972) (*per curiam*). *But see* United States v. Butcher, 557 F.2d 666, 670-71 (9th Cir. 1977) (approving trial court's refusal to give restrictive charge on eyewitness identification). One court required a cautionary jury instruction where the government's case rested solely on questionable eyewitness identification evidence. United States v. Greene, 591 F.2d 471, 476-77 (8th Cir. 1979).

[227] *See Telfaire*, 469 F.2d at 558-59. This instruction has been adopted by courts in other circuits. *See, e.g.*, *Holley*, 502 F.2d at 275; *Greene*, 591 F.2d at 476-77.

psychology of eyewitness identifications may follow their intuitions, and instruct the jury incorrectly Finally, even a detailed and technically correct jury instruction—coming as it does at the end of the trial after all of the evidence has been heard—would probably not be sufficient because, by that time, the jury might have made up its mind about the evidence.[228] Additionally, studies have found that juries do not understand most of the instructions that they receive, especially technical and detailed ones,[229] and a detailed jury instruction about eyewitness testimony might well be beyond the comprehension of most jurors. While the use of cautionary instructions is an improvement over the current state of the law, it is not enough.

4. *Admitting Expert Testimony*

The use of experts is the most frequently proposed reform for courts' treatment of eyewitness identification evidence.[230] Until the early 1980's, courts generally did not admit expert testimony about eyewitness identifications.[231] More recently, a growing number of courts have admitted such testimony pursuant to Federal Rule of Evidence 702.[232] No court, however, has recognized a constitutional right to such testimony Such a constitutional right would entitle the defendant to counter inculpatory eyewitness evidence that is the product of a pretrial identification procedure by the testimony of an expert witness on his behalf, and would impose upon the state an obligation to provide identification experts to indigent defendants.

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[228] *See* Note, *Did Your Eyes Deceive You?*, *supra* note 213, at 1005.

[229] *See* Gross, *Loss of Innocence: Eyewitness Identification and Proof of Guilt*, 16 J. LEGAL STUD. at 404 n.44 (citing authority).

[230] *See, e.g.*, E. LOFTUS, *supra* note 3, at 191-203; Katz & Reid, *Expert Testimony on the Fallibility of Eyewitness Identification*, 1 CRIM. JUST. J. 177, 197-206 (1977); Note, *Did Your Eyes Deceive You?*, *supra* note 213, at 1008-14 (citing authority).

[231] *See, e.g.*, United States v. Thevis, 665 F.2d 616, 641 (5th Cir. 1982), *cert. denied*, 459 U.S. 825 (1982); United States v. Fosher, 590 F.2d 381, 383-84 (1st Cir. 1979), United States v. Watson, 587 F.2d 365, 369 (7th Cir. 1978), *cert. denied*, 439 U.S. 1132 (1979); United States v. Brown, 540 F.2d 1048, 1054 (10th Cir. 1976), *cert. denied*, 429 U.S. 1100 (1977); United States v. Amaral, 448 F.2d 1148, 1153 (9th Cir. 1973). It is ironic that some courts based their exclusion of expert testimony on the ground that expert testimony about the unreliability of eyewitness evidence did not have an adequate scientific basis, *see, e.g.*, United States v. Amaral, even after the Supreme Court endorsed the "well-recognized unreliability" of eyewitness evidence in *Wade*.

[232] *See, e.g.*, United States v. Downing, 753 F.2d 1224, 1226 (3rd Cir. 1985); State v. Chapple, 660 P.2d 1208 (Ariz. 1983); State v. Buell, 489 N.E.2d 795, 803 (Ohio 1986), *cert. denied*, 479 U.S. 81 (1986).

The due process right to expert testimony is based upon the case of *Ake v Oklahoma*,[233] in which the Supreme Court held that indigent criminal defendants are entitled as a matter of due process to the assistance of a psychiatrist, at state expense, if they prove that their sanity will be a significant factor at their trial.[234] Applying the balancing test of *Mathews v Eldridge*,[235] the Court held that the state's interest in limiting expenditures of criminal trials was far outweighed by the private interest in a fair outcome of a proceeding in which life or liberty are at stake and the public interest in the fair adjudication of criminal cases.[236] Of paramount importance to the Court was the risk that the issue of sanity might be decided incorrectly without expert testimony [237]

Ake's reasoning applies with full force in the case of expert eyewitness testimony The psychological evidence demonstrates that without expert testimony, juries tend to overvalue the reliability of eyewitness testimony and may reach incorrect decisions on the basis of such testimony, which imperil the defendant's life or liberty It further demonstrates that expert testimony could aid juries considerably in avoiding such errors,[238] and it appears that no other method would aid the jury in accurately evaluating the eyewitness identification testimony as much as expert testimony Just as these factors compelled the Supreme Court in *Ake* to recognize a due process right to a psychiatrist on the issue of sanity, they compel with equal force the recognition of a due process right to expert testimony on the issue of. eyewitness testimony

Recognizing the due process right to expert testimony would enhance the jury's ability to fulfill its role of evaluator of the evidence because it would enable the jury to evaluate the evidence

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[233] 470 U.S. 68 (1985).

[234] Ake v. Oklahoma, 470 U.S. 68, 76-83 (1985). The Court also held that a defendant is entitled to a psychiatrist at state expense in a capital sentencing proceeding if the prosecution introduces evidence about the defendant's future dangerousness. *Id.*

[235] 424 U.S. 319, 335 (1976).

[236] *Ake*, 470 U.S. at 82.

[237] *Id.* at 77.

[238] *See* Loftus, *The Impact of Expert Psychological Testimony on the Unreliability of Eyewitness Identification*, 65 J. APP. PSYCH. 9, 14 (1980); Note, *Did Your Eyes Deceive You?*, *supra* note 213, at 1010; *see also* Brigham and Bothwell, *supra* note 219, at 29 ("[T]he testimony of an expert on [eyewitness identification] matters would aid the jury in its evaluation of evidence and would thereby further the cause of justice."); Hosch, Beck & McIntire, *Influence of Expert Testimony Regarding Eyewitness Accuracy on Jury Decisions*, 4 L. & HUM. BEHAV. 287 (1980); Wells, Lindsay & Tousignant, *Effects of Expert Psychological Advice on Human Performance in Judging the Validity of Eyewitness Identifications*, 4 L. & HUM. BEHAV 275 (1980).

more accurately than it would otherwise be able to do. After hearing the expert testimony, the jury may make a more sophisticated determination of reliability than the court, unaided by such testimony, would, for expert testimony could delve into all of the several factors that may affect the reliability of eyewitness testimony in a particular case. Neither the *Biggers* and *Manson* test nor any model jury instruction could be as flexible or accurate.

Some would argue that the right to expert testimony should be limited to psychiatric experts testifying about the defendant's sanity The two bases of this argument are that (1) the issue of sanity is so complicated that, without expert testimony, jurors could not properly evaluate it, and (2) the issue of sanity is a "threshold" issue, because if a defendant was insane at the time of the crime, then she cannot be constitutionally punished for it.

The proposed limitation would be unfounded. In the first place, although it is true that sanity is a complicated issue on which expert guidance may aid juries, the same is true of eyewitness identification. Although jurors may reach intuitive conclusions about eyewitness testimony that they might not reach about the issue of sanity, those intuitive conclusions may be wrong and harmful to the defendant.[239] Thus expert testimony is at least as important in the case of eyewitness identifications as it is in the case of testimony about a defendant's sanity Second, although the issue of the defendant's sanity is indeed a critical issue, the accuracy of eyewitness testimony is no less important: an innocent defendant may be convicted on the basis of eyewitness testimony, the unreliability of which cannot be discerned by the jury Finally, the proposed limitation is unsupported in the caselaw, for inferior federal courts both before and after *Ake* have recognized a due process right to non-psychiatric experts.[240] And in the case of *Caldwell v Mississ-*

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[239] *See also* Note, *Did Your Eyes Deceive You?*, *supra* note 213, at 1017 n.224 (data conflicts with belief on effects of stress, etc. on reliability).

[240] Before *Ake*: Williams v. Martin, 618 F.2d 1021, 1025-26 (4th Cir. 1980) ("There can be no doubt that an effective defense sometimes requires the assistance of an expert witness. Moreover, provision for experts reasonably necessary to assist indigents is now considered essential to the operation of a just judicial system."); Mason v. Arizona, 504 F.2d 1345, 1351 (9th Cir. 1974) (due process requires appointment of investigative assistance for indigent defendants), *cert. denied*, 420 U.S. 936 (1975); *cf.* Westbrook v. Zant, 704 F.2d 1487, 1494-97 (11th Cir. 1983) (state must furnish psychiatric or psychological experts to indigent capital defendant if evidence not available from other sources is necessary to prove mitigating circumstances). After *Ake*: Little v. Armontrout, 835 F.2d 1240, 1243-44 (8th Cir. 1987) (hypnosis); *see also* Moore v. Kemp, 809 F.2d 702, 740-42 (11th Cir. 1987) (*en banc*) (Johnson, J., concurring in part and dissenting in part in an opinion joined by five other judges) (*Ake* should apply to non-psychiatric experts).

sippi,[241] decided just three months after *Ake*, the Supreme Court rejected a defendant's contention that he had a due process right to a criminal investigator, a fingerprint expert, and a ballistics expert. The grounds for the decision were not that the defendant *could not* have a right to such experts, but that he had not made a sufficient showing of need, because he had "offered little more than undeveloped assertions that the requested assistance would be beneficial."[242] This suggests that the Supreme Court was willing to extend the principle of *Ake* to apply to non-psychiatric experts if there had been a proper showing of need.[243]

One might further object that recognizing the proposed right would significantly increase the cost to the state of criminal trials. Because eyewitness identification evidence is more prevalent than the insanity defenses, this argument runs, providing eyewitness identification experts would be more expensive than providing experts on sanity

This argument must be treated with caution because unreliable eyewitness identification evidence threatens a goal of signal importance to our criminal procedures, the protection of innocent people, and preserving that goal is worth a considerable cost. Nevertheless, if giving every defendant a right to an expert whenever eyewitness identification evidence was entered against him would impose an excessive cost on society, then the right to an expert could be limited in its scope. One refinement might be to differentiate between those defendants who have been subjected to a suggestive pretrial identification procedure and those who have not. The former would be automatically entitled to an expert, while the latter would be entitled to an expert only if they could demonstrate with particularity how an expert would help the jury to interpret the eyewitness identification testimony This would lessen the number of cases in which experts were used, while giving defendants an unqualified constitutional right to an expert's assistance in

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[241] 472 U.S. 320 (1985).

[242] Caldwell v. Mississippi, 472 U.S. 320, 323-24 n.1 (1985).

[243] The only post-*Ake* case that has considered whether a defendant had a due process right to an expert witness on the unreliability of eyewitness identification found that the defendant did not have such a right. *See* Johnson v. Wainwright, 806 F.2d 1479, 1485-86 (11th Cir. 1986), *cert. denied*, 484 U.S. 872 (1987). The *Johnson* Court did not even mention *Ake*, and based its decision on the grounds that the evaluation of eyewitness identification evidence was "merely [a] matter[] of common sense, well within the ordinary experience of a jury." *Id.* at 1486. This finding is contrary to the growing body of scientific evidence and to the increasing trend of judicial decisions that find that expert testimony about eyewitness identification satisfies the requirements of Federal Rule of Evidence 702.

situations where the danger of unreliable evidence is greatest. It is also consistent with *Caldwell*'s requirement that a defendant must make a showing that the help of an expert would aid her case.[244]

A third objection is that recognizing a due process right to an eyewitness identification expert would open the door for expert witnesses in a multitude of other situations where they may not be warranted: if experts are constitutionally required in cases of eyewitness identifications, this argument runs, then they also might be constitutionally required in numerous other situations where there is technical or potentially misleading evidence, and criminal trials would bog down into "wars of the experts."

But eyewitness evidence is different from most other types of evidence precisely because juries consistently tend to overvalue it. Thus, eyewitness evidence is more dangerous to defendants than many other types of evidence, and the due process argument that applies to eyewitness identification may not apply with equal strength to other types of evidence. Moreover, the danger that this argument foresees is really not a danger at all. Simply put, we live in a society in which science illuminates many parts of our life and yields surprises about matters—like eyewitness identification—that were once thought to be straightforward and common sense.

CONCLUSION

Since its uncertain beginnings in *Stovall v Denno*, the right to due process in connection with pretrial identification procedures has been whittled down by the Supreme Court and treated almost offhandedly and casually by the lower federal courts and the state courts. Consequently, it is extremely weak and doctrinally confused. And, because of its exclusive focus on reliability, the right fails to protect the value of procedural fairness, which the Supreme Court has clearly indicated it is the role of the due process clause to protect.

The proposed formulation of the right to due process in connection with pretrial identification procedures is intended to remedy the deficiencies of the current formulation of the right. To summarize, it provides that (1) eyewitness identification testimony that

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[244] *See Caldwell*, 472 U.S. at 323-24 n.1. This approach also is consistent with other authority. *See* Moore v. Kemp, 809 F.2d 702, 712 (11th Cir. 1987) (For a defendant to have a due process right to an expert "the defendant must show the trial court that there exists a reasonable probability both that an expert would be of assistance to the defense and that denial of expert assistance would result in a fundamentally unfair trial.").

is the product of unnecessarily suggestive pretrial procedures is *per se* inadmissible (with suggestiveness being accorded the definition proposed in Part III.A. of this Article), and (2) eyewitness identification testimony that is derived from other pretrial identification procedures—either necessarily suggestive ones or non-suggestive ones—may be admitted if it passes a scientifically sound threshold test for probativity and the defendant has a right to counter it with expert testimony

There are two final points, the first concerning the breadth of the proposed right to due process and the second concerning its necessity.

First, it may be argued that the right to due process in connection with pretrial identification procedures should be expanded to become a right to due process in connection with eyewitness identification testimony generally Eyewitness identification testimony that is not derived from pretrial identification procedures—that is, eyewitness testimony given by a witness whose only viewing of the assailant was at the scene of the crime—may be just as untrustworthy as other eyewitness testimony,[245] and may be similarly overvalued by the jury Thus, the defendant may have an equally strong argument for a due process right to expert testimony in such cases as he does where the testimony is derived from a pretrial identification procedure.[246] Although this Article does not explore that argument, it has merit and deserves further consideration. This Article confined its analysis to the right to due process in connection with eyewitness identification evidence derived from pretrial identification procedures simply because that is how the Supreme Court has constructed the right.

Secondly, some commentators appear to believe that there is no need for a right to due process in connection with pretrial identification procedures. These commentators argue that (a) suggestive procedures undermine accurate evidence, and (b) the police are presumably interested in obtaining only accurate evidence—for that is the only kind of evidence that helps them to do their job,

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[245] *See* Note, *Did Your Eyes Deceive You?*, *supra* note 213, at 994 ("Suggestive procedures used to facilitate identification of the accused are only a minor cause of unreliability of eyewitness testimony. Problems of perception and memory can often play a far greater role in producing an inaccurate identification.").

[246] The defendant confronted by eyewitness identification testimony that is not derived from any pretrial identification procedure would not have any argument from procedural fairness, of course, but only an argument from his right not to have particularly unreliable and unevaluable evidence used against him.

which is capturing guilty people and deterring crime—therefore (c) the police do not need a constitutional rule to compel them to conduct proper pretrial identification procedures. According to one commentator, "[t]he mystery is why the police should need additional incentives [imposed by the due process clause] to avoid use of unreliable identification testimony "[247] The answer to this argument is that, although the police *should*, perhaps, not conduct suggestive identification procedures,[248] the undeniable fact is that they *do* conduct such objectionable procedures every day As a consequence, the criminal defendant's right to due process is violated. That right should be strengthened, not abandoned.

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[247] Seidman, *Soldiers, Martyrs, and Criminals: Utilitarian Theory and the Problem of Crime Control, supra* note 121, at 327; *see also* Manson v. Brathwaite, 432 U.S. 98, 112 n.12 (1977) ("The interest in obtaining convictions of the guilty also urges police to adopt procedures that show the resulting identification to be accurate. Suggestive procedures often will vitiate the weight of the evidence at trial and the jury may tend to discount such evidence.").

[248] One possible explanation for the apparently irrational behavior of the police is that the police believe that they are able to achieve the goal of crime-deterrence without going to the effort and expense of conducting correct procedures. This explanation is offered by Professor Seidman. *See* Seidman, *supra* note 121, at 328.