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# Reforming Eyewitness Identification Law and Practices to Protect the Innocent

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## **Reforming Eyewitness Identification Law and Practices to Protect the Innocent**

### **Margery Malkin Koosed\***

My fellow panelists have well-informed us regarding the evolving psychological research in the field that displays the continuing vagaries of eyewitness identification. It is my task here to discuss the varying reform proposals that may help to finally achieve a greater level of reliability in this critical phase of the criminal justice process. A comprehensive reform that includes tightening exclusionary rules, along with (minimally) corroboration requirements for death-sentencing, and more appropriately, for convictions in capital and non-capital cases, with a concomitant loosening of standards for relief on appeal, hold the most promise.

#### **The Scope of Our Problem – Why We Are Overdue for Reform Measures**

First, let me make clear that eyewitness misidentification is a significant threat to the reliability of our criminal justice system, and the more we learn about it, the greater and more acute that threat appears to be.

I first wrote on the topic of mistaken eyewitness identifications in 1989 in The Champion, the Official Journal of the National Association of Criminal Defense Lawyers.<sup>1</sup> In that piece, I recounted the frequency of misidentification revealed in the seminal study of wrongful convictions in potentially capital cases prepared by Professors Hugo Bedau and Michael L. Radelet and published in the Stanford Law Review two

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<sup>1</sup> Margery M. Koosed, *Dead Wrong: Mistaken Identifications and Capital Prosecutions*, Volume XIII, No. 5 *The Champion* 42-50 (Official Journal of the National Association of Criminal Defense Lawyers) (June 1989).

years earlier.<sup>2</sup> Their study of 350 miscarriages of justice in potentially capital cases in the 20<sup>th</sup> century identified good faith mistaken eyewitness identification as causing an erroneous conviction in 56 cases, or 16% of the cases studied.<sup>3</sup> As I discussed in a later 2002 article in Ohio State Law Journal,<sup>4</sup> if one added in witness errors that were attributable to police or prosecutor-influenced identification testimony (listed in the witness error sub-categories of perjury and unreliable or erroneous prosecution testimony), that number would surely rise, most likely to one-fifth or more of the cases they studied.<sup>5</sup> Other contemporaneous studies of erroneous convictions that were not limited to potentially capital cases placed the frequency of eyewitness misidentification errors a great deal higher, at 52% in Prof. Arye Rattner's 1988 study.<sup>6</sup>

In my 2002 Ohio State Law Journal Innocence Protection article, I found if one added in the 66 additional miscarriages of justice in potentially capital cases that Prof. Radelet and others identified in their 1992 book, *In Spite of Innocence*,<sup>7</sup> the rate of wrongful convictions based simply on mistaken identifications in that group rose from 16% earlier to 18.5%, and a comparable rise occurred in the related perjury and unreliable or erroneous prosecution testimony accounts sub-categories.<sup>8</sup> But if one

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<sup>2</sup> Hugo Bedau & Michael I. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 Stan. L.Rev. 21 (1987).

<sup>3</sup> *Id.* at 57, tbl. 6.

<sup>4</sup> Margery Malkin Koosed, *The Proposed Innocence Protection Act Won't -- Unless It Also Curbs Mistaken Eyewitness Identifications*, 63 Ohio St. L. J. 263 (2002) (hereinafter *Ohio State* or *2002 article*).

<sup>5</sup> *Id.* at 276-278.

<sup>6</sup> Arye Rattner, *Convicted But Innocent: Wrongful Conviction and the Criminal Justice System*, 12 Law and Hum. Behav. 283, 289 (1989).

<sup>7</sup> Michael L. Radelet, et. al, *In Spite of Innocence: Erroneous Convictions in Capital Cases* (1992).

<sup>8</sup> Koosed, *Proposed Innocence*, *supra* n. 5 at 283.

focused on only cases in both the studies that came after the 1967 United States Supreme Court decisions that were the first to attend to the eyewitness misidentification problem,<sup>9</sup> that percentage rose starkly to 32%.<sup>10</sup>

So in 2002, nearly one-third of the innocents being convicted in potentially capital cases since 1967 were getting there in whole or in part through erroneous identification testimony. As I related then, the annals of criminal law appeared to have become even more “rife with instances of mistaken identification.”<sup>11</sup> When combined with the non-capital findings of 52% by Prof. Rattner as of 1989, the picture was most disturbing.

That disturbance factor has dramatically multiplied since 2002. As the DNA exonerations have shown, misidentification is a factor in far more than 50% of cases. In 2007, a National Institute of Justice Report related that over 75% of the first 183 DNA exonerations in the United States involved misidentification.<sup>12</sup> The latest figures from the Innocence Project confirm this -- looking at over 230 DNA exonerations in capital and non-capital cases -- a whopping 77% of (post-Wade) wrongful convictions involved misidentification.<sup>13</sup> As Dr. Watts related in his introduction to this panel, in 70% of these

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<sup>9</sup> United States v. Wade, 388 U.S. 218 (1967), Gilbert v. California, 388 U.S. 263 (1967), Stovall v. Denno, 388 U.S. 293 (1967).

<sup>10</sup> Id. at 285-286.

<sup>11</sup> Id. at 286, citing United States v. Wade, 388 U.S. 218, 228 (1967) (quoting Felix Frankfurter, The Case of Sacco and Vanzetti 30 (1927)).

<sup>12</sup> Beth Schuster, “Police Lineups: Making Eyewitness Identifications More Reliable”, NIJ Journal No. 258, (October 2007), citing Meetings/Events of the American Judicature Society Institute of Forensic Science and Public Policy (in Greensboro, North Carolina), [www.ajs.org/wc/wc-meetings.asp](http://www.ajs.org/wc/wc-meetings.asp), which referenced the Innocence Project as the source of this information.

<sup>13</sup> Innocence Project, <http://www.innocenceproject.org/Content/351.php>; Steve McGonigle and Jennifer Emily “18 Dallas County cases overturned by DNA relied on heavily eyewitness testimony”, Dallas Morning News, Sunday Oct. 12, 2008. <http://crimeblog.dallasnews.com/archives/1008/10/innocent-mans-idnetification-i.html>.

cases the identifier was the victim, and in 28% this was the central evidence in the case. With 77% of cases involving misidentification, this is justifiably labeled the leading cause of wrongful convictions.<sup>14</sup>

There is still no clear explanation for the increase in the frequency of errors attributable to mistaken identifications over the past four decades,<sup>15</sup> but it is certain the need to curb mistaken identifications is more acute than ever thought before. Two Texas journalists have well-described the challenge that is now besetting all of us:

Eyewitness testimony is the crack cocaine of the criminal justice system. Law officers know the potential risks but are addicted to its power to convict.<sup>16</sup>

Writing in a three-part series in October 2008, the two reported that Dallas County has led the nation in DNA exonerations since 2001, with 19 wrongly convicted persons, and “in every instance but one, . . . police and prosecutors built their case on eyewitness accounts, even though they knew such testimony can be fatally flawed.”<sup>17</sup> The journalists recounted that legislation to require more reliable identification procedures failed in the Texas legislature in 2007; that there was no disciplinary action imposed for what they termed the lying, incompetent, or negligent actions of police officers; that over 3 million dollars was spent in compensating and incarcerating the wrongly convicted in the Dallas County cases; and that Texas law since 1975 has allowed for conviction based on the testimony of a lone eyewitness and that a prospective juror could be denied the

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<sup>14</sup> Innocence Project, <http://www.innocenceproject.org/Content/351.php>.

<sup>15</sup> The varying possible explanations I identified in 2002, 63 Ohio St. L.J. at 286-287, are still viable, but the answer(s) remain elusive.

<sup>16</sup> McGonigle and Emily, *supra* n. 13.

<sup>17</sup> *Id.*

opportunity to serve if they were not willing to convict based on such testimony.<sup>18</sup>

Further, only a handful of police departments in Dallas County apparently had written policies regarding witness identification procedures.<sup>19</sup>

This is a big-as-Texas statewide problem. All six DNA exoneration cases in Harris County (including Houston) were built on faulty eyewitness identifications.<sup>20</sup> And,

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<sup>18</sup> Jennifer Emily and Steve McGonigle, “Eyewitnesses still play key roles in cases where DNA, other evidence, is lacking”, Dallas Morning News, October 14, 2008. <http://www.dallasnews.com/sharedcontent/dws/dn/dnacases/stories/101308dnproDNArobbery.264>. As prosecutor Kevin Brooks, the present head of the Dallas County felony trial bureau, stated about working under the late Dallas County District Attorney Henry Wade, “Eyewitness testimony was gold. If the witness said they saw it, they saw it.” Steve McGonigle and Jennifer Emily, “18 Dallas County cases overturned by DNA relied on heavily eyewitness testimony”, October 12, 2008. [http://www.dallasnews.com/sharedcontent/dws/news/politics/local/stories/DN-DNAlineups\\_05pro.ART.State.Edition2.4a899db.html](http://www.dallasnews.com/sharedcontent/dws/news/politics/local/stories/DN-DNAlineups_05pro.ART.State.Edition2.4a899db.html). Joe Kendall, a prosecutor under Wade in the early 80’s stated “No one ever thought a one-eyewitness case was good. But if you had a one-eyewitness case, and it was a rape case, and the victim said that’s the one, you couldn’t dismiss.” Id.

<sup>19</sup> Id.

<sup>20</sup> Roma Khanna, “Study: Witness Errors Lead Juries Astray: DNA undoes the mistakes on the stand during trials”, Houston Chronicle, March 26, 2009, <http://www.chron.com/dispatch/story.mpl/metropolitan/6342269.html>. Legislation [S.B. 117] has been introduced in the Texas legislature that would require police departments to create written policies about their eyewitness identification practices that use best practices. Id.

Texas is not alone regarding the frequency of misidentification as a cause, or the absence of written identification policies in its police departments.

According to an Innocence Project study in Georgia, for instance, all six exonerations in that state were based on faulty eyewitness identifications, and 83% of Georgia police agencies have no written rules on conducting eyewitness identifications. “New Study Reveals Deficiencies in Eyewitness Identification Procedures; Legislative Review Set”, Atlanta Journal-Constitution, September 17, 2007. The Georgia legislature established a House Study Committee on Eyewitness Identification Procedures to take testimony and make recommendations on reforms. “Barry Scheck testifies before Georgia identification panel today”. Innocence Project blog, Oct. 22, 2007, <http://innocenceproject.org/content/957.php>. As yet, there has been no legislation adopting eyewitness identification reform in Georgia.

On the other hand, Maryland adopted legislation in 2007 that requires police departments to prepare written guidelines that “comply with the United States Department of Justice standards on obtaining accurate eyewitness identification.” Public Safety Sec. 3-505 adopted May 15, 2007. Wisconsin, North Carolina, New Jersey, and West Virginia also require written policies. See <http://www.innocenceproject.org/news/LawView5.php>. New Jersey’s overall 2001 Attorney General Guidelines appear as Appendix A in New Jersey v. Herrera, 187 N.J. 493, 902 A.2d 177 (2006).

according to a study just issued by The Justice Project, only 12 percent of police agencies in the entire state of Texas have written policies.<sup>21</sup>

As this Texas report confirmed, while it is possible to measure the financial costs of reinvestigation and of compensating the wrongly convicted that does not fully tell the tale of the societal cost of these eyewitness identification mistakes. The costs to community safety of having ended investigations too soon and convicting an innocent, as importantly, left the dangerous actual perpetrator at large to commit more crimes. The Justice Project reported that the actual perpetrator had been identified in about 35% of the 39 Texas DNA exoneration cases, but that some could not be prosecuted due to statutes of limitations or other reasons.<sup>22</sup> All told, “the Innocence Project has identified 91 actual perpetrators in the 233 exoneration cases” nationwide, and “estimates that 49 rapes and

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<sup>21</sup> The Justice Project, *Convicting the Innocent: Texas Justice Derailed*, p. 6-7. <http://www.thejusticeproject.org/convicting-the-innocent/>. The study opens by relating that the 39 Texas exonerees have served over 500 years in prison for crimes they did not commit.

<sup>22</sup> *Convicting the Innocent*, supra note 20, <http://www.thejusticeproject.org/convicting-the-innocent/public-safety/>. The Report recounts the wrongful 1985 rape conviction of Timothy Cole, who died in prison in 1999 and was posthumously exonerated by DNA in the past year, and the two rapes and possibly one murder committed by the actual perpetrator Jerry Wayne Johnson in the years that followed Cole’s conviction, which was based in part on a suggestive photographic identification procedure. Johnson was convicted of the later rapes and was sentenced to life in prison. In 1995 when the statute of limitations had expired on the crime Cole was convicted of committing, Johnson began writing to judges and prosecutors admitting his guilt of the crime, but his admissions were ignored by officials. See Jim Vertuno, “Dead inmate formally exonerated of rape conviction”, *Houston Chronicle*, April 7, 2009, <http://www.chron.com/disp/story.mpl/ap/tx/6363338.html>. After Cole’s death, the Innocence Project became involved and was able to confirm his innocence by means of DNA testing. *Id.* The Texas Justice Project wrote that had the police continued their investigation after the suggestive identification procedure, they might have apprehended Johnson and stopped him before he committed the other crimes. *Convicting the Innocent*, supra note 21. A similar incident wrongly convicted Timothy McGowan in 1985, but perpetrator Kenneth Wayne Woodson can no longer be prosecuted for this as the statute of limitations has passed. *Id.* He too went on to commit other crimes (rape, burglary, and robbery) the following year, for which he was prosecuted and punished, but which he may not have committed had he been prosecuted for the earlier rape and burglary. *Id.*

19 murders were committed” by those persons after the others had been wrongly convicted.<sup>23</sup> The cost to society of these additional crimes is truly incalculable.

So what is to be done? We must break our habit, curb our addiction to the fix of eyewitness identification testimony, or at the least significantly reduce the risks of mistake within this investigative process. We simply cannot continue to tolerate identification procedures that gratuitously increase the risk of convicting the innocent, and fortunately, we now know some of what can be done to reduce the risk and break our habit.<sup>24</sup>

### **Identifying Best Practices to Improve Identification Procedures**

At the time of my 2002 article in the Ohio State Law Journal, the American Psychology/Law Society (AP/LS) had released its 1998 report “Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads”,<sup>25</sup> which specified four

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<sup>23</sup> Id.

<sup>24</sup> We do not yet know everything that there is to know about perception, retention, and retrieval of memory, of course. According to a recent New York Times wire service report, for instance, neuroscience researchers have found a single dose of an experimental drug delivered to areas of the brain critical for holding specific types of memory can erase the memory in animals. Benedict Carey, “Discovery of memory molecule raises hopes - and big questions”, New York Times wire service, appearing in the Cleveland Plain Dealer, April 6, 2009, p. A7. The discovery of an apparently critical memory molecule, PkMzeta, that is “present and activated in cells” precisely when they were needed to retain a memory, id., could be a major advancement. Neuroscience research is still in its infancy, but even four years ago, researchers were suggesting one explanation for lower reliability of eyewitness identifications in stressful situations may be that “high levels of hormones such as cortisol and adrenaline that result from stress may degrade special memory”. “Study finds high risk of error in eyewitness identifications,” New Hampshire Register, Science Section, June 21, 2004 (relating results of a study conducted by the U.S. Navy and Yale University). As neuroscience advances, it will bring us to greater understanding, and hopefully, improvements in memory capacity.

<sup>25</sup> The AP/LS Report, prepared by Gary L. Wells, et.al, appeared in 22 Law & Hum. Behav. 603, 639-640 (1998) (hereinafter AP/LS Report). Their study of 40 cases of innocence people who were convicted of serious crimes and served time in prison, five on death row, found that 90% involved eyewitness identification evidence in which one or more eyewitnesses falsely identified the person. Id. at 605.

recommendations that then “represent(ed) an emerging consensus among eyewitness scientists as to key elements that such a set of procedures must entail”:<sup>26</sup>

1. double blind procedures where the person who administers/conducts the lineup or photospread should not be aware of which member is the suspect, so the administrator cannot reveal any facts about the matter and confirmation bias can be avoided;<sup>27</sup>
2. instructions that the person in question might not be in the lineup or photospread and therefore the witness should not feel they must make an identification, and instructions that the person administering the lineup does not know which person is the suspect in the case;<sup>28</sup>
3. design of the procedure and selection of foils so the suspect should not stand out in the lineup or photospread from the distractors or foils, based on the eyewitness’ previous description of the culprit or other factors;<sup>29</sup>
4. a statement taken from the eyewitness at the time of the identification and prior to any feedback as to his or her confidence that any identified person is the actual culprit.<sup>30</sup>

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<sup>26</sup> Id. at 609.

<sup>27</sup> Id. at 627-629.

<sup>28</sup> Id. at 629-630. This discourages the witness from making relative judgments [a task reminiscent of Sesame Street’s ‘one of these things is not like the other’] about who in the group best matches their memory of the assailant. Relative judgment frequently leads to misidentification in culprit-absent identification procedures. Id.

<sup>29</sup> Id. at 630-632. This would preclude use of show-ups as they are more likely to yield false identifications. For further information detailing this recommendation, see Koosed, 63 Ohio St. L. J., at n. 225.

<sup>30</sup> Wells, et. al, supra n. 25 at 635-636. This is designed to prevent confidence inflation between the time of the identification and the time of trial from playing a role in the jury’s assessment of the witness’

The United States Department of Justice, Office of Research Programs' had also released its publication "Eyewitness Evidence; A Guide for Law Enforcement",<sup>31</sup> that recommended non-suggestive procedures but stopped short of requiring double-blind administration, and would simply minimize the use of show-ups.<sup>32</sup>

Neither the AP/LS nor the NIJ Report recommended recording of identification procedures. The AP/LS declined this due to expense and implementation concerns.<sup>33</sup>

Though the AP/LS recognized the superiority of sequential lineups, where the witness views one lineup participant at a time in sequence, over simultaneous lineups where all are shown at once, it stopped short of recommending this as it would be a deviation from current practices and the other four recommendations it made had to exist concurrently with a sequential lineup to assure reliability of the information obtained, among other reasons.<sup>34</sup>

In 2006, the American Bar Association Criminal Justice Section's Ad Hoc Innocence Committee to Ensure the Integrity of the Criminal Process (with representation of academics, forensic scientists, district attorneys, defenders, and judges) released its Report. In Achieving Justice: Freeing the Innocent, Convicting the Guilty, the ABA recommends as "Best Practices" a double-blind administration "whenever practicable",

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testimony, and to provide a clean record of the witness' confidence at the time of the identification. *Id.* at 636.

<sup>31</sup> U.S. Dep't. of Justice, "Eyewitness Evidence: A Guide for Law Enforcement", at [www.ncjrs.org/txtfiles1/nij/178240/txt](http://www.ncjrs.org/txtfiles1/nij/178240/txt) (hereinafter NIJ Report).

<sup>32</sup> *Id.* See also Donald P. Judges, "Two Cheers for the Department of Justice's Eyewitness Evidence: A Guide for Law Enforcement", 53 Ark. L. Rev. 231 (2000) for a rather critical review of the NIJ Report.

<sup>33</sup> Wells, et. al., *supra* n. 25, at 639-641.

<sup>34</sup> *Id.* at 639-640.

and also provides for selection of foils, instructions, and a post-identification statement by the witness of the type identified in the AP/LS Report.<sup>35</sup>

On size, the ABA Report recommended “a sufficient number of foils to reasonably reduce the risk of an eyewitness selecting a suspect by guessing rather than by recognition.”<sup>36</sup> Noting that though there is “no magic correct number”, the ABA relates “many researchers believe that [the present American standard of 5 to] 6 person lineups create an unacceptably high risk of error”, and that “Britain uses arrays of 9”.<sup>37</sup> The ABA recommended larger size lineups “whenever practicable.”<sup>38</sup>

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<sup>35</sup> American Bar Association Criminal Justice Section’s Ad Hoc Innocence Committee to Ensure the Integrity of the Criminal Process, Achieving Justice: Freeing the Innocent, Convicting the Guilty (2006) (hereinafter *ABA Report*), at 24-26.

With regard to eyewitness identification law, the ABA Report frequently references the fine resource Brian L. Cutler & Steven D. Penrod, Mistaken Identification – The Eyewitness, Psychology and the Law (1995).

<sup>36</sup> *Id.* at 25.

<sup>37</sup> *Id.* at 35. In Britain, lineups have been known as “identity parades”, showups as “confrontations” or “street identifications”, and in-court identifications as “docket identifications”. See Peter Hain, Mistaken Identity: The Wrong Face of the Law 130-131 (Quartet Books Ltd., Hunt Barnard Printing Ltd., 1976). More recent statutory terms are added: “video identifications” “when the witness is shown moving images of a known suspect, together with similar images of others who resemble the suspect”, and “group identifications” “when the witness sees the suspect in an informal group of people.” Police and Criminal Evidence Act, 1984, Code of Practice D §3.5, §3.9, see Michael Zander, The Police and Criminal Evidence Act (5<sup>th</sup> Ed. 2005).

The use of eight foils dates back to a Home Office directive issued in 1969. Hain, *Mistaken Identity* 132.

Britain has struggled with curbing procedures leading to mistaken eyewitness testimony. As early as 1925, the Home Office issued a memorandum to police regarding identification procedures, but there was “no obligation to follow them”. *Id.* at 131-132. In January 1969, the Home Office published a Circular on Identification Parades, incorporating some of the 1925 directives, and stating in its preamble “The object of an identification parade is to make sure that the ability of the witness to recognize the suspect has been fairly and adequately tested.” Ruth Brandon & Christie Davies, Wrongful Imprisonment 268-270 (Circular reprinted as Appendix B) (George Allen & Unwin Ltd. 1973). The Circular provided for possibly blind identification procedures: “[i]f an officer concerned with the case against the suspect is present, he should take no part in conducting the parade.” *Id.* at 268. It provided for “if practicable, eight or more” foils “who are as far as possible of the same age, height, general appearance (including standard of dress and grooming) and position in life”. *Id.* Further, witnesses should not see the suspect or his photograph before attending a parade, *id.*, and witnesses should be prevented from communicating with each other during the parade. *Id.* at 269. Suspects could change their position in the line after each witness has left. *Id.* If a witness was unable to identify one positively, “this fact should be carefully noted ... as should every other circumstance connected with it”. *Id.* Finally, a suspect was to be informed that he could have a solicitor or friend present at the identification parade. *Id.* Photographic identification procedures were only to be used

The ABA Report further recommended videotaping or digital recording of lineup procedures, including the witness' confidence statements and any statements made by the police to the witness, "whenever practicable".<sup>39</sup> If it is not practicable, then a photograph should be taken of each lineup and a detailed record made of the entire procedure, noting the appearance of the suspect and the foils, the identity of the foils, and in any event, ensuring accurate documentation of the statement of any witness of the level of confidence in any identification.<sup>40</sup>

On the matter of sequential lineups or photospreads, the ABA "Best Practices" states "the advisability of either a sequential lineup or photospread..., or a simultaneous lineup or photospread... should be carefully considered."<sup>41</sup> The ABA notes the vast majority of researchers support sequential lineups as "producing a lower rate of mistaken identifications when the perpetrator is absent", and resulting in "little loss of accuracy when the perpetrator is present," citing authorities for both propositions.<sup>42</sup> But it notes that there is "a growing dissenting view among some well-respected social scientists that the research has not proceeded far enough to determine under what conditions, if any, a

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if a personal identification was not possible, and the witness reviewing the photos (of persons having as close a resemblance as possible) "should be left to make a selection without help and without opportunity of consulting other witnesses". *Id.* at 270.

The Police and Criminal Evidence Act of 1984 Code of Practice D makes some slight changes in the above matters. §3.11 provides that "the identification procedure shall be the responsibility of an officer ...who is not involved with the investigation." Annex B to Code of Practice D §9 mandates at least eight foils, providing "The identification parade shall consist of at least eight people (in addition to the suspect) who, so far as possible, resemble the suspect in age, height, general appearance and position in life." Other provisions in the Code of Practice D and its Annex parallel those in the 1969 Circular.

<sup>38</sup> *Id.* at 36.

<sup>39</sup> *Id.* at 25-26.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 25.

<sup>42</sup> *Id.* at 33-34.

sequential lineup is to be preferred to a simultaneous lineup,” and that “field studies have not been administered to determine the practicability of sequential methods, though new technologies entering the marketplace now may substantially reduce the time and out-of-pocket costs involved.”<sup>43</sup> The ABA Committee concluded the Illinois statutory approach that mandated further study by certain police departments using sequential while others use simultaneous methods was “most consistent with an effort to improve the long run accuracy of lineups.”<sup>44</sup>

To shed further light on the appropriateness of sequential lineups, a much-awaited field study using new technology is currently being conducted by the American Judicature Society’s Institute of Forensic Science and Public Policy in four parts of the

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<sup>43</sup> Id. at 34-35. Around the time of the ABA Report, the controversial Mecklenburg Report was issued. See Sheri H. Mecklenburg, Report to the Legislature of the State of Illinois: The Illinois Pilot Program on Sequential Double-Blind Identification Procedures (2006), available at <http://www.chicagopolice.org/ILPilotonEyewitnessID.pdf>. This study found a higher rate of false identifications in sequential identification procedures. Id. at iv. However, it has been subject to intense criticism with regard to its methodology and on issues of bias. See a summary of this criticism in Sandra Guerra Thompson, “What Price Justice? The Importance of Costs to Eyewitness Identification Reform”, 41 Tex. Tech. L.Rev. 33, 45-46, n. 12 (2008). An extensive examination of the argued flaws in the Mecklenburg Report can be found in a sample motion in limine to preclude the prosecution from referencing the Mecklenburg Report that is reproduced in the National Association of Criminal Defense Lawyers publication “A New Legal Architecture: Litigating Eyewitness Identification Cases in the 21<sup>st</sup> Century” (on file with the author and publication available for purchase at [www.nacdl.org/multimedia](http://www.nacdl.org/multimedia)).

The use of controlled studies that often involve college student subjects has been questioned, but it is suggested that use of these subjects may well underestimate the degree of mistaken identifications that could be evidenced in the field, and results in the field have shown errors are often made. Gary Wells and Deah S. Quinlivan, “Suggestive Eyewitness Identification Procedures and the Supreme Court’s Reliability Test in Light of Eyewitness Science: Thirty Years Later,” 33 Law & Hum. Behav. 1, 6-7 (Feb. 2009).

As the ABA noted, computerized lineups and photospreads are being developed that may make it possible to conduct a sequential multi-foil identification procedure. See as well the NIJ Report, supra n. 31 at 9. A suspect’s photo would be scanned in, and then the computer would choose photos of others who matched the witness’ description from a large database and offer standardized, neutral instructions. Id. In the interim, one of my co-panelists has identified a less costly and readily available “folder method” where folders with a photo are shuffled and shown sequentially and the administrator has no view of the photos. See Amy Klochuchar, Nancy K. Mehrkens Steblay & Hilary Lindell Caliguri, “Improving Eyewitness Identifications: Hennepin County’s Blind Sequential Lineup Pilot Project, 4 Cardozo Pub. L. Pol’y. & Ethics J. 381 (2006).

<sup>44</sup> Id. at 35.

country.<sup>45</sup> “The purpose of the study is to evaluate the effectiveness of simultaneous versus sequential line-ups in identifying perpetrators using computer-based lineup procedures in actual police investigations.”<sup>46</sup> As part of the study, the AJS and its collaborating bodies are now distributing a survey to assess the strength of varying forms of evidence in determining guilt.<sup>47</sup>

Regarding the practice of show-ups, the ABA postponed any recommendation on when “even prompt show-ups (presenting a single suspect to an eyewitness to identify or reject the suspect as the perpetrator)” “should or should not be permissible”.<sup>48</sup> Though highly suggestive, the ABA noted there is some research suggesting that “a show-up is preferable to a poorly constructed lineup,” and that “many representatives of law enforcement... described show-ups as common and as essential to effective law

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<sup>45</sup> “Eyewitness Identification Field Studies,” American Judicature Society, [www.ajs.org/wc/ewid/ewid-home.asp](http://www.ajs.org/wc/ewid/ewid-home.asp), accessed March 6, 2009.

<sup>46</sup> Id.

<sup>47</sup> A cover letter accompanying the survey being distributed by email states “The EWID Field Studies consist of two unique phases. Under the direction of the AJS Institute, the first phase will focus on the collection of data resulting from photo lineup identifications. For the second phase, the Police Foundation is developing a rating instrument to be used by a panel of judges, prosecutors, defense attorneys and law enforcement officials to assess the likelihood of guilt for each case. In order to do so, the Police Foundation is seeking input from legal scholars experienced in criminal justice matters. The information will be used to assist with establishing the reliability and validity of the rating instrument.” [April 9, 2009 email to University of Akron Law School Dean and AJS Vice President Martin Belsky, copy on file with the author.] The introduction to the survey states “the survey is part of a scientific research study conducted by the American Judicature Society, John Jay College of Criminal Justice, the Center for Problem-Oriented Policing, and the Police Foundation. Experts from the judicial, criminal justice, legal, and law enforcement fields assisted in the development of a rating instrument for assessing probable guilt, and [the survey responses will help to] establish the reliability and validity of that instrument. ...[The survey’s] goal is to establish the strength of the specific descriptive examples of information and/or evidence. ...[The] survey will include two sections. The first is a rating of descriptive examples of information and/or evidence and the second is a rating of categories of information and/or evidence.” “Survey Assessing the Guilt of a Suspect”, distributed by The Police Foundation to criminal justice experts in April 2009. [Copy on file with the author.]

<sup>48</sup> Id. at 38-39.

enforcement.”<sup>49</sup> It concluded further research was needed to craft a general rule on the topic.<sup>50</sup>

As to photospreads, the ABA Report noted that their use “may be rising relative to lineup frequency,” and this “merely underscores the importance of using the same principles for sound identification procedures, whether done by lineup or photospread”.<sup>51</sup> The ABA noted “[c]aution in administering photospreads and show-ups is especially important because flawed ones can easily taint later lineup and at-trial identifications”.<sup>52</sup>

The ABA Report briefly summarized aspects of other eyewitness identification reforms recommended by the NIJ, the New Jersey State Attorney General and Police, former Illinois Governor Ryan’s Commission on Capital Punishment, and the North Carolina Actual Innocence Commission.<sup>53</sup> Among these, all but the NIJ mandated double blind procedures and sequential lineups; all set a minimum number of foils and generally require instructions to witnesses and collecting confidence judgments.<sup>54</sup>

The further reforms recommended or adopted by the North Carolina legislature, the Justice Project, and the Innocence Project, are compared and contrasted with these earlier proposals in a 2008 article by Prof. Sandra Guerra Thompson.<sup>55</sup> Professor Thompson writes “there is a surprising amount of consensus on the direction legislatures

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<sup>49</sup> Id. at 39.

<sup>50</sup> Id.

<sup>51</sup> Id. at 40.

<sup>52</sup> Id. at 40.

<sup>53</sup> Id. at 44-45.

<sup>54</sup> Id. at 45.

<sup>55</sup> Sandra Guerra Thompson, “What Price Justice? The Importance of Costs to Eyewitness Identification Reform”, 41 Tex. Tech. L.Rev. 33, 42-55 (2008).

should take in reforming identification procedures”.<sup>56</sup> Provisions for documentation, foils, and interactions with witnesses basically mimic those found in the earlier reports described.<sup>57</sup>

One of the few areas where consensus has been delayed is sequential versus simultaneous lineups. North Carolina was the first (and as of 2007, the only) state to legislatively require statewide sequential double-blind lineup and photo array procedures without exception.<sup>58</sup> New Jersey also requires blind sequential procedures, but provides for exceptions, and these procedures are strongly recommended by the Innocence and Justice Projects.<sup>59</sup> The Innocence Project has declined to include this recommendation in their package of reforms at this time as it has “often prevented clear consideration of the other important and accepted reforms”.<sup>60</sup> As previously noted, the American Judicature Society’s national Eyewitness Identification Field Studies should further illuminate this question.

### **Making Eyewitness Identification Practices Reform Happen**

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<sup>56</sup> Id. at 43.

<sup>57</sup> See id. at 48-54. West Virginia’s practice is only briefly addressed in Prof. Thompson’s article as an example of adoption of less expensive reform measures. Id., at 62. West Virginia does have provisions requiring instructions to witnesses, obtaining confidence statements from the witness, and assuring a written record of the proceeding. WV Code 62-1E-1. Another section provides law enforcement agencies may create educational materials and conduct training programs regarding these practices. WV Code 62-1E-3. Both provisions became effective March 10, 2007.

<sup>58</sup> Thompson, supra note 55 at 47, citing N.C. Gen. Stat. §15A-284.52(b)(2) (2007).

<sup>59</sup> Id. at 48.

<sup>60</sup> “Sequential lineups”, available at <http://www.innocenceproject.org/Content/151.php>. The Innocence Project website includes an interactive map allowing one to see the status of reform efforts among the states. <http://www.innocenceproject.org/news/LawView5.php>.

How to achieve reforms, implement them, and have a means of continual improvement as we learn more and can evolve even better “best practices” has been the subject of much discussion.

Criminal defense lawyer and innocence reform activist Kevin Doyle has made the argument well regarding our need to promptly address and correct the causes of wrongful convictions -- that were estimated by Prof. D. Michael Risinger to occur at a rate of 3 to 5% in just the 1980’s era capital rape-murder cases.<sup>61</sup> Doyle cogently argues that if one (let alone 3 or 5) in every hundred commercial airline flights crashed, no one would trust that system or call that system a success.<sup>62</sup> We would be evaluating and making necessary changes. We need to be approaching these mistakes with the same sense of urgency the FAA responds to plane crashes.

Many have suggested the changes the need to be made quite soon. Like the economic recession revealing bad practices and Ponzi schemes, the DNA exonerations have exposed the bad identification practices leading to mistakes. These exonerations can only represent a fraction of the scope of wrongful convictions brought about by mistaken identifications.<sup>63</sup> If we do nothing, the mistakes will continue to be made. Many crimes leave behind no DNA, so our ability to avert or identify those mistakes by DNA is limited. But as we continue testing prisoners after conviction and begin to perform DNA testing as a standard part of pre-trial police investigative practices, the number of DNA

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<sup>61</sup> D. Michael Risinger, “Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate”, 97 *J. Crim.L. & Criminology* 761, 762, 779 (2007). Prof. Risinger suspects the wrongful conviction rate for other interpersonal violence crimes may be at least as high as that figure, but more study is needed. *Id.* at 788, and see 780-788 for discussion.

<sup>62</sup> See *id.*, at 791.

<sup>63</sup> Wells and Quinlivan, *supra* note 43, at 2.

exonerations will begin to fall, and there will be less exposure and attention to these systemic flaws. We may well be at high point of that exposure now, with eyewitness identification mistakes and research capturing the everyday reader and television watcher.<sup>64</sup> But as media attention subsides with fewer exonerations, the political will to make the needed changes may diminish,<sup>65</sup> so a ‘reform now’ movement is underway.

Change can begin of course with defense attorneys filing motions to compel the use of best practices in individual cases. But though these motions do help to educate judges on the issues, they seem to be too-little, too-late if we are to effect systemic change.

Prof. Sandra Guerra Thompson has focused on costs. She finds that almost 10 years after the NIJ Report, there is “not yet any fundamental change in the vast majority of law enforcement agencies,” that most will not make these changes on their own as “the police culture... resists change,” and there are concerns “the new procedures will result in a loss of valuable evidence,” and about the “training, equipment, personnel and administrative costs” involved in reform.<sup>66</sup> She concludes legislative action is the only practical way to achieve uniform success, and any statutory action “should be implemented with few exceptions for practicability concerns and with serious

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<sup>64</sup> Last month, feature stories detailing eyewitness identification research/reforms in Gary Wells and Deah Quinlivan’s recent article, *supra* note 43, appeared in Newsweek [Dahlia Lithwick, “When Our Eyes Deceive Us” (March 23, 2009), <http://www.newsweek.com/id/189294>], and on CBS 60 Minutes, “Eyewitness; How Accurate is Visual Memory?” (March 8, 2009), [http://www.cbsnews.com/stories/2009/03/06/60minutes/main4848039.shtml?source=related\\_story](http://www.cbsnews.com/stories/2009/03/06/60minutes/main4848039.shtml?source=related_story), and “How Reliable Are Alibis?” (March 11, 2009), [http://www.cbsnews.com/video/watch/?id=4860413n%3fsource=search\\_video](http://www.cbsnews.com/video/watch/?id=4860413n%3fsource=search_video), <http://www.cbsnews.com/stories/2009/03/11/60minutes/main4859708.shtml>.

<sup>65</sup> Thompson, *supra* note 55, at 39.

<sup>66</sup> Thompson, *supra* note 55, at 56-57. See also Katherine Kruse, “Instituting Innocence Reform: Wisconsin’s New Governance Experiment,” 2006 Wis. L. Rev. 645, 687-689 (2006).

consequences for failures to follow the procedures.”<sup>67</sup> Her 2008 article urged providing data to the legislatures on the financial impact of all proposals if the reforms are to have a reasonable chance at adoption,<sup>68</sup> and then discussed the relative costs of varying reform measures.<sup>69</sup> Though Prof. Thompson suggested it was “probably unnecessary to estimate the cost of additional crimes or the costs to the wrongly imprisoned,”<sup>70</sup> it seems to this

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<sup>67</sup> *Id.*, at 39 and 57. The need for strong enforcement measures with regard to any procedures devised is well-illustrated by Britain’s experience with the Home Office’s 1969 Circular on Identification Parades, the contents of which are described *supra* note 37. As Peter Hain writes in his book describing the miscarriages of justice that occurred thereafter,

Had these rules been universally observed, many of the subsequent cases of mistaken identity arising from procedural defects would almost certainly have been avoided. As it was, the Home Office had missed the point by failing to make any effective provision to enforce the rules.... The 1969 rules were prefaced with the gentle warning that failure to observe them might result in judges questioning the validity of the evidence obtained. In the light of the courts’ past record of turning a blind eye to the problems of identification, the Home Office warning was an unrealistic platitude.... The rules were not technically law, and therefore not an enforceable right.... Whether a subject undergoing identification was granted his rights, or even informed of them, depended largely on the discretion and goodwill of the police, there was no statutory force behind the parade rules.... Many of the mistaken identity cases which inevitably continued to occur after the 1969 rules revealed that, before making an identification, witnesses already knew or guessed which member of the parade was the police suspect.

Hain, *supra* note 37 at 132-133. He added “the Home Office rules state that a witness’s uncertainty should be recorded, but often such details are ignored.” *Id.*, at 146.

Peter Hain’s book compiles compelling stories of Britain’s wrongly identified, a sad saga not helped along by the failure to effectively enforce the Home Office’s rules. See, *id.* at 132-138. Brandon and Davies’ equally compelling work Wrongful Imprisonment, *supra* note 37, references transcripts and the then extant empirical studies in memory to examine misidentification, *id.* at 24-46, and makes a similarly fine analysis of other causes of wrongful imprisonments in Britain, along with recommendations regarding additional enforcement measures, those regarding misidentification to be discussed later herein.

Enforcement measures have improved in Britain. Practice under Britain’s 1984 Police and Criminal Evidence Act and the later Criminal Justice and Public Order Act 1994 has included the possibility of disciplinary action against officers breaching its provisions, and exclusion of identification evidence. See e.g., *R. v. Graham*, Crim. L. R. 212, C.A. (1994) [not conducting an identification parade when identity was at issue required reversal].

<sup>68</sup> Prof. Thompson urged reformers seek help from public policy research centers at universities to perform the cost analyses needed by legislators. *Id.* at 61.

<sup>69</sup> *Id.* at 57-63. Minimal cost categories were witness instructions, double blind procedures, preparation of photospreads with adequate foils, where there would be some costs for preparation and additional training. *Id.* at 59. (Some have suggested that the double blind procedure may also involve additional personnel making this measure possibly infeasible in small counties. Kruse, 2006 Wis. L. Rev., *supra* note 66, at 687.) Prof. Thompson suggested costs may increase substantially with using video equipment to document the procedure, but this is less burdensome than it would have been previously. *Id.* at 60.

<sup>70</sup> *Id.* at 61.

author that the costs of adopting reforms must be weighed against the significant costs of doing nothing. Continuing on our present wrongful convictions course permits more criminal acts to be committed by the actual perpetrator, requires us to compensate the innocent who were wrongly incarcerated,<sup>71</sup> and also suffer the diminution of trust in our criminal justice system. Precise cost estimates, it is true, may not be necessary. But that trust alone is priceless.<sup>72</sup>

Like Prof. Thompson, Prof. D. Michael Risinger agrees that cost is a factor, but he addresses it through a “reground moral lens”,<sup>73</sup> rather than in strict monetary terms. In a recent article, Prof. Risinger proposes a “Reform Ratio” to determine when a particular reform would be cost-prohibitive:

Any wrongful conviction that can be corrected or avoided without allowing more than one or two perpetrators of similar crimes to escape ought to be corrected or avoided; in addition system alterations (reforms, if you will) that there is good reason to believe will accomplish this ought to be embraced.<sup>74</sup>

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<sup>71</sup> Though fiscal pressures on states and counties are acute given the current economic recession, and one district attorney office has threatened bankruptcy in the wake of a 14 million dollar judgment for Brady violations, see “Orleans Parish DA’s Office Faces Bankruptcy,” MSNBC News, Jan. 8, 2009, we do not yet compensate those wrongly imprisoned at a reasonable rate, or provide adequate support services upon their release. See Adele Bernhard, “Justice Still Fails; A Review of Recent Efforts to Compensate Individuals Who have Been Unjustly Convicted and Later Exonerated, 52 Drake. L. Rev. 703 (2004). Since 2004, Connecticut, Florida, Louisiana, Missouri, Texas, Utah, and Vermont, have enacted or amended their statutes to make some improvements. Prof. Adele Bernhard, “Table – When Justice Fails: Indemnification for Unjust Conviction” (August 11, 2008), distributed at her presentation at the AALS Annual Meeting in San Diego in early January 2009 [copy on file with the author]. However, much more work needs to be done in this area. See the recommendations for compensation awards identified by the ABA in its Report, supra note 35, at 109-110. The recent decision in *Van de Kamp, et. al. v. Goldstein*, \_\_\_ U.S. \_\_\_, 129 S.Ct. 855 (January 26, 2009), involving a wrongful incarceration of 24 years duration, does not improve this situation. The Court there held that prosecutors were absolutely immune from civil damage actions under 42 U.S.C. §1983 for failing to properly train or supervise prosecutors regarding disclosure of impeachment material or establish an information system containing potential impeachment material regarding informants. Id.

<sup>72</sup> “The benefits of avoiding wrongful convictions, providing more accurate identifications, and allowing prosecutors to tell the jury that an identification was scientifically sound, are mostly incalculable.” Thompson, supra note 55, at 60, referencing The Justice Project.

<sup>73</sup> Risinger, supra note 61 at 799.

<sup>74</sup> Id. at 797.

Under that analysis, blind testing protocols in forensic science and when administering line-ups and photo-spreads are “cost-free proposals, presenting no risk of losing any defensible convictions of the guilty”.<sup>75</sup> Prof. Risinger hopes that “with hard [wrongful conviction rate] numbers, and a reground moral lens [his Reform Ratio],” decision-makers will yet be persuaded to make these reforms.<sup>76</sup>

Other scholars agree that cost is a factor, but would go about achieving reforms differently, from police agencies up, rather than the legislature down. Prof. Katherine Kruse lauds Wisconsin’s 2005 legislation<sup>77</sup> as a governance experiment that produced “a breathtaking course of reform” in the areas of misidentification and false confessions.<sup>78</sup> Viewing the challenge as “how to embed proposed reforms within institutional structures that will sustain them over time,” she champions the Wisconsin experience where the “content of police practice was neither legislatively nor judicially dictated to law enforcement agencies”.<sup>79</sup> Instead, a “democratic experimentalism” legislatively delegated rulemaking authority to local police agencies, thereby giving them a stake in the problem-solving process and creating an institutional structure to make reform an ongoing process.<sup>80</sup>

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<sup>75</sup> Id. As there seems to be differing perspectives on the question of whether sequential lineups may create a loss in correct identifications and to what extent that may occur, see e.g., the ABA Report, *supra* note 35 at 34 (noting one researcher has found a fifteen percent loss over that experienced with simultaneous lineup procedures), it is likely too soon to assess whether sequential lineups would meet Prof. Risinger’s Reform Ratio. Once completed, the AJS EWID study should help with that evaluation.

<sup>76</sup> Id. at 799.

<sup>77</sup> WI Stat. 175.50 (2005).

<sup>78</sup> Kruse, *supra* note 66 at 646.

<sup>79</sup> Id. at 646, 647-648.

<sup>80</sup> Id. at 649-650.

The Wisconsin statute mandates local law enforcement agencies develop written policies for eyewitness identification in light of the evolving best practices from social science, and conduct a biennial evaluation of these policies.<sup>81</sup> The Wisconsin courts then back-up the agency policies by excluding testimony relating to the out-of-court identification procedure when the policy was not followed, and can also compare policies to possibly hold a substandard policy to be itself unnecessarily suggestive.<sup>82</sup>

Prof. Kruse credits the Innocence Project network as a fine partnership among academics, litigators and policy makers that can effectively combine theory, practice, and policy to achieve reform, particularly when, as in Wisconsin, a high profile exoneration occurs and all the state's stakeholders are amenable to problem-solving in face-to-face meetings.<sup>83</sup> Being in a collective problem-solving mode rather than an adversarial one litigating constitutional suppression issues increases the likelihood that reforms will be adopted.<sup>84</sup>

She suggests a state agency take the role of coordinating information regarding agency policies and limit access to that data while still allowing criminal defense lawyers

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<sup>81</sup> Id. at 685, referencing WI Stat. 175.50 (2005).

<sup>82</sup> Id. at 690, referencing *Wisconsin v. Dubose*, 285 Wis.2d 143, 699 N.W.2d 582 (2005) In *Dubose*, the Court referenced social science research and held, based on the state constitution, that evidence of a showup will not be admissible unless, based on the totality of the circumstances, the showup was necessary, and that a showup will not be necessary unless the police lacked probable cause to make an arrest, or, as a result of other exigent circumstances, could not have conducted a lineup or photo array; and further, directed that instructions be given to the witness, and that the suspect be shown to the witness only once. Id., 285 Wis.2d at 162, 166-168, 699 N.W.2d at 591-592, 594-596.

<sup>83</sup> Id. at 696-697, 703-717.

<sup>84</sup> Id. at 721-727.

and social science researchers access as agency policies should be revisable in light of experience.<sup>85</sup>

Prof. Thompson and Prof. Kruse pursue slightly differing adoption and implementation methods. Prof. Thompson contends that police departments will not make the recommended changes on their own<sup>86</sup> and that the legislature should direct the particular procedures to be used, not merely require written policies be adopted at the local level<sup>87</sup> Thus far, several states seem more comfortable with the latter approach, but the key distinction among them is whether the legislature has directed the adoption of “best practices” and then permitted what may be divergent implementation at the local level.<sup>88</sup> Wisconsin has, and Prof. Kruse suggests this model.

If, as in Wisconsin and to a lesser extent Maryland, the legislature does direct that local agencies adopt written policies encompassing “best practices” without specifying the particulars thereof, and this is a more palatable path to reform for legislatures, then this at least engages the reform process, which is a significant step. Prof. Thompson has agreed that the process of reform must be an evolving one in any event, allowing police departments to incorporate advances arrived at through improved technology or greater social science research.<sup>89</sup> So though there may be a lag time (or grace period, depending

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<sup>85</sup> Id. at 728-732.

<sup>86</sup> Thompson, *supra* note 55 at 57.

<sup>87</sup> Id. at 62.

<sup>88</sup> Only the North Carolina legislature required double blind sequential procedures. The Virginia legislature simply required written policies, with no direction as to their content. Id. The Wisconsin legislature directed written policies using best practices. Id. However, Maryland directed written policies consistent only with the Department of Justice, limiting and at this point excluding blind, sequential, and recording practices. Id. West Virginia requires written instructions, a confidence statement, and a written record, but it is unclear whether other practices will be mandated when a task force returns its recommendations. See *infra* note 57.

<sup>89</sup> Thompson, *supra* note 55 at 55.

on one's perspective), while best practices are identified and adopted, the process of reform is at least underway when the general "best practices" directive is given. With legislatures, starting can be hard to achieve. Thus, the Innocence Project's present stance of endorsing sequential lineups while excluding them from their reform package is a wise and pragmatic approach. If general directives to adopt best practices can make reforms happen, then that tactic is worthy of support.

Another helpful tactic is to present a comprehensive reform package that includes both averting misidentifications, false confessions, and preserving DNA evidence. There appears to be a greater consensus among police agencies and others regarding the preservation of evidence and the videotaping of interrogations than there is for some eyewitness identification reform measures.<sup>90</sup>

Finally, it may be helpful for legislators to begin to think of eyewitness identification evidence in terms commonly associated with trace evidence. Years ago, researcher Gary Wells made this analogy: "memory is a form of trace evidence, like blood or semen or hair, except the trace exists in the witness' head. How you go about collecting that evidence and preserving it and analyzing it is absolutely vital."<sup>91</sup> The recent report of the National Academy of Sciences<sup>92</sup> did not address the infirmities in this area of evidence collection, but the concerns the NAS identified are clearly analogous, and its recommendations are transferable to this science. Thus, when developing the

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<sup>90</sup> See ABA Report, *supra* note 35, at 16-18, 21-22.

<sup>91</sup> D.W. Miller, *Looking Askance at Eyewitness Testimony in New Jersey*, *Chronicle of Higher Education*, Feb. 25, 2000.

<sup>92</sup> National Academy of Science, "Strengthening Forensic Science in the United States: A Path Forward", released Feb. 18, 2009, hereinafter NAS Report, prepublication copy available at [http://www.nap.edu/openbook.php?record\\_id=12589](http://www.nap.edu/openbook.php?record_id=12589); news summary at <http://www8.nationalacademies.org/onpinews/newsitem.aspx?RecordID=12589>.

standard operating procedures to minimize potential bias and sources of human error, proficiency testing, accreditation, routine quality control, improved education and training practices recommended by the NAS,<sup>93</sup> a legislature could be urged to look to the same considerations for eyewitness identification procedures.<sup>94</sup>

Indeed, improving eyewitness identification procedures may be more critical. When a forensic test is poorly done, there is usually material remaining, and one can retest. But when eyewitness identification is suggestively and unreliably conducted, the eyewitness' memory may be so tainted that there is no ability to reliably retest.<sup>95</sup> The memory is in a sense gone - there may not be a second chance to do it right in this area of trace evidence. We have to do it right the first time.

That latter point does suggest that implementation of reforms should be prompt, and that the pragmatist's position of 'lay the foundation with written guidelines requiring best practices and then persist and persevere from there' is a mistake, even if it is the

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<sup>93</sup>Id.

<sup>94</sup> Gary Wells and Deah Quinlivan make a similar point in their recent article, supra note 43 at 24, urging court attention and assertiveness: "Today, police carry out very complex evidence collection procedures with physical evidence such as blood, hair, and fiber that have to conform to precise protocols and careful documentation. Clearly, police would be capable of carrying out careful non-suggestive protocols with eyewitness identification evidence as well if courts were more assertive in demanding it."

Interestingly, some have tried to argue (without much success) that the lineup and photo array eyewitness identification type-practices should be transferred to the identification of inanimate objects, such as cars or instrumentalities of the crime. See the cases collected in New Jersey v. Delgado, 188 N.J. 48, 66-67, 902 A.2d 888, 898-899 (2006), and noting perhaps "in a rare and extreme case, the degree of suggestiveness of an identification procedure concerning an inanimate object might be so great as to contravene due process rights", quoting Commonwealth v. Spann, 383 Mass. 142, 418 N.E.2d 328, 332 (Mass. 1981).

<sup>95</sup> See e.g., Gary L. Wells and Amy L. Bradfield, "Good, You Identified the Suspect: Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience", 83 *Journal of Applied Psychology* 360-376 (1998); Gary L. Wells and Amy L. Bradfield, "Distortions in Eyewitness Recollections; Can the Postidentification-Feedback Effect Be Moderated", 10 *Psychological Science* 38-144 (1999).

approach more acceptable to legislators who may think the top-down approach is ‘too much, too soon’.

I respect that desire for a quick fix. But with this window only being open a short while, it is important to gather all the legislators and other decision-makers one can now, and together make sure that window will remain open to make the reforms and continue making them, even as the window brings us fresh air in the form of new research. So I am drawn to Profs. Kruse and Risinger’s views, and would be content with passing the required adoption of unspecified best practices, if that is what it takes to keep the momentum of reform.

### **Reforming the Law Surrounding Eyewitness Identification Practices**

Whether we are successful in reforming identification practices, or are left to the current less reliable means that significantly contribute to mistaken convictions, we will still be in need of enforcement and protective legal measures.<sup>96</sup> Some presently exist, but nearly everyone agrees they are ineffectual. Simply witness our witness identification mistakes.

So what do we have, and what should we be seeking? Educating jurors through admission of expert testimony on eyewitness identification practices and reliability, and through jury instructions if this evidence is admitted, is minimal protection, but still hard to come by. Much attention, including mine, has been given to expanding the exclusionary rule so unreliable evidence is never admitted. Recently, I and others have suggested excluding death, instead of merely excluding evidence, as a means of

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<sup>96</sup> The British experience, with the Home Office having written rules for identification parades in 1969, but failing to provide any effective enforcement for many years, serves as a gentle reminder. See Hain *supra* note 37, at 132-164, and note 64, *infra*.

encouraging the adoption of better practices, and/or as simply a protective measure against fatal mistaken convictions. Others have suggested corroboration requirements to obtain any kind of conviction, or specialized appeal and post-conviction remedies that may more readily permit the un-doing of a potentially wrongful conviction. Each of these measures has considerable merit and a combination of many would no doubt serve our goal of averting mistaken convictions due to misidentification.

### *Admitting expert testimony*

Judges are still reluctant to admit expert testimony on the reliability of eyewitness testimony. A 2006 article in *Jurimetrics* summarized the present state of admissibility practices among the states as eleven requiring admission in limited circumstances (often when a stranger identification is not corroborated and there is a significant time lapse between the crime and procedure), five that totally exclude such evidence (including Nebraska in that camp), and the other states lying somewhere between, often under an abuse of discretion standard.<sup>97</sup>

The *Jurimetrics* authors challenge the oft-relied-on rationale for exclusion that ‘there is no need for expert testimony because there is evidence corroborating the eyewitness identification’, urging it violates due process<sup>98</sup> and citing the 2004 *Crawford v. Washington* decision.<sup>99</sup> We now have the unanimous 2006 decision in *Holmes v. South Carolina*<sup>100</sup> to strengthen that due process argument. In *Holmes*, the Court struck down

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<sup>97</sup> Richard S. Schmechel, Timothy P. O’Toole, Catherine Easterly, Elizabeth Loftus, “Beyond the Ken? Testing Jurors’ Understanding of Eyewitness Reliability Evidence”, 46 *Jurimetrics* 177, 185-188 (Winter 2006).

<sup>98</sup>Id. at 188-190.

<sup>99</sup> 541 U.S. 34 (2004).

<sup>100</sup> 547 U.S. 319 (2006).

South Carolina's state evidentiary rule that the defendant "may not introduce proof of third-party guilt if the prosecution has introduced forensic evidence that, if believed, strongly supports a guilty verdict."<sup>101</sup> The Court found this was an arbitrary denial of an opportunity to defend against the state's charges:<sup>102</sup>

The true strength of the prosecution's proof cannot be assessed without considering challenges to the reliability of the prosecution's evidence. Just because the prosecution's evidence, *if credited*, would provide strong support for a guilty verdict, it does not follow that evidence of third-party guilty has only a weak logical connection to the central issues in the case....By evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt. Because the rule applied...did not heed this point, the rule is 'arbitrary'.<sup>103</sup>

Just as South Carolina could not rely on strong forensic evidence to bar defense evidence as supposedly weakly connected to the case, a state cannot rely on the fact that an eyewitness identification is corroborated to contend that its case is so strong that no challenge to the reliability of the prosecution's evidence can be made.<sup>104</sup>

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<sup>101</sup> Id. at 321.

<sup>102</sup> Id. at 331.

<sup>103</sup> Id. at 330-331.

<sup>104</sup> Though a few months later a closely-divided Supreme Court narrowly permitted Arizona to exclude psychiatric evidence of mental disease and diminished capacity short of insanity in *Clark v. Arizona*, 548 U.S. 735 (2006), this was within the context of a showing of an "undue risk of unfair prejudice, confusion of the issues, or potential to mislead the jury." Id. at 770. The defense there conceded that it was within the state's authority to require the defendant to meet a burden of proof of insanity to obtain an acquittal, id. at 771, a circumstance which is not present in identification cases where the state clearly maintains the burden of proof regarding identity beyond a reasonable doubt. Further, the view that controversies among experts regarding mental disease and capacity could mislead, and that exclusion would "avoid confusion and misunderstanding on the part of the jurors", id. at 779, is not present here. Courts have not relied on any such rationale in denying admissibility of this testimony. See Schmechel, et al, 46 *Jurimetrics*, at 188-193. Thus, while the reasons for requiring the evidence in *Clark* to be channeled and restricted were good enough to satisfy the standard of fundamental fairness that due process required there, id. at 779, that is not so with regard to excluding expert testimony on the reliability of eyewitness evidence

Further, the ‘corroborating evidence is there’ rationale is simply unworkable and fraught with danger. A trial court is not in a posture to make a decision about the strength of corroborating evidence “prior to hearing all the evidence and without a complete understanding of the case.”<sup>105</sup> Additionally, pretrial,

it is difficult for a trial court to determine whether corroborating evidence arose independently of the eyewitness identification. In a criminal investigation, evidence emerges from a dynamic context in which each item is affected by the establishment of other evidence. Knowledge of one eyewitness’ identification can raise a second person’s confidence in their identification, or lead police to use more suggestive interrogative tactics with other potential witnesses.<sup>106</sup>

The difficulty in ascertaining whether one has found truly independent corroborating evidence is a concern that will be addressed later in other contexts. But suffice to say that this rationale for excluding expert testimony suffers from constitutional, reliability, and practical concerns and should no longer be relied upon.

To the extent judges have oft-relied on a second rationale, that ‘the expert testimony on the reliability of eyewitness identification is ‘not beyond the ken’ or not helpful to the jury’<sup>107</sup>, this is capably refuted in the *Jurimetrics* article by an empirical study demonstrating that eyewitness research findings are not known to jurors,<sup>108</sup> and by

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<sup>105</sup> Schmechel, et al., 46 *Jurimetrics*, at 189.

<sup>106</sup> *Id.* (The authors cite Kirk Bloodworth’s case as an example of this phenomenon. Another is William O’Dell Harris’ saga, as described in George Castelle & Elizabeth Loftus, “Misinformation”, in *Wrongly Convicted: Perspectives on Failed Justice* (Saundra D. Westervelt and John A. Humphrey editors, Rutgers Univ. Press 2005), pp. 21-23. I would also add Ron Williamson and the other defendants in John Grisham’s *The Innocent Man* (Bennington Press 2006).

<sup>107</sup> *Id.*, at 191-193.

<sup>108</sup> *Id.* at 193-205. [“As an empirical matter, the PDS poll shows that significant numbers of jurors (often substantial majorities) do not understand concepts like weapon focus, the effects of stress, the tendency of witnesses to overestimate exposure time, and the lack of meaningful correlation between witness’ stated confidence and accuracy in making an identification. Jurors also place unwarranted stock in the eyewitness abilities of police officers, they overestimate the reliability of cross-racial identification, and they have

other trial simulation studies finding such testimony assists jurors in evaluating eyewitness testimony.<sup>109</sup>

The ABA Report speaks to allowing expert testimony where appropriate for an individual case.<sup>110</sup> Expert testimony should clearly be permitted in all cases where identity is a central issue in the case and there is little or no other independent evidence of guilt. It should likewise be permitted when identity is a central issue, and a showup has been conducted<sup>111</sup>, and/or when juror preconceptions regarding the specific circumstances surrounding the identification are significantly contradicted by generally accepted empirical research findings.

***Jury instructions tailored to the needs of the case***

In the early 70's, the DC Circuit determined in the *Telfaire* case that a cautionary jury instruction regarding eyewitness identification testimony may be appropriate in certain cases.<sup>112</sup> Since then, other instructions have come to be viewed as more effective.<sup>113</sup> The ABA Report urges that:

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minimal understanding of how police procedures can affect the accuracy of an eyewitness identification.” Id. at 204.]

<sup>109</sup> ABA Report, supra note 35, at 42, citing multiple studies.

<sup>110</sup> Id. The ABA Report references state practices, at 42, and recommends that jurisdictions adopt the following principle: “Courts should have the discretion, where appropriate for an individual case, to allow a properly qualified expert to testify both pretrial and at trial on the factors affecting eyewitness accuracy.” Id. at 24.

<sup>111</sup> See Amy Luria, “Showup Identifications: A Comprehensive Overview of the Problems and a Discussion of Necessary Changes”, 86 Neb. L. Rev. 515, 549-551 (2008) [“[C]ourts should regularly permit the use of expert testimony pertaining to eyewitness identifications, especially in the context of showup identifications, given the lax rules of admissibility for such identifications, and, more importantly, jurors’ propensity to believe such identifications.”]

<sup>112</sup> *United States v. Telfaire*, 469 F.2d 52,558-559 (DC Cir. 1972).

<sup>113</sup> See e.g., Edith Greene, “Eyewitness Testimony and the Use of Cautionary Instructions,” 8 U. Bridgeport L. Rev. 15 (1987); the revised *Telfaire* instruction in Edith Greene, “Judge’s Instruction on Eyewitness

Whenever identity is a central issue in a case tried before a jury, courts should consider exercising their discretion to use a specific instruction, tailored to the needs of the individual case, explaining the factors to be considered in gauging the accuracy of the identification.<sup>114</sup>

Though jury instructions are not looked on by the ABA as particularly effective, absent the adoption of other reforms, they could be of some benefit on areas in which there is widespread scientific consensus.<sup>115</sup>

In a recent article, Prof. Gary Wells likewise notes the deficiencies in the Telfaire instruction, but credits the possibility that instructions more tailored to the case could be helpful to the jury and serve as a deterrent to suggestive practices in the future:

So, for instance, if the court found that a particular feature of the identification procedure was suggestive, the jury would be told about the suggestive feature and instructed that the suggestive feature can be considered in evaluating the likely accuracy of the eyewitness. If post-identification feedback was given to the eyewitness before securing a certainty statement, for instance, the jury might be instructed “Research has shown that suggestions to an eyewitness that they identified the ‘right’ person can lead them to recall that they were certain all along even if they were not. You can consider this as a possible factor in deciding whether the witness really was certain when she made her identification.”

Whether jury instructions of this sort will have much impact on the jury is an open question, but it is likely to serve a deterrent function because prosecutors, who are motivated to keep such instructions away from the jury, will likely help

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Testimony: Evaluation and Revision”, 18 J. Applied Soc. Psychol. 252, 252-276 (1988); and the “Wright instruction” devised in *People v. Wright*, 43 Cal.3d 399 (1987).

<sup>114</sup>ABA Report, supra note 35, at 24. For instance, the Connecticut Supreme Court has created an instruction dealing with the failure to warn a witness that the perpetrator may or may not be in the procedure, informing the jury this may increase the likelihood that the witness will select one even when the perpetrator is not present, and that “this information is not intended to direct you to give more or less weight to the eyewitness identification offered by the state, ... you may, however, take into account this information... in making that determination.” *Connecticut v. Ledbetter*, 275 Conn. 534, 579-580, 881 A.2d 290, 318-319 (2005). New Jersey has required instructions on the dangers of cross-racial identification, *State v. Cromedy*, 158 N.J. 112, 727 A.2d 457 (1999), and has developed standard instructions “in all eyewitness identification cases that eyewitness identification testimony requires close scrutiny and should not be accepted uncritically”, instructing the jury it “must critically analyze such testimony”, and that “a witness’ level of confidence standing alone may not be an indication of the reliability of the identification.” *New Jersey v. Romero*, 191 N.J. 59, 76, 922 A.2d 693, 703 (2007).

<sup>115</sup> Id. at 44.

bring pressure back on their police departments to avoid suggestive procedures in the future.<sup>116</sup>

North Carolina has gone somewhat further than simply tailoring the instruction to the problem area in the case that Prof. Wells and others have suggested. North Carolina mandates instructions that a jury “may consider credible evidence of non-compliance [with its statutorily required eyewitness identification practices] in determining the reliability of the eyewitness identification.”<sup>117</sup> This is another helpful enforcement mechanism for its required practices, and adds to the deterrent effect sought by calling attention to non-compliance. When coupled with the more specific instructions tailored to the case, it could be quite effective.

Jury instructions tailored to the case are thus a necessary part of reducing the risk of mistaken convictions based on eyewitness identification testimony. This is true from a standpoint of juror education, which should actually begin with voir dire and be carried throughout the case. This should include instructions at the opening of the case and immediately before an eyewitness testifies, as well as after and at the close of the case.<sup>118</sup> Instructions also provide an incremental deterrent benefit on police behaviors. If a state adopts written guidelines and eventually best practices, a non-compliance instruction going further than North Carolina’s would be quite appropriate. Jurors should be

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<sup>116</sup> Wells and Quinlivan, *supra* note 43, at 23.

<sup>117</sup> N.C. Gen. Stat. §15A-284.52(d)(3) (2007).

<sup>118</sup> See Sandra Guerra Thompson, “Beyond a Reasonable Doubt? Reconsidering Uncorroborated Eyewitness Testimony”, 41 U.C. Davis L. Rev. 1487, 1522 (2008). For a thorough discussion of jury education and the studies addressing the effectiveness of jury instructions and the timing of them, as well as a perspective on suggested reforms for Canadian courts to prevent wrongful conviction, see Lisa D. Dufraimont, “Regulating Unreliable Evidence: Can Evidence Rules Guide Juries and Prevent Wrongful Convictions?”, 33 Queen’s L. J. 261, 298-309 (2008).

instructed they may infer or presume the identification is less reliable due to non-compliance.<sup>119</sup>

### ***Excluding Identification Testimony***

In my 2002 article, I described the Supreme Court's creation of the exclusionary rules attaching to eyewitness identification practice,<sup>120</sup> and in particular, the due process exclusionary rule developed in the capital case of *Stovall v. Denno*<sup>121</sup> in 1967, and culminating in the non-capital case of *Manson v. Brathwaite* in 1977.<sup>122</sup>

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<sup>119</sup> This would go further than the North Carolina or Connecticut instructions, see supra note 114. However, investigative mistakes "hurt the credibility of the Government's witnesses." *U.S. v. Howell*, 231 F.3d 615, 625 (9<sup>th</sup> Cir. 2000). A loss or destruction of memory evidence may properly become the basis of an adverse inference or presumption instruction, just as it has in other areas of lost evidence. See generally *Arizona v. Youngblood*, 488 U.S. 51, 59-60 (1988) [J. Stevens, concurring, noting instruction given below that permitted an inference against the state for loss or destruction of evidence (and note as an aside, Youngblood was later exonerated by DNA)]; *People v. Wimberly*, 5 Cal.4th 773, 793 (Ca. 1992); *State v. Maiccia*, 355 N.W.2d 256, 259 (Iowa 1984); *State v. Fulminante*, 975 P.2d 75, 93 (Ariz. 1999). See also *Kyles v. Whitley*, 514 U.S. 419, 446 & n. 15 (1995) [jury instruction regarding police failure to use those procedures that have been proven to decrease the risk of error].

<sup>120</sup> Koosed, Innocence Protection, supra note 4, 63 Ohio St. L. J., at 287-298. Since 1967, the Supreme Court has overseen procedures in an effort to reduce unreliability and the likelihood of convicting the innocent. Motions to suppress or exclude possibly mistaken eyewitness identification testimony rely on varying constitutional arguments. If an illegal detention or arrest violating the defendant's Fourth Amendment prohibition against unreasonable seizure preceded the identification procedure, testimony regarding the out-of-court procedure will be excluded as a fruit of the poisonous tree, and possibly also the in-court identification. *United States v. Crews*, 445 U.S. 463 (1980). Lineup participants who are ordered to repeat the words used by the culprit during the crime are not denied their Fifth Amendment privilege against self-incrimination as this is not a testimonial communication. *United States v. Wade*, 388 U.S. 218 (1967). However, the Sixth Amendment right to assistance of counsel does attach when a defendant appears in a lineup after the criminal prosecution has begun, and denial of counsel will require exclusion of some identification testimony. *Id.* When suggestive procedures of any type create a substantial likelihood of misidentification, due process will require exclusion of all identification testimony from the witness. *Manson v. Brathwaite*, 432 U.S. 98 (1977).

<sup>121</sup> 388 U.S. 293 (1967). Such a rule was also recommended in Britain. See e.g., Chairman Rt. Hon. Lord Patrick Devlin's "Report to the Secretary of State for the Home Department of the Departmental Committee on Evidence of Identification in Criminal Cases" (1976), at 151, para. 8.8 (Recommendation 8.8 – "We recommend a statutory provision that a witness who has been shown a photograph of the accused shall not be permitted to identify him in court unless the judge, having regard to the Rules, is satisfied that the showing was reasonably necessary for the purposes of the investigation."), [see Williams, "Evidence of Identification: The Devlin Report", Cr. L. Rev. 407-422 (1976)].

<sup>122</sup> 432 U.S. 98 (1977).

In *Manson*, the Court set forth a due process test for the admission of eyewitness identification testimony that remains the Court’s approach today. There, police investigators had presented an undercover police officer witness with a single photo of their suspect, rather than presenting several photos of varying individuals to him in a photo array. Though the single photo identification practice was unnecessarily suggestive, the *Manson* Court majority refused to exclude the undercover officer’s testimony about his out-of-court suggestive photographic identification of the defendant, nor his in-court identification of the defendant at trial. The lower appellate court had interpreted earlier due process rulings in *Stovall v. Denno* and *Neil v. Biggers*<sup>123</sup> to create a *per se* rule that required excluding testimony that the witness had previously identified the defendant in an unnecessarily suggestive procedure, thus discarding this testimony about an identification that was, by definition, suspect in its reliability because it had been arrived at through an unnecessarily suggestive procedure, and thereby encouraging the use of a more reliable means of identification when it was available.<sup>124</sup> But the *Manson* majority rejected this *per se* exclusionary rule of some identification testimony as too severe.<sup>125</sup> Instead, a witness could testify about the out-of-court identification and also make an in-court identification, unless, under the totality of the circumstances, there is a “very substantial likelihood of misidentification.”<sup>126</sup> This likelihood was to be determined by weighing the corrupting effect of the suggestive identification procedure against five factors relating to reliability: the witness’ opportunity to observe, degree of

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<sup>123</sup> 409 U.S. 188 (1972).

<sup>124</sup> Koosed, *supra* note 4, 63 Ohio St. L. J., at 293-294.

<sup>125</sup> *Manson*, *supra* note 121, 432 U.S., at 112-113.

<sup>126</sup> *Id.* at 116.

attention, level of certainty, the accuracy of the prior description and the time lapse between the crime and the identification procedure.<sup>127</sup>

The *Manson* dissenters argued *Stovall* had held that due process was violated simply by conducting an unnecessarily suggestive procedure, and that testimony about the out-of-court identification had to be excluded as a direct fruit thereof.<sup>128</sup> They urged the per se rule was needed to provide a greater deterrent of unreliable procedures. That debate continues today, though the United States Supreme Court itself has not revisited any aspect of the matter for 30 years.

My 2002 article argued that improved identification procedures and a tighter exclusionary rule were necessary in capital cases if we were to avoid executing an innocent person. I urged legislative adoption of best eyewitness identification practices (then based on the AP/LS and NIJ standards), and a return to the *Stovall* per se exclusionary rule standard when police were investigating an offense that is the subject of capital charges, that officers can reasonably expect may be the subject of capital charges, or a closely related offense thereto.<sup>129</sup> The *Stovall* exclusionary approach would apply when there was any impermissibly suggestive identification encounter, even if not actually planned or conducted by the police or prosecutors.<sup>130</sup> An in-court identification would be allowed only if the prosecution could prove by clear and convincing evidence

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<sup>127</sup> Id., at 114. These factors came from the *Neil v. Biggers* decision, 409 U.S., at 199.

<sup>128</sup> Id. at 120 (Marshall, J., dissenting).

<sup>129</sup> Koosed, *supra* note 4 at 310-311.

<sup>130</sup> Id. at 311, and 299-302 (discussing the possible suggestiveness in chance encounters that could also undermine reliability).

that the prior identification was not conducive to irreparable mistaken identification.<sup>131</sup>

The prosecution should prove the identification procedure was not conducive to irreparable mistaken identification with facts surrounding the incident itself, and could not resort to discrete corroborating or inadmissible evidence, or to unreliable inferences.<sup>132</sup> A preferred option, the article concluded, would be the exclusion of death itself -- a bar on seeking death when an unnecessarily suggestive identification procedure had been used – or at the least, instructing the jury to presume life in this setting to avoid a mistaken execution.<sup>133</sup>

I was not alone in my criticism of the Supreme Court’s due process exclusionary rule, and the drumbeat for change since then has been incessant.<sup>134</sup> Some states have already made changes by use of their state constitutions or supervisory powers.<sup>135</sup> Others

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<sup>131</sup> *Id.*, and 302-303 (discussing varying tests for admitting the in-court identification).

<sup>132</sup> *Id.* at 312, and 303-305 (discussing reliance on other evidence to show lack of mistake, including other witnesses’ identifications). In Manson, the Court had stated such corroborating evidence “plays no part in our analysis” of the identification’s admissibility or reliability. *Id.*, 432 U.S. at 116, and at 118, fn.\* (Stevens, J. concurring, agreeing evidence connecting the suspect with the crime could not be considered for purposes of assessing reliability or admissibility under the Neil test, but could be considered by an appellate court in assessing whether denial of a suppression motion was harmless error).

<sup>133</sup> *Id.* at 312-313, and 313, n. 244.

<sup>134</sup> See e.g., Luria, *supra* note 111 at 534-535 (discussing differing interpretations and highly subjective fact intensive determinations under the rule), 543-544 (urging a return to Stovall if a showup was used without exigency or close temporal proximity to the witnessing event); Timothy P. O’Toole & Giovanni Shay, “Manson v. Brathwaite Revisited: Toward a New Rule of Decision for Due Process Challenges to Eyewitness Identification Procedures”, 41 Val. U. L. Rev. 109 (2006); Wells and Quinlivan, *supra* note 43.

<sup>135</sup> Johnson v. Massachusetts, 420 Mass. 458, 465-466, 650 N.E.2d 1257 (1995) [adopts Stovall]; People v. Adams, 53 N.Y.2d 241, 423 N.E.2d 379 (1981) [same]; Utah v. Ramirez, 817 P.2d 774, 781 (Utah 1991) [altering the “reliability factors” to use: the witness’ opportunity to view the actor during the event, the witness’ degree of attention to the actor at the time of the event, the witness’ capacity to observe the event, including his or her physical and mental acuity, whether the identification was spontaneous and remained consistent thereafter, whether it was the product of suggestion, and the nature of the event being observed and the likelihood that the witness would perceive, remember, and relate it correctly, including in the latter whether the event was an ordinary one in the mind of an observer and whether the race of the actor was the same as the race of the observer]; Kansas v. Hunt, 275 Kan. 811, 69 P.3d 571, 576 (2003) [refines reliability factors to use those found in Utah v. Ramirez]; Wisconsin v. Dubose, 285 Wis. 2d 143, 148, 699 N.W.2d 582, 584-585 (2005) [finding strong support from its state constitution, declines per se

may be spurred to change by the excellent article by Gary Wells and Deah Quinlivan published in February, “Suggestive Identifications and the Supreme Court’s Reliability Test in Light of Eyewitness Science: Thirty Years Later.”<sup>136</sup> The article is a head-on social science assault on the Court’s present exclusionary rule test.

Wells and Quinlivan write that rather than deterring suggestive procedures, “*Manson* has had the unintended consequence of setting up conditions that create a positive incentive for police to use suggestive procedures.”<sup>137</sup> Though “courts seem to assume that a misidentification resulting from a suggestive procedure can somehow be corrected later by using a fair procedure,” the social science does not generally accept the idea this can somehow be erased.<sup>138</sup> Instead, the earlier procedure taints memory, replacing or blending it.<sup>139</sup> Though in theory a strong memory could be so reliable that it trumps weak suggestiveness, there are almost no cases this clear.<sup>140</sup> More troubling, the Court’s test does not attend to biasing post-identification feedback,<sup>141</sup> none of the five so-called reliability factors are unequivocally related to accuracy, and “three of the five

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exclusionary rule of Stovall, but an out of court showup is only admissible if it was necessary, and only necessary when the police lacked probable cause to make an arrest, or as a result of other exigent circumstances, police could not have conducted a lineup or photo array; Court also requires warning regarding culprit may or may not be in the lineup, and only one showing of the suspect. *Id.* at 168, 594.]; New Jersey v. Delgado, 188 N.J. 48, 51, 902 A.2d 888, 890 (2006) [requires, as a condition to the admissibility of out-of-court identification, that the police record, to the extent feasible, the dialogue between witnesses and police during an identification procedure].

<sup>136</sup> Wells and Quinlivan, *supra* note 43.

<sup>137</sup> *Id.*, at 5.

<sup>138</sup> *Id.* at 16.

<sup>139</sup> *Id.* at 17.

<sup>140</sup> *Id.* at 18.

<sup>141</sup> *Id.* at 17.

(certainty, view, and attention) are self-reports that are themselves products of suggestive procedures.”<sup>142</sup>

Wells and Quinlivan rightly state “for deterrence to work, the use of a suggestive procedure must lower the chances that the witness will receive a passing score in the second inquiry in *Manson*,” but, instead “the test actually raises the score.”<sup>143</sup> “As a result,

there is almost no threat of exclusion resulting from the use of suggestive procedures. In other words, the inflated certainty, statement of view, and statement of attention resulting from suggestive procedures effectively guards against exclusion, thereby undermining incentives to avoid suggestive procedures.”<sup>144</sup>

Worse, *Manson* may actually encourage suggestive procedures.

We believe a case can be made that the *Manson* approach not only undermines incentives to avoid suggestive procedures but also provides an incentive to use suggestive procedures. As any police officer knows, the ideal witness for purposes of obtaining a prosecution is one who is certain and who describes the witnessing conditions in a favorable light. If the *Manson* hearing is not going to result in the exclusion of the identification anyway, then why not use suggestive procedures to make sure that the witness not only picks the suspect but also expresses high certainty, reports an exaggeratedly good view, and claims to have paid close attention?<sup>145</sup>

Appreciating this “might appear cynical or accusatory”, the two respond:

We do not intend it to be so. Police are just people and people respond to contingencies and incentives, often without an explicit awareness of what they are doing or why they are doing it. A justice motive, resulting from a belief that they have the right person and need to help the witness along, might very well be behind the continued prevalence of suggestive procedures. But, as long as the *Manson* test continues to be applied the way it is today, there is no reason to

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<sup>142</sup> Id. at 18.

<sup>143</sup> Id. at 19.

<sup>144</sup> Id.

<sup>145</sup> Id.

expect the contingencies and incentives themselves to somehow reduce the use of suggestive identification procedures.<sup>146</sup>

Complicating this already inadequate test as conjured up by the Court is the failure of the lower courts to follow its very modest constraints, contend Wells and Quinlivan. Judges accept statements of certainty reflecting points after the identification procedure, rather than at the time of the identification procedure.<sup>147</sup> They consider descriptions given after the identification or after having viewed the suspect instead of those given before.<sup>148</sup>

When factors are weak, a stronger (or perceived stronger) factor can overcome and displace it.<sup>149</sup> The two suggest “perhaps the criteria are just too flexible to be meaningful.”<sup>150</sup>

In proposing alternatives to the present exclusionary rule, Wells and Quinlivan support the incentives of the per se exclusionary rule, but do not favor “a hard and fast version” because, they suggest, such a version would exclude all identification testimony from a witness whenever a suggestive procedure had occurred, and this would free the guilty even when suggestiveness is outweighed by the strength of the witness’ memory.<sup>151</sup>

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<sup>146</sup> Id.

<sup>147</sup> Id. at 20.

<sup>148</sup> Id.

<sup>149</sup> Id.

<sup>150</sup> Id.

<sup>151</sup> Id. at 22: “First, witnessing conditions can exist that would make the use of a suggestive procedure a moot consideration because the strength of the witness’ memory would outweigh the suggestiveness factors (recall our abduction example [where the witness spent 3 months with the unmasked culprit, at 9]). Clearly, per se exclusion in this particular situation would result in a guilty person going free.”

This is not cause for concern or putting aside the per se rule, however, because the version of the per se exclusionary rule as it was interpreted in cases following Stovall and as considered by the Court itself in Manson, was not so hard and fast, and did not involve excluding all identification evidence -- only testimony relating to the out-of-court identification was per se excluded.<sup>152</sup> An in-court identification could still be made if the prosecution proved the in-court identification was “reliable”, or that the pretrial identification procedure was not “conducive to irreparable mistaken identification,” or as framed in the *Manson* appellate court below, that there was no “substantial likelihood of irreparable mistaken identification” arising from the suggestive procedure.<sup>153</sup> Therefore, under this per se rule, if the strength of the witness’ memory did indeed outweigh the suggestiveness factors, the witness in Wells and Quinlivan’s example could still make an in-court identification and the defendant may well be convicted. Thus, though the two did not make this clear, it would appear that they would support the per se rule that was actually in use before the United States Supreme Court rejected it in Manson, the one I have advocated we return to.

The second concern Wells and Quinlivan posit is that the per se rule is limited to unnecessarily suggestive procedures, when the problems are there with any suggestive procedure, whether or not necessary.<sup>154</sup> It can be contended that the latter may not be

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<sup>152</sup> Manson, 432 U.S., at 110, fn. 10; see also Koosed, supra note 4 at 292-294, citing Brathwaite v. Manson, 527 F.3d 363, 366-371 (2d Cir. 1975), .

<sup>153</sup> *Id.*, 432 U.S., at 110, fn. 10 (allowing that the in-court identification is admissible under the per se rule if it is reliable); Koosed, supra note 4 at 292-294 (referencing courts looking to whether the out of court identification was conducive to irreparable mistaken identification); Brathwaite, 527 F.3d, at 370 (referencing no substantial likelihood of irreparable mistaken identification, quoting *Simmons v. United States*, 390 U.S. 377, 384 (1968).)

<sup>154</sup> Wells and Quinlivan, supra note 43, 33 Law & Hum. B., at 20-21.

what was intended in *Manson*, where the Court spoke only to weighing the “corrupting effect of the suggestive procedure” and did not focus at that point in the totality of the circumstances analysis on the necessary nature,<sup>155</sup> perhaps as it was less concerned with whether a more reliable procedure was available at that point. But this is how the test is often applied in the lower courts -- though some do not find the deterrence rationale determinative and instead look simply to suggestiveness and are willing to suppress though the identification may not have been the product of culpability on the part of the police.<sup>156</sup> As noted earlier, I have argued the exclusion should not be limited to police practices, and should apply to even chance encounters that are suggestive. Wells and Quinlivan, it appears, agree that the present rule is too limited in that respect.

Indeed, Wells and Quinlivan ultimately propose a shift-of-burden notion following a suggestive identification procedure, under which, much like mine, “the prosecution would have to make the case that the identification was reliable regardless of whether a suggestive procedure was necessary or unnecessary.”<sup>157</sup> It is unclear whether under their proposed alternative to *Manson*, the witness could testify as to both the out-of-court identification and an in-court identification if the prosecution meets its burden. Under the per se approach in the lower court in *Manson*, as noted earlier, the out-of-court identification would be excluded, while the in-court identification could come in under some circumstances.<sup>158</sup> Since the necessity aspect is being deleted, and it appears they may be perceiving the per se rule differently, it is likely Wells and Quinlivan intend this

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<sup>155</sup> *Manson*, 432 U.S., at 114, and see 117 (the failure to use another procedure was not one of constitutional dimension).

<sup>156</sup> See Koosed, *supra* note 4 at 299-302.

<sup>157</sup> Wells and Quinlivan, *supra* note 43 at 22.

<sup>158</sup> See text to and footnotes 152 and 153 above.

to be an all-or-nothing approach like the U.S. Supreme Court agreed to in *Manson*, where either both forms of identification come in or not. But my proposal remains use of the *Stovall* and *Manson* lower court approach, with exclusion of the out-of-court identification for deterrent purposes and to further avert mistake, at least in capital cases.

Wells and Quinlivan would bar the government from proving reliability by using “a witness’ certainty, view, or attention, unless it is demonstrably shown that these self-reports were reliable.”<sup>159</sup> A prosecutor must find evidence of reliability “that is independent of the suggestive procedure.”<sup>160</sup> This should pressure police to collect detailed statements from witnesses early in the investigative process and prior to the possibility of suggestiveness, a very helpful development.<sup>161</sup> It should also diminish suggestive practices because self-reporting factors cannot be used once a suggestive procedure has occurred.<sup>162</sup>

This position regarding evidence available to prove reliability is welcome in that it denies the ability to use self-reporting factors that do not really prove reliability. It is consistent with my own suggestion that the prosecution should not prove the identification procedure’s reliability by resorting to inadmissible evidence or unreliable inferences.<sup>163</sup>

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<sup>159</sup> Id.

<sup>160</sup> Id., at 22, 23.

<sup>161</sup> Id., at 22.

<sup>162</sup> Id. at 22-23.

<sup>163</sup> Koosed, *supra* note 4 at 312.

If by permitting evidence that is independent of the suggestive procedure this would allow extraneous corroborating evidence of guilt to prove reliability, then this would be inconsistent with the Court's view in *Manson* that such evidence plays no part in the analysis of admissibility.<sup>164</sup> However, the Court may have allowed such evidence in to show the harmlessness of a denial of suppression,<sup>165</sup> and perhaps the distinction is not really significant, unless it would impact on the deterrent effect, which it might. But still, the critical concern is avoiding mistake, and that the corroborating evidence in fact be independent. If their criteria are followed, there may be a lesser deterrent effect arising out of cases where guilt was clear, but at least there would not be the risk of mistake in that case. That is an acceptable trade-off.

It has been suggested that the exclusionary rule does not have much teeth because courts don't have the stomach for silencing a witness, especially a victim.<sup>166</sup> There may be some credence for this proposition. But if the evidence is reliable, the witness can still provide an in-court identification as noted; and if not, the witness should be heard on their other observations, but not on their identification. Courts need to be reminded that they cannot stomach, or afford (societally or economically), a wrongful conviction.

Blending the Wells and Quinlivan test with a per se exclusionary approach that excludes the testimony relating to the out-of-court identification procedure if an identification procedure was suggestive, but allows the in-court identification to be made if the prosecution proves it is based on independent evidence is very close to the original *Stovall* test, the one I advocated we should return to in 2002. Adding that the prosecution

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<sup>164</sup> See footnote 131, *infra*.

<sup>165</sup> *Id.*

<sup>166</sup> Thompson, *supra* note 118 at 1525.

cannot use self-reporting matters unless the prosecution demonstrates these are reliable is also consistent with that approach, and essential given what we now know from social science studies. Tightly construing the accuracy of the prior description factor so as to include only a truly prior description will also enhance reliability. All in all, this could be an ideal exclusionary rule formulation.

Though the United States Supreme Court may not be the most receptive court when it comes to social and other science evidence, they have had their moments. Their decisions in the capital cases of *Roper v. Simmons*<sup>167</sup> and *Atkins v. Virginia*<sup>168</sup> provide some indication they will look to science for relevant information. Additionally, the extended discussion in *Kansas v. Marsh*<sup>169</sup> suggests the four dissenters (Justices Souter, Stevens, Ginsburg and Breyer) are quite sensitive to DNA exonerations and the causes of wrongful capital convictions. To be sure, my concern rose when the Supreme Court recently ordered re-briefing in the pending *Montejo v. California*<sup>170</sup> on whether *Michigan v. Jackson*<sup>171</sup> should be overruled, given that its Sixth Amendment right to counsel exclusionary rule may well provide added protection against false confessions. However, the Court's new decision in *Corley v. United States*<sup>172</sup> rejecting an argument that

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<sup>167</sup> *Roper v. Simmons*, 543 U.S. 551, 568-570 (2005).

<sup>168</sup> *Atkins v. Virginia*, 536 U.S. 304, 318-321 (2002).

<sup>169</sup> *Kansas v. Marsh*, 548 U.S. 163 (2006), containing a dispute over exonerations and the risk of executing an innocent when the evidence at sentencing is left in equipoise, see 208-212 (Souter, J. dissenting), 185-199 (Scalia, J. concurring).

<sup>170</sup> *Montejo v. California*, \_\_\_ U.S. \_\_\_, 2009 WL 793514 (March 27, 2009).

<sup>171</sup> *Michigan v. Jackson*, 475 U.S. 625 (1986).

<sup>172</sup> *Corley v. United States*, \_\_\_ U.S. \_\_\_, 2009 WL 901513 (April 16, 2009).

Congress had abrogated the *McNabb-Mallory* confessions exclusionary rule<sup>173</sup> was encouraging, particularly where the court referenced “there is mounting empirical evidence that (custodial) pressures can induce a frighteningly high percentage of people to confess to crimes they never committed.”<sup>174</sup>

Perhaps the Court will soon be ready to address this eyewitness empirical evidence, at least in capital cases, and finally revise its due process identification evidence exclusionary rule. As the *Manson* test itself is a totality of the circumstances one, its own malleability may open it up to a tinkering or refining that allows empirical research to be added in to the equation. In any event, these issues should continue to be taken to the state courts and legislatures.<sup>175</sup> Exclusion should also be viewed as an appropriate remedy for breaching guidelines, even if no alteration of the due process exclusionary rule is ultimately made.<sup>176</sup>

Wells and Quinlivan proffer another more limited exclusionary rule approach which also has considerable merit. A court could consider limiting some testimony of the eyewitness, when outright exclusion is too extreme a remedy.<sup>177</sup>

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<sup>173</sup> *McNabb v. United States*, 318 U.S. 332 (1943) and *Mallory v. United States*, 354 U.S. 449 (1957) together require under the federal supervisory powers that a detained individual be taken before a magistrate within a reasonable time, and order exclusion of any confession obtained thereafter.

The Corley Court’s refusal to find *McNabb-Mallory* abrogated by 18 U.S.C. §3501 (1968) reassures that a similar provision which tried to overturn the exclusionary rules in identification cases, 18 U.S.C. §3502, would suffer a similar fate. See also *Koosed*, 63 Ohio St. L. J., at 298.

<sup>174</sup> *Corley*, supra note 172, at \*11.

<sup>175</sup> As earlier noted, some state courts have already done this and modified their exclusionary rules by means of state constitutions. See footnote 135, *infra*.

<sup>176</sup> See e.g., N.C. Gen. Stat. §15A-284.52(d)(1) (2007) (evidence of non-compliance shall be admissible in a suppression motion); *Brandon and Davies, Wrongful Imprisonment*, supra note 37, at 44 (urging exclusion of showup confrontation unless the witness previously knew the defendant); *Koosed*, supra note 4 at 310-311.

<sup>177</sup> *Wells and Quinlivan*, supra note 43 at 23.

Suppose, for instance, that the eyewitness received confirming feedback at the lineup and the certainty statement was taken *after* the feedback. A judge might rule that the witness could testify about the identification, but could not testify about his or her certainty. Likewise, suppose that an eyewitness gave a vague pre-lineup description of the culprit but began to give descriptions that are more detailed after the identification. A judge could rule that the witness can testify as to the pre-lineup description but not the post-lineup description. Alternatively, suppose that a witness made a tentative identification and then was shown a second lineup in which the only person in common was the defendant and positively identified him. A judge could rule that testimony regarding the initial tentative identification could be used at trial, but the second (more certain) identification could not become part of the testimony. Every case would be a different set of facts, but the point is that total exclusion is not the only option in some cases.<sup>178</sup>

Again, this may reflect a greater concern than is necessary here, as the per se rule is not so extreme. However, the suggestion of tailoring exclusion to the specific problem at hand is an inviting alternative if the blended per se exclusionary rule above is not adopted.

### ***Corroboration and Conviction/Execution Evidentiary Requirements***

Our quest for greater assurance against mistaken convictions and executions has led to an outpouring of proposals to ratchet-up the system's reliability. In a 2001 article I urged adopting the Model Penal Code 210.6 provision that barred the death penalty if the evidence did not foreclose all doubt about guilt.<sup>179</sup> My 2002 article argued for a tighter eyewitness identification rule, and preferably, excluding death when a suggestive identification procedure occurred to avert mistaken executions. At the time, I thought

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<sup>178</sup> Id.

<sup>179</sup> Koosed, "Averting Mistaken Executions by Adopting the Model Penal Code Exclusion of Death in the Presence of Lingering Doubt", 21 Northern Illinois Law Review 41 (2001) (also arguing, at the very least, for jury instructions permitting consideration of residual doubt about guilt as a mitigating circumstance).

these were necessary but rather unlikely reforms. However, recent scholarship and events have convinced me they are not outliers and that such reforms are truly possible.

To survey the scholarship first, suffice to say that requiring corroboration of eyewitness testimony to avoid mistakes is not a new idea, its roots can be found in ancient Talmudic texts.<sup>180</sup> In the 1976 “Report to the Secretary of State for the Home Department of the Departmental Committee on Evidence of Identification in Criminal Cases,” Lord Patrick Devlin conceded “the only way of diminishing the risk is by the erection of general safeguards which will inevitably increase the burden of proof.”<sup>181</sup> The Devlin Committee recommended a corroboration requirement:

We do however wish to ensure that in ordinary cases prosecutions are not brought on eye-witness evidence only and that, if brought, they will fail. We think that they ought to fail, since in our opinion it is only in exceptional cases that identification evidence is by itself sufficiently reliable to exclude a reasonable doubt about guilt. We recommend that the trial judge should be required by statute: a. to direct the jury that is not safe to convict upon eyewitness evidence unless the circumstances of the identification are exceptional or the eye-witness evidence is supported by substantial evidence of another sort; and b. to indicate to the jury the circumstances, if any, which they might regard as exceptional and the evidence, if any, which they might regard as supportive of the identification; and c. if he is unable to indicate either such circumstances or such evidence, to direct the jury to return a verdict of not guilty.<sup>182</sup>

Likewise, Prof. Sandra Guerra Thompson’s article, *Beyond a Reasonable Doubt? Reconsidering Uncorroborated Eyewitness Testimony*,<sup>183</sup> proposes requiring corroborating evidence in cases involving eyewitness identification, “especially for

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<sup>180</sup> Thompson, supra note 118 at 1528-1529, and see generally 1528-1540 for a thorough history and discussion of corroboration requirements in the law.

<sup>181</sup> Devlin Report, supra note 121, para. 1.25, at p. 7.

<sup>182</sup> Id. at para. 8.4, p. 149-150.

<sup>183</sup> Thompson, supra note 118.

extremely violent crimes”<sup>184</sup> unless the witness knew the culprit before the crime.<sup>185</sup> She contends there is “a substantial margin of error that cannot be eliminated” even with best practices,<sup>186</sup> and that “actors in the criminal justice system can do nothing to improve a witness’ innate perception and memory failings.”<sup>187</sup> A corroboration requirement is also helpful, she posits, as it relieves the prosecutor of the moral dilemma of how to deal with a witness-victim who can make an identification but where this is the only evidence in the case, by allowing him or her to just say no until the police have fulfilled their responsibility to obtain other evidence.<sup>188</sup>

As with Wells and Quinlivan’s proposal, Prof. Thompson’s will create a strong motivation for police to investigate the case further, a needed improvement in the system. How best to obtain corroborating evidence is left entirely within the discretion of police investigators under Prof. Guerra’s proposal.<sup>189</sup> Importantly, however, like Wells and Quinlivan, she “requires some genuine investigative work to uncover other independent evidence linking the suspect to the crime.”<sup>190</sup>

This requirement of independent corroborating evidence is critical. Professors George Castelle and Elizabeth Loftus write in “Misinformation” (included in the

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<sup>184</sup> Id. at 1524.

<sup>185</sup> Id. at 1541.

<sup>186</sup> Id. at 1497.

<sup>187</sup> Id. at 1503.

<sup>188</sup> Id. at 1528.

<sup>189</sup> Id. at 1527-1528.

<sup>190</sup> Id. at 1542.

excellent essay collection Wrongly Convicted: Perspectives on Failed Justice)<sup>191</sup> that cross-contamination of evidence is common in wrongful conviction cases.<sup>192</sup> Evidence does not exist in discrete and immutable units, with each piece isolated. One mistake causes other things to happen as the mistake transforms thought, memories, and approach to potentially every other piece of evidence.<sup>193</sup> Knowledge that an identification was made or a confession given can permeate every aspect of a case, even if excluded from trial.<sup>194</sup> Misinformation can even prompt forensic examiners making somewhat subjective or ambiguous judgment calls to confirm what the misinformation found.<sup>195</sup> Post-event information alters decision-making, and may cause prosecutors to reinterpret all they perceive in light of the contaminating effect of the knowledge of ‘guilt.’<sup>196</sup> Profs. Castelle and Loftus argue it is critical to understand this cross-contamination potential and implement safeguards against it.<sup>197</sup> Jurisdictions can minimize cross-contamination by “carefully recording and disclosing witnesses’ initial observations before exposing a witness to post-event information.”<sup>198</sup>

The independent corroborating evidence requirement Prof. Thompson and others have proposed must therefore be accompanied by requiring a written contemporaneous

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<sup>191</sup> Castelle and Loftus, in volume supra note 106.

<sup>192</sup> Id. at 17-35. See also Wells and Quinlivan, supra note 43 at 16.

<sup>193</sup> Id. at 19.

<sup>194</sup> Id. at 29.

<sup>195</sup> Id.

<sup>196</sup> Id. at 30. This leads to tunnel vision and wrongful convictions. See Samuel Gross, “The Risks of Death: Why Erroneous Convictions are Common in Capital Cases”, 44 Buff. L. Rev.469, at 474-480 (1996).

<sup>197</sup> Id. at 31.

<sup>198</sup> Id. at 31.

record of a witness' initial observations. This is presently included in recommended best practices for eyewitness identification,<sup>199</sup> but not yet fully expected in other investigative areas that may serve as the source for corroborating evidence.

A related requirement is that the independent corroborating evidence itself be reliable. As Prof. Thompson states, "extreme care should be taken not to allow one type of unreliable evidence to corroborate another."<sup>200</sup> Thus, confessions from juveniles or the mentally retarded, or jailhouse snitch testimony, should not be used to corroborate eyewitness identification testimony.<sup>201</sup>

A requirement of strong corroboration with other independent and reliable evidence has also been proposed in Professors Boaz Sangero and Mordechai Halpert's extensively researched study and article "Why Convictions Should Not Be Based on a Single Piece of Evidence: A Proposal for Reform."<sup>202</sup>

Reality and research indeed prove that in a significant number of cases of wrongful conviction based on eyewitness testimony, there was no other significant evidence that tied the suspect to the crime. Therefore, a requirement for "strong corroboration" to eyewitness testimony should be established in legislation as an essential condition for a conviction based on such evidence.<sup>203</sup>

As its title suggests, after study, the authors would go further and urge a legislative requirement of "strong corroboration" to convict in all cases involving any single piece of

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<sup>199</sup> See references to the AP/LS Report, supra note 30; the ABA Report, supra note 39; and others at supra note 57.

<sup>200</sup> Thompson, supra note 118 at 1543.

<sup>201</sup> Id.

<sup>202</sup> 48 *Jurimetrics J.* 43 (2007).

<sup>203</sup> Id. at 93-94.

evidence.<sup>204</sup> Their unequivocal requirement for “strong corroboration” to the main evidence in a case would require “independent and significant additional evidence indicating that the defendant is the perpetrator.”<sup>205</sup>

Requiring corroboration to convict in all cases would inevitably reduce the risk of error.

Other more limited reform proposals focus like my own on barring death, if not a conviction. I proposed in 2001 that the evidence must foreclose all doubt before death could be imposed,<sup>206</sup> and in 2002 that conducting a suggestive identification procedure must bar a death sentence.<sup>207</sup> More proposals to assure greater reliability before imposing death are now on the legislative table.

The Illinois Governor’s Commission on Capital Punishment recommended barring death eligibility when the conviction was based on the uncorroborated testimony of a single eyewitness, or of an accomplice.<sup>208</sup> Professor Rory K. Little goes further, positing in the upcoming “Addressing the Evidentiary Sources of Wrongful Convictions; Categorical Exclusion of Evidence in Capital Statutes”<sup>209</sup> that legislatures should ban

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<sup>204</sup> Id. at 46. “Some might assume that a low error rate for evidence--such as a fingerprint, a DNA sample, a confession, or the testimony of an eyewitness--only leads to a small percentage of wrongful convictions. However, we shall show that, counterintuitively, even a very low error rate for evidence might lead to a wrongful conviction in *most* cases where the conviction is based on a single piece of evidence. Given this danger of convicting the innocent, the theory proposed herein is that, as a society, we should no longer allow defendants to be convicted on the basis of any single piece of evidence.” Id. at 44.

<sup>205</sup> Id. at 94.

<sup>206</sup> Koosed, *supra* note 4.

<sup>207</sup> Koosed, *supra* note 179.

<sup>208</sup> Recommendation 69 B., Report of the Governor’s Commission on Capital Punishment 35 (2002) available at [http://www.idoc.state.il.us/ccp/ccp/reports/commission\\_report/summary\\_recommendations.pdf](http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/summary_recommendations.pdf).

<sup>209</sup> 37 Sw. U. L. Rev. \_\_\_\_ (forthcoming). Abstract available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1283902](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1283902).

seeking death if a prosecution is based primarily on one of the four most common sources of wrongful conviction evidence – eyewitness identification, false confession, criminal informants (jailhouse snitches), or invalidated (junk) science, whether singly or in combination.<sup>210</sup> This ban would be immediately judicially enforceable and reviewable.<sup>211</sup>

In a similar move, the Massachusetts Governor’s Council on Capital Punishment recommended that to impose death,

the jury should be required to find that there is conclusive scientific evidence (ie. physical or other associative evidence) reaching a high level of scientific certainty, that connects the defendant to either the location of the crime scene, the murder weapon, or the victim’s body, and that strongly corroborates the defendant’s guilt of capital murder.<sup>212</sup>

Governor Romney set up the Council to provide recommendations if Massachusetts were to consider reinstating the death penalty. But Innocence Project staff attorney Craig Cooley asserts in his 2007 article “Forensic Science and Capital Punishment Reform: An “Intellectually Honest” Assessment:”<sup>213</sup> that this Council recommendation would foster a false sense of confidence in capital convictions:

Governor Romney’s directive to construct a forensically-dependent “foolproof” death penalty system is misplaced, considering the numerous crime lab problems (across the country and especially in Massachusetts) and the lack of funding. ... We have a broken system (the forensic science system) attempting to support another broken system (the death penalty system). Accordingly, because capital cases require and demand perfection, something the forensic science community

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<sup>210</sup> Id.

<sup>211</sup> Id.

<sup>212</sup> Recommendation (6), Governor’s Council on Capital Punishment (Report) 20-21, available at <http://www.lawlib.state.ma.us/docs/5-3-04Governorsreportcapitalpunishment.pdf>. The Council Report would also require the jury have no doubt about guilt before it imposes death. Recommendation (7), at 22-23.

<sup>213</sup> 17 Geo. Mason U. Civ. Rts. L. J. 299 (2007).

cannot presently offer, a capital system premised on forensic evidence, examiners, and labs will inevitably falter from the outset.<sup>214</sup>

His article sets out to debunk several assumptions regarding forensic science, and presages weaknesses identified by the National Academy of Sciences in its recently-released Report.<sup>215</sup> The Governor's Council anticipated many of these concerns in its own Report,<sup>216</sup> but Cooley concludes "given the forensic science community's current state of disarray, it is dangerous to assume that forensic science can and will cure the innumerable problems which infect the capital punishment system."<sup>217</sup>

Notwithstanding these concerns, it does appear that such a limitation could provide at least some incremental protection against wrongful executions if the forensic science practices can be suitably ratcheted-up. Abolition of the death penalty is no doubt, however, the only true cure.

Thus far, one state has taken up the banner of the Illinois and Massachusetts Governor's Commissions. Though the effort in Maryland this spring was directed at abolition,<sup>218</sup> it appears at this writing to have devolved into a reform measure with its roots in all these scholarly and commission proposals. Maryland Senate Bill 279 prohibits a capital prosecution in cases in which the state relies solely on evidence provided by

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<sup>214</sup> Id. at 305.

<sup>215</sup> Id. at 306- 332 (absence of time, meticulousness and funding in/for forensic science laboratories), 332-395 (absence of adequate testing, scrutiny of methods), 396-422 (absence of scientists in forensic science). See also the Report of the National Academy of Science, supra note 92.

<sup>216</sup> Massachusetts Council Report, supra note 212, at 20-21.

<sup>217</sup> Cooley, supra note 213 at 306.

<sup>218</sup> John Wagner, "Maryland General Assembly Expected to Approve New Limits on Death Penalty Cases," Washington Post (March 26, 2009, available at [http://www.washingtonpost.com/wp-dyn/content/article/2009/03/25/AR2009032501643\\_2.html?sid=ST2009030300975](http://www.washingtonpost.com/wp-dyn/content/article/2009/03/25/AR2009032501643_2.html?sid=ST2009030300975)).

eyewitnesses.<sup>219</sup> It then goes further, limiting death eligibility to cases with specified biological or DNA evidence of guilt, a videotaped confession, or a videotape that conclusively links the defendant to the homicide.<sup>220</sup> Though repealing the death penalty altogether is surely preferred for its obvious power to avert mistaken executions, a bill of this type could significantly reduce mistakes if coupled with improved forensic testing practices as recommended in the National Academy of Sciences Report.

Along with ratcheting-up reliability requirements like corroboration or exclusions of death have come numerous proposals to provide broader authority to courts to set aside wrongful death sentences and convictions. The Massachusetts Council included such a general provision.<sup>221</sup> Specific to eyewitness identification, one commentator urges “if a conviction is based solely on uncorroborated eyewitness testimony, appellate courts must engage a *de novo* review of the facts and circumstances surrounding the eyewitness identification and not be bound by current standards of clear abuse or abuse of discretion.”<sup>222</sup>

Prof. D. Michael Risinger, following the lead of the British, proposes a process that reverses “unsafe verdicts.”<sup>223</sup> Weak identification cases have often led to such

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<sup>219</sup> Maryland Senate Bill 279, available at <http://mlis.state.md.us/2009rs/billfile/sB0279.htm>. Governor Martin O’Malley is expected to sign this bill very soon. See Wagner, *supra* note 218. According to the Governor’s website, he may already have done so, see <http://www.governor.maryland.gov/safety.asp>, but there has been no press release or media coverage confirming that as of this writing.

<sup>220</sup> *Id.*

<sup>221</sup> Massachusetts Council Report, *supra* note 212, at 25-28.

<sup>222</sup> Calvin TerBeek, “A Call for Precedential Heads: Why the Supreme Court Eyewitness Identification Jurisprudence is Anachronistic and Out-of-Step With the Empirical Reality,” 31 *Law & Psych. Rev.* 21, 48 (2007). He would couple this with mandatory continuing legal education for judges at the trial and appellate levels explaining the inherent problems with eyewitness identification. *Id.*

<sup>223</sup> D. Michael Risinger, “Unsafe Verdicts: The Need for Reformed Standards for the Trial and Review of Factual Innocence Claims,” 41 *Hous. L. Rev.* 1281 (2004).

reversals in Britain.<sup>224</sup> A verdict is unsafe if there is “lurking doubt” regarding guilt.<sup>225</sup> Prof. Risinger recommends an unsafe verdict review in the trial court and on appeal, and suggests “a special obligation [to reverse] when a conviction is undergirded with evidence known to be of questionable reliability, such as stranger-on-stranger eyewitness identification or “jailhouse snitch” testimony.”<sup>226</sup> As in Britain, he “would oblige a court to consider any relevant fresh evidence, including research casting doubt on the evidence of a kind relied upon at trial, as long as that evidence was ‘not in hand’ and intentionally bypassed by trial counsel.”<sup>227</sup>

Prof. Risinger also offers a three-part retrial opportunity analysis: if a verdict was viewed as unsafe, and if the fresh evidence is admissible, he would order a new trial; if new evidence clearly shows actual innocence, he would dismiss with double jeopardy effect; and if the verdict is necessarily subject to reasonable doubt, he would dismiss and a retrial would be possible only on application to a court after development of significant new evidence of guilt.<sup>228</sup> Adding a requirement that the significant new evidence in such a retrial be independent, his three-part proffer is most inviting.

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<sup>224</sup> Id. at 1317.

<sup>225</sup> Id. at 1320, citing R. v. Cooper, 53 Crim. App. R. 82 (CA 1969), and Richard Nobles and David Schiff, Understanding Miscarriages of Justice 71 (2000).

<sup>226</sup> Id. at 1332.

<sup>227</sup> Id.

<sup>228</sup> Id. at 1332-1333. See also Glenn A. Garber and Angharad Vaughan, “Actual Innocence Policy, Non-DNA Innocence Claims”, *New York Law Journal* (April 4, 2008) [suggesting using state post-conviction relief mechanisms and having a sliding scale of evidence required for relief; if only a minimum showing of innocence by a preponderance of the evidence, the defendant should be given a new trial; if there is clear and convincing evidence of innocence, or a preponderance showing coupled with an established constitutional claim, reversal would be ordered and a new trial would be barred.]

Finally, Prof. Risinger would add a fourth option in capital cases allowing a court to determine that the record makes the imposition of capital punishment unsafe and then to reverse the death sentence while affirming the conviction.<sup>229</sup> The latter option is essentially that provided by the Model Penal Code 210.6 provision that bars death if the evidence does not foreclose all doubt about guilt, though Prof. Risinger does not refer to it.

These proposals for reform have come from diverse sources, and take differing perspectives on the best way to ratchet up the reliability of eyewitness identifications practices and/or assure that outcomes are worthy of public trust.

If we more broadly interpret the concept of reform, we can see that the recent legislative repeals of the death penalty in New Jersey and New Mexico are rooted in the same desire -- to avert wrongful executions. Just as Illinois Governor Ryan feared the ultimate nightmare of executing an innocent and granted clemency to all those on Illinois death row,<sup>230</sup> New Jersey and New Mexico Governors have endorsed repeal to avoid an irrevocable mistake. As he ended the death penalty in New Mexico on March 18, 2009, Governor Bill Richardson stated:

...I do not have the confidence in the criminal justice system as it currently operates to be the final arbiter when it comes to who lives and who dies for their crimes. ...[T]he system to impose this penalty must be perfect and can never be wrong. But the reality is the system is not perfect – far from it. The system is inherently defective: DNA testing has proved that.<sup>231</sup>

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<sup>229</sup> Id. at 1333-1334.

<sup>230</sup> Ken Armstrong & Steve Mills, “Ryan: ‘Until I Can Be Sure’, Illinois is First State to Suspend Death Penalty,” Chicago Tribune, Feb. 1, 2000, at 1.

<sup>231</sup> Governor Bill Richardson’s remarks on repeal of the death penalty, March 18, 2009, available at <http://www.deathpenaltyinfo.org/governor-bill-richardson-signs-repeal-death-penalty>. Repeal also provided financial savings in these weak economic times. A New Mexico legislature Fiscal Impact Report on H.B. 285-355 provided by the Public Defender Department on Jan. 28, 2009 pointed out that there was only a 4.5% chance any multi-million dollar death penalty prosecution (over the cost of life without parole) would

Governor Jon Corzine echoed the same concern a few days before the New Jersey death penalty repeal bill came to his desk.<sup>232</sup> The ultimate reform, then, is abolition of the death penalty, for it will prevent the ultimate nightmare.

### **Conclusion**

I ended my 2002 article with the statement, “In a capital punishment system, we will never be able to altogether avoid being dead wrong, but we can try.” Since then, some states have wisely concluded that the only true solution in capital cases is repeal of the death penalty. They are to be applauded, and I hope more will follow.

In non-capital cases, we can keep on trying to avoid being wrong -- by adopting best practices; assuring compliance by means of exclusion; admitting expert testimony and educating juries; instructing on the vagaries of eyewitness identification; requiring corroboration with independent and reliable evidence; and redressing unsafe verdicts.

We need to. If we fail in this attempt, it is inevitable innocents will continue to be wrongly convicted.

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ever end in an execution in New Mexico. See “New Mexico to Save Money After Abolition of Death Penalty,” available at <http://www.deathpenaltyinfo.org/new-mexico-save-money-after-abolition-death-penalty>.

<sup>232</sup> Terrence Dopp, “New Jersey Death Penalty Repeal Advances to Corzine”, The Bloomberg Report, Dec. 13, 2007, available at <http://www.bloomberg.com/apps/news?pid=20601087&sid=a6zXSC8hbW58&refer=home>.