# REFORMING EYEWITNESS IDENTIFICATION LAW AND PRACTICES TO PROTECT THE INNOCENT

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## I. INTRODUCTION

I am honored to be part of the Creighton Law Review’s fine symposium. I regret that I could not be there to participate in person due to a death in my family, but I am pleased the Creighton Law Review Board and I were able to establish my presence at the symposium through technological means. Furthermore, I am pleased that I could submit this Article to the Creighton Law Review.

My fellow symposium panelists have well-informed the symposium audience regarding the evolving psychological research in the

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field of eyewitness identification that displays the continuing risk of mistaken identification. My task is 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. The comprehensive reform proposal that holds the most promise for increasing the reliability of eyewitness identifications includes tightening exclusionary rules, establishing corroboration requirements for death-sentencing, and more appropriately for convictions in capital and non-capital cases, and loosening standards for appellate relief.

II. THE SCOPE OF OUR PROBLEM—WHY THE CRIMINAL JUSTICE SYSTEM IS OVERDUE FOR REFORM MEASURES

Eyewitness misidentification is a significant threat to the reliability of the criminal justice system. The more psychological researchers and legal practitioners learn about eyewitness misidentification, the greater and more acute its threat to the criminal justice system appears to be.

I first addressed the topic of eyewitness misidentifications in a 1989 article, *Dead Wrong: Mistaken Identifications and Capital Prosecutions*. In that article, I recounted the frequency of eyewitness misidentification revealed by Professors Hugo Bedau and Michael L. Radelet's seminal study of wrongful convictions in potentially capital cases. Bedau and Radelet studied 350 miscarriages of justice in potentially capital criminal cases occurring within the twentieth century and identified eyewitness misidentification as causing an erroneous conviction in fifty-six cases (16% of the cases studied). In my 2002 article, *The Proposed Innocence Protection Act Won't—Unless It Also Curbs Mistaken Eyewitness Identifications*, I stated that if witness errors that were attributable to police or prosecutor influenced eyewitness identification testimony (which the Bedau and Radelet study listed in the witness error sub-categories of perjury and unreliable or erroneous prosecution testimony) were added into the analysis, the percentage of witness errors would likely be increased, most likely to one-fifth or more of the 350 cases Bedau and Radelet studied. Contemporaneous studies of erroneous convictions that were not limited to potentially capital cases, including Professor Arye Rattner's 1988

3. *Id.* at 57 (illustrated in table 6).
study of erroneous capital and non-capital convictions, placed the frequency of eyewitness misidentification errors a great deal higher.\(^5\) Indeed, Rattner placed the frequency of eyewitness misidentification in criminal cases at 52\%.\(^6\)

In 2002, I found if one added in the sixty-six additional miscarriages of justice in potentially capital cases Radelet identified in 1992,\(^7\) the rate of wrongful convictions based simply on eyewitness misidentifications rose from the earlier established 16\% to 18.5\%.\(^8\) Furthermore, I found a comparable rise in the percentage of the witness-error subcategories of perjury and unreliable or erroneous prosecution testimony accounts occurred when these additional sixty-six potentially capital cases were considered.\(^9\) However, if one focused on only cases decided after the 1967 United States Supreme Court decisions that addressed the eyewitness misidentification problem, the percentage of miscarriages of justice involving eyewitness misidentification rose starkly to 32\%.\(^10\)

Thus in 2002, nearly one-third of the convictions of innocent persons in potentially capital cases occurring after 1967 were based in whole or in part on erroneous identification testimony. As I related then, the annals of criminal law appeared to have become even more "rife with instances of mistaken identification."\(^11\) When this error percentage in potentially capital cases is combined with Rattner's finding that 52\% of non-capital case convictions involved eyewitness misidentification, the result was most disturbing.

This disturbance factor related to eyewitness misidentification has dramatically increased since 2002. As the DNA exonations have shown, eyewitness misidentification is a factor in far more than 50\% of wrongful conviction cases. In 2007, a National Institute of Justice Report related that more than 75\% of the first 183 DNA exonations in the United States involved eyewitness misidentification.\(^12\) The lat-

\(^6\) Id.
\(^7\) Michael L. Radelet et al., In Spite of Innocence: Erroneous Convictions in Capital Cases 17 (Northeastern University Press Boston) (1992).
\(^8\) Koosed, supra note 4, at 283.
\(^9\) Id.
\(^12\) 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, which referenced the Innocence Project as the source of this information).
est figures from the Innocence Project confirm that the majority of wrongful convictions involved eyewitness misidentification.\textsuperscript{13} Indeed, the Innocence Project examined more than 230 DNA exonerations in capital and non-capital cases, finding 77\% of (post-Wade\textsuperscript{14}) wrongful convictions involved eyewitness misidentification.\textsuperscript{15} As Professor Sean Watts related in his introduction to the symposium panel, in 70\% of these wrongful conviction cases the identifying witness was the victim of the crime, and in 28\% of these wrongful conviction cases the victim-witness’s identification of the suspect as the perpetrator was the central evidence in the case. With 77\% of (post-Wade) cases involving eyewitness misidentification, it is justifiably labeled as the leading cause of wrongful convictions.\textsuperscript{16}

No clear explanation for the increase in the frequency of errors attributable to eyewitness misidentifications over the past four decades exists, but this increase shows that the need to curb mistaken eyewitness identifications is more acute than ever.\textsuperscript{17} Two Texas journalists, Steve McGonigle and Jennifer Emily, well-described the challenge that is now besetting 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.”\textsuperscript{18}

In McGonigle and Emily’s October 2008 three-part series, they reported that Dallas County, Texas led the nation in DNA exonerations since 2001 with nineteen wrongful convictions being overturned, 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.”\textsuperscript{19} McGonigle and Emily recounted that there was no disciplinary action imposed for what they termed the lying, incompetent, or negligent actions of police officers.\textsuperscript{20} The journalists reported

\begin{itemize}
  \item \textsuperscript{13} Innocence Project, Facts on Post-Conviction DNA exonerations, May 12, 2009, http://www.innocenceproject.org/Content/351.php [hereinafter Innocence Project, Facts].
  \item \textsuperscript{14} Wade, 388 U.S. at 228. Wade was the first United States Supreme Court decision to find eyewitness identification practices were of constitutional concern. In it, the Court established a right to counsel in a post-indictment lineup identification proceeding as well as an exclusionary rule if the right was not accorded. Id.
  \item \textsuperscript{15} Innocence Project, Facts, supra note 13.
  \item \textsuperscript{16} Innocence Project, http://www.innocenceproject.org/Content/351.php.
  \item \textsuperscript{17} See Koosed, supra note 4, at 286-87 (The varying possible explanations for the increase in the frequency of errors attributable to eyewitness misidentifications identified in 2002 are still viable, but the answer(s) remain elusive).
  \item \textsuperscript{18} Steve McGonigle and Jennifer Emily, \textit{18 Dallas County cases overturned by DNA relied on heavily eyewitness testimony}, \textit{Dallas Morning News}, Sunday Oct. 12, 2008.
  \item \textsuperscript{19} Id.
\end{itemize}
that more than three million dollars was spent in compensating and incarcerating the wrongly convicted persons in the Dallas County cases.\textsuperscript{21} McGonigle and Emily referenced that since 1975, Texas law allowed convictions based on the testimony of a lone eyewitness and that prospective jurors could be denied the opportunity to serve if they were not willing to convict based on such testimony.\textsuperscript{22} Furthermore, McGonigle and Emily noted that legislation to require more reliable eyewitness identification procedures failed in the Texas legislature in 2007 and stated that only a handful of police departments in Dallas County had written policies regarding eyewitness identification procedures.\textsuperscript{23}

Eyewitness misidentification is a big-as-Texas statewide problem. All six DNA exoneration cases in Harris County, Texas, which includes the City of Houston, were built on eyewitness misidentifications.\textsuperscript{24} Further, according to a recent Justice Project study, only 12% of Texas police agencies have written policies regarding eyewitness identification procedures.\textsuperscript{25}

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\item \textsuperscript{21} Id.; McGonigle & Emily, supra note 18.
\item \textsuperscript{22} Emily & McGonigle, supra note 20. 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." Id.; McGonigle & Emily, supra note 18. Joe Kendall, a prosecutor under Wade in the early 80's stated "in 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.
\item \textsuperscript{23} Emily & McGonigle, supra note 20. 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, "[e]yewitness testimony was gold. If the witness said they saw it, they saw it." Id.; McGonigle & Emily, supra note 18. 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.
\item \textsuperscript{25} The Justice Project, Convicting the Innocent: Texas Justice Derailed, http://www.thejusticeproject.org/convicting-the-innocent/ (last visited May, 12, 2009). The study opens by relating that the 39 Texas exonerees had served more than 500 years in prison "for crimes they did not commit." Id. 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. Roma Khanna, Study: Witness Errors Lead Juries Astray: DNA undoes the mistakes on the stand during trials, HOUSTON CHRONICLE, March 26, 2009, available at http://www.chron.com/disp/story.mpl/metropolitan/6342269.html.
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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
As the Justice Project's report on Texas police agencies confirmed, while it is possible to measure the financial costs of reinvestigation and of compensating a wrongly convicted person, those figures do not fully show the societal cost of these eyewitness misidentifications. When police end a criminal investigation after the conviction of an innocent person, the dangerous actual perpetrator is left at large to commit more crimes. The Justice Project reported that the actual perpetrator had been identified in approximately 35% of the thirty-nine Texas DNA exoneration cases, but that some actual perpetrators could not be prosecuted due to the statute of limitations or other reasons.26 “[T]he Innocence Project has identified [ninety-one] actual perpetrators in the 233 exoneration cases” nationwide, and “estimates that [forty-nine] rapes and [nineteen] murders were committed” by those perpetrators after innocent persons were wrongly convicted for those actual perpetrator’s crimes.27 The cost to society of these additional

Committee on Eyewitness Identification Procedures to take testimony and make recommendations on reforms. Barry Scheck testifies before Georgia identification panel today, Innocence Project blog, http://innocenceproject.org/content/357.php (Oct. 22, 2007). As yet, there has been no legislation adopting eyewitness identification reform in Georgia.


26. The Justice Project, Convicting the Innocent: Texas Justice Derailed, http://www.thejusticeproject.org/convicting-the-innocent/public-safety/ (last visited May, 12, 2009). 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, available at 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 25. 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.

crimes that may have come about as a result of wrongful convictions is truly incalculable.

These alarming statistics lead to the question: what is to be done to prevent the risks associated with eyewitness identifications? The criminal justice system must break its habit of convicting the innocent, curb its addiction to the fix of eyewitness identification testimony, or at the least significantly reduce the risks of eyewitness misidentification within the police investigative process. The criminal justice system simply cannot continue to tolerate eyewitness identification procedures that gratuitously increase the risk of convicting innocent persons. Fortunately, steps can be taken to reduce the risk of eyewitness misidentification and break this habit.28

III. IDENTIFYING BEST PRACTICES TO IMPROVE IDENTIFICATION PROCEDURES

At the time of my 2002 article, The Proposed Innocence Protection Act Won't—Unless It Also Curbs Mistaken Eyewitness Identifications,

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, available at 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 25. 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.

28. 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, reprinted in 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, 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.
the American Psychology/Law Society ("AP/LS") had released its 1998 report *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads* \(^{29}\) ("AP/LS Report"). The AP/LS report specified four recommendations that then "represent(ed) an emerging consensus among eyewitness scientists as to key elements that such a set of procedures must entail":\(^{30}\)

1. Double blind procedures, in which the person "administering 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;\(^{31}\)

2. Instructing the witness that "the person in question might not be in the lineup or photospread and therefore [the witness] should not feel that they must make an identification," and instructions "that the person administering the lineup does not know which person is the suspect in the case;"\(^{32}\)

3. Designing the procedure and selecting 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;\(^{33}\)

4. Taking a statement "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."\(^{34}\)

By 2002 the United States Department of Justice's ("DOJ") Office of Research Programs had also released its report *Eyewitness Evidence; A Guide for Law Enforcement* ("DOJ Report").\(^{35}\) This DOJ Report recommended non-suggestive procedures, but did not require double-blind administration of lineups, and simply advised minimizing the

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29. The AP/LS Report, prepared by Gary L. Wells, et.al, appeared in 22 LAW & HUM. BEHAV. 603, 639-40 (1998) [hereinafter The APILS Report]. Their study of 40 cases of innocent 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.

30. *Id.* at 609.

31. *Id.* at 627-29.

32. *Id.* at 629-30. 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.*

33. *Id.* at 630-32. This would preclude use of show-ups as they are more likely to yield false identifications. For further information detailing this recommendation, see Koosed, supra note 4, at n. 225.

34. The AP/LS Report, supra note 29, at 635-36. 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' testimony, and to provide a clean record of the witness' confidence at the time of the identification. *Id.* at 636.

use of show-ups. Neither the AP/LS Report nor the DOJ Report recommended recording of eyewitness identification procedures. The AP/LS Report declined to make this recommendation due to expense and implementation concerns.

The AP/LS Report recognized the superiority of sequential lineups, in which the witness views one lineup participant at a time in sequence, over simultaneous lineups, in which the witness views all the potential suspects at once. However, the AP/LS Report stopped short of recommending sequential lineups over simultaneous lineups because sequential lineups would be a deviation from current police practices, and its four recommendations had to exist concurrently with a sequential lineup to assure reliability of the information obtained.

In 2006, the American Bar Association Criminal Justice Section's Ad Hoc Innocence Committee to Ensure the Integrity of the Criminal Process, which consists of academics, forensic scientists, district attorneys, defenders, and judges, released its report Achieving Justice: Freeing the Innocent, Convicting the Guilty ("ABA Report"). The ABA Report recommends as "best practices" a double-blind administration of a lineup "whenever practicable," supplies procedures for selection of foils, and follows the AP/LS Report recommendations with regard to providing instructions to witnesses making identifications and obtaining post-identification statements from the witnesses.

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." Noting that though there is "no magic correct number" of persons to be included in a lineup, the ABA Report states "many researchers believe that [the present American standard of five to] [six] person lineups create an unacceptably high risk of error," and that "Britain uses arrays of [nine]." As such, the

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38. Id. at 639-40.
39. Id.

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).
41. Id. at 25.
42. Id. at 35. In Britain, lineups have been known as "identity parades", show-ups as "confrontations" or "street identifications", and in-court identifications as "docket
ABA Report recommended larger size lineups "whenever practicable."

The ABA Report further recommended videotaping or digital recording of lineup procedures, including the witness's confidence statements and any police statements to the witness, "whenever practicable." If it is not practicable to videotape or digitally record the lineup procedure, then the ABA Report recommended "a photograph should be taken of each lineup and a detailed record made" of the entire procedure. The ABA Report further recommended that the detailed record note the appearance of the suspect and the foils, 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 (5th Ed. 2005).


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". Hain, supra note 42, at 131-32. 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 268-70 (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 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. Section 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.

43. ABA Report, supra note 40, at 36.
44. Id. at 25-26.
45. Id.
the identity of the foils, and in any event, ensure accurate documentation of any statement witnesses make regarding their level of confidence in any identification.\textsuperscript{46}

On the matter of sequential lineups or photospreads, the ABA Report on “best practices” states, “the advisability of either a sequential lineup or photospread . . . or a simultaneous lineup or photospread . . . should be carefully considered.”\textsuperscript{47} The ABA Report notes the vast majority of researchers support sequential lineups as use of such procedures “produces a lower rate of mistaken identifications when the perpetrator is absent,” and results in “little loss of accuracy when the perpetrator is present,” citing authorities for both propositions.\textsuperscript{48} However, the ABA Report 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 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.”\textsuperscript{49} The ABA Report concluded the Illinois

\footnotesize{\textsuperscript{46} Id. \textsuperscript{47} Id. at 25. \textsuperscript{48} Id. at 33-34. \textsuperscript{49} Id. at 34-35. Around the time of the ABA Report, the controversial Mecklenburg Report was issued. See Sheri H. Mecklenburg, \textit{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. \textit{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, \textit{What Price Justice? The Importance of Costs to Eyewitness Identification Reform}, 41 \textit{Tex. Tech. L. Rev.} 33, 45-46, note 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 available from the author and at the very helpful website devoted to eyewitness identification developments www.eyeid.org, and is also reproduced in the National Association of Criminal Defense Lawyers publication \textit{A New Legal Architecture: Litigating Eyewitness Identification Cases in the 21st Century} (publication available for purchase at www.nacdl.org/multimedia).\textsuperscript{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, \textit{Suggestive Eyewitness Identification Procedures and the Supreme Court's Reliability Test in Light of Eyewitness Science: Thirty Years Later}, 33 \textit{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 also DOJ Report, \textit{supra} note 35 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. \textit{Id.} In the interim, one of my co-panelists has identified a less costly and readily available “folder method” where
statutory approach, which mandated certain police department use sequential lineups while other designated police departments use simultaneous methods for the purpose of a comparative study, was "most consistent with an effort to improve the long run accuracy of lineups."\(^{50}\)

In an effort to shed further light on the appropriateness of sequential lineups, the American Judicature Society's ("AJS") Institute of Forensic Science and Public Policy is currently conducting a much-awaited field study using new technology in four parts of the United States.\(^{51}\) The AJS stated, "[t]he 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."\(^{52}\) As part of this study, the AJS and its collaborating bodies are now distributing a survey to assess the strength of varying forms of evidence in determining guilt.\(^{53}\)

Regarding the practice of show-ups, the ABA Report 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."\(^{54}\) Though show-

\(^{50}\) ABA Report, supra note 40 at 35.


\(^{52}\) Id.

\(^{53}\) A cover letter accompanying the survey being distributed by email states "[t]he 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].

\(^{54}\) ABA Report, supra note 40 at 38-39.
ups are highly suggestive, the ABA Report noted the existence of some research which suggests 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 enforcement." The ABA Report concluded that further research was needed to craft a general rule on the topic of show-ups.

The ABA Report noted that police use of photo lineups may be on the rise compared to the frequency of live lineups, and this trend "merely underscores the importance of using the same principles for sound identification procedures, whether done by lineup or photo-pread." The ABA Report noted "[c]autious in administering photo-preads and show-ups is especially important because flawed ones can easily taint later lineup and at-trial identifications."

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

In What Price Justice? The Importance of Costs to Eyewitness Identification Reform, Professor Sandra Guerra Thompson compared and contrasted these earlier reform proposals with the further reforms recommended or adopted by the North Carolina legislature, the Justice Project, and the Innocence Project. Guerra Thompson wrote, "there is a surprising amount of consensus on the direction legislatures should take in reforming identification procedures." This general consensus includes provisions for the documentation of the events surrounding the identification procedure, foils, and interactions with witnesses, which basically mimic those recommended reforms found in the earlier reports described.

55. Id. at 39.
56. Id.
57. Id. at 40.
58. Id.
59. Id. at 44-45.
60. Id. at 45.
62. Id. at 43.
63. 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. W. Va. Code Ann. § 62-1E-1 (West 2007). Another section provides law enforce-
One of the few areas where consensus on best practices has been delayed is sequential lineups versus simultaneous lineups. In 2007, North Carolina was the first state to legislatively require statewide sequential, double-blind live lineup and photo array procedures without exception. New Jersey requires blind sequential procedures, but provides for exceptions, and these procedures are strongly recommended by the Innocence and Justice Projects. Though the Innocence Project does recommend the sequential lineup reform, the Innocence Project has declined to include this reform at this time in the package of reforms the Innocence Project is submitting to legislatures, as this reform has "often prevented clear consideration of the other important and accepted reforms." As previously noted, the AJS's National Eyewitness Identification Field Studies should provide further information on which practice, sequential lineups or simultaneous lineups, produces more accurate identifications.

IV. MAKING EYEWITNESS IDENTIFICATION PRACTICES REFORM HAPPEN

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 argues there is a need to promptly address and correct the causes of wrongful convictions, which Professor D. Michael Risinger estimated occur at a rate of 3.3% to 5% in 1980s capital rape-murder cases. Doyle cogently argues that if one (let alone three or five) in every one-hundred commercial airline flights crashed, no one would trust the commercial airline system or refer to it as a success. The flying public would evaluate that system and make necessary changes to improve it. Doyle concludes that we need to approach eyewitnessment agencies "may create educational materials and conduct training programs" regarding these practices. W. VA. CODE ANN. § 62-1E-3 (West 2007). Both provisions became effective March 10, 2007.

64. Thompson, supra note 61, at 47 (citing N.C. GEN. STAT. §15A-284.52(b)(2) (2007)).
65. Id. at 48.
67. 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. See also id. at 780-88 for discussion.
68. See id. at 791.
misidentifications that result in wrongful convictions with the same sense of urgency with which the Federal Aviation Administration ("FAA") responds to plane crashes.

Many concerned about the criminal justice system have suggested that changes to eyewitness procedures need to be made quite soon. Just as the current economic recession revealed bad practices in the financing system and Ponzi schemes, the recent DNA exonerations have exposed the bad eyewitness identification procedures that lead to wrongful convictions. These DNA exonerations can only represent a fraction of the scope of wrongful convictions caused by eyewitness misidentifications. If the criminal justice system does nothing to reform eyewitness identification procedures, witnesses will continue to mistakenly identify innocent persons. As DNA evidence is not present at many crime scenes, the criminal justice system’s ability to avert or identify those eyewitness misidentifications through DNA testing is limited. However, as the criminal justice system continues DNA testing of prisoners post-conviction and begins to perform DNA testing as a standard part of pre-trial police investigative practices, the number of DNA exonerations will begin to fall. As a result of this decline in DNA exonerations, there will be less exposure and attention to these eyewitness identification systemic flaws. These flaws may well be at the high point of that exposure now, with eyewitness identification mistakes and research capturing the everyday reader and television watcher. As media attention subsides with dwindling DNA exonerations, society's political will to make the needed changes may diminish. Therefore, a "reform now" movement is underway.

The process of changing eyewitness identifications procedures may begin with criminal defense attorneys, who file motions to compel the use of eyewitness identification best practices in individual cases. While these motions to use best practices do expose and help to educate judges on the issues associated with eyewitness identification procedures, these motions seem to be too-little, too-late if there is to be systemic change.

Professor Sandra Guerra Thompson has focused on the costs of implementing changes. Guerra Thompson found that almost ten

71. Thompson, supra note 61, at 39.
years after Eyewitness Evidence; A Guide for Law Enforcement\textsuperscript{72} (the “DOJ Report”) was first issued, it had “not yet [produced] 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 many law enforcement professionals have concerns that “the new procedures will result in a loss of valuable evidence,” and that the “training, equipment, personnel and administrative costs” involved in reform are too high.\textsuperscript{73} Guerra Thompson concluded legislative action is the only practical way to achieve uniform success in eyewitness identification reform, and any statutory action “should be implemented with few exceptions for practicability concerns and with serious consequences for failures to follow the procedures.”\textsuperscript{74} Guerra Thompson’s What Price Justice? The Importance of Costs to Eyewitness Identification Reform urged that pro-


\textsuperscript{73} Thompson, supra note 61, at 56-57. See also Katherine Kruse, Instituting Innocence Reform: Wisconsin’s New Governance Experiment, 2006 Wis. L. Rev. 645, 687-89 (2006).

\textsuperscript{74} Thompson, supra note 61, at 39, 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 above in Hain supra note 42, at 132-33. 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 42 at 132-33. He added, “[t]he Home Office rules state that a witness’s uncertainty should be recorded, but often such details are ignored.” Hain, supra note 42, 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 Hain, supra note 42 at 132-38. See also Brandon & Davies, supra note 45, at 24-46 (referencing transcripts and the then extant empirical studies in memory to examine misidentification and making 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.
providing financial data to state legislatures on the impact of all eyewitness identification reform proposals was necessary if the reforms were to have a reasonable chance at adoption.\textsuperscript{75} Guerra Thompson discussed the relative costs of varying eyewitness identification reform measures.\textsuperscript{76} Though Guerra Thompson suggested, "[i]t would probably be unnecessary to estimate the cost of additional crimes or the costs to the wrongly imprisoned," it seems imperative that the costs of adopting eyewitness identification reforms must be weighed against the significant costs of not adopting them.\textsuperscript{77} Continuing on the present course that leads to wrongful convictions permits the actual perpetrator to commit more crimes, requires society to compensate innocent suspects who were wrongly incarcerated,\textsuperscript{78} and causes further diminution of trust in the criminal justice system. Though precise cost estimates of the additional crimes and compensation of the innocent may not be absolutely essential, at the least we must acknowledge that the lost trust in the system is priceless.\textsuperscript{79}

Like Guerra Thompson, Professor D. Michael Risinger agrees that cost is a factor, but he addresses it through a "reground moral

\textsuperscript{75} Prof. Thompson urged reformers to seek help from public policy research centers at universities to perform the cost analysis needed by legislators. Thompson, supra note 61, at 61.

\textsuperscript{76} Thompson, supra note 61, 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. See e.g. Kruse, supra note 73, 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.

\textsuperscript{77} Thompson, supra note 61, at 61.

\textsuperscript{78} 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, 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). Much more work needs to be done in this area. See the recommendations for compensation awards identified by the ABA in its Report. ABA, supra note 40, at 109-110. The recent decision in Van de Kamp v. Goldstein, 129 S.Ct. 855 (2009), involving a wrongful incarceration of 24 years duration, does not improve this situation. The United States Supreme Court there held that prosecutors were absolutely immune from civil damage actions under 42 U.S.C. § 1983 (2009) 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.

\textsuperscript{79} "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 61, at 60 (referencing The Justice Project).
lens,” rather than in strict monetary terms. In *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 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.

Under Risinger’s analysis, blind testing protocols in forensic science when administering line-ups and photo-spreads are “cost-free proposals, presenting no risk of losing any defensible convictions of the guilty.” 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.

Other legal scholars agree that cost is a factor in determining whether to implement eyewitness identification reforms, but suggest achieving reforms through different means. Specifically, these scholars suggest implementing reforms from police agencies up, rather than the legislature down. Professor Katherine Kruse lauded Wisconsin’s 2005 legislation as a governance experiment that produced “a breathtaking course of reform” in the areas of misidentification and false confessions. Kruse viewed the challenge as “how to embed proposed innocence reforms within institutional structures that will sustain them over time.” Kruse championed the Wisconsin reform experience, where the “content of police practice was neither legislatively nor judicially dictated to local law enforcement agencies.” Instead, a “democratic experimentalism” legislatively delegated rulemaking authority to local police agencies, thereby giving these agencies a stake in the problem-solving process and creating an institutional structure to make reform an ongoing process.

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81. Id. at 796.
82. 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 40 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.
83. Risinger, supra note 80, at 799.
86. Id. at 647-48.
87. Id.
88. Id. at 649-50.
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.\(^89\) The Wisconsin courts then provide support to the local agency's policies by excluding testimony relating to the out-of-court identification procedure when these policies were not followed, and can also compare agency policies to possibly find a sub-standard policy unnecessarily suggestive.\(^90\)

Kruse credited 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.\(^91\) Kruse found this particularly true when, as in Wisconsin, a high profile exoneration occurs and all those with a stake in the state's criminal justice system are amenable to problem-solving in face-to-face meetings with one another.\(^92\) When the state's stakeholders are in a collective problem-solving mode, rather than an adversarial mode in which they litigate constitutional suppression issues, the likelihood that reforms will be adopted is increased.\(^93\)

Kruse suggests a state agency take the role of coordinating information regarding agency policies, generally limiting access to that data while allowing criminal defense lawyers and social scientists access for analytical and research purposes. In this way, agency policies may be revised in light of experience.\(^94\)

In their respective articles, Guerra Thompson and Kruse pursue slightly differing adoption and implementation methods. Guerra Thompson contends that police departments “will not make the recommended changes on their own,” and that the legislature should direct the particular eyewitness identification procedures for police to use and not merely require written policies be adopted at the local level.\(^95\) Currently, several states appear more comfortable adopting Guerra Thompson's approach, but the key distinction among these states is

\(^{89}\) Id. at 685-86 (citing Wis. Stat. Ann. § 175.50 (West 2005)).

\(^{90}\) 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 show-up will not be admissible unless, based on the totality of the circumstances, the show-up was necessary, and that a show-up 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.; Dubose, 285 Wis.2d at162, 166-168, 699 N.W.2d at 591-92, 594-96.

\(^{91}\) Kruse, supra note 85, at 696-97, 703-17.

\(^{92}\) Id. at 696-97, 703-17.

\(^{93}\) Id. at 721-27.

\(^{94}\) Id. at 728-32.

\(^{95}\) Thompson, supra note 61, at 57, 62.
whether the legislature has directed the adoption of "best practices" and then permitted what may be divergent implementation at the local level.\textsuperscript{96} Wisconsin has done so, and Kruse suggests this model.

When a state legislature, like Wisconsin and to a lesser extent Maryland, does adopt written eyewitness identification policies encompassing best practices without specifying the particulars thereof, and finds this a more palatable path to reform, this at least takes a significant step forward. Guerra Thompson agreed that the reform process must be an evolving process, allowing police departments to incorporate eyewitness identification procedures developed through improved technology or greater social science research.\textsuperscript{97} While there may be a lag time (or grace period, depending on one's perspective) as eyewitness identification best practices are identified and adopted, the reform process is at least underway when the "best practices" directive is issued. However, obtaining such a "best practices" directive from a state legislature is often no easy matter. Thus, the Innocence Project's present stance of endorsing sequential lineups while excluding them from their legislative reform package is a wise and pragmatic approach. That approach is worthy of support if it can produce directives to adopt best practices.

Another helpful tactic in the process of achieving eyewitness identification reform is to present state legislatures with these reforms within a comprehensive reform package that includes averting false confessions, and preserving evidence for DNA testing.\textsuperscript{98} There appears to be a greater consensus among police agencies and others regarding the videotaping of interrogations and preservation of evidence than there is for some eyewitness identification reform measures.\textsuperscript{99}

\textsuperscript{96} \textit{Id.} at 57, 62. Only the North Carolina legislature required double blind sequential procedures. The Virginia legislature simply required written policies, with no direction as to their content. \textit{Id.} The Wisconsin legislature directed written policies using best practices. \textit{Id.} However, Maryland directed written policies consistent only with the Department of Justice, limiting and at this point excluding blind, sequential, and recording practices. \textit{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. \textit{Id.} at 48-57.

\textsuperscript{97} \textit{Id.} at 55.

\textsuperscript{98} Preserving DNA evidence is important so that evidence can be tested or retested as our DNA technology advances; however, access to preserved DNA evidence may be problematic. Since the April 2009 Symposium, and as this article reaches its final posture, the United States Supreme Court has ruled, 5-4 in a case from Alaska, that there is no freestanding substantive constitutional right to obtain postconviction access to the state’s evidence for DNA testing, and that Alaska’s procedures were adequate to meet any limited liberty interest presented. District Attorney’s Office for the Third Jud. Dist., v. Osborne, 129 S. Ct. 2308 (2009). The Court did welcome legislation and court rules in the area. \textit{Id.}

Finally, it may be helpful to get state legislators thinking about 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.”

The National Academy of Sciences’s (“NAS”) recent report on forensic evidence did not address the infirmities in the collection of eyewitness identification evidence, but the NAS identified concerns that are clearly analogous to those infirmities. As such, the NAS’s recommendations are transferable to the science of collecting eyewitness identification evidence. Thus, when state legislatures are adopting the NAS’s recommendations (forensic science laboratory standard operating procedures to minimize potential bias and sources of human error, proficiency testing, accreditation, routine quality control, and improved education and training practices), they should consider adopting the same types of reforms for eyewitness identification procedures.

Indeed, improving eyewitness identification procedures may be more critical than improving other evidentiary procedures. When a forensic test is poorly administered, there is usually evidentiary material remaining that can be retested. Comparatively, when eyewitness identification procedures are suggestively and unreliably conducted, the procedure may so taint the eyewitness’s memory that there is no ability to reliably retest the eyewitness’s memory. In a sense, the


102. Id.

103. Cf. Wells & Quinlivan, supra note 49, at 14 (“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, 898-99 (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).

104. See, e.g., Gary L. Wells & Amy L. Bradfield, Good, You Identified the Suspect: Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience, 83 J. of Applied Psychology, 360-76 (1998); Gary L. Wells and Amy L. Bradfield, Distortions in
eyewitness’s memory is gone - there may not be a second chance to
“retest” the memory as there would be in the 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 approach more acceptable to legislators who may think the top-down approach is ‘too much, too soon.’

I respect the reformer’s desire for a quick fix. However, with this window for eyewitness identification reform 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 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.

V. REFORMING THE LAW SURROUNDING EYEWITNESS IDENTIFICATION PRACTICES

Whether we are successful in reforming eyewitness identification practices or are left with the current, less reliable practices that significantly contribute to mistaken convictions, the system still needs enforcement and protective legal measures. \(^{105}\) Some such measures presently exist, but nearly everyone agrees they are ineffectual. Simply witness our eyewitness identification mistakes.

So what do we have and what should we be seeking? Admission of expert testimony on eyewitness identification practices’ reliability, along with similar jury instructions educating jurors on the inherent flaws in eyewitness identification and procedures, do provide minimal protection, but these are often difficult to come by. Other legal scholars and I have devoted much attention to expanding the exclusionary rule so that unreliable evidence is never admitted at trial. Recently, others and I have suggested excluding death, instead of merely excluding evidence, as a means of encouraging the adoption of better practices, and/or as simply a protective measure against fatal mis-

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\(^{105}\) Eyewitness Recollections; Can the Postidentification-Feedback Effect Be Moderated, 10 Psychological Science, 138-44 (1999).

105. 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 42, at 132-64. See also supra note 74 and accompanying text.
taken convictions. Some legal scholars have suggested corroboration requirements to obtain any conviction, or implementing specialized appeal and post-conviction remedies that may more readily permit the un-doing of a potentially wrongful conviction. Each of these reform measures has considerable merit and a combination of many of them would serve the goal of averting mistaken convictions due to eyewitness misidentification.

A. Admitting Expert Testimony

Judges remain reluctant to admit expert testimony on the reliability of eyewitness testimony. A 2006 article, Beyond the Ken? Testing Jurors' Understanding of Eyewitness Reliability Evidence, summarized then present admissibility practices among the states, with eleven requiring admission of expert testimony on the reliability of eyewitness testimony in limited circumstances (often when a stranger identification is not corroborated and there is a significant time lapse between the crime and identification procedure), five totally excluding evidence related to the reliability of eyewitness identifications (including Nebraska), and the remaining thirty-four states lying somewhere between requiring admission and excluding all such evidence, often under an abuse of discretion standard.\textsuperscript{106}

Beyond the Ken? Testing Jurors' Understanding of Eyewitness Reliability Evidence authors challenge the oft-relied-on rationale for exclusion of expert testimony regarding the reliability of eyewitness identification that 'there is no need for expert testimony because there is evidence corroborating the eyewitness identification,' urging that rationale violates due process.\textsuperscript{107} For this proposition, those authors cite Crawford v. Washington,\textsuperscript{108} a 2004 United States Supreme Court decision. Legal scholars now have the Court’s unanimous 2006 Holmes v. South Carolina\textsuperscript{109} decision to strengthen that due process argument. In Holmes, the Court struck down South Carolina’s state evidentiary rule that provided 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.”\textsuperscript{110} The Court found this was an arbitrary denial of an opportunity to defend against the state’s charges.\textsuperscript{111}

\textsuperscript{106} Richard S. Schmechel, Timothy P. O'Toole, Catherine Easterly, Elizabeth Loftus, Beyond the Ken? Testing Jurors’ Understanding of Eyewitness Reliability Evidence, 46 JURIMETRICS 177, 185-88 (Winter 2006).

\textsuperscript{107} Id. at 188-90.

\textsuperscript{108} 541 U.S. 36 (2004).

\textsuperscript{109} 547 U.S. 319 (2006).


\textsuperscript{111} Holmes, 547 U.S. at 331.
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 guilt 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' . . . .

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.

Further, the 'corroborating evidence is there' rationale is simply unworkable and fraught with danger. A trial court is not in a position to make a decision about the strength of corroborating evidence "prior to hearing all the evidence and without a complete understanding of the case." Additionally, at 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.]

112. Id. at 330-31.
113. Cf. Clark v. Arizona, 548 U.S. 735, 770 (2006). Though a few months after Holmes, a closely-divided Supreme Court narrowly permitted Arizona to exclude psychiatric evidence of mental disease and diminished capacity short of insanity, id. 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, supra note 106, at 188-93. 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.
115. See Schmechel, et al., supra note 106, at 189. The authors cite Kirk Bloodworth's case as an example of this phenomenon. Id.
The difficulty in ascertaining whether one has found truly independent corroborating evidence is a concern that will be addressed later in other contexts. But, it suffices to say that this rationale for excluding expert testimony suffers from constitutional, reliability, and practical concerns, and therefore, states should no longer be relying upon this rationale.

The Beyond the Ken? Testing Jurors' Understanding of Eyewitness Reliability Evidence authors capably refute a second rationale often relied on by judges, specifically that 'the expert testimony on the reliability of eyewitness identification is 'not beyond the ken' or not helpful to the jury,'\textsuperscript{116} by an empirical study demonstrating that eyewitness research findings are not known to jurors,\textsuperscript{117} and other trial simulation studies finding such testimony assists jurors in evaluating eyewitness testimony.\textsuperscript{118}

Achieving Justice: Freeing the Innocent, Convicting the Guilty (the "ABA Report") would allow expert testimony regarding the reliability of eyewitness identification evidence, where appropriate for an individual case.\textsuperscript{119} Expert testimony should be permitted in all cases where the perpetrator's identity is a central issue, and there is little or no other independent evidence of the defendant's guilt. Additionally, expert testimony should be permitted when the perpetrator's identity is a central issue and a show-up has been conducted,\textsuperscript{120} and/or when juror preconceptions regarding the specific circumstances surrounding the eyewitness identification are significantly contradicted by generally accepted empirical research findings.

\textsuperscript{116} Schmechel, et al., supra note 106, at 191-93.

\textsuperscript{117} 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 minimal understanding of how police procedures can affect the accuracy of an eyewitness identification.").

\textsuperscript{118} ABA Report, supra note 40, at 42 (citing multiple studies).

\textsuperscript{119} ABA Report, supra note 40, at 24, 42. The ABA Report references state practices, 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."

\textsuperscript{120} See Amy Luria, Showup Identifications: A Comprehensive Overview of the Problems and a Discussion of Necessary Changes, 86 Neb. L. Rev. 515, 549-51 (2008) ("Courts should regularly permit the use of expert testimony pertaining to eyewitness identifications, especially in the context of [show-up] identifications, given the lax rules of admissibility for such identifications and, more importantly, jurors' propensity to believe such identifications.")
B. JURY INSTRUCTIONS TAILORED TO THE NEEDS OF THE CASE

In United States v. Telfaire, the United States Court of Appeals for the District of Columbia determined that a cautionary jury instruction regarding eyewitness identification testimony may be appropriate in certain cases. Since Telfaire, the courts and legal scholars have come to view other instructions more tailored to the particular case and practice as more effective. Achieving Justice: Freeing the Innocent, Convicting the Guilty (the “ABA Report”) urges that:

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.

Though the ABA Report does not view jury instructions regarding the reliability of eyewitness identification evidence as particularly effective, in the absence of the adoption of other reforms, jury instructions on areas where there is widespread scientific consensus could be of some benefit.

In Suggestive Eyewitness Identification Procedures and the Supreme Court’s Reliability Test in Light of Eyewitness Science: Thirty Years Later, Professor Gary Wells similarly noted the Telfaire instruction’s deficiencies, but credits the possibility that jury instructions more tailored to the individual case could aid the jury and deter future suggestive identification practices:

121. 469 F.2d 552, 558-59 (D.C. Cir. 1972).
123. 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 Testimony: Evaluation and Revision, 18 J. APPLIED SOC. PSYCHOL. 252, 252-76 (1988); and the “Wright instruction” devised in People v. Wright, 43 Cal.3d 399 (1987).
124. ABA Report, supra note 40, 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, 579-80, 881 A.2d 290, 318-19 (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).
125. ABA Report, supra note 40, at 44.
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 bring pressure back on their police departments to avoid suggestive procedures in the future.\textsuperscript{126}

North Carolina courts have gone somewhat further than simply tailoring the jury instructions to the problem area in the individual case as suggested by Wells and others. North Carolina law 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.”\textsuperscript{127} This instruction is another helpful enforcement mechanism for North Carolina’s required eyewitness identification practices, and adds to the deterrent effect on police that is sought by calling attention to non-compliance. This instruction, when coupled with the more specific jury instructions tailored to the case, could be quite effective in bringing about more reliable identification practices and identifications.

Thus, jury instructions tailored to the individual case are a necessary part of reducing the risk of mistaken convictions based on faulty eyewitness identification testimony. Juror education should begin with voir dire and be carried throughout the case. The trial process should include jury instructions regarding the reliability of eyewitness identification evidence at the opening of the case, immediately before and after an eyewitness testifies, and at the close of the case.\textsuperscript{128}

\begin{footnotes}
\item[126] Wells & Quinlivan, \textit{supra} note 49, at 23.
\end{footnotes}
These jury instructions also provide an incremental deterrent effect on police behaviors. If a state adopts written eyewitness identification guidelines and eventually best practices, a non-compliance jury instruction, even one going further than North Carolina’s non-compliance jury instruction, would be quite appropriate. If the police have not complied with a state’s best practices, jurors should be instructed that they may infer or presume the eyewitness identification is less reliable due to that non-compliance.\textsuperscript{129}

C. EXCLUDING IDENTIFICATION TESTIMONY

In \textit{The Proposed Innocence Protection Act Won’t—Unless It Also Curbs Mistaken Eyewitness Identifications}, I described the United States Supreme Court’s creation of the exclusionary rules attaching to eyewitness identification practice,\textsuperscript{130} and in particular, the due process exclusionary rule developed in the 1967 capital case, \textit{Stovall v. Denno},\textsuperscript{131} and culminating in \textit{Manson v. Brathwaite},\textsuperscript{132} the 1977 non-capital case.

\textsuperscript{129} See supra note 124 and accompanying text. This would go further than the North Carolina or Connecticut instructions. However, investigative mistakes “hurt the credibility of the Government’s witnesses.” U.S. v. Howell, 231 F.3d 615, 625 (9th 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 \textit{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)); \textit{People v. Wimberly}, 5 Cal.4th 773, 793 (Cal. 1992); \textit{State v. Maiccia}, 355 N.W.2d 256, 259 (Iowa 1984); \textit{State v. Fulminante}, 975 P.2d 75, 93 (Ariz. 1999). See also \textit{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).

\textsuperscript{130} Koosed, supra note 4, at 287-98. 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).

\textsuperscript{131} 388 U.S. 293 (1967). An exclusionary rule was also recommended in Britain. See e.g., Chairman Rt. Hon. Lord Patrick Devlin, \textit{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 proviso 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 satis-
In *Manson*, the Court set forth a due process test for the admission of eyewitness identification testimony that remains the Court's approach today. In that case, police investigators had presented an undercover police officer witness with a single photo of the suspect, rather than presenting the officer with a photo array containing photos of several individuals. Though the single photo identification practice was unnecessarily suggestive, the *Manson* court majority refused to exclude the undercover police officer's testimony about his out-of-court suggestive photo identification of the defendant, nor his in-court identification of the defendant at trial.

The United States Court of Appeals for the Second Circuit had interpreted the Court's earlier due process rulings in *Stovall v. Denno* and *Neil v. Biggers* as creating a per se exclusionary rule. This per se exclusionary rule required the court to exclude testimony that the witness had previously identified the defendant in an unnecessarily suggestive procedure. In excluding this testimony regarding the out-of-court identification, the court discarded testimony about an identification that was necessarily suspect in its reliability, as the identification was made in an unnecessarily suggestive procedure. Furthermore, the court's exclusion of this evidence encouraged police to use more reliable means of eyewitness identification when those means were available.

Despite these potential benefits, the *Manson* majority rejected this per se exclusionary rule of some eyewitness identification testimony as too severe. Instead, the Court held an eyewitness could testify about the eyewitness's out-of-court identification and make an in-court identification, unless under the totality of the circumstances, "a very substantial likelihood of irreparable misidentification" existed. The courts were to determine the likelihood of irreparable misidentification by weighing the corrupting effect of the suggestive identification procedure against five factors relating to reliability: 1) the eyewitness's opportunity to observe, 2) the eyewitness's degree of attention, 3) the eyewitness's level of certainty, 4) the accuracy of the eyewitness's prior description, and 5) the time lapse between the crime and the identification procedure.
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 must be excluded as a direct fruit thereof. The Manson dissenters urged the per se exclusionary rule was necessary to provide a greater deterrent to police not to use unreliable eyewitness identification procedures. The debate between the Manson majority and dissenters continues today amongst legal scholars, though the United States Supreme Court has not revisited any aspect of the Manson test (or Manson case) for over thirty years.

My 2002 article, The Proposed Innocence Protection Act Won’t—Unless It Also Curbs Mistaken Eyewitness Identifications, argued that improved eyewitness identification procedures and a tighter exclusionary rule were necessary in capital cases to avoid executing an innocent person. I urged legislative adoption of best eyewitness identification practices (then based on the American Psychology/Law Society (“AP/LS”) AP/LS and Department of Justice (“DOJ”) standards), and a return to the Stovall per se exclusionary rule standard when police were investigating a potentially capital offense or a closely related offense thereto. The Stovall per se exclusionary rule would apply when any impermissibly suggestive eyewitness identification occurred, even if neither the police nor the prosecutors planned or conducted the encounter between the eyewitness and the defendant. Under my approach, an in-court eyewitness identification would be allowed only if the prosecution could prove by clear and convincing evidence that the prior identification was not conducive to irreparable mistaken identification. Furthermore, the prosecution should prove the eyewitness identification procedure was not conducive to irreparable mistaken identification with the facts surrounding the identification itself, and prosecutors would not be allowed to resort to discrete corroborating or inadmissible evidence, or to unreliable inferences. My article concluded a preferred option would be the exclusion of death itself, a bar on seeking the death penalty when law

138.  Id. at 120 (Marshall, J., dissenting).
139.  Koosed, supra note 4, at 310-11.
140.  Id. at 311; see also id. at 299-302 (discussing the possible suggestiveness in chance encounters that could also undermine reliability).
141.  Id. at 302-03 (discussing varying tests for admitting the in-court identification).
142.  Id. at 312, see also id. at 303-05 (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. 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).
enforcement used unnecessarily suggestive eyewitness identification procedures, or at the least, instructing the jury to presume life in this setting to avoid a mistaken execution.\(^\text{143}\)

I was not alone in my criticism of the Court’s due process exclusionary rule, and the drumbeat for change since my criticism has been incessant.\(^\text{144}\) Some states have implemented exclusionary rule changes by use of their state constitutions or supervisory powers.\(^\text{145}\) Gary Wells and Deah Quinlivan’s excellent 2009 article, *Suggestive Eyewitness Identification Procedures and the Supreme Court’s Reliability Test in Light of Eyewitness Science: Thirty Years Later*, may spur other states to make a change.\(^\text{146}\) This 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.”\(^\text{147}\) Though “courts seem to assume that a misidentification resulting from a suggestive procedure can somehow be corrected later by using a fair procedure,” social science does not generally accept the idea that the effect of a suggestive eyewitness identi-

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143. *Id.* at 312-13, *see also id.* at 313, note 244.
144. *See e.g.*, Luria, *supra* note 120, at 534-35 (discussing differing interpretations and highly subjective fact intensive determinations under the rule), 543-44 (urging a return to *Stovall* if a show-up 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 & Quinlivan, *supra* note 49.
145. Johnson v. Massachusetts, 420 Mass. 458, 465-66, 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 exclusionary rule of *Stovall*, but an out of court show-up 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) (requiring, 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).
146. *See generally Wells & Quinlivan, supra* note 49.
147. *Id.* at 5.
fication procedure can somehow be erased by use of a fair eyewitness identification procedure.\textsuperscript{148} Instead, the earlier suggestive eyewitness identification procedure taints the eyewitness's memory, replacing or blending that memory.\textsuperscript{149} While in theory an eyewitness's strong memory could be so reliable that it trumps weak suggestiveness, there are almost no cases this clear.\textsuperscript{150} More troubling, the Court's test does not attend to biasing post-identification feedback,\textsuperscript{151} none of the five so-called reliability factors are unequivocally related to accuracy, and "three of the five (certainty, view, and attention) are self-reports that are themselves products of suggestive procedures."\textsuperscript{152}

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 of \textit{Manson}," but instead, "the test actually raises the score."\textsuperscript{153} As a result:

[T]here 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.\textsuperscript{154}

Worse, \textit{Manson} may actually encourage suggestive procedures.

We believe a case can be made that the \textit{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 \textit{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?\textsuperscript{155}

Appreciating this "might appear cynical or accusatory," Wells and Quinlivan respond:

We do not intend it to be so. Police are just people and people respond to contingencies and incentives, often without an ex-

\textsuperscript{148} \textit{Id.} at 16.
\textsuperscript{149} \textit{Id.} at 17.
\textsuperscript{150} \textit{Id.} at 18.
\textsuperscript{151} \textit{Id.} at 17.
\textsuperscript{152} \textit{Id.} at 18.
\textsuperscript{153} \textit{Id.}
\textsuperscript{154} \textit{Id.}
\textsuperscript{155} \textit{Id.}
licit 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 expect the contingencies and incentives themselves to somehow reduce the use of suggestive identification procedures.156

Wells and Quinlivan additionally contend that the Court's already inadequate exclusionary rule test is further undermined by the lower court's failure to follow the test's very modest constraints. Lower court judges accept and consider eyewitness's certainty statements made long after the eyewitness identification procedure, rather than limiting consideration to statements made at the time of the identification procedure.157 Judges also consider eyewitness descriptions given after the identification or after the eyewitness has viewed the suspect, instead of those descriptions given before the identification or before the eyewitness has viewed the suspect.158 When one or more Manson reliability factors is weak then, a stronger (or perceived stronger) factor can overcome and displace those weak factors.159 Wells and Quinlivan suggest "perhaps the criteria are just too flexible to be meaningful."160

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," suggesting such a version of the per se exclusionary rule would exclude all eyewitness identification testimony whenever a suggestive procedure had occurred, and an overly broad exclusionary rule would free the guilty perpetrator even when suggestiveness is outweighed by the strength of the eyewitness's memory.161

However, the severity of a hard and fast per se exclusionary rule as envisioned by Wells and Quinlivan is not cause for concern or putting aside the Stovall per se exclusionary rule because the version of the rule as interpreted in cases following Stovall and as considered by

156. Id.
157. Id. at 20.
158. Id.
159. Id. at 18.
160. Id.
161. Id. at 19. "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." Wells & Quinlivan, supra note 49, at 19.
the Court in *Manson* was not so hard and fast. The *Stovall* per se
exclusionary rule did not exclude all eyewitness identification evi-
dence; it only mandated exclusion of testimony relating to the out-of-
court identification. Under the *Stovall* per se exclusionary rule, an
eyewitness could still make an in-court identification, if the prosecu-
tion proved the in-court identification was "reliable," or that the pre-
trial identification procedure was not "conducive to irreparable mis-
taken identification," or as framed by the United States Court of
Appeals for the Second Circuit in *Manson*, that there was no "substan-
tial likelihood of irreparable misidentification" arising from the sug-
gestive eyewitness identification procedure. Therefore, under the
*Stovall* per se exclusionary rule, if the strength of the eyewitness's
memory outweighed the suggestiveness, Wells and Quinlivan's exam-
ple eyewitness could still make an in-court identification and the de-
fendant may well be convicted. Thus, though Wells and Quinlivan did
not make this explicitly clear, it appears that Wells and Quinlivan
would support the per se exclusionary rule in place prior to the Court's
decision in *Manson*, the same *Stovall* per se exclusionary rule that I
advocated the courts return to.

Wells and Quinlivan's second concern is that the per se exclusion-
ary rule is limited to unnecessarily suggestive procedures, when the
problems presented by suggestive procedures exist whether or not the
suggestiveness was necessary. It can be contended that the *Man-
son* court did not intend to limit the due process exclusionary rule to
instances of unnecessary suggestiveness; the Court spoke only to
weighing the "corrupting effect of the suggestive identification" and
did not focus on the necessary or unnecessary nature when conducting
its totality of the circumstances analysis. Perhaps this is because the
Court was simply less concerned with whether a more reliable proce-
dure was available, having discarded that concept as a per se test for
admissibility. However, regardless of what the *Manson* court may
have intended, this is how the *Manson* test is often applied in the
lower courts— though some lower courts may suppress when an iden-

162. *Manson*, 432 U.S. at 110, fn. 10; see also Koosed, supra note 4 at 292-94, citing
*Brathwaite v. Manson* (*Brathwaite*), 527 F.3d 363, 366-71 (2d Cir. 1975).
163. *Manson*, 432 U.S. at 110, fn. 10; see also Koosed, supra note 4 at 292-94, citing
*Brathwaite*, 527 F.3d at 366-71.
164. *Manson*, 432 U.S. at 110, fn. 10 (stating that the in-court identification is ad-
missible under the per se rule if it is reliable); Koosed, supra note 4 at 292-94 (referenc-
ing courts looking to whether the out of court identification was conducive to irreparable
mistaken identification); *Brathwaite*, 527 F.3d. at 370 (referencing no substantial likeli-
hood of irreparable mistaken identification) (quoting *Simmons v. United States*, 390
U.S. 377, 384 (1968)).
166. See *Manson*, 432 U.S. at 114, 117 (stating the failure to use another procedure
was not one of constitutional dimension).
tification is suggestive, even when it is not a product of police con-
duct.\textsuperscript{167} As noted above, I have argued the per se exclusionary rule
should not be limited to instances where a suggestive identification
was a product of police practices and should apply to even chance en-
counters that are suggestive. Based on their article, it appears that
Wells and Quinlivan agree that the present \textit{Mason} exclusionary 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 my proposal, “the prosecution would have to make the case
that the identification was reliable regardless of whether a suggestive
procedure was necessary or unnecessary.”\textsuperscript{168} It is unclear whether
under Wells and Quinlivan's proposed alternative to \textit{Manson} the wit-
ness could testify as to both the out-of-court identification and an in-
court identification. Under the \textit{Stovall} per se approach adopted by the
lower court in \textit{Manson}, the out-of-court identification would be ex-
cluded, while the in-court identification could be admitted under some
circumstances.\textsuperscript{169} As Wells and Quinlivan advocate the deletion of
the necessity aspect and may be perceiving the per se rule differently,
Wells and Quinlivan may intend their approach to be an all-or-noth-
ing approach like the Court agreed to in \textit{Manson}, where either both
the out-of-court and in-court identifications are admitted or both are
excluded. However, my proposal remains that courts adopt the
\textit{Stovall} and \textit{Manson} lower court approach, with exclusion of the out-of-
court identification for deterrent purposes and to further avert mis-
taken convictions, at least in capital cases.

Wells and Quinlivan would bar the government from proving the
reliability of eyewitness identifications by using an eyewitness's “cer-
tainty, view, or attention, unless it is demonstrably shown that these
self-reports were reliable.”\textsuperscript{170} Under this approach, a prosecutor must
find evidence of reliability “that is independent of the suggestive pro-
cedure.”\textsuperscript{171} Adoption of Wells and Quinlivan's position should pres-
sure police to collect detailed statements from eyewitnesses early in
the investigative process and prior to the possibility of suggestiveness,
which would be a very helpful development.\textsuperscript{172} Furthermore, adop-
tion of this rule should also diminish suggestive practices because self-

\begin{itemize}
\item \textsuperscript{167} See Koosed, \textit{supra} note 4, at 299-302.
\item \textsuperscript{168} Wells \& Quinlivan, \textit{supra} note 49, at 22.
\item \textsuperscript{169} See \textit{supra} notes 133-38, 162-64 and accompanying text.
\item \textsuperscript{170} Wells \& Quinlivan, \textit{supra} note 49, at 22.
\item \textsuperscript{171} \textit{Id.} at 22-23.
\item \textsuperscript{172} \textit{Id.} at 22.
\end{itemize}
reporting factors could not be used once a suggestive procedure has occurred.173

Wells and Quinlivan’s position regarding the evidence available to prove reliability of an eyewitness identification is welcome because it denies the prosecution the ability to prove reliability of an identification by use of self-reporting factors that do not actually prove reliability. Wells and Quinlivan’s position is consistent with my own suggestion that the prosecution should not prove the eyewitness identification procedure’s reliability by resorting to inadmissible evidence or unreliable inferences.174

If Wells and Quinlivan’s proposal that the prosecution prove reliability by evidence “independent of the suggestive procedure” means their proposal 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.175 However, the Court may have admitted such evidence to show the harmlessness of an erroneous suppression denial,176 and perhaps the distinction is not really significant, unless it would impact on the deterrent effect, which it might. Still, the critical concern is avoiding mistake, and that the corroborating evidence in fact be independent. If Wells and Quinlivan’s criteria are followed, a lesser deterrent effect may arise out of cases where guilt is clear, but at least in such cases there would not be the risk of mistake. This is an acceptable trade-off.

Legal scholars have suggested that the exclusionary rule does not have much teeth because courts don’t have the stomach for silencing a witness, especially a victim.177 This proposition may have some credence. However, eyewitnesses can still provide an in-court identification where the evidence is reliable; and if the evidence is not reliable, then eyewitnesses should testify only about their own observations at the time of the crime and not about their identification. Quite simply, 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 eyewitness testimony related to the out-of-court identification procedure if an eyewitness identification procedure was suggestive, but allows the in-court eyewitness identification to be made when the prosecution proves the in-court eyewitness iden-

173.  Id. at 22-23.
174.  Koosed, supra note 4, at 312.
175.  See supra note 142, and accompanying text.
176.  See supra note 142, and accompanying text.
177.  Thompson, supra note 128, at 1525.
tification is based on independent evidence, is very close to the original Stovall test, the test I advocated the criminal justice system should return to. Adding to this test a requirement that the prosecution cannot use self-reporting matters unless the prosecution demonstrates these are reliable is also consistent with that approach, and essential given what legal scholars now know from social science studies. Tightly construing the accuracy of the Manson prior description factor, so as to include only a truly prior description of the perpetrator, will also enhance reliability of eyewitness identifications. All in all, the suggestion outlined above could be an ideal exclusionary rule formulation.

Though the United States Supreme Court may not be the most receptive court when it comes to including a consideration of social and other science evidence in its development of legal rules, the Court has had its moments of considering such evidence. The Court’s decisions in the capital cases Roper v. Simmons178 and Atkins v. Virginia179 provide some indication that the Court will look to science for relevant information.180 Additionally, the dissenting justices’ extended discussion in Kansas v. Marsh181 suggests the four dissenters (Justices David Souter, John Paul Stevens, Ruth Bader Ginsburg and Stephen Breyer) are quite sensitive to DNA exonerations and the causes of wrongful capital convictions. To be sure, my concern rose when the Court recently ordered re-briefing in the pending case, Montejo v. California,182 on whether Michigan v. Jackson183 should be overruled, given that Jackson’s Sixth Amendment right to counsel exclusionary rule may well provide added protection against false confessions.184 However, the Court’s recent decision in Corley v. United States,185 rejecting an argument that the United States Congress had abrogated the McNabb-Mallory confessions exclusionary rule186 was

181. 548 U.S. 163 (2006) (containing a dispute over exoneration and the risk of executing an innocent when the evidence at sentencing is left in equipoise); see id. at 208-212 (Souter, J. dissenting), 185-199 (Scalia, J. concurring).
186. 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.
encouraging. The Court's discussion was particularly encouraging 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." 187

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 is a totality of the circumstances analysis, the Manson test's own malleability may open it up to a tinkering or refining by the Court 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. 188 Exclusion should also be viewed as an appropriate remedy for breaching eyewitness identification procedure guidelines, even if no alteration of the due process exclusionary rule is ultimately made. 189

Wells and Quinlivan proffer another more limited exclusionary rule approach that also has considerable merit. A court could consider limiting some eyewitness testimony, when "outright exclusion is too extreme of a remedy." 190 Wells and Quinlivan write:

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

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188. As earlier noted, some state courts have already done this and modified their exclusionary rules by means of state constitutions. See supra note 145, and accompanying text.
189. 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 & Davies, supra note 42, at 44 (urging exclusion of show-up confrontation unless the witness previously knew the defendant); Koosed, supra note 4 at 310-11.
190. Wells & Quinlivan, supra note 49, at 23.
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.\textsuperscript{191}

Again, this limited-exclusion approach 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 presented by an individual case is an inviting alternative, if the blended per se exclusionary rule above is not adopted.

\section{Corroboration and Conviction/Execution Evidentiary Requirements}

The quest for greater assurance against mistaken convictions and executions has led to an outpouring of proposals to ratchet-up the criminal justice system’s reliability. In 2001, I urged adopting the Model Penal Code 210.6 provision that barred the death penalty where the evidence did not foreclose all doubt about the convicted person’s guilt.\textsuperscript{192} Similarly in \textit{The Proposed Innocence Protection Act Won’t—Unless It Also Curbs Mistaken Eyewitness Identifications}, I argued for a tighter eyewitness identification rule, and preferably, excluding death, to avert mistaken executions when a suggestive identification procedure occurred. At the time, I thought these were necessary, but rather unlikely, reforms. However, recent scholarship and events have convinced me these reforms are not outliers and are truly possible.

Surveying the scholarship first, it suffices to say that requiring corroboration of eyewitness testimony to avoid mistakes is not a new idea, as its roots can be found in ancient Talmudic texts.\textsuperscript{193} In 1976, Lord Patrick Devlin conceded in a report to the British Home Secretary, “the only way of diminishing the risk [of wrongful conviction] is by the erection of general safeguards which will inevitably increase the burden of proof.”\textsuperscript{194} The Devlin Committee recommended a corroboration requirement:

\begin{quote}
We do however wish to ensure that in ordinary cases prosecutions are not brought on eye-witness evidence only and that,
\end{quote}

\textsuperscript{191} 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 & Davies, supra note 42, at 44 (urging exclusion of show-up confrontation unless the witness previously knew the defendant); Koosed, supra note 4, at 310-11.


\textsuperscript{193} Thompson, supra note 128, at 1528-29. See generally id. at 1528-40 for a thorough history and discussion of corroboration requirements in the law.

\textsuperscript{194} Devlin Report, supra note 131, para. 1.25, at 7.
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 eyewitness 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. 195

Likewise, Professor Sandra Guerra Thompson proposes in her 2008 article, Beyond a Reasonable Doubt? Reconsidering Uncorroborated Eyewitness Testimony, requiring corroborating evidence in cases involving eyewitness identification, “especially for extremely violent crimes,” 196 unless the eyewitness knew the perpetrator before the crime. 197 Guerra Thompson contends there is “a substantial margin of error that cannot be eliminated” even with best practices, and that actors in “the criminal justice system can do nothing to improve a witness’s innate perception and memory failings.” 198 Guerra Thompson further posits that a corroboration requirement is also helpful as it relieves the prosecutor of the moral dilemma of how to deal with an eyewitness-victim who can make an identification but where this is the only evidence in the case – a prosecutor can just say no to prosecuting until the police have fulfilled their responsibility to obtain other evidence. 199

As with Wells and Quinlivan’s proposal, Guerra Thompson’s proposal will create a strong motivation for police to investigate the case further, which is a needed improvement in the criminal justice system. Under Guerra Thompson’s proposal, how best to obtain corroborating evidence is left entirely within the discretion of police investigators. 200 Importantly, however, like Wells and Quinlivan, Guerra Thompson “requires some genuine investigative work to uncover other independent evidence linking the suspect to the crime.” 201

196. Thompson, supra note 128, at 1524.
197. Id. at 1541.
198. Id. at 1497, 1503.
199. Id. at 1528.
200. Id. at 1527-28.
201. Id. at 1542.
Guerra Thompson’s requirement of independent corroborating evidence is critical. Professors George Castelle and Elizabeth Loftus write in *Misinformation* that cross-contamination of evidence is common in wrongful conviction cases. Evidence does not exist in discrete and immutable units, with each piece isolated. One mistake causes other things to happen, as the mistake transforms thoughts, memories, and “approach to potentially every other piece of evidence.” Knowledge that an eyewitness identification was made or a confession given “can permeate every aspect of a case, even if excluded from trial.” Misinformation can even prompt forensic examiners, making somewhat subjective or ambiguous judgment calls, to confirm what the misinformation found. 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.” Castelle and Loftus argue that it is critical for the criminal justice system to understand this cross-contamination potential and implement safeguards against it. Jurisdictions can minimize cross-contamination “by carefully recording and disclosing witnesses’ initial observations before exposing a witness to post-event information.”

Therefore, the independent corroborating evidence requirement proposed by Guerra Thompson and others must be accompanied by a requirement of a written contemporaneous record of an eyewitness’s initial observations. This requirement is presently included in recommended best practices for eyewitness identification, 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 Guerra Thompson states, “Extreme care should be taken not to allow one type of unreliable evidence to corroborate another.” Thus, confessions from juveniles or the mentally re-

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204. *Castelle & Loftus, supra* note 202, at 19.
205. *Id.* at 29.
206. *Id.*
208. *Id.* at 31.
209. *Id.*
211. Thompson, *supra* note 128, at 1543.
tarded, or jailhouse snitch testimony, should not be used to corroborate eyewitness identification testimony.\textsuperscript{212}

A requirement of strong corroboration with other independent and reliable evidence has also been proposed by Professors Boaz Sangero and Mordechai Halpert, in their extensively researched study and article \textit{Why Convictions Should Not Be Based on a Single Piece of Evidence: A Proposal for Reform}, in which they state:\textsuperscript{213}

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.\textsuperscript{214}

As Sangero and Halpert’s title suggests, they would go so far as to urge a legislative requirement of “strong corroboration” to convict in all cases involving any single piece of evidence.\textsuperscript{215} 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.”\textsuperscript{216} Requiring corroboration to convict in all cases would inevitably reduce the risk of error.

Other more limited reform proposals focus, like my own reform proposal, on barring the death penalty, if not a conviction. In \textit{Averting Mistaken Executions by Adopting the Model Penal Code Exclusion of Death in the Presence of Lingering Doubt}, I proposed that the evidence must foreclose all doubt of guilt before death could be imposed on a convicted person, and in \textit{The Proposed Innocence Protection Act Won’t—Unless It Also Curbs Mistaken Eyewitness Identifications} that conducting a suggestive identification procedure must bar a death sentence.\textsuperscript{217} More proposals to assure greater reliability of evidence before imposing death are now on the legislative table.

\textsuperscript{212} \textit{Id.} at 1543.
\textsuperscript{214} \textit{Id.} at 93-94.
\textsuperscript{215} \textit{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.” \textit{Id.} at 44.
\textsuperscript{216} \textit{Id.} at 94.
\textsuperscript{217} See generally Koosed, supra notes 192 and 4.
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.\textsuperscript{218} Professor Rory K. Little's reform proposal goes further, positioning in the upcoming \textit{Addressing the Evidentiary Sources of Wrongful Convictions: Categorical Exclusion of Evidence in Capital Statutes},\textsuperscript{219} that legislatures should ban seeking the death penalty, if a prosecution of a convicted person is based primarily on one of the four most common sources of wrongful conviction evidence – 1) eyewitness identification, 2) false confession, 3) criminal informants (jailhouse snitches), or 4) invalidated (junk) science, whether singly or in combination.\textsuperscript{220} This ban would be immediately judicially enforceable and reviewable.\textsuperscript{221}

Similarly, the Massachusetts Governor's Council on Capital Punishment recommended that to impose death:

\textit{The jury should be required to find that there is conclusive scientific evidence (i.e., 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.}\textsuperscript{222}

Governor Mitt Romney set up the Council to provide recommendations, if Massachusetts were to consider reinstating the death penalty. However, Innocence Project staff attorney Craig Cooley asserts in his 2007 article, \textit{Forensic Science and Capital Punishment Reform: An "Intellectually Honest" Assessment},\textsuperscript{223} 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, particularly at this juncture, considering the numerous crime lab problems (across the country and especially in Massachusetts) and the lack of funding . . . . We have a broken system

\begin{footnotesize}
\begin{itemize}
  \item Id.
  \item Id.
  \item Recommendation (6), Governor's Council on Capital Punishment (Massachusetts Council Report) 20-21, available at \url{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.
\end{itemize}
\end{footnotesize}
(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 cannot presently offer, a capital system premised on forensic evidence, examiners, and labs will inevitably falter from the outset.²²⁴

Cooley's article sets out to debunk several assumptions regarding forensic science, and presages weaknesses identified by the National Academy of Sciences ("NAS") in its recently-released Report.²²⁵ The Governor's Council anticipated many of these concerns in its own Report,²²⁶ 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."²²⁷

Notwithstanding Cooley's 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, only one other state, Maryland, has taken up the banner of the Illinois and Massachusetts Governor's Commissions. Though the effort in Maryland during the Spring of 2009 was directed at abolition of the death penalty,²²⁸ it currently appears 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 eyewitnesses.²²⁹ Maryland Senate Bill 279 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 de-

²²⁴. Id. at 305.
²²⁵. Id. at 306-32 (absence of time, meticulousness and funding in/for forensic science laboratories), 332-95 (absence of adequate testing, scrutiny of methods), 396-422 (absence of scientists in forensic science). See also Report of the National Academy of Science, supra note 101.
²²⁷. Cooley, supra note 223, at 306.
²²⁹. S. B. 279, 2009 Reg. Sess. (Md. 2009) [Blue Book R13c] 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 227. 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.
fendant to the homicide. 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.

E. Expanding Appellate Review

Along with ratcheting-up reliability requirements like corroboration or exclusions of the death penalty, have come numerous proposals to provide broader authority to courts to set aside wrongful death sentences and convictions. The Massachusetts Governor’s Council included such a general provision. Specific to eyewitness identification, one commentator, Calvin TerBeek urges “when a conviction is based solely on uncorroborated eyewitness testimony, (i.e. a lone witness) 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.”

Professor D. Michael Risinger, following the lead of the British criminal justice system, proposes a process that reverses “unsafe verdicts.” Weak eyewitness identification cases are often reversed as “unsafe verdict” cases in Britain. A verdict is unsafe when there is “lurking doubt” regarding guilt of the convicted person. Risinger recommends an unsafe verdict review in the trial court and on appeal, and suggests “a special obligation [to reverse] when a conviction was undergirded primarily with evidence known to be of questionable reliability, such as stranger-on-stranger eyewitness identification or ‘jailhouse snitch’ testimony.” As in Britain, Risinger “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

232. 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.
234. Id. at 1317.
235. Id. at 1319 (citing R. v. Cooper, 53 Crim. App. R. 82 (CA 1969), and Richard Nobles and David Schiff, Understanding Miscarriages of Justice 71 (2000)).
236. Id. at 1332.
Risinger also offers a three-part retrial opportunity analysis: if a verdict was viewed as unsafe, and if the fresh evidence is admissible, Risinger would order a new trial. If new evidence clearly shows actual innocence, Risinger would dismiss with double jeopardy effect. If the verdict is necessarily subject to reasonable doubt, Risinger would dismiss and a retrial would be possible only on application to a court after development of significant new evidence of guilt. Adding a requirement that the significant new evidence in such a retrial be independent, Risinger’s three-part proffer is a most inviting reform.

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 allowing the court to reverse the death sentence while affirming the conviction. Though Rinsinger does not refer to it, this option is essentially that found in the Model Penal Code 210.6 provision, which bars the death penalty if the evidence does not foreclose all doubt about guilt.

These reform proposals 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 judgments are worthy of public trust.

F. ABOLISHING THE DEATH PENALTY

Under a broader interpretation of the concept of reform, 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 George Ryan feared the ultimate nightmare of executing an innocent person and granted clemency to everyone on Illinois’ death row, New Jersey Governor Jon Corzine and New Mexico Governor Bill Richardson have endorsed repeal of the death penalty to avoid an irrevocable mistake. As he ended the death penalty in New Mexico on March 18, 2009, Governor Bill Richardson stated:

237. Id.
238. Id. at 1332-33. 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).
239. Risinger, supra note 233, at 1333-34.
I do not have 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 crime. . . . [T]he system to impose this ultimate 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.241

New Jersey Governor Jon Corzine echoed the same concern a few days before the death penalty repeal bill came to his desk.242 The ultimate reform, therefore, is abolition of the death penalty, for it will prevent the ultimate nightmare.

VI. CONCLUSION

I ended The Proposed Innocence Protection Act Won't—Unless It Also Curbs Mistaken Eyewitness Identifications 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 to repeal the death penalty. These states are to be applauded, and I hope more states will follow this path of reform.

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 try, and to make these reforms happen. If we fail in this attempt, it is inevitable that innocent persons will continue to be wrongly convicted.

