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Eyewitness Errors and Wrongful Convictions: Let's Give Science a Chance

Starting with the man holding the card that read "I," each stepped forward, closer to the table, turned to the side, then back to the front, and spoke.

"Shut up or I'll cut you! Hey, baby, how ya doing? Your man's over in Germany. It's been a long time."

The words hit me like a punch to the stomach. Hearing what that man had uttered to me, his face right above mine. I had to make my mind split, the way it had that night. I didn't want to make eye contact with any of them, despite trying to look at each of them closely. I concentrated on my job—to find him if he was here—even though my mind vividly replayed scenes as each man repeated the line.

Number four began his turn. He had on a light yellow shirt and jeans. A sudden shudder of recognition went through me. Was this him?

Number five went, next. When he said, "Shut up or I'll kill you!" I froze. He and number four looked so much alike, so much like my attacker. Why did he say, "I'll kill you?" I wondered. Was it a trick? He had on a brown and beige mock turtleneck and jeans.

The rest of the men finished. I kept looking at numbers four and five. I turned to Detective Gauldin, "It's between four and five. Can I see them again?" I whispered.

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> Number four repeated the procedure. His facial features were so close, but his body didn't seem right. My rapist had been lankier.
>
> "Shut up or I'll cut you!"
>
> Number five got it right this time. I looked at his face. He had a light mustache; his eyes looked cold. His body was long and lean. He knew to wear brown, I thought, because he knew he had been wearing dark blue the night of my assault. And he knew to wear his hair differently.
>
> It was him. There was no doubt in my mind.[1]

> "Jennifer, do you see the man in the courtroom today who was in your apartment on the early morning hours of July 29, who had sexual intercourse with you, oral sex with you, and broke into your apartment?"
>
> "Yes," I answered, glaring at Ronald Cotton, who sat there expressionless, as if he didn't care at all what had been done to me.
>
> "Would you point to him?"
>
> I raised my index finger and pointed directly to him, wishing I had had a gun instead and could get a clear shot at him, so I'd never have to see that face again.
>
> "Let the record show that she has pointed to the defendant. Jennifer, are you absolutely sure that Ronald Junior Cotton is the man?"
>
> How could I ever forget? Didn't they know his terrible face would stay in my mind forever?
>
> "Yes," I said.[2]

Though Jennifer Thompson, the rape victim, spent more than forty-five minutes with her attacker in her brightly lit home, spoke to him face-to-face, and took special care during the attack to make careful observations and notes in her mind of all the attacker's identifying characteristics, Ms. Thompson, a twenty-two-year-old college student, identified the wrong man in a photographic identification, in a lineup, and at trial. She claimed to be "100% certain" of her identifications on all three occasions. Indeed, when Ms. Thompson later observed her *actual* rapist face-to-face in a South Carolina courtroom after his confession and his DNA absolutely determined his guilt, Ms. Thompson stated that she had never seen him before in her life. Mortified by her errors that caused Ronald Cotton to spend fourteen years in jail for a crime he did not commit, Ms. Thompson has joined Mr. Cotton in a nationwide crusade to

[1] JENNIFER THOMPSON-CANNINO ET AL., PICKING COTTON: OUR MEMOIR OF INJUSTICE AND REDEMPTION 36–37 (2009).

[2] *Id.* at 64.

change the way American state and federal courts handle eyewitness identification procedures.[3]

All of the procedures in Cotton's trial fully complied with the Supreme Court's existing case law on the admission of eyewitness identification evidence.

As Professor Medwed has written:

> The reason why eyewitness misidentifications are so prevalent generally stems from both (a) the imperfect manner in which human beings process visual information at the time of an event, and (b) the design of most police identification procedures, which can serve to reinforce, or exacerbate, any potential flaws in the original observation.[4]

There are many processing explanations as to why eyewitnesses may make inaccurate identifications. These include stress and fear along with several cognitive factors, such as the difficulty of identifying individuals from a different racial group ("cross-racial misidentification") and inadvertently associating the perpetrator's features with the features of someone more familiar to the eyewitness ("unconscious transference").[5] Though the vagaries of the manner in which observers process information has been well documented and concisely chronicled elsewhere,[6] this Article focuses on the flaws in the police-initiated identification procedures and the U.S. Supreme Court's flawed legal standard for the admissibility of the identifications generated by these procedures.

It is time to change the law governing lineup eyewitness identification procedures and the admission at trial of eyewitness identifications. Over the last forty years, forensic science has developed considerably while the law governing lineups has remained largely calcified. The advent of DNA typing has underscored the unreliability of lineup identifications. The authors of one study estimate that the convictions of seventy-five percent of those defendants exonerated through the use of DNA evidence were based on erroneous eyewitness testimony.[7] The unreliability of eyewitness

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[3] *See generally id.* at 276–91.

[4] Daniel S. Medwed, *Anatomy of a Wrongful Conviction: Theoretical Implications and Practical Solutions*, 51 VILL. L. REV. 337, 358 (2006).

[5] *Id.* at 358–59.

[6] *See id.* at 358–59 (explaining the factors involved in human processing).

[7] Gary L. Wells et al., *From the Lab to the Police Station: A Successful Application of Eyewitness Research*, 55 AM. PSYCHOLOGIST 581, 589 (2000); *see also* INNOCENCE PROJECT, REEVALUATING LINEUPS: WHY WITNESSES MAKE MISTAKES AND HOW TO

identifications is revealed most dramatically in sexual assault cases, which often include both victim identification testimony and physical evidence from which the assailant's DNA can be determined.[8] DNA evidence has also exonerated many defendants whose convictions for other crimes (some carrying a capital sentence) were based on flawed eyewitness identifications. Improved lineup identification procedures and more stringent admissibility standards can help reduce the number of individuals wrongly convicted through erroneous eyewitness identification.[9]

I
SUPREME COURT DECISIONS

From 1967 to 1977, the Supreme Court issued a series of rulings setting out the constitutional requirements governing lineups and the admissibility of eyewitness identification testimony. Predictably, perhaps, the Warren Court expanded the rights of suspects while the Burger Court contracted them.

In 1967, in *United States v. Wade*,[10] the Warren Court, recognizing the risks created by suggestive lineups, held that after indictment there is a Sixth Amendment right to counsel during a lineup.[11] The *Wade* Court observed that the presence of counsel at the lineup would

REDUCE THE CHANCE OF A MISIDENTIFICATION 3–4 (2009) (noting that, in thirty-eight percent of misidentification cases, multiple eyewitnesses misidentified the same innocent person and that, in fifty percent of misidentification cases, eyewitness testimony was the central evidence relied upon by the prosecution).

[8] The wrongful rape conviction of Ronald Cotton—based on an erroneous victim identification—is described at *What Jennifer Saw*, FRONTLINE, www.pbs.org/wgbh/pages/frontline/shows/dna/cotton/summary.html (last visited Oct. 16, 2010). After spending ten and a half years in a North Carolina prison, Cotton was exonerated through the use of DNA evidence. *Id.* Similarly, McKinley Cromedy spent six years in a New Jersey prison after being convicted of rape. Ronald Smothers, *DNA Tests Free Man After 6 Years; Had Been Convicted in Rape of Student*, N.Y. TIMES, Dec. 15, 1999, http://www.nytimes.com/1999/12/15/nyregion/dna-tests-free-man-after-6-years-had-been-convicted-in-rape-of-student.html. DNA evidence proved that the victim's identification was wrong and that another man had committed the crime. *Id.*

[9] Some inaccuracy in eyewitness identifications will persist because of the circumstances of the crime itself. Scientists call these factors "estimator variables" and explain that they exist outside the control of criminal justice officials. Brian L. Cutler, *A Sample of Witness, Crime, and Perpetrator Characteristics Affecting Eyewitness Identification Accuracy*, 4 CARDOZO PUB. L. POL'Y & ETHICS J. 327, 328 (2006).

[10] United States v. Wade, 388 U.S. 218, 224–36 (1967).

[11] Though the lineup discussed in *Wade* happened to have taken place after Wade's indictment, nothing in the Court's reasoning would have limited the right to counsel to post-formal charge identification.

deter police from improperly influencing the eyewitness and would enhance the defendant's ability to recreate the lineup at a suppression hearing and to cross-examine the eyewitness at trial.[12] In the companion case of *Gilbert v. California*, the Court ruled that an out-of-court identification would be excluded at trial unless the prosecution could show "beyond a reasonable doubt" that the identification was untainted by the uncounseled out-of-court identification.[13]

In the companion decision of *Stovall v. Denno*,[14] the Court held that due process requires the suppression at trial of identifications that courts deem necessary[15] but "unduly suggestive" under a "totality of the circumstances" test.[16] An unnecessarily suggestive lineup or showup identification would be per se excluded.[17] A year later in a case involving a pretrial photographic lineup, the Court provided content and guidance to the totality assessment, stating that "convictions based on eyewitness identification at trial following a pretrial identification by photography will be set aside . . . only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."[18]

In *Simmons*, the Court pointed out the dangers of police suggestions in the identification process and recognized the fact that "[r]egardless of how the initial misidentification comes about, the witness thereafter is apt to retain in his memory the image of the photograph rather than of the person actually seen, reducing the trustworthiness of subsequent lineup or courtroom identification."[19] The Court found that the police procedures employed in the photographic identification of Simmons were not unfairly suggestive and should not be excluded, particularly in light of the extended and

12 *See id.* at 228 (reasoning that confrontation between witnesses and the accused are riddled with many dangers that may seriously derogate from a fair trial.) The court also pointed to the common occurrence of mistaken identification as support. *Id*.

13 Gilbert v. California, 388 U.S. 263, 273–74 (1967).

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

15 In *Stovall*, the Court found the suggestive identification, a showup, not to be "unnecessary" because the only surviving witness to a hold-up murder was lying on (what was expected to be) her deathbed in a New York hospital. *Id.* at 301–02. In fact, the witness, who was the widow of the victim, survived. *Id.*

16 *Id.*

17 *Gilbert*, 388 U.S. at 273.

18 Simmons v. United States, 390 U.S. 377, 384 (1968).

19 *Id.*

clear opportunity the witnesses had to observe the defendant at the time of the crime.[20]

The Burger Court seemed less concerned with the constitutionally dangerous implications of suggestive pretrial identification procedures and the resultant, increased likelihood of convicting the innocent. First, in *Kirby v. Illinois*,[21] the Court limited the *Wade* right to counsel to post-indictment lineups. Given that the vast majority of lineups are conducted before the return of an indictment or the filing of formal charges, the *Kirby* Court's elimination of counsel left the due process test as the only constitutional protection against most unfair identification procedures.[22]

Then, in *United States v. Ash*, the Court ruled that there is no Sixth Amendment right to counsel during a photographic lineup, whether

[20] *Id.*

[21] Kirby v. Illinois, 406 U.S. 682 (1972).

[22] In its discussion of the Sixth Amendment right to counsel, the Supreme Court has gradually moved to a "formal charge" trigger in place of its historical emphasis on "critical stage" analysis. In *United States v. Wade*, 388 U.S. 218, 227 (1967), the Court focused on a critical stage analysis in ruling that the defendant was entitled to counsel at a lineup that happened to have occurred after the indictment. In *Kirby v. Illinois*, 406 U.S. 682, 688 (1972), the Court looked back on a long line of cases (starting with *Powell v. Alabama*, 287 U.S. 45 (1932)) and presented a relatively vague standard requiring that the Sixth Amendment right to counsel attached at or after the time that adversary judicial proceedings had been initiated against the defendant. *Kirby*, 406 U.S. at 688. The Court then confirmed *Wade*'s extension of the right to counsel to pretrial critical stages. *Id.* at 690. However, in *Brewer v. Williams*, 430 U.S. 387 (1972), the Court held that the Sixth Amendment right to counsel attached at the first appearance before a judicial officer at which the defendant was informed of the charges against him. *Id.* at 398–99. The Court reasoned that the formal charge trigger accounted for the right to counsel following the commencement of judicial proceedings against the defendant. *Id.* at 398. Similarly, in *Moran v. Burbine*, 475 U.S. 412 (1986), the Court clarified the rule, holding that the Sixth Amendment right to counsel attached only following formal charges. *Id.* at 431. The Court supported this holding by reviewing two similar cases declaring the admissibility of evidence contingent on whether or not the defendant had been indicted. *Id.* The Court concluded that these previous holdings established the "formal charge" as the moment of attachment for Sixth Amendment right to counsel. *Id.* In *McNeil v. Wisconsin*, 501 U.S. 171 (1991), the Court found "[t]he Sixth Amendment right to counsel attaches at the first formal proceeding against an accused," and noted that "in most States . . . free counsel is made available at that time." *Id.* at 180–81. Still, the standard remained somewhat unclear in subsequent cases. In *Texas v. Cobb*, 532 U.S. 162 (2001), the Court affirmed the reasoning in *McNeil* and found that the Sixth Amendment right to counsel attached at or after the initiation of adversarial judicial proceedings whether by way of formal charge, preliminary hearing, indictment, information, or arraignment. *Id.* at 167–68. Finally, in a recent case, the Court looked to further clarify the standard by holding that "a criminal defendant's initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel." Rothgery v. Gillespie Cnty., Tex., 128 S. Ct. 2578, 2592 (2008).

conducted before or after indictment or formal charge.[23] The Court based its rejection of counsel on a belief that presenting a witness with an array of photographs in the absence of both the defendant and counsel somehow provides "substantially fewer possibilities of impermissible suggestion" than a lineup attended by both the suspect and counsel.[24] Common sense, of course, suggests the opposite conclusion.[25] Given this purported unlikelihood of prejudice and the huge number of photo lineups, the Court found that requiring counsel at every lineup would place an unreasonable burden on the criminal justice system.[26] In thus limiting or denying the right to counsel for most identification procedures, the Court reduced the due process test announced in *Stovall* to the only constitutional protection from unfair and suggestive lineups for the vast majority of criminal defendants.

As for due process, in *Neil v. Biggers*, the Burger Court essentially overruled *Stovall*, holding that once a trial court found a lineup unnecessarily and impermissibly suggestive, due process required that a court apply a "totality of circumstances test" to demonstrate the reliability of the identification before admitting the identification at trial.[27] The Court set out five factors that make up the totality of the circumstances: the witness's opportunity to observe, the degree of attention paid by the witness, the accuracy of the witness's initial description, the certainty of the witness's lineup identification, and the length of time between the crime and the identification confrontation.[28] The Court, however, deleted the term "unnecessarily suggestive" from the due process test, thereby placing its imprimatur on the admission of suggestive identifications even where the government chose, but was not forced by circumstance, to conduct a suggestive identification procedure.[29] Finally, in *Manson v.*

23 United States v. Ash, 413 U.S. 300, 321 (1973).

24 *Id.* at 324 (Stewart, J., concurring).

25 In a rejection of some of the federal courts' decisions, some argue that state courts should not rely on the formalistic reasoning of federal decisions and should instead incorporate psychological research findings that have followed the landmark decisions. *See, e.g.*, Neil Colman McCabe, *The Right to a Lawyer at a Lineup: Suppport From State Courts and Experimental Psychology*, 22 IND. L. REV. 905, 907 (1989) (arguing against state courts' following the *Kirby* and *Ash* decisions).

26 *See Ash*, 413 U.S. at 310–11 (explaining that the realities of modern criminal prosecution limit the court's ability to afford the Sixth Amendment protections to defendants at "critical stages" of the proceedings).

27 Neil v. Biggers, 409 U.S. 188, 199 (1972).

28 *Id.* at 199–200.

29 *Id.* at 198–99.

Brathwaite, the Supreme Court reaffirmed that the *Biggers* five-prong test was required only when authorities had conducted an impermissibly suggestive lineup.[30] The five prongs—henceforth known as the "*Brathwaite* factors"—are intended to ensure "reliability," which, in the *Brathwaite* Court's view, "is the linchpin in determining the admissibility of identification testimony."[31] Thus, after *Biggers* and *Brathwaite*, the Court would have the lower state and federal courts balance the degree of lineup suggestiveness against the five factors that the Court identified as those which could ensure reliability despite unnecessary and improper police suggestions.

Thus, the validity of the Court's announced "reliability" factors is crucial to determining the guilt or innocence of the criminal defendant. If the reliability criteria are so faulty as to allow conviction of the innocent, then the Court's own test fails functionally and fails to protect the defendant's due process rights.

II

POST-*BRATHWAITE* FORENSIC SCIENCE

In the thirty-two years since *Brathwaite*, forensic science has debunked the efficacy of the five-prong test as a measure of reliability and developed generally accepted techniques that minimize erroneous eyewitness identifications. Unfortunately, the law has not kept pace.

A. Identification Procedures and Terminology

Police principally employ two pretrial identification procedures: showups and lineups. When police permit a witness to view a single suspect for possible identification, this is a "showup."[32] When police allow the witness to view several possible suspects, this is a "lineup" (which may also be a non-corporeal photo array).[33]

The suggestiveness inherent in showups is obvious and well documented, clear to most juries, and requires no elaboration here.[34]

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30 Manson v. Brathwaite, 432 U.S. 98, 108 (1977).

31 *Id.* at 114.

32 Amy Luria, *Showup Identifications: A Comprehensive Overview of the Problems and a Discussion of Necessary Changes*, 86 NEB. L. REV. 515, 515 (2008).

33 Gary L. Wells & Deah S. Quinlivan, *Suggestive Eyewitness Identification Procedures and the Supreme Court's Reliability Test in Light of Eyewitness Science: 30 Years Later*, 33 LAW & HUM. BEHAV. 1, 1 (2008).

34 Stovall v. Denno, 388 U.S. 293, 302 (1967); *see also* Luria, *supra* note 32, at 516; Nancy K. Mehrkens Steblay, *Reforming Eyewitness Identification: Cautionary Lineup*

Lineups are preferred because lineups are perceived to be fair to the accused.[35] The manner in which the lineup is conducted, however, can greatly affect the procedure's fairness and reliability.[36]

Police have generally conducted lineups in the same manner for decades.[37] Typically, the eyewitness is brought to a room where the lineup administrator and law enforcement officers are present. Often these officers are involved in the investigation or arrest of the prime suspect, and the lineup administrator may even be heading the investigation.[38] The witness is brought to a one-way mirror or window (thus reducing the possibility of intimidation).[39] Those in the lineup who are not suspects are "fillers."[40] The police lead in a group of individuals—presumably of the same general physical type—so that the witness can view them all.[41] Police then ask the witness if she is able to identify anyone in the lineup.

In the traditional lineup, police allow the witness to view all the individuals—suspects and fillers—at once. This procedure is known as a "simultaneous lineup."[42] If police allow the witness to view the individuals seriatim, this is a "sequential lineup."[43]

The lineup administrator traditionally knows the identity of the suspect.[44] Accordingly, because there is only one "blind" participant—the eyewitness—this is known as a "non-double-blind"

Instructions; Weighing the Advantages and Disadvantages of Show-Ups Versus Lineups, 4 CARDOZO PUB. L. POL'Y & ETHICS J. 341, 349–50 (2006).

35 *See* Michael R. Headley, *Long on Substance, Short on Process: An Appeal for Process Long Overdue in Eyewitness Lineup Procedures*, 53 HASTINGS L.J. 681, 683 (2001–2002) (discussing the predominate use of lineups in American prosecutions).

36 Steblay, *supra* note 34, at 341–43.

37 Gary L. Wells, *Eyewitness Identification: Systemic Reforms*, 2006 WIS. L. REV. 615, 617–18 (2006) (describing the typical eyewitness lineup procedure).

38 *See* Zack L. Winzeler, *Whoa, Whoa, Whoa . . . One at a Time: Examining the Responses to the Illinois Study on Double-Blind Sequential Lineup Procedures*, 2008 UTAH L. REV. 1595, 1599 (2008) (describing police involvement in eyewitness identification lineup procedures).

39 *E.g.*, Taylor v. Kuhlmann, 36 F. Supp. 2d 534, 540 (E.D.N.Y. 1999).

40 *See* Amy Klobuchar & Hilary Lindell Caligiuri, *Protecting the Innocent/Convicting the Guilty: Hennepin County's Pilot Project in Blind Sequential Eyewitness Identification*, 32 WM. MITCHELL L. REV. 1, 11 (2005) (describing the most effective method of picking "fillers" for a lineup).

41 *See id.*

42 Suzannah B. Gambell, *The Need to Revisit the* Neil v. Biggers *Factors: Suppressing Unreliable Eyewitness Identifications*, 6 WYO. L. REV. 189, 194 (2006).

43 *Id.*

44 *See id.* at 195.

lineup.[45] If the administrator also does not know the identity of the suspect, the lineup is "double-blind."[46]

The manner in which a lineup is conducted can significantly affect its reliability.[47] Obviously, if the fillers do not resemble the suspect, the witness will quite likely identify the suspect as his or her assailant.[48] Studies have shown, however, that more subtle difficulties can undermine a lineup's reliability. For instance, when the suspect and the fillers have the same general appearance, the eyewitness is likely to select the individual that most closely resembles the general description that he or she has given to the police.[49] This problem of "relative judgment" often causes misidentifications.[50] Thus, when the actual perpetrator is not in the lineup,[51] the witness is nonetheless likely to identify an innocent person because he most closely resembles the perpetrator.[52] To minimize this difficulty, fillers should fit the witness's initial description but should not share similarities beyond that description.[53] Additionally, studies have shown that this relative judgment problem is significantly mitigated when the witness views a sequential lineup.[54] The sequential lineup gained prominence in 1985 when

[45] *Id.*

[46] *Id.*

[47] *See* Dori Lynn Yob, *Mistaken Identifications Cause Wrongful Convictions: New Jersey's Lineup Guidelines Restore Hope, But Are They Enough?*, 43 SANTA CLARA L. REV. 213, 219 (2002). Scholars have identified "system variables" as those factors that criminal justice administrators can manipulate that may affect reliability. *Id.* Furthermore, scholars distinguish these factors from circumstances of the crime itself, which are outside the control of administrators. *Id.*

[48] *See id.* at 224 (suggesting that, in ideal circumstances, the use of "mock witnesses" to test for lineup neutrality is recommended).

[49] *Id.* at 222.

[50] Gary L. Wells et al., *The Selection of Distractors for Eyewitness Lineups*, 78 J. APPLIED PSYCHOL. 835, 842–44 (1993).

[51] *See* Yob, *supra* note 47, at 226 (describing how some researchers suggest "blank lineups," in which no suspect is present, in order to gauge a witness's propensity to make relative judgments).

[52] Gary L. Wells & Eric P. Seelau, *Eyewitness Identification: Psychological Research and Legal Policy on Lineups*, 1 PSYCHOL. PUB. POL'Y & L. 765, 768–69 (1995).

[53] Wells et al., *supra* note 7, at 585.

[54] Wells & Seelau, *supra* note 52, at 772; *see also* Yob, *supra* note 47, at 217–18 (describing how the "absolute judgment" used in sequential lineups, in which a witness compares the appearances of the suspect to their memory of the perpetrator, is preferred to relative judgment).

several researchers envisioned it as a potential solution to the problem of relative judgment.[55]

Administrator bias—whether intended or not—also often compromises lineup reliability. For instance, the administrator could inform the witness that the suspect may or may not be in the lineup. Studies dating back to the 1970s confirm that this instruction improves identification reliability.[56] Studies confirm that not informing the witness that the suspect is in the lineup significantly decreases reliability.[57]

Other examples of administrator bias abound. If a witness is unable to make an identification after viewing a lineup that includes a suspect and fillers, the administrator may immediately conduct a second lineup that includes different fillers but the same suspect.[58] Similarly, when a witness identifies a filler, the administrator might say, "Are you sure?" or "No, try again."[59]

Any expression of approval by the administrator undermines lineup reliability.[60] Researchers have discovered this "confidence malleability," which can induce false confidence in an eyewitness even after she has made the identification.[61] In the most obvious instance, the administrator will actually tell the witness she identified the suspect.[62] Less obvious is the instance where a hesitant witness makes a tentative lineup identification of the prime suspect. The administrator smiles and quickly ends the lineup, thanking the witness. The witness will likely view this reaction as confirmation that she has made the correct choice.[63] As a result, by the time of trial, a tentative lineup identification is likely to have become clear

55 Wells et al., *supra* note 7, at 586.

56 *Id.* at 585.

57 Wells & Seelau, *supra* note 52, at 769; *see also* Yob, *supra* note 47, at 220–21 (explaining that explicitly telling the witness that the suspect "may or may not be" in the lineup greatly increases accuracy).

58 *E.g.*, Foster v. California, 394 U.S. 440, 441–42 (1969).

59 *See* Melissa B. Russano et al., *"Why Don't You Take Another Look at Number Three?": Investigator Knowledge and Its Effects on Eyewitness Confidence and Identification Decisions*, 4 CARDOZO PUB. L. POL'Y & ETHICS J. 355, 358–59 (2006) (outlining ways in which administrators may affect an eywitness's identification).

60 *Id.* at 361.

61 Wells et al., *supra* note 7, at 586.

62 INNOCENCE PROJECT, *supra* note 7 at 13.

63 *See id.* (describing why confidence statements are not reliable indicators of accuracy).

and certain.[64] Indeed, this is what happened in connection with a recent Missouri prosecution.

> Eyewitness to a crime viewing a lineup: "Oh my god . . . I don't know . . . It's one of those two . . . but I don't know."
>
> [The eyewitness continued to view the lineup for thirty minutes and then stated,] "I don't know . . . number 2?"
>
> Officer administering lineup: "Okay."
>
> Months later . . . at trial: "You were positive it was number two? It wasn't a maybe?"
>
> Answer from eyewitness: "There was no maybe about it . . . I was absolutely positive."[65]

Recent studies again confirm that giving a witness any positive feedback after she makes a lineup identification produces two significant results.[66] First, it causes the witness subsequently to repeat the identification with greater certainty; and second, the witness is likely to remember her lineup identification as being considerably more certain than it in fact was.[67] Thus, to promote reliability, scientists suggest recording the witness's identification statement before the administrator offers feedback in any form.[68] This procedure will likely prevent a falsely inflated sense of confidence.[69]

B. Inadequacy of the Brathwaite *Factors*

Analyzing the *Brathwaite* factors in the light of both traditional police lineup practices and the dramatic progress of forensic science confirms the need to eliminate the *Brathwaite* test.

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[64] Gary L. Wells & Amy L. Bradfield, *"Good, You Identified the Suspect": Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience*, 83 J. APPLIED PSYCHOL. 360, 360 (1998).

[65] *Id.* (quoting State v. Hutching, 927 S.W.2d 411 (Mo. Ct. App. 1996)).

[66] Studies of "real world" situations have been limited, as many police departments have been reluctant to allow others to observe their lineup procedures. Russano et al., *supra* note 59, at 374.

[67] Wells & Bradfield, *supra* note 64, at 362; Amy Bradfield Douglass & Nancy Steblay, *Memory Distortion in Eyewitnesses: A Meta-Analysis of the Post-Identification Feedback Effect*, 20 APPLIED COGNITIVE PSYCHOL. 859, 864–66 (2006); *see also* Russano et al., *supra* note 59, at 364 (noting that administrator feedback can affect other factors such as how the witness remembers the quality of the view and the amount of attention she paid to the crime).

[68] Yob, *supra* note 47, at 225–26.

[69] Wells et al., *supra* note 7, at 586.

1. Opportunity to Observe

Traditionally, this factor was a function of the witness's distance from the perpetrator, the angle of view, and the amount of time the witness had to observe.[70] Studies have shown that distance and angle may be compromised by what scientists call "Visual Hindsight Illusion."[71] A witness with normal vision is unable to identify the facial features of a person at a distance of 150 feet. If the witness thinks he knows the person—if, for instance, he believes it is someone he has seen before—he will probably remember facial features that he could not have seen from 150 feet.[72] Although Visual Hindsight Illusion can obviously compromise the reliability of an eyewitness's identification, the *Brathwaite* analysis does not account for it.

Studies have also shown that witnesses—especially those in stressful situations—frequently overestimate the time they actually viewed the perpetrator and underestimate the time their view was obstructed.[73] Even more significantly, other studies have shown that there is only a weak correlation between the length of time a witness views a perpetrator and the accuracy of that witness's subsequent identification, thus again controverting a key part of the *Brathwaite* analysis.[74]

Finally, it appears that in testifying to their observations, witnesses frequently improve the angle of their view, especially when they receive positive feedback from the police.[75]

2. Attention

Contrary to the simplistic *Brathwaite* analysis, modern forensic science has confirmed that the relationship between the degree of attention a witness pays and the reliability of his subsequent identification is subtle and often unpredictable. For instance, a

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[70] Wells & Quinlivan, *supra* note 33, at 12–13.

[71] *Id.* at 13.

[72] Geoffrey R. Loftus & Erin M. Harley, *Why Is It Easier to Identify Someone Close Than Far Away?*, 12 PSYCHONOMIC BULL. & REV. 43, 61–64 (2005).

[73] Gary L. Wells & Donna M. Murray, *What Can Psychology Say About the* Neil v. Biggers *Criteria for Judging Eyewitness Identification Accuracy?*, 68 J. APPLIED PSYCHOL. 347, 350 (1983).

[74] *See* Peter N. Shapiro & Steven Penrod, *Meta-Analysis of Facial Identification Studies*, 100 PSYCHOL. BULL. 139, 146–52 (1986).

[75] Wells & Murray, *supra* note 73, at 347–62.

witness who did not pay close attention to a perpetrator's particular facial features, but instead simply looked at the perpetrator's face, is more likely to make an accurate lineup identification.[76] Although a witness who concentrated on the perpetrator's facial features is more likely to provide police with an accurate description of the perpetrator, he is also more likely to make an inaccurate lineup identification.[77] Similarly, studies have shown that the more attention the witness pays to the details of the scene he is observing, the less detail he will remember about the perpetrator's face.[78] Stress may also reduce identification accuracy.[79] Finally, studies confirm that if the assailant brandished a firearm, the witness is far less likely to provide an accurate description of that person because the witness's attention was focused almost exclusively on the weapon.[80]

3. Description Accuracy

There is no significant correlation between the accuracy of a witness's initial description of the perpetrator and the accuracy of the witness's subsequent lineup identification.[81] Scientists believe that the two types of memory involved—recognition and recall recognition—account for this lack of correlation.[82] Recognition relates to the ability of a witness to describe someone whom he has seen before in a rapid and uninvolved process; recall recognition relates only to a witness's ability to identify what he has seen after an intentional retrieval stage requiring some effort.[83]

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[76] K.E. Patterson & A.D Baddeley, *When Face Recognition Fails*, 3 J. EXPERIMENTAL PSYCHOL.: HUM. LEARNING & MEMORY 406, 406–07 (1977).

[77] *Id.* at 407.

[78] *See* Gary L. Wells & Michael R. Leippe, *How Do Triers of Fact Infer the Accuracy of Eyewitness Identifications? Using Memory for Peripheral Detail Can Be Misleading*, 6 J. APPLIED PSYCHOL. 682, 684–86 (1981).

[79] Gambell, *supra* note 42, at 219.

[80] Elizabeth F. Loftus et al., *Some Facts About "Weapon Focus,"* 11 LAW & HUM. BEHAV. 55, 55–62 (1987); *see also* Gambell, *supra* note 42, at 198 (describing that the stress and anxiety associated with "weapon focus" can lead to inaccuracy in eyewitness identifications).

[81] Gary L. Wells, *Verbal Descriptions of Faces from Memory: Are They Diagnostic of Identification Accuracy?*, 70 J. APPLIED PSYCHOL. 619, 623–25 (1985).

[82] A. Venter & D.A. Louw, *Method of Questioning and the Accuracy of Eyewitness Testimony*, 24 MED. & L. 61, 63 (2005).

[83] *Id.* at 63–64.

4. Certainty

Historically, some experts believed that there is a significant (but not overwhelming) correlation between the certainty and accuracy of a witness's identification.[84] Unfortunately, as has been discussed, because the certainty of lineup identifications is so often the result of police encouragement,[85] the validity of that correlation is questionable. In fact, the leading researchers have directly challenged the validity of eyewitness certainty as an indicator of accuracy.[86]

5. Delay

The final *Brathwaite* factor is the delay between the witnessed event and the lineup identification. The longer the delay, the more likely the witness will make an inaccurate lineup identification.[87] Significantly, several studies confirm that, the greater the delay, the more suggestible the witness is likely to become, thus increasing the probability of an inaccurate lineup identification.[88] Moreover, as has been discussed, once a witness adopts the suggestion of a police officer or lineup administrator respecting a perpetrator's appearance, the witness will likely hold firm to that description irrespective of delay, thus increasing the perceived certainty of his identification.[89]

The "delay" factor is the only *Brathwaite* factor that has earned the approval of the social science community as relevant to reliability. Indeed, the research indicates that lengthy delay can interact with other identification issues, like suggestiveness, to harden the witness's error. It is noteworthy, however, that in *Biggers* itself, Justice Powell

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[84] *See, e.g.*, Siegfried Ludwig Sporer et al., *Choosing, Confidence, and Accuracy: A Meta-Analysis of the Confidence Accuracy Relation in Eyewitness Identification Studies*, 118 PSYCH. BULL. 315, 315–27 (1995).

[85] *See* Yob, *supra* note 47, at 220.

[86] Elizabeth F. Loftus et al., *Misguided Memories: Sincere Distortions of Reality*, *in* CREDIBILITY ASSESSMENT 155, 170 (John C. Yuille ed., 1989); Gary L. Wells & Donna M. Murray, *Eyewitness Confidence*, *in* EYEWITNESS TESTIMONY: PSYCHOLOGICAL PERSPECTIVES 155, 168–69 (Gary L. Wells & Elizabeth F. Loftus eds., 1984); *see also* J.W. Shepard, *Identification After Long Delays*, *in* EVALUATING WITNESS EVIDENCE 173, 185–86 (Sally M.A. Lloyd-Bostock & Brian R. Clifford eds., 1983).

[87] BRIAN L. CUTLER & STEVEN D. PENROD, MISTAKEN IDENTIFICATION: THE EYEWITNESS, PSYCHOLOGY, AND THE LAW 105–06 (1995); *see also* Gambell, *supra* note 42, at 198 (explaining the "forgetting curve" by which memory fades quickly soon after an event and then slows to a gradual fade).

[88] *E.g.*, Elizabeth F. Loftus & Edith Greene, *Warning: Even Memory for Faces May Be Contagious*, 4 LAW & HUM. BEHAV. 323, 323–34 (1980).

[89] *See* Yob, *supra* note 47, at 225–26.

chose to ignore the significance of a *seven-month* delay between the commission of the crime and the lineup in deference to the fact that the identification did not fail the tests of the other four (now discredited) reliability factors.[90]

Overall, many of the factors that affect reliability are counterintuitive.[91] Thus, it is important that law enforcement officers, judges, and jurors have some understanding of the latest developments in the study of eyewitness identification.

III
REFORM EFFORTS

A. Proposed Federal Lineup Reforms

In 1999, the Justice Department published a study authored by the National Institute of Justice: "Eyewitness Evidence: A Guide for Law Enforcement."[92] This was the first time the federal government officially acknowledged the longstanding research on eyewitness identifications.[93] The study included a discussion of recent cases in which eyewitnesses wrongly identified defendants who were subsequently exonerated through the use of DNA evidence.[94] The DNA exonerations encouraged closer government consideration of the forensic work demonstrating the unreliability of eyewitness identification.[95] The study included a description of the latest psychological research respecting eyewitness testimony.[96] The authors recommended implementing many of the lineup reforms discussed here, including using fillers that resemble the suspect, keeping a detailed record of lineups, and instructing witnesses in a

[90] Neil v. Biggers, 409 U.S. 188, 201 (1972).

[91] Brian L. Cutler, *A Sample of Witness, Crime, and Perpetrator Characteristics Affecting Eyewitness Identification Accuracy*, 4 CARDOZO PUB. L. POL'Y & ETHICS J. 327, 338 (2006).

[92] NAT'L INST. OF JUSTICE, EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT (1999), *available at* http://www.ncjrs.gov/pdffiles1/nij/178240.pdf. The drafting committee included government officials, social science researchers, law enforcement officials, defense lawyers, and prosecutors. *See* Wells et al., *supra* note 7, at 590 (providing detailed makeup of drafting committee).

[93] *See id.* (describing the process by which Attorney General Janet Reno became aware of social science research on eyewitness identification procedures and how she decided to initiate the DOJ report).

[94] NAT'L INST. OF JUSTICE, *supra* note 92, at iii.

[95] *Id.*

[96] *Id.* at 9.

non-suggestive manner.[97] Perhaps most significantly, the authors recommended that police departments explore the feasibility of requiring double-blind, sequential lineups.[98] The study did not, however, go so far as to require federal law enforcement to employ double-blind or sequential procedures.[99]

Neither the Clinton nor Bush Justice Departments urged Congress to adopt any of these reforms. It remains to be seen whether this will also hold true for the Obama Justice Department. As of the time of this writing, there are no lineup reform proposals pending in Congress.

B. State Lineup Reforms—Executive Branch Action and Legislative Change

In 2001, the New Jersey Attorney General required all state and local police to conduct only double-blind, sequential lineups.[100] Recognizing that this procedure might not always be possible, he agreed that, in limited instances, his office would continue to present in court traditional lineup identifications.[101]

Although there have been no independent studies of the effectiveness of those reforms, it appears the police have not had significant difficulty implementing them. As reported in a 2003 survey, ninety-four percent of New Jersey law enforcement agencies indicated that they employ sequential lineups in virtually every case; seventy-seven percent indicated that they always use a blind lineup administrator.[102]

Other states have reformed lineup procedures through legislation. In 2003, Illinois adopted new laws requiring police to photograph or

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[97] *Id.* at 29, 32–33.

[98] *Id.* at 9.

[99] The scientists involved in the drafting of the report have expressed their disappointment that these requirements were not in the final report. *See* Wells et al., *supra* note 7, at 594–95 (noting that, although law enforcement officials were receptive to these changes, the prosecutors involved in the drafting process opposed them).

[100] OFFICE OF THE ATTORNEY GEN., STATE OF N.J., ATTORNEY GENERAL GUIDELINES FOR PREPARING AND CONDUCTING PHOTO AND LIVE LINEUP IDENTIFICATION PROCEDURES 1–2 (2001), *available at* http://www.state.nj.us/lps/dcj/agguide/photoid.pdf.

[101] *Id.* at 2.

[102] SHERI H. MECKLENBURG, ILL. STATE POLICE, REPORT TO THE LEGISLATURE OF THE STATE OF ILLINOIS: THE ILLINOIS PILOT PROGRAM ON SEQUENTIAL DOUBLE-BLIND IDENTIFICATION PROCEDURES 13 (2006), *available at* http://www.chicagopolice.org/IL%20Pilot%20on%20Eyewitness%20ID.pdf.

record every lineup.[103] In addition, Illinois law now requires police to inform witnesses at a lineup that the suspect may or may not be present.[104] Finally, the law now requires Illinois police to use lineup fillers that resemble the prime suspect.[105]

In 2005, Wisconsin required all law enforcement agencies to create written lineup procedure policies.[106] The legislation was intended to "reduce the potential of erroneous identification"[107] while affording individual police departments broad discretion in implementing the new policies.[108] The legislation requires that local agencies consider model lineup legislation from other jurisdictions.[109] The legislation also requires biennial evaluation of lineup procedures in light of advances in the science of eyewitness identification.[110] Local agencies are thus encouraged to revise their procedures to reflect both their experience and the latest scholarship.[111]

Virginia also promulgated new statutes governing lineups in 2005.[112] Henceforth, law enforcement agencies would develop model lineup procedures and reduce all lineup policies to writing.[113] These statutes also require law enforcement to maintain a photographic database of all lineups.[114] The legislation did not impose any other requirements—like double-blind, sequential lineups—on local agencies.[115]

In 2007, Maryland enacted a statute requiring that, by December 2007, all police departments adopt written lineup policies that conform to Department of Justice eyewitness identification standards, and file those policies with the State Police by January 2008.[116]

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103 S. 472, 93d Gen. Assemb., Reg. Sess. (Ill. 2003).

104 *Id.*

105 *Id.*

106 Assemb. B. 648, 2005–2006 Leg., Reg. Sess. (Wis. 2005).

107 *Id.*

108 Katherine R. Kruse, *Instituting Innocence Reform: Wisconsin's New Governance Experiment*, 2006 WIS. L. REV. 645, 647–48 (2006).

109 *Id.* at 686.

110 *Id.*

111 *Id.*

112 H.R. 2632, Gen. Assemb., 2005 Sess. (Vir. 2005).

113 *Id.*

114 *Id.*

115 Sandra Guerra Thompson, *Why Do We Convict As Many Innocent People As We Do?: What Price Justice? The Importance of Costs to Eyewitness Identification Reform*, 41 TEX. TECH. L. REV. 33, 62 (2008).

116 H.R. 103, 2007 Leg., 422d Sess. (Md. 2007).

Although the Department of Justice's report includes many suggestions,[117] it does not require double-blind administration, sequential lineups, or videotaping.[118] Thus, it appears that the costs that would be incurred with the statewide implementation of broad lineup reform caused the Maryland legislature to adopt more modest changes.[119]

In 2007, West Virginia required all police conducting lineups to record the details of each lineup (i.e., the number of fillers and their resemblance to the prime suspect), all statements made by each lineup witness, and whether the lineup was double-blind and sequential.[120] More significantly, in 2007, West Virginia convened a task force to investigate the possibility of requiring that every lineup be double-blind and sequential, and that police inform every lineup witness both that the suspect might not be in the lineup and that the witness need not make an identification because it is as important to exclude the innocent as it is to identify the guilty.[121]

North Carolina has adopted the most wide-ranging lineup reforms. In 2007, North Carolina enacted statutes requiring that every lineup and photo array be composed of fillers whose appearance is similar to that of the prime suspect.[122] More significantly, North Carolina police are required to conduct only sequential, double-blind lineups.[123] The new statutes set out the alternative requirements of "neutral administration"—adopted by the North Carolina Criminal Justice Education Training Standards Commission—to be employed when an independent administrator is not available.[124] For instance, if there is no neutral person available to conduct a photo array, the standards require use of a computer program that discloses photos to the witness in a random order unknown to the administrator.[125] Perhaps most significantly, failure to comply with these new lineup requirements renders the related identification inadmissible at trial.[126]

117 NAT'L INST. OF JUSTICE, *supra* note 92, at 29–38.

118 Thompson, *supra* note 115, at 42.

119 *Id.*

120 S. 82, 2007 Leg., Reg. Sess. (W. Va. 2007).

121 *Id.*

122 H.R. 1625, 2007 Gen. Assemb., Reg. Sess. (N.C. 2007).

123 *Id.*

124 *Id.*

125 *Id.*

126 *Id.*

In a recent development, the Dallas Police Department has announced that it will implement double-blind, sequential procedures.[127] A nation-leading fourteen DNA exonerations in Dallas County prompted the reform.[128] Finally, many other states are considering reforming their lineup procedures: California,[129] Connecticut,[130] Georgia,[131] Hawaii,[132] Maine,[133] Massachusetts,[134] Michigan,[135] Missouri,[136] New Hampshire,[137] New York,[138]

127 INNOCENCE PROJECT, *supra* note 7, at 23.

128 *Id.*

129 As of 2006, California had proposed legislation on eyewitness identification reform. *See* S. 1544, 2005–2006 Leg., Reg. Sess. (Cal. 2006) (as amended on June 21, 2006), *available at* http://www.leginfo.ca.gov/pub/05-06/bill/sen/sb_1501-1550/sb_1544_bill_20060621_amended_asm.pdf (proposing reforms including double-blind procedures (§ 3(a)(2)), the use of at least four fillers fitting the initial description (§ 3(a)(7)), sequential procedures (§ 3(a)(2)(A)), instruction informing the witness that the suspect is not necessarily in any of the lineups (§ 3(a)(3)(A)), and videotaping the lineup and witness statements (§ 3(a)(16)(H))).

130 As of 2006, the most recent eyewitness identification reform bill in Connecticut had failed. *See* Scott Ehlers, *Eyewitness ID Reform Legislation (2005–2006)—32 Bills in 17 States*, NAT'L ASS'N OF CRIMINAL DEF. LAWYERS (June 14, 2006), http://www.nacdl.org/sl_docs.nsf/freeform/EyeID_legislation.

131 As of 2005, the most recent eyewitness identification reform bill in Georgia had failed. *See id.*

132 As of 2005, the most recent eyewitness identification reform bill in Hawaii had failed. *See id.*

133 As of 2005, the most recent eyewitness identification reform bill in Maine had failed. *See id.*

134 As of 2005, Massachusetts had several proposed pieces of legislation on eyewitness identification reform. *See, e.g.*, S.B. 913, 2005 Leg., Reg. Sess. (Mass. 2005) (proposing reforms including double-blind procedures (§ 9(C)(1)), the use of fillers fitting the initial description (in a photographic lineup) (§ 10(ii)), sequential procedures (§ 9(C)(2)), instruction informing the witness that the suspect is not necessarily in any of the lineups (§ 9(B)(iv)), and videotaping the lineup and witness statements (§ 9(C)(13))).

135 As of 2006, Michigan had proposed legislation on eyewitness identification reform. *See* H.R. 5905, 2006 Leg., Reg. Sess. (Mich. 2006) (proposing reforms including double-blind procedures (§ 2(a)), the use of at least four fillers fitting the initial description (§ 2(c), (e)), sequential procedures (§ 2(a)), instruction informing the witness that the suspect is not necessarily in any of the lineups (§ 2(b)(i)), and videotaping the lineup and witness statements (§ 2(n)(vii))).

136 As of 2006, the most recent eyewitness identification reform bill in Missouri had failed. *See* Ehlers, *supra* note 130.

137 As of 2005, the most recent eyewitness identification reform bill in New Hampshire had failed. *See id.*

138 As of 2005, New York had several proposed pieces of legislation on eyewitness identification reform including A.B. 772, 228th Leg., Reg. Sess. (N.Y. 2005) and A.B. 3483, 228th Leg., Reg. Sess. (N.Y. 2005). *See, e.g.*, N.Y. A.B. 772 (proposing reforms including the requirement that the administrator avoid providing information that may influence the eyewitness's decision (§ 8(E)), the use of at least four fillers fitting the initial

Oregon,[139] Rhode Island,[140] Vermont,[141] and the District of Columbia[142] are all considering lineup reform legislation. Whether these reforms are adopted may turn on how law enforcement has fared in those states with pilot lineup reform programs.

C. Pilot Programs

In 2006, Minnesota and Illinois completed field studies of the effect that lineup reforms had on the reliability of eyewitness identifications. To enhance the validity of the programs, they were implemented in both urban and suburban localities.[143] The results were not altogether as expected. The Minnesota Study confirmed that lineup reforms enhanced the reliability of eyewitness identifications.[144] The Illinois Program suggested that the reforms were impractical and did not enhance reliability,[145] but the program was seriously flawed.[146]

description (§ 6(B), (D)), sequential procedures (§ 8(A)), instruction informing the witness that the suspect is not necessarily in any of the lineups (§ 2(B)), and videotaping the lineup and witness statements (§ 8(H))).

139 As of 2003, the most recent eyewitness identification reform bill in Oregon had failed. *See* Ehlers, *supra* note 130.

140 As of 2006, Rhode Island had several eyewitness identification reform bills pending. *See, e.g.*, H.R. 7069, Gen. Assemb., Jan. Sess. (R.I. 2006) (proposing reforms including double-blind procedures (§ 12-7-22(a)(1)), sequential procedures (§ 12-7-22(a)(3)), instruction informing the witness that the suspect is not necessarily in any of the lineups (§ 12-7-22(a)(2)), and a written record of the lineup and witness statements (§ 12-7-22(a)(4))).

141 As of 2005, the most recent eyewitness identification reform bill in Vermont had failed. *See* Ehlers, *supra* note 130.

142 As of 2008, the District of Columbia had one eyewitness identification reform bill pending. *See* B. 17-841, 2008 Leg., (D.C. 2008) (proposing reforms including double-blind procedures (§ 2(a)), the use of at least five fillers fitting the initial description (§ 2(b)), the option for sequential procedures (§ 2(h)), instruction informing the witness that the suspect is not necessarily in any of the lineups (§ 2(h)(1)), and videotaping of the lineup and witness statements (§ 2(o))).

143 Amy Klobuchar et al., *Improving Eyewitness Identifications: Hennepin County's Blind Sequential Lineup Pilot Project*, 4 CARDOZO PUB. L. POL'Y & ETHICS J. 381, 391 (2006); MECKLENBURG, *supra* note 102, at ii.

144 Klobuchar et al., *supra* note 143, at 404.

145 MECKLENBURG, *supra* note 102, at iv–vi.

146 GARY L. WELLS, COMMENTS ON THE MECKLENBURG REPORT, 4 (2006), *available at* http://www.psychology.iastate.edu/faculty/gwells/Illinois_Project_Wells_comments.pdf.

1. Minnesota

This study was conducted in the following Hennepin County Police Districts: Minneapolis (urban district with a population of 382,000), Bloomington (suburban district with a population 85,000), Minnetonka (suburban district with a population of 51,000), and New Hope (suburban district with a population of 21,000).[147] In the words of the study:

> The Hennepin County Attorney's Office pilot project focused on felony cases in four municipal police departments, including both *stranger* and *familiar perpetrator* lineups. The cities chosen represent four levels of population and include both urban and suburban locales. In Minneapolis, the largest of the four cities, the protocol was used exclusively by Central Investigations, which handles violent crimes. Ultimately, the project involved 280 lineups from 117 cases, representing 206 eyewitnesses over a twelve month period ending in November 2004.[148]

The study required authorities to conduct only sequential, double-blind lineups.[149] The police used "property damage" officers to conduct lineups where the crime under investigation involved an assault or other human injury, and, conversely, when the crime under investigation involved property damage, the police used officers who customarily investigated assaultive offenses.[150] Every effort was made to conduct lineups of six persons with fillers of appearance similar to the suspect.[151] Police informed witnesses that the perpetrator might or might not be present and recorded each witness's identification statement.[152]

The Minnesota results were encouraging. Compared to traditional lineups, the reformed lineups resulted in fewer incorrect identifications, comparable suspect identification rates, and more certain (i.e., less guess-prone) witness selections.[153] Indeed, the rate of "jump out" identifications (i.e., immediate, certain identifications) remained the same, with ninety-nine percent accuracy.[154] There were

147 Klobuchar et al., *supra* note 143, at 383.

148 *Id.* at 391.

149 *Id.* at 393.

150 *Id.* at 408.

151 *Id.* at 393.

152 *Id.* at 405.

153 *Id.* at 411.

154 *Id.* at 400.

fewer filler identifications.[155] Accordingly, some scholars have concluded that the reformed lineup procedures "give us a clearer view of the truth."[156] Despite initial concerns, the police departments involved adapted to the new procedures and indicated they could implement the reforms permanently.[157]

To enhance its validity, the study included a comparison of data from other jurisdictions and laboratory analyses.[158] The primary criticism of the Minnesota Project is the failure to simultaneously conduct a traditional lineup survey in the same Hennepin County Police Districts.[159]

2. Illinois[160]

Begun in 2004, the Illinois Pilot Program was implemented in Chicago, Evanston, and Joliet.[161] Unlike Minnesota, Illinois required the contemporaneous comparison of double-blind, sequential lineups with traditional lineups.[162] The results, released in 2006, greatly surprised the Program's most vigorous proponents. As one put it: "[T]he sequential, double-blind lineups, when compared with the simultaneous method, produced a higher rate of known false picks and a lower rate of 'suspect picks.'"[163]

Indeed, the results of the Illinois Program suggested that traditional lineup methods were uncannily accurate. According to the study, traditional lineup methods resulted in accurate identifications one

155 *Id.* at 395.

156 *Id.* at 411.

157 *Id.* at 406–07. The most difficult logistical issue was the implementation of double-blind procedures, especially in small police departments. *Id.* Still, within a short period, even the small departments were able to adjust and implement the new procedures with relatively little difficulty. *Id.*

158 *Id.* at 404.

159 MECKLENBURG, *supra* note 102, at 16.

160 The eyewitness identification reform followed a tumultuous time in Illinois history as Governor George Ryan outlawed the death penalty following a string of overturned capital convictions. *See* Sharone Levy, *Righting Illinois' Wrongs: Suggestions for Reform and a Call for Abolition*, 34 J. MARSHALL L. REV. 469, 471–73 (2001) (detailing the series of events leading up to the abolition of the death penalty in Illinois); *see also* STATE OF ILL., REPORT OF THE GOVERNOR'S COMMISSION ON CAPITAL PUNISHMENT i–iii (2002), *available at* http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/complete_report.pdf (describing the background for eyewitness identification procedure reform in Illinois).

161 MECKLENBURG, *supra* note 102, at ii.

162 *Id.* at iii.

163 *Id.* at 7.

hundred percent of the time in Chicago and Evanston and 97.2% statewide.[164] It is apparent, however, that the program's flawed implementation accounts for these highly improbable results.[165] For instance, in Chicago, the reformed lineup methods were implemented in the busiest police district.[166] Officers placed more than one suspect in forty percent of the lineups even though a sequential lineup is most effective when only one suspect is used.[167] When police conducted sequential lineups, they were invariably double-blind; simultaneous lineups never were.[168] Police complained repeatedly that the need to find a neutral administrator caused intolerable delays, often resulting in witnesses threatening to leave the station before the lineups were conducted.[169] Moreover, police officers unfamiliar with the kinds of crime under investigation were often assigned to conduct reformed lineups.[170]

Although the report of the Illinois Study indicated that the "program's protocols and forms . . . were reviewed and approved" by prominent experts,[171] a number of those experts were harshly critical of the manner in which the program was implemented. One expert noted that inaccurate results were inevitable when two entirely separate groups of officers were used: one group was instructed to apply only traditional lineup methods with which they were quite familiar, and a second was required to apply only methods that were entirely new to them.[172]

In sum, given the flaws in implementing the Illinois Program and its unlikely conclusions (i.e., that traditional lineups were virtually one hundred percent accurate), experts have largely discounted its validity.[173]

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164 WELLS, *supra* note 146, at 3.

165 *See id.* at 1 (explaining the shortcomings of the methodology of the Illinois study).

166 MECKLENBURG, *supra* note 102, at 27.

167 *Id.* at v.

168 WELLS, *supra* note 146, at 1.

169 MECKLENBURG, *supra* note 102, at v.

170 *Id.* at 28.

171 *Id.* at 32.

172 *See* WELLS, *supra* note 146, at 4 (noting that the study had a major flaw in failing to include a simultaneous, double-blind condition and that this flaw prevents researchers from drawing clear conclusions from the results of the study).

173 *E.g.*, *id.*

IV
JUDICIAL INTERPRETATION

A. Brathwaite *Applied in State Courts*

Though the Supreme Court has failed to revisit the *Brathwaite* factors test in the forty years during which social science has debunked them as a test for reliability, under our federal system of government, however, a state court may interpret its state constitution to confer greater (but not lesser) rights than those conferred by the federal constitution.[174] In applying *Brathwaite*, the highest courts of some forty states have declined to broaden its protections, their authority to do so under their own interpretations of their own due process clauses notwithstanding.[175] The highest courts in the remaining states, or at least some judges, however, have found *Brathwaite*'s protections inadequate. A review of these decisions is instructive.

In *People v. Adams*, the New York Court of Appeals, applying the due process clause of its state constitution, held that henceforth all courts would exclude at trial the admission of any suggestive lineup identification.[176] The *Adams* Court explained that:

> [T]he rule excluding improper pretrial identifications bears directly on guilt or innocence. It is designed to reduce the risk that the wrong person will be convicted as a result of suggestive identification procedures employed by the police.
>
> . . . Permitting the prosecutor to introduce evidence of a suggestive pretrial identification can only increase the risks of convicting the innocent . . . .[177]

Acknowledging *Adams*, the Massachusetts Supreme Judicial Court has promulgated a similar per se rule of exclusion under the Massachusetts Constitution, reasoning that "[t]he 'reliability test' is unacceptable because it provides little or no protection from unnecessarily suggestive identification procedures, from mistaken identifications and, ultimately, from wrongful convictions."[178]

Although no other state court has adopted a similar per se rule of exclusion, several courts have ruled or suggested that their state

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174 *E.g.*, Mills v. Rogers, 457 U.S. 291, 300 (1982).

175 Gambell, *supra* note 42, at 211.

176 People v. Adams, 423 N.E.2d 379, 383 (N.Y. 1981).

177 *Id.* at 383–84.

178 Commonwealth v. Johnson, 650 N.E.2d 1257, 1262 (Mass. 1995).

constitutions provide greater rights than those conferred by *Brathwaite*.

For instance, in 2005, the Wisconsin Supreme Court held that the due process clause of the Wisconsin Constitution provided greater protections than those announced in *Brathwaite*.[179] Accordingly, the court held that "evidence obtained from an out-of-court showup is inherently suggestive and will not be admissible unless . . . the procedure was necessary."[180] The court believed that in rejecting the *Brathwaite* factors, it was "return[ing] to the principles enunciated by the United States Supreme Court decisions in *Stovall*, *Wade*, and *Gilbert*."[181]

In 2006 and 2007, a member of the New Jersey Supreme Court opined that unnecessarily suggestive identification procedures violate the state constitution's due process clause.[182] The Utah Supreme Court, although not rejecting the *Brathwaite* factors outright, has altered them to include:

> (1) [T]he opportunity of the witness to view the actor during the event; (2) the witness's degree of attention to the actor at the time of the event; (3) the witness's capacity to observe the event, including his or her mental acuity; (4) whether the witnesses identification was made spontaneously and remained consistent thereafter, or whether it was the product of suggestion; and (5) the nature of the event being observed and the likelihood that the witness would perceive, remember and relate it correctly. This last area includes such factors as whether the event was an ordinary one in the mind of the observer during the time it was observed, and whether the race of the actor was the same as the observer's.[183]

Significantly, the *Ramirez* court eliminated entirely the certainty factor—the factor that psychologists agree becomes the most

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[179] State v. Dubose, 699 N.W.2d 582, 597 (Wis. 2005).

[180] *Id.* at 593–94.

[181] *Id.* at 597.

[182] State v. Herrera, 902 A.2d 177, 199 (N.J. 2006) (Albin, J., dissenting) (explaining that an emphasis on determining the reliability of the identification itself has distracted courts, under the federal approach, from the issues of unnecessarily suggestive procedures, mistaken identifications, and even wrongful convictions); *see also* State v. Romeo, 922 A.2d 693, 706 (N.J. 2007) (Albin, J., concurring) ("Because we recognize that misidentifications are the single greatest cause of wrongful convictions, I believe that this Court has an obligation to discourage law enforcement from using highly suggestive identification techniques, such as showups, when there is no exigency.").

[183] State v. Ramirez, 817 P.2d. 774, 781 (Utah 1991) (quoting State v. Long, 721 P.2d 483, 493 (Utah 1986)).

unreliable after the witness views a suggestive lineup.[184] The Kansas Supreme Court agreed and, in 2003, adopted *Ramirez*.[185]

Two state supreme courts have sought to reform eyewitness identification procedures through the use of strengthened cautionary instructions to the trial jury. Acknowledging that certainty is the least reliable of the *Brathwaite* factors, the Georgia Supreme Court has ruled as follows:

> In light of the scientifically-documented lack of correlation between a witness's certainty . . . and the accuracy of that identification . . . we can no longer endorse an instruction authorizing jurors to consider the witness's certainty in his/her identification as a factor to be used in deciding the reliability of that identification.[186]

The Connecticut Supreme Court has gone further, requiring juries to be informed of any suggestive pretrial identification. "If, after considering the appropriate reliability factors, the trial court determines that the resulting identification is, nevertheless, reliable, the jury should be instructed that the identification procedure was unnecessarily suggestive, which could increase the likelihood of mistaken identification."[187]

Once again, however, social science has demonstrated what most lawyers already know or suspect: that limiting or cautionary instructions are an inadequate guardian of reliable evidence.

B. The Limitations of Limiting Instructions

As noted above, one possible ameliorant to the vagaries of unreliable eyewitness identification is for the judge to provide the jury with a limiting instruction. These instructions would warn juries about the dangers surrounding eyewitness identification and advise caution and scrutiny without the onerous task of introducing expert testimony.[188] The U.S. Supreme Court has historically been optimistic in its view on the power of jury instruction, noting that an effective instruction will remove any influence of unspoken adverse

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[184] *Id.* (citing *Long*, 721 P.2d at 490).

[185] State v. Hunt, 69 P.3d 571, 572 (Kan. 2003).

[186] Brodes v. State, 614 S.E.2d 766, 771 (Ga. 2005).

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

[188] *See* United States v. Smithers, 212 F.3d 306, 314 (6th Cir. 2000) (expressing a preference for exclusion of expert testimony if the jury could receive the same information through effective cross examination).

inferences against a defendant.[189] The Court has even gone so far as to say that "jury instructions suffice to exclude improper testimony."[190] The Court's underlying assumption is that jurors follow limiting instructions in making decisions.[191] Because large numbers of lawyers and some judges have long questioned the efficacy of cautionary instructions, in an effort to evaluate this claim, a large body of social science research has emerged on the effectiveness of limiting instructions to the jury.

1. Basic Findings

At the heart of this issue is the fundamental question of whether people, specifically jurors, can truly disregard information after they hear it. A significant body of research shows that jurors do not effectively ignore information after they are exposed to it, even with a limiting or cautionary instruction.[192] In a surprising turn, other studies indicate that a judge's limiting instructions or admonishment can have the opposite of their desired effect and cause jurors to increase their focus on inadmissible or questionable evidence.[193] This is commonly known as the "backfire effect."[194] To understand

189 Carter v. Kentucky, 450 U.S. 288, 298 (1981). *But see* Krulewitch v. United States, 336 U.S. 440, 453 (1949) (Jackson, J., concurring) (declaring that "[t]he naïve assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction").

190 Cruz v. New York, 481 U.S. 186, 191 (1987).

191 Nancy Steblay et al., *The Impact on Juror Verdits of Judicial Instruction to Disregard Inadmissable Evidence: A Meta-Analysis*, 30 LAW & HUM. BEHAV. 469, 470 (2006).

192 Rachel K. Cush & Jane Goodman Delahunty, *The Influence of Limiting Instructions on Processing and Judgments of Emotionally Evocative Evidence*, 13 PSYCHIATRY PSYCHOL. & L., 110, 113 (2006); Joel D. Lieberman & Jamie Arndt, *Understanding the Limits of Limiting Instructions: Social Psychological Explanations for the Failures of Instructions to Disregard Pretrial Publicity and Other Inadmissible Evidence*, 6 PSYCHOL. PUB. POL'Y & L. 677, 680 (2000). *But see* Cush & Delahunty, *supra* at 110 (explaining that limiting instructions may be more effective if a judge gives them before the end of the trial); Lieberman & Arndt, *supra* at 691 (noting that limiting instructions may be more effective when judges provide a nonlegal reason for exclusion, such as poor quality of an audio recording); Steblay et al., *supra* note 191, at 483 (summarizing that juror noncompliance with instructions is most likely when there is no explanation, when the exclusion is based on an unexplained technicality, or when the evidence is excludable because it was illegally obtained). In contrast, studies have shown that instructions are more likely to be effective when the judge explains that inadmissible evidence is unreliable, hearsay, or irrelevant. Steblay et al., *supra* note 191, at 483.

193 Lieberman & Arndt, *supra* note 192, at 679, 691; Cush & Delahunty, *supra* note 192, at 113.

194 Lieberman & Arndt, *supra* note 192, at 677.

the general ineffectiveness of limiting instructions and the backfire effect, it is helpful to look more closely at some of the underlying data.

2. Possible Explanations for Why Limiting and Cautionary Instructions Are Ineffective

There are a multitude of explanations for the ineffectiveness of limiting instructions. The most straightforward theory is that jurors may simply fail to understand them.[195] Another theory rests on the belief that jurors make their judgments according to what they feel is fair or correct.[196] Some scholars refer to this juror tendency as "commonsense justice."[197] According to this theory, some jurors may fully understand the instructions but choose to disregard them in favor of the outcome they prefer.[198]

Beyond these explanations, there are many more complex psychological hypotheses that may explain the ineffectiveness of limiting instructions. One of the most prominent ideas, which also helps to explain the backfire effect, is "reactance theory."[199] Reactance theory starts with the assumption that individuals seek to behave in "free behaviors."[200] A free behavior is "any behavior in which individuals feel that they have either the requisite physical or psychological ability to engage."[201] Research indicates that, when individuals perceive a threat to their ability to take part in a free behavior, the attractiveness of that behavior increases.[202] A judge's instruction to ignore certain evidence may fall into this category of threats.[203] Thus, under the reactance theory, a juror receiving such an

195 David R. Shaffer & Shannon R. Wheatman, *Does Personality Influence Reactions to Judicial Instructions? Some Preliminary Findings and Possible Implications*, 6 PSYCHOL. PUB. POL'Y & L. 655, 659 (2000).

196 *Id.*; Lieberman & Arndt, *supra* note 192, at 692–93.

197 Shaffer & Wheatman, *supra* note 195.

198 Lieberman & Arndt, *supra* note 192, at 692–93.

199 *Id.* at 693.

200 *Id.* In this case, the free behavior is the ability to consider the inadmissible evidence as part of their decision-making process.

201 *Id.*

202 *Id.*

203 Samuel R. Sommers & Saul M. Kassin, *On the Many Impacts of Inadmissible Testimony: Selective Compliance, Need for Cognition, and the Overcorrection Bias*, 27 PERSONALITY & SOC. PSYCHOL. BULL. 1368, 1369 (2001).

instruction may pay even more attention to the stricken evidence than he would have without the instruction.[204]

The "belief perseverance," theory posits that once a person forms a belief, it becomes difficult for him to change his mind.[205] Thus, the normal sequence of a trial—during which the jury first hears evidence and is then instructed to disregard it—would limit the effectiveness of the instructions.[206] "Hindsight bias" may also explain why limiting instructions are ineffective. Under this broadly applicable theory, once the outcome of an event is known, individuals tend to overestimate the chance that the specific outcome would have occurred.[207] Thus, a limiting instruction would not cause jurors to disregard evidence, even if inadmissible, if the evidence supported their conclusion respecting a defendant's guilt.[208]

General bias in the learning of information during a trial, and subsequent judgment based upon that information, may also help to explain why limiting instructions are ineffective.[209] Few jurors, if any, are wholly unaffected by bias.[210] A popular model provides four requirements to prevent bias from infecting judgment: (1) awareness of the bias, (2) motivation to correct for bias, (3) awareness of the direction and magnitude of the bias, and (4) the ability to adjust judgments correctly so that the bias is eliminated.[211] Many jurors do not even pass the threshold requirement of realizing their biases.[212] Plainly, limiting instructions do not sufficiently address the effects of bias.[213]

Finally, some scholars attribute the ineffectiveness of limiting instructions to "ironic mental processes."[214] Researchers note that any effort at mental control includes both an active, conscious process

204 *Id.*

205 Lieberman & Arndt, *supra* note 192, at 691.

206 The jury would first form its belief about the reliability of any eyewitness testimony upon presentation of that testimony. Under the "belief perseverance" theory, it would be difficult to dislodge this initial opinion with limiting instructions at the end of the trial.

207 Lieberman & Arndt, *supra* note 192, at 692.

208 *Id.* at 692–93.

209 Cush & Delahunty, *supra* note 192, at 112.

210 *Id.* An infinite number of variations in life experience and personality make bias and its effect on jurors' decisions particularly unpredictable.

211 *Id.*

212 *Id.*

213 *Id.*

214 Lieberman & Arndt, *supra* note 192, at 699.

that screens for thoughts indicative of the desired mental state and an unconscious monitoring process that seeks to ensure that the individual is not thinking about the suppressed information.[215] This process may prove to be exceedingly difficult in the context of a trial due to abundant information and the unfamiliar courtroom environment.[216] The effort to suppress may also contribute to a backfire effect.[217]

3. Personality Issues

Beyond general psychological phenomena, the individual personalities of jurors may help to explain the inadequacies of limiting instructions. Several studies have focused on the issue of jury composition.[218] One study established a "dogmatic scale" to correlate personality traits with likelihood to follow instructions.[219] Researchers rated participants based on their level of authoritarianism and dogmatism.[220] Though its conclusions were tentative, the study underscored that each juror's personality may compromise the effectiveness of limiting instructions.[221] Additional studies have focused on other personality traits.[222]

C. Admissibility of Expert Eyewitness Testimony

Given the inadequacy of the *Brathwaite* test and the counterintuitive nature of the reality of the eyewitness identification process, some courts have turned to the admission of expert testimony on the cognitive memory process and the vagaries of the identification process. Rule 702 of the Federal Rules of Evidence and its fifty state common law or statutory analogues all provide for the admission of expert opinion testimony where the factfinder (ordinarily a jury in a criminal case) "needs assistance" in understanding the evidence.

215 *Id.* at 699–700.

216 *Id.* at 701.

217 *Id.* at 702.

218 Shaffer & Wheatman, *supra* note 195, at 661.

219 *Id.* at 661–62.

220 *Id.* at 664–65. The researchers defined "authoritarianism" as a trait of individuals who are rigid, conservative, and highly deferential to authority. *Id.* at 662. They defined "dogmatisim" as a generalized form of authoritarianism, free of politically rightist ideology that characterizes high authoritarians. *Id.* at 663.

221 *Id.* at 674–75.

222 *See, e.g.*, Sommers & Kassin, *supra* note 203 (describing how the "need for cognition" personality trait may influence the effectiveness of limiting instructions).

Despite the rapid growth and general acceptance of eyewitness identification psychology in recent years,[223] such expert testimony has received a decidedly mixed reception in federal and state courts.[224]

An exhaustive review of state and federal opinions has found no ruling excluding expert psychological testimony on grounds of either "unreliability" in federal courts and most state courts or "lack of general acceptance" in the remaining state courts.[225] Rather, the fault line for the admission or exclusion of eyewitness identification expert testimony is the determination of whether the jury does indeed require assistance in evaluating eyewitness identification testimony. Those courts that admit the testimony have determined that juror experience and common sense are inadequate to reach the correct conclusion because of the counterintuitive nature of the reality of the identification process. Those courts that decline admission have determined that jurors' common sense would somehow include the understanding of the social scientist's findings without the findings being brought to their attention.

1. Federal Courts

There is a three-way split among the federal courts respecting the admissibility of expert eyewitness testimony. Presumably the Supreme Court will eventually resolve these disagreements.

a. A Complete Bar to Expert Testimony

The Eleventh Circuit alone has barred the admission of such testimony.[226] In *United States v. Smith*, the defense sought to introduce expert testimony on three issues: (1) the lack of correlation between certainty and accuracy, (2) the weapon-focus effect, and (3) the impact of stress on memory.[227] In deciding to bar this expert testimony, the court began with a *Daubert* analysis to determine

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223 *See* Wells et al., *supra* note 7, at 587–90 (explaining that the general acceptance of eyewitness identification psychology research occurred only after the proliferation of expert testimony on the subject, heightened media coverage, and prominent DNA exoneration cases).

224 United States v. Smith, 148 Fed. Appx. 867, 871–72 (11th Cir. 2005).

225 *See, e.g.*, Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 588 (1993); Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923).

226 *Smith*, 148 Fed. Appx. at 871–72.

227 *Id.*

admissibility under Rule 702 of the Federal Rules of Evidence.[228] Under *Daubert*, the court must determine (1) whether the testimony is accepted within the scientific community and (2) whether the testimony will assist the trier of fact.[229] The Eleventh Circuit had already held, in cases both before and after *Daubert*, that expert eyewitness testimony did not aid the jury.[230] Accordingly, the *Smith* court adhered to this reasoning to affirm the lower court's exclusion of the proffered testimony.[231]

b. A Case-by-Case Approach

In *United States v. Rincon*, a Ninth Circuit case, a defense expert sought to testify as to how the following factors could impair the accuracy of eyewitness identification: the passage of time, stress, obstruction of view, certainty, and cross-racial identification.[232] The district court excluded the testimony, reasoning that it would explain these factors in its trial jury instructions.[233] The Ninth Circuit affirmed, holding that the proffered testimony was not accepted in the scientific community, and it "would not assist the trier of fact [but would] likely . . . mislead [it]."[234] The Ninth Circuit emphasized that this was an individualized inquiry under *Daubert* and that there was no per se rule excluding expert eyewitness testimony.[235] The Ninth Circuit has since acknowledged the current trend to admit such testimony as a matter of evidence law, not as a constitutional right.[236] The court thus ruled that exclusion of the expert eyewitness testimony did not result in a fundamentally unfair trial.[237]

Similarly, in the Eighth Circuit case of *United States v. Purham*, the district court had excluded the testimony of a defense expert respecting potential for the inaccuracy in eyewitness identifications.[238] In holding that this was within the trial judge's discretion, the Eighth Circuit stated that the proferred testimony did

228 *Id.* at 872.

229 *Id.*

230 *Id.*

231 *Id.*

232 United States v. Rincon, 28 F.3d 921, 925 (9th Cir. 1994).

233 *Id.* at 925–26.

234 *Id.* at 926.

235 *Id.*

236 Gurry v. McDaniel, 149 Fed. Appx. 593, 594–95 (9th Cir. 2005).

237 *Id.* at 594.

238 United States v. Purham, 725 F.2d 450, 454 (8th Cir. 1984).

not materially add to the lay jury's understanding of eyewitness identification.[239] Moreover, in light of "the aura of reliability and trustworthiness that surrounds scientific evidence," the jury was likely to give undue weight to the expert testimony.[240] Other courts have held similarly.[241] The First Circuit has set out the reasoning these courts have employed:

> "[W]e are unwilling to adopt a blanket rule that qualified expert testimony on eyewitness identification must routinely be admitted or excluded." Rather, we, and the district courts, should examine each case one by one, taking into account such concerns as "the reliability and helpfulness of the proposed expert testimony, the importance and the quality of the eyewitness evidence it addresses, and any threat of confusion, misleading of the jury, or unnecessary delay."[242]

c. Courts' Finding Expert Testimony Generally Admissible

The Third Circuit first addressed the admissibility of expert eyewitness testimony in 1985, eight years before *Daubert*. In *United States v. Downing*, the defendant was indicted for mail fraud, wire fraud, and interstate transportation of stolen property.[243] The conduct in question was part of a broader scheme to defraud vendors at national trade shows.[244] The scheme consisted of furnishing potential vendors with nonexistent references and then providing positive reports when the vendors attempted to contact the supposed references.[245]

At trial, the main issue was the identification of a "Reverend Claymore," who served as chief organizer of the fraudulent scheme.[246] The government's case primarily rested on eyewitness testimony.[247] The witnesses had interacted with the defendant for

239 *Id.*

240 *Id.*

241 *See, e.g.*, Middleton v. United States, 401 A.2d 109, 131 (D.C. Cir. 1979); Smith v. United States, 389 A.2d 1356, 1359 (D.C. Cir. 1978); Bethea v. United States, 365 A.2d 64, 81–82 (D.C. Cir. 1976).

242 United States v. Stokes, 388 F.3d 21, 26 (1st Cir. 2004) (quoting United States v. Brien, 59 F.3d 274, 277 (1st Cir. 1995)).

243 United States v. Downing, 753 F.2d 1224, 1227 (3d Cir. 1985).

244 *Id.*

245 *Id.*

246 *Id.*

247 *Id.*

varying periods of time ranging from five to forty-five minutes.[248] The defendant offered three arguments impugning the reliability of the eyewitness identification: (1) the short amount of time in which the witness had to view Claymore, (2) the innocuous circumstances of their meeting, and (3) the significant passage of time between the meetings and the subsequent identifications.[249]

In an attempt to clarify the impact of these factors, defense counsel attempted to introduce the expert eyewitness identification testimony of then Temple University Assistant Professor of Psychology Robert D. Weisberg.[250] The defense contended that Dr. Weisberg, who was a cognitive psychologist, could help the jury "deal with the problem of identification of the defendants" and could answer some hypothetical questions.[251] The trial court excluded this testimony, reasoning that it would "usurp the function of the jury."[252] The court found significant that the government had introduced evidence in addition to identification testimony to establish the defendant's guilt.[253]

The reasoning offered by the Third Circuit in reversing is instructive. The court noted (and the government conceded) that the prosecution was based on identification testimony alone.[254] The court also noted that, under Rule 704 of the Federal Rules of Evidence, "testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."[255]

In these circumstances, the court rejected the trial judge's implicit suggestion that the expert testimony was inadmissible because it concerned "a matter of common experience that the jury is itself presumed to possess" under Rule 702.[256] Rather, the court held that, because such evidence frequently runs counter to common experience, trial courts have the discretion to admit it.[257] Specifically, the court approved the approach of the Arizona Supreme

248 *Id.*

249 *Id.* at 1227–28.

250 *Id.* at 1228.

251 *Id.*

252 *Id.*

253 *Id.*

254 *Id.*

255 *Id.* at 1229 n.3.

256 *Id.* at 1229.

257 *Id.*

Court in *State v. Chapple*,[258] which ruled that it was error to exclude the defendant's proffer of expert identification testimony where the expert would testify as to (1) "the forgetting curve" of memory; (2) stress's producing inaccuracy and creating recall distortion; (3) "the assimilation factor," which refers to the witness's propensity to incorporate post-event information into her identifications; (4) the unconscious reinforcement that occurs when witnesses discuss their identifications with each other; and (5) the absence of any correlation between the witness's expressed level of confidence in her identification and the factual accuracy of the identification.[259]

Additionally, the liberal standard of admissibility that Rule 702 establishes further convinced the court to remand the case for reconsideration of the admissibility of the testimony.[260]

Over twenty years later, the Third Circuit revisited the admissibility of expert eyewitness testimony. In *United States v. Brownlee*, the court held that, in light of recent studies showing the unreliability of eyewitness identifications, such testimony was admissible under Rule 702 and *Daubert*.[261] In reversing Brownlee's conviction, the court found significant that the trial judge had allowed only limited expert testimony even though the prosecution was based primarily on eyewitness identifications.[262]

The Sixth Circuit has held that a criminal defendant has the right to a full *Daubert* hearing on the question of whether his proffered identification expert is qualified to offer an opinion at trial.[263] At such a hearing, the trial court must weigh the helpfulness of the expert testimony against its potential to confuse the jury.[264] The court should also consider whether the testimony would touch on the ultimate issue in the case, whether the prosecution had presented evidence in addition to the identification testimony, and whether the substance of the expert testimony could be imparted to the jury through effective cross-examination.[265] The *Smithers* court found

[258] State v. Chapple, 660 P.2d 1208 (Ariz. 1983).

[259] *Downing*, 753 F.2d at 1230.

[260] *Id.* at 1229.

[261] United States v. Brownlee, 454 F.3d 131, 141–42 (3d Cir. 2006).

[262] *Id.* at 141–44.

[263] United States v. Smithers, 212 F.3d 306, 314 (6th Cir. 2000).

[264] *Id.*

[265] *Id.*

that the district court should have conducted a full *Daubert* hearing to consider these issues.[266]

2. State Courts

A number of state courts have held that the trial judge may *not* exclude defense expert identification testimony when the prosecution has based its case on uncorroborated eyewitness identification testimony. The California Supreme Court held in *People v. McDonald*:

> When an eyewitness identification of the defendant is a key element of the prosecution's case but is not substantially corroborated by evidence giving it independent reliability, and the defendant offers qualified expert testimony on specific psychological factors shown by the record that could have affected the accuracy of the identification but are not likely to be fully known to or understood by the jury, it will ordinarily be error to exclude that testimony.[267]

The Arizona Supreme Court[268] and the New York Court of Appeals have held similarly.[269] Like the *McDonald* court, the Arizona and New York courts found significant that both prosecutions were based almost entirely on eyewitness identification testimony.[270] Accordingly, both courts found the exclusion of expert eyewitness testimony to be an abuse of discretion.[271]

In a recent development, the Utah Supreme Court similarly held that expert testimony is reliable in eyewitness cases where known factors affecting accuracy are present and, therefore, should be routinely admitted.[272] In its analysis, the court highlighted scientific evidence showing that expert testimony is often the best way to educate jurors about eyewitness identification issues.[273] The court concluded that such testimony met Utah's evidentiary reliability requirement and that courts should not dismiss such evidence as an impermissible lecture to the jury.[274]

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266 *Id.*

267 People v. McDonald, 690 P.2d 709, 727 (Cal. 1984).

268 State v. Chapple, 660 P.2d 1208, 1222–24 (Ariz. 1983).

269 People v. LeGrand, 867 N.E.2d 374, 380 (N.Y. 2007).

270 *Chapple*, 600 P.2d at 1218; *LeGrand*, 867 N.E.2d at 379.

271 *Chapple*, 600 P.2d at 1224; *LeGrand*, 867 N.E.2d at 380.

272 State v. Clopten, 223 P.3d 1103, 1112–14 (Utah 2009).

273 *Id.* at 1108–11.

274 *Id.* at 1112–14.

In 1995, however, the Pennsylvania Supreme Court barred the admission of expert identification testimony, reasoning that such evidence "intrude[s] upon the jury's basic function of deciding credibility."[275] The defense had attempted to present expert testimony on the general psychological and behavioral patterns associated with eyewitness identification.[276] The court held that expert testimony was admissible only where "formation of an opinion on a subject requires knowledge, information, or skill beyond that possessed by the ordinary juror."[277] The court believed that the expert's air of authority would undermine the jury's role in credibility determination.[278] The Pennsylvania Supreme Court has more recently declined to revisit the wisdom of that decision.[279]

Few state courts have gone as far as the Pennsylvania Supreme Court. Rather, many have held that it is within the trial judge's discretion to admit or exclude such expert testimony.[280] Although the courts have not always offered the clearest guidance, they have generally reasoned (as the *Downing* court did in 1985[281]) that, the more significant the identification testimony is to the prosecutor's case and the weaker the corroborative evidence, the less discretion the trial judge has to exclude the testimony of a defense identification expert.[282]

CONCLUSION

We end as we began. Advances in forensic science over the last forty years have revealed the unreliability of traditional police identification procedures and demonstrated that the implementation of new procedures will enhance reliability. This same research proves that the Supreme Court's "reliability" factors, which are used to

275 Commonwealth v. Simmons, 662 A.2d 621, 631 (Pa. 1995).

276 *Id.* at 630.

277 *Id.* at 631.

278 *Id.*

279 Commonwealth v. Bormack, 827 A.2d 503, 512 (Pa. Super. Ct. 2003), *cert. denied*, 845 A.2d 816 (Pa. 2004).

280 *See, e.g.*, Johnson v. State, 438 So. 2d 774, 777 (Fla. 1983); Johnson v. State, 526 S.E.2d 549, 552 (Ga. 2000); People v. Tisdel, 788 N.E.2d 1149, 1151 (Ill. App. Ct. 2003); State v. Kelly, 752 A.2d 188, 191 (Me. 2000); State v. Whitmill, 780 S.W.2d 45, 47 (Mo. 1989).

281 United States v. Downing, 753 F.2d 1224, 1226 (3d Cir. 1985).

282 *See, e.g.*, Cook v. State, 734 N.E.2d 563, 571 (Ind. 2000); State v. Whaley, 406 S.E.2d 369, 372 (S.C. 1991).

approve admission of identification evidence, are seriously flawed and ineffective. Significant reform of lineup procedures will most likely come from legislative action. As has been described, executive branch reform of lineups has been limited to the New Jersey Attorney General's 2001 requirement that state and local police conduct only sequential, double-blind lineups.[283] The unique structure of the New Jersey State government made such executive branch action possible. Under the New Jersey Constitution, all county prosecutors answer to the Attorney General.[284] Because the Attorney General is ultimately responsible for all state court prosecutions, he or she can prohibit county prosecutors from using flawed lineup procedures. In the great majority of states, however, the attorney general has no direct supervisory authority over local prosecutors who are independently elected.[285] Accordingly, any order promulgated by those attorneys general respecting lineups would have an exceedingly limited effect.

This is not the case with respect to the U.S. Attorney General, who has supervisory authority over all Department of Justice attorneys.[286] Unfortunately, no Attorney General has shown interest in lineup reforms since they were proposed in 1999.

Significant lineup reform through judicial decree has been limited. As has been discussed, the great majority of state courts have declined to expand the *Brathwaite* protections.[287] Although a number of circuits have suggested that the exclusion of expert eyewitness defense testimony might be reversible error, no federal court has suggested that due process requires the reform of the customary lineup procedures.

Given the current makeup of the U.S. Supreme Court, including a number of Justices who have been quoted as proudly believing that the execution of an innocent person does not violate the federal due process clause,[288] it is unlikely that the Court will revisit and alter the

283 OFFICE OF THE ATTORNEY GEN., STATE OF N.J., *supra* note 100, at 2.

284 N.J. CONST. art. VII, § 2.

285 Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 438–39 (2001).

286 Act of June 22, 1870, ch. 150, 16 Stat. 162 ("Department of Justice Act").

287 Gambell, *supra* note 42, at 211.

288 *See* Adam Liptak, *Justices Tell Federal Court to Step into Death Row Case*, N.Y. TIMES, Aug. 18, 2009, http://query.nytimes.com/gst/fullpage.html?res=9C04E5D9143FF93BA2575BC0A96F9C8B63. In a recent dissenting opinion, Justice Scalia wrote "[t]his Court has never held that that the Constitution forbids the execution of a convicted defendant who has had a full and fair trial but is later able to convince a habeas court that he is 'actually' innocent." *In re* Davis, 130 S. Ct. 1, *3 (2009). Indeed, in *Herrara v.*

present and demonstrably unreliable *Brathwaite* due process test. The burden then falls primarily on the legislative branches of the state and federal governments and the highest state courts (through interpretations of their own constitutions).

We recommend that state courts follow the reasoning of the Supreme Judicial Court of Massachusetts and the New York Court of Appeals in returning to the *Stovall* test, which bars the admission of any identification that is unnecessarily suggestive (e.g., a showup in an emergency situation). In addition, this test allows the admission of other suggestive identifications only if the court is convinced by clear and convincing evidence that they and any resulting in-court identifications are reliable based on the scientific factors that provide real indicia of reliability. Rather than focus exclusively on the inadequate *Brathwaite* factors, courts should insist (except in extraordinary circumstances) on (1) double-blind lineup or photo array procedures, (2) the use of at least five fillers who resemble the suspect to a reasonable degree (e.g., height, weight, race or skin tone, and hair), (3) sequential lineups or photo arrays, (4) informing the witness that the suspect is not necessarily in any of the lineups, and (5) videotaping the lineup and the witness's statements during the lineup procedure. In addition, state courts can and should require, under their state constitutions, the presence of defense counsel or some other person associated with the suspect at any lineup or photo array, irrespective of whether the identification procedure is conducted before or after the lodging of an indictment or other formal charge. Finally, in order to fully inform jurors of the counterintuitive information surrounding the identification process, and given its general acceptance in the field of psychology, all courts should admit properly qualified expert testimony on the manner in which the mind processes identification information.

More than fifty years ago, Professor Herbert Packer identified two contending bodies of thought regarding the criminal justice process: the Crime Control Model, which elevates the value of swiftness and certainty over procedural niceties, and the Due Process Model, which elevates principles of fairness over efficiency.[289] Implicit in both

Collins, 506 U.S. 390 (1993), a majority of the Supreme Court held that a claim of actual innocence that is based on newly discovered evidence is not a ground for relief by habeas corpus, leaving the only route to relief in the hands of state clemency boards. *Id.* at 400–01.

[289] *See generally* HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 154–73 (1968).

models is the reliable judicial separation of the guilty from the truly innocent.[290] Nothing in our proposals should trouble even the most ardent Crime Control adherent unless he or she has abandoned the generally accepted notion that society is better served by models that, at their cores, seek to convict only the guilty and exonerate the innocent, so the actual malefactor can be caught and punished.

[290] *In re* Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) ("I view the requirement of proof beyond a reasonable doubt in a criminal case as bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.").