Beyond a Reasonable Doubt? Reconsidering Uncorroborated Eyewitness Identification Testimony

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This Article reviews the overwhelming scientific evidence that establishes that eyewitnesses are notoriously inaccurate in identifying strangers, especially under the conditions that exist in many serious offenses such as robbery. Many of the factors that tend to decrease the accuracy of an identification are intrinsic to a witness's abilities and not the product of inappropriate suggestion by the police. The literature shows that witnesses have limited powers of perception, as well as memory retention and retrieval, and that these powers are further limited by the typical conditions that surround events such as violent crimes. As such, this Article posits that reforms that aim simply to improve police procedures surrounding eyewitness identifications fall short in correcting the problem of erroneous identifications. Instead, it proposes the implementation of a rule requiring corroborating evidence in cases involving an eyewitness identification. This Article provides an extensive review of the history of corroborating evidence requirements as a means of protecting against wrongful convictions.

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"In the life of justice trains are wrecked and ships are colliding too often, simply because the law does not care to examine the mental colour blindness of the witness's memory."[1]

INTRODUCTION

Human perception and memory are highly fallible; social and cognitive psychologists have universally accepted this fact for many decades. Experiments long ago conclusively established that people lack the ability to remember accurately the appearance of a stranger with whom they had only a brief interaction.[2] For decades, the criminal justice systems throughout the United States and other countries have ignored these scientific findings.[3] Indeed, some courts still recognize a presumption of reliability for eyewitness testimony.[4] Such a presumption accords with the layperson's beliefs about the reliability of a witness who confidently proclaims to have seen the alleged culprit "with her own eyes."[5]

The scientific findings of high rates of eyewitness memory failure have serious implications for the reliability of criminal cases that rest on eyewitness identifications. We know, for example, that eyewitnesses identify a known wrong person (a "filler" or "foil") in approximately twenty percent of all real criminal line-ups.[6] This

[1] HUGO MÜNSTERBERG, ON THE WITNESS STAND 68-69 (1908).

[2] *See infra* notes 44-81, 136-55 and accompanying text.

[3] *See, e.g.*, Franklin v. Miami Univ., 214 Fed. App'x. 509, 511-12 (6th Cir. 2007) ("[S]ince eyewitnesses' statements are based on firsthand observations, they are generally entitled to a presumption of reliability and veracity . . . ." (quoting Ahlers v. Schebil, 188 F.3d 365, 370 (6th Cir. 1999))); United States v. Burbridge, 252 F.3d 775, 778 (5th Cir. 2001) (same); Hirmuz v. City of Madison Heights, 469 F. Supp. 2d 466, 479-80 (E.D. Mich. 2007) (same); Manuel v. City of Columbus, 200 F. Supp. 2d 842, 851 (S.D. Ohio 2002) (same); Weber v. Bland, No. 97 C 5227, 1998 U.S. Dist. LEXIS 9401, at *13-14 (N.D. Ill. June 15, 1998) (same).

[4] *See* cases cited *supra* note 3.

[5] *See* BRIAN L. CUTLER & STEVEN D. PENROD, MISTAKEN IDENTIFICATION: THE EYEWITNESS, PSYCHOLOGY, AND THE LAW 207-09 (1995) (summarizing survey studies, prediction studies, and mock juror studies, and concluding "jurors are generally insensitive to factors that influence eyewitness identification accuracy, often rely on factors (such as recall of peripheral details) that are not diagnostic of witness accuracy, and rely heavily on one factor, eyewitness confidence, that possesses only modest value as an indicator of witness accuracy").

[6] *See* Gary L. Wells & Elizabeth A. Olson, *Eyewitness Testimony*, 54 ANN. REV. PSYCHOL. 277, 291 (2003) (noting reports from two studies of actual cases of filler identification rates of 20% and 24% and observing that these rates may be underestimated because police often do not distinguish between witnesses who choose filler and those who make no choice); *see also* Amy Klobuchar, Nancy K. Mehrkens

means that one in five eyewitnesses in real cases who are willing to give sworn testimony that would put a person behind bars for a long time — or even to death — are undeniably wrong. Fortunately, in those cases, police investigators know that the chosen foil is not the true culprit, so the error does not lead to a wrongful conviction. However, we also know that the police sometimes erroneously arrest a person who fits the general description, but who is not the perpetrator. Consequently, eyewitnesses will sometimes incorrectly select that innocent person from a line-up or photo spread. The many wrongful convictions uncovered by the work of innocence projects around the country have brought into stark relief the fact that eyewitnesses often get it wrong.[7]

Studies of wrongful conviction cases have concluded that erroneous eyewitness identifications are by far the leading cause of convicting the innocent.[8] For example, the Innocence Project of Cardozo School of

Steblay & Hillary Lindell Caligiuri, *Improving Eyewitness Identifications: Hennepin County's Blind Sequential Lineup Pilot Project*, 4 CARDOZO PUB. L. POL'Y & ETHICS J. 381, 396 (2006) (reporting 20% rate); Tim Valentine, Alan Pickering & Stephen Darling, *Characteristics of Eyewitness Identification that Predict the Outcome of Real Lineups*, 17 APPLIED COGNITIVE PSYCHOL. 969, 973 (2003) (reporting 20% rate).

[7] *See* Innocence Project, Eyewitness Misidentification, http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php (last visited Mar. 17, 2008). The total number of case profiles on the Innocence Project's website is 214. Innocence Project, Innocence Project Case Profiles, http://www.innocenceproject.org/know (last visited Mar. 17, 2008). Another study examined 328 exonerations since 1989 and found that 90% of those cases involved misidentification by witnesses, very often across races. *See* Adam Liptak, *Study Suspects Thousands of False Convictions*, N.Y. TIMES, Apr. 19, 2004, at A15. Today, the announcement of wrongfully convicted persons being exonerated has become a regular feature of newspaper reports. *See, e.g.*, Jeff Carlton, *Dallas County Clearing Man Convicted of Rape; He Is the 12th in that Jurisdiction Aided by DNA Test*, HOUS. CHRON., Jan. 17, 2007, at B4 (noting James Waller was twelfth person exonerated by DNA in Dallas County alone).

The next most frequent cause of wrongful convictions is false confessions, which were admitted in 25% of the cases. *See* Innocence Project, False Confessions, http://www.innocenceproject.org/understand/False-Confessions.php (last visited Mar. 17, 2008). False statements by informants were involved in more than 15%. *See* Innocence Project, Informants/Snitches, http://www.innocenceproject.org/understand/Snitches-Informants.php (last visited Mar. 17, 2008). Faulty and false forensic evidence accounted for a significant number of erroneous convictions as well, although the frequency of occurrence is not provided by the study. *See* Innocence Project, Forensic Science Misconduct, http://www.innocenceproject.org/understand/Forensic-Science-Misconduct.php (last visited Mar. 17, 2008).

[8] Innocence Project, Eyewitness Misidentification, *supra* note 7 (citing numerous analyses over several decades that have consistently proved that mistaken eyewitness identification is single largest source of wrongful convictions); *see also* Wells & Olson,

Law reports that of the first 130 exonerations, 101 (or 77.8%) involved mistaken identifications.[9] But exactly how often eyewitnesses make tragic mistakes that lead to the punishment of innocent persons is unknown and probably unknowable.[10] The only reason so many wrongful convictions have come to light is that we now have the technology to test DNA evidence.[11] Without DNA samples and the wherewithal to test them, the dozens of innocent people who had been wrongly convicted would almost certainly remain behind bars.

Logic suggests that untold numbers of additional innocent people have been punished for crimes they did not commit. DNA evidence, although a powerful tool, is quite limited in its ability to uncover wrongful convictions as it is generally only available in sexual assault cases. In virtually every recent case in which individuals have been exonerated, DNA matter from the crime scene was available for testing, and these tests have proved that the convicted person is innocent.[12] Every case in which DNA evidence has been available for testing involved a sexual assault, even if the charged offense did not include a sexual assault.[13] Regardless of whether the charge is burglary, assault with a deadly weapon, robbery, murder, or anything else, the only reason that individuals have been exonerated by DNA evidence is that there was also evidence of rape. Thus, only wrongly convicted "rapists" have enjoyed the benefits of DNA evidence, and

supra note 6, at 277.

[9] *See supra* note 5 and accompanying text.

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

[11] Today innocent people are also frequently being spared the horror of wrongful prosecution by being excluded as a suspect through DNA testing before trial. By one account, "[o]f the first eighteen thousand results at the FBI and other crime laboratories, at least five thousand prime suspects were excluded *before* their cases were tried." *See* BARRY SCHECK, PETER NEUFELD & JIM DWYER, ACTUAL INNOCENCE: WHEN JUSTICE GOES WRONG AND HOW TO MAKE IT RIGHT, at xviii (2003).

[12] My review of the 214 case files posted by the Innocence Project showed that every case involved a sexual assault, even if the individual was not charged with a sexual assault. For example, David Vasquez was wrongly convicted of burglary in Virginia, but the underlying offense actually included a rape and murder. Innocence Project, David Vasquez, http://www.innocenceproject.org/Content/276.php (last visited Mar. 17, 2008); *see* Innocence Project, Browse the Profiles, http://www.innocenceproject.org/know/Browse-Profiles.php (last visited Jan. 17, 2008); *see also* Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 LAW & HUM. BEHAV. 603, 606-08 (1998) (listing first 40 DNA exonerations and respective charges; every case listed involves sexual assault).

[13] *See supra* note 12 and accompanying text.

then only those innocent "rapists" for whom there was DNA evidence available to test (and with the resources to test it) have been exonerated.

For other violent felonies, such as robberies that do not involve a sexual assault, there has yet to be a case in which DNA evidence was available for testing.[14] Serious felonies committed by a culprit who is a stranger to the victim will almost inevitably require the use of an identification procedure such as a line-up. Robbery cases are usually perpetrated by strangers.[15] Robbery cases pose grave risks of wrongful conviction because of the frequency of the use of line-ups in these cases.[16] In a large study of twentieth century wrongful convictions — a study conducted before the advent of DNA testing — robberies accounted for fifty-three percent, or seventy-three out of 136 of all wrongful convictions.[17] The Supreme Court acknowledged the dangers of misidentifications in robbery cases as early as 1967.[18] In fact, six of its important early decisions on police line-ups involved robbery cases.[19] Two others involved crimes other than sexual assault;[20] only one involved a rape.[21] Because robbers almost always perpetrate their crimes against strangers, in a typical situation an

[14] Fortunately, more and more crimes are being solved in the first instance by means of DNA evidence, including nonviolent crimes such as thefts. *See* Richard Willing, *Thefts Solved by DNA Analysis*; *Usage Expands in Non-Violent Crime*, USA TODAY, Oct. 20, 2006, at 1A. The use of DNA evidence as an investigative tool can be expected to decrease the numbers of wrongly convicted persons in the future. *See* SCHECK, NEUFELD & DWYER, *supra* note 11, at xx.

[15] In 2005, 74% of male robbery victims and 48% of female robbery victims report that the individual(s) who robbed them was a stranger. *See* U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CRIME CHARACTERISTICS (2007), *available at* http://www.ojp.usdoj.gov/bjs/cvict_c.htm#relate.

[16] *See, e.g.*, Valentine, Pickering & Darling, *supra* note 6, at 979 tbl.7 (listing numbers of witnesses at line-ups by offense categories in London study and showing total of 213 witnesses who had viewed line-ups in robbery cases as compared to 25 in rape or indecent assault cases).

[17] Samuel R. Gross, *Loss of Innocence: Eyewitness Identification and Proof of Guilt*, 16 J. LEGAL STUD. 395, 412-13 (1987).

[18] *See* United States v. Wade, 388 U.S. 218, 230 (1967) ("Line-ups are prevalent in rape and robbery prosecutions and present a particular hazard that a victim's understandable outrage may excite vengeful or spiteful motives.").

[19] *See, e.g.*, United States v. Ash, 413 U.S. 300, 302-03 (1973); Kirby v. Illinois, 406 U.S. 682, 683-84 (1972); Foster v. California, 394 U.S. 440, 441-44 (1969); Simmons v. United States, 390 U.S. 377, 379 (1968); Gilbert v. California, 388 U.S. 263, 265 (1967); *Wade*, 388 U.S. at 220.

[20] Manson v. Brathwaite, 432 U.S. 98, 101 (1977) (concerning narcotics sale); Stovall v. Denno, 388 U.S. 293, 295 (1967) (regarding murder).

[21] Neil v. Biggers, 409 U.S. 188, 189 (1972).

eyewitness victim is asked to identify a suspect in an identification procedure such as a line-up, photo array, or show-up.

The circumstances under which a victim views an armed robbery suspect typically present many of the classic variables that reduce the accuracy of an eyewitness's identification — presence of a weapon, no prior familiarity with the robber, dark lighting conditions, hats or disguises, and a short time frame in which to view the robber.[22] Race also plays a major factor in exacerbating the problem of erroneous identifications.[23] The phenomenon of unreliable cross-racial identifications is universally accepted as fact by psychologists.[24] Thus, the practice of relying on eyewitness testimony to obtain convictions often involves an element of racial injustice.[25]

How many innocent people have been wrongly identified as armed robbers and consequently unfairly punished? The numbers would likely dismay us; by one estimate they would be in the thousands.[26] There are over four times as many robberies committed as there are rapes. In 2004, there were 401,470 robberies, compared to 95,089 rapes reported by victims in the United States.[27] Therefore, if DNA evidence were available in robbery cases, we would likely have an additional four times the number of individuals exonerated to date, and these would only include cases dating back about twenty years.

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[22] *See generally infra* notes 63-81, 136-55 and accompanying text (addressing estimator variables that affect eyewitness identification accuracy).

[23] *See infra* notes 68-71 and accompanying text.

[24] *See infra* notes 68-71 and accompanying text.

[25] *See infra* notes 123-30 and accompanying text (regarding *Cromedy*); *see also* Andrew E. Taslitz, *Wrongly Accused: Is Race a Factor in Convicting the Innocent?*, 4 OHIO ST. J. CRIM. L. 121, 124-25 (2006) (noting cross-racial identification issues can lead to more broad stereotyping and selective inattention at every stage of investigation and prosecution process).

[26] A 2004 University of Michigan study, supervised by Professor Samuel R. Gross, estimates that in the past 15 years there were over 28,500 innocent people convicted of noncapital cases. *See* Liptak, *supra* note 7. Interestingly, in 1987, before the large wave of DNA exonerations, Professor Gross had written an article in which he set out to determine why eyewitness misidentifications (and erroneous convictions) are "so rare." *See* Gross, *supra* note 17, at 396. The sudden rash of exonerations since the 1990s resulting from DNA testing proves that prior to the advent of DNA evidence, there was simply no way to sense the real frequency of wrongful convictions, especially violent felony convictions that often rested on eyewitness identification testimony. *See, e.g.*, Wells & Olson, *supra* note 6, at 282 (addressing phenomenon of "weapon-focus" that reduces overall accuracy of eyewitness identifications).

[27] U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CRIME — STATE LEVEL (2004), *available at* http://bjsdata.ojp.usdoj.gov/dataonline/Search/Crime/State/RunCrimeOneYearofData.cfm.

What has not been determined, however, is how best to prevent erroneous convictions.[28] The Warren Court's opinions in *United States v. Wade*[29] and *Stovall v. Denno*,[30] among others, put into motion a movement to improve identification procedures. Similar efforts to regulate the manner in which the police conduct line-ups are proceeding today at a record pace.[31] Most reforms proposed by innocence commissions and other reformers aim to improve the procedures followed by police investigators in obtaining eyewitness identifications.[32] These prophylactic remedies include efforts to implement blind and sequential line-ups or photo arrays.[33] The methods are designed to reduce the tendency of human memory to malfunction and to minimize the possibility of police influencing an eyewitness's choice. Other remedies are thought to better equip juries in evaluating the reliability of eyewitness testimony. These include the use of expert testimony, as well as special jury instructions, on the dangers of various aspects of eyewitness identifications.[34]

If the Warren Court's effort to regulate identifications has taught anything, however, it is that regulating the investigative process is a difficult task. It is difficult for two reasons. First, the culture within police departments is such that they will make efforts to circumvent mandates imposed from "on high."[35] Second, especially in the area of

[28] For an article arguing wrongful convictions scholars should focus on the criminal justice system as a single interrelated "system" in searching for the causes of wrongful convictions, see Erik Luna, *System Failure*, 42 AM. CRIM. L. REV. 1201, 1202 (2005). Some scholars have also begun to encourage an examination of other aspects of the administration of justice, beyond evidence-related procedures, that may contribute to wrongful convictions. *See, e.g.*, Andrew M. Siegel, *Moving Down the Wedge of Injustice: A Proposal for a Third Generation of Wrongful Convictions Scholarship and Advocacy*, 42 AM. CRIM. L. REV. 1219, 1222 (2005) (urging scholars to focus on broader questions about structure and administration of justice system such as prosecutorial decision-making).

[29] 388 U.S. 218, 236-37 (1967) (holding Sixth Amendment right to counsel applies to post-indictment pretrial line-ups).

[30] 388 U.S. 293 (1967) (holding Fourteenth Amendment Due Process Clause requires exclusion of eyewitness identifications that are product of unnecessarily suggestive procedures).

[31] *See infra* Part II.D.

[32] *See infra* notes 158-76 and accompanying text.

[33] *See infra* notes 162-69 and accompanying text.

[34] *See infra* Part II.C.

[35] *See* JOHN KLEINIG, THE ETHICS OF POLICING 224-29 (1996); Debra Livingston, *Police Reform and the Department of Justice: An Essay on Accountability*, 2 BUFF. CRIM. L. REV. 815, 848 (1999) ("'[E]xternal controls and accountability mechanisms (desirable as they are) cannot be expected to be effective unless police organizations are themselves involved in the process of control.'" (quoting DAVID DIXON, LAW IN

eyewitness identifications, the courts themselves have shown a profound and understandable reluctance to enforce their own judicially created rules.[36] On a human level, it is a gut-wrenching task to prohibit a victim or other witness from identifying the alleged culprit in court, no matter how dubious the identification procedure may have been or how unlikely it may seem that the victim or witness got a sufficient view of the suspect.[37]

A simpler and more effective approach to systemic reform would shift the focus away from what the police do or fail to do in gathering evidence, and focus instead on changes to the rules of criminal procedure that govern the sufficiency of evidence for conviction. To give one example, in a number of states, convictions cannot be obtained on the sole basis of an accomplice's testimony.[38] The categorical unreliability of accomplice testimony prompted state legislatures to enact a rule simply requiring that other corroborating evidence be produced in cases that rely on an accomplice's testimony; the accomplice's testimony is insufficient on its own. Likewise, in ordinary cases, the inherent unreliability of eyewitness identifications justifies a limitation on their use to obtain convictions. I do not propose an outright ban on convictions based solely on identifications, as that would go too far. For instance, this proposal would exclude from those cases in which victims and culprits knew each other prior to the date of the crime.

A corroboration requirement has the distinct advantages of being simple to implement and of prompting systemic changes in police investigations without attempting to micromanage police behavior or trying to change police or prosecutorial culture. Perhaps most importantly, such a rule does not require courts to exclude identifications, as do the rules in *Wade* and *Stovall*.[39] Courts have proved themselves highly reluctant to exclude identifications.[40] Besides, victims and witnesses have a right to expect that they will be allowed to identify the person they believe to be the culprit at trial. A corroboration requirement operates at the investigative stage, making it incumbent on police investigators to continue their investigations even after obtaining a positive identification. Without corroborating evidence, a case is simply not accepted by the prosecutor's office, and

POLICING: LEGAL REGULATION AND POLICE PRACTICES 94-95 (1997))).

[36] *See infra* Part II.A-B.

[37] *See infra* note 133 and accompanying text.

[38] *See infra* note 239 and accompanying text.

[39] *See infra* notes 111-35 and accompanying text.

[40] *See infra* notes 162-69 and accompanying text.

the police must explain to the victim the shortcoming in the available evidence.

The rule thus relieves courts of the difficult choice of allowing convictions based uncorroborated eyewitness identifications on the one hand (a prospect that should be highly troubling given the high probability of error), and rejecting an eyewitness's identification testimony as too unreliable to admit into evidence, on the other hand. Such a rule also brings the criminal practice into line with the mandate of *In re Winship* that criminal convictions can only be obtained on proof beyond a reasonable doubt. [41] Scientific evidence establishes beyond peradventure that eyewitness identification testimony carries an error rate too high to meet the evidentiary threshold of "beyond a reasonable doubt."[42]

Part I of this Article addresses the rich psychology literature documenting the numerous laboratory experiments and studies of actual eyewitness identifications in a police setting. This first part of the Article demonstrates that there are numerous factors relating to the inherently faulty memory capabilities of human beings, especially under the circumstances that crime victims usually make their observations.

In Part II, this Article examines the failure of currently available remedies in protecting the integrity of the trial process as a search for truth. In particular, this part reviews the constitutional protections of the right to counsel at line-ups and the due process rule excluding unreliable identifications made under unduly suggestive circumstances. Also reviewed in Part II are the corrective remedies of admitting expert testimony on the unreliability of eyewitness identifications under certain circumstances and jury instructions to the same effect. Finally, this Article examines the prophylactic remedies of blind and sequential line-ups that are currently favored by reformers. This Article argues that the new prophylactic measures, while worthwhile in improving the overall accuracy of eyewitness identifications, do nothing to reduce the error rate caused by the inherent fallibility of human memory. Indeed, there is no known remedy for the basic shortcomings in the ability of the human mind to recall events accurately.[43] Any such remedy would be the stuff of

[41] 397 U.S. 358, 368 (1970).

[42] *See infra* Part I.

[43] For example, the mind requires sufficient time and light to be capable of identifying a person, and there is simply no way for the legal system to improve these inherent perceptive abilities of witnesses; nor can changes in the legal system affect the lighting or duration of criminal events. *See, e.g.*, Wells & Olson, *supra* note 6, at

science fiction today. Thus, while better eyewitness identifications are possible, there is a substantial margin of error that cannot be eliminated.

This Article concludes with a proposal in Part III to prohibit convictions based solely on eyewitness identification testimony. This part reviews other federal and state laws that similarly prohibit convictions based only on various types of single witness testimony, such as that of confessing suspects, accomplices, and rape victims, as well as the two-witness rule in treason law. In each case, either because of the seriousness of the charge, the ease of wrongly convicting an individual falsely accused, or the motivations of the witness, the government must produce some independent corroborating evidence in order to protect the innocent. Finally, this Article concludes with a brief, preliminary discussion about how a corroborating evidence requirement for eyewitness identification cases might operate.

I. THE INHERENT FALLIBILITY OF EYEWITNESS IDENTIFICATIONS

Eyewitness identifications are notoriously subject to error. Most people believe that the human mind "records" events in an accurate fashion, much like a video camera.[44] Psychological research, however, proves human perception is selective in the details that it "records," and human memory reconstructs and fills in the missing detail of the images stored in the mind. In her classic 1979 book on the subject, Elizabeth Loftus explains the process:

> Early on, in the acquisition stage [of developing a memory of an event], the observer must decide to which aspects of the visual stimulus he should attend. Our visual environment typically contains a vast amount of information, and the proportion of information that is actually perceived is very small. The process of deciding what to attend to can be broken down into an even finer series of decisions . . . .

280-82 (noting accuracy of eyewitness's identification can be affected by numerous factors relating to witness, such as lessened ability to recognize person of different race and unconscious transference, as well as factors relating to event, such as amount of time culprit is viewed, lighting conditions, whether culprit wears disguise, distinctiveness of culprit's appearance, presence of weapon, and timing of knowledge that one is witnessing crime).

[44] *See* ELIZABETH F. LOFTUS, EYEWITNESS TESTIMONY 21 (1979); Shari Seidman Diamond, *Psychological Contributions to Evaluating Witness Testimony*, *in* BEYOND COMMON SENSE: PSYCHOLOGICAL SCIENCE IN THE COURTROOM 353, 353 (E. Borgida & S. Fiske eds., 2007).

> Once the information associated with an event has been encoded or stored in memory, some of it may remain there unchanged while some may not. Many things can happen to a witness during this crucial retention stage. The witness may engage in conversations about the event, or overhear conversations, or read a newspaper story — all of these can bring about powerful and unexpected changes in the witness's memory.
>
> Finally, at any time after an event a witness may be asked questions about it. At this point the witness must recreate from long-term memory that portion of the event needed to answer a specific question. This recreation may be based both on information acquired during the original experience and on information acquired subsequently.[45]

Experiments have confirmed that under the best of circumstances, eyewitnesses to a violent crime are likely to make serious errors on significant aspects of the event. As early as 1902, German Professor Franz von Liszt conducted an experiment in which he staged a fake violent crime in his class to test his students' ability to recall the events accurately.[46] The surprising findings showed that even the student with the best recollection committed errors on about twenty-six percent of the significant details; the rest made more errors than that.[47] The findings showed that:

> Words were put into the mouths of men who had been silent spectators during the whole short episode; actions were attributed to the chief participants of which not the slightest trace existed; and essential parts of the tragi-comedy were completely eliminated from the memory of a number of witnesses.[48]

Following this experiment, countless other psychological experiments and field studies have confirmed the principal finding of von Liszt's seminal experiment: eyewitnesses invariably err in their recollections of events and persons.[49]

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[45] LOFTUS, *supra* note 44, at 21-22.

[46] *See* MÜNSTERBERG, *supra* note 1, at 49-51 (recounting experiment by German criminologist von Liszt); *see also* SCHECK, NEUFELD & DWYER, *supra* note 11, at 53-55 (discussing Münsterberg's account of von Liszt experiment).

[47] *See supra* note 46.

[48] MÜNSTERBERG, *supra* note 1, at 50-51.

[49] *See, e.g.*, Wells & Seelau, *supra* note 10 (reviewing dozens of empirical studies

Researchers have identified two categories of variables that contribute to the likelihood of error. The first, known as estimator variables, are factors relating to the attributes of the eyewitness that cannot be controlled by the legal system. These include such things as "lighting conditions at the time of witnessing and whether the witness and culprit are of the same or of different races,"[50] both of which can affect identification accuracy. The second category — system variables — includes factors that can be controlled by the legal system.[51] Examples of system variables include "instructions given to eyewitnesses prior to viewing a line-up and the functional size of a line-up."[52] There is an abundance of social science research on both estimator variables and system variables that explores how these factors tend to reduce the accuracy of eyewitness identifications.[53]

Obviously, the legal system can only address system variables. Thus, articles addressing legal reforms do not attempt to eliminate estimator variables, which is by definition impossible. Instead, most of the newer reforms either address system variables (reducing police suggestion and unreliable line-up procedures) or provide so-called "corrective" measures designed to inform jurors about the existence of estimator variables (such as the increased unreliability of cross-racial identifications) through expert testimony or jury instructions.[54]

The following sections address the rich literature detailing numerous studies on the effects of both system and estimator variables on the accuracy of eyewitness identifications. The studies are of two types. First, there are laboratory experiments in which various aspects of an event and subsequent identification procedure are simulated and recorded, and scientific hypotheses are put forth to try to explain the results.[55] Second, psychologists have been able to conduct studies based on actual police procedures by which eyewitnesses try to identify the culprits.[56] These studies document the frequency in

on eyewitness identifications).

[50] Wells & Olson, *supra* note 6, at 279.

[51] *See* Wells & Seelau, *supra* note 10, at 766.

[52] Wells & Olson, *supra* note 6, at 279.

[53] *See, e.g.*, *id.* at 279-80 (providing meta-analysis of eyewitness identification literature from 1970s through present).

[54] *See infra* notes 136-55 and accompanying text.

[55] *See, e.g.*, Wells & Olson, *supra* note 6, at 290-91 (addressing some data gaps and theoretical conclusions obtainable from laboratory experiments and studies of actual line-ups).

[56] *Id.*

which witnesses identify the person who the police have arrested and the possible effects of various system variables.

Both types of studies have their shortcomings. On the one hand, the findings of laboratory experiments can be criticized on the grounds that they cannot sufficiently replicate the conditions under which crime victims identify suspects. Thus, critics of such studies may call into question whether the findings can be extrapolated to real criminal cases.[57]

On the other hand, studies of actual police line-ups, photo arrays, or field show-ups can be criticized on the ground that they tell us only the rate at which witnesses positively identify a "suspect."[58] Measuring the rate at which witnesses select the suspect that police have arrested tells us little about the accuracy of the identification process.[59] In other words, although witnesses may "correctly" identify the suspect arrested by the police, they may simply be choosing a person who looks most like the culprit, but who is actually innocent.[60] The natural impulse that witnesses exhibit to choose a person who, it turns out, resembles the culprit but is actually innocent, is precisely the problem that has led to so many wrongful convictions. Thus, the findings of error rates in studies of real identification procedures actually underestimate the true error rate. They only tell us how often witnesses identify a known innocent person. However, the wrongful conviction cases establish the fact that witnesses also often err when they identify police suspects who are actually innocent.[61] In addition, field studies can be badly designed, poorly implemented, or incompletely documented.[62]

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[57] *See, e.g.*, Diamond, *supra* note 44, at 355 (noting criticism of laboratory experiments).

[58] *See, e.g.*, Bruce W. Behrman & Sherrie L. Davey, *Eyewitness Identification in Actual Criminal Cases: An Archival Analysis*, 25 LAW & HUM. BEHAV. 475, 478 (2001) (providing archival analysis of real cases and determining effects of various estimator effects on "suspect identification rates," or rates at which eyewitnesses identified persons that police had singled out as suspects).

[59] *See* Valentine, Pickering & Darling, *supra* note 6, at 969 ("One of the major difficulties that an applied researcher faces is that one seldom knows with any degree of certainty whether a line-up in a criminal case genuinely contains the culprit.").

[60] *See infra* notes 59, 63-64 and accompanying text.

[61] *See supra* notes 5-8 and accompanying text.

[62] *See* Diamond, *supra* note 44, at 358-59 (addressing flaws in field study purporting to refute findings of laboratory experiments on benefits of sequential versus simultaneous line-ups).

A. Estimator Variables

Barry Scheck, Peter Neufeld, and Jim Dwyer described the way in which the human mind actually perceives events: "What happens in front of the eyes is transformed inside the head, and is refined, revisited, restored, and embellished in a process as perpetual as life itself."[63] The legal system can do nothing to minimize the effect that estimator variables play in diminishing a person's ability accurately to perceive and recall an event or to identify a perpetrator.

The mind's ability to perceive an event accurately is affected, for example, by the amount of time that a witness has to perceive the event as this affects the witness's ability to form an accurate memory of the event.[64] Witnesses of violent events, or those who otherwise experience higher amounts of stress, are also less able to form accurate recollections.[65] A witness's expectations — including cultural expectations, temporary biases, and expectations based on past experiences — also color a witness's memory of an event.[66]

In addition, Loftus reported that "recognizing people [as opposed to events] can be fraught with its own set of [additional] difficulties."[67] Two important factors are cross-racial identification and "unconscious transference."[68] With regard to cross-racial identification, Loftus reports that "[i]t seems to be a fact — it has been observed so many times — that people are better at recognizing faces of people of their own race than a different race."[69] She surmised that when a witness views a person of a different race, the witness may focus more on a distinctive feature of most people of that race (e.g., skin tones, eyes, noses) rather than on the distinctive features of the individual person.[70] Interestingly, studies also show that "contrary to widely held assumptions, racial attitude and amount of interracial experience were not related systematically to recognition accuracy for subjects of either [black or white] race."[71]

Unconscious transference occurs when "a person seen in one situation is mistakenly remembered by a witness as being seen in a

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[63] SCHECK, NEUFELD & DWYER, *supra* note 11, at 55.

[64] *Id.* at 23-24.

[65] *Id.* at 31-35.

[66] LOFTUS, *supra* note 44, at 36-51.

[67] *Id.* at 136.

[68] *Id.*

[69] *Id.* at 136-37.

[70] *Id.* at 139.

[71] *Id.*

different situation."[72] In one experiment designed to study unconscious transference, fifty college students watched a videotaped story concerning six fictitious college students, one of whom commits a crime.[73] Photographs of each of the characters in the story appeared for approximately two seconds. The photos included only white males, with medium-length brown hair and no glasses. After three days, the subjects attempted to identify the criminal from a set of five faces presented to them. Half of the subjects viewed a set of photographs that did not include the criminal but did include an incidental character. Loftus described the findings:

> Of interest are the data from the subjects who were tested with an identification set that did not include the face of the criminal but did include the face of an incidental character. Of those subjects, 60 percent chose the incidental character, 16 percent chose a different incorrect man, and 24 percent refused to make a choice. If the tendency to pick the incidental character was no greater than the tendency to pick one of the other non-culprits, then 20 percent of those who made a selection should have picked the incidental character. In fact, 79 percent of those making a selection picked the incidental character.

In explaining unconscious transference, Loftus hypothesized:

> [A]n incidental character seen prior to a crime may look familiar to a witness who is attempting to identify the perpetrator of a crime from a set of photographs . . . and this familiarity is interpreted as being due to the perception at the time of the crime. . . . The familiar trace of the incidental character becomes integrated into the witness's memory for the crime.[74]

Other studies have found differences in witnesses' memory accuracy based on sex and age.[75] Men and women are considered to be equal in their ability to remember, but they tend to remember items oriented to their gender more accurately and to be less prone to suggestibility on those items.[76] The studies on age show that children are "relatively

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[72] *Id.* at 136.

[73] *Id.* at 143.

[74] *Id.*

[75] *Id.* at 158-59, 162; Wells & Olson, *supra* note 6, at 280.

[76] LOFTUS, *supra* note 44, at 158-59.

inaccurate" and also "highly suggestible."[77] Gary Wells and Elizabeth Olson reported that "very young children and the elderly perform[] significantly worse than younger adults" in studies of eyewitness identification.[78]

Bruce Behrman and Sherrie Davey conducted an archival analysis of studies examining several important estimator effects: the effect of delay in conducting an identification procedure, cross- versus own-race effects, and weapon focus effects.[79] They reviewed the findings of large numbers of laboratory experiments and studies of actual police identification procedures, and found that the literature confirmed the importance of delay, cross-race identifications, and weapon focus as factors that decreased the accuracy of identifications.[80] In the criminal justice system, cross-racial offenses, often combined exacerbation by the presence of a weapon, mean that these two estimator variables frequently contribute to less accurate identifications by witnesses.

It bears repeating that the lessened accuracy of eyewitness identifications due to the presence of estimator variables is not attributable to any failing of police investigators or the criminal justice system in general. Human beings quite simply lack the ability to record accurate images of strangers, especially under the typical circumstances of a crime like armed robbery. Actors within the criminal justice system can do nothing to improve a witness's innate perception and memory failings.

This is not to say that we cannot use our knowledge about estimator variables to improve the way in which the system functions. New research now suggests that it may be possible to postdict eyewitness accuracy based on the presence of certain estimator variables.[81] The ability to estimate eyewitness accuracy is a valuable piece of information for decision makers within the criminal justice system. Moreover, courts have for many years considered the use of "corrective measures," such as expert witness testimony and jury

[77] *Id.* at 162.

[78] Wells & Olson, *supra* note 6, at 280.

[79] Behrman & Davey, *supra* note 58, at 476; *see also* LOFTUS, *supra* note 44, at 35-36 (regarding weapon focus). Of course, police investigators may be able to control the amount of time that elapses between a crime and an identification procedure, but in some cases a lengthy delay will be unavoidable. If, for example, a rape victim delays in reporting the crime, any subsequent identification procedure would necessarily occur after a possible lengthy delay after the commission of the crime.

[80] Behrman & Davey, *supra* note 58, at 476.

[81] *See* Wells & Olson, *supra* note 6, at 291.

instructions to educate jurors about estimator variables so that they may better evaluate the reliability of identification testimony.[82]

B. System Variables

In contrast to estimator variables, system variables are those factors affecting witness accuracy that the legal system can control to some extent.[83] There are two principal system variables that reformers have aimed to minimize through preventive procedures. First, studies have shown that through conscious or unconscious suggestion police investigators can encourage eyewitnesses to choose the suspect arrested by the police.[84]

The most striking example is the use of field show-ups, in which a single suspect is presented to a witness for possible identification.[85] Experts consider field show-ups to be highly suggestive because witnesses are likely to believe that the police have arrested the correct person.[86] Studies have also shown that show-ups "result in more false identifications than line-ups."[87] Researchers further find that field show-ups are "the more typical and preferred method of identification used by police departments."[88] This is understandable since field show-ups offer the possibility to clear an innocent person who is detained by the police more quickly than if the police had to organize a line-up.[89] Moreover, delay in conducting an identification procedure

[82] *See infra* notes 136-55 and accompanying text.

[83] *See, e.g.*, Diamond, *supra* note 44, at 354 (noting line-up procedures are important system variable that can affect eyewitness identification accuracy); Wells & Seelau, *supra* note 10, at 766 (explicitly addressing only system variables in proposing legal policy choices).

[84] Improper police suggestion in the selection of a suspect is precisely the type of impropriety that concerned the Supreme Court in the landmark *United States v. Wade* case. 338 U.S. 218, 228-29 (1967). The Court identified a right to counsel at post-indictment line-ups as a constitutionally required preventive measure. *Id.* at 236-37. For a variety of reasons, not the least of which is the fact that most line-ups occur before indictment, the right to counsel has not served to counteract police suggestion at line-ups. *See* Wells et al., *supra* note 12, at 608-09.

[85] Single-photograph identifications may present the same problems as field show-ups, but the research is insufficient to draw definitive conclusions. The practice appears to be much less common since it is a fairly simple matter for the police to provide multiple similar photos to witnesses. *See, e.g.*, Behrman & Davey, *supra* note 58, at 483 (reporting findings of study of 18 single-photograph identifications).

[86] *Id.* at 477, 487 (citing studies).

[87] *Id.* at 477.

[88] *Id.*

[89] Behrman and Davey's study of 258 field show-ups showed that 93% were administered within a day after the crime. *Id.* at 482.

has been shown to be an important estimator variable that decreases the accuracy of identifications.[90] Thus, a prompt on-the-scene identification should increase accuracy. The higher false identification rate of show-ups as compared to line-ups suggests, however, that the increased suggestibility of show-ups more than offsets the possible gains in accuracy by a prompt opportunity to identify a suspect.

Show-ups present a second problem as well. Studies confirm the hypothesis that earlier identifications taint later ones in a variety of ways.[91] Thus, an incorrect identification at a field show-up is likely to produce a higher level of confidence in a later in-court identification.

Line-ups do not dispense with this problem. A similar phenomenon has been observed in relation to police line-ups. In-court identifications may be tainted by the behavior of police investigators during line-ups as well. For example, when a witness selects the suspect, an investigator's confirmatory feedback (e.g., "Good, you've identified the suspect") tends to boost the witness's confidence in the accuracy of the identification and has other distorting effects on a witness's memory.[92]

Furthermore, witnesses have a natural tendency to make a selection based on a process known as "relative judgment." The psychological process of relative judgment causes a witness to select the person in the line-up who best fits the limited contours of the witness's memory, rather than choose solely on the basis of an independent memory of the culprit's physical features.[93] A traditional line-up consists of a simultaneous presentation of a group of individuals. This method

[90] *Id.* at 476 (citing large number of laboratory studies that show number of correct identifications declines as interval between crime and identification procedure increases).

[91] *Id.* at 488.

[92] *See, e.g.*, Amy Bradfield Douglass & Nancy Steblay, *Memory Distortion in Eyewitnesses: A Meta-Analysis of the Post-identification Feedback Effect*, 20 APPLIED COGNITIVE PSYCHOL. 859 (2006) (reinforcing need for double-blind testing, recording of eyewitness reports immediately after identification is made and reconsideration by court systems of variables currently recommended for consideration in eyewitness evaluations); 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 (1998) (finding feedback given to witnesses after identifying suspect produces strong effects on witness's retrospective reports of their certainty, quality of view they had, clarity of their memory, speed with which they identified suspect, and several other measures); *see also* Tim Valentine & Pamela Heaton, *An Evaluation of the Fairness of Police Line-Ups and Video Identifications*, 13 APPLIED COGNITIVE PSYCHOL. S59, S69 (1999) (evaluating fairness of live line-ups as compared to video line-ups and concluding that video line-ups are fairer and thus more reliable).

[93] Wells & Seelau, *supra* note 10, at 769.

allows a witness to select by process of comparison and elimination.[94] Relative judgment is actually an efficient and effective process by which to identify a culprit when the true culprit is in a line-up. According to Wells and Eric Seelau, "Eyewitnesses are fairly efficient at selecting the actual culprit when the culprit is in the line-up but have great difficulty not selecting someone when the culprit is not in the line-up."[95] They conclude that "[t]he danger of mistaken identification exists almost solely under conditions in which the actual culprit is not present in the line-up."[96]

In sum, in the absence of other extrinsic evidence linking the suspect to the crime, ideally physical or forensic evidence, the legal system is simply incapable of confirming the accuracy of an eyewitness's identification. This is also the biggest obstacle to genuine scientific testing of police identification procedures. At best, field studies of eyewitness identification procedures such as line-ups can tell us the rates at which witnesses mistakenly identify fillers and "correctly" identify the suspects arrested by police investigators.

II. THE ADVOCACY SYSTEM'S FAILURE TO PREVENT WRONGFUL CONVICTIONS BASED ON MISTAKEN IDENTIFICATIONS

The fact that so many individuals are wrongly convicted based on eyewitness testimony proves that the criminal justice system as it currently operates fails to live up to the ideals of an adversarial system.[97] The theory underlying an adversarial system is that from the courtroom clash of two opponents of roughly equivalent abilities the truth will emerge.[98] Scholars have studied numerous shortcomings of

[94] Nancy Steblay et al., *Eyewitness Accuracy Rates in Sequential and Simultaneous Lineup Presentations: A Meta-Analysis Comparison*, 25 LAW & HUMAN BEHAV. 459, 460 (2001) (reporting results of 28 available tests of overall accuracy that show superiority of sequential line-ups over simultaneous line-ups for counteracting relative judgment and increasing accuracy of identifications); Wells et al., *supra* note 12, at 613 (relying on relative judgment theory in recommending procedures for line-ups and photospreads); Wells & Seelau, *supra* note 10, at 768 (addressing relative judgment process).

[95] *See* Wells & Seelau, *supra* note 10, at 769.

[96] *Id.* ("When Bayesian statistical models are applied to actual data in which the presence or absence of the culprit is treated as a base rate and the eyewitness's selections are treated as likelihood rations, most of the variance in the probability of a mistaken identification is attributable to the base rate for the presence or absence of the culprit in the line-up.").

[97] *See supra* notes 8-10 and accompanying text (discussing wrongful convictions).

[98] *See, e.g.*, Lon L. Fuller & Kenneth I. Winston, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 382 (1978) (addressing importance of

the adversarial system that have undermined the system's ability to work as intended. The National Committee on the Right to Counsel, for example, recently documented the national crisis of the lack of resources and poor quality of appointed counsel for indigent defendants.[99] The widespread lack of adequate representation for the indigent and working poor undermines the search for truth and plays a causal role in convicting the innocent.[100] Thus, in courtrooms across the country the basic foundation of the advocacy system as a clash of adversaries of roughly equivalent ability does not exist. Instead, defendants often find themselves caught in a system that can pressure even an innocent person to plead guilty.[101]

Other scholars have highlighted a variety of "systemic design failures" that may lead to wrongful convictions.[102] The literature identifies the "institutional culture[s]" of politicians, prosecutors, judges, and the police, each of which can contribute to flawed investigations and prosecutions, as well as to the resistance to correct errors upon the discovery of exculpatory evidence.[103] The overall culture and the numerous procedural and evidentiary rules spawned by this culture create an overall systemic dysfunction that presents a daunting challenge for reformers.[104]

Erroneous eyewitness identifications play an important part in commencing what can become a relentless drive to convict the innocent suspect. Once a suspect is identified by the police, investigators often develop a drive, commonly known as "tunnel vision," to convict whomever the victim identifies, even if other

participation of lawyers as advocates for their clients to determine dispute properly).

[99] *See* Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031, 1116-17 (2006). The National Committee on the Right to Counsel was established as a joint endeavor of the Constitution Project and the National Legal Aid and Defender Association. The Committee is comprised of judges, prosecutors, defenders, academics, victim advocates, law enforcers, and policymakers. *Id.* at 1043-44.

[100] Rodney Uphoff, *Convicting the Innocent: Aberration or Systemic Problem?*, 2006 WIS. L. REV. 739, 748-65.

[101] *Id.*, at 797-801.

[102] Siegel, *supra* note 28, at 1224.

[103] *See* Alafair Burke, *Neutralizing Cognitive Bias: An Invitation to Prosecutors*, 2 N.Y.U. J.L. & Liberty 512, 520-30 (2007) (suggesting ways to counteract cognitive bias among prosecutors that impede neutrality); Siegel, *supra* note 28, at 1225 n.24 (addressing institutional culture of prosecutors and incentives to obtain convictions and maintain them against claims of innocence); Uphoff, *supra* note 101, at 810-19, 821-25 (discussing entrenched attitudes of legislators and indifference of judiciary and attitudes of police and prosecutors).

[104] *See supra* note 28 (citing articles by Luna and Siegel).

evidence does not give reason to suspect the individual, and, even if other evidence seems to rule out the individual.[105] The Supreme Court's seminal decision in *United States v. Wade* recognized that tunnel vision, especially when there is no other evidence of a suspect's guilt, can tempt the police to taint an identification through suggestion to the witness.[106] An erroneous identification can in turn harden investigators' conviction that a suspect is guilty.[107] The drive to gather additional evidence often leads investigators to use trickery and deceit to obtain inculpatory statements from the suspect, to entice jailhouse snitches with rewards in exchange for inculpatory information about the suspect, and even to pressure forensic scientists to interpret ambiguous data or fabricate results in such a way as to inculpate the suspect.[108] The accumulation of other false evidence against the innocent suspect "enters a feedback loop that bolsters the witnesses' confidence in the reliability and accuracy of their incriminating testimony and reinforces the original assessment of guilt held by police, and ultimately by prosecutors, courts, and even defense counsel."[109]

In a system in which defendants are often underrepresented and other players in the system have incentives to convict the accused person, the adversarial system has an imbalance that makes it likely to fail in its truth-finding function. The metaphorical scales of justice are weighted against the accused. Even the numerous safeguards that

[105] For a comprehensive examination of tunnel vision, cognitive biases, institutional pressures, and deliberate policies that contribute to tunnel vision, see Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 292-96. Findley and Scott define tunnel vision as "that 'compendium of common heuristics and logical fallacies,' to which we are all susceptible, that lead actors in the criminal justice system to 'focus on a suspect, select and filter the evidence that will 'build a case' for conviction, while ignoring or suppressing evidence that points away from guilt.'" *Id.* at 292; *see also* Innocence Project, The Problem of Tunnel Vision in Criminal Justice, www.innocenceproject.org/docs/TunnelVision_WEB.pdf (last visited Mar. 17, 2008).

[106] 388 U.S. 218, 234-35 (1967) ("The fact that the police themselves have, in a given case, little or no doubt that the man put up for identification has committed the offense, and that their chief pre-occupation is with the problem of getting sufficient proof, because he has not 'come clean' involves a danger that this persuasion may communicate itself even in a doubtful case to the witness in some way . . . ." (quoting Glanville Williams & H. A. Hammelmann, *Identification Parades, Part I*, 1963 CRIM. L. REV. 479, 483)).

[107] *See supra* note 90.

[108] Findley & Scott, *supra* note 105, at 292-93.

[109] *Id.* at 293.

should operate to prevent wrongful convictions, such as the burden of proof beyond a reasonable doubt, simply fail to protect the innocent.

The following sections address the important role that eyewitness identification testimony plays in contributing to the imbalance in the advocacy system. In particular, they examine the several remedies that have been implemented to varying degrees in different jurisdictions in an attempt to safeguard the innocent from convictions based on inaccurate eyewitness identifications. In the end, what is clear is that none of these remedies has even the potential to counteract the frequent inaccuracy introduced by eyewitness identification testimony.[110]

A. The Right to Counsel at Line-Ups

The Supreme Court's seminal opinion in *United States v. Wade* ostensibly created a right to counsel at a police line-up.[111] Counsel's presence at a line-up ensures that someone is present who is alert for possibly prejudicial conditions, such as "a victim's understandable outrage [that] may excite vengeful or spiteful motives" or that the police might use improper suggestion to influence a witness's identification choice.[112] In retrospect, *Wade* made keen observations

[110] *See generally* Wells et al., *supra* note 12, at 608 (arguing legal remedies have failed to prevent substantial numbers of erroneous convictions based on false eyewitness identifications).

[111] 388 U.S. at 236-38; *see also* Gilbert v. California, 388 U.S. 263, 272 (1967).

[112] The opinion highlighted several "striking examples" of suggestive line-ups:

> In a Canadian case . . . the defendant had been picked out of a line-up of six men, of which he was the only Oriental. In other cases, a black-haired suspect was placed among a group of light-haired persons, tall suspects have been made to stand with short non-suspects, and, in a case where the perpetrator of the crime was known to be a youth, a suspect under twenty was placed in a line-up with five other persons, all of whom were forty or over.
>
> Similarly . . . [other suggestive procedures include] that all in the line-up but the suspect were known to the identifying witness, . . . that only the suspect was required to wear distinctive clothing which the culprit allegedly wore, that the witness is told by the police that they have caught the culprit after which the defendant is brought before the witness alone or is viewed in jail, that the suspect is pointed out before or during a line-up, and that the participants in the line-up are asked to try on an article of clothing which fits only the suspect.

Wade, 388 U.S. at 232-33 (citations omitted).

on some of the problems with line-ups, but utterly failed to provide a genuine remedy.[113]

In short order, *Kirby v. Illinois* effectively overruled *Wade* by restricting the right to counsel only to line-ups conducted after initiation of formal proceedings against the accused.[114] Moreover, most identifications of criminal suspects are obtained from photo spreads rather than live line-ups; there the right to counsel does not apply at all.[115]

[113] Only a handful of states provide a right to counsel earlier in the investigation process. *See, e.g.*, People v. Bustamante, 634 P.2d 927, 929 (Cal. 1981) (applying right to counsel to pre-indictment line-up); People v. Jackson, 217 N.W.2d 22, 27 (Mich. 1974) (applying right to counsel to pre-indictment line-up, applying right to counsel to photo identification procedures, and noting line-up should be used in lieu of photo identification unless exigent circumstances exist); Commonwealth v. Richman, 320 A.2d 351 (Pa. 1974) (applying right to counsel to any post-arrest line-up); State v. Mitchell, 593 S.W.2d 280 (Tenn. 1980) (applying right to counsel to all warranted arrests).

Even violations of the right to counsel requirement do not necessarily preclude the introduction of eyewitness testimony at trial. The *Wade* decision itself did not mandate exclusion of all identification evidence whenever a line-up is conducted in violation of the Sixth Amendment right to counsel. Rather, the *Wade* decision excludes the line-up identification, but would allow an in-court identification by a witness if it is shown to have been "independent" of the initial line-up identification. *Wade*, 388 U.S. at 242.

The Court further identified several factors that trial courts should consider in determining whether the in-court identification is independent of the tainted line-up identification:

> [T]he prior opportunity to observe the alleged criminal act, the existence of any discrepancy between any pre-lineup description and the defendant's actual description, any identification prior to lineup of another person, the identification by picture of the defendant prior to the lineup, failure to identify the defendant on a prior occasion, and the lapse of time between the alleged act and the lineup identification. It is also relevant to consider those facts which, despite the absence of counsel, are disclosed concerning the conduct of the lineup."

Id. at 241. This rule ignores scientific studies that have shown than an earlier suggestive identification procedure has profound effects that taint a later identification. *See supra* notes 92-94 and accompanying text (addressing confidence boosting, memory distorting effects of post-identification confirmatory feedback, and effects of show-ups on later identifications).

[114] 406 U.S. 682, 690 (1972) (plurality opinion).

[115] United States v. Ash, 413 U.S. 300, 321 (1973); Wells et al., *supra* note 12, at 608. At least one state has extended the right to counsel to photographic identification procedures and requires line-ups be used instead of photographic identifications unless exigent circumstances require use of photographs. *See Jackson*, 217 N.W.2d at 27.

The Court most likely backed away from mandating counsel because it realized the shortcomings of an attorney's presence as a remedy.[116] As an observer of the process, a lawyer is likely to end up becoming a witness in the client's case, requiring that she be removed as counsel in order to testify on the client's behalf.[117] Defense attorneys are also generally unfamiliar with the factors that can decrease the accuracy of an identification procedure in any case, so they are not likely to be effective in protecting their clients' interests.[118] Finally, if the police employed videotaping of line-ups, show-ups, and photo arrays, such a practice would be about as effective as an attorney's presence.[119]

B. Exclusion of Unreliable Identifications Made Under "Unduly Suggestive" Circumstances

In addition to the attempts to implement a right to counsel at line-ups, the Supreme Court has also called for the exclusion of unreliable identifications as a matter of due process.[120] *Neil v. Biggers* requires

[116] *See, e.g.*, Messiah v. Duncan, No. 99 Civ. 12178 (RCC) (HBP), 2004 U.S. Dist. LEXIS 17271, at *14-18 (S.D.N.Y. Aug. 27, 2004) (noting no violation of state constitutional right to counsel when counsel instructed to remain outside door within earshot, as counsel was "present" for purposes of satisfying right to counsel); People v. Hawkins, 435 N.E.2d 376, 382 (N.Y. 1982) (finding counsel "plays the relatively passive role of an observer" at line-ups); People v. Tom, 422 N.E.2d 556 (N.Y. 1981) (finding right to counsel waived where defense counsel assisted prosecutor in arranging line-up, explained reasons for absence at line-up to defendant, and advised prosecutor to proceed with line-up in his absence, even though defendant did not himself communicate waiver to prosecutor).

[117] *See, e.g.*, United States v. Kwang Fu Peng, 602 F. Supp. 298, 300-03 (S.D.N.Y. 1985) (defense counsel was disqualified as attorney because counsel participated in conference between defendant and witness, thus, becoming witness himself; Model Code of Professional Responsibility DR 5-102(a) requires disqualification).

[118] *See* CUTLER & PENROD, *supra* note 5, at 167. Of course, this is a problem that the defense bar can reduce through continuing legal education programs.

[119] *See, e.g.*, UTAH CODE ANN. § 77-8-4 (West 2007) (requiring recording of line-ups). Because many police cars are now equipped with videotaping equipment, it is also conceivable that show-ups in the field could be videotaped if they are conducted within the vicinity of a police car. The Department of Justice proposals recommend "documenting" and "recording" all identification procedures including the interviews with eyewitnesses, but most provisions in the report contemplate the creation of written records. *See* U.S. DEP'T OF JUSTICE, EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT 20, 23, 28, 38 (1999), *available at* http://www.ncjrs.gov/pdffiles1/nij/178240.pdf.

[120] Manson v. Brathwaite, 432 U.S. 98, 104 (1977); Neil v. Biggers, 409 U.S. 188, 199 (1972); Simmons v. United States, 390 U.S. 377, 385-86 (1968); Stovall v. Denno, 388 U.S. 293, 294-95 (1967).

lower courts to determine reliability by applying a "totality of the circumstances" test that takes into account five factors:

> [T]he opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.[121]

While the Court appropriately focused on reliability, this exclusionary remedy ultimately fails for many reasons.

First, the due process protection extends only to deterring improper suggestion by the police, and leaves unaddressed the concerns about estimator factors that decrease the accuracy of an eyewitness's identification.[122] Misidentifications can occur even when there is no improper suggestion by the police, and some may even occur outside the police setting. For example, in the high-profile case of *New Jersey v. Cromedy*, a rape victim identified her alleged attacker almost eight months after the crimes were committed.[123] She saw McKinley Cromedy standing across the street from where she stood waiting for the light to change. As the two crossed each other in the street, she studied his "face and gait" and concluded that he was her assailant.[124] The only evidence linking Cromedy to the crime was the victim's identification testimony.[125] Based on this evidence alone, Cromedy

[121] *Biggers*, 409 U.S. at 199-200.

[122] The Court has fashioned a due process exclusionary remedy for unduly suggestive identification procedures. *Manson*, 432 U.S. at 113-14. The remedy need not be employed if the identification is determined to be sufficiently reliable, despite the fact that the procedure was unduly suggestive. *Id.* However, the Court has not addressed whether the remedy would apply to a nonsuggestive line-up, even if other factors might indicate that it is unreliable through no fault of the police. *See supra* notes 63-81 and accompanying text (addressing estimator variables); *see also* Timothy P. O'Toole & Giovanna Shay, Manson v. Brathwaite *Revisited: Towards a New Rule of Decision for Due Process Challenges to Eyewitness Identification Procedures*, 41 VAL. U. L. REV. 109, 120-22 (2006) (noting confidence levels are not necessarily strongly correlated with accuracy and can be infected by suggestion).

Because of concerns about the validity of the factors in *Manson*, several states have adopted alternate admissibility tests under state constitutional law. *See* O'Toole & Shay, *supra*, at 131.

[123] 727 A.2d 457, 459 (N.J. 1999).

[124] *Id.*

[125] *See id.* Cromedy consented to give saliva and blood samples which were scientifically tested. No forensic evidence such as fingerprints, hair, or semen matches linking Cromedy to the crime was introduced at his trial, however. *Id.* In fact, there

was convicted of multiple felonies. Pending retrial, a DNA test of the biological evidence collected from the victim proved Cromedy was innocent.[126]

While the victim identified Cromedy without police presence, the police had earlier shown her his photograph among a large number of photographs of possible suspects (presumably mug shots of persons generally fitting the description she gave), so there was some police involvement in this sense.[127] Because the police likely had no suspect in mind at that time, it is unlikely that there was any conscious or unconscious suggestion involved. In the absence of police misconduct, there was no possible due process challenge.[128] A preferable due process test would instead exclude identifications that were inherently unreliable, even if there is no evidence of police misconduct.[129]

The due process focus on reliability[130] is ironic in that the Court's emphasis on witness confidence in the identification does not correlate with reliability.[131] As a consequence, federal courts consider the degree of witness confidence in determining reliability for due process purposes. Courts may then decide that an expert witness should apprise the jury about the lack of correlation between witness confidence and accuracy.[132]

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was police testimony that fingerprints, hair samples, and other body fluids from the crime scene did not match. K. Suzanne Heisinger, Case Note, State v. Cromedy*: 727 A.2d 457 (N.J. 1999)*, 6 WASH. & LEE RACE & ETHNIC ANC. L.J. 155, 156 (2000).

[126] Klobuchar, Steblay & Caligiuri, *supra* note 6, at 386.

[127] *Cromedy*, 727 A.2d at 459.

[128] *See supra* note 112.

[129] In the *Cromedy* case, for example, the culprit and the victim were of different races, and it is well established that cross-race identifications are less reliable. *Cromedy*, 727 A.2d at 460-61; *see also supra* notes 67-71 and accompanying text. Moreover, the victim was facing away from the attacker for most of the time, having only fleeting opportunities to see his face, and was under great stress during the event. *See Cromedy,* 727 A.2d at 459.

Perhaps most tellingly, she did not identify him upon viewing his photograph a few days after the crime, but rather eight months later upon spotting him on the street. *Id.* Delays in making an identification reduce the accuracy of the identification. *See supra* notes 79-81 and accompanying text. Thus, we would expect the victim to have made a more accurate identification five days after the crime than eight months later.

[130] Manson v. Brathwaite, 432 U.S. 98, 114 (1977) ("[R]eliability is the linchpin . . . .").

[131] *See, e.g.*, United States v. Brownlee, 454 F.3d 131, 140-44 (3d Cir. 2006) (finding reversible error in trial court's decision to exclude expert testimony on weak correlation between certainty and accuracy); *see* O'Toole & Shay, *supra* note 122, at 120-21.

[132] *See, e.g.*, *Brownlee*, 454 F.3d at 140-44 (upholding on *Biggers* grounds and reversing because trial court abused its discretion by erroneously excluding expert

Like the right to counsel remedy, the exclusionary rule for unduly suggestive and unreliable identifications has failed to provide an effective remedy for unreliable identifications.[133] Scholars have noted the general reluctance of trial courts to exclude evidence simply because the "constable has blundered" for fear that a dangerous person will be acquitted.[134] In those rare instances in which appellate courts find error in the admission of unreliable identifications, they almost always find the error to be harmless and affirm the conviction.[135]

C. Corrective Measures: The Use of Expert Witness Testimony and Jury Instructions

For decades, defense attorneys have requested the use of two types of corrective measures — the admission of expert testimony and special jury instructions — both designed to educate the jury on the scientific knowledge on the effects of certain factors on identification accuracy.[136] For decades, the overwhelming judicial response has been to deny such requests.[137]

testimony on lack of correlation between witness confidence and accuracy of identification).

[133] *See* Margery Malkin Koosed, *The Proposed Innocence Protection Act Won't — Unless It Also Curbs Mistaken Eyewitness Identifications*, 63 OHIO ST. L.J. 263, 291-306 (2002) (arguing due process test fails to prevent suggestive identification practices); O'Toole & Shay, *supra* note 122, at 136-48 (arguing due process remedy has failed and encouraging consideration of whether prophylactic measures might allow more flexible means of incorporating findings of social science research); *see also* Evan J. Mandery, *Legal Development: Due Process Considerations of In-Court Identifications*, 60 ALB. L. REV. 389, 391-92 (1996) (proposing per se rule of exclusion for suggestive identifications without regard to reliability as well as for in-court identifications which are inherently suggestive).

[134] *See, e.g.*, L. Timothy Perrin et al., *If It's Broken, Fix It: Moving Beyond the Exclusionary Rule: A New and Extensive Empirical Study of the Exclusionary Rule and a Call for a Civil Administrative Remedy to Partially Replace the Rule*, 83 IOWA L. REV. 669, 752-53 (1998) (finding exclusionary rule exacts high costs for little deterrent value and proposing civil administrative remedy for individuals wronged by police, reserving exclusionary rule for intentional police misconduct); Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363, 364-66 (making similar arguments); James Stribopoulos, *Lessons from the Pupil: A Canadian Solution to the American Exclusionary Rule Debate*, 22 B.C. INT'L & COMP. L. REV. 77 (1999) (proposing United States consider adopting discretionary rule like that in use in Canada, rather than automatic rule of exclusion applied in American courts).

[135] *See* Brandon L. Garrett, *Innocence, Harmless Error, and Federal Wrongful Conviction Law*, 2005 WIS. L. REV. 35, 36 (2005).

[136] Diamond, *supra* note 44, at 354.

[137] *See infra* notes 143-46, 155 and accompanying text.

Frequently, when expert testimony, jury instructions, or both are used, they are limited to a single issue that bears on reliability, rather than fully educating the jury on the numerous issues that may affect the reliability of a particular identification. Here again, the *Cromedy* case is instructive. The New Jersey Supreme Court reversed the conviction because the court erred in denying a jury instruction on the unreliability of cross-racial identifications.[138] The cross-racial factor, however, is only one of several that have been shown as likely to affect the victim's identification. Other estimator factors included: (1) the victim observed the culprit during a traumatic event, (2) she had little opportunity to see her attacker (a person she had never seen before), and (3) there was an eight month delay in making the identification.[139] The jury would also have benefited from understanding the phenomenon of unconscious transference which likely contributed to the erroneous identification.[140]

The more fundamental problem with expert testimony as a corrective measure is that courts generally refuse to admit the testimony and provide the resources needed to hire the experts.[141] Because the Supreme Court has never recognized a constitutional right to admit expert testimony on identifications, the question of admissibility is purely discretionary under the rules of evidence.[142] Leading researchers in the field report that judges, who exercise broad discretion in deciding the admissibility of experts, frequently refuse to allow experts to testify.[143] The high cost of expert testimony also

[138] State v. Cromedy, 757 A.2d 457, 459 (N.J. 1999).

[139] *See supra* notes 123-29 (discussing case); s*ee also supra* notes 64-80 and accompanying text (discussing effect of these factors on reliability of eyewitness identification).

[140] Unconscious transference, an estimator variable, refers to the psychological phenomenon by which a witness transfers an image of a different person that she has previously seen and incorporates that image into her memory of the event. *See supra* notes 67-73 and accompanying text. In this case, the victim had viewed numerous police slides and photos, including a photo of Cromedy, five days after the event. *Cromedy*, 727 A.2d at 459. When she saw Cromedy crossing the street eight months later, the earlier viewing of Cromedy may have caused her to transfer that image into her memory of the event and to conclude that Cromedy was the culprit. *See id.*

[141] *See infra* note 143 and accompanying text.

[142] Exclusion is reviewed on appeal under an abuse of discretion standard, which is a high standard to meet. *See, e.g.*, United States v. Brownlee, 454 F.3d 131, 144 (3d Cir. 2006) ("[W]e hold that the district court abused its discretion in barring [the expert's] tendered testimony on the confidence/accuracy factor." (quoting United States v. Stephens, 935 F.2d 1380, 1406-07 (3rd Cir. 1991))).

[143] Wells et al., *supra* note 12, at 609; s*ee also* Henry F. Fradella, *Why Judges Should Admit Expert Testimony on the Unreliability of Eyewitness Testimony*, 2006 FED. CTS. L.

makes it beyond the reach of the vast majority of the 77,000 suspects who are arrested on the basis of an eyewitness's identification.[144] One observer estimates that no more than perhaps 500 cases per year include eyewitness experts.[145]

Courts generally exclude expert testimony on a variety of grounds. Most frequently, courts cite the concern that expert testimony on the accuracy of identifications will usurp the role of the jury on the issue of witness credibility.[146] Courts also cite concerns that the testimony would not assist the jury or would mislead the jury.[147] Additionally, courts cite the availability of cross-examination of witnesses as a substitute means of highlighting problems with the testimony, and the availability of jury instructions that would adequately inform the jury of the substance of the proffered testimony.[148]

All of these evidentiary grounds for exclusion have been refuted by scientific studies on jurors' shared assumptions about the accuracy of eyewitness identifications and the effectiveness of cross-examination in conveying the substance of the proffered testimony.[149]

Most ironically of all, another ground for rejecting expert testimony is that the defense has failed to make an adequate showing of the reliability of the testimony on scientific evidence as required by *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[150] Although the scientific findings on eyewitness identification have been resoundingly accepted by researchers in the field, defense counsel may nevertheless fail to make an adequate showing under *Daubert*.[151] More often than not, this failure is likely attributable to lack of funding needed to pay an

REV. 3, 23 ("The overwhelming majority of courts have excluded such expert testimony."). To date only the Third Circuit in the federal courts routinely admits expert testimony on eyewitnesses. Fradella, *supra*, at 27.

[144] Wells et al., *supra* note 12, at 609.

[145] *Id.*

[146] Fradella, *supra* note 143, at 23; *see also* Christopher M. Walters, Comment, *Admission of Expert Testimony on Eyewitness Identification*, 73 CAL. L. REV. 1402, 1403-04 (1985) (addressing reasons for exclusion).

[147] Fradella, *supra* note 143, at 23-24.

[148] *Id.*

[149] *See, e.g.*, CUTLER & PENROD, *supra* note 5, at 143-68, 171-209 (noting ineffectiveness of cross examination to convey factors affecting eyewitness identifications, jurors' lack of knowledge about factors affecting eyewitness identifications, and jurors' inability to detect unreliable identification).

[150] 509 U.S. 579, 590 (1993); *see, e.g.*, United States v. Rodriguez-Felix, 450 F.3d 1117, 1122-26 (10th Cir. 2006) (discussing admissibility of expert testimony under *Daubert*, 509 U.S. 579, and subsequent Supreme Court decisions and finding defense failed to meet *Daubert*'s requirements).

[151] *Rodriguez-Felix*, 450 F.3d at 1122-26.

expert just to produce a summary of the proferred testimony so that counsel can use the summary to request funding to hire the expert to testify.[152] Thus, the failure to meet the *Daubert* requirements is not due to the unreliability of the expert testimony, but simply to an inability to put forth sufficient evidence of its reliability.

The use of jury instructions in lieu of an expert witness would eliminate the cost issues associated with the use of expert witnesses. In *Cromedy*, the New Jersey Supreme Court held that the lower court erred in not giving jury instructions on the cross-racial impact on eyewitnesses.[153] However, it is unclear how often trial courts agree to issue them.[154]

Furthermore, the use of jury instructions instead of providing expert testimony has been criticized as inadequate to educate juries.[155] Through careful questioning, qualified experts can explain the complexities of scientific findings on perception and memory in a way that the sterile reading of jury instructions cannot.[156] The substance of jury instructions is beyond the common knowledge of jurors, and by imparting this critical information at the end of the trial, jury instructions come far too late to help jurors evaluate eyewitness identification testimony.[157]

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[152] In *United States v. Rodriguez-Felix*, for example, the court denied the funds to hire the expert on eyewitness identifications, in part because the defense did not provide an adequate proffer of the scientific basis for the expert's testimony as required by *Daubert*. *Id.* at 1127-29. However, the defense could not make a sufficient proffer because the defense could not provide the funds to pay the expert to prepare the proffer which must include the substance of the proposed testimony, the scientific basis for the expert opinions, and the relation of the proposed testimony to the defendant's case. Thus, the defense was caught in a Catch-22: the *Daubert* showing was not made due to a lack of funds and funds were denied due to the failure to make a *Daubert* showing. *See id.*

[153] State v. Cromedy, 727 A.2d 457, 467-68 (N.J. 1999). Ironically, in *Cromedy*, one reason stated by the trial court for refusing to give a jury instruction was the fact that no expert had testified on the subject. *Id.* at 460.

[154] There was clearly resistance in the past to such instructions, although attitudes may now have changed. *See* Michael H. Hoffheimer, *Requiring Jury Instructions on Eyewitness Identification Evidence at Federal Criminal Trials*, 80 J. CRIM. L. & CRIMINOLOGY 585, 585-87 (1989) (showing federal appellate courts routinely upheld convictions despite omission of jury instructions on eyewitness identification testimony).

[155] Fradella, *supra* note 143, at 28 (citing Edward Stein, *The Admissibility of Expert Testimony About Cognitive Science Research on Eyewitness Identification*, 2 LAW PROBABILITY & RISK 295, 302 (2003)).

[156] *Id.*

[157] *Id.*

Regardless, in the final analysis, the corrective measures of expert testimony and jury instructions make no sense in cases lacking any evidence that corroborates the identification. If the gist of the instruction or testimony is to inform jurors that eyewitness identifications made under these circumstances leave room for doubt, then one may wonder why the legal system would even bother asking jurors to decide whether the accused is guilty beyond a reasonable doubt. How can a jury convict a person when the court or an expert witness is telling the jury that the only evidence linking the suspect to the crime is subject to a reasonable doubt?

D. Non-Judicial Remedies: Sequential and Blind Line-ups and Photo Arrays

The influential recommendations in a 1999 Justice Department report on eyewitness identifications aimed to eliminate the subtle or not-so-subtle suggestion by police investigators that can influence a witness's choice of suspect or the witness's confidence in the selection that is made.[158] The American Bar Association has endorsed these prophylactic measures as well.[159] Even the prominent Innocence Project of the Cardozo School of Law has joined the chorus promoting these innovations in procedure to improve eyewitness identification accuracy.[160] While proposals that take aim at line-up procedures (or other investigative procedures) certainly have merit, they do not go far enough in preventing wrongful convictions. The main reason is that the proposals like those issued by the Justice Department assume that the problem of inaccurate eyewitness identifications can be reduced to an acceptable level by implementing better police procedures.[161]

The use of "blind" line-ups and photo arrays promise to reduce or eliminate the effects of police suggestion. Quite simply, in a blind line-up or photo array, the police investigator does not know the

[158] U.S. DEP'T OF JUSTICE, *supra* note 119, at iii-iv (proposing uniform practices for collection and preservation of eyewitness evidence that integrate psychological knowledge).

[159] AM. BAR ASS'N, ACHIEVING JUSTICE: FREEING THE INNOCENT, CONVICTING THE GUILTY 23-45 (2006).

[160] *See* Innocence Project, Mistaken Eyewitness Identifications, http://www.innocenceproject.org/docs/Mistaken_ID_FactSheet.pdf (last visited Mar. 17, 2008) (advocating sequential and double-blind line-up procedures).

[161] U.S. DEP'T OF JUSTICE, *supra* note 119, at 2 (noting practices and procedures "will tend to increase the accuracy and reliability of eyewitness evidence, even though they cannot guarantee the accuracy (or inaccuracy) of a particular witness' testimony in a particular case").

identity of the suspect arrested by the police. Research shows that an important step in the administration of the blind line-up procedure (sometimes called "double blind") is notifying the witness that the investigator is not aware of the suspect's identity.[162] Telling a witness that the investigator does not know who the suspect is eliminates the tendency of some witnesses to seek or infer clues from an investigator's behavior.[163] Scholars have enthusiastically supported the use of double blind line-ups.[164]

To counteract the natural tendency to make a selection based on "relative judgment,"[165] there is also a growing acceptance of the use of a sequential method of presentation in which the individuals are presented one at a time.[166] In addition, these organizations support measures to reduce police suggestion through conversation with the witness, suggestibility of the line-up itself (e.g., number of fillers, characteristics of fillers, etc.), and suggestion from one witness to another.[167] They also provide procedures for consistent and well-documented identifications.[168] It is important to note that field studies show a decrease in the willingness of eyewitnesses to make *any* identification at all when these new procedures are followed.[169]

Although these changes are thought to improve the quality of identifications significantly, there is little reason to expect that they will be adopted on a wide-scale basis. First, there are literally thousands of independent law enforcement departments conducting tens of thousands of identifications procedures each year.[170] Unless

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[162] Klobuchar, Steblay & Caligiuri, *supra* note 6, at 389-90.

[163] *Id.*

[164] *See, e.g.*, O'Toole & Shay, *supra* note 122, at 138 (noting single most important guideline for line-ups that Supreme Court should adopt would be implementation of double-blind procedures).

[165] *See supra* notes 94-96 and accompanying text.

[166] *See also* AM. BAR ASS'N, *supra* note 159, at 25 (suggesting careful consideration of use of sequential line-ups and photo arrays); Klobuchar, Steblay & Caligiuri, *supra* note 6, at 390 (noting tests since NIJ report suggesting sequential line-ups confirm benefits of procedure). Sequential presentations differ from show-ups in that they involve the presentation of multiple individuals rather than just one individual.

[167] *See, e.g.*, Innocence Project, North Carolina Actual Innocence Commission — Recommendations for Eyewitness Identification, http://www.innocenceproject.org/docs/NC_Innocence_Commission_Identification.html (last visited Mar. 17, 2008) (proposing measures to reduce relative judgments).

[168] *Id.*

[169] *See* Steblay et al., *supra* note 94, at 464.

[170] *See* Wells et al., *supra* note 12, at 609 (estimating approximately 77,000 suspects per year in United States become defendants based on their being identified by eyewitnesses).

Congress, state legislatures, or both implement the new identification procedures as a matter of law, it is highly improbable that all of these police departments would voluntarily adopt them. Police departments have been described as having a deeply ingrained culture that resists change[171] and is skeptical of new procedures — in this case new procedures that, in effect, make it harder for an eyewitness to make any selection at all.[172] Procedures that appear to interfere with the collection of usable evidence to solve a criminal case are not viewed favorably as a general rule, explaining some of the resistance to these new proposals.[173] Alternatively, the procedures might be implemented as a requirement for accreditation. However, only a fraction of police departments have applied for national accreditation status, so this approach is not likely to produce widespread adoption of the new procedures.[174]

More importantly, the social science literature gives little support for the sanguine assumption that eyewitness identifications can be made sufficiently accurate through better police procedures. These would only reduce the influence of system variables, not estimator variables. The main problem that plagues the area of eyewitness identifications is not that police procedure can skew a witness's selection of a suspect (although the power of suggestion is enormous), but rather that eyewitnesses have inherently fallible powers of perception and memory — deficiencies that no police procedure can correct.[175] Thus, while innocence commissions, task forces, and similar organizations may offer proposals to minimize the occurrence of convictions based on erroneous identifications, these proposals do not go far enough.[176]

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[171] *Id.* at 224-29 (reviewing external mechanisms that generally fail to promote change within departments due to "us versus them" attitude).

[172] *See* Daniel L. Schacter et al., *Policy Forum: Studying Eyewitness Investigations in the Field*, 32 LAW & HUM. BEHAV. 3, 3 (2008) (addressing "vigorous debate over potential changes in the design and execution" of line-ups and photographic arrays and discussing controversy surrounding field study findings in Illinois that seemed to contradict laboratory findings on sequential line-ups).

[173] *See id.*

[174] *See* KLEINIG, *supra* note 35, at 36-37 (noting only fraction of police departments nationwide have sought accreditation).

[175] *See supra* note 43.

[176] *See, e.g.*, Andrew E. Taslitz, *Eyewitness Identification, Democratic Deliberation, and the Politics of Science*, 4 CARDOZO PUB. L. POL'Y & ETHICS J. 271, 315-23 (2006) (proposing creation of Criminal Justice Coordinating Councils). The Innocence Project encourages states to create innocence commissions to "study wrongful convictions and advocate for changes in the system." *See* Innocence Project, Criminal Justice Reform Commissions, http://www.innocenceproject.org/fix/Innocence-

The hope must be that system variables, as opposed to estimator variables, account for most of the errors. However, there is little scientific basis for believing that system variables account for the lion's share of inaccuracies. The first experiment of eyewitness identifications, conducted by Professor von Lizst over 100 years ago, was structured in such a way that it minimized system variables by immediately questioning the witnesses using nonsuggestive procedures.[177] In addition, because the experiment took place in a university classroom in Germany a few years before 1907, it is a fair assumption that the subjects were of the type most likely to give accurate accounts (i.e., educated, young adults), the lighting conditions were good, and the offense involved two individuals of the same race.[178] On the other hand, it was a violent crime (involving the apparent firing of a revolver and a scuffle) that occurred fairly quickly.[179] Despite the many factors that would favor accurate recollection of the event, the experiment produced wildly varying accounts of the key aspects of the staged crime they had witnessed.[180] Likewise, in *Cromedy*, the victim erred in identifying Cromedy, and there was negligible police involvement in the identification process.[181] She erred because of the presence of many estimator variables that inhibited her ability to make an accurate identification.

In short, reformers are right to seek the improvement of police procedures for obtaining eyewitness identifications. Adoption of these measures nationwide would vastly improve the likelihood of erroneous identifications. Unfortunately, widespread adoption is unlikely, so other additional safeguards should be implemented. Moreover, the inability to correct for estimator variables makes it necessary to find other ways for ensuring accuracy in trials that depend on eyewitness identifications. Additional assurances of accuracy are especially important in robbery trials that constitute a substantial segment of the criminal justice docket, typically turning on eyewitness identifications that do not ordinarily yield DNA samples.[182]

Commissions.php (last visited Mar. 17, 2008).

[177] *See* MÜNSTERBERG, *supra* note 1, at 49-50.

[178] *See id.*

[179] *Id.*

[180] *Id.*

[181] *Id.*

[182] *See supra* notes 15-30 and accompanying text.

E. Summary: The Shortcomings of Remedies in Current Use

Wrongful convictions have put greater focus on the integrity of investigations viewed in their entirety,[183] but the area of eyewitness identifications raises the most pressing concerns.[184] First, none of the remedies employed or advocated can reduce the problem that eyewitnesses have inherently limited powers of perception and memory.[185] Second, the constitutional remedies have proven to have virtually no application for various reasons. Third, the use of corrective measures at trial such as expert testimony and jury instructions are often not allowed by courts for various reasons, or the courts simply do not provide the funds to hire the experts (which effectively is the same thing as excluding experts).[186] Fourth, even if the courts do allow experts to testify, the testimony may be limited to one issue when a case often involves numerous variables that increase the risk of erroneous identification.[187] Finally, the thousands of police departments across the country are likely to adopt reforms to line-up and photo array procedures such as sequential and blind presentations, especially because most have shown no interest in changing their long-standing practices.[188] At present, there are simply no mechanisms, such as system-wide regulation or required accreditation standards, that might be used to impose procedural changes on police departments on a large-scale basis.

In sum, legal reformers have taken two approaches: (1) to improve the accuracy of eyewitness identifications by eliminating system variables, and (2) to reduce the weight that juries give to eyewitness identification testimony by apprising them of the effects of estimator variables. However, the daunting practical limitations on full implementation of either of these remedies, among other

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[183] *See, e.g.*, SCHECK, NEUFELD & DWYER, *supra* note 11 (summarizing investigations in their entirety to highlight multiple causes of erroneous convictions). For an article arguing wrongful convictions scholars should focus on the criminal justice system as a single interrelated "system" in searching for the causes of wrongful convictions, see Luna, *supra* note 28, at 1202-03.

[184] *See supra* notes 8-10 and accompanying text (addressing high rate of erroneous eyewitness identifications in wrongful convictions cases).

[185] *See supra* notes 63-81, 136-55 and accompanying text.

[186] *See supra* notes 142-53 and accompanying text.

[187] *See supra* notes 138-40 and accompanying text.

[188] *See* Diamond, *supra* note 44, at 356-63. In 2004, there were almost 800,000 state and local law enforcement agencies in the United States. *See* U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, LAW ENFORCEMENT STATISTICS (2007), *available at* http://www.ojp.usdoj.gov/bjs/lawenf.htm.

shortcomings, mean that these reform efforts will not sufficiently reduce the problem of erroneous identifications.

III. REQUIRING CORROBORATING EVIDENCE

Almost sixty years ago, in 1948, the New York Judicial Council undertook to develop "safeguards against erroneous identifications" in response to a request by the state governor, who raised a concern about wrongful convictions.[189] The Council considered four possible approaches, one of which was "[a] statutory prohibition against convictions based solely on identification testimony."[190] The Council rejected this corroboration requirement. Interestingly, the report's explanation seemed to equate corroboration with an outright ban on identification testimony:

> It must be admitted that no statement urging such a rule by any responsible student of the problem of identification has been found. The fact remains that, subject to human error though it may be, identification testimony is evidence. In many cases, it is the only evidence. To banish it outright because it is subject to error is not only unscientific but would probably have the practical result of further encouraging the already too numerous crimes of robbery and assault which plague our society. Our courts are aware of its uncertain nature. No justification is seen, therefore, for adopting such a rule.[191]

The Council's conclusions resonate with us to this day. Although eyewitness identification testimony is well-known to be unreliable, prosecutors offer it, courts admit it, and juries all too often convict people based *solely* on the identification testimony of one witness.[192]

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[189] FOURTEENTH ANNUAL REPORT OF THE JUDICIAL COUNCIL OF THE STATE OF NEW YORK 233 (1948) [hereinafter FOURTEENTH].

[190] *Id.* at 234. The Council put forth only one recommendation of the four, specifically, the legislature should urge police and prosecuting agencies to develop regulations to govern the operation of line-ups in order to reduce the influence of suggestion. *Id.* at 233-34. The other two approaches had to do with the possibility of using psychological testing to determine the capacity of an eyewitness to make an accurate identification, which was determined to be impossible, and the possible use of lie detector tests to determine whether a perpetrator's claim of innocence is true. The lie-detector test was determined not to be sufficiently reliable for use in court. *Id.*

[191] *Id.* at 257-58.

[192] It is impossible to say how often people are convicted based only on identification testimony, but it is clear that it sometimes happens. Erroneous eyewitness identification is the leading cause of wrongful convictions. *See supra* note

A rule requiring corroborating identification evidence would undoubtedly preclude some convictions where other evidence is simply unavailable. The worrisome questions are: how many guilty people would be set free, and what effect would it have in "further encouraging the already too numerous crimes of robbery and assault which plague our society"?[193] On the other hand, we already know the tragic results of a rule that permits the government to condemn a person to years in prison, or even death, based on a single eyewitness's testimony: hundreds, and perhaps thousands, of innocent people wrongly punished.[194] Moreover, as is often repeated, for every innocent person wrongly convicted, a guilty person remains at large to victimize society again.

The time has come to reconsider the wisdom and basic fairness of permitting convictions, especially for extremely serious crimes, based solely on a single eyewitness's identification testimony. As a simple matter of known probabilities, the scientific literature makes a compelling case that a single eyewitness's identification of a stranger, especially under the typical circumstances present in serious crimes, does not constitute proof "beyond a reasonable doubt."

The following sections first outline the desirability and advantages of the adoption of a corroboration rule as a means of addressing the pressing problem of faulty eyewitness identifications.[195] Second, the corroboration requirement is considered in the context of other long-recognized corroboration rules in American criminal law as well as in the context of the rules of evidence.[196] Finally, this part of the Article concludes with a brief discussion about the particulars of implementing a corroboration rule.[197]

8. Clearly, prosecutors in those cases relied heavily, if not exclusively, on identification testimony to obtain the conviction. If there had been other strong evidence linking the defendant to the crime, the conviction likely would not have turned out to have been erroneous. *See also* Tom Singer, *To Tell the Truth, Memory Isn't that Good*, 63 MONT. L. REV. 337, 341-42 (2002) (addressing Gary Graham's conviction and execution on sole basis of single eyewitness's identification testimony that other witnesses contradicted).

193 FOURTEENTH, *supra* note 189, at 258; *see also* Fredric D. Woocher, Note, *Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification*, 29 STAN. L. REV. 969, 1001-02 (1977) (rejecting corroboration requirement for eyewitness identification testimony as having harsh consequences of allowing guilty people to go free despite availability of reliable but uncorroborated identification testimony).

194 *See supra* notes 12, 26 and accompanying text.

195 *See infra* Part III.A-B.

196 *See infra* Part III.C.

197 *See infra* Part III.D.

A. The Need for a Bright-Line Rule

Eyewitness identification testimony is generally at its least reliable in cases of violent crime in which the victim and culprit are strangers.[198] Numerous factors that decrease the reliability of an eyewitness's ability to correctly identify the culprit will most assuredly exist in those situations, as well as the frequent problem of police suggestion.[199] Yet courts have proved themselves to be disinclined to exclude such evidence on constitutional grounds, even when there is ample evidence of police suggestion.[200] As a political matter, outright exclusion of a victim's eyewitness identification testimony is apparently still unthinkable. Exclusion of identification testimony would deprive the victim of his or her "day in court," the right to point to the culprit and exclaim, "That's the guy who robbed me!" In cases in which the police have obtained no additional identifying evidence, it would also preclude a conviction. When presented with a flesh-and-bones innocent victim of a serious crime who would swear under oath that the defendant is guilty, courts quite understandably do not have the stomach to reject the victim's testimony as insufficiently reliable and throw out the case.[201]

Even middle-of-the-road compromises such as the use of corrective measures, like expert testimony and jury instructions, meet with powerful resistance from courts.[202] An expert's testimony or judge's instruction to the jury would educate the jury about the perils of eyewitness identifications under certain circumstances and would likely lead some juries to acquit in cases where other evidence was lacking.[203] The courts' reluctance to implement these corrective measures further confirms the strong disinclination of judges to discredit an eyewitness's testimony and hamper the prosecution's ability to obtain a conviction.

Appellate courts are no more willing than trial courts to exclude identification testimony and bring about dismissal of charges.[204] Even

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[198] *See supra* notes 64-66 and accompanying text (discussing estimator variables that affect witness's ability to identify person accurately when witness has little time to view individual and views culprit under stressful circumstances).

[199] *See supra* Part I.

[200] *See supra* notes 133-35 and accompanying text.

[201] As a general matter, scholars have noted the strong reluctance of trial courts to exclude evidence simply because the constable has blundered for fear that a guilty person will be set free. *See supra* note 134 and accompanying text.

[202] *See supra* notes 142-54 and accompanying text.

[203] *See supra* notes 142-54 and accompanying text.

[204] *See* Garrett, *supra* note 135, at 79-88.

the erroneous admission of an excludable identification will be upheld on appeal under a harmless error standard of review.[205] Thus, as the numerous recent exonerations confirm,[206] we cannot expect to safeguard the innocent from wrongful convictions by means of trial or appellate remedies that require courts to exercise their discretion in such a way as to bring about acquittals.

B. Advantages for Law Enforcement

A corroboration requirement has advantages for law enforcement over the reliance on a remedy of exclusion, the admission of expert testimony, or the use of cautionary jury instructions. For instance, a corroboration requirement offers the advantage that, in and of itself, it does not preclude the admission of the identification under any circumstances;[207] it simply requires that there be additional evidence to ensure the identification's accuracy. The effect of such a rule is to provide strong motivation for the police to investigate cases built on eyewitness identifications further in order to find corroborating evidence — a motivation that is currently lacking.[208]

A corroboration requirement is consistent with a preference for rules that do not attempt to micromanage the police. How best to obtain corroborating evidence to support an eyewitness's testimony is left entirely within the discretion of police investigators.[209]

As a policy matter, leaving the proper conduct of investigations in the hands of law enforcement is best because, in the long run,

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[205] *Id.*

[206] *See supra* notes 7, 26 and accompanying text.

[207] Of course, courts will apply the constitutional right to counsel and due process rules, which may, at least in theory, require exclusion of the testimony. *See supra* Part II.A-B.

[208] Unless a rule in effect requires additional investigation, there is no legal requirement that the police search for additional evidence once they obtain an eyewitness's statement identifying a suspect. Consequently, investigations often end with the eyewitness's identification of the suspect. For example, in reviewing civil rights lawsuits for wrongful arrest, courts have repeatedly found that the police may rely on a single eyewitness identification as satisfying probable cause to arrest and conclude that due process requires no additional investigation. *See* cases cited *supra* note 4. Of course, as a practical matter, police often continue to investigate a case in search of additional evidence. But the constant stream of cases in which wrongly convicted people are being exonerated demonstrates the frequency with which the investigation is inadequate or skewed against the person arrested. *See supra* notes 7, 26 and accompanying text.

[209] *See supra* notes 35-36, 173 and accompanying text (describing practical difficulties of convincing police departments to implement blind and sequential line-ups).

attempts at judicial micromanagement usually fail. Sometimes they fail because the courts backtrack once they realize they face the task of making policy choices best left to police administrators. For example, the Supreme Court nearly got into the business of micromanaging line-ups in *Wade*.[210] The Court seemed poised to impose an obligation for police to permit defense attorneys to attend all identification procedures, but the prospect of micromanaging the manner in which line-ups are conducted may have caused some members of the Court to have second thoughts. Within a few years, the Court had limited the right to counsel to live, post-indictment line-ups,[211] with the result that it is practically unheard of for a defense attorney to attend a line-up.[212] Were it otherwise, the Court, having identified a constitutional right to the presence of an attorney, would have had the task of defining the lawyer's role at the line-up.[213] The Court's rulings would inevitably resemble a police manual, providing step-by-step instructions for the proper manner in which to conduct a line-up. In

[210] United States v. Wade, 388 U.S. 218, 236-37 (1967) (holding Sixth Amendment right to counsel applies to post-indictment line-up); *see also supra* notes 106-08 and accompanying text.

[211] *See supra* notes 112-19 and accompanying text (discussing *Wade* and *Kirby*).

[212] The police rarely, if ever, hold line-ups *after* they have obtained an indictment. On the contrary, line-ups are held in order to give the police sufficient evidence to obtain an indictment. *See, e.g.*, People v. Chojnacky, 505 P.2d 530, 535 (1973) (Mosk, J., concurring) (noting post-indictment line-ups are "rarely" used). On occasion an indicted individual may be placed in a line-up as part of an investigation of a different crime. In that case, the right to counsel — regarding the second crime — will not yet have attached, such that the person has no right to counsel. *See* Texas v. Cobb, 532 U.S. 162, 167-68 (2001) (holding Sixth Amendment right to counsel is "offense specific" and does not attach automatically for subsequent offenses after first offense triggers right, even if subsequent offenses are "factually related").

Researchers have not gathered statistics on the frequency with which line-ups are held and the point in time in the process in which line-ups are held. There is a dearth of case law asserting the right to counsel at a line-up or challenging the role that counsel was allowed to play. *See, e.g.*, *Chojnacky*, 505 P.2d at 535 (Mosk, J., concurring) (noting that post-indictment line-ups are "rarely" held). The lack of defense challenges to the manner of line-ups or to the role that counsel is allowed to play indicates that counsel is not generally present to observe line-ups because line-ups are being held prior to indictment when there is no right to counsel. Since *Kirby* was decided in 1973, for example, the Supreme Court has heard only one case involving the *Wade* right to counsel at an identification procedure. *See* Moore v. Illinois, 434 U.S. 220, 227-31 (1977) (finding right to counsel violated when victim allowed to view defendant for purposes of identification at post-indictment preliminary hearing at which defendant was not represented by counsel).

[213] Some state courts that apply a broader right to counsel as a matter of state constitutional law have considered the proper role that defense attorneys should play at a line-up. *See supra* notes 113, 116.

this sense, it is perhaps for the best that the Court effectively abandoned the idea of bringing defense attorneys into the police station for line-ups.

Other times, judicial micromanagement fails because police investigators learn how to circumvent the rules. When the Court has attempted to micromanage police interrogations, as many say it did by requiring the reading of *Miranda* warnings prior to custodial interrogations, the police simply found ways to turn the reading of warnings to their advantage.[214] Here, too, the Court appears to have backpedaled by limiting the reach of the *Miranda* requirements and minimizing the effect of violating the rule.[215]

A corroboration requirement for eyewitness identification cases also relieves prosecutors from resolving the moral dilemma of whether to try a defendant when there is only a single witness's statement positively identifying the defendant as the culprit. Additional evidence would give a prosecutor comfort in knowing that he or she is not sending an innocent person to prison or death row. With a corroboration requirement, the absence of corroborating evidence means the prosecutor cannot go forward — the decision is taken out of the prosecutor's hands. The burden is then on police investigators to unearth more identifying evidence.

C. Corroboration Requirements in Criminal Law

Corroboration requirements have perhaps the longest lineage of all evidentiary rules. Legal scholars identify the earliest corroboration requirement in criminal law in three different places in the Torah, the first five books of the Bible.[216] The biblical two-witness rule prohibits conviction on the basis of testimony of a single witness and instead requires at least two witnesses.[217] The rule applies to capital and

[214] *See generally* Richard A. Leo & Welsh S. White, *Adapting to* Miranda*: Modern Interrogators' Strategies for Dealing with the Obstacles Posed by* Miranda, 84 MINN. L. REV. 397 (1999) (contending police interrogators have refined their techniques to avoid obstacles posed by *Miranda*).

[215] *See* Sandra Guerra Thompson, *Evading* Miranda*: How* Seibert *and* Patane *Failed to "Save"* Miranda, 40 VAL. U. L. REV. 645, 646 (2006).

[216] *See* Irene Merker Rosenberg & Yale L. Rosenberg, *"Perhaps What Ye Say Is Based Only on Conjecture" — Circumstantial Evidence, Then and Now*, 31 HOUS. L. REV. 1371, 1376 (1995).

[217] *Id.* at 1376 n.15 ("Whoso killeth any person, the murderer shall be slain at the mouth of witnesses; one witness shall not testify against any person that he die." (quoting *Numbers* 35:30)); *id.* ("At the mouth of two witnesses, or three witnesses, shall he that is to die be put to death; at the mouth of one witness he shall not be put

noncapital criminal cases as well as civil cases, with certain exceptions.[218] In addition, Jewish law bars the use of the statements of the accused's family members as well as any confession by the accused.[219] The two-witness rule was intended to promote reliability of the trial process.[220] The exclusion of confessions and the statements of relatives were derived in part from the two-witness rule.[221] What is fascinating about the development of these ancient evidentiary rules — one being a rule requiring corroboration and the other an exclusionary rule — is that history seemed to repeat itself centuries later when two similar rules were adopted by mid-eighteenth century English courts.

English common law adopted a similar corroboration requirement for accomplice testimony. John Langbein's comprehensive research on the origins of the adversary system in eighteenth-century England identifies the corroboration rule as "one of the earliest manifestations of what we can later identify as the law of criminal evidence."[222] The English courts adopted a two-witness rule in the 1740s and applied it frequently in cases involving "shoptheft" by gangs of thieves.[223] The typical practice of the time was to interview accomplices separately and then pit them against one another in a high-stakes competition to see who would be selected as the government's informant or "crown witness."[224] The person who gave the most complete statement won

to death." (quoting *Deuteronomy* 17:6)); *id.* at 1377 n.16 (citing *Deuteronomy* 19:15, which precludes both bodily and monetary punishment in absence of two witnesses).

[218] *Id.* at 1377 n.17 (citing THE CODE OF MAIMONIDES, BOOK 14: THE BOOK OF JUDGES, KINGS AND WARS, EVIDENCE 5:1-3, at 91-92 (Abraham M. Hershman trans., 1949)).

[219] *See* Irene Merker Rosenberg & Yale L. Rosenberg, *In the Beginning: The Talmudic Rule Against Self-Incrimination*, 63 N.Y.U. L. REV. 955, 974-84 (1988).

[220] *Id.* at 979-80. The Talmud makes clear the insufficiency of a lone witness's testimony:

> As it once happened that Tobias sinned and Zigud alone came and testified against him before R. Papa, [whereupon] he had Zigud punished. "Tobias sinned and Zigud is punished!" exclaimed he. "Even so," said he to him, "for it is written, *one witness shall not rise up against a man*, whereas you have testified against him alone: you merely bring him into ill repute."

Id. at 975 n.76 (citing BABYLONIAN TALMUD, PESAHIM 113b (I. Epstein ed., 1960)).

[221] *Id.* at 974-80.

[222] John H. Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources*, 50 U. CHI. L. REV. 1, 96 (1983); *see also* JOHN H. LANGBEIN, THE ORIGINS OF THE ADVERSARY CRIMINAL TRIAL 203-33 (2003).

[223] *See* LANGBEIN, *supra* note 222, at 203-33.

[224] Langbein, *supra* note 222, at 87-89.

the competition and the right to testify against his or her accomplice in exchange for immediate release from custody or a pardon.[225] The loser of the competition would be convicted after a quick trial at which he or she had no defense attorney and at which the statement of the alleged accomplice, as well as his or her own statement, was introduced in evidence.[226] Losers were generally sentenced to death.[227]

Concerns about the reliability of accomplice testimony given under the duress of the crown witness competition led to the adoption of the corroboration requirement for accomplice testimony. The obvious concern was that a person may "say anything to save his own life."[228] Langbein links the same reliability concerns about statements made in crown witness competitions to the adoption of an ancillary rule that barred the use of involuntary pretrial confessions.[229] Thus, as is true under Jewish law, English common law also precluded convictions based on the testimony of a single witness (although the English rule only applies to witnesses who are accomplices); both systems precluded the use of a defendant's extrajudicial statements (but English law applied only to involuntary statements).

In addition to the adoption of protective evidentiary rules, "judges' alarm about that danger [of the crown witness competition] was one of the driving forces that motivated their decision in the 1730s to allow felony defendants to have the assistance of counsel in probing prosecution evidence in trial."[230] Langbein made the insightful point that the corroboration rule, in contrast to the provision of counsel, "undertook to identify a particular subset of crown witness cases — those with no other evidence of the defendant's culpability — as too problematic for the jury to be allowed to convict."[231] This Article also takes a skeptical view of reform efforts that aim to improve the process by which evidence is received in court and insists that eyewitness identification testimony is "too problematic for the jury to be allowed

[225] *Id.* at 91-92.

[226] *Id.* at 105, 115, 124.

[227] *Id.* at 87-88 (noting crown witness competition involved "life-or-death grant of nonprosecution" for winner).

[228] *Id.* at 97 (quoting Richard Munday in trying to impeach crown witness who was testifying against him).

[229] *Id.* at 103-05.

[230] LANGBEIN, *supra* note 222, at 203. Likewise, in today's atmosphere of alarm over wrongful convictions, the adequate provision of counsel is an important concern. *See supra* notes 99-100 and accompanying text.

[231] LANGBEIN, *supra* note 222, at 203.

to convict" in the absence of evidence to corroborate the identification.

What we see in the development of remarkably similar evidentiary rules for accomplice testimony and confessions in biblical times and in English common law is the use of two main modalities for ensuring reliability through evidence rules: corroboration requirements and exclusionary rules. American criminal law has also always been governed by a combination of both types of evidentiary safeguards.[232] Not surprisingly, corroboration requirements similar to those in English common law found their way into American criminal law as well.[233] Crimes likely to be proved through the testimony of witnesses

[232] See *infra* notes 233-85 and accompanying text for a discussion of corroboration requirements in American criminal law. Numerous exclusionary rules, such as the general rule against hearsay, have existed since the founding of the country. LANGBEIN, *supra* note 222, at 247-50. For a discussion of the admissibility of certain hearsay statements such as depositions during the time of the framing of the Constitution, see generally Thomas Y. Davies, *Exploring the Future of the Confrontation Clause in Light of Its Past: What Did the Framers Know, and When Did They Know It? Fictional Originalism in* Crawford v. Washington, 71 BROOK. L. REV. 105 (2005) (rejecting Justice Scalia's claims in *Crawford* that framing era cases required exclusion of depositions of unavailable witnesses that had not been cross-examined).

[233] It bears mentioning that corroboration rules exist in other disciplines as well. For example, in patent cases, over 100 years ago, the Supreme Court held that the testimony of a party who claims to be an earlier inventor is insufficient absent corroborating evidence to defeat an existing patent. *See, e.g.*, The Barbed Wire Patent Cases, 143 U.S. 275, 285 (1892) (noting claims to have previously invented patented device, supported only by oral testimony, seemed to follow every important patent, "throw[ing] a certain amount of discredit upon all that class of evidence," justifying placement of burden on claimant to prove earlier invention beyond reasonable doubt). The rule prevails in patent cases to this day. *See* Thomson, S.A. v. Quixote Corp., 166 F.3d 1172, 1175 (Fed. Cir. 1999). A typical so-called Dead Man's Rule also precludes the admission of a deceased person's oral statements to be offered against the person's estate unless the statement is corroborated. *See., e.g.*, TEX. R. EVID. 601(b) (prohibiting testimony in civil action against executors, administrators, or guardians regarding oral statements of testator, intestate, or ward, unless oral statements are corroborated). This class of corroboration requirement has fallen into disfavor as critics have challenged the rule as sweeping too broadly by disallowing legitimate and fraudulent claims. *See* CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE 422 (3d ed. 2003).

In contract law, with few equitable exceptions, the parol evidence rule renders some contracts unenforceable unless evidenced by a signed writing. For example, all contracts for the sale of goods over $500 require some writing. *See* U.C.C. § 2-201(1) (2004) ("[A] contract for the sale of goods for the price of $500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker.").

In immigration law, the ease with which immigrants may invent false claims of

who may also be involved in illegal activity — treason, perjury, defamation — as well as crimes proved through the testimony of accomplices, are subject to corroboration requirements in many jurisdictions.[234]

For example, the law of treason, as defined in the Treason Clause of Article III of the Constitution, requires a minimum of two witnesses who would testify to the same overt act to substantiate a charge of treason.[235] In praise of the adoption by the Constitutional Convention of the two-witness rule in treason, for example, James Madison explained:

> As treason may be committed against the United States, the authority of the United States ought to be enabled to punish it. But as new-fangled and *artificial* treasons have been the great engines by which violent factions, the natural offspring of free government, have usually wreaked their alternate malignity on each other, the convention have, with great judgment, opposed a barrier to this peculiar danger, by inserting a

persecution motivated the imposition of a requirement that immigrants seeking asylum must corroborate their claims of persecution in their home countries. *See* Marisa Silenzi Cianciarulo, *Terrorism and Asylum Seekers: Why the Real ID Act Is a False Promise*, 43 HARV. J. ON LEGIS. 101, 122-28 (2006); Michele R. Pistone, *Justice Delayed Is Justice Denied: A Proposal for Ending the Unnecessary Detention of Asylum Seekers*, 12 HARV. HUM. RTS. J. 197, 219 (1999).

[234] *See infra* notes 235-56 and accompanying text.

[235] U.S. CONST. art. III, § 3. The treason two-witness rule provides: "No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court." *Id.*; *see also* Monika Jain, Comment, *Mitigating the Dangers of Capital Convictions Based on Eyewitness Testimony Through Treason's Two-Witness Rule*, 91 J. CRIM. L. & CRIMINOLOGY 761, 775-77 (2001) (noting treason two-witness rule in United States can be traced back to Statute of 25 Edward III enacted in 1350).

Almost every state code, constitution, or both also requires the testimony of two witnesses or the defendant's confession in open court. *See, e.g.*, ALA. CONST. art. I, § 18; ARK. CONST. art. II, § 14; CAL. CONST. art. I, § 18; COLO. CONST. art. II, § 9; IDAHO CONST. art. V, § 5; ME. CONST. art. I, § 12; MONT. CONST. art. II, § 30; N.C. CONST. art. I, § 29; S.D. CONST. art. VI, § 25; WYO. CONST. art. 1, § 26; ALA. CODE § 13A-11-2 (2007); CAL. PENAL CODE § 37 (West 2007); GA. CODE ANN. §§ 16-11-1, 24-4-8 (2007) (applying also to perjury and accomplice testimony in all felonies, corroborating evidence other than second witness's testimony may be offered); IDAHO CODE ANN. § 9-501 (2007) (requiring two witnesses for treason and two witnesses, or one witness and corroborating evidence for perjury); LA. REV. STAT. ANN. § 14:113 (2007); MICH. COMP. LAWS § 750.544 (2007); MINN. STAT. § 609.385 (2007); NEV. REV. STAT. § 196.010 (2007); VA. CODE ANN. § 18.2-481 (2007); TEX. CODE CRIM. PROC. ANN. art. 1.20 (Vernon 2007); *id.* art. 38.15. Canadian statutory law also contains this treason rule. *See* Jain, *supra*, at 765 n.10.

> constitutional definition of the crime, fixing the proof necessary for conviction of it, and restraining the Congress, even in punishing it, from extending the consequences of guilt beyond the person of its author.[236]

Benjamin Franklin argued in favor of requiring not only two witnesses but also that both witnesses must testify to the same overt act.[237] He favored this further restriction on convictions for treason because "'prosecutions for treason were generally virulent; and perjury too easily [was] made use of against innocence.'"[238]

In a similar vein, fifteen American states and one territory apply a corroboration requirement in some form for accomplice testimony (and in some jurisdictions for government agents as well[239]).[240] These states apply the rule out of concerns that accomplice testimony is "unreliable, weak, and subject to other infirmities owing to a possible desire by the accomplice to implicate another so as to draw judicial scrutiny away from himself."[241] One court explains further, "The rule reflects a general mistrust of accomplice testimony on the theory that

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[236] Jain, *supra* note 235, at 778 (quoting THE FEDERALIST No. 23 (James Madison), *reprinted in* J.S. MILL, AMERICAN STATE PAPERS: THE FEDERALIST 140 (1989)) (emphasis added).

[237] *Id.* at 779.

[238] *Id.* (quoting JAMES MADISON, THE DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA 443 (Gaillard Hunt & James Brown Scott eds., 1987)).

[239] The Texas code of criminal procedure prohibits convictions based solely on the testimony of covert police informants who are not peace officers. *See* TEX. CODE CRIM. PROC. ANN. art. 38.141 (Vernon 2007). In 2007, California adopted the same rule. *See* Solomon Moore, *DNA Exoneration Leads to Change in Legal System*, N.Y. TIMES, Oct. 1, 2007, at A1.

[240] *See, e.g.*, ALA. CODE § 12-21-222 (2007) (applying only to felonies); ALASKA STAT. § 12.45.020 (2007) (prohibiting conviction based on accomplice testimony unless corroborated by other evidence that tends to connect defendant with commission of crime); ARK. CODE ANN. § 16-89-111(e)(1) (2007) (applying only to felonies); GA. CODE ANN. § 24-4-8 (2007) (applying to treason, perjury, and felonies, but only when accomplice is sole witness); TEX. CODE CRIM. PROC. ANN. 38.14 (Vernon 2007) (requiring corroborating evidence tending to connect defendant with offense committed as evidence that merely shows commission of offense is insufficient).

[241] *See, e.g.*, Teal v. State, 555 So. 2d 1176, 1177 (Ala. Crim. App. 1989) (citing state rule requiring corroboration of accomplice testimony); People v. Shelby, 491 N.Y.S.2d 195, 196 (N.Y. App. Div. 1985) (same); Reyna v. State, 22 S.W.3d 655, 657 (Tex. Ct. App. 2000) (same); *see Receiver of Stolen Goods as Accomplice of Thief for Purposes of Corroboration*, Annotation, 74 A.L.R.3D 560, § 2[b] (1976).

an accomplice may hope to save himself from punishment if he assists the State in convicting a partner in crime."[242]

At one time, nearly a quarter of all states and territories applied a corroboration requirement for accomplice testimony.[243] Concerns about impeding the efficiency of state prosecutions led six states and the American Virgin Islands to repeal their accomplice testimony corroboration rules between the years 1973 and 1980.[244] This trend is most likely attributable to an increase in public fear of crime and a growing prevalence of "get tough" political sentiment.[245] Other scholars view such changes as part of a modern trend during the twentieth century to liberalize the admission of testimonial evidence and leave the matter to juries to decide truthfulness.[246]

In contrast, federal courts have not adopted a corroboration rule for accomplice testimony.[247] The different rules in federal and many state courts have given rise to a wide variety of opinions on best practices. One commentator has called for the adoption of a corroboration rule in federal courts.[248] The fact that federal prosecutors regularly obtain

[242] *Reyna*, 22 S.W.3d at 657-58; *see also* Taren Stanton, In re Anthony W.*: The Accomplice Corroboration Rule Applies to Juvenile Proceedings*, 36 U. BALT. L.F. 65, 65 (2005) (discussing Maryland case extending state's corroboration requirement for accomplice testimony to juvenile proceedings).

[243] *See* Derek J.T. Adler, Note, *Ex Post Facto Limitations on Changes in Evidentiary Law: Repeal of Accomplice Corroboration Requirements*, 55 FORDHAM L. REV. 1191, 1205 n.81 (1987); Christine J. Saverda, Note, *Accomplices in Federal Court: A Case for Increased Evidentiary Standards*, 100 YALE L.J. 785, 790-91 n.40 (1990).

[244] Adler, *supra* note 243, at 1205 n.81; Saverda, *supra* note 243, at 790-91 n.40.

[245] *See* Kurt J. Fischer, *Corroboration of Accomplice Testimony: The Military Rule*, 1986 ARMY LAW. 48, 49; Saverda, *supra* note 243, at 792 n.49 (citing Note, *Corroboration in the New York Criminal Law*, 24 BROOK. L. REV. 324, 343 n.116 (1957)) (noting criticism from New York Commission on Administration of Justice that rule was refuge for principals in organized crime and racketeering cases). Although all states view the testimony of an accomplice as less credible, many simply require trial judges to give cautionary jury instructions on accomplice testimony credibility. Clifford S. Fishman, *Defense Witness as "Accomplice": Should the Trial Judge Give a "Care and Caution" Instruction?*, 96 J. CRIM. L. & CRIMINOLOGY 1, 5-8 (2005).

[246] *See, e.g.*, Singer, *supra* note 192, at 341 (arguing against reliance on uncorroborated testimony and presumption of truth in civil cases and instead urging jury instruction on unreliability of testimonial evidence, including eyewitness testimony); Adler, *supra* note 243, at 1205-06 (arguing retroactive application of new rule eliminating corroboration requirement for accomplice testimony does not constitute ex post facto violation).

[247] *See* Saverda, *supra* note 243, at 792-95 (noting that federal courts appear to require either corroboration or jury instruction cautioning against giving too much weight to accomplice testimony).

[248] *Id.* at 787.

accomplice testimony in exchange for promises of immunity or leniency casts great suspicion on the truthfulness of such testimony.[249] Others have viewed the absence of a two-witness rule for accomplice testimony in federal courts as providing useful advantages to federal prosecutors in prosecuting organized crime cases, as compared to some state prosecutors who face the obstacle of the two-witness rule.[250] They argue that when numerous accomplices corroborate each other, as may be the case in federal organized crime cases, the unreliability problems that underlie the two-witness rule no longer apply with much force.[251] The typical state case, on the other hand, involves a single criminal act involving only the defendant and an accomplice.[252]

While it has no corroboration requirement for accomplice testimony, the federal criminal perjury statute does include a requirement of two witnesses or one witness with sufficient corroborating evidence.[253] According to one author, the two-witness rule for perjury is "'deeply rooted in past centuries,' and is designed to prevent a defendant from being convicted on the strength of his oath versus that of another."[254] Numerous state statutes also contain provisions requiring two witnesses, sometimes including the option of corroborating testimony, for convictions of perjury.[255] For example, Montana law prohibits a conviction for defamation based on an oral communication without corroboration by two witnesses.[256]

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[249] R. Michael Cassidy, *"Soft Words of Hope": Giglio, Accomplice Witnesses, and the Problem of Implied Inducements*, 98 NW. U. L. REV. 1129, 1130-31 (2004); Ellen Yaroshefsky, *Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 FORDHAM L. REV. 917, 917 (1999).

[250] John C. Jeffries, Jr. & John Gleeson, *The Federalization of Organized Crime: Advantages of Federal Prosecution*, 46 HASTINGS L.J. 1095, 1104-08 (1995).

[251] *Id.* at 1106.

[252] *Id.* at 1107.

[253] There are actually three federal perjury statutes. *See* 18 U.S.C. §§ 1621-1623 (2000); *see also* United States v. Chaplin, 25 F.3d 1373, 1377 (7th Cir. 1994). *See generally* Linda F. Harrison, *The Law of Lying: The Difficulty of Pursuing Perjury Under the Federal Perjury Statutes*, 35 U. TOL. L. REV. 397 (2003) (discussing application of federal perjury two-witness rule).

[254] *See* Harrison, *supra* note 253, at 409.

[255] *See* ALA. CODE § 13A-10-105 (2007); CAL. PENAL CODE § 118 (West 2007); COLO. REV. STAT. § 18-8-506 (2007); GA. CODE ANN. § 24-4-8 (2007); IDAHO CODE ANN. § 9-501 (2007); VA. CODE ANN. § 18.2-434 (2007); TEX. CODE CRIM. PROC. ANN. art 38.18 (Vernon 2007) (prohibiting conviction for perjury or aggravated perjury that rests solely upon testimony of one witness other than defendant).

[256] MONT. CODE ANN. § 45-8-212(4) (2007).

Reliability concerns similar to those that limit the use of hearsay underlie the corroboration rule known as the *corpus delicti* rule. The rule came into being in seventeenth-century England in response to certain wrongful executions of individuals convicted of murdering one William Harrison, only to have the "victim" Harrison show up later alive and well.[257] One of the wrongly convicted, John Perry, after extensive interrogation, not only confessed to the murder but implicated his brother and mother as well.[258] The three were tried, convicted, and executed based on Perry's uncorroborated confession.[259] The *corpus delicti* rule, as originally adopted, barred a confession based on an individual's confession in homicide cases in the absence of independent corroborating evidence that a crime was actually committed.[260]

The original rule presupposed that extrajudicial confessions are too unreliable to support a conviction without some independent evidence that the crime actually occurred. The more common problem is not that a person will be wrongly convicted of a crime that did not actually occur, but that he or she will be wrongly convicted on the basis of a false confession obtained through deceitful or coercive means. By the mid-1950s, the federal courts had abandoned the traditional *corpus delicti* rule for a new rule that required corroboration of the confession itself.[261] To date many states have also adopted this new approach, dubbed the "trustworthiness standard."[262] The *corpus delicti* rule in

[257] *See* Richard A. Leo et al., *Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 WIS. L. REV. 479, 501-02.

[258] *Id.* at 502.

[259] *Id.*

[260] *Id.* at 501-02.

[261] *Id.* at 508. For an argument in favor of retaining the traditional rule because it protects against dangers of wrongful convictions in those cases in which the mentally ill or otherwise weak-minded suspect confesses to a crime that has not actually occurred, see generally David A. Moran, *In Defense of the* Corpus Delicti *Rule*, 64 OHIO ST. L.J. 817 (2003).

[262] Leo et al., *supra* note 257, at 508. One author explained the proper operation of the rule as follows:

> One method for corroborating the confession is to establish by independent evidence the elements of the offense embraced in the confession. That evidence must also cast light on the trustworthiness of the confession. Another method of proof is to verify the existence of the essential facts embraced in the confession. If this second method is used, the corroborative evidence, in addition to casting light on the trustworthiness of the confession, must implicate the accused in the commission of the crime. This additional factor is necessary to ensure that the accused is not convicted based on a false confession.

some form exists in every American jurisdiction.[263] Like other corroborating evidence requirements, this rule is motivated by the concern to prevent the conviction of innocent people.[264]

An important point to note is that corroboration requirements are not all created equal. The corroboration requirement in sexual assault cases has now fallen thoroughly into disrepute.[265] The feminist movement of the 1970s evoked an intense backlash against the erroneous and sexist underpinnings of the corroboration requirement that existed for sexual assault cases.[266] The rule in sexual assault cases was a uniquely American invention that required corroboration of the woman's account of the crime.[267] As a practical matter, the corroborating evidence that courts anticipated the prosecution to

R. Wade Curtis, *Military Rule of Evidence 304(g) — The Corroboration Rule*, 1987 ARMY LAW. 35, 41.

Prosecutors and commentators have argued against the *corpus delicti* rule, but these arguments generally favor a move to the trustworthiness approach of the federal courts and many state courts. *See, e.g.*, B. Don Taylor III, *Evidence Beyond the Confession: Abolish Arizona's* Corpus Delicti *Rule*, 41 ARIZ. ATT'Y 22 (2005) (arguing against *corpus delicti* and viewing trustworthiness standard favorably); Maria Lisa Crisera, Comment, *Reevaluation of the California* Corpus Delicti *Rule: A Response to the Invitation of Proposition 8*, 78 CAL. L. REV. 1571, 1594-97 (1990) (same).

[263] Massachusetts became the last state in the country to adopt the rule. *See* Carolyn K. MacWilliam, Annotation, *Sufficiency of Corroboration of Confession for Purpose of Establishing* Corpus Delicti *as Question of Law or Fact*, 33 A.L.R.5TH 571, § 2 n.3 (1995).

[264] *Id.* § 2. Texas law requires a heightened degree of corroboration for oral extrajudicial statements made during custodial interrogation in recognition of the "dual dangers" of ambiguity in the suspect's statement and in the transcription made by the witness. *See* Robert R. Barton, *The Code Means What It Says: Revisiting the Admissibility of Corroborated Unwritten Custodial Statements*, 26 TEX. TECH L. REV. 779, 780 (1995).

[265] *See* Vitauts M. Gulbis, Annotation, *Modern Status of Rule Regarding Necessity for Corroboration of Victim's Testimony in Prosecution for Sexual Offense*, 31 A.L.R.4TH 120, § 1[a]-[b] (1984) (noting most jurisdictions have abandoned corroboration requirement for sexual assault cases); *see also* Tom Barber, *The Anatomy of Florida's* Corpus Delicti *Doctrine*, 74 FLA. BAR J. 80, 81-83 (2000) (analyzing Florida's rule, which is traditional *corpus delicti* rule, and noting most commentators have called for abrogation of such rules).

[266] *See* Michelle J. Anderson, *The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault*, 84 B.U. L. REV. 945, 949 (2004) (noting legal scholars and others have criticized corroboration requirement for rape, among other requirements, for about three decades and citing articles dating to 1970s).

[267] *See id.* at 955-56.

produce would consist of torn clothing and nongenital physical injury.[268]

The rule emerged during the late nineteenth century as a means of protecting men from an "untruthful, dishonest, or vicious complainant."[269] The traditional view was that the rule would "minimize the risk that false charges will be brought; that it balances the sympathy for the victim felt by the jury; and that it is appropriate in view of the difficulty of defending against a charge of rape."[270] Unfortunately, the rule was based on two false premises — that the female victims of sexual assault were prone falsely to accuse men of this serious offense when in fact there was no sexual assault at all, and that there will be evidence of a struggle in a genuine sexual assault.[271] Once prevalent, the requirement has now been abandoned or softened in most American jurisdictions.[272]

Interestingly, New York — the first state to adopt the rule — made the rule more stringent in the 1960s.[273] Adopted in 1962, the Model Penal Code also included a corroboration requirement.[274] By the early 1970s, however, the feminist movement had brought about the abolition of the corroboration requirement in all but seven states,[275] and today weakened corroboration rules exist in only three.[276] In the end, the corroboration requirement in sexual assault law, however

[268] *Id.* at 979.

[269] *Id.* at 956-57 (quoting People v. Yannucci, 15 N.Y.S.2d 865, 866 (N.Y. App. Div. 1939)).

[270] *See* Gulbis, *supra* note 265, § 2[a].

[271] *See* Anderson, *supra* note 266, at 979 (noting nongenital, physical injury is uncommon in rape cases). Ironically, the wrongful convictions uncovered through DNA testing show that women *do* falsely accuse men of sexual assault, not because they are not actually raped, but because they often provide unreliable eyewitness identification testimony. *See supra* notes 7, 12 and accompanying text.

[272] *See* Gulbis, *supra* note 265, § 3[a] (citing cases). Texas law, for example, maintains a corroboration requirement, but it only applies if the victim failed to notify anyone of the offense for more than one year, and it makes exceptions for victims who are young, elderly, or who suffer from a mental or physical disease. *See* TEX. CODE CRIM. PROC. ANN. art. 38.07 (Vernon 2007).

[273] *See* Anderson, *supra* note 266, at 957 n.60 (citing cases holding that victim's pregnancy and defendant's generalized admissions were insufficient corroboration).

[274] *See id.* at 962.

[275] *Id.* at 957. For the feminist critique of the corroboration rule in rape cases, see Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1138-40 (1986). For a discussion of the feminist reform movement, see Cassia C. Spohn, *The Rape Reform Movement: The Traditional Common Law and Rape Law Reforms*, 39 JURIMETRICS J. 119, 119-30 (1999); *see also* Donald J. Friedman, Note, *The Rape Corroboration Requirement: Repeal Not Reform*, 81 YALE L.J. 1365, 1365-66 (1972).

[276] Anderson, *supra* note 266, at 968.

offensive and misguided, serves as yet another example of a corroboration rule that sprung from the concern to guard against the possibility of convicting an innocent person by means of a single witness's unfounded accusation.

A related area is that of child sexual assault, which has also been subject to corroboration requirements.[277] However, these requirements emerged due to a different set of reliability concerns. The requirements were responses to concerns that children are less reliable witnesses than adults, as well as the "prevalent myths about children such as their suggestibility, curiosity, and tendency to fantasize about sex."[278] In addition, reliability issues have been at the forefront of rulemaking because child victims are frequently unavailable to testify at trial, so prosecutors must rely on hearsay statements of the children offered by persons such as parents, doctors, and social workers.[279] The admission of children's hearsay statements under various exceptions to the hearsay rules introduces a second layer of concern about unreliability.[280]

In general, numerous rules of evidence and standards of appellate review consider the existence of corroborative evidence as establishing the reliability of the evidence in question. For example, in most states courts have observed a corroboration requirement for dog-tracking evidence out of concerns that it can be erroneous.[281] Hearsay evidence generally, with its attendant unreliability dangers, has prompted calls for corroboration requirements for some types of hearsay offered in criminal cases.[282] Even in the area of eyewitness identification

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[277] *See* Laura Lane, *District of Columbia Survey: The Effects of the Abolition of the Corroboration Requirement in Child Sexual Assault Cases*, 36 CATH. U. L. REV. 793, 794 (1987).

[278] *Id.* at 806.

[279] *See generally* Myrna Raeder, *Remember the Ladies and the Children Too:* Crawford*'s Impact on Domestic Violence and Child Abuse Cases*, 71 BROOK. L. REV. 311 (2005) (considering effect of *Crawford v. Washington* on continued admissibility of hearsay evidence typically offered in lieu of victim testimony in domestic violence cases involving women and children).

[280] A full discussion of the corroboration requirements under the hearsay rules is beyond the scope of this Article, but see generally Robert P. Mosteller, *Remaking Confrontation Clause and Hearsay Doctrine Under the Challenge of Child Sexual Abuse Prosecutions*, 1993 U. ILL. L. REV. 691, 801-04 (arguing state corroboration requirements can play unconstitutional role in preventing erroneous convictions in child sexual assault cases based on hearsay statements by victims).

[281] *See* Andrew E. Taslitz, *Does the Cold Nose Know? The Unscientific Myth of the Dog Scent Lineup*, 42 HASTINGS L.J. 17, 34-35 (1990).

[282] *See* Gordon Van Kessel, *Hearsay Hazards in the American Criminal Trial: An Adversary-Oriented Approach*, 49 HASTINGS L.J. 477, 532-34 (1998).

testimony, some courts have employed corroboration requirements as prerequisites to the admissibility of expert testimony[283] or to avoid reversal on appeal when an eyewitness's testimony was erroneously admitted.[284] The Alaska Supreme Court has approved the use of eyewitness identification testimony that had been "refreshed" by hypnosis prior to trial on the ground that the "substantial corroboration" established its accuracy.[285]

In sum, corroboration requirements have for centuries served to protect the innocent from wrongful conviction. They ensure greater reliability of the trial process in categories of cases that are "too problematic for the jury to be allowed to convict."[286] Serious violent crimes such as robbery frequently turn on eyewitness identifications, and these cases may not involve other physical evidence. Moreover, the typical estimator factors that affect any eyewitness's identification in a robbery case gives us reason to doubt the accuracy of such an identification.[287] Thus, in violent crime cases such as robbery, the risk of wrongful conviction is simply too high to allow a conviction based solely on an eyewitness's identification testimony absent some other corroboration of the suspect's guilt.

D. How the Rule Might Work

In regulating the use of eyewitness identification testimony, the Supreme Court has applied constitutionally based exclusionary rules that have proved to have little teeth in actually protecting against the admission of highly unreliable testimony.[288] Most recent reform attempts have sought not to strengthen the exclusionary rule but to reduce the unreliability of eyewitness identification testimony by improving the procedures by which the identifications are obtained.[289]

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[283] *See* Hoffheimer, *supra* note 154, at 668-70 (criticizing corroboration rule for its manner of implementation and its effects of limiting jury instructions); Walters, *supra* note 146, at 1420 (discussing California Supreme Court case admitting expert testimony in cases involving "key" eyewitness testimony that was not independently corroborated).

[284] Rudolf Koch, Note, *Process v. Outcome: The Proper Role of Corroborative Evidence in Due Process Analysis of Eyewitness Identification Testimony*, 88 CORNELL L. REV. 1097, 1102 (2003) (addressing proper role of corroborative evidence in harmless error analysis for erroneous eyewitness identification testimony).

[285] State v. Contreras, 674 P.2d 792, 817-18 (Alaska Ct. App. 1983).

[286] *See supra* note 231 and accompanying text.

[287] *See supra* Part I.A; *supra* notes 14-25.

[288] *See supra* Part II.A-B.

[289] *See supra* Part II.D.

These measures are long overdue, worthwhile, and should continue to be encouraged. This Article takes the position that today's lawmakers should consider supplementing these efforts with an additional safeguard: a corroboration requirement.

This Article aims to lay the groundwork for the adoption of a corroboration rule in cases in which eyewitness identification testimony is offered. The proposed rule could be adopted as a rule of criminal procedure, either by legislative initiative, by state high court decisions interpreting state constitutional law, or by the U.S. Supreme Court as a matter of federal constitutional law. The rule would have no effect on the discretion trial courts otherwise exercise in admitting eyewitness identification testimony in criminal cases. Normally, however, it would preclude a conviction that was based solely on the eyewitness identification testimony so that such cases would not be brought forward by prosecutors in the first place.[290]

One obvious exception to the rule should allow for convictions based solely on eyewitness testimony in cases in which the victim knows the culprit through a relationship existing prior to the date of the crime. A person who hires a handyman to do odd jobs around the house for a substantial period of time is certainly in a position to recognize that person if the handyman later commits a crime in the homeowner's presence. Such testimony, assuming the witness had sufficient opportunity to observe the culprit and perhaps hear the culprit's voice, would not be subject to the same reliability concerns that exist in cases of crimes by strangers.

Ironically, one criticism levied against corroboration requirements is that they fail to provide much protection because they could be satisfied by a minimal quantum of evidence.[291] Past experience with

[290] The corroborating evidence rules in Texas, for example, specify that the courts must ensure a verdict of acquittal in all cases in which the government's proof fails in providing sufficient corroborating witnesses or other evidence. TEX. CODE CRIM. PROC. ANN. art. 38.07 (Vernon 2007) ("In all cases where, by law, two witnesses, or one with corroborating circumstances, are required to authorize a conviction, if the requirement be not fulfilled, the court shall instruct the jury to render a verdict of acquittal, and they are bound by the instruction.").

[291] *Cf.* Leo et al., *supra* note 257, at 511 ("[P]olice are prone to suggest and incorporate corroborating evidence into a suspect's confession, whether inadvertently or intentionally, [leading] many false confessions [to] masquerade as true confessions."). *See generally* Boaz Sangero, Miranda *Is Not Enough: A New Justification for Demanding "Strong Corroboration" to a Confession*, 28 CARDOZO L. REV. 2791, 2795, 2817-18 (2007) (proposing requirement of "strong" corroborating evidence in cases based on confessions, even if there is no evidence of police wrongdoing in obtaining confessions); Crisera, *supra* note 262, at 1575-80 (arguing California *corpus delicti* rule is hollow because courts require only slight evidence).

the operation of corroboration requirements should guide the adoption of any new rule pertaining to eyewitness identification evidence. For a corroboration requirement to be truly effective in guarding against wrongful conviction, it should require some genuine investigative work to uncover other independent evidence linking the suspect to the crime.

Admittedly, a corroboration requirement increases the risk that police investigators may feel pressured to obtain evidence from other sources no matter how unreliable or misleading. To some extent, this pressure already exists because, as a practical matter, investigators generally do not consider an investigation complete when an eyewitness identifies a suspect.[292] Eyewitness identifications typically lead to the arrest and custodial interrogation of the individual. In cases of erroneous identification, officers may have to try harder to obtain incriminating statements from the suspect whom they now believe to be the right person. Thus, a corroboration rule may make them more inclined to use tactics that have been shown to be more likely to produce false statements.[293] The risk of false confession is most acute in cases involving juveniles and the mentally retarded, as it is well-documented that these groups are most susceptible to coercive police tactics.[294] They may also seek the assistance of alleged accomplices or jail cellmates, offering payments or reduction of punishment for any incriminating information that the suspect may reveal. These incentives, in turn, can encourage cellmates to provide false information to the police and the courts.[295] As this Article has discussed, evidence such as confessions and accomplice testimony have been subject to corroboration requirements for hundreds of years

[292] *See supra* note 105 and accompanying text (regarding "tunnel vision" phenomenon).

[293] For general discussions of the problem of false confessions, see Miriam S. Gohara, *A Lie for a Lie: False Confessions and the Case for Reconsidering the Legality of Deceptive Interrogation Techniques*, 33 FORDHAM URB. L.J. 791, 791-96 (2006), and Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. U. L. REV. 979, 983 (1997).

[294] *See, e.g.*, Morgan Cloud et al., *Words Without Meaning: The Constitution, Confessions, and Mentally Retarded Suspects*, 69 U. CHI. L. REV. 495, 496, 572 (2002) (arguing *Miranda* fails to protect rights of mentally retarded in custodial interrogations and additional safeguards are needed); Barry C. Feld, *Police Interrogation of Juveniles: An Empirical Study of Policy and Practice*, 97 J. CRIM. L. & CRIMINOLOGY 219, 241-46 (2006) (addressing susceptibility of juveniles to interrogation tactics that may produce false confessions).

[295] *See supra* note 7 (addressing use of paid informants as cause of wrongful conviction).

precisely because they are considered highly unreliable.[296] Extreme care should be taken not to allow one type of unreliable evidence to corroborate another.

Of course, even forensic analyses can be falsified or misrepresented in the zealous drive to obtain a conviction.[297] In the end, rules alone cannot guard against every danger posed by unscrupulous investigators who develop tunnel vision in pursuit of convictions. These concerns should not lead us to reject a corroboration requirement, but rather it should lead us to redouble our efforts to improve the accuracy of police investigations as a whole and create greater safeguards to ensure the legitimacy of the truth-finding function of the advocacy system.[298] A corroboration requirement cannot solve all of the criminal justice systems ills,[299] but it is a good first step.

CONCLUSION

It defies logic for a judge and jury to accept the testimony given in a case like *Cromedy* without any corroborating evidence as proof beyond a reasonable doubt, when numerous factors indicating unreliability of the identification are present.[300] Although the law does not quantify what it means to prove something "beyond a reasonable doubt," the clear unreliability of a statement made under the conditions in *Cromedy* surely fails to meet that standard. The eventual revelation of McKinley Cromedy's actual innocence only further underscores the urgent need for a bright-line rule that puts police investigators to the task of gathering additional corroborating identification evidence.

The additional fact that Cromedy happened to be wrongly identified as a rapist is important, too. But for the existence of DNA evidence that ultimately exonerated him, Cromedy would still be considered a convicted rapist. Had the victim been robbed instead of raped, there would not have been any such DNA evidence. With four times the numbers of robberies as rapes prosecuted in this country, the vast

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[296] *See supra* Part III.C.

[297] *See supra* note 7 (addressing false and faulty forensic evidence as cause of wrongful conviction).

[298] *See generally* AM. BAR ASS'N, *supra* note 159 (providing suggestions to improve many aspects of police investigations as well as prosecution practices).

[299] Some legal scholars argue, for example, that even the trustworthiness standard for the admission of confessions is not sufficient to prevent all wrongful convictions and suggest that additional safeguards such as videotaping should be utilized. *See* Leo et al., *supra* note 257, at 511.

[300] *See supra* notes 15-27 and accompanying text.

majority perpetrated by strangers, it is beyond question that there are large numbers of wrongly convicted robbers who will never be exonerated.[301]

This Article proposes a simple, logical rule that accords proper recognition to the universally accepted scientific knowledge that eyewitnesses often misidentify strangers. It also gives real meaning to the constitutional mandate that a conviction must be based on evidence that leaves no room for "a reasonable doubt." The corroboration requirement can be adopted as part of a jurisdiction's code of criminal procedure or as a matter of constitutional law. The important thing is that policymakers, courts, or both put a stop to the practices that have been demonstrated to result in wrongful convictions based on misidentifications.

Requiring some additional identifying evidence be put forth is not unduly burdening police investigators. DNA testing and other forensic testing has much to offer the system in the future in ruling out innocent suspects before prosecutions, and even before arrest in some cases.[302] These are hopeful developments for police investigations and the quality of outcomes in the criminal justice system. In addition, search warrants can be used to search a robbery suspect's home or workplace for stolen items, weapons, and distinctive clothing. Other possible witnesses can be sought out. Alibi witnesses can be interviewed. New forms of evidence are now often available as well. The prevalence of security video technology and the ability to trace a person's whereabouts through computer records of their financial transactions give police investigators many new avenues for proving a person's guilt. If required, they should be able to find definitive corroborating evidence in many more cases than we might have expected in earlier times.

Moreover, placing this extra burden on law enforcement to investigate a case further is likely to have several salient effects. In some cases, it will confirm a suspect's actual guilt, which makes conviction even easier. In others, it will exonerate an innocent suspect before trial. In turn, having police investigators go through the process of realizing that a suspect whom they have arrested and who was positively identified by a witness was actually innocent, and was proven so through their additional police investigation, may even reduce the tendency to develop tunnel vision or to engage in suggestive identification practices as a general matter. A little healthy

[301] *See supra* note 27 and accompanying text.

[302] *See supra* note 11 and accompanying text.

skepticism of their arrest decisions and of eyewitness identifications could go a long way in preventing future miscarriages of justice. But these are lessons that police investigators often have to learn for themselves. Attempts from the outside to force a change of law enforcement attitudes, culture, and practices typically meet with great resistance and often fail.[303]

Scientific evidence in the form of DNA testing has created great upheaval in the criminal justice system and allowed for the long-overdue exoneration of hundreds. This upheaval has created the political momentum for policymakers to bring about fundamental changes to reduce erroneous convictions. It is time for policymakers to recognize what scientific studies of eyewitness identifications have long shown: eyewitnesses are prone to get it wrong. Current remedies available to address the problems of eyewitness identification testimony fail to protect the innocent from wrongful conviction. In order to ensure the level of accuracy demanded by a standard of proof beyond a reasonable doubt, additional corroborating identification evidence should be a prerequisite for criminal conviction.

[303] *See supra* note 35 and accompanying text.