The Proposed Innocence Protection Act Won't—Unless It Also Curbs Mistaken Eyewitness Identifications

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Jurors are trusting mistaken eyewitness identification testimony. They are returning mistaken convictions, and risking mistaken executions. The author urges that federal and state Innocence Protection legislation should include provisions to avert erroneous eyewitness identifications. She recommends adopting guidelines found in the Recommendations for Lineups and Photospreads developed by the American Psychology/Law Society (AP/LS), and mandating a more stringent exclusionary rule when less reliable means of identification have been used during a capital crime investigation. She further urges legislators to avert mistaken executions by barring prosecutors from seeking the death penalty when suggestive identification procedures have been used in the course of a capital crime investigation.

I. INTRODUCTION

This article contends that legislatures should adopt measures to assure greater reliability in the eyewitness testimony introduced in capital cases. Erroneous eyewitness identification is one of the most frequent causes of mistaken convictions and executions. Decades ago, the United States Supreme Court crafted due process and right to counsel constitutional doctrines to curb identification procedures that gratuitously enhanced the risk of mistake.[1] While initial interpretations favored a greater judicial role in preventing such abuses, later rulings retreated.[2] Present constitutional rules do not suffice due to the narrowness of their definition and the weakness of the remedial sanctions allotted. The proposed Innocence Protection Act[3] and similar state legislation trust DNA testing to avert mistaken executions. But testing requires biological material that is often not available in capital prosecutions, and so DNA cannot detect all the innocents among those capitally prosecuted. To avert mistaken convictions and executions, legislative reforms need to go beyond DNA, and avert mistakes arising from erroneous eyewitness identifications. Studies show this is one of the most common sources of unjust conviction, and that such mistakes may well be on the rise.[4]

Federal and state legislation should be adopted that provides a stronger curb on suggestive identification practices that gratuitously increase the risk of executing the innocent. The Recommendations for Lineups and Photospreads,[5] developed by the American Psychology/Law Society (AP/LS) in 1998, are an appropriate starting point for legislatures (or state courts exercising their supervisory powers or interpreting state constitutional provisions). Adopting such guidelines will reduce the risk of error in capital cases, with little or no expense borne by the states.

Further, to assure that these more reliable procedures will be used during capital case investigations and prosecutions, legislatures and courts should, minimally, adopt an exclusionary rule of the type first announced by the United States Supreme Court in *Stovall v. Denno*,[6] the Court's only capital case addressing identification practices. Reinstating a more stringent exclusionary rule when less reliable means of identification have been used may provide some reduction in the risk of executing an innocent.

However, a return to a somewhat more demanding exclusionary rule is not enough. The *Stovall* exclusionary rule would simply deny the prosecution an opportunity to make use of the fact that the witness had previously chosen the defendant in a suggestive lineup, photo display, or show-up (a one-on-one confrontation between the witness and the suspect). This is testimony the prosecution may be willing to forego in any event, and so this sanction may not assure that more reliable procedures will be used in the future. More importantly, excluding it will not sufficiently assure against the mistake that may have been created by the suggestive procedure. Under present exclusionary rules found in *Manson v. Brathwaite*,[7] the witness may still testify in court that he or she believes the defendant committed the crime, unless there is a "very substantial likelihood of misidentification" brought about by the prior identification process.[8] This standard risks too much.

We are regularly sending innocent persons to death row in this country,[9] and we can be confident there are more to come and some that will not be saved from the executioner's needle. When studies confirm that witness error accounts for more miscarriages of justice in potentially capital cases than any other flaw in the system, and that mistaken identification represents a significant segment of these errors, our task is to reform the system to reduce that risk. Jurors believe eyewitness testimony, even when it is suspect. While cautionary instructions and expert testimony may be helpful, these have not proved strong enough in our battle to assure against mistaken executions. Altering the *Manson* standard for admission of the in-court identification and returning to the *Stovall* inquiry of whether the pretrial procedure was "conducive to irreparable mistaken

identification"[10] (or an analogous "any likelihood of misidentification will exclude the in-court testimony" standard) may further improve our arsenal.

But the better approach would be for legislatures to simply bar the State from seeking death when suggestive identification procedures have been used. In so doing, we encourage that more reliable means of identification will be used in the future, and we remove the risk that an innocent life will be lost due to gratuitous and avoidable witness error.

II. DESPERATELY SEEKING CERTAINTY THROUGH LEGISLATION TO PROTECT THE INNOCENT

Through means too numerous to list, Americans are coming to realize that our capital punishment system is not only capable of making mistakes, but is making them with some regularity. The system is "broken,"[11] and as the theme of this Symposium indicates, one way of fixing it is to look to legislative reforms—either ratcheting up the system to reduce the risk of error, or adopting moratorium measures,[12] or perhaps outright abolition.[13] Legislative proposals abound.[14]

The most prominent reform proposal is H.R. 912,[15] the proposed Innocence Protection Act now pending in Congress, which has drawn vast support.[16] The bill is offered "to reduce the risk that innocent persons may be executed, and for other purposes."[17] It would provide for post-conviction DNA testing in the federal and state criminal justice systems, require preservation of biological material left at crime scenes, and provide grants to prosecutors for DNA testing programs, among other measures.[18] The proposed findings supporting the bill summarize the promise and accomplishments of DNA testing; they also allow us to look inside the heads of congresspersons' intent on ratcheting-up a flawed system.

The proposed findings assert the benefits of DNA testing. DNA testing "has emerged as the most reliable forensic technique for identifying criminals when biological material is left at the crime scene."[19] With DNA testing, some certainty is possible. "Because of its scientific precision, [DNA testing] . . . can, in some cases, conclusively establish the guilt or innocence of a criminal defendant."[20] Even if certainty cannot be achieved every time, DNA testing helps. It "may have significant probative value to a finder of fact" in other cases.[21] DNA's track record of success in exonerating the innocent is startling. "In more than 80 cases in the United States, DNA evidence has led to the exoneration of innocent men and women who were wrongfully convicted. This number includes at least 10 individuals sentenced to death, some of whom came within days of being executed."[22]

The proposed findings also reflect on costs, efficiency, and needs. Adopting a practice of post-conviction DNA testing will not be "unduly burdensome."[23] "The cost of that testing is relatively modest and has decreased in recent years, . . . [and] the number of cases in which post-conviction DNA testing is appropriate is small, and will decrease as pretrial testing becomes more common."[24] Congressional action is needed because "only a few States have adopted post-conviction DNA testing procedures, . . . some . . . are unduly restrictive, and . . . only a handful of States have passed legislation requiring that biological evidence be adequately preserved."[25] The bill's sponsors point to Congress' previous support of federal and state efforts to create DNA data banks and provide financial assistance to laboratories to carry out DNA testing for law enforcement identification purposes.[26] Wielding the power of the purse, the sponsors urge that Congress "insist that States which accept financial assistance make DNA testing available to both sides of the adversarial system in order to enhance the reliability and integrity of that system."[27]

The bill cites a constitutional basis for congressional action. "In *Herrera v. Collins*, 506 U.S. 390 (1993), a majority of the members of the Court suggested that a persuasive showing of innocence made after trial would render the execution of an inmate unconstitutional."[28] A plea to the moral sense of the body is also included. "It shocks the conscience and offends social standards of fairness and decency to execute innocent persons."[29] The sponsors conclude, "if biological material is not subjected to DNA testing in appropriate cases, there is a significant risk that persuasive evidence of innocence will not be detected and, accordingly, that innocent persons will be unconstitutionally executed."[30] Thus, "a Federal statute assuring the availability of DNA testing and a chance to present the results of testing in court is a congruent and proportional prophylactic measure to prevent constitutional injuries from occurring."[31]

The Innocence Protection Act deserves support.[32] All of the proposed findings are firmly supported, and action is necessary to avert mistakes. However, the Act does not go far enough in rooting out the evils that beset the process and lead to convictions of innocent persons. Providing DNA testing is worthless if there is no biological material left behind at the crime scene to test. Most capital prosecutions arise from felony murder scenarios, and while rape-murder often results in traceable

biological material,[33] the more common capitally-charged slaying accompanying a robbery or burglary generally does not.[34] DNA testing therefore may be "the forensic 'magic bullet,'"[35] but to work its magic, testable material must be conjured up, and it is often lacking in capital cases.[36] Only a handful of death-row exonerations have come about from DNA testing.[37] Commonly, other "truth-revealing graces" have saved the condemned from the executioner's needle.[38]

If policy makers are truly desirous of averting mistaken executions, they cannot stop at DNA testing legislation. Other reforms must be included, or little real curb on the ultimate nightmare—the execution of an innocent—can occur.

Some members of Congress are now explicitly acknowledging this simple truth. As Professor Liebman has pointed out in his article:

> Former prosecutor and current United States Congressman William Delahunt put the point as follows in recent testimony before the Senate Judiciary Committee in favor of death penalty reforms going beyond access to post conviction DNA testing: "DNA is the spotlight that has enabled us to focus on this problem with our criminal justice system. And our bill would help ensure that defendants have access to testing in every appropriate case. . . . But we should be under no illusion that by granting access to DNA testing we are solving the problem. DNA is not a panacea for the frailties of the justice system. To suggest otherwise would be tantamount to fraud, particularly when, in the vast majority of cases, biological evidence that can be tested does not even exist."[39]

III. MISTAKEN EYEWITNESS IDENTIFICATIONS

A. *Frequency in Criminal Cases Generally*

DNA testing can be credited for having provided a better means of detecting mistakes, and in so doing, it may help to spotlight how the system may have gone so horribly astray. But for those who have studied the topic, the answer has been clear for quite some time.

The most frequently cited cause for miscarriages of justice is eyewitness misidentification. Professor Samuel Gross has provided one of the two most thorough studies of wrongful convictions, encompassing all types of penalties.[40] He recounted in a subsequent article three years ago that "[m]ost miscarriages of justice are caused by eyewitness misidentification."[41] He was supported in this view not only by his own study, but also by the results of the other extensive compilation of erroneous convictions completed by Professor Arye Rattner.[42] Professor Rattner's study of 205 erroneous convictions revealed that "fifty-two percent of the errors for which the cause could be determined were caused by misidentification."[43] As Professor Gross has related, "other researchers concur that misidentification is by the far the most common cause of convictions of innocent defendants."[44]

The first twenty-eight cases in which DNA testing confirmed innocence, recounted in *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial* in 1996,[45] provide additional insight. The case summaries reveal that in eighteen of the twenty-eight cases, witnesses or victims had provided what turned out to be an erroneous identification.[46] DNA testing simply provides another means of making an entry in "the annals of criminal law," reflecting the system is "rife with instances of mistaken identification," for "the identification of strangers" remains "proverbially untrustworthy."[47]

B. *Mistaken Identifications in Potentially Capital Cases*

Professors Gross's study, Professor Rattner's study, and others, as well as the DNA case studies, evaluated eyewitness misidentification for both homicide and non-homicide offenses. Zeroing in on capital cases, or potentially capital cases, is needed to identify means of curbing execution of the innocent. For that more precise inquiry, the preferred source is the study conducted by Hugo Bedau and Michael L. Radelet, published in 1987 in the *Stanford Law Review*, entitled "*Miscarriages of Justice in Potentially Capital Cases*."[48]

1. *Mistakes Made Too Often—The Incidence of Error*

Professors Hugo Adam Bedau and Michael Radelet expanded on the research done by several authorities whose works were relied upon in the 1967 United States Supreme Court decision of *United States v. Wade*. [49] But the authors also

narrowed the focus to United States convictions after 1900 of "potentially capital crimes."[50] The authors of *Miscarriages* defined "potentially capital cases," to include cases in which a factually innocent person was erroneously convicted of (1) a capital crime and sentenced to death or to a lesser sentence; (2) a non-capital crime that had both capital and non-capital forms; or (3) a crime of criminal homicide that was not punishable by the death penalty only because it had been previously abolished for that crime in the defendant's jurisdiction.[51] The authors then excluded from this class of potentially capital cases all offenses other than homicide or rape, and finally, excluded all rape convictions where the defendant was not sentenced to death.[52] Further, the authors considered only instances of conviction where no such crime actually occurred or the defendant was legally and physically uninvolved in the crime.[53] "Given the evidence at [their] disposal, and the appropriate criteria of error, these decisions yield[ed] a set of 350 cases."[54]

Bedau and Radelet published their study in the *Stanford Law Review* in 1987. The two continued their research and later identified sixty-six more cases by the end of 1991, briefly describing each in the 1992 book *In Spite of Innocence*.[55] Because the researchers sorted and catalogued the cases by cause of error in the 1987 article, and did not do so in the 1992 book, the article is worthy of initial discussion, and thereafter, some sorting and cataloguing of the additional sixty-six cases will be conducted by this author.

2. *Bedau and Radelet's 1987 Findings—Causes of Miscarriages*

These 350 miscarriages of justice reflected that an innocent person was sentenced to death in 40% of the cases, and that in twenty-three of these cases in this century the innocent person was executed.[56] The study demonstrated the "surprising stability" of such miscarriages of justice:

> In virtually every year in this century, in some jurisdiction or other, at least one person has been under death sentence who was later proved to be innocent. Based on this evidence, it is virtually certain that at least some of the nearly two thousand men and women currently under sentence of death in this country are innocent.[57]

The authors were clearly prescient, as dozens have been released from death row since their study was published.[58]

The Bedau and Radelet "Miscarriages" article categorized the causes of erroneous convictions. "Mistaken eyewitness identification" was identified as a factor causing an erroneous conviction in 56 of the 350 cases studied, amounting to 16% of the cases.[59]

Mistaken identification was one segment of an overall "witness error" category that was itself the prevailing source of unjust convictions. The "witness error" category included mistaken eyewitness identification, perjury by prosecution witnesses, and unreliable or erroneous prosecution testimony.[60] The incidence of mistaken conviction for witness errors was 193 cases of 350.[61] Over half (55%) of convictions of the innocent then were attributed to juries or judges trusting witnesses who should not have been trusted. Witness error was "[b]y far the most frequent cause of erroneous convictions," and was often "the primary or even the sole cause of the wrongful conviction."[62]

An evaluation of the case descriptions provided by the researchers suggests that the fifty-six figure reflecting mistaken eyewitness identifications may well need to be expanded in order to accurately assess the incidence of miscarriage of justice arising not only from the dangers inherent in any eyewitness identification, but also that arising from the influence of improper suggestions by police and prosecutors. The researchers described the mistaken eyewitness identification sub-category of witness error as testimony "tendered in good faith."[63] Due to this criterion, the researchers at times apparently included the police or prosecutor-influenced identification testimony in the sub-category of perjury, rather than the sub-category of mistaken eyewitness identification.[64]

The two acknowledged that one way "for the police to exert influence to secure the conviction of an innocent person" is "[t]ypically . . . through improper influence on a key witness."[65] They then cited cases listed in the perjury sub-category and concluded that, "in twenty-two of our cases, this type of improper conduct by the police helped to bring about a wrongful conviction."[66] It is unclear whether all of these twenty-two cases of improper influence by the police on a key witness wound up being categorized in the perjury category, but that appears likely. It is also unstated how many instances of improper prosecutorial influence on a key witness exist, or of undue influences on other witnesses by either prosecutors or police. But, the sub-category of perjury by prosecutorial witnesses comprised 117 cases, and it appears some of these may be attributable to police or prosecutorial suggestion as to the identity of the culprit. The instances of miscarriages of justice arising from what

this author would term "mistaken eyewitness identification" may be recognized to be more than the fifty-six so labeled. Indeed, some of the twenty cases included within the unreliable or erroneous prosecution testimony sub-category might also properly be added to this assessment, as some reflect that the unreliability arose in the context of eyewitness testimony, although not attributable to police suggestion.[67]

The Bedau and Radelet study shows that miscarriages of justice have occurred in potentially capital cases in this century, and further, that it is highly likely that one-fifth or more of these cases can be attributed in whole or in part to some form of mistaken identification.[68] Bedau and Radelet noted that other investigators have found a greater frequency of misidentification error and have commonly concluded that "the single most important factor leading to wrongful convictions in the United States . . . is eyewitness misidentification."[69] The two suggest three possible explanations why their study may have reached a conclusion of the less significant 16%. It may be due to ordinary sampling differences.[70] Or, potentially capital cases may tend, more than other felony cases, to lack eyewitnesses other than those who are or might be regarded as accomplices—thus creating a greater incentive for perjury in this type of crime due to the risk of a death or life sentence in the balance.[71] Lastly, the major source of eyewitness misidentification in the Borchard study, for instance, was the victim of the crime, which is rarely possible when the crime is homicide.[72]

Another reason for the disparity among researchers regarding whether this is the most important factor is likely Bedau and Radelet's choice to include only good faith eyewitness identification testimony in its mistaken identification sub-category. As noted above, suggestive identification practices were at times included within the perjury category. As "perjury by prosecution witnesses . . . is *twice* as frequent a cause of error as are the next most important factors (eyewitness testimony . . . and coerced or false confessions)" in the Bedau and Radelet study,[73] the distinctions among the studies may be less than appears. If the researchers had considered all good faith mistakes, all suggestive practices leading to evidence the police believed to be false or reckless, and all instances of unreliable or incompetent eyewitness evidence, the figures for "mistaken identification" may have been closer to that of other researchers.

Professor Rattner, in his own study that was not limited to potentially capital cases, found that "[t]he most frequent kind of error detected . . . was that of eyewitness misidentification, which accounts for more than 52% of all cases."[74] It appears that Professor Rattner may well have counted within his classification of misidentifications the instances where suggestive influences may have been brought to bear. He acknowledged: "the eyewitness misidentifications are made in good faith, but that rubric tells us nothing about the conditions under which the identification was made, [and] whether the police had shown a picture of the suspect before the lineup, whether the identifying witness was unsure and urged to be positive when testifying."[75] Further, Professor Rattner's sorting process distinguished these cases from perjury by a witness and perjury by criminal justice officials, which he found in 11% and 2.6% of the cases respectively.[76] He cautioned against oversimplification, however:

> The issue is far more complex . . . for there is almost always more than one force at work. If a single reason had to be isolated that pervades large numbers of these cases, it could probably be described as police and prosecutorial overzealousness: the eagerness or urgency to solve a case, and the consequent ease with which one having such feelings is willing to believe, on modest evidence of a negligible nature, that the culprit is at hand. The desire to obtain a conviction when one believes that the man at the bar is guilty may lead to the temptation to use improper, unethical, and illegal means to obtain that conviction.[77]

In such a situation however, the officer may not even need to consciously seek to influence the witness—it may just happen. As the Supreme Court cited in *Wade*, to a source that it considered "one of the most comprehensive studies of [eyewitness] identification":[78]

> [T]he 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.[79]

Professor Gross acknowledges this same overzealousness and examines the distinctive pressures that may propel it in homicide investigations, as overarching factors bringing about miscarriages of justice in murder cases. He reports that 18% of the cases of misidentification in his own study (24 of 135) were murders, and estimates that 21% of the misidentifications in Rattner's study were murder cases.[80] He notes in general, "many, perhaps most eyewitness identifications of criminals by strangers are accurate" (the gathering of corroborating evidence may confirm the identification and greatly reduce the

likelihood of error).[81] Further, "for about half of all violent crimes, eyewitness identifications are extremely reliable because the crimes were committed by relatives, friends, or others who are known to the victims."[82] But, he adds, to the extent that victims are relied upon as reliable sources of identification, there is a disabling effect on the rate of reliable identifications in murder cases, for the victim is (by definition) gone. "In the words of the immortal cliché, 'dead men don't talk.'"[83]

When the victim is unavailable and physical evidence is scarce or non-existent, the lack of evidence leads to added pressures on the police, who are already under greater pressure to solve the case because it is a homicide, as opposed to a run-of-the-mill offense or even a heinous non-homicide.[84] Like the others, Professor Gross sees these pressures leading to mistaken convictions and risking mistaken executions. "If the murder cannot be readily solved, the police may be tempted to cut corners, to jump to conclusions, and—if they believe they have the killer—perhaps to manufacture evidence to clinch the case."[85]

Because they are under greater pressure themselves, the police are more likely to pressure others in murder cases than other cases for the evidence they need. By suggestiveness in the identification process, or influence of other forms, they may produce the unreliable or untruthful testimony by eyewitnesses (or—perhaps one should say—by purported eyewitnesses).[86] When the problem of error is approached holistically, one can see the pressures on police and prosecutors yielding further pressures on others that may cause somewhat variant fissures (mistaken identifications by suggestive influences, perjury, or other pressures), but that all reflect a broken system.[87] Miscarriages of justice will simply occur more frequently in capital cases than other prosecutions.[88]

3. *Bedau and Radelet's 1992 Findings*

In Spite of Innocence captures and discusses another sixty-six instances of miscarriages of justice in potentially capital cases, bringing the total identified by the authors to 416 as of the end of 1991.[89] The book reaffirms for the annals of criminal law the role of mistaken identifications in denying justice. "As for the cause of the errors, our research has shown that the two most frequent are perjury by prosecution witnesses and mistaken eyewitness testimony."[90]

While the authors did not catalogue the additional cases, a review of the brief case summaries by this author suggests that twenty-one involved mistaken identification.[91] Of these twenty-one cases, three appear to be misidentifications where police pressured the witness, or the witness felt pressured to make the identification the police sought.[92] Perjury appears to be present in eighteen cases.[93] Unreliable testimony appears to have been the cause for eight miscarriages of justice.[94] Of the new cases, then, there are forty-seven fitting the category of "witness error." If one adds these forty-seven witness errors to the 193 found in the 1987 study, then a whopping *57%* of the 416 miscarriages of justice in this century arose from witness error. This is 2% more than was evidenced in the 1987 study. Clearly, the most common mistake in a capital or potential capital case is trusting a witness who should not be trusted.

Among these witness errors that make up a majority of the convictions of the innocent, mistaken identifications account for 18.5% (77 of 416), up from 16% in the 1987 study. Perjury by a witness or improper influences on a witness accounts for more than 32% (135 of 416). Unreliable or erroneous prosecution testimony accounts for almost 7% (28 of 416) of these unjust convictions.

4. *Post-1991 Data on a Smaller Class—Those Released from Death Row*

The Bedau-Radelet findings above describe miscarriages confirmed as of the end of 1991. The two continued to collect data on one group within their findings, those who were not simply potential capital defendants, but were actually condemned to death. They compiled a list of those who have been released from death rows since 1970 due to doubts about their guilt. Information regarding releases from death row through the end of 1995 was published in a *Cooley Law Review* article.[95] Their compilation is further updated at a website.[96] While the summaries are again somewhat abbreviated in both sources, it appears that since the 1987 and 1992 studies, twenty-seven more miscarriages of justice have been uncovered where witness errors played a role in sentencing an innocent to death.[97]

C. *Mistakes on the Rise—The Rate of Mistaken Identification Before and After* Wade

In the 1967 United States Supreme Court opinions in *United States v. Wade* and its two companion cases,[98] the Court held that eyewitness misidentification posed such a threat to the reliability of criminal adjudications that due process and right to counsel constitutional doctrines barred the admissibility of certain identification testimony. These constraints, and their subsequent devolution, will be further described in the next section of this article. But suffice it to say that 1967 represented a watershed year insofar as judicial attentiveness to the risk of error arising from misidentification is concerned.

Before leaving the empirical scene, then, it is worthwhile to engage a sense of how or whether misidentifications appear to have slackened or diminished during this period of increased judicial sensitivity to the problem. Unfortunately, the incidence of mistaken identification errors in potentially capital cases does not appear to have diminished since the Supreme Court's acknowledgement of the general risk of error in 1967 in *Wade*. Rather, the incidence of such errors appears to have risen.

Of the fifty-six mistaken eyewitness identification sub-category cases identified in the 1987 Bedau and Radelet study, twenty were for convictions imposed since 1967.[99] Thus, over 35% of the errors attributed in whole or in part to mistaken identification in that study have occurred since 1967. Looked at another way, over the eighty-six years covered by the 1987 era study, the overall percentage of errors attributed in whole or in substantial part to mistaken eyewitness identification was 19%. But in the last nineteen years of the 1987 study, it was nearly 26% (twenty of the seventy-seven miscarriage of justice cases identified since 1967).[100] The rate may be even higher. Some post-1967 cases of highly suggestive, even coercive, influences on identifying witnesses, or other instances of eyewitness unreliability yet trusted by the police, may not have been included in this mistaken identification sub-category.[101] Thus the frequency of this type of error in potentially capital cases during the period 1967 to 1987 may actually be higher than 26%.[102]

The frequency of mistaken identification in the post-*Wade* period is even higher when one adds in the new cases found in the 1992 study. According to this author's categorization, there were apparently twenty-one mistaken identification cases among this group.[103] Of these, eighteen were post-*Wade* convictions.[104] If one looks to the researcher's noted conviction dates, it appears that there were a total of forty-one post-*Wade* cases in the 1992 study that did not appear in the 1987 study.[105] The eighteen mistaken identification cases thus represent a whopping 43% (18 of 41) of these newly added post-*Wade* miscarriages of justice cases. The new cases reaffirm that the incidence of mistaken identifications appears to be on the rise.

If one combines the post-*Wade* cases from each study, there are a total of 118 (77 plus 41) mistaken convictions represented. Of these, thirty-eight (20 plus 18) were arrived at in whole or in part through mistaken identification. Therefore, overall, *32%* (38 of 118) of the post-*Wade* miscarriages of justice appear to be mistaken identification cases. This is a startling and substantial increase over the 19% figure that characterized the pre-*Wade* period. Almost one-third of the innocents being convicted post-*Wade* are getting there in whole or in part through erroneous identification testimony. Truly, the annals of criminal law appear to have become even more "rife with instances of mistaken identification."[106]

Put another way, all things being constant, one could expect that such errors might occur at a rate of .83 per year over the 92-year period of the study (77 over 92 years). However, in convictions since *Wade*, the rate of such errors has been almost double that, at 1.52 per year (38 over 25 years). The rate has significantly risen, rather than fallen.

This calculation does not include the witness perjury cases, where some of the instances of pressures to make identifications may be found. The inclusion of these cases could be expected to further inflate the risk of error arising from purported eyewitness identification testimony. But if one considers the incidents of perjury alone, it appears the incidence of perjury errors has fallen slightly during the post-*Wade* period. In the post-*Wade* period, there were thirty-two such cases.[107] This represents 23% of the total 135 such cases since 1900 (117 in the 1987 study, plus 18 in the 1992 edition). One might expect, at 135 over the 92-year period, a rate of 1.46 per year. In the post-*Wade* period, with thirty-two cases over a twenty-five-year period, the rate is 1.28. So that rate is falling off slightly, compared to pre-*Wade*. But if one looks at the narrower class of persons released from death row since 1991, the rate may be climbing. Of the twenty-seven cases of releases where witness error could be identified as a cause in whole or in part, as many as sixteen appear to have involved witness perjury.[108]

These dramatic increases in witness misidentification errors are very troubling. The apparent increase in the frequency of errors attributable to mistaken identifications might be argued to be due to a more thorough reporting of the problems underlying the more recent cases of miscarriages of justice. But there is no clear explanation why the mistaken identification cases would become more fully documented than any others. It might be surmised that the courts are more sensitive to the problem, but as will be discussed in the next section, the exclusionary rule has been so diluted that there is little added incentive for the courts or counsel to look for these mistakes, particularly after-conviction.

Are there other more society-driven explanations? Is it possible that eyewitnesses are becoming less reliable as a class? Are we becoming too preoccupied with our own comings and goings and responsibilities to be good observers of what is

happening around us? Or is there so much focus on being tough on crime, on private actors "taking a bite out of crime," that witnesses get caught up in being "good soldiers" in the "war on crime" and are less willing to reflect on what they have seen, or are more susceptible to influences from others? Is the high profile nature of capital cases in our "news at all hours" media frenzy world prompting more persons to gather their five minutes of fame by becoming a witness (as it has attracted jurors)? Or is a witness who saw something so likely to be swayed to an artificial certainty by repeated exposures through the media to facts and pictures that this solidifies the latter memory and displaces an earlier more accurate memory?

One can muse on it, but the highly disturbing fact is that we seem to be making more mistakes rather than less. Misidentification seems to be at the core of this evil. It is now time to consider what the courts have done thus far to curb juror reliance on erroneous identification testimony, and in particular, how the courts have attempted to use the exclusionary rule to avert injustice. While much has been written elsewhere about using other protective mechanisms such as expert testimony and cautionary instructions to address these errors,[109] the exclusionary rule is our first line of defense against mistaken eyewitness testimony.

IV. THE COURT'S RESPONSE TO THE RISK OF MISIDENTIFICATION—DEVELOPMENT OF THE EXCLUSIONARY RULE AS A PROTECTIVE DEVICE

A. *The Right to Counsel's Presence and Defining an Exclusionary Rule*

In *United States v. Wade*,[110] the Court majority found that "a major factor contributing to the high incidence of miscarriage of justice from mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification."[111] The Court recognized that "suggestion can be created intentionally or unintentionally in many subtle ways,"[112] and the accused is commonly unable to "effectively [] reconstruct at trial any unfairness that occurred at the lineup"[113] as "improper influences may go undetected"[114] by the witness and the defendant. Concluding "the first line of defense must be the prevention of unfairness and the lessening of the hazards of eyewitness identification at the lineup itself"[115] to reduce this risk of erroneous convictions, the *Wade* Court held that the defendant had a Sixth Amendment right to counsel at pre-trial identification procedures.[116] The Court never accused the police of bad faith dealing with suspects and declined to "assume that these risks are the result of police procedures intentionally designed to prejudice an accused."[117] Rather, these risks were simply "inherent in eyewitness identification and the suggestibility inherent in the context of the pretrial identification."[118]

Importantly, in announcing a right to counsel, the Court acknowledged, as they had a year before in *Miranda v. Arizona*,[119] that legislative or administrative action might alleviate the need for it:

> Legislative or other regulations, such as those of police departments, which eliminate the risk of abuse and unintentional suggestion at lineup proceedings and the impediments to meaningful confrontation at trial may also remove the basis for regarding the stage as "critical." But neither Congress nor the federal authorities have seen fit to provide a solution. What we hold today "in no way creates a constitutional straight-jacket which will handicap sound efforts at reform, nor is it intended to have this effect."[120]

The Court then concluded that conducting a post-indictment lineup without counsel's presence had denied Wade his right to counsel at a critical stage of his federal criminal prosecution and had also denied Gilbert, a similarly situated defendant facing state criminal prosecution in the companion case, his rights.[121]

The next inquiry related to remedy. In *Wade*, the government had eschewed introducing the fact that Wade had been picked out in a lineup. The Court saw this as likely a strategic move—the circumstances of the lineup identification (if recollected) were likely to discount its persuasiveness, compared to the unequivocal in-court identification made by the witness.[122] Wade's counsel had cross-examined the witnesses to elicit the out-of-court identification's circumstances and then moved to strike the in-court identification.[123] In *Gilbert*, on the other hand, the prosecution had elicited identification testimony from its witnesses relating to the out-of-court lineup and also an in-court identification.[124] Defense counsel moved to strike both forms of identification.[125]

The Court responded with a two-pronged exclusionary rule analysis in the two cases. Testimony as to the out-of-court identification should have been excluded in Gilbert's trial as "that testimony is the direct result of the illegal lineup 'come at by

exploitation of [the primary] illegality.'"[126] This was a deterrent-based exclusionary rule: "Only a per se exclusionary rule as to such testimony can be an effective sanction to assure that law enforcement authorities will respect the accused's constitutional right to the presence of his counsel at the critical lineup."[127] The Court also viewed this as a proportional response, for it expected that otherwise "the witness' testimony of his lineup identification will enhance the impact of his in-court identification on the jury and seriously aggravate whatever derogation exists of the accused's right to a fair trial."[128] Because the trial jury had improperly heard the unconstitutionally obtained out-of-court identification testimony, Gilbert was entitled to a new trial unless the state could prove its admission harmless beyond a reasonable doubt, as required under the *Chapman v. California*[129] standard.

As to the in-court identification by a witness following a denial of counsel at the identification procedure, a per se rule of admission was deemed unacceptable, as it "would render the right to counsel an empty one."[130] But a per se rule of exclusion was also unacceptable. Exclusion could not be "justified without first giving the Government the opportunity to establish by clear and convincing evidence that the in-court identifications were based upon observations of the suspect other than the lineup identification."[131] In other words, this testimony could be admitted if the government could prove it was not a fruit of the prior illegality, i.e., if it had an "independent origin" or independent basis. The Court identified a number of factors relevant to this analysis[132] and remanded.

Over the subsequent years, in spite of great criticism, the Court constrained the right to counsel it had fashioned. The right only applied in identification procedures conducted at or after formal charges and/or the initiation of adversarial judicial proceedings against the accused, i.e., at critical stages in the criminal prosecution, as defined under the Sixth Amendment.[133] Stepping back from exclusion, even in the post-charge setting, the Court then held the right would not apply to non-corporeal identification procedures, such as photo spreads, because counsel was unnecessary to detect and report improper influences.[134] "If accurate reconstruction is possible, the risks inherent in any confrontation still remain, but the opportunity to cure defects at trial causes the confrontation to cease to be 'critical.'"[135] The Court was "not persuaded that the risks inherent in the use of photographic displays are so pernicious that an extraordinary system of safeguards is required," and believed "the primary safeguard against abuses . . . is the ethical responsibility of the prosecutor."[136] Justice Brennan's dissent described this decision as "simply another step toward the complete evisceration of the fundamental constitutional principles established by this Court only six years ago."[137]

B. *The Due Process Exclusionary Rule*

1. Stovall v. Denno

The Court decided a third case—and its only capital case on the subject of identification procedures—on the same day as *Wade* and *Gilbert*. In *Stovall v. Denno*,[138] Theodore Stovall had argued that the eyewitness identification of him by the victim's wife should be excluded because he had been denied his right to counsel and due process when the police conducted a show-up (one on one) identification procedure in her hospital room. While concluding the new right to counsel announced in *Wade* would not be retroactively applied to the death-sentenced petitioner because his case arose on collateral review,[139] the Court announced that an independent ground for relief may exist under the due process clause. This was based on the "need to assure the integrity and reliability of our system of justice . . . ."[140] The defendant may show that under the totality of the circumstances, "the confrontation conducted . . . was so unnecessarily suggestive and conducive to irreparable mistaken identification that [it] denied due process of law."[141] As the Court found the show-up procedure used to identify Stovall was not on the facts unnecessarily suggestive,[142] the Court did not elaborate on the due process test or any rules of exclusion arising from the concept.

Although it was not emphasized in the opinion, *Stovall* was, as noted, a capital case. The lower courts did not pay much attention to this fact, and this is not unexpected, given it was 1967. This was well before the United States Supreme Court recognized that "death is different" and that, due to the irrevocable nature of the penalty, an extra degree of reliability was necessary in the determination of guilt and the determination of punishment in capital cases.[143] The Supreme Court had not embarked on its capital jurisprudence course, and the lower courts were simply striving to discern how *Stovall*'s due process limitation was to apply to witness identifications conducted during the investigation of an offense at any level.

Lower courts faced with capital and non-capital cases in which unnecessarily suggestive identification procedures

occurred commonly responded with a two-pronged approach to exclusion of identification testimony. This approach found its origins in *Wade*'s two-pronged test for exclusion of identification testimony when the government had denied the right to counsel. Under this post-*Stovall* approach to the due process claim, if the pre-trial identification procedure was unnecessarily suggestive, this required exclusion of the testimony of the witness regarding the out-of-court, pre-trial identification. Moreover, if the confrontation conducted was conducive to irreparable mistaken identification, the in-court identification testimony of the witness must also be excluded.[144] However, the in-court identification could be admitted if the mistake was not irreparable, i.e., if there was no "substantial likelihood of irreparable mistaken identification" arising from the suggestive procedure.[145]

This latter restatement of the test came from the 1968 decision in *Simmons v. United States*.[146] In *Simmons*, the Court had applied the due process exclusionary rule analysis to admission of in-court testimony following a suggestive photo identification procedure. The Court stated the test as whether a pretrial procedure was "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."[147] This altered the *Stovall* test somewhat—from the unnecessarily suggestive one to perhaps a looser inquiry of general impermissibility that looked at the degree of suggestiveness it entailed.[148] Further, it arguably ratcheted-up the necessary showing of impact on the in-court identification from the suggestive procedure. Instead of merely being "conducive" to a mistake that was irreparable, *Simmons* required that the impermissible pretrial identification experience create a "very substantial likelihood" of such a mistake.[149] Simmons failed to make that showing, and an in-court identification was allowed in his case.[150]

The effect of this two-pronged approach to admissibility of identification testimony was to enhance the reliability of eyewitness identifications by deterring police from using a less reliable identification procedure when a more reliable method was available. Each time the police engaged in an impermissibly suggestive identification, there would be some consequence—exclusion of testimony relating to that identification made out-of-court—if the defendant sought it. The consequence was modest, but it was certain and clear, thus forcing police and prosecutors to be somewhat attentive to how identification procedures were conducted. The response was also proportional: it did not bar the use of all identification testimony obtained after a suggestive identification procedure, but only the out-of-court identification testimony that was its direct product—an identification that was, by definition, suspect in its reliability because it had been arrived at through an unnecessarily suggestive procedure.[151] Officers were thus encouraged to consider the suggestiveness of the procedure about to be used and whether a less suggestive process was reasonably available. Finally, officers were encouraged to use the available, less suggestive procedure if they wished all of the witness' identification testimony to be admissible. More reliable identification procedures, and thus more reliable identifications, were the intended result of this two-pronged approach.

2. Neil v. Biggers

Most lower courts around the country adhered to this interpretation of *Stovall/Simmons*, but confusion arose in the early 1970s due to the United States Supreme Court decision in *Neil v. Biggers*.[152] In *Neil*, the Court concluded there was no need to exclude either testimony relating to the out-of-court show-up identification or the in-court identification.[153] Considering the totality of the circumstances, there was no substantial likelihood of misidentification.[154] The Court identified five factors to be weighed in determining whether such likelihood was present.[155] Some lower courts concluded from *Neil* that a two-pronged approach to admissibility that considered each form of identification testimony individually was inappropriate and that an all-or-nothing approach applied. Other courts focused on the Court's statement in *Neil* that a strict rule of exclusion of the out-of-court identification due to the unnecessarily suggestive procedure that occurred "would have no place in the present case, since both the confrontation and the trial preceded *Stovall v. Denno*, when we first gave notice that the suggestiveness of confrontation procedures was anything other than a matter to be argued to the jury."[156] The *Neil* Court thus could be seen by these lower courts as acknowledging that the two-pronged approach was appropriate to post-*Stovall* confrontations, but refusing to apply the two-pronged test retroactively to pre-*Stovall* confrontations.

3. Manson v. Brathwaite

To relieve the confusion created by *Neil*, the Court heard the non-capital case of *Manson v. Brathwaite*,[157] and determined that the all-or-nothing approach of *Neil* applied to post-*Stovall* fact patterns.[158] According to the majority in

Manson, the Court should consider the totality of the circumstances to determine whether there was a "very substantial likelihood of irreparable misidentification," and if so, all of the identification testimony from that witness must be excluded.[159] The Court would ascertain the likelihood of misidentification by weighing the corrupting effect of the suggestive influences against the *Neil* reliability factors.[160]

The rationale for the Court majority's rejection of the *Stovall* approach was that this "per se" rule was unwarranted as the suggestive procedure did "not in itself intrude upon a constitutionally protected interest,"[161] and the approach "goes too far since its application automatically and peremptorily, and without consideration of alleviating factors, keeps evidence from the jury that is reliable and relevant."[162] The majority acknowledged that the per se approach has the more significant deterrent effect,[163] but contended that the totality approach also has an influence on police behavior and that societal costs outweighed the additional deterrent benefits to be achieved.[164]

The dissent of Justices Marshall and Brennan argued, however, that *Stovall* had established a due process right of criminal suspects to be free from confrontations that, under all the circumstances, are unnecessarily suggestive.[165] As a violation of rights had occurred, the out-of-court identification had to be excluded as a direct fruit thereof.[166]

The dissent also decried the majority's inability to distinguish among the purposes and costs of application of various exclusionary rules. While the evidence excluded as a result of a Fourth Amendment violation may well be reliable and is excluded in order to serve interests unrelated to guilt or innocence, "[s]uggestively obtained eyewitness testimony is excluded, in contrast, precisely because of its unreliability and concomitant irrelevance. Its exclusion both protects the integrity of the truth-seeking function of the trial and discourages police use of needlessly inaccurate and ineffective investigatory methods."[167]

In effect, the majority was looking at exclusionary rules with blinders on. Having dashed away from the Fourth Amendment exclusionary rule a year earlier due to the perception that its deterrent benefits were abstractions, and its costs in freeing guilty persons concrete,[168] the Court majority was seeing this as yet another "inflexible rule[] of exclusion that may frustrate rather than promote justice," by imposing a "Draconian sanction" of reversal when the identification is reliable despite an "unnecessarily suggestive identification procedure."[169] But the dissent argued that the likelihood of reliability was slight and the need to avert mistakes was weightier. The societal cost of impermissibly suggestive identification had to be considered. Not only did this endanger the innocent, but such identifications "pose a grave threat to society . . . [in that] the police and the public [may] erroneously conclude . . . the right man has been caught and convicted, [when] the real outlaw . . . remain[s] at large."[170] The dissent argued society will benefit by the greater reliability of identification evidence likely to be received through the heightened deterrent effect on the use of suggestive tactics and that this outweighed any other societal cost.

Justice Stevens, while joining the Court's opinion, wrote separately, suggesting this was an appropriate area for legislation. "[T]he arguments in favor of fashioning new rules to minimize the danger of convicting the innocent on the basis of unreliable eyewitness testimony carry substantial force. . . . [But] this rulemaking function can be performed 'more effectively by the legislative process than by a somewhat clumsy judicial fiat.'"[171]

Years ago, many commentators elaborated on the wrong-headedness of the *Manson* decision. It has been rightly called "more misdirected than lax" as it loosens restrictions, heroically assumes courts can decide after the fact which witnesses are likely to have been inaccurate, and restricts courts to an extreme remedy.[172] Some also remarked on the continued use of improper methods:

> The uniformly condemned [show-ups] are flourishing under the totality of circumstances approach. Rather than deterring such conduct, the effect . . . has been to provide the police with a fairly clear signal that absent extremely aggravating circumstances, [these actions] will result in no suppression. The use, therefore, of the preferable techniques . . . is left to the discretion of the investigating police officer.[173]

As Professor Gross related in his study, "Although many post-Brathwaite cases report patently suggestive pretrial identification procedures, only very few defendants have succeeded in keeping the resulting identifications out of evidence."[174]

Thus far, Congress has not gone in the direction Justice Stevens or the commentators suggested. Its past acts represent a drift toward more errors, rather than less (though, at least, no one listened or obeyed). Congress did legislate on the exclusion of identification testimony years ago—not to praise it, but to bury it. Just one year after *Wade*, Congress voted to preclude the

exclusion of all in-court identifications. The eyewitness testimony provisions of the 1968 Crime Control Act required admission of "testimony of a witness that he saw the accused commit or participate in the commission of the crime" in all federal courts.[175] The provision was ignored,[176] and in the wake of the *Dickerson v. United States*[177] decision this past term, striking down the same act's attempted repeal of *Miranda*, it no doubt will (and likely must) continue to be ignored. The *Wade-Manson* exclusionary rule, constrained as it is, continues to impose (extremely modest) controls on identification practices.

C. *Exclusion and Dilution in the Lower Courts*

The United States Supreme Court has been silent on this exclusionary rule since *Manson*, leaving lower courts to thresh out a number of issues that define its range and its effectiveness. Considering some recent cases will provide insight into these concerns.

1. *Holding on to* Stovall

One state has followed the lead of Justice Stevens and the commentators, declining to follow *Manson*. Massachusetts has maintained a *Stovall*-type per se exclusionary rule under its state constitution's due process clause.[178] Ironically, the state requiring more reliable means of identification has no death penalty. Massachusetts courts require that the out-of-court identification testimony be excluded and that the in-court identifications be excluded also, unless the prosecutor can show by clear and convincing evidence that the identification was not the product of the initial unfairly suggestive procedure and was instead derived from another, independent source.[179] When determining impermissible suggestiveness, the Massachusetts court considers whether the officers possessed a motivation to suggest a particular suspect.[180] Further, the state constitutional rule appears dedicated to instances where the confrontation is brought about through state officials. The defendant bears an initial burden of demonstrating by a preponderance of the evidence that the witnesses were subjected by the State to a confrontation that was unnecessarily suggestive and thus offensive to due process.[181] "The pertinent question was not whether there may have been a mistaken identification, but whether any possible mistake in identifying the defendant was, or might have been, caused by improper suggestions made by the police."[182]

2. *Police Conduct and Chance Encounters*

A rule limiting exclusion to police-initiated confrontations is understandable and parallels the approach the United States Supreme Court has taken with respect to defining other rights in other settings. For instance, that Court has steadfastly limited the Fourth Amendment to instances of official searching and seizing. It has eschewed exclusion when private actors engaged in unlawful activity,[183] and of late has defined the scope of rights by whether the citizen would feel deprived of liberty by reason of police conduct.[184] Even when confronted with evidence of highly questionable reliability, such as a confession from a mentally ill individual, the Court has refused to exclude identifications "[a]bsent police conduct causally related to the confession," demanding this as the state action that deprived the defendant of due process.[185] On the other hand, if the private party is acting on behalf of the police, or at their instruction or request, exclusion may be appropriate.[186]

Courts have struggled with the question of whether to engage in exclusion when, by chance, an eyewitness encounters or sees the defendant.[187] Professor Gross calls this a "spontaneous identification," and in his study he found "many reported misidentifications originated in this manner," but he was chagrined that persons writing about identification procedures had failed to acknowledge these are prone to errors, and had instead credited their reliability.[188] Professor Gross expressed disappointment that such mistakes could not likely be addressed under the due process clause.[189]

It may be possible to gain exclusion in some cases that appear to be chance encounters, but may not truly be. For instance, one can look to whether the witness' prior contact with the police, to interview, provision of composite sketch information, examination photo displays, or other such conduct may have made the witness an agent of the state. Or, it may be possible to find state action in cases where the state actors have been somewhat involved in creating the encounter, for instance, by providing a photo or information to the media which is reported and then reacted to by a witness.

These situations are not truly "simultaneous" and likely have enough official action to warrant exclusionary analysis. In a recent New Mexico case,[190] for instance, witnesses had seen a photo of the defendant on television, had an immediate reaction, and contacted the authorities. The witnesses had earlier viewed photo arrays and were unable to make an

identification though the defendant's photo was among them.[191] The New Mexico court proceeded to consider the question of whether the witnesses had been tainted by viewing the photo (a newer photo of the defendant than the witnesses had previously seen).[192] The court ultimately concluded that the trial court could properly find the chance viewing was not so impermissibly suggestive as to have tainted the witnesses' later in-court identification.[193]

In another recent case, the state contended that the suggestiveness of a lineup was immaterial because the defendant who was chosen had been a foil, placed in the lineup to ensure its fairness because his appearance was similar to the man the police had arrested as their suspect.[194] The Second Circuit panel proceeded to consider the defendant's exclusion argument. Though the court agreed it was "happenstance" that placed the defendant in the lineup and that the lineup was not suggestive as to the police's suspect, the court found the lineup could still be suggestive as to the defendant, where the appearances of the two were different and only the defendant met the viewing witness's prior description of a person wearing a black leather jacket.[195] Further, to the extent the State argued the suggestiveness of its assemblage was unintentional, that argument was found immaterial.[196] Contrary to the Massachusetts court, the Second Circuit viewed the critical question as one of mistake, rather than police misconduct.[197] "The purpose of excluding identifications that result from suggestive police procedures is not deterrence but rather the reduction of the likelihood of misidentification."[198] The court stated "[i]t is certainly possible that an in-court identification by a prosecution witness may prove to be unreliable, even though the pre-trial encounter in question has not involved any culpable police conduct."[199]

To the extent these courts are willing to consider exclusion when the police have not intended to elicit an identification, but merely participated in some way in creating a situation where that could happen, both defendants and society have benefited by having judicial oversight of possible misidentification and miscarriages of justice. The practice should continue, but it may be that it will be up to a legislature to assure such review. Given the direction of United States Supreme Court rulings in other exclusionary rule contexts,[200] the due process or constitutional approach may not be a comfortable fit for some of these cases.[201] In comparable contexts, the Court has welcomed legislation or rules.[202] It would be wise to get such on the books to assure that courts can continue to act to address the dangers of misidentifications presented by the arguably chance encounter.

3. *Burden of Proof*

Another area of disparity among the courts is the question of the standard of proof and the allocation of proof in implementing the *Manson* test. Most courts appear to place the burden on the defendant to show the pretrial identification procedure was impermissibly suggestive. This is understandable. But having made that showing, some courts are silent on where the burden lies and the level of proof necessary to demonstrate that there is a very substantial likelihood of misidentification.[203] Others place the burden on the defendant,[204] enhancing the risk of mistake, and failing to follow through on the *Wade* parallel that would require that the government be obliged to prove the absence of such likelihood of irreparable mistake by clear and convincing evidence. Some courts do place the burden on the government,[205] where it should lie.

The factors animating the scope of procedural safeguards weigh in favor of placing the burden on the prosecution. [206] More pointedly too, it is the prosecution that will generally have far superior access to the information from which the inquiry will be resolved (records of the earlier descriptions of the witnesses, of the identification procedure itself, and etc.). Traditional policies underlying allocating the burden of proof lead to this burden being on the government. To assure against mistakes in capital cases, it is justly borne by the government who may have been responsible for the suggestive confrontation. The American Law Institute's *Model Code of Pre-Arraignment Procedure* has placed a burden on the prosecution, though only to a preponderance of the evidence.[207] As this is a constitutional question, it would be helpful to have the Supreme Court's direction. But absent that, solidifying the allocation and standard of proof on these questions through judicial supervisory powers or legislation would be most helpful.

To curb this risk of error even further, a legislature could apply a harmless error standard where the prosecution must prove beyond a reasonable doubt that testimony respecting the out-of-court identification did not contribute to the conviction. Steps should be taken of some nature to diminish the risk of error presented by continued use of the present *Manson* test in capital cases.

4. *Reliance on Other Information to Show Lack of a Mistake*

Courts have also discounted the ability of the *Manson* rule to check jury reliance on unreliable identifications by improperly resorting to reliance on other, even inadmissible, evidence of guilt to admit the eyewitness identification testimony under the substantial likelihood of mistake standard. Some courts have looked to other evidence in the record showing that the defendant committed the crime when considering the "accuracy of the witness' prior identification" factor from *Neil*.[208] This is contrary to *Manson*, where the Court's analysis of this factor simply looked to the extent of the description given by the witness, and how consistent it was with the defendant's own physical characteristics.[209] It also discounts the significance of an eyewitness' testimony to the jury. Frequently, this evidence (short of a confession) is the evidence most likely to be believed by a jury, even when it is often wrong. Studies have shown that jurors tend to "overvalue eyewitness evidence in general," and there is "strong evidence that they cannot tell accurate testimony from inaccurate."[210] We risk more mistaken convictions if the more damning, but erroneous, evidence is admitted because there is some other less potent evidence corroborating it.

Reliance on other witnesses having picked out the defendant in the suggestive procedure as a means of demonstrating reliability[211] is another piece of circular reasoning that markedly increases rather than decreases the likelihood of error. This amounts to looking at presumptively inadmissible evidence to decide whether other presumptively inadmissible evidence should come in, and therefore, should not be condoned. There must be an individualized weighing of the corrupting effect of suggestiveness against the reliability factors presented by each witness.[212] The Second Circuit recently rejected a district court's reliance on inadmissible evidence and impermissible inferences to corroborate the reliability of an impermissibly suggestive identification.[213] Reliance on other evidence of guilt was properly held to violate *Manson*.[214] These practices cannot be condoned when we are trying to avoid mistakes.

5. *A Sampling of Suggestive Practices*

Looking at recent cases, it is evident that suggestive identification practices are continuing post-Manson.[215] We have done little to prevent gratuitous mistakes.

V. RATCHETING-UP THE EXCLUSIONARY RULE AS A MEANS OF AVERTING MISTAKES IN CAPITAL CASES

At a minimum, legislatures should be looking to reinstatement of the *Stovall* rule of exclusion to help avert mistakes. It is difficult to even quibble with the notion that officers should be using the most reliable means of identification available to them when investigating what they reasonably believe may become a capitally-charged case. The Court has consistently reaffirmed that greater reliability is required in these cases, and we have the means to know what procedures will provide us with identifications that are more reliable. Empirical studies have proliferated on the question of eyewitness identification since the United States Supreme Court examined the admissibility of this testimony in its only capital case in 1967. This knowledge was not available to the court in 1967 or in 1977, when *Manson* was decided. Consensus about reliable identification procedures is at hand, and now it is time for legislatures to mandate these safe practices be followed as part of their quality control over capital investigations.

If the Innocence Protection Act is to live up to its title, it must go beyond ordering preservation of physical evidence at a crime scene. To assure against mistakes in many cases, it must contain some measures directed at police and prosecutorial handling of eyewitness identification evidence.

A. *Setting the Guidelines for Reliable Identification Procedures*

The direction needed can be found in two recent documents. First, a report of the Executive Committee of the American Pyschology/Law Society (AP/LS) was released in 1998. It is entitled "Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads."[216] Before making its recommendations, the AP/LS discussed its own study of forty cases of innocent people who were convicted of serious crimes and served time in prison, five on death row.[217] They found that 90% involved eyewitness identification evidence in which one or more eyewitnesses falsely identified the person.[218] The AP/LS determined to direct their recommendations to police and prosecutors, rather than the juries who convicted these innocents, because their approach is to "make the eyewitness identification evidence more reliable rather than make juries more skeptical."[219]

The AP/LS added their trained voice to the criticism already aired concerning *Manson v. Brathwaite*.[220] "In legal theory, various safeguards are presumed to be operating within the legal system to prevent miscarriages in the form of mistaken identification. These safeguards, however, fail to provide the intended protection."[221] Noting there is currently no set of legal rules of procedure for obtaining eyewitness identifications that law enforcement investigators must follow, the body presents recommendations that "represent an emerging consensus among eyewitness scientists as to key elements that such a set of procedures must entail."[222]

The four rules proposed to better assure identification practices yield reliable evidence are extensively supported in the scientific literature and in the AP/LS Report. These rules are:

1. The person who conducts the lineup or photospread should not be aware of which member of the lineup or photospread is the suspect.[223]

2. Eyewitnesses should be told explicitly that the person in question might not be in the lineup or photospread and therefore should not feel that they must make an identification. They should also be told that the person administering the lineup does not know which person is the suspect in the case.[224]

3. The suspect should not stand out in the lineup or photospread as being different from the distracters based on the eyewitness' previous description of the culprit or based on other factors that would draw extra attention to the suspect.[225]

4. A clear statement should be taken from the eyewitness at the time of the identification and prior to any feedback as to his or her confidence that the identified person is the actual culprit.[226]

The AP/LS's four recommendations "are largely without financial cost to the judicial system," and "do not serve to reduce the chances that the guilty party will be identified."[227] The proposals have no real costs, only benefits in the form of reducing "the mistakes that are the product of the procedures that are used in the criminal justice system."[228] The rules therefore perfectly fit the crime control model's aim of an efficient, expeditious, and reliable system.

Another source of guidance for legislatively crafted parameters on identification procedures is the United States Department of Justice, Office of Research Programs' recent publication, "Eyewitness Evidence: A Guide for Law Enforcement."[229] The guide, twenty-five pages in length, provides recommendations to law enforcement personnel that incorporate some, but not all, of the recommendations of the American Psychology/Law Society discussed above. An extensive and thoughtful comparison of the two reports, and the science underlying them, is available in the recent article of Donald P. Judges, entitled *Two Cheers for the Department of Justice's Eyewitness Evidence: A Guide for Law Enforcement*.[230] Two cheers, rather than three, were provided from this commentator, for while the report has "much that is potentially useful in promoting greater accuracy in eyewitness evidence," its "shortcomings are both unfortunate and unnecessary."[231] While the Department did not intend its guide to be used to mandate certain practices, it would be appropriate for legislatures to examine both the AP/LS and the DOJ reports to illuminate the problem of misidentification, and determine areas of needed reform.

Legislative adoption of the AP/LS provisions above would provide safeguards on the system with no cost to society. If added to the duties to preserve crime scene evidence, the two reports would provide reasonable regulations over police investigations in the areas where mistakes most often occur.[232] The legislature should order a commission to conduct a study of what, if any, additional safe practices for identification procedures should be adopted beyond the four recommendations above. Funding should be provided for equipment, such as video-cameras to record identification procedures in capital investigations, and for the training of law enforcement personnel, prosecuting and defense lawyers, and the courts on proper identification techniques needed to avert mistakes. With such resources and commitment to improving the identification process, the state can do more justice, and avert injustices of the worst kind.[233]

B. *Contours of a Stovall-Based Exclusionary Rule for Capital Case Investigations*

To encourage regular compliance and avert mistaken executions, the reasonable regulations chosen by the legislature should be accompanied by an exclusionary remedy in the event they are disregarded in the course of the investigation of an offense that is the subject of capital charges, that officers can reasonably expect may be the subject of capital charges, or a closely related offense thereto.[234] (In determining the latter, the constraints of the same offense doctrine, recently applied to the Sixth Amendment right to counsel in interrogations, should not apply.).[235] The legislation should mandate that the consequence of use of an impermissibly suggestive procedure, as determined by reference to the facts and circumstances in the

case and the guidelines provided in the legislation, is exclusion of any testimony relating to the out-of-court identification procedure. To ensure reliability, this analysis should be applied to any impermissibly suggestive identification encounter, even if not actually planned or conducted by the police or prosecutors.

An in-court identification may then only be provided if the prosecution can prove by clear and convincing evidence that the prior identification was not conducive to irreparable mistaken identification. The defendant would bear no burden to show anything more than that an impermissibly suggestive pretrial identification had occurred. The "substantial likelihood of misidentification" terminology would be replaced by the "conducive to irreparable mistaken identification" terminology, and the burden to show there was none would be on the government. In addition, for this inquiry, the *Neil* reliability factors would be replaced by those found in *Wade v. United States* (thereby removing the level of certainty factor which has been so undercut by empirical studies). Finally, the prosecution should prove the identification procedure was not conducive by resorting to facts surrounding the incident itself, and cannot resort to inadmissible evidence or unreliable inferences to attempt to support the reliability of the in-court identification.

VI. SEEKING MORE ASSURANCES—EXCLUDE THE DEATH PENALTY, NOT JUST THE EVIDENCE

To avert misidentification miscarriages, Professor Gross suggests that where there is some non-eyewitness corroboration (whether admissible at trial or not), it should be scrutinized for its reliability.[236] If the corroborating evidence is unreliable or proves little, the risk of error should be recognized to be nearly as high as if there was no corroborating information.[237] He advises that a prosecutor's pre-trial screening best averts mistakes.[238] To that end, he recommends that a prosecutor "not proceed with a criminal case if, after reviewing all the available evidence of identity—evidence from the defense as well as the police, inadmissible as well as admissible evidence—the prosecutor has a reasonable doubt about the identity of the defendant as the criminal."[239]

That rule is a highly sensible one, and should be supported, particularly in capital cases. But even in modest offense cases,[240] Professor Gross had "no illusion that a formal adoption of this proposed standard would transform prosecutorial practices[, as the] trick would be to implement [it.]"[241] This author holds even less trust in this approach.

Given the unique pressures on police and prosecutors to pursue homicide prosecutions, which Professor Gross has amply described elsewhere,[242] while one could hope for restraint from prosecution altogether, it is unlikely. Prosecutors will find desisting difficult, even when they should. Some may argue, too, that expecting a prosecutor to refrain from prosecution altogether may be simply asking too much, and those ascribing to a "tough on crime" philosophy may also argue it is asking society to give up too much.

But while the case may be prosecuted, we should not be risking an innocent life if conviction occurs. Because prosecutors may not be willing to restrain themselves, and judicial oversight is a means of implementing Professor Gross' concern—and prosecution may be acceptable, while a mistaken execution is not—we should simply bar the death penalty when the case presents the risk of mistake. When the prosecutor wishes to use a witness that has been subjected to an impermissibly suggestive identification procedure, death should not be an option.

The risk of mistake presented by an impermissibly suggestive identification procedure may not bar a conviction, but it should bar an execution. This is simply another way of implementing the Model Penal Code's exclusion of death when the evidence does not foreclose all doubt about guilt, which this author has argued elsewhere should be adopted in a modified form.[243] (Rather than being a determination made by the trial judge before the penalty phase begins, the author urged this should be a determination at the trial phase made by the trial jury and independently reviewed by the trial judge before a penalty phase is underway.)[244]

VII. CONCLUSION

Those crafting Innocence Protection Acts need to be true to their titled goal. This means incorporating quality controls on the gathering of identification testimony as well as forensic evidence. There is a growing consensus on what those quality controls should be, as discussed in the AP/LS and DOJ Reports. It is time to enact these measures, or at the least, commit to a timetable for study, evaluation, proposal, and adoption of such measures.

In the interim and thereafter, at a minimum, the legislatures should ratchet-up the reliability of capital investigation identification procedures by adopting the refined *Stovall* exclusionary rule practice described above. But the legislation should go further than that. Death should be excluded as a possible sentence by the trial court judge, during the pretrial period, if the prosecution wishes to use a witness who has been subjected to an impermissibly suggestive identification procedure. Both the

defendant and the prosecution should have the right to pursue an interlocutory appeal of this ruling in the state appellate court.

This is a solution less costly than refraining from prosecution altogether, and more consistent with the crime control philosophy that animates so much of current legislative thinking. Legislators seeking "an efficient, expeditious, and reliable screening and disposition of persons suspected of crime"[245] should find this proposal acceptable. The execution of an innocent is anathema to all, death-penalty supporters and non-supporters alike. Even those who follow a retributivist philosophy will seek to avert it.[246] The use of an impermissibly suggestive identification procedure gratuitously increases our risk of executing an innocent. Making a prosecutorial and, if needed, a judicial assessment of whether death should be excluded in a pre-trial, even pre-capital charging,[247] time frame will provide significant cost-savings. Parties would know early-on, as would the court, whether the case would proceed as a capital one. If death is excluded, then the extensive additional resources required of all to prepare for a capital penalty phase proceeding would be saved.[248] And an innocent life may well be saved.

In a capital punishment system, we will never be able to altogether avoid being dead wrong. But we can try.

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[1] *See* Stovall v. Denno, 388 U.S. 293 (1967) (due process); Gilbert v. California, 388 U.S. 263 (1967) (right to counsel); United States v. Wade, 388 U.S. 218 (1967) (right to counsel).

[2] *See* Manson v. Brathwaite, 432 U.S. 98 (1977) (due process); United States v. Ash, 413 U.S. 300 (1973) (right to counsel); Kirby v. Illinois, 406 U.S. 682 (1972).

[3] H.R. 912, 107th Cong. § 101 (2001).

[4] *See infra* Part III.

[5] Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 LAW & HUM. BEHAV. 603, 639–40 (1998).

[6] 388 U.S. 293. The Court held that an identification procedure could be "so unnecessarily suggestive and conducive to irreparable mistaken identification" as to violate due process. *Id.* at 302.

[7] 432 U.S. 98.

[8] *Id.* at 117 (citation omitted).

[9] Ken Armstrong & Steve Mills, *Ryan: "Until I Can Be Sure," Illinois is First State to Suspend Death Penalty*, CHI. TRIB., Feb. 1, 2000, at 1.

[10] Stovall v. Denno, 388 U.S. 293, 302 (1967).

[11] The term "broken" has been used to refer to error rates in capital cases. James S. Liebman et al., *A Broken System: Error Rates in Capital Cases*, (June 2000) *at* http://www.law.columbia.edu/instructionalservices/liebman/liebman_final.pdf (last visited Sept. 26, 2001), *reprinted in part in* James S. Liebman, et al., *Capital Attrition: Error Rates in Capital Cases, 1973–1995*, 78 TEX. L. REV. 1839 (2000). The report documents a 68% reversal rate in capital cases among the state's high courts. *Id.* at 1846–50.

[12] Of course, the first statewide moratorium in the modern capital punishment era came about through executive action, rather than legislative, with Illinois Governor George Ryan's extraordinary announcement in March 2000. Confronted with a system that had sent thirteen innocents to death row, Republican Governor George Ryan declared: "There is no margin of error when it comes to putting a person to death. Until I can be sure with moral certainty that no innocent man or woman is facing a lethal injection, no one will meet that fate." Armstrong & Mills, *supra* note 9. Governor Ryan decried the Illinois system as one that was "so fraught with error and has come so close to the ultimate nightmare" of executing an innocent that executions must be suspended. *Id.*

United States Supreme Court Justices are now speaking to the flaws in the system as well. In a speech some months ago, Justice O'Connor noted that, since 1973, ninety death row inmates have been exonerated of the crimes for which they were charged. She commented: "[I]f statistics are any indication, the system may well be allowing some innocent defendants to be executed." Ken Armstrong & Steve Mills, *O'Connor Questions Fairness of Death Penalty; Justice Rethinking Laws She Shaped*, CHI. TRIB., July 4, 2001, at 1. Justice Ruth Bader Ginsburg, in a speech this spring in Maryland, expressed further reservations, and commented favorably on a proposed moratorium on executions in the state. *Id.* Justice Stephen Breyer related in a recent radio interview in France responding to a question about our retention of the death penalty: "I think that DNA is going to make the difference, because if it is found that someone was really innocent, if it can be proved with DNA, perhaps that will make a difference." RECAP, NATIONAL DEATH PENALTY DEVELOPMENTS, (June 2001) (translating an interview broadcast on the French radio station France Inter).

[13] This is the surest path to averting the inevitable fallibility of any capital litigation system. While the author is more of a cockeyed-optimist than some, like Professor Liebman, I recognize that we are unlikely to "unplug the death penalty machine" immediately. James S. Liebman, *Opting*

for Real Death Penalty Reform, 63 OHIO ST. L.J. 315, 320 (2002). Moratorium measures are gathering great momentum. For many, including this author, moratoria represent an immediate means of stopping executions, which offers an indirect path, but more promise of abolition, than the faint hope of accomplishing abolition without intermediate steps. By giving society a chance not to kill, society can come to realize it need never kill again. The moratorium measures therefore deserve support. It may be that the present efforts yield only legislative reforms that ratchet up the reliability of the system to a point where fewer mistakes are made in the future, and allot us the breathing space to correct the mistakes already made before we kill. But that is better than the system we now have, and the effort has given us a time to experience doing without. This experience will condition us to incremental recognitions that society can no longer tolerate that risk of injustice, and then injustice itself. Moratoria beckon us to the next plateau on our gradual evolution away from death.

[14] *See* James S. Liebman, *The New Death Penalty Debate: What's DNA Got to Do With It?*, 33 COLUM. HUM. RTS. L. REV. (forthcoming 2002) (manuscript at n.2–7, on file with author); *see also* The Death Penalty Information Center, *Death Penalty* Links, at http://www.208.55.30.156/facts/other/links/hstml (last visited Sept. 26, 2001); The Quixote Center, *Moratorium Now*, *at* http://www.quixote.org/ej/ (last visited Sept. 26, 2001).

[15] H.R. 912, 107th Cong. § 101 (2001).

[16] As of July 31, 2001, the bill had over 200 sponsors—22 in the Senate and 210 in the House of Representatives. Christi Parsons, *ABA Chief Seeks Halt to Executions; Group Advocates U.S. Moratorium*, CHI. TRIB., Aug. 4, 2001, at 11.

[17] *Id.*

[18] The bill also seeks to ensure competent legal services in capital cases by creating a National Commission on Capital Representation. Innocence Protection Act, H.R. 912, 107th Cong. § 201 (2001). The bill will provide for capital defense incentive grants, revise the effects of procedural default rules, provide for capital defense resource grants, increase compensation in Federal cases, and address compensation in State death penalty cases. *Id.* §§ 202, 301–02. It will also provide for an alternative federal sentence of life imprisonment without possibility of release and seek to ensure an informed jury during the sentencing phase. *Id.* § 304.

[19] *Id.* § 101(a)(1).

[20] *Id.* § 101(a)(2).

[21] *Id.*

[22] *Id.* § 101(a)(5).

[23] *Id.* § 101(a)(7).

[24] *Id.*

[25] *Id.* § 101(a)(10).

[26] *Id.* § 101(a)(11)–(a)(12).

[27] *Id.* § 101(a)(12).

[28] *Id.* § 101(a)(13).

[29] *Id.* § 101(a)(14).

[30] *Id.* § 101(a)(15).

[31] *Id.* § 101(a)(16).

[32] It is true that some people caution against pursuing a reformist stance, urging that, at the least, a careful weighing of the costs and benefits of particular reforms be engaged beforehand. Professors Jordan and Carol Steiker in the Symposium advised such restraint. *See* Carol S. Steiker and Jordan M. Steiker, *Should Abolitionists Support Legislative "Reform" of the Death Penalty?*, 63 OHIO ST. L.J. 417, 424 (2002). They question whether abolitionists should support legislative reforms. *Id.* Professors Carol and Jordan Steiker suggests that the reform measures could legitimize capital punishment by giving a false and exaggerated impression of legitimacy, and that many may produce an "entrenchment effect," leaving persons less inclined to scrutinize the system in the future. *Id.* at 421–24. They urge that evaluating the possible legitimizing effects and counter-legitimizing effects in the proposals floated. *Id.* at 424–25. Some proposals may appear enlightened, but have little effect. *Id.* at 423–24. They suggest positive reforms that would create new institutions that could become the locus for reforms to keep on reforming; sunshine reforms, such as those allowing data collection so future study and reform can be stimulated; and sunset provisions that would reconsider reforms every two to three years. *Id.* at 425–30. They expressed the view that generally tinkering with the death penalty does not work and that it tends to have a sedative effect, putting out the perception that the problem is solved, and the public can go on to something else. *Id.* at 421.

These are factors worthy of serious consideration. Reforms that bear the least possible risk of entrenchment effects are most worthy of support. The Innocence Protection Act, H.R. 912, 107th Cong. § 101 (2001), as proposed, contains provisions that would create new institutions and mandate the development of institutional protections (increased compensation for counsel, *id.* §§ 301, 302, qualifications for appointment to represent capital defendants, *id.* § 201, better crime scene investigation, and preservation of evidence, *id.* §§ 102–04.). While the post-conviction DNA testing portions may be more in the nature of a "quick fix" that could lead to some complacency and entrenchment, these other provisions implement protections on which further real protections can be built. In any event, the risk of retrenchment must be weighed against the risk of mistake and degree of unfairness or unreliability in the present system. At present, some mistakes cannot be uncovered due to the absence of legal means affording the opportunity. As Professor Liebman points out, DNA testing offers the prospect of relief to an innocent who had no procedural error with which to open the courthouse doors. Liebman, *supra* note 14 (manuscript at nn.56–72) It is a "truth-revealing grace" currently outside the common judicial pathway. *Id.* Bringing it within that pathway will save some innocents. *Id.* Though this may risk some complacency for others, that effect may be reduced as each of the mistakes the system made are publicized. The more obvious the mistakes, the greater the perception of a broken system and the greater a concern that stimulates thought and action.

On balance, with all its features, the Innocence Protection Act should help by reducing the risk of mistake, building future institutions that will assist in that process, and encouraging the public to maintain a watchful eye on the capital punishment system. If it stumbles in adoption, it may be because the Act is viewed by some to have too many institution-building features. *See* Liebman, *supra* note 14 (manuscript at 34) (citing the Federal News Service, *Hearing of the Senate Judiciary Committee on Protecting the Innocent: Ensuring Competent Counsel in Death Penalty Cases*, (June 27, 2001)) (Senator Hatch "argues that Senate should suspend consideration of provisions to improve defense counsel in capital cases and other reforms and should instead focus immediately and exclusively on 'DNA legislation [which] enjoys nearly universal support in this committee' and 'very quickly could pass . . . Houses of Congress.'").

Many states have already passed some form of post-conviction DNA testing legislation. *See* Liebman, *supra* note 14 (manuscript at app.) (relating that, as of July 9, 2001, twenty-three states had enacted such legislation, one had adopted it by court rule, and fifteen more had proposed legislation pending). The reforms proposed in this article, while not yet the subject of action among the states, are worthy of adoption, and as discussed later, the benefits should outweigh any potential entrenchment effect.

[33] DNA testing is most helpful in sexual assault cases, where the biological evidence (sperm generally) "has been recovered from a place (vaginal/rectal/oral swabs or underwear) that makes DNA results on the issue of identity virtually dispositive." Commentary of Peter Neufeld & Barry C. Scheck, in Edward Connors et al., *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial*, U.S. Dept. of Justice NCJ 161258 (June 1996), at xxix (describing the nature of sexual assault referrals made to the FBI over a seven-year period, in which DNA testing produced a 26% exclusion rate).

[34] *See* Liebman, *supra* note 14 (manuscript at n.51) ("The typical capital crime in this country is not a rape murder, but a murder in the course of robbery or burglary, or for insurance or hire—offenses only infrequently characterized by biological evidence left by the offender."); *see also* Phyllis L. Crocker, *Crossing the Line: Rape-Murder and the Death Penalty*, 26 OHIO N.U. L. REV. 689, 696–98 (2000).

The lack of biological evidence may contribute toward the lower clearance rate (police arrests for the crime) in burglary and robbery cases. *See* Samuel R. Gross, *Lost Lives: Miscarriages of Justice in Capital Cases*, 61 LAW & CONTEMP. PROBS. 125, 134 (1998) (only 14% of robberies are cleared, and 7% of burglaries, while 18% of rapes are cleared, according to federal uniform crime reports). As Professor Gross points out, however, once the robbery or burglary offense includes a killing, clearance rates can be expected to soar. *Id.* at 134–35. Professor Gross stated:

> Overall, the proportion of all homicides that are solved is about four times higher than the comparable proportion for other violent crimes . . . [recounting a study where but 13% of all robberies reported to the police were solved within two months, compared to 57% of robbery killings and concluding] . . . This difference cannot be explained by superior evidence—on the contrary robbery homicides will usually have weaker evidence, since the victim is dead—but must be due to a systematic difference in the investigation by the police.

Id. Professor Gross attributes this to the greater pressure to solve these cases than nonhomicidal crimes. *Id.* at 135.

[35] Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?*, 49 RUTGERS L. REV. 1317, 1376 (1997). Professor Givelber imagined a rule requiring the police to preserve, and the state to test, available forensic evidence, and described it as "a partial antidote to the inaccuracy of eyewitness identifications." *Id.* at 1384. He suggested the rule to achieve greater accuracy, but acknowledged it was unlikely to be proposed and adopted in the near future. *Id.* at 1385. Opposition was anticipated as courts may be wary of the expense, reluctant to force states to undertake it, and may view compelled testing as contrary to the adversary system. *Id.* at 1384–85. Further, those who think all defendants are "guilty in any event" may view it as wasteful, and both the prosecution and defense may "prefer the selective, party-driven use of scientific tests and their results to a system where such tests are routinely conducted." *Id.* at 1386. The proposed Innocence Protection Act requires preservation of evidence, but stops short of mandating testing. It thereby reduces these concerns, though as Professor Givelber suggests, this may be at the expense of accuracy in the system. *Id.* at 1384.

[36] This distinction among underlying felonies may diminish in the future if the mandate of crime scene preservation in the Innocence Protection Act is passed and successfully implemented and if the science of DNA testing improves to allow reliable testing on even more minute samples. But even with testable material, the bullet's magic qualities are dependent on properly equipped facilities with capable, trained personnel who follow standard procedures and testify truthfully. Concerns over "the adequacy of laboratory procedures and the competence of the experts who testify" led the National Research Council to make recommendations in its report, DNA Technology in Forensic Science. *See* Connors, et al., *supra* note 33, at 25–26. The proposed Innocence Protection Act attempts to respond to these concerns as well.

[37] Liebman, *supra* note 14 (manuscript at 23–24) ("[O]f the 96 post-1973 exonerations, only a handful, something close to 10 percent, required DNA. And of all documented DNA exonerations in the United States, only about 12 percent have involved capital prisoners.").

[38] Liebman, *supra* note 14 (manuscript at 25–26) ("death row exonerations are typically produced not by DNA but by the actual perpetrator's confession, a witness's recanting of crucial testimony against the defendant, documentation of an iron-clad alibi, defects in the state's other forensic evidence, or most often, the overall weakness of the existing evidence of guilt"); *see also* Gross, *supra* note 34, at 150, 152. Gross argues:

> Judging from the cases that are reported, three factors, separately or in combination, are usually responsible for an innocent defendant's exoneration: attention, confession, and luck . . . The most the legal system can do is improve the odds by providing resources to help discover and prove errors, by considering serious claims whenever they are made, and by taking action.

Id.; Michael Radelet et al., *Prisoners Released from Death Row Since 1970 Because of Doubts About Their Guilt*, 13 COOLEY L. REV. 907, 920 (1996) ("virtually every case . . . is a story of good luck that spared an innocent inmate's life").

[39] Liebman, *supra* note 14 (manuscript at 25).

[40] Samuel H. Gross, *Loss of Innocence: Eyewitness Identification and Proof of Guilt*, 16 J. LEGAL STUDIES 395 (1987) (examining 136 proven misidentifications, 97 of which led to convictions). Professor Gross considered only "undisputed misidentifications, by strangers, of people accused of crimes that were committed on or after 1900." *Id.* at 412. Undisputed misidentifications were presented when a judicial or executive determination of innocence was made, or the prosecutor who originally brought the charge subsequently agreed the defendant was innocent. *Id.* Twenty-four of these cases involved homicides. *Id.* at 413. Most of those homicides were coupled with a felony, and half or more involved

robberies or attempted robberies as the underlying felony. *Id.*

[41] *See* Gross, *supra* note 34, at 136.

[42] Arye Rattner, *Convicted but Innocent: Wrongful Conviction and the Criminal Justice System*, 12 LAW AND HUM. BEHAV. 283 (1988) (examining 205 erroneous convictions). Professor Rattner defined a "wrongful conviction" as one in which a person was convicted of a felony, but later was exonerated generally due to evidence that was available, but was not sufficiently utilized at the time of the conviction; new evidence that was not previously available; or in some cases, the confession of the actual culprit. *Id.* at 284. He, too, limited the class to cases tried after 1900, in which error has been acknowledged officially, rather than merely claimed. *Id.* at 286. He reduced the class further by eliminating all cases in which the type of error either was not mentioned or was insufficiently clear. *Id.* at 287. By this method, he identified 205 cases. Nearly 45% of the 205 known cases of wrongful conviction were for murder. *Id.* The second most frequent crime was robbery with nearly one-third (30.5%) of the 205 false positives. *Id.* at 288.

[43] Gross, *supra* note 34, at 136; *see* Rattner, *supra* note 42, at 289.

[44] Gross, *supra* note 34, at 136 (citing numerous studies in n.54); *see, e.g.*, RUTH BRANDON & CHRISTIE DAVIES, WRONGFUL IMPRISONMENT: MISTAKEN CONVICTIONS AND THEIR CONSEQUENCES 21 (1973) (concluding that, of seventy cases of wrongful conviction occurring between 1950 and 1970, the most frequent errors that lead to wrongful imprisonment were "unsatisfactory identification, particularly by confrontation between the accused and the witness; confessions made by the feebleminded and inadequate; . . . certain joint trials; perjury, especially in cases involving sexual or quasi sexual offences [sic]; badly-conducted defence[s] [sic]; [and the use of] criminals as witnesses"); C. Ronald Huff et al., *Guilty Until Proven Innocent: Wrongful Conviction and Public Policy*, 32 CRIME & DELINQ. 518, 524 (1986) ("[T]he single most important factor leading to wrongful convictions in the United States is eyewitness misidentification."); Rattner, *supra* note 42, at 285–86 (A study of previous work on the conviction of the innocent listed what they saw as "major sources of error"—only seldom is a listed source the sole one in a particular case. Those "major sources of error" were: (1) eyewitness misidentification; (2) police and prosecutorial overzealousness; (3) police and prosecutorial bad faith; (4) community pressure for conviction; (5) false accusation; and (6) plea bargaining.).

[45] Connors et al., *supra* note 33.

[46] *Id.* The case summaries recount that victim or witness identifications were made in the following cases: Gilbert Alejandro, *id.* at 34 (victim made identification from police mug shot and in court); Ronnie Bullock, *id.* at 40 (both victims identified him in a police lineup); Leonard Callace, *id.* at 41 (victim identified him from a photo array and made an in-court identification); Terry Leon Chalmers, *id.* at 42 (witness identification by photo array, two separate police lineups and in court); Ronald Cotton, *id.* at 43 (photo identification by one victim, police lineup identification by one of the victims; jury was not allowed to hear evidence that the second victim failed to pick Cotton out of either a photo array or a police lineup which led to overturning of conviction; on retrial, the second victim made an in-court identification); Frederick Rene Daye, *id.* at 50 (victim made a photo identification and a lineup identification; witness to the crime also made lineup identification); Gary Dotson, *id.* at 51 (victim identification from police mug book, and police lineup, victim recanted that she fabricated the rape to conceal a consensual sexual encounter with her boyfriend); Edward Green, *id.* at 53 (second victim made identification in a "show-up" on the street; first victim made identification in a photo array and a formal lineup, both made in-court identification); Ricky Hammond, *id.* at 54 (victim identification by a photo array, and in-court); William O'Dell Harris, *id.* at 56 (victim identification by a police lineup and in-court); Edward Honaker, *id.* at 58 (victim and her boyfriend picked him out of photo lineup, and victim made in-court identification); Joe C. Jones, *id.* at 60 (two witnesses identified him as the man at the location; victim picked out a different man in a photo lineup but identified him when she saw him face to face); Kerry Kotler, *id.* at 62–63 (victim identification from a group of 500 photos, and identification by sight and voice from a police lineup); Brian Piszczek, *id.* at 67 (victim identification from a photo array two months after incident, and made an in-court identification); Dwayne Scruggs, *id.* at 68 (victim identified him with "98 percent surety" from a sex crimes file of approximately 200 photos; victim identified him a second time from a different picture, and made in-court identification); David Shephard, *id.* at 72 (victim identified him by sight and voice at his work) *id.* at 70; Walter Snyder (victim identified him as the person who lived across the street from her, made identification in a police station "show-up"); Glen Woodall, *id.* at 74 (partial visual identification made by one of the victims; distinctive smell about him was noted by two victims and also noted at defendant's workplace). The number of cases in the study in which eyewitness identification testimony was introduced may have been greater. *See* Commentary by Edward J. Imwinkelreid, Connors, et al., *supra* note 33, at xiv ("In all 28 cases, without the benefit of DNA evidence, the triers of fact had to rely on eyewitness testimony, which turned out to be inaccurate.").

[47] United States v. Wade, 388 U.S. 218, 228 (1967) (quoting FELIX FRANKFURTER, THE CASE OF SACCO AND VANZETTI 30 (1927) and citing further authorities at n.6).

[48] Hugo Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21 (1987) [hereinafter, Bedau & Radelet, *Miscarriages*]. This study was later published, in somewhat expanded form, in a book. *See* MICHAEL L. RADELET ET AL., IN SPITE OF INNOCENCE: ERRONEOUS CONVICTIONS IN CAPITAL CASES (1992) [hereinafter RADELET ET AL., IN SPITE OF INNOCENCE]. Some have criticized the judgment of wrongful conviction the authors reached in particular high-profile cases. *See, e.g.*, Stephen J. Markman and Paul G. Cassell, *Protecting the Innocent: A Response to the Bedau-Radelet Study*, 41 STAN. L. REV. 121 (1988). But as Professor Gross has remarked: "The precision of Bedau and Radelet's judgment in every case hardly matters; it is the overall pattern that tells the story. In the great majority of the cases they identify, the error has been admitted or is beyond dispute." Gross, *supra* note 34, at 130.

A subsequent study of the sixty-eight persons released from death row between 1970 and 1996 was prepared by Professors Radelet, Bedau, and Lofquist and published in *Prisoners Released from Death Row Since 1970 Because of Doubts About Their Guilt.* Radelet et al., *supra* note 38.

[49] 388 U.S. 218, 228 & n.6 (citing PATRICK M. WALL, EYEWITNESS IDENTIFICATION IN CRIMINAL CASES 25 (1965); EDWIN BORCHARD, CONVICTING THE INNOCENT: ERRORS OF CRIMINAL JUSTICE (1932); and other sources).

[50] Bedau & Radelet, *Miscarriages*, *supra* note 48, at 31–34.

[51] *Id.*

[52] *Id.* at 31–34.

[53] *Id.* at 22–45. The authors excluded: (1) cases involving only due process issues over the presence or absence of mens rea (for example, no controversy existed over who committed the deadly act); (2) those cases where the error asserted was misidentification over which accomplice fired the fatal shot; and (3) those instances where error was averted prior to conviction. *Id.* at 42–45.

[54] *Id.* at 35.

[55] RADELET ET AL., IN SPITE OF INNOCENCE, *supra* note 48.

[56] Bedau & Radelet, *Miscarriages*, *supra* note 48, at 36.

[57] *Id.* at 38–39.

[58] *See* RADELET ET AL., IN SPITE OF INNOCENCE, *supra* note 48, at 279 (forty innocent persons were sentenced to death in the twenty-year period preceding the book's publication). An additional fifty-plus innocents have been identified and released from death row. *See* The Death Penalty Information Center, *Innocence File*, *at* http://www.deathpenaltyinfo.org/ innoc.html (last visited Sept. 26, 2001).

[59] Bedau & Radelet, *Miscarriages*, *supra* note 48, at 57, tbl.6.

[60] *Id.*

[61] *Id.*

[62] *Id.* at 60.

[63] *Id.* at 61.

[64] For instance, in the description relating to four New Mexico co-defendants sentenced to death in 1974, the researchers recount "[p]erjured identification given under police pressure" as a basis for the erroneous convictions, and list the miscarriage of justice as one caused in part by perjury, but do not list this as mistaken identification testimony, apparently because it was not tendered in good faith. *Id.* at 118; *see also id.* at 124 (reflecting that in the case of Vance Hardy "perjured eyewitness testimony, given under police coercion," when the witness tried to testify in the defendant's favor but was deterred by police threats, and the witness admitted his identification testimony was the "result of unscrupulous police pressure").

Other instances of police suggestion with respect to the offender's identity that is sufficiently overt to meet the researcher's category of perjury may exist, but this is unclear from the descriptions provided in the article. Some descriptions appear to suggest perjury by eyewitnesses, but this may be self-motivated and not state-induced; other descriptions suggest coercive influence by the police on witnesses to make statements, but the witness testimony obtained may have been related to issues other than identification. *See id.* at 120–21 (excerpt describing case of Gross); *id.* at 124 (case of Hauptmann); *id.* at 125 (case of Hicks); *id.* at 126 (case of Hoffman); *id.* at 142–43 (case of Msajcek and Marcinkiewicz); *id.* at 153 (case of Pyle); *id.* at 165 (case of Venegas); *id.* at 168 (case of Wilkinson).

It does appear that instances of police suggestion pertaining to identification were not always assigned to the perjury sub-category, as some case descriptions assigned exclusively to the mistaken eyewitness identification sub-category reflect the presence of such influences. *See, e.g.*, *id.* at 105–06 (excerpt describing case of Clark, C.); *id.* at 126 (case of Hoffner).

Of course, some of the cases classified as good faith mistakes may have included such suggestive features, but could not be detected by the researchers, as they may not have even been noted by the witnesses themselves. *See* United States v. Wade, 388 U.S. 218, 230 (1967).

[65] Bedau & Radelet, *Miscarriages*, *supra* note 48, at 58.

[66] *Id.* at 59.

[67] *See id.* at 128–29 (case of E. Jackson); *id.* at 135 (case of Kirkes); *id.* at 147 (case of Merritt).

[68] If one takes all of the twenty-two cases where pressures on a key witness by the police occurred, and adds them to the fifty-six mistaken identification cases, then 22% of the 350 miscarriages are attributable to mistaken identifications by witnesses, either in good faith, or with police coaching. As noted above, that figure may be underestimating the total. Categorization is difficult, as so many erroneous convictions will be brought about by more than one cause. *See* Rattner, *supra* note 42, at 285–86.

[69] Bedau & Radelet, *Miscarriages*, *supra* note 48, at 61 n.184 (quoting Huff et al., *supra* note 44, at 524). The Borchard study, for instance, attributed 45% of the erroneous convictions to mistaken eyewitness identification. *Id.* Another later article by Professor Rattner attributed 52% of erroneous convictions to mistaken identifications. *See* Rattner, *supra* note 42, at 289; *infra* notes 67–70 and accompanying text.

[70] Bedau & Radelet, *Miscarriages*, *supra* note 48, at 61 n.184.

[71] *Id.*

[72] *Id.*; *see also* Gross, *supra* note 34, at 137. Professor Gross relates that among the nonmurder cases in Rattner's sample, more than 80% of the errors may have been due to misidentifications. *Id.* He suggests:

> [T]he main reason for this difference is the absence of a live victim in most homicides. Victims provide crucial identification evidence in most robberies and rapes, and so they make most of the mistakes, when mistakes are made. In the absence of a victim, the police may have no eyewitness evidence, and therefore no room for eyewitness error.

Id.

[73] Bedau & Radelet, *Miscarriages*, *supra* note 48, at 61 n.184.

[74] Rattner, *supra* note 42, at 289.

[75] *Id.* at 289–90.

[76] *Id.* at 291, tbl.6.

[77] *Id.* at 289.

[78] United States v. Wade, 388 U.S. 218, 235 (1967).

[79] *Id.* (quoting Glanville Williams & H.A. Hammelmann, *Identification Parades, Part I*, CRIM. L. REV. 479, 483 (1963).

[80] Gross, *supra* note 34, at n.56.

[81] *Id.* at 137.

[82] *Id.*

[83] *Id.*

[84] *Id.* at 134–35 ("Homicides are different. . . . [T]here is much more pressure to solve these cases than non-homicidal crimes. The relatives of the victim care more, the prosecutor cares more, the public is much more likely to be concerned, and the police themselves care more.").

[85] *Id.* at 135. In another article, Professor Gross stresses that police may be particularly prone to such practices to obtain an identification, because "the availability of an eyewitness, any eyewitness, is one of the more valuable plea-bargaining chips a prosecutor can possess." Gross, *supra* note 40, at 437 ("If the authorities add a single eyewitness identification to their case, even one obtained under suggestive circumstances, the defendant could be prosecuted and might well be convicted despite the limited value of the eyewitness testimony itself."). Because "eyewitness testimony can make it possible for a prosecutor to get a conviction with unreliable evidence that she could not have gotten with inadmissible evidence," *id.*, the incentives to engage in impermissible behavior are strong, and therefore the risk of miscarriage, already greater in capital cases, is intensified in the context of identification practices. Gross, *supra* note 34, at 132.

[86] Gross, *supra* note 34, at 137. Gross states:

> [K]illers must be pursued, and, in the absence of eyewitness evidence, the police are forced to rely on evidence from other sources: accomplices, jail-house snitches and other underworld figures; and confessions from the defendants themselves. Not surprisingly, perjury by a prosecution witness is the most common type of evidence that produces erroneous capital convictions, and coerced or otherwise false confessions are the third most common cause.

Id.

[87] Professor Liebman focuses further attention on the great risk to both reliability and efficiency when the system operates to give incentives to prosecutors and judges to go to the margins or periphery of what the evidence and the law would allow in potentially capital cases. Liebman, *supra* note 13, at 321, 325. The pressures on the police are not relieved or cured by these later actors then, but may instead be intensified, as everyone is "under the gun" under the present system. So no one may be inclined, or even if so, no one may have the power to question whether the gun is directed at an innocent person. As Zimring and Hawkins suggested, to the extent it functions, the system may be seen as a "game of chicken" where each actor would prefer that someone else stop the execution. FRANKLIN E. ZIMRING & GORDON HAWKINS, CAPITAL PUNISHMENT AND THE AMERICAN AGENDA, 99–100 (1986); *see also* Margery Koosed, *Some Perspectives on the Possible Impact of Diminished Federal Review of Ohio Death Sentences*, 19 CAP. U. L. REV. 695, 764–74 (1990) [hereinafter Koosed, *Some Perspectives*] (describing the "rules of the game" and the "passing of the buck" among state actors in Ohio). It makes sense to think creatively about ways to reduce these pressures and replace the present incentive structure with one with quality controls, designed for more accurate and efficient decision-making.

Professor Liebman's suggestions to delay the decision to proceed capitally—to postpone the game until more information and less emotionalism exist—and to name names of bad actors are proposals worthy of attention. *See* Liebman, *supra* note 13, at 333–34 & nn.80, 86. As is developed in this article and in another by this author, another way to relieve these pressures may be for the legislature to adopt additional exclusion-of-death criteria. *See* Margery Koosed, *Averting Mistaken Executions by Adopting the Model Penal Code Exclusion of Death in the Presence of Lingering Doubt*, 21 N. ILL. L. REV. 41 (2001) [hereinafter Koosed, *Averting Mistaken Executions*].

Presently, death is often excluded based on the defendant's status as a minor, or in many states, the defendant's mental retardation. Legislation barring executions where the evidence does not foreclose all doubt about guilt, such as that provided for in the Model Penal Code § 210.6, can impose an independent, non-deferential, review responsibility on each decision maker, from prosecutor to juror to judge and appellate judge. One can hope that given this duty, some one or more of these actors will find the basis in law, and thereby, the courage, to stop the game, take responsibility, and prevent an execution of an innocent. A similar responsibility is placed on the prosecutor, trial judge, and reviewing judges by the proposal made here.

[88] Gross, *supra* note 34, at 132 ("[C]apital cases are heavily over-represented among known miscarriages of justice—five-to-one or ten-to-one or 100-to-1 or more, depending on which comparison seems most telling.").

[89] RADELET ET AL., IN SPITE OF INNOCENCE, *supra* note 48, at 17.

[90] *Id.* at 18.

[91] Some cases presented more than just "witness errors." As Bedau and Radelet recognized, a single case may present multiple forms of injustice, and be categorized in more than one cause of erroneous conviction. Bedau & Radelet, *Miscarriages*, *supra* note 48, at 57, tbl.6 (many cases counted more than once for purposes of noting the cause of erroneous conviction).

As in the 1987 article, the authors list each case alphabetically in an Appendix, here termed "Inventory of Cases." The twenty-one cases of mistaken identification this author identified for the purposes of this article are the following: Clarence Brandley, Robert Brown (and another), Willie Brown (and another), Harry Cashin, Matthew Connor, Frank Davino, George Emmett (with six others), Lock Foster (with four others), Freddie Lee Gaines, Charles Ray Giddens, Russell Leon Gray, Gordon Hall, Timothy Hennis, William Jent, James Landono, Lloyd Lindsey, Guy Gordon Marsh, Santiago Morales, Derrick Robinson, Bradley Scott, Scotty Scott, and Damaso Vega.

[92] These are the cases of Clarence Brandley, Guy Gordon Marsh, and Santiago Morales.

[93] These are Randall Dale Adams, Melvin Todd Beamon, Willie Brown, Perry Cobn, Frank Davino, Henry Drake, Ayliff Draper, Jack Favor, Francis Featherstone, Samuel Greason, Phyllis Hall, Loren Hamby, Christina Hill, James Landano, Thomas Mooney, Clarence Norris, James Richardson, and David Wilson. (Several of these were multi-defendant cases.)

[94] This category under witness errors—unreliable or erroneous prosecution testimony—is less distinct, as there are likely to be overlaps with each of the categories above and also with some of the other categories noted in the 1987 study. *See* Bedau & Radelet, *Miscarriages*, *supra* note 48, at 57, tbl.6. Still, the following appear as possible fits: Willie Brown, C.D. Cooper, Lloyd Lindsey, Steven Linscott, Max Ludkowitz, Anthony Peek, Juan Ramos, and Charles Smith.

[95] Radelet et al., *supra* note 38.

[96] *See* The Death Penalty Information Center, *Innocence and the Death Penalty*, *at* http://www.deathpenaltyinfo.org/innoc.html.

[97] These are: Michael Thomas Blazak, Radelet et al., *supra* note 38, at 925–26 (witness perjury); Kirk Bloodworth, *id.* at 926 (misidentification); Dale Johnston, *id.* at 945 (inconsistent and unreliable witness accounts); Joseph Burrows, *id.* at 931 (one witness coerced by prosecutors and police); Sabrina Butler, *id.* at 931 (forensic witness did not do thorough autopsy); Patrick Croy, *id.* at 933–34 (witness wrongly reported defendant was attempting to rob the store); Robert Charles Cruz, *id.* at 934–35 (witness perjury); Rolando Cruz and Alejandro Herndandez, *id.* at 935–36 (witness perjury); Muneer Deeb, *id.* at 936 (witness unreliability or perjury); Federico Macias, *id.* at 948–49 (unreliable or perjured jailhouse informant testimony); Walter McMillan, Radelet et al., *supra* note 31, at 949–50 (witness perjury); Adolph Honel Munson, *id.* at 951 (witness perjury); Gary Nelson, *id.* at 952 (unreliable witness testimony); Sonia Jacobs, *id.* at 941 (witness perjury and other unreliable testimony); James Robison, *id.* at 956–57 (unreliable or perjured witness testimony); Jay C. Smith, *id.* at 959–60 (unreliable or perjurious witness); Gregory Wilhoit, *id.* at 962 (unreliable expert testimony); Michael Graham and Albert Burrell, Death Penalty Information Center, *Cases of Innocence at* http://www.deathpenaltyinfo.org/innoccases.html (last visited Sept. 26, 2001) (witness discredited and DNA confirmed error); Joseph Nahume Green , *id.* (eyewitness testimony was inconsistent and contradictory and possibly incompetent); Ricardo Guerra, *id.* (police misconduct in gathering and presenting evidence); Curtis Kyles, *id.* (unreliable or perjurious witness); Peter Limone, *id.* (witness fabricated testimony); Steve Manning, *id.* (witness perjury); Joacquin Martinez, *id.* (witness perjury or unreliability); Anthony Porter, *id.* (police pressured witness); Alfred Rivera, *id.* (witness perjury); Frank Lee Smith, *id.* (chief eyewitness recanted, DNA confirmed witness error).

[98] United States v. Wade, 388 U.S. 218 (1967); Gilbert v. California, 388 U.S. 263 (1967); Stovall v. Denno, 388 U.S. 293 (1967).

[99] *See* Bedau & Radelet, *Miscarriages*, *supra* note 48, at 177–79, app. B (listing cases by year and noting type of error).

[100] *Id.*

[101] *See supra* notes 64, 66, and 67. Cases identified among the perjury cases occurring since 1967 that may fit this mold include that of four defendants. *See* Bedau and Radelet, *Miscarriages*, *supra* note 48, at 118, 178 (app. B) (case of Gladish and three others). Other more ambiguous cases listed among the perjury category also arose since 1967. *See id.* at 125 (excerpt describing case of Hicks); *id.* at 165 (case of Venegas); *id.* at 169 (case of Wilkinson). Two of the possible unreliable witness cases arose since 1967. *See id.* at 128–29 (case of E. Jackson); *id.* at 147 (case of Merrit).

[102] In a 1987 article, Professor Gross relates that his "data seem to show a clear historical trend" toward use of lineups after *Wade*, which he suggests may be due to more general awareness about the dangers of eyewitness identifications, and more sensitivity to the problem as a result of the Court's decision(s). Gross, *supra* note 40, at 428. He examined 136 cases of undisputed misidentifications, by strangers, of people accused of crimes that were committed on or after 1900. *Id.* at 412. His study was not limited to potentially capital crimes, as was the Bedau-Radelet inquiry, and did not describe how many were capitally charged. But it may be assumed that some of the twenty-four homicide cases, and of the twenty-seven rape cases, were capitally charged. *See id.* at 413 (sorting group by offenses). It is an encouraging trend, but it is not sufficient to assuage concerns about the risk of misidentification. *See id.* at 449.

[103] *See supra* note 84.

[104] Of the cases listed in note 84 *supra*, three were pre-*Wade* cases: Harry Cashin, Frank Davino, and Lock Foster.

[105] There were, according to this author's calculation, sixteen pre-*Wade* new cases added in the 1992 book. As an aside, while the researcher's introduction relates that "sixty-six more cases have been added to the list," RADELET ET AL., IN SPITE OF INNOCENCE, *supra* note 48, at x, this author's cross-referencing of cases and persons named in the 1987 article and those named in the book yielded a list of fifty-seven new cases (as opposed to persons).

[106] United States v. Wade, 388 U.S. 218, 228 (1967) (quoting FELIX FRANKFURTER, THE CASE OF SACCO AND VANZETTI 30 (1927)).

[107] There were twenty-one cases in the 1987 study that were post-*Wade* perjury cases. *See* Bedau & Radelet, *Miscarriages*, *supra* note 48, at 177–79 (app. B). According to the author's review, there are eleven post-*Wade* perjury cases among the eighteen perjury cases found in the 1992 study.

[108] *See supra* note 97.

[109] *See*, *e.g.*, JANE CAMPBELL MORIARTY, PSYCHOLOGICAL AND SCIENTIFIC EVIDENCE IN CRIMINAL TRIALS, 13–62 to 13–68 (West 2001); Edith Greene, *Eyewitness Testimony and the Use of Cautionary Instructions*, 8 U. BRIDGEPORT L. REV. 15 (1987); Roger B. Handberg, *Expert Testimony on Eyewitness Identification: A New Pair of Glasses for the Jury*, 32 AMER. CRIM. L. REV. 1013 (1995); Elizabeth Loftus & Norman G. Schneider, *Behold With Strange Surprise: Judicial Reactions to Expert Testimony Concerning Eyewitness Reliability*, 56 UMKC L. REV. 1 (1987).

[110] 388 U.S. 218 (1967). Justice Brennan wrote the opinion for a bare majority of the Court. Justice Black wrote separately to explain his

joining the Court in granting relief in the companion case of *Gilbert v. California*, 388 U.S. 263 (1967), decided the same day. Justice White wrote for the dissenters (Justice Harlan and Justice Stewart).

[111] *Wade*, 388 U.S. at 228.

[112] *Id.* at 229.

[113] *Id.* at 232.

[114] *Id.* at 230–31.

[115] *Id.* at 235.

[116] United States v. Wade, 388 U.S. 218, 236–37 (1967).

[117] *Id.* at 235.

[118] *Id.*

[119] 384 U.S. 436 (1966).

[120] *Wade*, 388 U.S. at 239 (quoting *Miranda*, 384 U.S. at 467). The dissenters critiqued the majority in part for not "simply fashion[ing] what it deems to be constitutionally acceptable procedures for the authorities to follow," rather than devising a right to counsel. *Id.* at 254 (White, J., dissenting). They agreed "the Court is correct in suggesting that the new rule will be wholly inapplicable where police departments themselves have established suitable safeguards," but stopped short of acknowledging there is a problem that the police should attend to. *Id.* at 254. The dissent viewed the majority as "assuming that a great majority of the country's police departments are following improper practices" when it did not "have before it any reliable, comprehensive survey of current police practices on which to base its new rule." *Id.* at 252. The dissenters found themselves "unable to share the Court's view of the willingness of the police and the ordinary citizen-witness to dissemble, either with respect to the identification of the defendant or with respect to the circumstances surrounding a pretrial identification." *Id.* at 253.

[121] Gilbert v. California, 388 U.S. 263, 265 (1967).

[122] United States v. Wade, 388 U.S. 218, 239 (1967). The two witnesses, who made their identification together, had both observed Wade in the hallway outside the courtroom in the custody or within sight of federal agents. *Id.* at 233–34.

[123] *Id.* at 220–21.

[124] *Gilbert*, 388 U.S. at 271.

[125] *Id.*

[126] *Id.* at 272–73 (quoting Wong Sun v. United States, 371 U.S. 471, 488 (1963)). *Gilbert* was a 6–3 decision on this point, while *Wade* was a 5–4 decision. Justice Black joined the Court in excluding the out-of-court identification in *Gilbert*, but joined the dissenters with respect to the Court's crafting of an exclusionary rule affecting the in-court identification. *Id.* at 281 (Black, J., dissenting).

[127] *Id.* at 273.

[128] *Id.* at 273–74. Justice Black said he too would have reversed if the government had used a "lineup identification either in place of courtroom identification or to bolster in a harmful manner crucial courtroom identification." *Wade*, 388 U.S. at 247 (Black, J., dissenting).

[129] 386 U.S. 18, 23 (1967).

[130] *Wade*, 388 U.S. at 240.

[131] *Id.*

[132] *Id.* at 124.

> Application of this test in the present context requires consideration of various factors; for example, the 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 the 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.

[133] *See* Kirby v. Illinois, 406 U.S. 682, 690–91 (1972). For critique and discussion of this decision, see generally, Joseph Grano et al., *Do Any Constitutional Safeguards Remain Against the Danger of Convicting the Innocent?*, 72 MICH. L. REV. 717, 785 (1974), and Jerold H. Israel, *Criminal Procedure, the Burger Court and the Legacy of the Warren Court*, 75 MICH. L. REV. 1320 (1977).

[134] United States v. Ash, 413 U.S. 300, 321 (1973).

[135] *Id.* at 316.

[136] *Id.* at 320–21.

[137] *Id.* at 326 (Brennan, J., dissenting) (citations omitted).

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

[139] *Id.* at 299. This ruling relied upon *Linkletter v. Walker*, 381 U.S. 618 (1965). Later, in *Griffith v. Kentucky*, 479 U.S. 314 (1987) and *Allen v. Hardy*, 478 U.S. 255 (1986), the Court drew a fairly bright-line between cases arising on direct appeal when the conviction is not yet final

and those arising in collateral attack, with respect to defense access to the benefit of new constitutional rulings. This line was solidified in *Teague v. Lane*, 489 U.S. 288 (1989), foreclosing a habeas petitioner whose conviction is final at the time a new rule is announced from seeking the benefit of the existing new rule, or asking for the creation of one, except in very limited circumstances. The 1996 Anti-Terrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (1996), sections 2254(d)(1), (e)(2) and 2244(b)(2) have now redefined the concept even more narrowly. These sections bar relief unless the state judgment resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court, and further, may foreclose evidentiary hearings and successor petitions unless the claim relied on is a new rule of constitutional law made retroactive to cases on collateral review by the Supreme Court. *See* Tyler v. Cain, 121 S. Ct. 2478 (2001); Williams v. Taylor, 529 U.S. 362, 202–409 (2000).

[140] *Stovall*, 388 U.S. at 299.

[141] *Id.* at 302.

[142] The Court agreed that show-up identification procedures were "widely condemned," but concluded that due to the wife's injuries, "an immediate hospital confrontation was imperative." *Id.* at 302. For a contrary view on the matter of necessity, see the dissenting opinion of Judge Friendly in the lower court's en banc opinion, *Stovall v. Denno*, 355 F.2d 731, 744–45 (2d Cir. 1966) (Friendly, J., dissenting).

[143] This Eighth Amendment and due process principle came later, in *Beck v. Alabama*, 447 U.S. 625, 637–38 (1980), and *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

[144] *See, e.g.*, Brathwaite v. Manson, 527 F.2d 363, 366–71 (2d Cir. 1975).

[145] *Id.* at 370 (quoting Simmons v. United States, 390 U.S. 377, 384 (1968)).

[146] 390 U.S. 377 (1968).

[147] *Id.* at 384.

[148] *See* Manson v. Brathwaite, 432 U.S. 98, 121–22 (1977) (Marshall, J., dissenting).

[149] *Id.*

[150] The Court did exclude evidence of an in-court identification in *Foster v. California*, 394 U.S. 440 (1969). There, the witness had been subjected to repeated displays of the defendant and the likelihood of mistake was found to violate due process.

[151] The dissent in *Wade* tried to criticize the exclusion of the out-of-court identification as too broadly painted because it "matters not how well the witness knows the suspect: whether the witness is the suspect's mother, brother, or long-time associate, and no matter how long or how well the witness observed the perpetrator at the scene of the crime." *Wade*, 388 U.S. at 251 (White, J., dissenting). However, as the majority responded, "the State's inability to bolster the witness' courtroom identification by introduction of the lineup itself will become less significant the more the evidence [there is] of other opportunities of the witness to observe the defendant," and "the value to the State of admission of the lineup is indeed marginal [in these cases], and such identification would be a mere formality." *Id.* at 241 n.33 (citation omitted). Indeed, this slippery-slope may never be realized, for it is doubtful the police would bother to conduct a lineup at all in many of these circumstances.

[152] 409 U.S. 188 (1972).

[153] *Id.* at 200.

[154] *Id.* at 201.

[155] These are: the opportunity to view the culprit at or during the crime; the degree of attention of the witness; the accuracy of the witness' prior description; the witness' level of certainty as to the identification; and the time between the crime and the confrontation. *Id.* at 199.

[156] *Id.* at 199 (citations omitted).

[157] 432 U.S. 98 (1977).

[158] *Id.* at 114.

[159] *Id.* at 116.

[160] *Id.* at 114.

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

[162] *Id.* at 112.

[163] The majority acknowledged that Justice Stevens had observed while on the Court of Appeals: "There is surprising unanimity among scholars in regarding such a rule [the per se approach] as essential to avoid serious risk of miscarriage of justice," and that "well-known federal judges have taken the position that 'evidence of, or derived from, a showup identification should be inadmissible unless the prosecutor can justify his failure to use a more reliable identification procedure.'" *Id.* at 111 (quoting United States *ex rel*. Kirby v. Sturges, 510 F.2d 397, 405–06 (7th Cir. 1975).

[164] *Id.* at 111 (citations omitted).

[165] *Id.* at 120 (Marshall, J., dissenting).

[166] This dispute is a familiar one, between those espousing a crime control model that looks at constitutional guarantees simply as a means of reducing the chance that innocent persons will be convicted, and a due process model that functions to ensure that convictions (even of the guilty) are obtained only through fair procedures. *See* Herbert L. Packer, *The Courts, the Police, and the Rest of Us*, 57 J. CRIM. L.C. & P.S. 238, 239 (1966); *see also* Strickland v. Washington, 466 U.S. 668, 711, 716–17 (1984) (Marshall, J., dissenting). There, Justice Marshall urged that counsel's failure to reasonably perform constituted a Sixth Amendment violation in itself, requiring reversal. In that context, lower courts had been willing to

find a violation but then sought to determine if the error could be proven harmless beyond a reasonable doubt. *See* United States v. Decoster (Decoster III), 624 F.2d 196 (D.C. Cir. 1976) (en banc) (Bazelon, J.). The dispute in *Manson* is typical of the conflict between the Warren and the Burger Courts over remedies. The Burger Court tried its best to displace the individual rights analysis that considered societal costs only in the remedy inquiry (by means of the harmless error doctrine), with one using a cost-benefit analysis to define the right itself and then attaching a remedy. In that way, the Burger Court no longer thought about rights and remedies as separate concepts. The two were so interwoven that a legal right may amount to no more than the conditional availability of remedies for violation of the right. *See, e.g.*, Stephen Schulhofer, *The Constitution and the Police: Individual Rights and Law Enforcement*, 66 WASH. U. L.Q. 11, 18 (1988) (critiquing the Burger Court for deviating from its job as a court to find law and ascertain the rights of the individual, and instead choosing to "balance costs and benefits like a legislature or even a construction engineer"); Tracy Thomas, *Congress' Section 5 Power and Remedial* Rights, 34 U.C. DAVIS L. REV. 673, 687–695 (2001) (describing unified right theory). The question of the appropriate division of responsibility between the courts and Congress with respect to the crafting of remedies has drawn the thoughtful attention of late, from commentators and the Court. *See* Dickerson v. United States, 530 U.S. 428 (2000) (concluding that Congressional legislation purporting to overrule *Miranda* was unconstitutional); Tracy Thomas, *supra* at 673 (2001). In crafting remedies, as Professor Schulhofer observed, the Burger Court got away with being activist because the government won. Schulhofer, *supra* at 18. The Court routinely found the costs of the exclusionary rule obvious and the benefits abstract and speculative. *Id.*

[167] *Manson*, 432 U.S. at 127 (Marshall, J., dissenting).

[168] *See* Stone v. Powell, 428 U.S. 465, 494 (1976) (where the Court ruled that Fourth Amendment exclusionary rule claims were not cognizable in habeas corpus where the state had provided an opportunity for a full and fair hearing, in part because the rule often frees the guilty by its exclusion of typically reliable evidence, and any additional incremental deterrent benefit did not outweigh the "costs to other values vital to a rational system of criminal justice").

[169] *Manson*, 432 U.S. at 113.

[170] *Id.* at 127 (Marshall, J., dissenting) (citations omitted).

[171] *Id.* at 117–18 (Stevens, J., concurring) (citation omitted).

[172] *See* Gross, *supra* note 40, at 441; *see also* Randolph N. Jonakait, *Reliable Identification: Could the Supreme Court Tell in* Manson v. Brathwaite*?*, 52 U. COLO. L. REV. 511, 515 n.15 (1981).

[173] Steven P. Grossman, *Suggestive Identifications: The Supreme Court's Due Process Test Fails to Meet Its Own Criteria*, 11 U. BALT. L. REV. 53, 59–60 (1981).

[174] Gross, *supra* note 40, at 403; *see also id.* at 403 n.41.

[175] Title II of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 3502 (1968).

[176] *See* Carl McGowan, *Constitutional Interpretation and Criminal Identification*, 12 WM. & MARY L. REV. 235, 249–50 (1970) (statute has been viewed as meaningless to lower courts).

[177] 530 U.S. 428 (2000).

[178] Commonwealth v. Andrews, 694 N.E.2d 329 (Mass. 1998).

[179] *Id.* at 333 n.2.

[180] *Id.* at 333. In *Andrews*, the court found no impermissible suggestiveness in the officer's inquiry of a witness who had initially described the shooter as Hispanic, and then indicated that the shooter might have been a light-skinned black man only after the police detective had asked whether this was a possibility. The court stated the trial court "was warranted in concluding that [the witness] had not been coached," and that there was no per se rule or impermissible suggestiveness on the facts of this case in asking that question. The trial judge had concluded the "detective was . . . simply trying to get a better description in preparation for the police investigation of the shooting." *Id.* The reviewing court found "[t]here is nothing in the record to indicate that the police had already identified the defendant (or anyone else) as a suspect at the time of the . . . interview . . . or that the police had any other motive to coach him." *Id.*

[181] *Id.* at 332.

[182] *Id.* at 332–33.

[183] *See* United States v. Jacobsen, 466 U.S. 109, 119–120 (1984) ("the agent's viewing of what a private party had freely made available for his inspection did not violate the Fourth Amendment"); Burdeau v. McDowell, 256 U.S. 465, 475 (1921) (exclusionary rule is "a restraint upon the activities of sovereign authority, and . . . not . . . a limitation upon other than governmental agencies").

[184] *See* Florida v. Bostick, 501 U.S. 429, 437 (1991) (bus-rider Bostick's freedom of movement was restricted by a factor independent of police conduct, and "the crucial test is whether, taking into account all of the circumstances surrounding the encounter, the police conduct would 'have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business'").

[185] Colorado v. Connelly, 479 U.S. 157, 164–65 (1986). ("The difficulty with the approach of the Supreme Court of Colorado is that it fails to recognize the essential link between coercive activity of the State, on the one hand, and a resulting confession by a defendant, on the other.")

[186] *See* Comment, *Police Bulletins and Private Searches*, 119 U. PA. L. REV. 163, 170 (1970) (arguing that if an individual acts in response to a police notification, bulletin, or request, this "warrants a finding of police agency when the activity would not have occurred but for the bulletin and could reasonably have been expected by the police").

[187] For a sampling of cases in this vein, see Lynn M. Talutis, Annotation, *Admissibility of In-Court Identification as Affected by Pretrial Encounter that was not the Result of Action by the Police, Prosecutors and the Like*, 86 A.L.R. 5th 463 (2001).

[188] Gross, *supra* note 40, at 435.

[189] *Id.* at 436–37.

[190] New Mexico v. Jacobs, 10 P.3d 127 (N.M. 2000).

[191] *Id.* at 138.

[192] *Id.*

[193] *Id.* at 139.

[194] Raheem v. Kelly, 257 F.3d 122, 130 (2d Cir. 2001).

[195] *Id.*

[196] *Id.*

[197] *Id.*

[198] *Id.* The court cited *Thigpen v. Cory*, 804 F.2d 893, 895–96 (6th Cir. 1986); *Green v. Loggins*, 614 F.2d 219, 222 (9th Cir. 1980); and *Manson v. Brathwaite*, 432 U.S. 98, 112–14 (1977) ("question of whether the police procedures constituted misconduct is not determinative of whether an identification was suggestive").

[199] *Id.* (citing Green v. Loggins, 614 F.2d at 222, and Israel v. Odom, 521 F.2d 1370, 1374 n.7 (7th Cir. 1975)).

[200] *See* Kuhlmann v. Wilson, 477 U.S. 436, 459 (1986) ("the Sixth Amendment is not violated whenever—by luck or happenstance—the state obtains incriminating statements . . . after the right to counsel has attached . . . . [T]he defendant must demonstrate that police and their informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks"); United States v. Jacobsen, 466 U.S. 109, 119 (1984); United States v. Henry, 447 U.S. 264 (1980) (violation of right to counsel where officers intentionally created a situation likely to induce Henry to make incriminating statements); Burdeau v. McDowell, 256 U.S. 465, 475 (1921).

[201] *See* Gross, *supra* note 40, at 436–37.

[202] *See* Colorado v. Connelly, 479 U.S. 157, 167 (1986). Here, the Court declined to consider the confessing defendant's mental illness as relevant to admission of the confession where this was "quite divorced from any coercion brought to bear on the defendant by the state. We think the Constitution rightly leaves this sort of inquiry to be resolved by state laws governing the admission of evidence and erects no standard of its own in this area." *Id.*

[203] *See, e.g.*, Kubat v. Thieret, 867 F.2d 351, 357 (7th Cir. 1989); New Jersey v. Cook, 750 A.2d 91, 102 (N.J. 2000).

[204] Louisiana v. Williams, No. 00-KA-1850, 2001 WL 360142 (La. Ct. App. Apr. 11, 2001) (burden on defendant to prove substantial likelihood of misidentification).

[205] Illinois v. Brooks, 718 N.E.2d 88, 108 (Ill. 1999) (State must show by clear and convincing evidence that the "witness is identifying the defendant based on his or her independent recollection of the incident").

[206] When procedural safeguards are sought, the Court, legislatures, and rule-makers have traditionally considered three factors: the private interest that will be affected by the action of the state, the governmental interest that will be affected if the safeguard is to be provided, and the probable value of the additional procedural safeguard and the risk of an erroneous deprivation of the affected interest if the safeguard is not provided. *See* Ake v. Oklahoma, 470 U.S. 68, 77 (1985).

[207] There, exclusion is required unless the prosecution proves by a preponderance of the evidence that the violation was not gross, willful, and prejudicial to the accused, or that the violation did not create a substantial risk of an unreliable identification. MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 160.7 (Proposed Official Draft 1975).

[208] Pennington v. Oklahoma, 913 P.2d 1356, 1365–66 (Ct. Crim. App. Okla. 1995) (court finds the accuracy of prior description factor in *Neil* is satisfied by another witness' identification, and the fact that there was other evidence generally supporting that he was the one).

[209] *Manson*, 432 U.S. at 108–09.

[210] Gross, *supra* note 40, at 401–02 & nn. 26–27.

[211] Buggs v. Mississippi, 754 So. 2d 569, 574 (Miss. Ct. App. 2000). The court also did a group-think on the issue of the witness' level of certainty factor, simply stating "upon viewing the photographic display, three witnesses identified Smith." *Id.* at 575. There are several problems with this. First, the fact that the witness identified him is a given, and gives no indication of its reliability. Second, there are already problems with this factor as empirical evidence demonstrates the level of certainty does not correlate to reliability. *See, e.g.*, Gary L. Wells & Donna M. Murray, *Eyewitness Confidence*, in EYEWITNESS TESTIMONY 155–70 (Gary L. Wells & Elizabeth F. Loftus eds., Cambridge Univ. Press, 1984); Gary L. Wells & Donna M. Murray, *What Can Psychology Say About the* Neil v. Biggers *Criteria for Judging Eyewitness Accuracy?*, 68 J. APPLIED PSYCH. 347 (1983). Third, the unreliability is compounded when one trades one witness' level of certainty for another to decide whether any of their testimony will be admitted. Studies have shown that "two eyewitnesses may not be better than one" even in the average identification procedures. *See* Gross, *supra* note 40, at 419 (60% of the innocent suspects were misidentified by more than one eyewitness). When suggestive procedures were used, the risk of error was obviously magnified. As Professor Gross pointed out, "police, prosecutors, and jurors are insufficiently aware of that fact and may place undue confidence in the testimony of multiple eyewitnesses." *Id.*

[212] It is appropriate to do an individual exclusionary analysis with respect to witnesses who were not subjected to unnecessarily suggestive identification procedures, where others were, to achieve reliability. As the district court stated recently in *Gregory-Bey v. Hanks* when doing this, "the jury heard all four of the identifications. One can reasonably assume that the cumulative effect of the four identifications added to their weight." No. IP 94-903-CH/G, 2000 WL 1909642, at *18 (S.D. Ind. Nov. 29, 2000).

[213] In *Raheem v. Kelly*, the lower court had relied on the defendant's confession which was inadmissible under state law, his failure to raise an alibi or any defense, the fact that he was convicted of another murder and so was assumed to have a propensity to kill, and his possession of a black leather coat, which was described by the witnesses as having been worn by the assailant. 257 F.3d 122, 132 (2d Cir. 2001). The Second Circuit found this error:

> Reliability, in the identification context, means essentially that the witness's recollection was '[un]distorted,' *Manson*, 432 U.S. at 112, and proper inquiry seeks to fathom whether the witness's identification is worthy of reliance, that is, whether it provides a foundation on which the factfinder can reasonably depend. This inquiry differs from the inquiry into the trustworthiness of the verdict. For example, even where there was irrefutable evidence of the defendant's guilt, if an identification were made by a witness who, it transpired, was not even present at the event, we could hardly term the identification reliable.

Id. at 140.

[214] *Id.* The court stated:

> We read *Manson v. Brathwaite* as consistent with our view. In that case, the Supreme Court applied the *Neil v. Biggers* factors in determining that the identification at issue was reliable, and it then referred to trial evidence that was corroborative of guilt, noting, for example, the frequent presence of the defendant at the site of the illegal activity; but the Court stated that that evidence "plays no part in our analysis" of the identification's reliability.

Id.

This observation in the majority opinion was further emphasized in Justice Stevens' concurrence: "[I]n evaluating the admissibility of particular identification testimony it is sometimes difficult to put other evidence of guilt entirely to one side . . . Mr. Justice Blackmun's opinion for the Court carefully avoids this pitfall and correctly relies only on appropriate indicia of the reliability of the identification itself." *Id.* at 140 (quoting *Manson*, 432 U.S. at 118 (Stevens, J., concurring)) (The Second Circuit acknowledged that a conflict exists among the circuits on this point.)

This approach in *Manson* differs from the manner in which the Court determines whether a petitioner for habeas corpus relief who has procedurally defaulted a claim may argue that the merits should be addressed because to do otherwise would be a fundamental miscarriage of justice as he is actually innocent. *See* Schlup v. Delo, 513 U.S. 298, 327–28 (1995). The court stated:

> In assessing the adequacy of petitioner's showing, therefore, the district court is not bound by the rules of admissibility that would govern at trial. Instead, the emphasis on "actual innocence" allows the reviewing tribunal also to consider the probative force of relevant evidence that was either excluded or unavailable at trial.

Id.

[215] *See, e.g.*, Buggs v. Mississippi, 754 So. 2d 569 (Miss. Ct. App. 2000) (the defendant's picture was included twice in photo displays and was only one of two with a Dallas Cowboys jacket on, an item of clothing described to the police by the victims); Illinois v. Brooks, 718 N.E.2d 88, 95, 109 (Ill. 1999) (In a capital case where defendant had been identified by another witness, the police proceeded to show a second witness photos and "kept flipping through the pictures and stopping at defendant's picture while saying 'This is the person. Isn't this him?'"; witness knew the defendant but did not know if the defendant was involved in the shooting; police did not emphasize any other pictures; another witness was told before the photo identification was conducted, "We already know who shot you[,] Little Terrence shot you" and also that another was involved in the crime; and the witness knew both persons by those names.); United States v. Smith, 156 F.3d 1046, 1050 (10th Cir. 1998) (police were unduly suggestive in telling witnesses to assume their suspect was in the photo array, and then implying they had picked the "correct" photo); Cossel v. Miller, 229 F.3d 649, 655–56 (7th Cir. 2000) (court granted habeas relief due to suggestive identification where the state conceded the single photo "show-up" and later line up were unduly suggestive; the victim knew the man whose photo had been emphasized by name, knew her husband and detective suspected him of rape and also knew he would be in the line up); Gregory-Bey v. Hanks, No. IP94-903-CH/G, 2000 WL 1909642, at *17 (S.D. Ind. Nov. 29, 2000) (prosecution team's conferences with the three witnesses who failed to identify Gregory-Bey at the line up after they had identified his photo certainly raised an eyebrow and were found suggestive); Raheem v. Kelly, No. 00-2304, 2001 WL 792040 (2d Cir. July 13, 2001) (defendant was the only person in the lineup wearing a black leather coat, and such was described by witnesses as apparel worn by the assailant); *see also* Kimble v. Arkansas, 959 S.W.2d 43, 43–44 (Ark. 1998) (witness was shown the same photo array twice, with only the defendant substituted in it the second time; where the police had had two separate suspects for a single offender robbery and shooting; trial court agreed one could very seriously argue the second photo lineup was suggestive; appellate court finds it not impermissibly so); Missouri v. Middleton, 995 S.W.2d 443 (Mo. 1999) (court assumes suggestiveness without deciding the question, where the prosecutor had asked the witness to step into the hall of the courthouse where Middleton's preliminary hearing was going on to see if he could identify the man who had purchased ammunition from him on the day of the murder; there were ten to fifteen people in hallway and the witness identified no one until the defendant, in handcuffs, walked into the hallway; witness did not recall if he made the observation/identification before he saw the handcuffs).

[216] Gary L. Wells et al., *supra* note 5, at 603.

[217] *Id.* at 605. This built on the National Institute of Justice Report by Edward Connors, et al., *supra* note 33 (adding 12 further exoneration cases). *See* Wells et al., *supra* note 5, at 606–08 (chart summarizing case studies).

[218] Wells et al., *supra* note 5, at 605.

[219] *Id.*

[220] The authors describe how later cases dramatically changed the level of analysis by which courts should evaluate identification evidence, and how the five *Neil* criteria have been criticized by eyewitness researchers on a number of grounds. *See id.* at 608.

[221] *Id.*

[222] *Id.* at 609.

[223] *Id.* at 627–29. In other words, a double-blind identification procedure should be used. By this means, the lineup administrator could not reveal any facts about the matter, and confirmation bias can be avoided. *Id.*

[224] *Id.* at 629–30. By this means, the witness is encouraged to not merely make relative judgments about whom in the group best matches their memory of the assailant, a factor that frequently leads to misidentification in culprit-absent identification procedures. *Id.*

[225] *Id.* at 630–32. Show-ups would be precluded because show-ups are more likely to yield false identifications. *Id.* at 631. One set of researchers had earlier related that its study "provide[d] no evidence that one-person show-ups are more suggestive than full lineups," and instead suggested that "lineups may provide less protection against misidentification and showups less danger of misidentification than is commonly believed." Richard Gonzales et al., *Response Biases in Lineups and Showups*, 64 J. PERSONALITY & SOC. PSYCHOL. 525, 536 (1993). These authors observed that "lineups call for comparative or relative strategies because the witness selects from several alternatives," and "show-ups elicit absolute strategies because the witness must decide if the suspect is or is not the perpetrator." *Id.* at 527. That study found that "the bias to respond yes when faced with a lineup leads to a high false-alarm rate" and suggested sequential lineups as "one solution to the biases stemming from the comparative nature of lineup judgments." *Id.* at 529, 534. The AP/LS acknowledges this "one suggestion in the psychological literature that show-ups might be superior to lineups because show-ups do not prompt relative judgments," but dismisses it because "there is clear evidence that show-ups are more likely to yield false identifications than are properly constructed lineups." Wells et al., *supra* note 5, at 630–31. The AP/LS has "grave concerns about the use of show-ups." *Id.* The AP/LS concurs in the view that sequential lineups (where an eyewitness views only one lineup member at a time and makes a decision before viewing another) are superior to standard lineup practices, but stops short of including this as a present recommendation. *Id.* at 639–40. The AP/LS cited the sequential practice's deviation from current practices and the need to assure that the other four recommendations existed concurrently with a sequential lineup to assure reliability of the information obtained, as among the factors prompting a deferral of this recommendation. *Id.* at 639–40. The body also points out the severe problems with the criteria the Court uses for deciding whether there is substantial likelihood of misidentification. *Id.* at 631. The body commends use of a fit-description criteria to determine who is placed in the identification procedure, as it preserves sufficient variability across lineup members, but does not make an innocent person stand out in the lineup. *Id.* at 632. There are some refinements to this rule, when a misfit exists between the suspect and the description, or when unique nondescribed features, of the suspect are present or when there are common nondescribed features of the suspect, unique descriptions, or multiple eyewitnesses. *Id.* at 633–35.

[226] Wells et al., *supra* note 5, at 635–36. This is designed to prevent confidence inflation on the part of the witness between the time of the identification and the time of trial from playing a role in the jury's assessment of the witness' testimony. A clean record of the witness' confidence at the time of the identification will be available for the jury. *Id.* at 636.

[227] *Id.* at 636–37.

[228] *Id.* at 638.

[229] U.S. DEP'T OF JUSTICE, EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT *at* www.ncjrs.org/txtfiles1/nij/178240.txt.

[230] Donald P. Judges, *Two Cheers for the Department of Justice's Eyewitness Evidence: A Guide for Law Enforcement*, 53 ARK. L. REV. 231 (2000).

[231] *Id.* at 283, 297. A thoughtful reflection on both the good and the bad in the report is available in highly readable form in this article. In general, though the DOJ guide recommends that non-suggestive procedures be used, it would simply minimize the use of show-ups. *Id.* at 275–76. While strong on preventing instruction bias, it is more perfunctory and incomplete with respect to composition of the lineups as to foils. *Id.* at 279. Perhaps most importantly, it refrains from requiring double-blind administration. *Id.* at 282. In this and other respects, the AP/LS report is a superior model for reform. But it, too, had declined certain recommendations, such as videotaping identification procedures (due to expense and implementation), and sequential lineups (because it deviates from common police practices and presents reliability difficulties if adopted without other recommendations, i.e. a double-blind feature). *See* Wells et al., *supra* note 5, at 639–41. These added measures should be considered by the legislature, for a package of reforms is preferable to a piece-meal approach, and any expense is one that should be borne. If a jurisdiction is intent on executing, it needs to invest the resources in doing it right, and applying it to the actually guilty, rather than the tragically condemned innocent.

[232] *See* Givelber, *supra* note 28, at 1383 (noting police are not presently required to make reasonable decisions as to how to conduct their investigations, or to make reasonable records while they investigate; and recommending same); Gross, *supra* note 40, at 443 (recommending general implementation of requirements that police avoid suggestive identification procedures, and that they collect and preserve the physical evidence that is available at the scene because that "would probably do more to reduce misidentifications than would any other set of policies").

[233] These provisions could parallel those in the proposed Innocence Protection Act respecting support and training for DNA testing. Incorporating this provision should ensure some steady improvement in justice and be of the nature that produces the least entrenchment effect. *See supra* note 32 (discussing the concerns of Professors Jordan and Carol Steiker).

[234] An exclusionary rule may well be appropriate in all investigations, but it is possible that some regulations of benefit might not be adopted at all were the remedy viewed as disproportionate or the regulations too burdensome to be implemented in all cases. In the setting of a non-capital case, the weighing of costs and benefits may be such as to permit such regulations to be more precatory in nature. *See* United States v. Caceres, 440 U.S. 741 (1979).

[235] In *Texas v. Cobb*, 532 U.S. 162 (2001), the Court ruled that the same offense test found in *Blockburger v. United States*, 284 U.S. 299 (1932), would control whether the defendant who had requested counsel in a non-interrogation setting was entitled to the right to counsel at an interrogation under *McNeil v. Wisconsin*, 501 U.S. 171 (1991). The Court held that due to the offense-specific nature of the Sixth Amendment right—that a defendant be in the course of a criminal prosecution to receive it—the same-offense test, rather than a closely-related offense test, was required. The exclusionary rule proposed here would not be constrained by offense-specificity and is not flowing from the Sixth Amendment, but instead from the Fourteenth Amendment due process clause and the Eighth Amendment, where the focus is on the reliability of what might become

capital prosecutions, convictions, and/or sentences. Basing the standard on whether an officer could reasonably expect that the case may be prosecuted capitally is a clear and workable rule. While officers may have difficulty determining whether an individual they have stopped is subject to jail time given the multitude of offenses, punishment schemes, and ancillary facts that the officer may reasonably be unaware of at the time, and the fact that the officer must act on the spur of the moment, see Atwater v. Lago Vista, 532 U.S. 318 (2001), these concerns are not presented in the context of police-conducted identification procedures. Witnesses will have provided information to the police describing the nature of the activity they observed, and this or other information (from other officers, prosecutors, and the like) will commonly provide the officers with sufficient knowledge of the likelihood of a capital crime before the witness is asked to make an identification. The exclusion of the out-of-court identification when a more reliable means was available will prove to be a "clear rule" that can be "predictably enforced, with clear consequences." *Manson v. Brathwaite*, 432 U.S. 98, 111 (1977) (agreeing the per se approach provided a more significant deterrent effect); Gross, *supra* note 40, at 441 (advising these characteristics to achieve the best deterrent effect). *Manson* declined to adopt such a rule due to what it perceived to be a greater societal cost; in that case, the possibility of freeing a guilty drug dealer. Here, the ascendant concern is the possibility we may otherwise be executing an innocent individual, and it is this cost, which society is unwilling to bear that necessitates the rule's adoption.

[236] Gross, *supra* note 40, at 444.

[237] *Id.*

[238] *Id.* at 446.

[239] *Id.* (emphasis omitted).

[240] This article, and his study, was directed at all offenses, although most were crimes of violence. *Id.* at 413.

[241] *Id.* at 447.

[242] *See* Gross, *supra* note 34, at 133–38.

[243] *See* Koosed, *Averting Mistaken Executions*, *supra* note 87, at 108–129. The author appreciates that excluding death only when the risk of error is too grave is not so far as others may go. An outright abolition stance is taken by the authors of the book *In Spite of Innocence*, for they believe it "absurd to grope any further in the forlorn hope of eliminating the risk of executing the innocent by reforming criminal procedure." RADELET ET AL., IN SPITE OF INNOCENCE, *supra* note 48, at 280. They suggest that "[m]ost of these factors [contributing to miscarriages of justice] cannot be eliminated by changes in the rules of criminal procedure [and] [t]hose that can . . . would require such drastic revision of the rules as to be impossible to enact." *Id.* at 279. The author agrees that abolition is the simplest course, but it may be a revision as yet impossible to enact. This proposal represents a ratcheting up of the system that could be currently adopted as a middle ground that can cure much (but not all) of what ails us.

[244] Koosed, *Averting Mistaken Executions*, *supra* note 87, at 111–12, 118–29. If this practice is not adopted, then the author urged forthright instruction of the jury on their ability to consider and rely upon residual or lingering doubt as a mitigating factor in the penalty phase. *Id.* at 126. Similarly, if death is not excluded due to the suggestive identification procedure, then this should be the subject of an instruction to the penalty phase jury making this akin to a mitigating factor in the case. Indeed, it would be appropriate to instruct the jury they are to presume life in this setting to avoid a mistaken execution.

[245] Herbert L. Packer, *supra* note 166, at 239 (1966); *see also* Herbert L. Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1, 1–68 (1964).

[246] *See* Koosed, *Some Perspectives*, *supra* note 87, at 778–82.

[247] Professor Liebman has suggested that prosecutors wait a period of months before deciding whether to proceed capitally in order to allow time and opportunity to conduct discovery and plea negotiations. *See* Liebman, *supra* note 14 (manuscript at 36). This inquiry could also be addressed by the parties during that time period.

[248] Preparation of the capital case differs fundamentally from the non-capital case, for all parties. Judges must allot more time for the handling of pre-trial motions, for jury selection, for the trial phase, and the penalty phase. Defense counsel must conduct an investigation of not only the offense, but also of all of the accompanying aggravating factors that make it death-eligible, and all the factors (statutory and non-statutory) that may mitigate punishment. *See generally* Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 317–39 (1983). This includes conducting a thorough investigation of the defendant—a life history that may save his life. A.B.A., GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES (1989); *see generally*, Koosed, *Averting Mistaken Execution*, *supra* note 87, at 95–96, 119–122.