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WRONGFUL CONVICTIONS AND UPSTREAM REFORM IN THE CRIMINAL JUSTICE SYSTEM

*By: Katherine R. Kruse**

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I. INTRODUCTION

The DNA exonerations of the late twentieth century spawned a reform movement arguably as influential in the American criminal justice system as the Warren Court criminal procedure revolution.[1] The goal of innocence reform is to prevent wrongful convictions by increasing the reliability of criminal justice system operations. A basic tenet of the adversary system of justice is that an adversary trial will expose and correct factual errors with procedural tools, such as the exclusion of unreliable evidence, vigorous cross-examination of witnesses, and the introduction of expert testimony.[2] However, DNA exonerations have undermined faith in the capacity of the adversary trial system to produce reliable results—shifting the focus "upstream" in the criminal justice system to earlier stages of law enforcement investigations. Upstream reforms target law enforcement investigative practices for improvements that will reduce or eliminate the produc-

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1. Keith A. Findley, *Innocence Found: The New Revolution in American Criminal Justice*, *in* CONTROVERSIES IN INNOCENCE CASES IN AMERICA 3, 3 (Sarah Lucy Cooper ed., 2014); Lawrence C. Marshall, *The Innocence Revolution and the Death Penalty*, 1 OHIO ST. J. CRIM. L. 573, 573 (2004).

2. Jules Epstein, *Eyewitnesses and Erroneous Convictions: An American Conundrum*, *in* CONTROVERSIES IN INNOCENCE CASES IN AMERICA 41, 51–54 (Sarah Lucy Cooper ed., 2014).

tion of unreliable evidence that will later need to be excluded, attacked, or explained at trial.[3]

At its inception, the innocence movement viewed criminal justice system reform as a cooperative project bringing together multiple stakeholders—law enforcement, prosecution, and defense—who shared an interest in preventing wrongful convictions.[4] Upstream reform efforts fit well into this cooperative paradigm, with the goal of using wrongful convictions, not as a source of blame, but as data to be studied with the goal of improving law enforcement operations. However, the banner of cooperative innocence reform has frayed over time, and stakeholders have retreated into the trenches of adversary conflict. Despite this retrenchment, upstream reform efforts have not included robust downstream enforcement mechanisms, such as the exclusion of evidence that has not been collected or analyzed according to emerging improved practices.

This Article explores the viability of upstream criminal justice reforms within the context of an adversary and procedural system of criminal justice, focusing on reforms in eyewitness identification procedures. Mistaken eyewitness identification evidence is often cited as the leading cause of wrongful convictions in the United States.[5] Eyewitness identification reforms have also been the most developed upstream efforts to grow out of the innocence movement. The success and limitation of upstream reform in eyewitness identification shed light on the efficacy of upstream criminal justice system reform more generally, as well as in areas that are less developed, such as the introduction of false confessions or the use of unreliable forensic science.

Part II of the Article describes the upstream trajectory of reform in the area of eyewitness identifications. It demonstrates how DNA exonerations have shed light on the inadequacy of trial procedures to correct or mitigate the damage caused by investigatory missteps that alter eyewitness testimony, and it explains the reforms to law enforcement investigatory practices that have been recommended by social science researchers to prevent mistaken eyewitness identifications. Part III demonstrates the landscape of post-exoneration legal reform, cataloguing the legislation enacted in a growing number of states that requires law enforcement agencies to adopt and adhere to eyewitness identification "best practices." This Part also demonstrates the reluctance of legislatures and courts to fashion robust downstream enforcement mechanisms to incentivize good investigatory practices, such as

3. Findley, *supra* note 1, at 13–14; Marshall, *supra* note 1, at 573.

4. Findley, *supra* note 1, at 13.

5. *See The Causes of Wrongful Conviction*, INNOCENCE PROJECT, http://www.innocenceproject.org/causes-wrongful-conviction [http://perma.cc/YHH4-7GM4] (documenting that mistaken eyewitness identification has occurred in 72% of the 325 DNA exonerations to date).

establishing a per se rule excluding evidence that resulted from impermissibly suggestive eyewitness identification procedures.

The reluctance to adopt a per se exclusionary rule to incentivize sound law enforcement practices with respect to eyewitness identification highlights a paradox within American criminal procedure: Courts are willing to adopt a per se rule that excludes reliable evidence to protect the constitutional rights of guilty defendants, but they are unwilling to exclude questionable evidence that would protect innocent defendants from being convicted of crimes they did not commit. The deterrent rationale for a per se exclusionary rule has some justification because state statutes increasingly mandate that law enforcement agencies follow best practices. However, because there is no individual right against being wrongfully convicted by the state, the downstream remedies that are gaining more traction are stronger judicial gatekeeping authority over the introduction of arguably unreliable evidence under evidentiary rules and the expanded use of expert testimony and jury instructions. Although these corrective measures are aimed at increasing the reliability of trial results, they lack the power to influence law enforcement behavior.

This Article argues for an alternative remedy that would keep the focus on reliability, but also incentivize stronger investigatory practices upstream—that eyewitness identification evidence arising from impermissibly suggestive practices be excluded unless identity is corroborated by reliable evidence from another source.[6] Independent corroboration requirements have a deep history in common law, but they have fallen out of use in modern times. Where they persist, they serve the purpose of protecting against the risk of conviction on the basis of unreliable evidence.[7] Unlike the corrective trial measures aimed at limiting the negative effects of unreliable evidence—expert testimony, jury instructions, and evidentiary rulings that limit the scope of testimony—independent corroboration requirements hold out the potential to incentivize law enforcement behavior upstream. If identification evidence gained by impermissibly suggestive procedures is excluded because it is uncorroborated, the message conveyed upstream is that either identification procedures need to be improved or more investigation must be done before charges can be brought.

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6. A similar corroboration proposal was made in 2008 by Sandra Guerra Thompson. *See* Sandra Guerra Thompson, *Beyond a Reasonable Doubt? Reconsidering Uncorroborated Eyewitness Identification Testimony*, 41 U.C. DAVIS L. REV. 1487 (2008). Guerra's proposal, which differs in part from the proposal advanced here, received some discussion by other academics. *See* David Crump, *Eyewitness Corroboration Requirements as Protections Against Wrongful Conviction: The Hidden Questions*, 7 OHIO ST. J. CRIM. L. 361 (2009) (highlighting problems with implementing a corroboration requirement); Margery Malkin Koosed, *Reforming Eyewitness Identification Law and Practices to Protect the Innocent*, 42 CREIGHTON L. REV. 595, 633–40 (2009) (reviewing corroboration requirements in the context of other alternative proposed reforms).

7. *See infra* Section IV.C.

Although an independent corroboration requirement holds out the promise of serving the dual role of ensuring reliability at trial and incentivizing law enforcement practices, it poses problems with implementation. Another important lesson of the DNA exonerations is that investigative errors are interconnected: Weak evidence in one part of an investigation can narrow the focus of the investigation, distort the subjective evaluation of other evidence, and blind investigators to evidence that might exculpate the accused.[8] An independent corroboration requirement will not be effective in reducing wrongful convictions unless it is implemented with these lessons in mind.

II. The Upstream Innocence Reform Movement

The idea that an actually innocent person could be found guilty in the American criminal justice system did not gain traction until late in the twentieth century. Although earlier scholars documented cases of wrongful conviction, such cases were treated as anomalies, failing to shake the public's faith in the efficacy of adversary criminal trial processes.[9] However, as DNA exonerations began to mount in the 1990s, it became increasingly difficult to maintain the façade of reliability of the adversary criminal trial.[10] The DNA exonerations demonstrated that innocent persons had been wrongfully convicted by well-meaning juries weighing evidence tested through adversary processes. Moreover, the causes of wrongful convictions pointed to systemic malfunction, not isolated incidents of human error.

Early in the innocence movement, advocates for wrongfully convicted individuals made a decision to use DNA exonerations as a way to investigate and correct systemic failings in the criminal justice system.[11] Rather than losing faith in the processes of criminal justice, they argued that DNA exonerations provided "a window into the error rate that exists in *all* cases," which could be used to identify the places where the criminal justice system could be improved.[12] Optimistically, they posited that for every identified cause of wrongful conviction, there was an upstream remedy—a way to improve law enforcement investigative practices that could prevent wrongful convictions in the future.[13] Social science academics aided the innocence reformers by testing the variables within criminal justice system operations that could be altered to reduce or avoid wrongful convictions.

8. Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 Wis. L. Rev. 291, 292–93.

9. Findley, *supra* note 1, at 3.

10. *See id.* at 4.

11. *See* Barry Scheck et al., Actual Innocence (2000).

12. Marshall, *supra* note 1, at 574–75.

13. Scheck et al., *supra* note 11, at 255–60; *see also* Marvin Zalman & Julia Carrano, *Sustainability of Innocence Reform*, 77 Alb. L. Rev. 955, 959–65, 991 (2014) (describing the "causes and cures" paradigm of innocence reform).

The most developed upstream reforms have come in the area of eyewitness identification. Eyewitness identification is powerful evidence of guilt, rooted partly in the layperson's assumption that a witness's perception of an event is like a digital recording that can be replayed in its original form at any time—most particularly at trial—without distortion by intervening events.[14] The prevailing view is that the trial process is well-designed to root out errors in such testimony, using time-worn techniques: The jury has the opportunity to directly observe the demeanor of the witness; the credibility of the witness can be impeached; and substantive weaknesses or inconsistencies in the witness's testimony can be explored on cross-examination. Moreover, the assumption has been that juries are fully capable of assessing eyewitness testimony on their own, without the need for expert assistance.

Social science research undermines these assumptions about the reliability of eyewitness testimony and the capacity of trial procedures to correct mistaken identifications. Rather than acting as mere recording devices, several decades of research demonstrate that witness perceptions are by nature incomplete and malleable as they are encoded, stored, and retrieved from memory.[15] Once imprinted in memory, a mistaken identification takes hold and becomes stronger when bolstered by feedback that confirms that the witness picked the "right person."[16] Importantly, the experience of being called as a trial witness is itself a form of confirmatory feedback, because the choice to proceed to trial signals to an eyewitness that the police and prosecutors have faith in the reliability of the pre-trial identification.

Traditional adversary trial protections are largely ineffective in correcting the effects of mistaken eyewitness identification. Studies have largely debunked the assumption that juries have the ability to accurately assess eyewitness testimony by showing that the perceptions of laypersons fail to match the social science research about the factors that make eyewitness testimony more or less reliable.[17] Studies show, for example, that jurors are most strongly influenced by the confidence of the eyewitness at trial, which research has shown is only weakly correlated with reliability.[18] An eyewitness's confident de-

14. Richard A. Wise, et al., *A Tripartite Solution to Eyewitness Error*, 97 J. CRIM. L. & CRIMINOLOGY 807, 812 (2007).

15. Epstein, *supra* note 2, at 41, 46.

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

17. Jules Epstein, *The Great Engine That Couldn't: Science, Mistaken Identifications, and the Limits of Cross-Examination*, 36 STETSON L. REV. 727, 743–45 (2007).

18. Steven D. Penrod & Brian L. Cutler, *Eyewitness Expert Testimony and Jury Decisionmaking*, 52 L. & CONTEMP. PROBS. 43, 59–60 (1989). While a witness's level of certainty has some diagnostic value in assessing the accuracy of an identification, the level of certainty at trial is less likely to correlate with accuracy, especially in cases where a suggestive procedure has been used. Post-identification confirmatory feed-

meanor and sincerity provide insulation from traditional trial tools like cross-examination and impeachment, which are designed to expose lies, not correct honestly held mistakes.[19]

Upstream reform efforts have focused on getting the law enforcement community to embrace and adopt practices that comport with social science research about how to reduce the incidence of mistaken eyewitness identification of innocent suspects. Social science research divides factors that lead to mistaken identification into "estimator variables," which relate to the conditions under which the eyewitness observed an event, and "system variables," which relate to the way identification procedures are conducted.[20] System variables include such features as the composition of the line-up; the pre-identification instructions given to the eyewitness; whether the person administering a lineup or photo array knows which person is suspected of committing the crime; and whether the lineup or photo array is presented simultaneously or sequentially.[21] The research into system variables opened a door, not only to understanding the causes of wrongful convictions, but to identifying specific ways that police procedures might be improved to reduce or prevent the incidence of mistaken identifications.[22] Because it could be demonstrated that adopting better law enforcement procedures could reduce the distortion of an eyewitness's memory, upstream reformers have made the analogy between memory and "trace evidence" left at a crime scene, which can be contaminated if not handled properly.[23]

An early consensus formed within the social science community around a set of specific reforms to reduce the incidence of wrongful conviction, which helped establish the upstream reform agenda. In 1996, the American Psychology/Law Society appointed a working

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back will have a larger inflationary effect on witness certainty in cases of mistaken identification than in cases of accurate identification, making the level of eyewitness certainty at trial a less useful diagnostic tool. Gary L. Wells & Deah S. Quinlivan, *Suggestive Eyewitness Identification Procedures and the Supreme Court's Reliability Test in Light of Eyewitness Science: 30 Years Later*, 33 L. & HUM. BEHAV. 1, 12 (2008).

19. Epstein, *supra* note 2, at 41, 51.

20. Gary L. Wells, *Applied Eyewitness-Testimony Research: System Variables and Estimator Variables*, 36 J. PERSONALITY & SOC. PSYCHOL. 1546, 1548 (1978).

21. Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 L. & HUM. BEHAV. 603, 627–36 (1998) (reporting the consensus recommendations of five psychologists appointed by the Executive Committee of the American Psychology/Law Society to study and draft a white paper on good-practice guidelines for law enforcement eyewitness identification procedures).

22. *See* Gary L. Wells et al., *From the Lab to the Police Station: A Successful Application of Eyewitness Research*, 55 AM. PSYCHOLOGIST 581, 582 (2000).

23. *See* Margery Malkin Koosed, *Reforming Eyewitness Identification Law and Practices to Protect the Innocent*, 42 CREIGHTON L. REV. 595, 615 (2009); Sandra Guerra Thompson, *Judicial Gatekeeping of Police-Generated Witness Testimony*, 102 J. CRIM. L. & CRIMINOLOGY 329, 331 (2012).

group to develop good-practice guidelines for conducting lineups and photo arrays for eyewitness identifications.[24] The resulting white paper reviewed three decades of social science research and recommended "four simple rules of procedure that follow from the scientific literature"[25]: (1) blind administration, in which the person conducting the procedure should not be aware of which member of the lineup or photo array is the suspect;[26] (2) explicit instructions to the witness that the culprit may not be present in the lineup;[27] (3) selection of fillers to match the witness's prior description of the culprit;[28] and (4) a clear statement taken from the eyewitness at the time of the procedure—before receiving any feedback—recording the witness's level of confidence in the identification.[29]

Three years later, in 1999, the National Institute of Justice ("NIJ") appointed a technical working group to issue guidelines for collecting and preserving eyewitness evidence in criminal cases, which expanded the discussion of reform to stakeholders in the law enforcement and prosecution communities.[30] Law enforcement members of the technical working group were generally receptive to suggestions about how identification procedures could be improved, having experienced cases in which eyewitnesses had identified lineup fillers known to be innocent.[31] However, law enforcement participants balked at the idea of blind administration, which would exclude the participation of investigating officers, who know which member of the lineup or photo array is suspected of committing a crime.[32] In the end, the working group did not recommend blind procedures, citing a concern that they "may be impracticable for some jurisdictions to implement," and instead flagged blind procedures as "a direction for future exploration and field testing."[33]

Blind administration has emerged as a bellwether of the success of upstream reform. It is "almost universally viewed by researchers, including now the National Academy of Sciences, as among the most fundamental" of all the eyewitness reforms because it goes to the heart of the problem—making it impossible for an administrator to send subtle or unconscious signals to an eyewitness that suggest or

24. Wells et al., *supra* note 21, at 603.

25. *Id.* at 627.

26. *Id.*

27. *Id.* at 629.

28. *Id.* at 630.

29. *Id.* at 635.

30. Technical Working Group for Eyewitness Evidence, National Institute for Justice, Eyewitness Evidence: A Guide for Law Enforcement (1999) [hereinafter DOJ Guide].

31. Wells et al., *supra* note 22, at 591.

32. *Id.* at 594.

33. *Id.*

confirm the identity of the suspect.[34] It is a standard part of social science research to screen an administrator from knowledge that could unintentionally affect the result of an experiment, so that the idea of blind administration is natural and acceptable to social scientists. However, it deviates greatly from standard law enforcement practice, where the investigating detective most often administers a lineup or photo array and observes first-hand the reaction of the witness. Therefore, the adoption of blind administration procedures is more than just a tweak to existing law enforcement practices; it requires a radical shift of perspective by law enforcement in deference to social science research.

By 2014, when the National Academy of Sciences issued a comprehensive report ("NAS Report") and recommendations about eyewitness identification procedures, blind administration had gained wider acceptance, leading to a recommendation that law enforcement agencies "use blind procedures to avoid the unintentional or intentional exchange of information that might bias an eyewitness."[35] Notably, in the time between the Department of Justice ("DOJ") guidelines and the NAS Report, some law enforcement agencies had developed methods of "blinded administration," in which the officer administering a photo array knows the suspect's identity but is unable to tell when the witness is looking at the suspect's photo.[36] Such procedures include computer automated presentation of lineup photos in a random order or a low-tech solution called the "folder shuffle" procedure, in which the officer places each photo in a separate folder and then shuffles the folders before presenting them to the witness.[37] The development of these procedures created a compromise that preserved many of the benefits of blind administration, while putting the cost within reach.

The combination of a well-documented problem with mistaken eyewitness identification evidence and an available set of research-based strategies addressing the problem set the stage for significant upstream reform in the area of eyewitness identification. Yet, contrary to the optimism of the early innocence reform movement, and as Part III will demonstrate, although there have been notable developments, there has not been a widespread embrace by law enforcement of the needed reforms to eyewitness identification procedures, and existing

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34. Keith A. Findley, *Implementing the Lessons from Wrongful Convictions: An Empirical Analysis of Eyewitness Identification Reform Strategies*, 81 Mo. L. Rev. (forthcoming 2016) (manuscript at 17) (on file with author).

35. Nat'l Acad. of Sci., Identifying the Culprit: Assessing Eyewitness Identification 107 (2014) [hereinafter NAS Report].

36. *Id.* at 25.

37. *Id.* at 27. Additional procedures in the "folder shuffle" method include always presenting a filler in the first envelope, and including two blank envelopes at the end, so that the witness is prevented from knowing when he or she is viewing the last image. *Id.*

legal standards do little to incentivize law enforcement agencies to pursue upstream reform.

III. Post-Exoneration Era Legal Reforms

Although the benefits of reforming eyewitness identification procedures to reduce mistaken identifications are self-evident, upstream reform is not self-executing. As social science research about system variables has become more widely known, some law enforcement agencies have voluntarily adopted procedures in accordance with acknowledged good law enforcement practices.[38] Yet, a 2013 study of over 1,300 law enforcement agencies of different sizes and geographic locations demonstrated that "law enforcement agencies for the most part have not implemented the full range of the 1999 NIJ guidelines."[39] Many agencies follow some of the recommended reforms, such as instructing the witness that the perpetrator may not be present in the lineup or photo array.[40] However, more fundamental reforms, such as blind administration of lineups and photo arrays, have not taken hold. About two-thirds of the agencies surveyed continued to use a non-blind administrator for photo lineups and over ninety percent used non-blind administrators in live lineups.[41]

Thirteen states have pushed reform more forcefully by enacting statutes that require law enforcement agencies to institute written policies for pre-trial identification line-up procedures that comport with social science research.[42] These statutes range from being highly directive and detailed in mandating that law enforcement follow specified "best practices," to allowing law enforcement significant autonomy to

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38. Findley, *supra* note 34, at 25–26 (noting that while there have been "a few notable leaders" among some police departments "those departments are noteworthy because they have distinguished themselves, not because they represent the norm"); *see also* Rebecca Brown & Stephen Saloom, *The Imperative of Eyewitness Identification Reform and the Role of Police Leadership*, 42 U. Balt. L. Rev. 535, 549–50 (2013) (discussing the role of voluntary reform).

39. Police Executive Research Forum, A National Survey of Eyewitness Identification Procedures in Law Enforcement Agencies xiv (Mar. 8, 2013).

40. *Id.* at ix ("83.9 percent of agencies that use photo lineups and 87.6 percent of agencies that use live lineups provide instructions that 'the perpetrator may or may not be present' to the witnesses or victims prior to viewing the lineup. However, just over half of the agencies provide three other instructions recommended by the 1999 NIJ Guide.").

41. *Id.* at 61, 64.

42. *See* Colo. Rev. Stat. Ann. § 16-1-109 (West 2014); Conn. Gen. Stat. Ann. § 54-1P (West 2009); Ga. Code Ann. § 17-20-2 and 17-20-3 (Supp. 2015) (effective July 1, 2016); 725 Ill. Comp. Stat. Ann. 5/107A-5 (West 2006); Md. Code Ann., Pub. Safety § 3-506 (LexisNexis Supp. 2014); Nev. Rev. Stat. 171.1237 (2011); N.C. Gen. Stat. Ann. § 15A-284.50 to .53 (West 2013); Ohio Rev. Code Ann. § 2933.83 (LexisNexis 2014); Tex. Code Crim. Proc. Ann. art. 38.20 (West 2005); Vt. Stat. Ann. tit. 13, § 5581 (Supp. 2014); Va. Code Ann. § 19.2-390.02 (LexisNexis Supp. 2015); W. Va. Code Ann. § 62-1E-1 to -3 (LexisNexis 2014); Wis. Stat. Ann. § 175.50 (West 2006).

develop their own procedures within more general guidelines.[43] Significantly, most of the state statutes either recommend or require the use of blind or blinded administration procedures where practicable, and some detail specific methods that reduce the need for an independent and neutral administrator, such as the use of computer automated programs or the "folder shuffle" method.[44] In some cases, detailed legislation was enacted only after less directive efforts to encourage law enforcement compliance with best practices failed to take hold.[45]

Even the state statutes that mandate best practices in detail, however, provide only weak downstream measures to enforce mandated eyewitness identification procedures. State statutes typically provide that failure to follow proper eyewitness identification procedures can be relevant in determining the admissibility of eyewitness evidence,[46] or it can be used to instruct the jury about how much weight to accord eyewitness testimony.[47] Nevertheless, none of the statutes impose a per se exclusionary rule for deviating from the mandated procedures.

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43. *See* Findley, *supra* note 34, for a comparison of directive "command and control" procedures with statutes that take a "new governance" or "experimentalist" approach.

44. *See, e.g.*, CONN. GEN. STAT. ANN. § 54-1P(c)(2) (West Supp. 2015); 725 ILL. COMP. STAT. ANN. 5/107A-2(a) (West 2006); MD. CODE ANN. PUB. SAFETY § 3-506.1(b) (LexisNexis Supp. 2014); N.C. GEN. STAT. ANN. § 15A-284.52(b)(1) and (c) (West 2013); OHIO REV. CODE ANN. § 2933.33(B)(1)-(3) (LexisNexis 2014); W. VA. CODE ANN. § 62-1E-2(d) (LexisNexis 2014); WIS. STAT. ANN. § 175.50(5)(a) (West 2006).

45. Findley, *supra* note 34, at 36–39 (describing the sometimes arduous legislative processes in North Carolina, Ohio, Connecticut, Georgia, and Maryland).

46. *See* 725 ILL. COMP. STAT. 5/107A-2(j)(1) (West 2006) (stating that law enforcement failure to comply with the requirements "shall be a factor to be considered by the court in adjudicating a motion to suppress an eyewitness identification or any other motion to bar an eyewitness identification" but stating that "this paragraph makes no change to existing applicable common law or statutory standards or burdens of proof"); OHIO REV. CODE ANN. § 2933.33(C)(1) (LexisNexis 2014) (stating that evidence of the failure of law enforcement agencies to adopt required procedures or failure of officers to comply with procedures that have been adopted "shall be considered by trial courts in adjudicating motions to suppress eyewitness identification resulting from or related to the lineup"); N.C. GEN. STAT. § 15A-284.52(d)(1) ("Failure to comply with any of the [statutory requirements] shall be considered by the court in adjudicating motions to suppress eyewitness identification."). Four state statutes, Connecticut, Maryland, West Virginia, and Wisconsin, are silent as to statutory remedies for the failure of law enforcement agencies to implement or follow procedures.

47. 725 ILL. COMP. STAT. ANN. 5/107A-2(j)(2) (West Supp. 2015) ("When warranted by the evidence presented at trial, the jury shall be instructed that it may consider all the facts and circumstances including compliance or noncompliance [of law enforcement in following statutory procedures for lineups] to assist in its weighing of the identification testimony of an eyewitness."); OHIO REV. CODE ANN. § 2933.33(C)(3) (LexisNexis 2014) ("[T]he jury shall be instructed that it may consider credible evidence of noncompliance in determining the reliability of any eyewitness identification resulting from or related to the lineup."); N.C. GEN. STAT. § 15A-284.52(d)(3) (2013) ("[T]he jury shall be instructed that it may consider credible evi-

The need to specify more robust statutory remedies is necessitated in part by the inadequacy of the leading constitutional test for excluding eyewitness testimony gained through suggestive procedures, which pays lip service to the importance of reliability but is unresponsive to social science research about what makes an eyewitness statement more or less reliable.[48] In *Manson v. Brathwaite*,[49] the United States Supreme Court ruled that impermissibly suggestive pre-trial eyewitness identifications could be introduced into evidence as long as they bear sufficient indicia of reliability.[50] Reasoning that "reliability is the linchpin in determining the admissibility of identification testimony,"[51] the Court rejected a per se rule that would bar admission of all identification evidence gained through impermissibly suggestive identification procedures, and imposed a five-factor "totality of the circumstances" test for measuring the reliability of identifications gained through suggestive procedures.[52]

The problem with the *Manson* test, as commentators have noted, is that its "reliability factors" fail to align with the social scientific knowledge about the malleability of eyewitness memory and ignore the effects of suggestive police procedures. Three of the factors—the witness's opportunity to view the suspect, the witness's degree of attention, and the witness's level of certainty—depend on the witness's self-reports, which research has shown are likely to be inflated by post-identification confirmatory feedback.[53] A fourth factor, the level of consistency between the witness's verbal description of the culprit and the physical characteristics of the defendant, largely fails to predict accuracy.[54] Only one factor—the time that elapsed between the

dence of compliance or noncompliance to determine the reliability of eyewitness identification.").

48. *See* Wells & Quinlivan, *supra* note 18, at 12; Amy L. Bradfield & Gary L. Wells, *The Perceived Validity of Eyewitness Identification Testimony: A Test of the Five* Biggers *Criteria*, 24 L. & HUM. BEHAV. 581 (2000).

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

50. *Id.* at 114.

51. *Id.*

52. *Id.* The Court adopted a five-factor test set out previously in *Neil v. Biggers*, 409 U.S. 198 (1972), under which courts must consider: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) how accurately the witness's prior description matches the suspect; (4) the level of certainty; and (5) the time that elapsed between the crime and the pre-trial identification. *Id.*

53. *See* Wells & Quinlivan, *supra* note 18, at 9; Wells & Bradfield, *supra* note 16, at 365–66; Amy Bradfield Douglass & Nancy Steblay, *Memory Distortion in Eyewitnesses: A Meta–Analysis of the Post-identification Feedback Effect*, 20 APPLIED COGNITIVE PSYCHOL. 859, 864–65 (2006).

54. Wells & Quinlivan, *supra* note 18, at 13. This is in part because the processes that lead to good recall (the ability to accurately describe a memory) are different from the processes that lead to good recognition (the ability to match a stimulus with a memory). It is also due in part to the interrelationship between the verbal description, the identification of possible suspects based on the description, and the relative judgments that witnesses make in selecting a suspect from a lineup. *Id.*

crime and the pre-trial identification—remains independent of a witness's potentially distorted recollection and correlates with what we know about memory and reliability.

As long as the federal standard in *Manson* remains intact, evidence that law enforcement has failed to comply with statutorily required eyewitness identification procedures will be relevant only to the threshold determination of whether a procedure was "impermissibly suggestive," without touching the problematic *Manson* reliability factors that permit introduction of eyewitness identification testimony despite the use of suggestive procedures. Despite the well-documented shortcomings of the *Manson* reliability factors, the Supreme Court has declined to revisit the standard.[55] Further, only a handful of state cases have rejected or amended the reliability factors to better align with the social science research.[56]

In its 2011 opinion in *State v. Henderson*, the New Jersey Supreme Court went the furthest among state courts.[57] It is not an exaggeration to say that New Jersey has been a national leader in the area of eyewitness identification reform. In 2001, New Jersey became the first state to adopt statewide guidelines for law enforcement conduct related to identification procedures, mandating those that comported with social science research.[58] Notably, New Jersey a "vertically unified law enforcement system, in which the Attorney General has direct supervisory authority over all law enforcement agencies in the state," made the Attorney General's guidelines mandatory for all law enforcement agencies.[59] In 2006, New Jersey added language to its model jury instruction, cautioning a jury that even good faith identifications may be mistaken, and advising that "a witness's level of confidence, standing alone, may not be an indication of the reliability of the identification."[60]

In 2011, after an exhaustive review of the social science data, the New Jersey Supreme Court replaced the *Manson* reliability factors

55. Most recently, the Court had an opportunity to revisit the standard in *Perry v. New Hampshire*, 132 S. Ct. 716, 728–29 (2012). However, the Court declined to apply a due process analysis in that case because there was no police involvement in arranging the suggestive circumstances under which the witness viewed the defendant. *Id.*

56. *See* State v. Henderson, 27 A.3d 872 (N.J. 2011); State v. Lawson, 291 P.3d 673 (Or. 2012); State v. Dubose, 699 N.W.2d 582 (Wis. 2005) (rejecting the *Manson* factors for show-up identifications, finding them inherently suggestive and subject to exclusion if the show-up was unnecessary under the totality of the circumstances); State v. Ramirez, 817 P.2d 774 (Utah 1991) (rejecting the *Manson* certainty factor as unsupported by social science).

57. *Henderson*, 27 A.3d 872.

58. Office of Attorney Gen., *Attorney General Guidelines for Preparing and Conducting Photo and Live Lineup Identification Procedures*, STATE OF NEW JERSEY (Apr. 18, 2001), http://www.state.nj.us/lps/dcj/agguide/photoid.pdf [http://perma.cc/PK53-NRPU].

59. Findley, *supra* note 34, at 26.

60. State v. Romero, 922 A.2d 693, 703 (N.J. 2007).

with a standard that is better grounded in social science.[61] In *Henderson*, the New Jersey Supreme Court appointed a special master and remanded the case for the purpose of reexamining the "assumptions and other factors reflected" in *Manson*'s two-part test.[62] The special master reviewed hundreds of exhibits, including more than 200 published studies on human memory and eyewitness identification, and held a ten-day hearing that took testimony from many of the leading researchers in the field.[63] In a nearly 60-page opinion, the court summarized the scientific evidence that had developed since *Manson* was decided and ultimately concluded that the *Manson* test was no longer valid because "it does not provide a sufficient measure for reliability, it does not deter, and it overstates the jury's innate ability to evaluate eyewitness testimony."[64] In its place, the court fashioned a more flexible test under which the defendant bears the initial burden of demonstrating some evidence that the identification procedure was suggestive, which shifts the burden of production to the State to show that the proffered eyewitness testimony is reliable, based on both system and estimator variables.[65]

Even from its position at the forefront of eyewitness identification reform, however, the New Jersey Supreme Court demonstrated a cautious and limited approach toward enforcing best practices. The court explicitly rejected a per se exclusionary rule for violations of the New Jersey Attorney General's mandatory eyewitness identification procedure guidelines.[66] It rejected the analogy between eyewitness memories and trace crime scene evidence on the ground that "[u]nlike vials of blood, memories cannot be stored in evidence lockers," and concluded that "we continue to rely on people as the conduits of their own memories, on attorneys to cross-examine them, and on juries to assess the evidence presented."[67] Finally, the court left the ultimate burden on the defendant "to prove a very substantial likelihood of irreparable misidentification."[68] Under this relatively high burden of proof, the court predicted that "in the vast majority of cases, identification evidence will likely be presented to the jury."[69]

Moreover, despite the New Jersey Supreme Court's careful consideration of social science relating to the variables that lead to mistaken eyewitness identification, its opinion paid scant attention to the social science research on the factors that influence jury decision making. While the court did not rule out the use of expert testimony to assist

61. *Henderson*, 27 A.3d at 919–22.
62. *Id.* at 884.
63. *Id.*
64. *Id.* at 918.
65. *Id.* at 919–20.
66. *Id.* at 922.
67. *Id.* at 924.
68. *Id.* at 920.
69. *Id.* at 928.

the jury, it stated a clear preference for jury instructions on the ground that "they are focused and concise, authoritative. . . and cost-free; they avoid possible confusion to jurors created by dueling experts; and they eliminate the risk of an expert invading the jury's role or opining on an eyewitness's credibility."[70] This preference runs counter to the existing social science research, which questions the effectiveness of jury instructions in helping jurors to distinguish between strong and weak eyewitness identification evidence.[71] By contrast, studies show that expert testimony can increase the sensitivity of jurors toward factors that more closely correlate with reliability.[72] Hence, the National Academy of Sciences concluded in a 2014 report that expert testimony was preferred over jury instructions as a method of educating the jury about the factors that make an eyewitness's identification more or less reliable because of its flexibility, ability to focus on the pertinent issues in a case, and ability clarify the state of research.[73]

Taken as a whole, the *Henderson* decision demonstrates ambivalence toward robust downstream reform, even in the face of extensive study of the factors that lead to mistaken eyewitness identifications. The next Part explores this ambivalence in more depth, describing the difficult terrain in constitutional law for imposing a per se exclusionary rule as an incentive to law enforcement and demonstrating why alternative grounds in evidentiary law on which the reliability of eyewitness identification have gained better traction.

IV. Downstream Enforcement of Upstream Reform

As the previous Part has demonstrated, both legislatures and courts are reluctant to impose a per se exclusionary rule for eyewitness identification evidence gained through an impermissibly suggestive procedure. Such a rule, patterned on the deterrent rationale of the exclusionary rule for law enforcement violations of constitutional rights, has some justification in light of the increasingly mandatory nature of directives to law enforcement to follow best practices. However, the mandates to follow best practices in eyewitness identification procedures arise in the context of a complicated interplay between reliability and deterrence in constitutional doctrine, in which the court has focused the exclusionary rule on deterrence and left concerns about reliability to be worked out at trial. Evidence law provides alternative grounds for challenging the admissibility of unreliable eyewitness identification testimony or mitigating its effects by educating the jury with instructions or expert testimony. However, these curative measures lack the deterrent power of a per se exclusionary sanc-

70. *Id.* at 925.
71. NAS Report, *supra* note 35, at 42–43.
72. Steven D. Penrod & Brian L. Cutler, *Eyewitness Expert Testimony and Jury Decisionmaking*, 52 L. & Contemp. Probs. 43, 43–44 (1989).
73. NAS Report, *supra* note 35, at 40, 42.

tion to incentivize upstream reform. This Part argues for a third type of remedy, an independent corroboration requirement, which would blend the concern for reliability with the need to incentivize law enforcement to adopt best practices upstream.

A. *Constitutional Criminal Procedure: Per Se Exclusionary Rule*

As discussed above, in *Manson v. Brathwaite*, the United States Supreme Court rejected a per se exclusionary rule for impermissibly suggestive eyewitness identification evidence, allowing such evidence to be admitted as long as the evidence can be shown to be reliable. While the argument for a per se exclusionary rule has been advanced in the state courts in the years since *Manson*, it has not succeeded.[74]

It seems a peculiar twist of logic that courts would be willing to exclude reliable evidence of guilt, but unwilling to exclude questionable evidence that has been demonstrated to put the actual innocence of mistakenly identified defendants at risk. This peculiarity can be explained in two ways: (1) law enforcement use of impermissibly suggestive identification procedures is simply bad police practice, not really police misconduct that needs to be deterred with an exclusionary rule; and (2) because persons who are wrongfully accused of crimes do not have a constitutional right to be free of wrongful conviction, the use of law enforcement procedures that lead to wrongful convictions is not a per se constitutional violation.

The United States Supreme Court has historically been unwilling to exclude questionable evidence on constitutional due process grounds based on concerns about its reliability without an accompanying aspect of law enforcement misconduct. The primary purpose of the exclusionary rule in the Court's constitutional criminal procedure jurisprudence is to deter law enforcement violations of the Constitution.[75] The interest in deterring police misconduct is generally weighed against an interest in determining guilt or innocence at trial; the suppressed evidence is considered sound evidence of guilt, excluded only because it has been obtained through law enforcement misconduct.[76] The reliability of the excluded evidence is thus immaterial to the determination of whether it should be excluded.

Consistent with the focus on deterrence, in *Perry v. New Hampshire*, the Court declined to recognize a constitutional violation based on the use of impermissibly suggestive eyewitness identifications

74. *See* State v. Henderson, 27 A.3d 872 (N.J. 2011); Commonwealth v. Silva-Santiago, 906 N.E.2d 299, 311–12 (Mass. 2009); State v. Dubose, 699 N.W.2d 582, 594 (Wis. 2005).

75. Thomas K. Clancy, *The Fourth Amendment's Exclusionary Rule as a Constitutional Right*, 10 OHIO ST. J. CRIM. L. 357, 367–71 (2013); Scott E. Sundby & Lucy B. Ricca, *The Majestic and the Mundane: The Two Creation Stories of the Exclusionary Rule*, 43 TEX. TECH L. REV. 391, 392 (2010).

76. *See* Sundby & Ricca, *supra* note 75, at 392–93.

where "the suggestive circumstances were not arranged by law enforcement officers."[77] In that case, an eyewitness looked out of her apartment window while being questioned by one police officer and identified Perry, who was standing outside next to another police officer, as the man she had seen breaking into cars in the apartment parking lot.[78] Although "show-ups" are generally considered the most suggestive kind of identification procedure, the Court concluded that the Due Process Clause was not implicated by evidence gathered "without the taint of improper state conduct."[79] Rather, the Court reasoned that the Constitution "protects a defendant against a conviction based on evidence of questionable reliability, not by prohibiting introduction of the evidence, but by affording the defendant means to persuade the jury that the evidence should be discounted as unworthy of credit."[80]

The Court's rationale in *Perry* echoes its earlier decision in *Colorado v. Connelly*,[81] where the Court failed to find a due process violation when the defendant's arguably involuntary confession arose from the defendant's obedience to deific commands he experienced in a psychotic state rather than from police overreaching. The defendant in *Connelly*, who suffered from schizophrenia, was in a psychotic state and heard the "voice of God" instruct him with increasing intensity to either confess to a murder or commit suicide.[82] In response, he booked a flight from Boston to Denver and approached a police officer on the street to confess to his crime.[83] Although noting that a confession induced by mental illness might be unreliable, the Court declined to find a constitutional violation in the absence of any police overreaching.[84] Instead, the Court held that "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."[85]

As upstream reforms to eyewitness identification procedures gain momentum, the failure of law enforcement agencies to adopt, enforce, or follow them—especially in the face of statutory mandates—could be seen as a form of deliberate misconduct warranting a deterrent sanction. However, courts have not been willing to use the exclusionary rule to deter this kind of law enforcement misconduct. In *State v. Henderson*, the New Jersey Supreme Court rejected a per se exclusionary rule urged by the defendant, even in the context of the court's detailed and well-informed discussion of the problem of mistaken eye-

77. Perry v. New Hampshire, 132 S. Ct. 716, 720–21 (2012).
78. *Id.* at 722.
79. *Id.* at 728.
80. *Id.* at 723.
81. Colorado v. Connelly, 479 U.S. 157 (1986).
82. *Id.* at 161–62.
83. *Id.* at 161.
84. *Id.* at 163–64.
85. *Id.* at 167.

witness identification.[86] At the time *Henderson* was decided, the state had well-established guidelines for best practices in eyewitness identification procedures, which had been mandatory for law enforcement agencies in the state for ten years.[87] Moreover, the violation of the procedures in *Henderson* involved deliberate interference with the blind administration of a photo lineup by the investigating detectives when the witness was unable to make an identification.[88] Yet the New Jersey Supreme Court rejected a per se rule, reasoning that "[a]lthough that approach might yield greater deterrence, it could also lead to the loss of a substantial amount of reliable evidence."[89]

The court's argument in *Henderson* begs the question of why the loss of reliable evidence should matter more in the eyewitness identification cases than it does in other areas of constitutional criminal procedure; the loss of reliable evidence is always the cost of an exclusionary rule directed at deterring police misconduct. The answer lies, in part, in the individual rights at stake. Although deterrence of police misconduct has come to dominate the Court's exclusionary rule jurisprudence, the legitimacy of the exclusionary rule has always been underwritten by its protection of individual constitutional rights against state interference.[90] When law enforcement officers fail to follow eyewitness identification mandates, they do not trench on individual constitutional rights in the same way as they do when they invade the protections of the Fourth or Fifth Amendment.

The constitutional basis for excluding impermissibly suggestive eyewitness identification evidence lies primarily in the Due Process Clause.[91] Because due process concerns are tied more directly to the

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86. *See supra* notes 61–70 and accompanying text.

87. *See supra* note 58 and accompanying text.

88. State v. Henderson, 27 A.3d 872, 884 (N.J. 2011). Detective Weber, who did not know the identity of the suspect, administered a photo array containing a photo of Henderson and seven fillers. *Id.* at 880. Weber read the witness instructions that stated the perpetrator may or may not be in the photo lineup and emphasized that the witness was "absolutely not required to choose any of the photographs" and "should not feel obligated to choose any one." *Id.* at 881. The witness narrowed the photos down to two but stated that he "wasn't 100 percent sure of the final two pictures." *Id.* According to Weber, the witness "just shook his head a lot. He seemed indecisive." *Id.* When Weber reported to the investigating detectives that the witness could not make an identification, they entered the interview room and spoke with the witness for one to five minutes. *Id.* When Weber returned to the room and reshuffled the eight photos, the witness identified Henderson with certainty, slamming his hand on the table and exclaiming, "[t]hat's the mother [———] there." *Id*.

89. *Id.* at 922.

90. *See generally* Clancy, *supra* note 75 (arguing that the individual rights justification for the exclusionary rule should take precedence over the deterrent rationale); Sundby & Ricca, *supra* note 74 (detailing the protection of individual rights and the deterrence of police misconduct as distinct "creation stories" in the history of the exclusionary rule).

91. In *United States v. Wade*, the Court declared that a lineup was a critical stage of pre-trial procedure, at which the defendant had the right to the presence of counsel. United States v. Wade, 388 U.S. 218, 236–37 (1967). The same year, the Court

fairness of the fact-finding process as a whole rather than to the rights of individuals, a failure to afford adequate process at the lineup stage of the proceeding can arguably be cured with additional process at trial. Courts have consistently expressed a preference for admitting eyewitness identification evidence and educating the jury, through expert testimony or jury instructions, about how to evaluate the limitations of an eyewitness's identification gained through suggestive procedures.[92]

The Supreme Court's hesitance to recognize a free-standing constitutional claim based on actual innocence reflects its focus on reliability in this area—rather than deterrence. In *Herrera v. Collins*, the Court assumed for the sake of argument that a showing of actual innocence, if properly proven, might render the execution of a defendant unconstitutional either on Eighth Amendment or due process grounds.[93] However, the Court declined to fashion a constitutional standard based on actual innocence, reasoning that "[d]ue process does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person."[94] Since deciding *Herrera*, the Court has consistently declined to announce a free-standing constitutional right based on actual innocence or to imagine the standard of proof that it would take to establish such a right.[95] As a result, even blatant disregard of best law enforcement practices in eyewitness identification procedures fails to encroach upon the rights of individuals, and are at best merely aspects of the process that is due by the state in the course of determining guilt or innocence and imposing criminal penalties.

B. *Evidence Law: Admissibility, Exclusion, and Jury Education*

An alternative ground for excluding mistaken eyewitness identification comes from evidence law rather than from constitutional criminal procedure. In the most detailed treatment of evidentiary exclusion, in *State v. Lawson,* the Oregon Supreme Court crafted standards based on social science research about mistaken eyewitness identification. The Oregon Supreme Court applied these standards to evidentiary

declined to apply the right to counsel retroactively but went on to declare a due process violation whenever a pre-trial confrontation between the defendant and a witness was "unnecessarily suggestive and conducive to irreparable mistaken identification." Stovall v. Denno, 388 U.S. 293, 301–02 (1967). The Court then moderated its due process test, ruling that unnecessary suggestiveness alone does not require the exclusion of evidence if, under the totality of the circumstances, the identification is reliable. Neil v. Biggers, 409 U.S. 188, 199 (1972).

92. Perry v. New Hampshire, 132 S. Ct. 716, 721 (2012); Manson v. Brathwaite, 432 U.S. 98, 114 (1977); *Henderson*, 27 A.3d at 925.

93. Herrera v. Collins, 506 U.S. 390, 417 (1993).

94. *Id.* at 399 (quoting Patterson v. New York, 432 U.S. 197, 208 (1977)).

95. *See* House v. Bell, 547 U.S. 518, 554–55 (2006); *see also* Schlup v. Delo, 513 U.S. 298, 313–17 (1995).

rulings to determine whether there was a proper evidentiary basis for the testimony, or whether the testimony's risk of unfair prejudice outweighed its probative value.[96] Prior to *Lawson*, the Oregon test for admissibility of eyewitness identifications followed the general two-part framework of *Manson v. Brathwaite*, by first examining whether the identification procedure was impermissibly suggestive and then evaluating whether it was nonetheless reliable.[97] The court, however, grounded its rule in state evidence law rather than constitutional due process.[98] After reviewing the state of knowledge on eyewitness perception and memory, the court concluded that its test failed to accomplish its goal of ensuring that only sufficiently reliable identifications are admitted into evidence.[99]

Like the New Jersey Supreme Court, the Oregon Supreme Court reviewed the current state of scientific knowledge about eyewitness perception and memory.[100] In particular, the New Jersey Supreme Court summarized the system and estimator variables that impinge on the reliability of eyewitness identification.[101] The court rejected outright some of the reliability factors it had previously endorsed, recognizing for example that "[u]nder most circumstances, witness confidence or certainty is not a good indicator of identification accuracy."[102] The court also acknowledged the endemic problem that in applying these reliability factors, courts rely heavily on inflated eyewitnesses' self-reports, creating "a sort of feedback loop in which self-reports of reliability, which can be exaggerated by suggestiveness, are then used to prove that suggestiveness did not adversely affect the reliability of an identification."[103] In analogizing the witness's original memory to trace evidence, the court concluded that "it is . . . only the original memory that has any forensic or evidentiary value" and that "once contaminated, a witness's original memory is very difficult to retrieve."[104]

The rule announced in *Lawson* was not just a re-working of the reliability factors, it was a re-working of the paradigm under which the

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96. State v. Lawson, 291 P.3d 673, 690–97 (Or. 2012); *see also* Sandra Guerra Thompson, *Judicial Gatekeeping of Police-Generated Witness Testimony*, 102 J. CRIM. L. & CRIMINOLOGY 329, 379–89 (2012) (elaborating the argument for using traditional evidentiary rules to exclude unreliable eyewitness testimony).

97. *Lawson*, 291 P.3d at 683–84 (discussing its test in State v. Classen, 590 P.2d 1198 (Or. 1979)).

98. *Id.* at 684.

99. *Id.* at 688.

100. *Id.* at 684–85. Rather than holding an evidentiary hearing, the Oregon court found that the state of scientific knowledge justified it in taking judicial notice of the data contained in over 2,000 scientific studies. *Id.* at 685.

101. *Id.* at 686–88. In addition to summarizing these variables in the text of the opinion, the court set out the research on each of the variables in a ten-page appendix to the opinion. *Id.* at 700–11.

102. *Id.* at 688.

103. *Id.* at 689.

104. *Id.*

reliability and admissibility of eyewitness identification evidence is assessed, drawing guidance from two sources within evidence law.[105] First, the court ruled that an eyewitness's identification is often not testimony of personal knowledge, but rather "a kind of lay opinion testimony that is based on a number of inferences and assumptions made by the witness regarding his or her perceptions."[106] The court reasoned that, as with all lay opinion testimony, the proponent of the evidence must establish whether the witness's identification of the defendant was rationally based on those perceptions and helpful to the jury.[107] When there is evidence that suggestive police procedure might have influenced the identification, the court ruled, the proponent of the evidence must establish by a preponderance of the evidence that the witness's identification was based on his or her own perceptions.[108]

Second, the court noted that evidence rules permit courts to exclude an eyewitness's identification of the defendant if its probative value is substantially outweighed by the risk of unfair prejudice.[109] The court explained that the probative value of eyewitness identification evidence is affected by the full panoply of system and estimator variables that affect its reliability: The more factors that weigh against reliability, the less probative value the identification will have.[110] When the reliability concerns center on estimator variables alone, the court anticipated that defendants would be more likely to probe the issues through cross-examination.[111] However, when police use suggestive procedures in obtaining the identification, the court said that the situation was "particularly susceptible to concerns of unfair prejudice" and that "'traditional' methods of testing reliability—like cross-examination—can be ineffective at discrediting" the eyewitness testimony.[112]

The court remained wary of outright exclusion of eyewitness identification evidence and encouraged lower courts to fashion "intermediate remedies" to reduce the risk of unfair prejudice, such as limiting the witness's testimony or supplementing it with expert testimony to assist the jury in evaluating it properly.[113] For example, the court noted that a witness's self-appraisal of certainty, after receiving confirming feedback, may have so little probative value and pose such a high risk of unfair prejudice that the statement of certainty should be

105. *Id.* at 691–92.
106. *Id.* at 692.
107. *Id.* at 693.
108. *Id.* (relying on Oregon Evidence Code, Rule 701).
109. *Id.* at 694.
110. *Id.*
111. *Id.* at 697.
112. *Id.* at 695.
113. *Id.*

excluded, even though the identification itself might still be admissible.[114]

In discussing alternatives to the exclusion of evidence, the Oregon court was attentive to the social science about what measures are actually most effective in educating the jury. After reviewing the pertinent social science, the court concluded that cross-examinations, closing arguments, and generalized jury instructions frequently are inadequate to caution factfinders of the pitfalls of eyewitness identification.[115] It therefore favored the use of expert testimony, which can both explain scientific research to the jury and "may prove vital to ensuring that the law keeps pace with advances in scientific knowledge."[116] As previously noted, the preference for expert testimony over jury instructions is consistent with social science research and in accordance with the recommendations of the National Academy of Sciences.[117]

The evidentiary rationale employed in *Lawson* has some obvious benefits in terms of flexibility over a constitutional due process test. Because the *Lawson* rationale focuses on the relationship between the witness's actual perceptions and the witness's identification, it has the capacity to target for exclusion the most problematic aspects of a mistaken eyewitness's testimony—such as the witness's in-court identification of the defendant and expression of certainty at the time of trial—while preserving testimony about what the witness actually saw or heard at the time of the crime. Because its rationale is firmly grounded in concerns about reliability, its focus remains on the strength of the eyewitness identification evidence. Although law enforcement deviation from mandated best practices is a factor in determining reliability, it is not the sole factor, and law enforcement misconduct is not a necessary threshold for an evidentiary ruling on admissibility.

However, the evidentiary rule fashioned in *Lawson* also has drawbacks that affect its capacity to incentivize law enforcement policy and behavior. Evidentiary rulings are generally committed to the discretion of the trial court and are virtually unreviewable on appeal. Hence, evidentiary rulings serve as flexible and nuanced tools in the hands of adept trial court judges, but they do little to protect defendants when trial courts fail to understand or incorporate the findings of social science and do not set the stage to advance the law through further development on appeal.

Moreover, while the evidentiary approach may be effective in sensitizing juries about how to weigh eyewitness evidence, it does not send a clear message back upstream to law enforcement agencies about the importance of following best practices in eyewitness identification

114. *Id.*
115. *Id.*
116. *Id.* at 696.
117. *See supra* notes 70–73 and accompanying text.

procedures. When individual cases are well-handled at the trial stage, the result under *Lawson*'s evidentiary approach is likely to be the partial introduction of eyewitness evidence coupled with expert testimony. Because it focuses on fine-tuning the evidence and instructions at trial, the evidentiary framework also does little to touch the plea negotiation process, which often rises or falls on the strength of an argument about the admissibility of key evidence. As a result, the curative approach lacks the effectiveness to incentivize upstream reforms, such as blind administration of lineups and photo arrays, which law enforcement agencies may otherwise be reluctant to put into place.

C. *Independent Corroboration Requirement*

As the foregoing Sections demonstrate, there are problems inherent in both of the existing approaches to fashioning downstream remedies for failing to follow the mandates of upstream reform. The constitutional framework does not support a per se exclusionary rule because failures to follow state-mandated eyewitness identification reforms are not per se violations of individual rights. The evidentiary framework can help to correct the distorting effect of impermissibly suggestive identifications by fine-tuning its use at trial, but this framework fails to enforce and incentivize adherence to upstream reforms. A third option would be to fashion a rule requiring impermissibly suggestive eyewitness identification evidence be corroborated by independent evidence.[118] Because they focus on verification of evidence, corroboration requirements retain the concern with reliability of convictions. However, corroboration requirements do more than seek to cure the problems caused by faulty law enforcement practices; when implemented correctly, they insist on thorough investigations.

Corroboration requirements have a deep—and not always popular—history in criminal procedure. They date from ancient Judaic law and continue into English common law, though their use has declined over time.[119] Scotland stands out as a notable exception in continuing to require that every fact in issue in a criminal case be proven by at least two independent sources of evidence.[120] However, abolition of

118. *See* Thompson, *supra* note 6 (examining a similar argument about a corroboration requirement for eyewitness identification evidence when the witness and the defendant have no prior relationship).

119. *See* John H. Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources*, 50 U. CHI. L. REV. 1, 96–103 (1983) (discussing early English common law that required corroboration of accomplice testimony); Irene Merker Rosenberg & Yale L. Rosenberg, *"Perhaps What Ye Say Is Based Only on Conjecture"—Circumstantial Evidence Then and Now*, 31 HOUS. L. REV. 1371, 1376–77 (1995) (discussing Talmudic law requiring two witnesses for conviction).

120. Fraser P. Davidson & Pamela R. Ferguson, *The Corroboration Requirement in Scottish Criminal Trials: Should It Be Retained for Some Forms of Problematic Evidence?* 18 INT'L. J. EVIDENCE & PROOF 1, 2–3 (2014).

the corroboration rule is currently under consideration in the Scottish Parliament.[121]

In the United States, corroboration requirements have been applied selectively to cases in which the reliability of evidence—most often the reliability of witness testimony—is in question. The United States Constitution requires that a treason conviction be based on the testimony of two witnesses to the same overt act, and both federal and several state statutes require corroboration for perjury convictions.[122] Corroboration of the testimony of complaining witnesses in rape cases was historically justified on the ground that women were likely to bring false accusations;[123] the Model Penal Code incorporated a corroboration requirement.[124] However, in the wake of changing perceptions of the credibility of rape victims, states have repealed the corroboration requirements as an unnecessary barrier to conviction.[125] Today, several states require corroboration for accomplice testimony because of concerns that accomplice testimony might be tainted by incentives to testify falsely.[126] One state, Maryland, has applied a corroboration requirement to eyewitness identification testimony, but only in capital cases.[127]

In the wake of DNA exonerations, scholars and commentators have endorsed independent corroboration as an appropriate response to the reliability concerns in eyewitness identification testimony.[128] Using Bayesian logic, Boaz Sangero and Mordechai Halpert argue that

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121. Efforts to abolish the rule are currently underway, with a criminal justice bill that includes abolition of the corroboration requirement passing Stage 1 and at Stage 2 of the proceedings in the Scottish Parliament. *Criminal Justice (Scotland) Bill*, THE SCOTTISH PARLIAMENT, http://www.scottish.parliament.uk/parliamentarybusiness/Bills/65155.aspx [http://perma.cc/5ET9-R63D].

122. Thompson, *supra* note 6, at 1531–35.

123. Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1137 (1986); Rosemary C. Hunter, *Gender in Evidence: Masculine Norms vs. Feminist Reforms*, 19 HARV. WOMEN'S L.J. 127, 155–56 (1996); *see also* Note, *The Rape Corroboration Requirement: Repeal Not Reform*, 81 YALE L.J. 1365 (1972) (describing and critiquing the justifications for the corroboration requirement in rape cases).

124. MODEL PENAL CODE § 213.6(5) (AM. LAW INST. 1981). This code provision is currently under re-examination by the American Law Institute. *Sexual Assault and Related Offenses*, AMERICAN LAW INSTITUTE, https://www.ali.org/projects/show/sexual-assault-and-related-offenses/ [https://perma.cc/MQL2-EGAK].

125. Hunter, *supra* note 123, at 155–56; Michelle J. Anderson, *The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault*, 84 B.U. L. REV. 945, 968–73 (2004).

126. Thompson, *supra* note 6, at 1531–34 (tracing the history of corroboration requirements in the United States and noting that fifteen states apply a corroboration requirement in some form to accomplice testimony). The Federal Rules of Evidence provide narrower protection, requiring evidence that corroborates the reliability of an out of court statement made by an unavailable accomplice against personal interest. *See* FED. R. EVID. 804(b)(3)(B).

127. Thompson, *supra* note 23, at 363 (discussing a Maryland statute that requires corroboration of eyewitness identification in capital cases).

128. *See* Thompson, *supra* note 6; *see also* Davidson & Ferguson, *supra* note 120, at 6–18 (arguing that the Scots corroboration requirement be retained for eyewitness

corroboration by two sources of evidence should be required because of its power to decrease the probability of error.[129] In addition to providing a backstop against erroneous evidence, a corroboration requirement would arguably incentivize law enforcement agencies to more thoroughly investigate cases upstream. Sandra Guerra Thompson has argued that a corroboration requirement would have the advantages of "prompting systemic changes in police investigations" by "making it incumbent upon police investigators to continue their investigations even after obtaining a positive identification."[130]

D. *The Problem of Sustainable Reform*

This Article argues that as a downstream remedy, an independent corroboration requirement would combine some of the deterrent benefits of a per se constitutional exclusionary rule with the curative evidentiary remedies that courts have found more attractive. As Marvin Zalman and Julia Carrano have recently argued, the upstream innocence reform movement needs to break out of its "causes and cures" paradigm, which isolates specified causes of wrongful conviction—like mistaken eyewitness identification—and proposes appropriate cures for each one.[131] The curative remedies that courts are favoring for eyewitness identification evidence—expert testimony, jury instructions, and fine-tuning of testimony through evidentiary rulings—fall into the trap of isolating and curing problematic evidence at trial rather than fashioning remedies that can work in a systemic way to incentivize better practices. Independent corroboration could serve a dual function by both providing a backstop against the introduction of unreliable evidence and incentivizing better law enforcement practices upstream.

To be effective, however, an independent corroboration requirement would need to be based on a deep understanding of independence that avoids the pitfall of allowing the use of multiple sources of unreliable evidence to bolster and corroborate each other. Keith Findley and Michael Scott have described the snowball effect that one piece of unreliable evidence can create, painting a scenario in which a single piece of unreliable evidence, like a mistaken eyewitness identification, can lead to the creation or interpretation of other evidence as inculpatory. As they describe:

> Convinced of guilt, investigators might then set out to obtain a confession from that suspect, producing apparently inculpatory reac-

identification evidence in cases where the witness has no previous acquaintance with the perpetrator).

129. Boaz Sangero & Mordechai Halpert, *Why a Conviction Should Not Be Based on a Single Piece of Evidence: A Proposal for Reform*, 48 JURIMETRICS J. 43, 44 (2007).

130. Thompson, *supra* note 6, at 1495.

131. Zalman & Carrano, *supra* note 13, at 960–62.

> tions or statements from the suspect, or leading investigators to interpret the suspect's innocent responses as inculpatory. The process of interrogating an innocent suspect might even produce a false confession. Police and prosecutors, convinced of guilt, might recruit or encourage testimony from unreliable jailhouse snitches, who fabricate stories that the defendant confessed to them, in hopes that they will benefit in their own cases from cooperation with authorities. Forensic scientists, aware of the desired result of their analyses, might be influences—even unwittingly—to interpret ambiguous data or fabricate results to support the police theory.[132]

As Findley and Scott write, "this additional evidence then enters a feedback loop that bolsters the witnesses' confidence in the reliability and accuracy of their incriminating testimony and reinforces the original assessment of guilt held by police, and ultimately by prosecutors, courts, and even defense counsel."[133]

Findley and Scott's scenario is borne out by recent empirical scholarship examining the factors that predict wrongful convictions and analyzes how those factors interact.[134] A study co-authored by Jon Gould statistically paired over two hundred erroneous convictions with over two hundred cases in which errors were caught prior to conviction (called "near misses" by the researchers).[135] It found that some of the traditionally understood "causes" of erroneous conviction, including erroneous eyewitness identification, occurred in both samples, and their presence alone did not predict a wrongful conviction.[136] What did make a difference was the way law enforcement and prosecutors responded—whether they continued to investigate and question the evidence, or whether they attempted to bolster it with additional evidence of questionable reliability.

As the Gould researchers concluded, the primary problem is not the presence of evidence that often leads to wrongful conviction, but tunnel vision—the tendency of police and prosecutors to "focus on a suspect, select and filter the evidence that will 'build a case' for conviction, while ignoring or suppressing evidence that points away from guilt."[137] Some of the factors that made a statistical difference between an erroneous conviction and a near miss included whether the case was located in a state with a more punitive culture[138] or whether the defendant had a prior record that might have influenced the police or prosecutor to an erroneous judgment of the defendant's

132. Findley & Scott, *supra* note 8, at 293 (citations omitted).

133. *Id.* (citations omitted).

134. *See* Zalman & Carrano, *supra* note 13, at 982–87.

135. Jon B. Gould et al., *Predicting Erroneous Convictions*, 99 IOWA L. REV. 471 (2014).

136. *Id.* at 489.

137. *Id.* at 504 (quoting Findley & Scott, *supra* note 8, at 292).

138. *Id.* at 497.

guilt in the case.[139] Other factors related more specifically to the behavior of the police or prosecutors. Forensic evidence, for example, could be used to detect error when used in a rigorous, independent assessment of the defendant's guilt, but could compound the error when deployed in a biased way to bolster the prosecution's case.[140] Notably, one of the statistically significant factors that harmed an innocent defendant was a weak prosecution case, largely because prosecutors had a tendency to seek to prop up weak cases by failing to disclose exculpatory evidence or by relying on false testimony by jailhouse snitches or other individuals with a motive to lie.[141]

The Gould study underscores the importance of pushing police and prosecutors to seek corroboration of guilt from multiple sources. To the extent that independent corroboration requirements incentivize further investigation, an independent corroboration requirement points in the right direction. Indeed, one of the reforms recommended in the Gould study is that investigators should not treat "any one piece of evidence as definitive in proving innocence or guilt" but should instead "gather and evaluate all evidence, while being mindful of its limitations."[142] However, the Gould study also points to the darker side of independent corroboration, highlighting the tendency of some prosecutors and law enforcement agencies—particularly those that operate in a punitive and conviction-oriented culture—to respond to a weak case by seeking to bolster it with additional unreliable evidence. At the end of the day, the effectiveness of an independent corroboration requirement will rise and fall on the ability of courts to distinguish the difference between truly independent sources of evidence, and manufactured corroboration.

V. Conclusion

The upstream reform movement resulting from the DNA exonerations of the late twentieth century is slowly making its mark on the criminal justice system. The early insight that DNA exonerations could be used to identify and correct systemic flaws in investigatory practices has won the attention of a limited number of state legislatures and courts. As upstream reform matures, it could benefit from more robust downstream enforcement, not merely to manage faulty evidence but to incentivize changes in law enforcement investigation. Until these downstream remedies develop more capacity to create accountability, the necessary changes to the criminal justice system will remain at the mercy of good intentions of those who are well-informed.

139. *Id.* at 498.
140. *Id.* at 500.
141. *Id.* at 501–03.
142. *Id.* at 510.

As this Article has argued, a per se exclusionary rule patterned after the exclusionary rule in constitutional criminal procedure could be justified to enforce and incentivize law enforcement adoption and adherence to best practices. However, such a rule has not taken hold, largely because in a procedural system of justice, bad investigation does not, in itself, trench on any individual right. Corrective measures at trial based in evidentiary rulings have been more favorably received by courts, but they lack deterrent force. An independent corroboration requirement could provide the dual function of preventing unreliable evidence from reaching the jury and incentivizing more upstream investigation prior to charging. To serve these functions well, however, an independent corroboration requirement must be developed with an understanding of the other lessons learned about tunnel vision and the systematic interaction of factors that lead to wrongful conviction.