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Sandra Guerra Thompson

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JUDICIAL GATEKEEPING OF POLICE-GENERATED WITNESS TESTIMONY

SANDRA GUERRA THOMPSON*

This Article urges a fundamental change in the administration of criminal justice. The Article focuses on what I call "police-generated witness testimony," by which I mean confessions, police informants, and eyewitness identifications. These types of testimony are leading causes of wrongful convictions. The Article shows that heavy-handed tactics by the police have a tendency to produce false evidence of these types, especially when the individuals being questioned by police are particularly vulnerable, such as juveniles or those who are intellectually disabled or mentally ill. It also demonstrates that there are procedural best practices that the police can follow to reduce the dangers of false evidence.

The most important feature of the Article is the proposal that courts take an active role in ensuring the reliability of evidence in criminal trials by invoking their gatekeeping responsibilities in screening police-generated evidence by holding pretrial reliability hearings. Current federal constitutional doctrine fails to exclude patently unreliable police-generated testimony. State high courts can invoke their state due process laws, as was recently done in a seminal New Jersey case on eyewitness identification. However, Federal Rule of Evidence 403 already gives trial courts broad discretion to exclude evidence on the grounds that its potential to mislead the jury substantially outweighs its probative value. Reliability hearings for lay witness testimony already exist in criminal cases for some types of evidence (mostly defense evidence), and they are also clearly required for expert scientific evidence. Moreover, effective gatekeeping is consistent with the objectives of the rules of evidence, not to mention ethical requirements that judges secure the integrity of the trial process.

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* University of Houston Law Foundation Professor and Criminal Justice Institute Director, University of Houston Law Center. The author represented the Texas public law schools as a member of the Timothy Cole Advisory Panel on Wrongful Convictions for the state legislature (2009–2010). She owes a debt of gratitude to Brandon Garrett, Keith Findley, Richard Leo, Alexandra Natapoff, and Myrna Raeder for their insightful comments on earlier drafts of the Article. Brooke Sizer and Michaiah Chatman provided excellent research assistance.

I. INTRODUCTION

Wrongful convictions prove that sometimes verdicts of guilty "beyond a reasonable doubt" are dead wrong.[1] Erroneous guilty verdicts often rest on three types of central—and often unreliable—lay witness testimony: eyewitness identification testimony, police officer testimony regarding a defendant's confession, and a police informant's[2] testimony regarding a defendant's incriminating statements.[3] Unlike other lay witness testimony,

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[1] As of this writing, a total of 300 men have been exonerated by means of DNA evidence. *News and Information: Facts on Post-Conviction DNA Exoneration*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Facts_on_PostConviction_DNA_Exonerations.php (last visited October 10, 2012). Seventeen death sentences have been overturned on account of DNA evidence. *Id.* Other studies suggest that the actual numbers of wrongful convictions, most of which cannot be discovered by means of DNA or other exculpatory evidence, are much greater. In fact, studies suggest that thousands of people are wrongly convicted of felonies each year. *See* Richard A. Wise, Clifford S. Fishman & Martin A. Safer, *How to Analyze the Accuracy of Eyewitness Testimony in a Criminal Case*, 42 CONN. L. REV. 435, 440–41 (2009); Samuel R. Gross et al., *Exonerations in the United States: 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 523–24 (2005).

[2] This Article addresses police informants generally, as opposed to in-custody or "jailhouse" informants, who are the sole focus of some statutes and reform proposals. The problems surrounding the use of police informants are as important for those not in custody, and perhaps even more so. *See* ALEXANDRA NATAPOFF, SNITCHING: CRIMINAL INFORMANTS AND THE EROSION OF AMERICAN JUSTICE 177–78 (2009).

[3] Misleading and false forensic evidence is also a contributing factor in a significant number of wrongful conviction cases. *See Understand the Causes: Unreliable or Improper Forensic Science*, INNOCENCE PROJECT, http://www.innocenceproject.org/understand/Forensic-Science-Misconduct.php (last visited Jan. 20, 2012). Forensic expert testimony is already ostensibly subject to reliability screening. Thus, this article focuses only on critical police-generated lay witness testimony.

Studying DNA exonerations allows us to learn about the extent to which eyewitness identification, false confessions, and informant testimony seem to be recurring causes of wrongful convictions. Erroneous eyewitness identification played a role in approximately 75% of the wrongful convictions. *Understand the Causes: Eyewitness Misidentification*, INNOCENCE PROJECT, http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php (last visited Jan. 20, 2012). False confessions are present in 25% of the cases, and false informant testimony is present in 15%. *See Understanding the Causes: False Confessions*, INNOCENCE PROJECT, http://www.innocenceproject.org/understand/False-Confessions.php (last visited October 10, 2012); *Understanding the Causes: Informants*, INNOCENCE PROJECT, http://www.innocenceproject.org/understand/Snitches-Informants.php (last visited October 10, 2012). Studies have also found that perjured testimony by police informants is a leading cause of wrongful death sentences, appearing in 45.9% of all documented wrongful convictions by one estimate, resulting in 51 wrongfully imposed death sentences. *See* CTR. ON WRONGFUL CONVICTIONS, NORTHWESTERN UNIV. SCH. OF LAW, THE SNITCH SYSTEM: HOW SNITCH TESTIMONY SENT RANDY STEIDL AND OTHER INNOCENT AMERICANS TO DEATH ROW 3, *available at* http://www.law.northwestern.edu/wrongfulconvictions/issues/causesandremedies/snitches/SnitchSystemBooklet.pdf. Frequently, wrongful convictions are based on more than one source of faulty evidence at the same time. *See Understand the Causes: The Causes of Wrongful Conviction*, INNOCENCE PROJECT,

police-generated testimony[4] in criminal cases is often rendered unreliable by suggestive or coercive police conduct or by police incentives to lie.[5] This is a critical factor that distinguishes other forms of testimonial evidence from this type of evidence. The role of the police in procuring these statements is a critical factor in assessing the reliability of confessions, informant testimony, and eyewitness identifications.

In an important sense, the evidence can be viewed as the *product* of the interaction between the individual, on the one hand, and the police investigator on the other. These types of evidence are not simply "found" in the way that a murder weapon may be found at a crime scene. Instead, a piece of these types of police-generated witness testimony may be likened to trace evidence, in that it must be carefully collected and processed in order to make accurate determinations. It is the interaction of the investigator with the individual giving statements that ultimately produces relevant evidence, and improper handling can contaminate or destroy the evidence.[6] Extensive studies have shown the effects that certain law

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http://www.innocenceproject.org/understand/. For a repository of information on wrongful convictions, see *id.*

These causes of wrongful convictions can occur at dramatically different rates in different kinds of cases, however. For example, erroneous identifications have been found in almost 90% of all rape exonerations, but only half of the homicides. Gross et al., *supra* note 1, at 542. Since DNA evidence is present in sexual assault cases far more often than in other types of crimes, wrongful rape convictions are far more likely to result in exonerations than other types of crimes. *Id.* at 530–31. Thus, considering DNA exonerations alone gives a skewed impression of how often mistaken identifications cause wrongful convictions. In murder cases, for example, the more common cause appears to be deliberate false testimony by a jailhouse snitch, the real perpetrator, or even the police or forensic scientists. *Id.* at 542–43. We can be certain of two things: huge numbers of wrongful convictions have occurred, and most will never be discovered. *Id.* at 533.

[4] For purposes of this Article, I will refer to three types of evidence—confessions, informant testimony, and eyewitness identification testimony—as "police-generated" evidence. There are clearly other types of testimonial evidence that may be generated by the police, such as alibi-negating witnesses or witnesses offering forensic evidence. This Article only compares three such types of evidence that have received the most attention from scholars and reformers.

In addition, to avoid confusion, I do not refer to the persons making the statements that have evidentiary value as "witnesses." In the case of confessions and informants, it is generally the police interrogator or informant who testifies to the incriminating statements, not the defendant who actually makes the incriminating statements. Thus, the "witness" in the case of confessions or informants is the police officer or informant. With eyewitness identifications, the person making the statements is also the witness in court.

[5] *See infra* Part II.A.

[6] The memories of eyewitnesses are extremely fragile and easily distorted by improper police practices. *See infra* notes 84–85 and accompanying text. The interrogation process can also "contaminate" the evidence of a suspect's statements if interrogators feed details of the crime to the suspect who then repeats them back to the interrogators. In the case of particularly vulnerable suspects, these details may become part of the suspect's false

enforcement practices can have in rendering police-generated witness testimony of these three types unreliable.[7] Reliability concerns have even led a few jurisdictions to prohibit death sentences based solely on these types of evidence.[8] Thus, a major contribution of this Article is to catalogue the ways in which all three of these types of prosecution evidence can be rendered substantially more unreliable by strong-armed police tactics, especially when they are employed against individuals who are particularly vulnerable, such as minors and the intellectually disabled or mentally ill.

A number of proposals have called on trial courts to play a gatekeeping role for police-generated witness testimony that mirrors the role they ostensibly play in screening scientific evidence for reliability as outlined by the Supreme Court in *Daubert*.[9] Just as with forensic evidence,

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memories that are created during the interrogations. *See infra* note 68. The gathering of information from potential informants can also produce contaminated evidence if the informant is told the details of the crime for which the police seek testimony. *See infra* notes 76–81 and accompanying text.

[7] *See infra* notes 143–80 and accompanying text.

[8] Illinois had a unique provision that allowed a trial court to decertify a case as a capital case "if the court finds that the only evidence supporting the defendant's conviction is the uncorroborated testimony of an informant witness . . . concerning the confession or admission of the defendant or that the sole evidence against the defendant is a single eyewitness or single accomplice without any other corroborating evidence." 720 ILL. COMP. STAT. 5/9-1(h-5) (2011). The provision is no longer needed in Illinois since the death penalty was recently repealed. *See* Illinois Pub. Act 096-1543, available at http://www.ilga.gov/legislation/publicacts/fulltext.asp?Name=096-1543. Nonetheless, the corroborating evidence requirement provides a useful exemplar.

In Maryland, a person may not be sentenced to death based solely on the testimony of eyewitnesses. The State must present the court or jury with "(i) biological evidence or DNA evidence that links the defendant to the act of murder; (ii) a videotaped, voluntary interrogation and confession of the defendant to the murder; or (iii) a video recording that conclusively links the defendant to the murder." MD. CODE ANN., CRIM. L. § 2-202(a)(3) (LexisNexis 2011). *See also* Michael Millemann, *Limiting Death: Maryland's New Death Penalty*, 70 MD. L. REV. 272, 272 (2010) (describing Maryland's death penalty laws as the most restrictive in the country).

[9] *See infra* notes 236–45 and accompanying text. *Daubert* announced judicial gatekeeping to ensure the reliability of scientific evidence. Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993); *see also* Kumho Tire Co. v. Carmichael, 536 U.S. 137 (1999) (applying *Daubert* reliability standard to expert witnesses offering technical evidence). In the civil context, Joseph Sanders views *Daubert* as evidence that American courts have "taken smaller steps toward reducing the untoward effects of the adversarial selection of witnesses" and "pushed courts in the United States toward a slightly more inquisitorial posture . . . . The era of a totally passive judiciary slowly ended after the adoption of the Federal Rules of Evidence, and, since *Daubert*, the federal judiciary and the courts in many states have adopted a more active, inquisitorial posture in assessing the quality of a party's experts." Joseph Sanders, *Science, Law, and the Expert Witness*, 72 LAW & CONTEMP. PROBS. 63, 78 (2009).

there are best practices for gathering and preserving these types of evidence. Laboratory protocols guide the scientist, and standardized protocols can guide law enforcement in gathering and preserving eyewitness identification evidence, confessions during custodial interrogations, and the use of police informants.[10] If investigators "contaminate" the evidence by using suggestive or coercive practices, it is within the province of the trial judge to exclude the resulting evidence as too unreliable or to devise a less drastic intermediate remedy.

Unfortunately, the analogy to scientific evidence—another common cause of wrongful convictions—suffers from the fact that trial courts generally have either been unwilling or unable to perform competent reliability screening in criminal cases.[11] To be fair, reliability in the context of scientific evidence presents a more challenging task for courts.[12] Evaluating the scientific validity of a proposed expert's testimony involves a complex assessment of the established scientific theory, the accepted protocols for obtaining such evidence, and the applicability of the science to the facts of the case at bar.[13] Scientific expertise also comes in a myriad of

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[10] *See infra* Part II.B. On the social science of eyewitness identification, see also Sandra Guerra Thompson, *Beyond a Reasonable Doubt? Reconsidering Uncorroborated Eyewitness Identification Testimony*, 41 U.C. DAVIS L. REV. 1487, 1497–1506 (2008) [hereinafter *Beyond a Reasonable Doubt?*]. On confessions, see RICHARD A. LEO, POLICE INTERROGATION AND AMERICAN JUSTICE 237–68 (2008). On informant testimony, sociologists have done more limited research. *See, e.g.*, NATAPOFF, *supra* note 2, at 40, 111.

[11] Concerns about the failures of *Daubert* in criminal cases and the admission of unreliable forensic evidence abound. *See* COMM. ON IDENTIFYING THE NEEDS OF THE FORENSIC SCIENCE CMTY., NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS. ET AL., STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD (2009) (finding that a wide range of forensic disciplines lack validity) [hereinafter STRENGTHENING FORENSIC SCIENCE]; Brandon L. Garrett & Peter J. Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions,* 95 VA. L. REV. 1, 2, 89–90 (2009) (reporting that invalid forensic science was offered in 82 of 137 (60%) of wrongful convictions studied; courts typically admit prosecution forensic evidence in a highly deferential manner and do not provide funds for defense experts). These concerns have also prompted the suggestion that perhaps judges should share the decisionmaking authority for forensic science with experts in those fields. *See* Keith A. Findley, *Innocents at Risk: Adversary Imbalance, Forensic Science, and the Search for Truth*, 38 SETON HALL L. REV. 893, 897 (2008).

[12] "Surveys and case law have demonstrated that judges have a poor judicial understanding of the *Daubert* factors, which in many ways requires an unrealistic working knowledge of the philosophy of science." Edward K. Cheng, *Independent Judicial Research in the* Daubert *Age*, 56 DUKE L. J. 1263, 1270 (2007).

[13] As *Daubert* explains, courts are required to evaluate the proposed testimony to determine whether it is supported by valid scientific principles. *Daubert*, 509 U.S. at 589–90. This involves a determination of whether the science is generally accepted in the relevant scientific community, whether the results of the testing have been published for peer review, whether they are falsifiable, and the error rate. *Id.* at 593–94. In addition, the court must evaluate the technique used to put the scientific principles into practice. Are there valid

varieties, and each type of evidence requires the court to assess reliability on numerous, complex levels.[14] Not surprisingly, grave concerns about the unscientific nature of much forensic evidence admitted by courts persist.[15]

It hardly makes sense to propose expanding on a failed model of reliability screening. However, courts are better suited to conduct reliability screening for police-generated lay witness testimony. The term "reliability" as used here means simply accuracy, and it operates in reference to the trial outcome. Determining reliability in relation to confessions, eyewitness identifications, and informant testimony involves a probabilistic assessment of the extent to which a variety of factors known to diminish the accuracy of these types of evidence are present in a given case. Judges can simply compare the police procedures followed in the case to state-of-the-art best practices that have been developed by law enforcement groups and reformers. A reliability assessment would also necessarily take into account any vulnerability factors, and other intrinsic factors pertaining to the individuals interviewed, that are known to reduce the likely accuracy of the statement given.[16]

Traditionally, trial courts hold pretrial hearings for confessions and eyewitness identification evidence, but only to determine whether it was obtained in accordance with the defendant's constitutional rights. These hearings have not been effective in ensuring the reliability of the evidence.[17] A new landmark decision by the New Jersey Supreme Court sets a new course for its state due process analysis of eyewitness identifications by

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protocols in the field? Were the protocols followed? Next, the court must evaluate the manner in which the results are interpreted and explained to the jury. Are the conclusions drawn by the expert empirically based? Finally, the court must determine whether the proposed evidence is sufficiently relevant in terms of "fit." Does the evidence support an issue in question in the case? *Id.* at 591. It goes without saying that a witness's credentials also must be assessed for adequate expertise. *See also* Garrett & Neufeld, *supra* note 11, at 7–8 (noting that in addition to validity of a particular forensic technique, data must also be interpreted, reported, and testified to within appropriate scientific parameters that are supported by empirical data).

[14] *Daubert*, 509 U.S. at 592–93.

[15] *See supra* note 11.

[16] With regard to both confessions and statements from police informants, for example, individuals who are juveniles, intellectually disabled, or mentally ill have been shown to be more susceptible to making false statements than others. *See infra* notes 69–75 and accompanying text. Likewise, for eyewitnesses, researchers have shown that many factors, such as an eyewitness's age, mental ability, and stress level during the crime, and other factors like differences in race between eyewitness and culprit, can affect the ability of the eyewitness to make an accurate identification. *See infra* notes 106–15 and accompanying text. Some cases may present the "perfect storm" of both particularly vulnerable individuals *and* highly suggestive or coercive police practices, posing an extremely high likelihood of unreliability.

[17] *See infra* Part III.A.

requiring pretrial reliability hearings of the type advocated here.[18] This opinion can serve as a template for other states in vastly improving the screening of identification evidence and the use of jury instructions. It also sets an important precedent in that it departs entirely from a failed federal constitutional test for police-generated lay witness testimony. It lays the responsibility for reliability assessment squarely at the feet of the judiciary as a protection for the innocent against wrongful conviction. In this broader sense, it lays the groundwork for a similar departure from the federal voluntariness test for confessions and the development of judicial reliability screening for informant testimony.

However, state trial courts need not wait for the supreme courts in their states to follow the New Jersey high court's lead. The state counterparts to the Federal Rules of Evidence also govern reliability. Traditionally, we would look to the hearsay rules to guard against the use of unreliable hearsay statements. However, the hearsay rules were drafted long before the advent of DNA exonerations brought to light the potential unreliability of police-generated evidence. For most hearsay, the rules require proof of certain indicia of reliability. In contrast, the rules freely admit confessions, eyewitness identifications, and informant testimony without any reliability screening.[19]

Fortunately, the drafters of the Federal Rules of Evidence showed the foresight to know that specific rules might not always provide sufficient protection against evidence that might lead to an inaccurate verdict by misleading or confusing the jury or unfairly prejudicing a party.[20] Thus, Rules 701 and 403 vest trial courts with broad discretion to determine whether evidence offered by a lay witness is inadmissible on the grounds that it presents a high risk of unreliability that may lead to an inaccurate verdict. This approach is consistent with the traditional role of the trial judge as evidentiary gatekeeper under Rule 104(a) as well. As our understanding of the dangers of a particular type of evidence may change, the rules should be adapted to meet the challenges presented by this new information. The "purpose and construction" provision of the rules calls on courts to interpret the rules over time so as to "promote the development of evidence law, to the end of ascertaining the truth and securing a just determination."[21]

Courts have not traditionally held pretrial reliability hearings. Instead, the practice is to leave it to the jury to "find the facts" based on "witness

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[18] *See infra* notes 316–25 and accompanying text.

[19] *See infra* notes 275–92 and accompanying text.

[20] *See infra* notes 269–72 and accompanying text.

[21] FED. R. EVID. 102.

credibility," among other things.[22] Witness "credibility" refers to the witness's truthfulness. However, eyewitnesses who misidentify an innocent suspect and police officers who testify to a suspect's false confession usually give truthful testimony. These witnesses actually believe that the defendant is guilty. The witnesses are "credible" in that they are not lying, but their testimony is nonetheless incorrect. Juries generally do not appreciate the ways in which certain police tactics can cause an eyewitness to make an honest mistake or to feel pressured to identify a certain person, honestly convincing himself of the defendant's guilt.[23] Jurors also generally do not understand how other tactics can cause an innocent person to confess falsely.[24] Similarly, jurors have been shown to be generally ineffective at evaluating the reliability of police informants because they do not appreciate the government incentives or coercion likely to cause informants to lie, nor do they appreciate the vulnerability of some informants in the face of police pressure.

Pretrial reliability hearings would transform the judicial role from one of passively admitting what may be patently unreliable evidence to one that involves actively scrutinizing the process by which the police have generated the witness testimony. Jurors already understand that trial courts rule on the admissibility of evidence, so freely admitting police-generated witness testimony may be assumed to indicate a judicial imprimatur, giving jurors a false belief that the judge considers the evidence reliable. Moreover, the reliability of police-generated witness testimony cannot properly be screened during a trial by a jury. The issues are better suited to a pretrial hearing regarding the conditions under which police interviewed the individual, as well as other reliability factors. As an institutional matter, judges through training and experience can develop the required expertise that jurors—who are not regular participants in the trial process—cannot.[25]

Finally, it fits within the adjudicative model already in place for judges to pass on the reliability of police-generated evidence. Courts already grant pretrial hearings to consider constitutional challenges to confessions and

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[22] *See generally* JAMES OLDHAM, TRIAL BY JURY: THE SEVENTH AMENDMENT AND ANGLO-AMERICAN SPECIAL JURIES 25–44 (2006) (discussing the fact-finding role of the jury and the role of the judge in determining questions of law).

[23] *See infra* note 303 and accompanying text.

[24] *See infra* notes 303–04 and accompanying text.

[25] Oliver Wendell Holmes, Jr., argued in his classic work, *The Common Law*, that even though facts "do not often repeat themselves in practice," yet "cases with comparatively small variations from each other do," and when this happens, "A judge who has long sat at *nisi prius* ought gradually to acquire a fund of experience which enables him to represent the common sense of the community in ordinary instances far better than an average jury."

OLDHAM, *supra* note 22, at 41.

identifications,[26] as well as the reliability of scientific evidence[27] and problematic types of lay witness testimony.[28] Moreover, reliability determinations do not interfere with a defendant's right to a jury trial,[29] but rather they would advance the defendant's right to a fair jury trial.

The judiciary carries a heightened responsibility to oversee the reliability of police-generated witness testimony for several reasons. For one thing, the many discoveries of wrongful convictions, through DNA evidence and otherwise, expose only the "tip of an iceberg."[30] Wrongful convictions scholars have generally agreed that the occurrence of wrongful convictions is almost certainly much higher than the occurrence of exonerations *and* that we do not have the means to uncover most of the wrongful convictions that occur.[31] Convictions based on government-generated witness testimony—now shown to *falsely* convict scores of innocents—impose on the state a new obligation to perform more rigorous screening for reliability, and that duty naturally falls to the courts.[32] Rule 104(a) outlines the basic duty of trial courts to determine the admissibility of evidence,[33] and Rule 403 grants courts the discretion to exclude evidence that carries a grave risk of misleading the jury.[34] Under these rules, courts have the discretion to engage in reliability gatekeeping, especially in light of the fact that these particular types of evidence are heavily influenced by the police procedures that generate them.[35] State high courts can invoke

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[26] *See infra* note 182 and accompanying text; *infra* Part III.A.

[27] *See supra* note 13; *infra* notes 257–63 and accompanying text.

[28] *See infra* Part III.B.

[29] A defendant has a Sixth Amendment right to have a jury determine the elements of the crime, including any fact that increases the maximum punishment. *See* OLDHAM, *supra* note 22, at 39–40. Reliability assessments either accrue to the advantage of the defendant by excluding evidence, or they admit the evidence and allow the jury to make the ultimate decision. Thus, by ruling on reliability the courts would not take from the jury the authority to find the defendant guilty.

[30] *See* Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 62 (2008).

[31] *See Beyond a Reasonable Doubt?*, *supra* note 10, at 1491.

[32] *See* D. Michael Risinger, *Tragic Consequences of* Deadly Dilemmas*: A Response to Allen and Laudan*, 40 SETON HALL L. REV. 991, 1020 (2010) ("Viewing the state as having more responsibility for harm done directly to the immediate subjects of its acts than for harm done indirectly by its failures to act [i.e., to convict the guilty], or by its choices to act one way rather than another, has a long tradition, especially in situations where the latter harm is done by the subsequent choice of an independent human agent."). For an article calling for heightened reliability review at the appellate level, see Keith A. Findley, *Innocence Protection in the Appellate Process*, 93 MARQ. L. REV. 591 (2009).

[33] *See* Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 592–93 (1993) (explaining the trial judge's responsibility to assess expert scientific testimony under 104(a)).

[34] *See id.* at 595; *see also infra* Part IV.B.

[35] *See infra* Parts IV.B–D.

their state due process clauses as well.[36] Legislatures can play an important role in guiding that discretion by defining and prioritizing the factors courts should consider.[37]

It bears mention that vigorous reliability screening for police-generated witness testimony by trial courts does not threaten the viability of large numbers of prosecution cases.[38] While confessions, informant testimony, and identification evidence are leading causes of wrongful convictions, in the vast majority of cases the identification of the perpetrator and the particular details of the crime are not in doubt. Large categories of crimes occur in cases involving people who know each other, such as domestic violence cases, or where people are caught red-handed, such as drunk-driving and undercover drug cases. These types of cases—over 90% of all felonies—tend to be resolved by guilty pleas.[39] It is only in the truly uncertain cases, which comprise a small minority of the total caseload, that confession, informant, and eyewitness evidence will require reliability assessments. These are the cases that tend to go to trial and in which defendants often reject otherwise lenient plea offers.[40] In one study of the first 200 DNA exonerations, with the exception of nine defendants who pled guilty, all the rest were found guilty after trial.[41] Any serious effort to curb wrongful convictions would focus on reforming the investigative and trial practices in this small subset of cases.

Part II of this article demonstrates what I call the "unreliability conundrum" in criminal prosecutions. Students of the problem are now familiar with the fact that these three types of testimonial evidence—confessions, eyewitness identifications, and police informant testimony—often lead to wrongful convictions. Yet the law remains unsettled on how best to respond. Surely not every eyewitness identification, confession, or police informant is unreliable, but many are. Calls for strict enforcement of

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[36] *See* Sandra Guerra Thompson, *Eyewitness Identifications and State Courts as Guardians Against Wrongful Conviction,* 7 OHIO ST. J. CRIM. L. 603, 621–31 (2010) [hereinafter *Eyewitness Identifications*].

[37] *See* NATAPOFF, *supra* note 2, at 194 (stating that the Illinois statute lists seven reliability factors).

[38] *See* Dan Simon, *The Limited Diagnosticity of Criminal Trials*, 64 VAND. L. REV. 143, 147 (2011).

[39] *Id.* This is not to say that a guilty plea assures the actual guilt of the defendant. The mass exonerations in Tulia, Texas, and the Rampart scandal in Los Angeles involved hundreds of innocent people who were deliberately framed by corrupt police officers, and almost all of them pled guilty. *See* Russell D. Covey, Mass Exoneration Data and the Causes of Wrongful Convictions (2011) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1881767.

[40] Simon, *supra* note 38, at 152.

[41] *See* Garrett, *supra* note 30, at 74.

scientifically proven best practices for the police run up against a strong resistance from many within law enforcement.[42] This part of the Article surveys the research on each of these three types of evidence so as to better understand the unreliability of each, focusing especially on the ways in which the police can exacerbate the unreliability. It also addresses the proposed protocols advanced by scholars and advocacy groups for each of the three areas and the extent to which the legal system has implemented them.

Among the proposals put forth by academics and advocacy groups is the proposal that trial courts expand their judicial gatekeeping role to include pretrial reliability reviews of police-generated witness testimony. Part III of the paper examines the support for such pretrial hearings in the rules of evidence and Supreme Court case law. It also reviews two types of lay witness testimony in which courts already conduct reliability hearings—the testimony of previously hypnotized witnesses and young child witnesses in sexual assault cases. Courts have recognized that certain safeguards should normally be followed in conducting out-of-court interviews with witnesses undergoing hypnosis and with child victims. Interestingly, these recommended procedures bear remarkable similarity to those proposed for obtaining police-generated witness testimony. Thus, there is significant, instructive precedent for holding pretrial reliability hearings for important prosecution lay witness testimony.

Finally, in Part IV, the Article argues that trial courts should conduct pretrial reliability hearings for police-generated witness testimony. This Part then outlines the various considerations that courts might take into account in evaluating the reliability of the three types of evidence addressed, using the New Jersey decision on pretrial hearings for eyewitness identifications as a model. This section explains the appropriateness of judicial screening of critical lay witness testimony. Judges have an ethical obligation to safeguard the integrity of the trial process, and they are best situated to develop the necessary expertise in these areas of law. Moreover, passing on reliability does not infringe on the

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[42] *See Beyond a Reasonable Doubt?*, *supra* note 10, at 1494 (addressing police resistance to changes imposed from outside law enforcement); *cf.* D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. CRIM. L. & CRIMINOLOGY 761, 765 (2007) (addressing resistance to new evidence of innocence by some judges and prosecutors); Gross et al., *supra* note 1, at 525–26 (citing examples of "state officials who continue to express doubt about the innocence of exonerated defendants, sometimes in the face of extraordinary evidence"). *See generally* Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 129–31, 150, 157–59 (2004) (examining the institutional and political incentives that cause prosecutors to resist claims of innocence).

jury's fact-finding role, a role designed to operate for the defendant's benefit.

II. THE UNRELIABILITY CONUNDRUM

The criminal justice system in the United States adheres to an adversarial model for investigation and prosecution.[43] Government agents seek to discover criminal wrongdoers and bring them to justice so as to keep their communities safe and provide solace to victims. Arrests and convictions take on a special importance as indicators of success in an adversarial model of criminal investigation.[44]

Some scholars have recognized the dangers of an adversarial model of criminal investigation. For example, the wrongful convictions literature has highlighted the psychological phenomenon of "tunnel vision" that can occur once police investigators come to believe in a particular suspect's guilt.[45] For complex, psychological reasons, police investigators can become blind to evidence inconsistent with a suspect's guilt, and they have a tendency to interpret other evidence as supporting their suspect's guilt.[46] In an adversarial investigative model, a defense attorney is considered a hindrance to the police, rather than a person who can assist the police in reaching the right result. The police will have little interest in sharing information with a defendant or a defense attorney. In fact, the police will be eager to gather their evidence to the greatest extent possible without the involvement of a defense attorney.[47] Institutional pressures can also lead prosecutors to develop tunnel vision about the guilt of persons arrested by the police.[48] In an adversarial system, police and prosecutors control how an investigation is conducted, as well as access to relevant evidence, thereby putting wrongly accused persons at a serious disadvantage in trying to clear their names.[49] Keith Findley astutely observes that:

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[43] New concerns about protecting the innocent have caused several scholars to write critically of the American adversarial system of law enforcement. *See, e.g.*, Mary Sue Backus, *The Adversary System is Dead; Long Live the Adversary System: The Trial Judge as the Great Equalizer in Criminal Trials*, 2008 MICH. ST. L. REV. 945, 945–50; Findley, *supra* note 11, at 900.

[44] *See* Findley, *supra* note 11, at 899 (addressing "[i]nstitutional pressures . . . to catch and convict . . . criminals" and "unrealistic public and media expectations . . . in the wake of violent and sensationalized crimes").

[45] For the definitive article on the topic, see Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WISC. L. REV. 291.

[46] *Id.* at 326–27.

[47] *See* Findley, *supra* note 11, at 898; Findley & Scott, *supra* note 45, at 323–27.

[48] *See* Findley, *supra* note 11, at 898–900.

[49] *Id.* at 898.

> While initial investigations must be handled by police, a system that is truly interested in protecting the innocent and finding the truth would not make police an arm of the prosecution. Instead, police might be made neutral inquisitors who work for the court or both parties, and not just the prosecution. Police investigative files and crime scene evidence would then be made fully available . . . to both parties, with appropriate safeguards to protect the safety of sensitive sources of information or the integrity of ongoing investigations. Some European countries do just that—they make the police investigative file fully available to both sides.[50]

Similar concerns about the adversarial nature of evidence gathering in the American criminal justice system have moved some to call for greater independence of forensic scientists from law enforcement as a means of improving the reliability of forensic evidence.[51] Unfortunately, the American adversarial system of criminal justice presents other hazards for the innocent, including unequal resources—in particular, access to experts and the quality of representation for indigents.[52] In short, criminal investigations that become motivated to build a case against a particular individual present grave risks to the wrongly accused.

The studies of each of the types of evidence addressed here—eyewitness identifications, confessions, and police informant testimony—show that each is derived by the police during the initial stages of the adversary process. There are two important dynamics that can operate simultaneously, often producing false statements. First, the police may attempt to obtain the statements *after* they have identified a suspect as a means of substantiating their case, rather than seeking the statements as a starting point in an investigation.[53] Police investigators who believe that they know the identity of the guilty person will engage in a conversation with a person (an eyewitness, a suspect, or a potential informant),[54] often using suggestive or coercive means, in order to obtain the desired evidence.[55] Second, the persons whose statements are obtained by the police may be vulnerable individuals who are more susceptible to suggestive, misleading, or coercive police behavior.[56] The combination of the two—police interviewers who believe they have the "correct" answers

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[50] *Id.* at 900.

[51] *See generally* STRENGTHENING FORENSIC SCIENCE, *supra* note 11 (discussing the challenges currently facing the forensic community, including the lack of validity in many forensic disciplines).

[52] *See* Lisa R. Pruitt & Beth A. Colgan, *Justice Deserts: Spatial Inequality and Local Funding of Indigent Defense*, 52 ARIZ. L. REV. 219, 300–01 (2010).

[53] *See, e.g.*, Findley & Scott, *supra* note 45, at 334 ("[A]n interrogation is conducted only when the investigator is reasonably certain of the suspect's guilt." (quoting FRED E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS 8 (2001))).

[54] *See infra* notes 62–65 and accompanying text.

[55] *See infra* notes 66–68 and accompanying text.

[56] *See infra* notes 69–75, 82, 106–08 and accompanying text.

in mind when they interview individuals and individuals who are particularly vulnerable to police suggestion or pressure—leads quite predictably to false answers.

Herein lies the reliability conundrum for the legal system: in many instances, police-generated witness testimony is reliable, but in other cases these critical types of evidence lead to wrongful convictions. Researchers have identified the police practices and other factors that affect the reliability of these types of evidence, and have made suggestions for improved police practices.[57]

The following sections address the literature on the three types of police-generated testimonial evidence discussed here. Each can create a risk of wrongful convictions due to the psychological vulnerability of the individuals questioned by the police, combined with the suggestive or coercive questioning practices of the police. This part of the Article also reviews the best practices for improving the reliability of these types of evidence.

A. PSYCHOLOGICALLY VULNERABLE INDIVIDUALS, DETERMINED INVESTIGATORS, AND A PROCESS HIDDEN FROM JUDICIAL SCRUTINY

When a serious crime occurs, the police look for leads and try to determine who committed the crime. For assistance, they turn to individuals such as eyewitnesses, "persons of interest," suspected accomplices, low-level criminals from the same community, or cellmates of a suspect in the county jail. Custodial interrogation, eyewitness identifications, and informant information are the means by which investigators build their cases. Once the police arrest a suspect, eyewitnesses can verify the arrest decision by making a positive identification. To obtain identification evidence, the police ordinarily conduct a lineup or photo array to see if the eyewitness can choose the suspect from the choices provided.[58] Alternatively, with on-the-scene arrests, the police may conduct a "show up" in which the suspect is the only

[57] Reformers have also advocated the use of pretrial reliability hearings. *See infra* notes 237–40 and accompanying text.

[58] Studies of identification practices show that the police generally use these procedures only after they have targeted a particular person as a "suspect." *See, e.g.*, Bruce W. Behrman & Sherrie L. Davey, *Eyewitness Identification in Actual Criminal Cases: An Archival Analysis*, 25 LAW & HUM. BEHAV. 475, 475–478 (2001) (providing archival analysis of real cases and various factors that affected "suspect identification rates," or rates at which eyewitnesses identified persons who police had singled out as suspects).

person shown to the eyewitness.[59] Once a suspect is in custody, the police can interrogate the arrestee to obtain incriminating statements.[60] They may also offer incentives to known criminals who may share a jail cell with the suspect.[61] All of these encounters produce important testimonial evidence for the prosecution.

Richard Leo emphasizes that the American system of police interrogation must be understood as an early phase of the adversary system and not simply as a neutral fact-finding process.[62] Leo's review of empirical studies of police detectives shows them to be "anything but neutral or impartial in their collection and construction of case evidence against criminal suspects during the interrogation process."[63] The same can be said of the process of eyewitness identification[64] and the use of informants.[65] Each of these investigative methods too often becomes an occasion for individuals to confirm the investigators' beliefs about a certain suspect's guilt, or simply to provide usable evidence to convict an arrestee, rather than being part of a neutral search for truth. Rather than one-on-one conversations between equals, the research shows these investigative processes to be police-dominated sessions in which officers use various psychological methods of suggestion, persuasion, or coercion.

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[59] Sandra Guerra Thompson, *What Price Justice? The Importance of Costs to Eyewitness Identification Reform*, 41 TEX. TECH L. REV. 33, 53–54 (2008) [hereinafter *What Price Justice?*] (noting that show-ups may be the most commonly used identification procedure).

[60] A person is considered to be in police "custody" if that person "has been . . . deprived of his freedom of action in any significant way." Miranda v. Arizona, 384 U.S. 436, 444 (1966). A lawful arrest is justified on the basis of probable cause to believe the person is guilty of a crime. *See* Terry v. Ohio, 392 U.S. 1, 27 (1968) (citing Beck v. Ohio, 379 U.S. 89, 91 (1964)). Following arrest, the police may engage in a custodial interrogation so as to gather sufficient evidence to prove guilt beyond a reasonable doubt. *Miranda*, 384 U.S. at 449–50.

[61] *See* NATAPOFF, *supra* note 2, at 27–29 (addressing the rewards, such as leniency, cash, and even illicit drugs offered to informants who have access to higher level targets of police investigations).

[62] *See generally* LEO, *supra* note 10, at 9–40.

[63] *Id.* at 11.

[64] Typically, the police use photo arrays or live lineups as a means of having an eyewitness confirm the identification of a suspect who is already in police custody or who is a target of the investigation. Scientists analogize these identification procedures to scientific experiments. In these experiments, "[p]olice investigators are like researchers who have a hypothesis (i.e., that the suspect is the culprit), the officer conducting the lineup is like an experimenter who administers the materials and 'runs,' the eyewitness through the procedure . . . ." Gary L. Wells & Eric P. Seelau, *Eyewitness Identification: Psychological Research and Legal Policy on Lineups*, 1 PSYCHOL. PUB. POL'Y & L. 765–67 (1995).

[65] *See* NATAPOFF, *supra* note 2, at 17–21 (addressing relationship of informant to police officer in investigating crimes).

When suspects confess falsely, they most often do so "in response to police coercion, stress, or pressure in order to achieve some instrumental benefit—typically either to terminate and thus escape from an aversive interrogation process, to take advantage of a perceived suggestion or promise of leniency, or to avoid an anticipated harsh punishment."[66] The combination of a highly stressful atmosphere in the interrogation room and a promise of leniency can wear a suspect down and manipulate him into confessing.[67] In addition, police may also use pressure, tricks, lies, fear, or other tactics to convince a person to make incriminating statements that may turn out to be false.[68]

The vulnerability of certain types of suspects increases the likelihood of a false confession as well. Juveniles,[69] the mentally ill,[70] and the

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[66] LEO, *supra* note 10, at 201–02; *see also, e.g.*, State v. Strayhand, 911 P.2d 577, 583 (Ariz. Ct. App. 1995) (describing interaction between two police detectives and a suspect where the police threatened to "hang [the suspect] in court" and that he would do some "big time" if he was not cooperative, ignored his request to stop being questioned, accused him of lying, and then lied about having a lab report that showed his fingerprints were on the vehicle used in the robbery).

[67] LEO, *supra* note 10, at 148.

[68] *Id.* at 132–50, 201–04. One study of cases in which innocent individuals were wrongly convicted and later exonerated through DNA evidence found that police had fed the facts and details of the crime to the innocent suspects and then reported that the suspects had provided these same facts and details as part of their confessions. *See* Garrett, *supra* note 30, at 89–90. Another scholar provides evidence of police dishonesty as testifying witnesses, in covering up their wrongdoing, as part of the interrogation process, and even in fabricating evidence against innocent people. *See* Melanie D. Wilson, *An Exclusionary Rule for Police Lies*, 47 AM. CRIM. L. REV. 1, 4 (2010). She proposes an exclusionary rule for unjustified "truth-distorting" police lies as a means of protecting the innocent from wrongful convictions. *Id.* at 45–46.

[69] *See* LEO, *supra* note 10, at 231–33. *See generally* Steven A. Drizin & Greg Luloff, *Are Juvenile Courts a Breeding Ground for Wrongful Convictions?*, 34 N. KY. L. REV. 257 (2007) (arguing that problems of false confessions and mistaken identifications by juveniles, when combined with procedural shortcomings of juvenile courts, create a heightened risk of wrongful conviction); Christine S. Scott-Hayward, *Explaining Juvenile False Confessions: Adolescent Development and Police Interrogation*, 31 LAW & PSYCHOL. REV. 53 (2007) (addressing suggestibility of children during interrogation, noting relevance of research on children as witnesses and victims, and recommending reforms including prohibiting coercive, deceptive, or suggestive questioning, as well as videotaping).

[70] Mentally ill persons may confess falsely even without the use of coercive or suggestive practices. Regardless of the reason, it is clear that the confessions of the mentally ill are not generally reliable. *See* Claudio Salas, Note: *The Case for Excluding the Criminal Confessions of the Mentally Ill*, 2004 YALE J.L. & HUMAN. 243, 268–69 (arguing for exclusion of all confessions by the mentally ill or mentally disabled persons who are not capable of comprehending the *Miranda* warnings); *see also* BRANDON L. GARRETT, *Characteristics of Informant Testimony in DNA Exoneration Cases*, *in* CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG ch. 5, app. (2011), *available at* http://www.law.virginia.edu/pdf/faculty/garrett/convicting_the_innocent/garrett_informants_

intellectually disabled[71] have been shown to be more susceptible to coercive or deceptive tactics by the police during custodial interrogation. A recent study of youths who have been exonerated by DNA evidence showed that of the 103 youth exonerees, 31.1% had falsely confessed.[72] In another study, 43% of all DNA exonerees were mentally ill, mentally retarded, or borderline mentally retarded.[73] For a variety of reasons, intellectually disabled suspects may become compliant with the interrogator and willing to say what the interrogator wants to hear.[74] After lengthy interrogations they can even become confused and persuaded to believe they are in fact guilty.[75]

With police informants, the typical image is that of a wily criminal who would commit perjury to obtain a benefit for himself. The police may be faulted for facilitating the perjury by offering some type of reward for the testimony, but they cannot necessarily be faulted for generating the testimony. However, there is another scenario in which the use of police informants mirrors the interrogation process. Police, or even prosecutors, may initiate similar government-dominated interviews with potential informants as a means of generating evidence about certain individuals they believe to be guilty. Police may attempt to pressure potential informants to "cooperate" by means of various types of inducements, including threats of incarceration or deportation, if they refuse to provide information.[76]

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appendix.pdf (quoting conflicting and vague victim-eyewitness testimony by psychiatric patient in case where defendant, Mark Bravo, was exonerated).

[71] *See generally* Morgan Cloud et al., *Words Without Meaning: The Constitution, Confessions, and Mentally Retarded Suspects*, 69 U. CHI. L. REV. 495 (2002) (presenting empirical study showing that mentally retarded suspects do not comprehend the *Miranda* warnings that are designed to protect them and that they have a proclivity to confess falsely).

[72] Joshua A. Tepfer, Laura H. Nirider & Lynda M. Tricarico, *Arresting Development: Convictions of Innocent Youth*, 62 RUTGERS L. REV. 887, 904–05 (2010). The study of 103 DNA exonerees who were juveniles showed that while 31.1% of all youth exonerees falsely confessed, only 17.8% of the 214 adult exonerees had falsely confessed. In addition, the study found that the incidence of false confessions increases as the age of the child decreases; of the eleven- to fourteen-year-olds in the study, over half had confessed falsely. *Id.*

[73] *See* Brandon L. Garrett, *The Substance of False Confessions*, 62 STAN. L. REV. 1051, 1064 (2010).

[74] *See* LEO, *supra* note 10 at 231–34 (discussing the reasons that vulnerable suspects may falsely incriminate themselves, including: the effects of low cognitive abilities on their susceptibility to manipulation and deception, becoming easily overwhelmed by stress, having low self-esteem, being eager to please authority figures, and having distorted perceptions due to mental illness).

[75] *Id.* at 210–11, 231–33.

[76] *See, e.g.*, NATAPOFF, *supra* note 2, at 90 (detailing the facts in *United States v. White*, No. CRIM.A.04-20047-01-K, 2004 WL 2182188, at *1 (D. Kan. Sept. 21, 2004), in which a police officer threatened to bring multiple charges and take the individual to jail if he did not

Alexandra Natapoff writes of the process of "creating informants" as one that "involves the purposeful manipulation of their vulnerability."[77]

Informants may be psychologically vulnerable to police pressure due to a variety of conditions similar to those observed in the context of interrogations. Natapoff explains the "lopsided power dynamics of the way informants are often created in the first place."[78] Rather than wily negotiators who bargain for rewards on equal footing with the police, "[i]nformants can be the most defenseless players in the criminal justice drama—those without counsel or education, those with substance abuse problems, or those who are otherwise susceptible to official pressure."[79] It is not uncommon for informants to be juveniles.[80] The fear of criminal punishment and other psychological disadvantages of potential informants will often induce them to lie in order to obtain the promised leniency or other rewards.[81]

Even informants without innate vulnerabilities may be susceptible to offers of substantial rewards or threats of punishment. The question would be whether the incentives offered by law enforcement were so great as to create an unacceptable likelihood that any person would be tempted to commit perjury to gain the benefit or avoid the punishment.[82]

Eyewitnesses conjure up yet another image of police encounters. The stereotypical eyewitness is the good citizen who is a crime victim or simply

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cooperate); *see also id.* at 27–29 (noting that leniency is the most common reward used, but others include monetary payment, relocation, new jobs and identities, and even illegally provided drugs or permission to engage in criminal conduct). For data on informant testimony regarding rewards offered to them at the trials of persons who were later exonerated by DNA evidence, see GARRETT, supra note 70, ch. 5, app.

[77] NATAPOFF, *supra* note 2, at 40. She quotes a former narcotics agent who bluntly explains:

> It is a widely accepted fact that individuals are most vulnerable to becoming cooperative immediately following arrest . . . . [I] learned to "strike" while the "iron is hot." Informants will often rethink their exposure and decide not to cooperate if given too much time to contemplate their decision. However, a night or two in jail can work for the investigator to help the informant decide to cooperate.

Id.

[78] *Id.*

[79] *Id.*

[80] *See* Andrea L. Dennis, *Collateral Damage? Juvenile Snitches in America's "Wars" on Drugs, Crime, and Gangs*, 46 AM. CRIM. L. REV. 1145, 1171–75, 1181–83 (2009) (addressing the harms and dangers to children from acting as police informants and advocating for an approach that requires government agents to adopt the best-interests-of-the-child standard when using a child as an informant).

[81] *Id.* at 40–41.

[82] The test would be similar to the elements of an entrapment defense. *See generally* WAYNE R. LAFAVE, CRIMINAL LAW § 9.8(a), at 530–34 (5th ed. 2010).

an eyewitness to a crime. The police will initially ask the eyewitness to describe the culprit and, following an investigation, will ask the eyewitness to try to identify a possible suspect. There is growing public awareness that eyewitnesses can be notoriously unreliable in identifying a stranger who committed a crime in their presence. Their primary disadvantage is the simple fact that most human beings lack the ability to develop and retain accurate memories of the faces of strangers; this deficiency is most acute when witnesses view those individuals under the typical circumstances in which serious stranger-on-stranger crimes are committed.[83]

The police can compound any preexisting unreliability of an eyewitness's identification by using suggestive, or even coercive, procedures.[84] In the zeal to build a case, a determined investigator can manipulate the collection of eyewitness testimony and cause a witness to select the wrong person; an investigator can also give positive feedback that

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[83] *See, e.g.*, LOFTUS, *infra* 136–37 (observing that "[i]t seems to be a fact—it has been observed so many times—that people are better at recognizing faces of people of their own race than a different race"); ELIZABETH F. LOFTUS, JAMES M. DOYLE & JENNIFER E. DYSART, EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL 106–08 (4th ed. 2007); Kenneth A. Deffenbacher, *Estimating the Impact of Estimator Variables on Eyewitness Identification: A Fruitful Marriage of Practical Problem Solving and Psychological Theorizing*, 22 APPLIED COGNITIVE PSYCHOL. 815, 819–22 (2008) (discussing studies of effects of heightened stress on eyewitness memory); Kenneth A. Deffenbacher et al., *A Meta-Analytic Review of the Effects of High Stress on Eyewitness Memory*, 28 LAW & HUM. BEHAV. 687, 699–704 (2004) (discussing findings that "high levels of stress negatively impact both accuracy of eyewitness identification as well as accuracy of recall of crime-related details"); *see also* Gary L. Wells & Elizabeth A. Olson, *Eyewitness Testimony*, 54 ANN. REV. PSYCHOL. 277, 279 (2003) (discussing studies on the effects of cross-race identification and lighting conditions). *See generally* BRIAN L. CUTLER & STEVEN D. PENROD, MISTAKEN IDENTIFICATION: THE EYEWITNESS, PSYCHOLOGY, AND THE LAW (1995); ELIZABETH F. LOFTUS, EYEWITNESS TESTIMONY (1979); Wells & Seelau, *supra* note 64.

[84] *See What Price Justice?*, *supra* note 59, at 50–51 (discussing reform proposals for lineup foil selection designed to prevent the suspect from standing out); *see also infra* notes 141–42. Multiple showings of the same suspect to the same witness may contribute to an erroneous identification due to a psychological phenomenon known as "unconscious transference." *See* LOFTUS, *supra* note 83, at 142–44; LOFTUS ET AL., *supra* note 83, at 106–08; *see also* Gabriel W. Gorenstein & Phoebe C. Ellsworth, *Effect of Choosing an Incorrect Photograph on a Later Identification by an Eyewitness*, 65 J. APPLIED PSYCHOL. 616, 621 (1980) (describing a study confirming that once an eyewitness selects an incorrect face, he or she is likely to make the same incorrect selection at a later time); *Frontline*: *What Jennifer Saw*, PBS, http://www.pbs.org/wgbh/pages/frontline/shows/dna/interviews/thompson.html (last visited Jan. 19, 2012) (providing a transcript of an interview with rape victim Jennifer Thompson who reports that even after DNA proved that Bobby Poole was the actual rapist, in her mind she continued to see the face of the man she had wrongly accused, Ronald Cotton).

has the effect of bolstering the witness's confidence in the erroneous selection.[85]

Police determination to build a case with witness testimony can go far beyond merely suggestive procedures and can closely resemble the type of determined coercion, and even deception, employed against suspects during interrogation. In more egregious cases, police officers can use outright threats, intimidation, and persistence to pressure a witness to identify a person the police seek to prosecute.

A major investigation by the *Houston Chronicle* uncovered evidence of witness intimidation that had provided the only evidence supporting the capital murder conviction of Ruben Cantu in 1985.[86] Cantu was a teenager with no criminal record at the time of the murder, which was witnessed only by Juan Moreno, a teenager and undocumented immigrant who was himself severely injured. Cantu became the leading suspect in the murder after his involvement in a later incident resulting in the non-fatal shooting of an off-duty police officer. The police tried twice with no success to obtain a positive identification of Cantu from Moreno by showing him photo arrays that included Cantu.[87] The day after the second attempt, the police took the deportable teenage witness to the police station to view a third photo array containing Cantu's photo.[88] This time Moreno identified Cantu. Years later, according to the newspaper:

> Moreno said he felt compelled to do what the officers wanted, even though he knew it was wrong. "The police were sure it was [Cantu] because he had hurt a police officer," Moreno said in a recent interview. "They told me they were certain it was him, and that's why I testified. That was bad to blame someone that was not there."[89]

Ruben Cantu never stopped proclaiming his innocence. He was executed in 1993. The prosecutor regrets seeking the death penalty in a case in which the sole eyewitness was able to identify the defendant only after being shown the same person's photo three times.[90] In retrospect, he now states:

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[85] *See* Amy Bradfield Douglass & Nancy Steblay, *Memory Distortion in Eyewitnesses: A Meta-Analysis of the Post-Identification Feedback Effect*, 20 APPLIED COGNITIVE PSYCHOL. 859, 860 (2006); 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, 374 (1998); John S. Shaw, III & Kimberley A. McClure, *Repeated Postevent Questioning Can Lead to Elevated Levels of Eyewitness Confidence*, 20 LAW & HUM. BEHAV. 629, 630–31, 649–50 (1996).

[86] Lise Olsen, *Did Texas Execute an Innocent Man? The Cantu Case: Death and Doubt; Eyewitness Says He Felt Influenced by Police To Identify the Teen as the Killer*, HOUS. CHRON., Nov. 20, 2005, at A1.

[87] *Id.*

[88] *Id.*

[89] *Id.*

[90] *Id.*

"We have a system that permits people to be convicted based on evidence that could be wrong because it's mistaken or because it's corrupt."[91]

In the case of Ricardo Aldape Guerra, both police and prosecutors coerced eyewitnesses in order to obtain identification evidence leading to a capital murder conviction.[92] Like Cantu's case, this case involved the shooting of a police officer, but here the shooting was fatal.[93] Years after the conviction, witnesses—who were all innocent bystanders—testified that police officers used angry, vulgar language in rejecting their statements identifying a different man, not Guerra, as the shooter.[94] One witness was told that the police would take her infant daughter away from her unless she cooperated.[95] She also watched as police officers yelled at her aunt, handcuffed her, and put her in a police car.[96] Another witness was threatened with her arrest and that of her husband if she did not cooperate.[97] Over twelve years after the conviction, a federal court granted Guerra's petition for the writ of habeas corpus and denounced in the strongest terms the extreme police and prosecutorial misconduct, which also went beyond witness intimidation.[98]

We have no way of knowing how often the police intimidate witnesses into identifying the person the police want them to choose, but the cases of Cantu and Guerra demonstrate that it does happen. Brandon Garrett's research of DNA exonerations shows several instances in which eyewitnesses reported feeling pressured to identify a particular person.[99] Many of the tactics used with eyewitnesses resemble those used in interrogations, such as the use of lengthy detentions as a means of

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[91] *Id.*

[92] Guerra v. Collins, 916 F. Supp. 620, 637 (S.D. Tex. 1995), *aff'd sub nom*. Guerra v. Johnson, 90 F.3d 1075 (5th Cir. 1996).

[93] *Id.* at 623.

[94] *Id.* at 624–25.

[95] *Id.*

[96] *Id.*

[97] *Id.* at 625.

[98] *Id.* at 637 ("The police officers' and the prosecutors' actions described in these findings were intentional, were done in bad faith, and are outrageous. These men and women, sworn to uphold the law, abandoned their charge and became merchants of chaos."); *see also* People v. Lee, 115 Cal. Rptr. 2d 828, 834 (Cal. Ct. App. 2002) (reversing conviction in part because police coerced eyewitness into identifying defendant by improper threat to try eyewitness for murder unless he named defendant as the killer).

[99] *See* GARRETT, *Characteristics of Eyewitness Misidentifications in DNA Exonerees' Trials*, *in* CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG, *supra* note 70, ch. 3, app., *available at* http://www.law.virginia.edu/pdf/faculty/garrett/convicting_the_innocent/garrett_eyewitness_appendix.pdf. (cases include Habib Abdal, Ulyssess Rodriguez Charles, Thomas Doswell, Jerry Lee Evans, and Michael Evans, among others).

pressuring them to "name names."[100] Other times, witnesses are given information (which may or may not be truthful) about certain suspects that matches their descriptions of the individuals. This information signals to the witness the officer's belief in that particular person's guilt.[101] Sometimes the suggestion is so blatant as to make the identification process a farce. In one case the witness was shown the photo of the suspect first and then shown a photo array that also included his photo—the equivalent of telling a student the answer to a multiple choice question before administering the exam question.[102] If witnesses initially pick a filler instead of the suspect, they may be told to try again—clearly communicating that the first choice was "wrong" and they should pick one of the others.[103] Like informants, witnesses may even make an identification in exchange for some type of reward.[104] In another extreme case, a federal appeals court found that the police officer had "fabricated" a lineup by making the defendant's photo obviously stand out in a photo array in order to frame the defendant for failing to cooperate.[105]

As with suspects and potential informants, the psychological vulnerabilities of eyewitnesses being questioned by the police play an important role. In the *Guerra* case, the witness was held overnight at the police station. The petitioner argued that "in addition to lack of sleep, the ability to coerce and intimidate the witnesses was made easy by three other factors common to most of the key witnesses, i.e., their inability to speak

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[100] *Id.* (Michael Evans case: witness detained for ten hours and pressured to name names).

[101] *Id.* (Jerry Lee Evans case: victim initially described attacker as having a black glove with metal-looking spikes, and police told witness after identification that Evans had previously been arrested for wearing spiked knuckles; Larry Fuller case: witness told that the photo was taken the morning of identification at Fuller's house and that he had previously been imprisoned for armed robbery; Anthony Green case: witness told suspect's name was Tony and she had indicated that assailant had identified himself as Tony).

[102] *Id.* (Clarence Harrison case). In the Jerry Lee Evans case, the D.A.'s office later described the police as "leading and encouraging" the victim to pick Evans. *Id.* (Jerry Lee Evans case). The victim in another case was shown only one photo and then told that the police would likely dismiss the case if she did not identify him. *Id.* (Peter Rose case). Another was told that if she did not identify the suspect in a single-person show-up, he would be released, making the investigation more complex because he would be harder to locate. *Id.* (Eduardo Velasquez case).

[103] *Id.* (Joe Jones case: filler chosen twice and then wrongly convicted; Larry Mayes case: suspect chosen on second attempt).

[104] *Id.* (Paula Gray case: witness initially did not make an identification, but made the identification after police offered assistance and relocation; Willie Rainge case: victim initially did not identify suspect, and only did so after offered police relocation).

[105] *Id.* (Donald Wayne Good case); *see also* Good v. Curtis, 601 F.3d 393, 399 (9th Cir. 2010).

fluent English, their lack of education, and their youth."[106] The court in *Guerra* acknowledged the special vulnerability of juveniles to intimidating police tactics.[107] Cantu's case also involved the intimidation of a juvenile, who was also subject to deportation.[108]

As the research in the area of false confessions shows, juveniles and those with an intellectual disability or mental illness have a greater likelihood of succumbing to police intimidation.[109] In addition, the research on eyewitness identifications shows that these groups are also less likely to be reliable eyewitnesses. Children and the elderly,[110] mentally disabled persons, and persons on certain medications, intoxicants, or controlled substances[111] are less likely to provide accurate identification evidence. Their sensory disadvantage exists regardless of the methods employed by investigators.[112] If suggestive or coercive tactics are used, the likelihood of misidentification is necessarily compounded.

In addition, researchers have observed that being the victim of a violent crime can cause a witness to experience an intense fear that can cause lasting psychological damage. Witnesses "often report having been really frightened, sometimes admitting that they do not remember much detail about what occurred in the frightening situation, even on rare occasion admitting to symptoms persisting for weeks, at least, symptoms resembling those characteristic of posttraumatic stress disorder" (PTSD).[113] The research shows that evidence of such symptoms suggests an increased possibility of "catastrophic decline in memory performance."[114] Thus,

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[106] Guerra v. Collins, 916 F. Supp. 620, 624 (S.D. Tex. 1995), *aff'd sub nom.* Guerra v. Johnson, 90 F.3d 1075 (5th Cir. 1996).

[107] *Id.* at 627. DNA exonerations also show that the use of leading questions can lead young victims to identify a suspect wrongly. *See* GARRETT, *supra* note 99 (Leonard McSherry case: seven-year-old victim's actual description of culprit was ignored, and police used leading questions to "help her go along with what [they] were trying to emphasize").

[108] *See supra* notes 86–88 and accompanying text.

[109] *See supra* notes 74–75.

[110] *See Beyond a Reasonable Doubt?*, *supra* note 10, at 1502–03 (reporting that "very young children and the elderly perform [] significantly worse than younger adults" in studies of eyewitness identification (quoting Wells & Olson, *supra* note 83, at 280)).

[111] It is obvious that a person's physical and mental condition is affected by intoxicants and some medications such as painkillers. Courts nonetheless have allowed witnesses who observed assailants under these conditions to give eyewitness testimony. *See* Sandra Guerra Thompson, *Judicial Blindness to Eyewitness Misidentification,* 93 MARQ. L. REV. 639, 653 (2009) [hereinafter *Judicial Blindness*].

[112] Scientists refer to such factors as "estimator variables" because these variables relate solely to the innate qualities of a witness's observation and cannot be improved through systemic change. *See* Wells & Seelau, *supra* note 64, at 765–66.

[113] *See* Deffenbacher et al., *supra* note 83, at 822.

[114] *Id.*

research indicates that the trauma of a violent crime may cause witnesses to develop psychological problems such as PTSD, a symptom of which is loss of memory. Psychological disorders such as PTSD might also make a witness more vulnerable to suggestive or coercive practices; this would be a useful area of research for social scientists to pursue.[115]

In short, all three types of testimonial evidence studied here derive from interactions of the police with individuals who may have information to offer. In each instance, the individuals tend to be at a significant psychological disadvantage due to the circumstances in which they find themselves and possibly also due to certain other factors that make them less reliable sources of information. The police believe they know the identity of the criminal, so their goal during the questioning of these individuals is to obtain confirmation, not neutral truth-seeking. To facilitate the information gathering, the police may use methods that are highly suggestive, coercive, or deceptive. These tactics have been shown to create a substantial risk of producing false information, leading to wrongful convictions.

Moreover, the processes involved in gathering police-generated witness testimony have traditionally remained beyond public scrutiny. Researchers have outlined a number of advantages that accrue to law enforcement by maintaining the secrecy of individual custodial interrogations and negotiations with informants.[116] The incentives for law enforcement run squarely against thorough documentation requirements: documentation invites criticism, judicial oversight, and possible legal repercussions for intentional or unintentional legal violations. Interference in the processes that produce admissible prosecution evidence may be seen as a hindrance to effective law enforcement, and therefore something to be avoided.[117]

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[115] Garrett's research shows that victims often report feeling nervous or scared during identification procedures, sometimes hastily selecting someone in order to get out of the room quickly. GARRETT, *supra* note 99 (Ulysses Rodriguez Charles case: victim picked a filler and then was told to keep looking, so she picked another photo and ran out of the room; Luis Diaz case: victim initially identified another man in the lineup because she "wanted to get out of the room"; Jeffrey Todd Pierce case: victim was unable to identify Pierce at a show-up following the offense because she reported being "hysterical and . . . still in a state of shock"; Brian Piszczek case: victim reported that six weeks after the crime, she was "still hysterical" but claimed that her memory had improved over time).

[116] NATAPOFF, *supra* note 2, at 83–99; *see* LEO, *supra* note 10, at 83–84 (discussing the perceived need for secrecy in the context of behavioral lie-detection methods).

[117] *See* JOHN KLEINIG, THE ETHICS OF POLICING 224–29 (1996) (describing the protective culture within police departments which leads to constant attempts to circumvent mandates imposed from outside the organization); Debra Livingston, *Police Reform and the Department of Justice: An Essay on Accountability*, 2 BUFF. CRIM. L. REV. 815, 848 (1999) ("[E]xternal controls and accountability mechanisms (desirable as they are) cannot be

Custodial interrogations in most jurisdictions are not routinely recorded, so the process cannot be fully evaluated to determine whether the officers may have contaminated the process by suggesting details of the crime to the suspect or whether there were coercive means used to obtain the statements.[118] Thus, besides the DNA exoneration cases that involve false confessions, it is impossible to know how many more false confessions may have led to wrongful convictions.[119] The unavailability of DNA in those cases means that the injustice may never be discovered.

Eyewitness identification procedures typically generate insufficient documentation. It may be common to preserve a photograph of a lineup or the photo array used in a case, but interviews with eyewitnesses have generally not been well documented and certainly have not been electronically recorded. Some jurisdictions have made great strides in this area, but most have not.[120]

With police informants, even prosecutors may not know much about the informant's history as a prosecution witness in a past case or the rewards given for the informant's previous testimony. Police officers are normally reluctant to share information about their informants with prosecutors because they may not trust prosecutors to manage their informants properly.[121] Natapoff reports that New York and Chicago police went so far as to maintain "double file" systems for investigative reports: one set was shared with the public and prosecutors, and one set was kept secret.[122] For constitutional purposes, prosecutors are required to make pretrial disclosures about the witness's history as an informant that tends to impeach the credibility of the witness, such as the informant's criminal record, prior testimony as an informant, rewards promised, etc.[123] However, there is no corresponding affirmative duty for prosecutors to obtain the information from the police, nor do they have the incentives to seek out such impeachment material on their witnesses.[124] Thus, for all intents and purposes, all three types of evidence—confessions, informant statements, and eyewitness identifications—have been understood only

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expected to be effective unless police organizations are themselves involved in the process of control." (quoting DAVID DIXON, LAW IN POLICING: LEGAL REGULATION AND POLICE PRACTICES 94–95 (1997))).

[118] Garrett, *supra* note 73, at 1110.

[119] *Id.*

[120] *See What Price Justice?*, *supra* note 59, at 42–43.

[121] *See* NATAPOFF, supra note 2, at 23.

[122] *Id.*

[123] *Id.* at 58–60.

[124] *Id.* at 74–75 (discussing Los Angeles scandal that revealed that prosecutors intentionally did not track informants' histories and rewards).

through the oral testimony of participants in the questioning: the police officers (relating confessions), informants, and eyewitnesses.

B. BEST PRACTICES

As the number of DNA exonerations reaches 300,[125] the calls for reform to address the causes of wrongful convictions continue to ring out from various quarters. Legal reform groups such as the Innocence Project and the (now-defunct) Justice Project have published reports outlining best practices,[126] as have the American Bar Association[127] and social science scholars.[128] Among the law scholars who specialize in wrongful convictions,[129] most focus on a particular cause of wrongful convictions

[125] As of this writing, the Innocence Project of the Cardozo School of Law reports that DNA evidence has led to the exoneration of 300 individuals. *Know the Cases*, INNOCENCE PROJECT, http://www.innocenceproject.org/know/ (last visited October 10, 2012).

[126] *Understand the Causes: The Causes of Wrongful Conviction*, INNOCENCE PROJECT, http://www.innocenceproject.org/understand/ (last visited Jan. 17, 2012); THE JUSTICE PROJECT, THE SOLUTION: AGENDA FOR REFORM (on file with author). On eyewitness identification, see *Model Legislation, 2009 State Legislative Sessions: An Act to Improve the Accuracy of Eyewitness Identifications*, INNOCENCE PROJECT (Oct. 2008), http://www.innocenceproject.org/docs/09_model_legislation/Eyewitness_ID_ Prescriptive_Model_Bill_2009.pdf; THE JUSTICE PROJECT, EYEWITNESS IDENTIFICATION: A POLICY REVIEW (2007), *available at* http://www.psychology.iastate.edu/~glwells/ The_Justice%20Project_Eyewitness_Identification_%20A_Policy_Review.pdf (last visited Feb. 13, 2012). On custodial interrogations, see *Model Legislation, 2010 Legislative Sessions: An Act Directing the Electronic Recording of Custodial Interrogations*, INNOCENCE PROJECT (Dec. 2009), http://www.innocenceproject.org/docs/2010/Recording_of_Custodial _Interrogations_Model_Bill_2010.pdf; THE JUSTICE PROJECT, ELECTRONIC RECORDING OF CUSTODIAL INTERROGATIONS: A POLICY REVIEW (2007) [hereinafter ELECTRONIC RECORDING] (on file with author). On police informants, see THE JUSTICE PROJECT, IN-CUSTODY INFORMANT TESTIMONY: A POLICY REVIEW (2007) [hereinafter INFORMANT REPORT] (on file with author).

[127] *See* AM. BAR ASS'N (ABA), ACHIEVING JUSTICE: FREEING THE INNOCENT, CONVICTING THE GUILTY: REPORT OF THE ABA CRIMINAL JUSTICE SECTION'S AD HOC INNOCENCE COMMITTEE TO ENSURE THE INTEGRITY OF THE CRIMINAL PROCESS (Paul C. Giannelli & Myrna S. Raeder eds., 2006), *reprinted in* 37 SW. U. L. REV. 763 (2008) [hereinafter ABA CRIMINAL JUSTICE SECTION] (addressing all the types of evidence examined here, among others).

[128] *See supra* notes 10 & 45 and *infra* notes 158 & 163.

[129] The literature on wrongful convictions issues other than confessions, the use of police informants, and eyewitness identifications covers a wide area of other causes and concerns. A few examples include: Garrett, *supra* note 30 (providing an empirical study of case law of exonerees, and finding that appellate review is ineffective in reviewing inaccurate evidence); Andrew D. Leipold, *How the Pretrial Process Contributes to Wrongful Convictions*, 42 AM. CRIM. L. REV. 1123 (2005) (addressing impediments to gathering and introducing evidence); Richard A. Leo & John B. Gould, *Studying Wrongful Convictions: Learning from Social Science*, 7 OHIO ST. J. CRIM. L. 7 (2009) (arguing that legal scholars should use social science to address wrongful convictions, not simply narrative or doctrine).

such as eyewitness identification,[130] custodial interrogations,[131] or police informants.[132] Law enforcement officials have produced some reports,[133]

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[130] This author and a few others addressed the admissibility of identification testimony relating solely to reliability and urged procedural reforms. *See, e.g.*, Noah Clements, *Flipping a Coin: A Solution for the Inherent Unreliability of Eyewitness Identification Testimony*, 40 IND. L. REV. 271 (2007) (proposing blanket exclusion of eyewitness identification testimony in criminal cases due to unreliability); Margery Malkin Koosed, *The Proposed Innocence Protection Act Won't—Unless It Also Curbs Mistaken Eyewitness Identifications,* 63 OHIO ST. L.J. 263 (2002) (calling for legislative measures to assure greater reliability of eyewitness identification testimony in capital cases); *Beyond a Reasonable Doubt?*, *supra* note 10 (recommending a corroboration requirement for admission of eyewitness identification evidence); *Eyewitness Identifications*, *supra* note 36, at 631–33 (urging state courts to apply state constitutional law or evidentiary rules to guard against admission of unreliable identification testimony); *What Price Justice?*, *supra* note 59 (reviewing reform proposals for eyewitness identification procedures); Richard A. Wise, Kirsten A. Dauphinais & Martin A. Safer, *A Tripartite Solution to Eyewitness Error*, 97 J. CRIM. L. & CRIMINOLOGY 807 (2007) (advocating expanded use of expert testimony, improved procedural safeguards, and judicial education).

[131] Richard Leo, together with various co-authors, has done extensive empirical legal work on custodial interrogations and the reforms needed to improve reliability. *See* Mark Costanzo & Richard A. Leo, *Research and Expert Testimony on Interrogation and Confessions*, *in* EXPERT PSYCHOLOGICAL TESTIMONY FOR THE COURTS 69 (Mark Costanzo, Daniel Krauss & Kathy Pezdek eds., 2006); Deborah Davis & Richard Leo, *Strategies for Preventing False Confessions and Their Consequences*, *in* PRACTICAL PSYCHOLOGY FOR FORENSIC INVESTIGATIONS AND PROSECUTIONS 121 (Mark R. Kebbell & Graham M. Davies eds., 2006); Richard A. Leo et al., *Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty-First Century,* 2006 WIS. L. REV. 479 [hereinafter *Bringing Reliability Back In*]; LEO, *supra* note 10, at 288–317; *see also* Garrett, *supra* note 73; Eugene R. Milhizer, *Confessions After Connelly*: *An Evidentiary Solution for Excluding Unreliable Confessions*, 81 TEMP. L. REV. 1 (2008). Most other scholars writing in the area of custodial interrogations have focused exclusively on the constitutional issues such as the applicability of *Miranda*, the Sixth Amendment right to counsel, and voluntariness under the Due Process Clause. For a small sample of the rich constitutional literature, see Morgan Cloud et al., *Words Without Meaning: The Constitution, Confessions, and Mentally Retarded Suspects*, 69 U. CHI. L. REV. 495 (2002) (addressing constitutional doctrine pertaining to interrogations of the mentally retarded); Mark A. Godsey, *Reliability Lost, False Confessions Discovered*, 10 CHAP. L. REV. 623 (2007) (critiquing Supreme Court's subversion of reliability factor in recent constitutional confession law); George C. Thomas III, Miranda*'s Illusion: Telling Stories in the Police Interrogation Room*, 81 TEX. L. REV. 1091, 1103 (2003) (reviewing WELSH S. WHITE, *MIRANDA*'S WANING PROTECTIONS (2001)).

[132] Alexandra Natapoff has written extensively on the subject. *See* NATAPOFF, *supra* note 2; Alexandra Natapoff, *Beyond Unreliable: How Snitches Contribute to Wrongful Convictions*, 37 GOLDEN GATE U. L. REV. 107 (2006). Other scholars have made important contributions to the issue as well. *See* George C. Harris, *Testimony for Sale: The Law and Ethics of Snitches and Experts*, 28 PEPP. L. REV. 1 (2000); Myrna S. Raeder, *See No Evil: Wrongful Convictions and the Prosecutorial Ethics of Offering Testimony by Jailhouse Informants and Dishonest Experts*, 76 FORDHAM L. REV. 1413 (2007); Ellen Yaroshefsky, *Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishments*, 68 FORDHAM L. REV. 917 (1999).

and most legislatures have taken some type of action, whether to form a study group or to enact new legislation.[134] Some state and federal courts have also recognized the danger of wrongful conviction posed by the types of evidence studied here, but only a few have created rules to minimize the risk.[135] For example, more than ten years after the Department of Justice issued a comprehensive set of guidelines for reforms of police procedures for eyewitness identification, only a few jurisdictions have mandated any of those procedures.[136] Moreover, even jurisdictions that have enacted new procedures for identification evidence have not gone so far as to mandate exclusion of the evidence for failure to follow the procedures.[137] Thus, we have seen some significant improvement in the quality of identification evidence in a few states and localities, but little to no improvement in most jurisdictions.[138] Reforms of both custodial interrogation and the use of police informants have lagged even more than reform of eyewitness

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[133] The most comprehensive and influential reports by law enforcement pertain to eyewitness identifications. They include: NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT (1999), *available at* http://www.ncjrs.gov/pdffiles1/nij/178240.pdf; N.C. ACTUAL INNOCENCE COMM'N, RECOMMENDATIONS FOR EYEWITNESS IDENTIFICATION (2003), *available at* http://www.ncids.org/New Legal Resources/Eyewitness ID.pdf; OFFICE OF THE ATT'Y GEN., STATE OF N.J., ATTORNEY GENERAL GUIDELINES FOR PREPARING AND CONDUCTING PHOTO AND LIVE LINEUP IDENTIFICATION PROCEDURES (2001), *available at* http://www.state.nj.us/lps/dcj/agguide/photoid.pdf. For a discussion of reform proposals on eyewitness identifications, see *What Price Justice?*, *supra* note 59, at 40–55.

[134] *See Reforms by State*, INNOCENCE PROJECT, http://www.innocenceproject.org/news/LawView3.php (providing links to state legislation on eyewitness identification reforms); *Reforms by State: State Laws Requiring Recorded Interrogations*, INNOCENCE PROJECT, http://www.innocenceproject.org/news/LawView3.php (last visited Mar. 2, 2012) (providing links to state legislation on electronic recording of interrogations); INFORMANT REPORT, *supra* note 126, at 4–5, 14 (addressing legislative actions regarding the use of informant testimony).

[135] *See* INFORMANT REPORT, *supra* note 126, at 6–7 (outlining the federal and state case law recognizing safeguards in the use of informant testimony).

[136] *See, e.g.*, *Reforms by State*, INNOCENCE PROJECT, http://www.innocenceproject.org/news/LawView5.php (last visited Jan. 24, 2012) (showing only eleven states with state-wide eyewitness identification reforms).

[137] Thus, courts can and do continue to admit identification evidence, even though it is shown to be produced by means known to decrease the reliability of the evidence and despite the fact that there are known means for reducing the degree of unreliability that law enforcement officials have simply chosen not to adopt. *See Judicial Blindness*, *supra* note 111, at 657–58.

[138] I have previously cataloged the few jurisprudential innovations of state courts, *see Eyewitness Identifications*, *supra* note 36, at 621–30, as well as the few states that have adopted reform procedures as a matter of law or by voluntary adoption, *see What Price Justice?*, *supra* note 59, at 42–55.

identification.[139] Overall, it is fair to say that actual reform of police practices in these three areas has proved sporadic, and there is much room for improvement in the practices actually used to collect these three types of evidence.

Interestingly, the procedures recommended for all three types of evidence have certain elements in common. On further reflection, the similarities in the best practices proposed by reformers (and observed in some jurisdictions) should not surprise us. Since so many of the weaknesses of all three types of evidence derive from the interactions of vulnerable individuals and determined investigators, as shown above, it stands to reason that the practices most likely to improve reliability would share similar traits.

First, for all three types of police-generated witness testimony considered here, best practices include procedures that protect against "contamination" by providing details of the crime to the individual being questioned or using suggestive tactics.[140] Especially for lineups and photo arrays, and to a lesser extent for interrogations, it is considered good practice to use a "blind" questioner (an officer who does not have information about the crime or the suspect).[141] For eyewitness identifications, it is recommended practice that the person administering the identification procedure also gives cautionary instructions to the witness so that the witness does not try to discern clues from the investigator and so that the witness does not feel any pressure to make a selection. Blind administration of identification procedures also eliminates the problem that occurs when officers give confirmatory feedback to the witness (such as,

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[139] For interrogations, the primary reform measure has been electronic recording, but in only a few jurisdictions have we seen any meaningful efforts to curb the coercive or suggestive practices used by law enforcement through legislative or judicial means. *See infra* notes 152–54 and accompanying text. In the area of police informants, Natapoff reports that jurisdictions have enacted only a few legislative safeguards. *See* NATAPOFF, *supra* note 2, at 192–200.

[140] Leo invokes the concept of contamination in discussing the ways in which interrogators may feed nonpublic details of crimes to suspects in helping the suspects to construct the public narrative that will explain how and why the crime was committed. *See* LEO, *supra* note 10, at 234–35, 286–87.

[141] Using a "blind" administrator for a study is a device commonly used to maintain the integrity of social science research studies. *See* Amy Klobuchar, Nancy K. Mehrkens Steblay & Hilary Lindell Caligiuri, *Improving Eyewitness Identifications: Hennepin County's Blind Sequential Lineup Pilot Project*, 4 CARDOZO PUB. L. POL'Y & ETHICS J. 381, 389–90 (2006). It is a feature of the leading reform proposals for eyewitness identifications. *See What Price Justice?*, *supra* note 59, at 43–44.

"You picked the right person"), which has the effect of increasing a witness's level of confidence in the selection made.[142]

For custodial interrogation, the Supreme Court already mandates cautionary instructions to the arrestee prior to the questioning.[143] The *Miranda* warnings ostensibly serve the purpose of putting the arrestee on stronger footing vis-à-vis the questioner so as to reduce the possibility of coercion, thus protecting a vulnerable individual from possible coercion by a determined interrogator. Moreover, to avoid contamination of the process, Leo and Ofshe would have courts review confessions for evidence that the information actually originates from the suspect and is not the product of contamination by the police.[144] According to a study of thirty-eight exonerations by Garrett, "[i]n all cases but two (ninety-seven percent—or thirty-six of the thirty-eight—of the exonerees for whom trial or pretrial records could be obtained), police reported that suspects confessed to a series of specific details concerning how the crime occurred."[145] This leads him to conclude that "police likely disclosed those details during interrogations by telling [the suspects] how the crime happened."[146] As a guard against such contamination, Garrett proposes the use of an investigator who is not involved in the investigation and is not

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[142] *See* Wells & Bradfield, *supra* note 85, at 364 (finding feedback given to witnesses after identifying suspect produces strong effects on witnesses' retrospective reports of their certainty, quality of the view they had, clarity of their memory, speed with which they identified the suspect, and several other measures).

[143] Miranda v. Arizona, 384 U.S. 436, 444 (1966).

[144] LEO, *supra* note 10, at 286–87. Rather than considering the circumstances under which a confession is obtained, the courts instead compare the facts of the crime known only to the police to the statements made by the individual, looking for the "degree of fit." *Id.* at 286. This approach calls on the judge to assess three factors that indicate the individual's personal knowledge: whether the confession provided information that "leads to the discovery of evidence unknown to the police," (2) whether it provided information about "highly unusual elements of the crime that have not been made public," and (3) whether it provided "an accurate description of the mundane details of the crime scene which are not easily guessed and have not been reported publicly." *Id.* (quoting State v. Mauchley, 467 P.3d 477, 489 (Utah 2003)) (internal quotation marks omitted). The purpose of considering the mundane details of the crime scene, for example, is that those are "less likely to be the result of suggestion by the police." *Id*. Videotaping is especially important because at least one study by Brandon Garrett shows that false confessions frequently contain "surprisingly rich, detailed, and accurate information" about the crime, precisely the kind of information that is considered evidence of the reliability of the confession. *See* Garrett, *supra* note 73, at 1054.

[145] Garrett, *supra* note 73, at 1054.

[146] *Id.*

privy to the details of the crime.[147] In effect, he proposes that the police use a "blind" interrogator.[148]

Second, proper documentation, preferably through videotaping, is recommended for all three types of evidence. The lack of information about each of these three types of investigative activities has posed a challenge to courts and reformers who seek to impose some form of regulation.[149] Indeed, secrecy shrouds the practice of custodial interrogation and the use of police informants,[150] and identification practices have remained outside of view by virtue of the lack of documentation.[151]

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[147] *Id.* at 1116.

[148] *Id.* This proposal would encounter resistance from police officers who likely consider it essential for an interrogator to know what information to seek and what inconsistencies to confront a suspect with. I do not here propose the use of blind interrogators, but since it would clearly eliminate the problem of contamination it is worthy of further exploration.

[149] For courts and researchers studying custodial interrogations, police training manuals have provided a wealth of information about the psychological tactics used to obtain incriminating statements from suspects. *See* LEO, *supra* note 10, at 106–16 (addressing techniques of psychological manipulation explained in police training manuals). More recently, researchers have conducted field studies that provide some information about confessions and eyewitness identifications. *See, e.g.*, Bruce W. Behrman & Sherrie L. Davey, *Eyewitness Identification in Actual Criminal Cases: An Archival Analysis*, 25 L. & HUM. BEHAV. 475 (2001) (on studies of actual identification practices); Richard J. Ofshe & Richard A. Leo, *The Social Psychology of Police Interrogation: The Theory and Classification of True and False Confessions*, 16 STUD. L. POL. & SOC'Y 189–251 (1997) (on interrogations). To gather information about police informants, Natapoff conducted interviews of informants and detectives; researched statutes, case law and news reports; and studied other writings on the subject, including reform proposals. *See generally* NATAPOFF, *supra* note 2.

[150] *See* LEO, *supra* note 10, at 35–36 (discussing the secretiveness of interrogations); NATAPOFF, *supra* note 2, at 83–99 (discussing the secretiveness of informant practices).

[151] One may view the Supreme Court's recognition of a right to counsel at lineups as an attempt to provide a prophylactic remedy for possible police suggestion. *See* United States v. Wade, 388 U.S. 218, 236–38 (1967); *see also* Gilbert v. California, 388 U.S. 263, 272 (1967). The presence of counsel can better ensure that non-suggestive practices are followed. However, the presence of counsel serves as a poor substitute for proper documentation because it puts counsel in the position of becoming a witness and being disqualified to continue as counsel. *See, e.g.*, United States v. Peng, 602 F. Supp. 298, 300–03 (S.D.N.Y. 1985) (disqualifying defense counsel as attorney under Model Code of Professional Responsibility DR 5-102(a) because counsel participated in a conference between defendant and a witness, thus becoming witness himself). Of course, the Court's later opinions so greatly limited the scope of the right to counsel as to virtually nullify it. *See Beyond a Reasonable Doubt?*, *supra* note 10, at 1510–11 (addressing the effects of *Kirby v. Illinois*, 406 U.S. 682, 690 (1972), and *United States v. Ash*, 413 U.S. 300, 321 (1973), which apply right to counsel only to post-indictment lineups and live lineups, respectively). Thus, the right to counsel has not served effectively either as a prophylactic remedy or as a substitute for a documentation requirement.

The leading reform on interrogations is the videotaping of the entirety of the interrogation, which is considered "imperative . . . so that it is possible to discern whether the facts were suggested to the [suspects] prior to the subsequent recording of a confession."[152] Videotaping of the entirety of the interrogation allows the court to evaluate whether any improper suggestion occurred and thus avoid resorting to the inevitable "swearing match" between the police and the defendant.[153] Although a number of states have adopted videotaping and the trend is strengthening, a majority of law enforcement agencies still do not videotape interrogations.[154]

Reformers propose adequate documentation and disclosure of evidence relating to eyewitness identifications and informant testimony as well.[155] At a minimum, for eyewitness identifications, the police should preserve the photo arrays used or create a photographic image of the live lineup so that they become part of the record.[156] Ideally, the interaction between an eyewitness and a police investigator during the administration of an identification procedure would be documented by means of videotaping, in addition to preserving the lineup or photo array.[157] With regard to informant testimony, the Center on Wrongful Convictions at Northwestern

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[152] Garrett, *supra* note 73, at 1059; *see generally* LEO, *supra* note 10, at 291–305 (regarding the movement for electronic recording of interrogations). The ABA Criminal Justice Section urges law enforcement agencies to videotape the entirety of custodial interrogations, and further urges courts or legislatures, or both, to enact rules of procedure requiring such videotaping. *See* ABA CRIMINAL JUSTICE SECTION, *supra* note 127, at 11–22. The Justice Project made the same recommendation for felony cases. *See* ELECTRONIC RECORDING, *supra* note 126, at 2–4.

[153] Additionally, videotaping would actually "save substantial court time and expense because electronically recorded confessions would induce guilty pleas from individuals who would otherwise take their cases to trial." Leo et al., *Bringing Reliability Back In*, *supra* note 131, 524 n.301. It would also "cut down on the time spent testifying by police and defendants at pretrial hearings (such as voluntariness hearings) about what occurred during the interrogation because the electronic recording objectively resolves that issue." *Id.*

[154] *See* ELECTRONIC RECORDING, *supra* note 126, at 2 ("In 2004–2005, state legislators in twenty-five states introduced legislation seeking to mandate the recording of custodial interrogations."); LEO, *supra* note 10, at 296 (noting that most police departments do not record interrogations, and the Federal Bureau of Investigation refuses to record as a matter of policy).

[155] *See* NATAPOFF, *supra* note 2, at 192–94 (discovery and disclosure of information about informants); *What Price Justice?*, *supra* note 59, at 48–49 (documentation of identification procedures).

[156] *See What Price Justice?*, *supra* note 59, at 48 & nn.137–38 (stating that New Jersey and North Carolina require photographic or video documentation, while the Innocence Project proposes only photographic documentation).

[157] *See id.* at 48–49 (stating that the Department of Justice encourages, but does not require, audio or video recording, and the ABA Criminal Justice Section requires video recording "whenever practicable" or photographic documentation if video recording is not possible).

University School of Law recommends that informants be wired to electronically record any incriminating statements made by suspects.[158] The group also recommends that law enforcement authorities electronically record their discussions with potential informants.[159] The photographs of lineups and electronic recordings of the administration of identification procedures, as well as those recordings and other information pertaining to informants, should all be disclosed to the defense before trial.[160]

In addition, for eyewitness identifications, the best practices call for soliciting and documenting an eyewitness's confidence level after a positive identification so as to document the degree of confidence *at that time*.[161] This has been found to be important because the witness will typically receive confirmatory feedback from the investigating officer or the prosecutor who will meet with the witness during the pretrial stage of the proceedings.[162] Indeed, the very process of pretrial preparation has been found to increase a witness's confidence in the identification such that the confidence exhibited at trial exceeds that which the witness reports initially.[163] A confidence statement made at the time of the identification is critical to properly evaluate the likely accuracy of an identification.

Third, there is a growing recognition of the importance of jury instructions and expert witnesses to help jurors better appreciate the ways in which these types of evidence may be rendered less reliable.[164] These remedies assume the traditional treatment of these three types of evidence, which is that the court will not conduct pretrial reliability screening and that

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[158] CTR. ON WRONGFUL CONVICTIONS, *supra* note 3, at 15.

[159] *Id.*

[160] *See id.* (proposing disclosure requirements relating to informant testimony); INFORMANT REPORT, *supra* note 126, at 3 (recommending mandatory, automatic pretrial disclosures relating to in-custody informants); NATAPOFF, *supra* note 2, at 192–94 (making the same recommendations as the Justice Project but for all police informants, not limited to in-custody informants).

[161] *See What Price Justice?*, *supra* note 59, at 52; *see also* OHIO REV. CODE ANN. § 2933.83(A)(6)(h)–(i) (West 2011) (requiring the administrator of a photo or live lineup to obtain a statement of the witness's confidence, stated in the eyewitness's own words, as to the certainty of the eyewitness's identification and prohibiting any confirmatory feedback to the witness until the administrator has documented the results of the procedure).

[162] *See supra* note 85 and accompanying text.

[163] *See* Shaw & McClure, *supra* note 85, at 630–31, 649–50 (stating that the adjudicative process and witness preparation for trial can artificially increase a witness's stated confidence level).

[164] The ABA Criminal Justice Section's proposals address all three types of evidence. The report addresses the discretion exercised by courts to allow testimony by experts on eyewitness identification and to give cautionary jury instructions on identifications and jailhouse informants. *See* ABA CRIMINAL JUSTICE SECTION, *supra* note 127, at 24 (admission of expert testimony and use of jury instructions on eyewitness identification); *id.* at 77 (practices regarding jury instructions on jailhouse informants).

the jury alone will weigh its reliability. For example, the Justice Project recommended the use of jury instructions warning jurors about the special unreliability of jailhouse informants.[165]

The use of jury instructions and expert witnesses has grown substantially in the area of eyewitness identification, reversing the traditional rejection of these devices.[166] With regard to the social science of interrogations, Leo reports that the use of expert testimony has also become increasingly common.[167] He also notes that the use of jury instructions regarding interrogations remains "rare," but such a reform offers several important advantages.[168] No court has ever admitted expert testimony by a defendant on the unreliability of police informants, "although comparable government witnesses (e.g., police handlers, gang experts, etc.) have been permitted to testify about how informants operate."[169]

In any case, studies have shown that jurors are psychologically predisposed to believe eyewitness identification testimony and evidence of confessions,[170] so these remedies would have to overcome that psychological predisposition. Nor does the use of jury instructions hold much hope as an effective remedy in cases involving police informants. Natapoff argues that social science casts doubt on the ability of jurors to understand and properly apply jury instructions.[171] Another study also indicates that jurors are no less likely to believe a witness, even if they learn that the witness has received a reward or incentive for the testimony.[172]

Finally, there are calls to require corroborating evidence in determining the admissibility of these three types of evidence. Police informant testimony (including that given by alleged accomplices) presents such a risk of unreliability that some states have already adopted a requirement that it be corroborated by other evidence.[173] In addition,

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[165] INFORMANT REPORT, *supra* note 126, at 2.

[166] *See Eyewitness Identifications*, *supra* note 36, at 628–30.

[167] *See* LEO, *supra* note 10, at 314–16.

[168] *Id.* at 316–17.

[169] Correspondence from Alexandra Natapoff, Aug. 2, 2011 (on file with author).

[170] *See* CUTLER & PENROD, *supra* note 83, at 207–09 (summarizing survey studies, prediction studies, and mock juror studies, and concluding that "jurors are generally insensitive to factors that influence eyewitness identification accuracy"); LEO, *supra* note 10, at 265 (explaining that jurors are subject to tunnel vision and confirmation bias, especially after learning that the defendant has written or signed a confession statement).

[171] *See* NATAPOFF, *supra* note 2, at 197–99 (taking issue with the Justice Project proposal based on psychological studies of juror behavior).

[172] *Id.* at 77.

[173] *See id.* at 196–97 (discussing reforms in Texas and at the federal level); *see also* TEX. CODE CRIM. PROC. ANN. art. 38.075 (West 2005 & Supp. 2011) (requiring that the testimony of a person confined in same correctional facility as the defendant be corroborated by

groups like the ABA and the Justice Project have urged this restriction on the use of informant testimony.[174]

I have previously called for a corroboration requirement for eyewitness identification testimony as a means of better ensuring reliability.[175] To date, only a 2009 Maryland law requires evidence corroborating the testimony of eyewitnesses, and the restriction applies solely in capital cases.[176] In every other American jurisdiction, a single eyewitness's testimony identifying a stranger as the guilty perpetrator can convict a person of a serious crime, including capital murder.

Leo puts forth what amounts to a new corroboration requirement for confessions. He has proposed a "new reliability test," which involves determining the "fit" between the details provided by the suspect and the known crime facts and other objective evidence.[177] He would require courts to weigh three factors similar to those in the previous trustworthiness test he outlined with Ofshe. Under his new test, courts should weigh:

> (1) whether the confession contains nonpublic information that can be independently verified, would be known only by the true perpetrator or an accomplice, and cannot likely be guessed by chance; (2) whether the confession led the police to new evidence about the crime; and (3) whether the suspect's postadmission narrative fits the crime facts and other objective evidence.[178]

Although no jurisdiction has yet adopted a corroboration requirement for confessions evidence, a number of courts have applied a "trustworthiness" test, similar to one previously proposed by Ofshe and Leo, which also took

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evidence connecting the defendant with the offense); CAL. PENAL CODE § 1111.5 (West Supp. 2011) (same; also disallowing corroboration to come from another in-custody informant).

[174] *See* NATAPOFF, *supra* note 2, at 197.

[175] *See Judicial Blindness*, *supra* note 111, at 1523–43.

[176] *See* MD. CODE ANN., CRIM. L. § 2-202(c) (LexisNexis Supp. 2011). *See also* Margery Malkin Koosed, *Reforming Eyewitness Identification Law and Practices to Protect the Innocent*, 42 CREIGHTON L. REV. 595, 633–39 (2009) (addressing the Maryland identification law, as well as efforts to adopt similar corroboration requirements in Illinois, Massachusetts, and Britain).

[177] LEO, *supra* note 10, at 288–89. Leo notes that courts have long applied a corroboration rule (the *corpus delicti* rule) to out-of-court confessions. *Id.* at 284–85. He explains that the *corpus delicti* rule is not a useful tool for assuring reliability, however, because it requires corroborating evidence of the crime itself—not evidence to corroborate the confession. *Id.* at 284. The rule addresses a valid concern that in some cases individuals will confess falsely to murders that did not occur; thus, it requires corroborating evidence that a harm or injury actually befell the victim. The rule focuses only on proof of the crime, not the reliability of the confession, so we cannot assume that proof of the former also proves the latter. As Leo writes, "this has been disproved by countless false confessions to very real crimes." *Id.*

[178] *Id.* at 289.

into account the existence of corroborating evidence.[179] Thus, there is reason to think that some courts might continue to examine corroborating evidence in determining the admissibility of confessions.

Ideally, police departments across the country would adopt all the best practices in procuring confessions, informant testimony, and eyewitness identifications.[180] Although the use of proper police procedures cannot eliminate the risk that a police-generated statement is still false, the adoption of best practices would reduce the element of unreliability introduced by suggestive or coercive police practices. Proper documentation and discovery would allow the courts to conduct a more accurate reliability assessment.

III. PRETRIAL RELIABILITY HEARINGS IN CRIMINAL CASES

In addition to best practices for the police, researchers have recommended that courts conduct pretrial reliability hearings for police-generated testimonial evidence.[181] The recommendations for pretrial reliability screening call into question the traditional practices of trial courts in admitting possibly unreliable prosecution evidence and would require a new approach to admitting these three common forms of evidence. For confessions and eyewitness identifications, courts have routinely exercised a limited gatekeeping role confined to reviewing the prosecution's evidence for possible constitutional violations.[182] Remarkably, informant testimony is generally admitted without any type of reliability or constitutional screening by courts.[183]

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[179] *Id.* at 285–86.

[180] For information about the jurisdictions that have adopted best practices in eyewitness identifications, confessions, and the use of informants, see *supra* notes 126 & 136.

[181] *See infra* notes 236–40 and accompanying text.

[182] Confessions must comply with the due process "voluntariness" test, the rule in *Miranda v. Arizona*, and the Sixth Amendment right to counsel. *See* LEO, *supra* note 10, at 272–83. Identification testimony must meet the due process requirements set forth in *Manson v. Brathwaite* and the extremely limited right to counsel. *See Judicial Blindness*, *supra* note 111, at 1509–14 (addressing right to counsel and due process rights for eyewitness identifications).

[183] *See* NATAPOFF, *supra* note 2, at 58–60 (explaining that the central protection against use of informant testimony is the requirement that the government turn over certain information about the informant to the defense; only Illinois requires a reliability hearing for informants in capital cases and Texas requires corroboration). With the recent repeal of the death penalty in Illinois, this protection for capital cases is no longer needed. *See supra* note 8. California now also requires corroboration of informant testimony. *See* CAL. PENAL CODE § 1111.5 (West Supp. 2011). Of course, cross-examination on the basis of the disclosed information serves to test the reliability of the informant. However, due to the limits of the disclosure requirements as well as numerous documented cases of prosecutorial misconduct in failing to disclose such information, defense counsel may not have the ability

The following sections reveal the inadequacies of current due process screening as a means of ensuring the reliability of police-generated witness testimony. They also show that courts have engaged in reliability gatekeeping under the rules of evidence for various types of lay witness testimony, most often to exclude defense witnesses.

A. DUE PROCESS FAILS TO ENSURE RELIABILITY

Due process under federal law has only limited effectiveness in regulating police-generated witness testimony. With regard to informant testimony, due process fundamental fairness may call for exclusion, but only in cases where the defense can show "outrageous government conduct" in using the informant to manufacture the evidence and set up a person who was not otherwise involved in criminal activity.[184] The more typical jailhouse informant provides information about a person who has already been arrested, so this application of due process would not apply. For jailhouse informant testimony, the central constitutional protections require limited disclosure and discovery of "impeachment material" regarding the informant.[185] Due process has not been applied to require a reliability assessment by the courts.

For confessions and identifications, due process protects against inappropriate police procedures in gathering the evidence, which may affect reliability. However, unreliability without more does not mandate exclusion under federal due process law. The Supreme Court has made it clear that no matter how unreliable a confession may be, unless it is a product of overreaching state action, no due process violation occurs.[186] Moreover, the defense must show that the overreaching by the police caused the defendant to confess.[187] In *Colorado v. Connelly*, the defendant, who suffered from schizophrenia, confessed and provided critical details about a previously unsolved murder.[188] There was no suggestion that the

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to conduct an effective cross-examination. *See* NATAPOFF, *supra* note 2, at 58–60 (noting limited nature of discovery requirements); *see also* Raeder, *supra* note 132, at 1439–47 (arguing that current constitutional jurisprudence does not promote sufficiently high standards of ethical behavior relating to the disclosure of informant information).

[184] *See* NATAPOFF, *supra* note 2, at 61.

[185] *See id.* at 58.

[186] Paul Marcus, *It's Not Just About* Miranda*: Determining the Voluntariness of Confessions in Criminal Prosecutions*, 40 VAL. U. L. REV. 601, 609–11 (2006) (discussing Colorado v. Connelly, 479 U.S. 157, 163 (1986)).

[187] *Id.* at 610–11; *see also* Mark A. Godsey, *Reliability Lost, False Confessions Discovered*, 10 CHAP. L. REV. 623, 624–28 (2007) (tracing the historical treatment of reliability in confessions law to the present day, in which it is no longer an independently relevant factor).

[188] Marcus, *supra* note 186, at 610–11.

police had in any way coerced Connelly to confess. The Court thus found no due process violation.

Viewed purely as a matter of evidentiary reliability, Connelly's confession may well have been reliable. If he provided the police with important information about a murder that would only have been known to the killer—and which was not even known to the police at the time—then it is likely his confession was true. The point here is that under the due process analysis, courts are not required to make a reliability determination as a condition of admissibility. Indeed, the Supreme Court has noted that reliability per se should be treated as an evidentiary concern, not a constitutional one.[189]

What makes matters worse is that even when there is evidence of police lies, threats, and other coercive conduct, the due process voluntariness test fails to ensure the reliability of the suspect's statements. After reviewing thousands of cases from the 1990s and 2000s challenging the voluntariness of confessions, Paul Marcus concludes:

> One necessarily comes away with a feeling of being unclean and tainted by government activities that are not honorable even given the environment needed for interrogations. Many judges allow confessions into evidence in cases in which police interrogators lied and threatened defendants or played on the mental, emotional, or physical weaknesses of suspects. While judges write that they do not condone such conduct and find such practices repugnant, reprehensible, or deplorable, some of those same judges have upheld the admission of such confessions that result from those practices after applying the totality of circumstances test.[190]

It bears noting as well that the due process voluntariness test does not take into account whether critical best practices have been followed, such as videotaping, lack of contamination by suggesting facts of the crime, and independent corroborating evidence.

In judging eyewitness identifications, the Supreme Court considers reliability the "linchpin" of its due process analysis.[191] Yet scholars have consistently bemoaned the many failures of the test as a reliability-screening tool.[192] First, as with confessions, due process only protects against inappropriate evidence-gathering procedures. But unreliability due

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[189] *See* Garrett, *supra* note 73, at 1091–92 ("The Court summarized the turn in its jurisprudence, stating that though a confession statement 'might be proved to be quite unreliable . . . this is a matter to be governed by the evidentiary laws of the forum, . . . not by the Due Process Clause of the Fourteenth Amendment.'" (quoting Colorado v. Connelly, 479 U.S. 157, 167 (1986))).

[190] Marcus, *supra* note 186, at 643 (footnotes omitted).

[191] Manson v. Brathwaite, 432 U.S. 98, 114 (1977).

[192] *See, e.g.*, *Eyewitness Identifications*, *supra* note 36, at 607 n. 21 (listing citations).

solely to other causes is not a sufficient ground for exclusion.[193] The fundamental unfairness of being convicted largely or even solely on patently unreliable identification evidence has no federal due process traction, unless the police also acted in an unduly suggestive way.[194]

Second, even if the police do use unduly suggestive procedures, due process does not require exclusion if the identification is nonetheless reliable. Reliability, as the Court defines it, does not take police suggestiveness into account.[195] The Court's reliability checklist ignores the several ways in which police suggestiveness can produce and reinforce a false identification. Instead, it provides what has come to be an exclusive list of five factors that bear on reliability. Four of the factors take into account characteristics of the witness and the circumstances surrounding the viewing, which are appropriate considerations in a reliability assessment.[196] However, one of the factors listed by the Court (which federal courts are still required to consider) has been scientifically shown not to have a bearing on reliability—"the level of certainty demonstrated by the witness at the confrontation."[197] One might take the view that this reliability test is mostly appropriate and good enough, until one considers all the other relevant factors that are missing. The most crucial omissions are whether the identification was cross-racial and whether the witness was intrinsically less reliable due to age, mental ability, or intoxication.[198] It also bears reiterating that whether the identification was "reliable" (applying the Court's definition of the term) ultimately does determine admissibility, but the Court's definition of reliability omits the critical factors of police suggestiveness or coercion, witness vulnerability, and cross-racial identifications.[199]

Some state courts have tweaked the *Manson* test by discarding factors that have been shown not to correlate with reliability and incorporating

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[193] *Id.* at 610–13 (explaining that identification does not violate due process unless a threshold finding is made that police used suggestive practices; thus, courts do not reach the reliability issue unless the police are found to have acted improperly).

[194] *Id.*

[195] *Id.* at 612.

[196] Here I refer to "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, . . . and the length of time between the crime and the confrontation." Neil v. Biggers, 409 U.S. 188, 199–200 (1972); *see also* Manson v. Brathwaite, 432 U.S. 98, 104 (1977).

[197] *Biggers*, 409 U.S. at 199; *Eyewitness Identifications*, *supra* note 36, at 611 n.44, 613.

[198] *See Beyond a Reasonable Doubt?*, *supra* note 10, at 1501–03 (cross-racial identifications and age); *Judicial Blindness*, *supra* note 111, at 644 (witness intoxication and age).

[199] *See Eyewitness Identifications*, *supra* note 36, at 612.

important factors that do bear on reliability.[200] These judicial fixes have not gone so far as to mandate that police follow best practices.

In its landmark decision of *State v. Henderson*, the New Jersey Supreme Court completely sidestepped the *Manson* due process test for identifications on the grounds that it fails to meet any of the reliability goals set for it. Instead the court replaced the test with a mandate for pretrial reliability hearings which take into account whether the police have followed best practices.[201]

In short, neither the "voluntariness" test for confessions nor the "reliability" test for identifications ultimately protects against unreliable evidence. The many wrongful convictions produced by confessions and identifications that passed muster under these anemic constitutional tests lay bare this truth.[202]

B. CURRENT PRACTICES IN RELIABILITY SCREENING FOR LAY WITNESS TESTIMONY

While police-generated witness testimony has not traditionally been subject to effective reliability screening, there is certainly precedent for such screening in relation to other types of evidence. The most instructive example involves the testimony of the lay witness whose memory has been hypnotically refreshed. The Supreme Court found that the preferred approach is for courts to conduct pretrial reliability screening to ensure that the evidence has been generated by professionals following accepted protocols.

Hypnotically refreshed witness testimony raises reliability concerns strikingly similar to those raised by police-generated witness testimony: (1) hypnosis makes a witness more vulnerable to the memory-distorting effects of suggestion; (2) biased interrogators may use suggestive questioning in order to elicit certain desired statements; (3) the process of suggestive questioning of a hypnotized subject may cause the subject to

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[200] *Id.* at 623–26.

[201] For a full discussion of the Court's opinion in *State v. Henderson*, see *infra* notes 316–25 and accompanying text.

[202] A few states have abandoned the federal test and instead apply a per se exclusionary rule for unnecessarily suggestive identifications. *See Eyewitness Identifications*, *supra* note 36, at 623 (Massachusetts, New York, and Wisconsin (only for show-ups in Wisconsin)). Only the Utah Supreme Court has so modified the *Manson* test as to make it consistent with scientific studies by excluding the witness confidence prong and adding other critical considerations such as cross-racial identifications and police suggestion. *Id.* at 625–26.

"confabulate";[203] and thus (4) a witness may experience a heightened and unwarranted degree of confidence in the memory.[204]

In *Rock v. Arkansas*, when the defense offered to introduce the defendant's own hypnotically refreshed testimony, the prosecution filed a motion to exclude the testimony, and the trial court held a reliability hearing to determine its admissibility.[205] The trial court, applying a per se rule excluding such testimony as unreliable, limited the defendant's testimony to memories that had been shared with the examiner before hypnosis.[206] In overturning the defendant's conviction, the Supreme Court found that such a per se exclusion violated the defendant's right to present a meaningful defense.[207] In lieu of categorical exclusion on grounds of unreliability, the Court suggested a case-by-case judicial assessment of reliability.[208] The Court clearly contemplated that trial courts should exercise their discretion in ruling on the admissibility of this type of evidence on grounds of reliability.[209]

The Court pointed to the use of procedural safeguards as a means of reducing inaccuracies in the testimony. The Court stated:

> One set of suggested guidelines calls for hypnosis to be performed only by a psychologist or psychiatrist with special training in its use and who is independent of the investigation. These procedures reduce the possibility that biases will be communicated to the hypersuggestive subject by the hypnotist. Suggestion will be less likely also if the hypnosis is conducted in a neutral setting with no one present but the hypnotist and the subject. Tape or video recording of all interrogations, before, during, and after hypnosis, can help reveal if leading questions were asked.[210]

Thus, the Court indicated that in assessing the reliability of the evidence, lower courts may consider whether recommended procedural

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[203] To confabulate means to "fill in the details from the imagination in order to make an answer more coherent and complete." Rock v. Arkansas, 483 U.S. 44, 60 (1987).

[204] *See* Daniel R. Webert, Note, *Are the Courts in a Trance? Approaches to the Admissibility of Hypnotically Enhanced Witness Testimony in Light of Empirical Evidence*, 40 AM. CRIM. L. REV. 1301, 1304–06 (2003). One expert testified that hypnotized subjects display the same degree of suggestibility and the same tendency to confabulate or to develop unwarranted confidence in their memories as witnesses who undergo traditional interrogation techniques. *Id.* at 1314.

[205] *Rock*, 483 U.S. at 47.

[206] *Id.*

[207] *Id.* at 62.

[208] *Id.* at 61.

[209] For example, the role of the trial court in ruling on admissibility is clearly communicated in the following statement: "The State would be well within its powers if it established guidelines to aid trial courts in the evaluation of posthypnosis testimony and it may be able to show that testimony in a particular case is so unreliable that exclusion is justified." *Id.*

[210] *Id.* at 60.

safeguards were followed. These include the use of trained interviewers, non-suggestive questioning, independence of the interviewer from the investigation, and audio or videotaping of the entire interrogation. These guidelines bear an eerie resemblance to those proposed for confessions, informant statements, and eyewitness identification evidence.[211] The Court also noted that the evidence can be tested by more traditional means, such as the presence of corroborating evidence, as well as typical trial safeguards such as cross-examination, jury instructions, and expert witnesses.[212]

Courts have also occasionally conducted reliability hearings when the prosecution offers the testimony of child victims in sexual assault cases.[213] The use of child-victim testimony raises concerns similar to those raised by police-generated testimony.[214] When young children are questioned about possible victimization, research has shown that overly zealous and suggestive questioning can cause children to make false allegations of sexual assault.[215] Scholars have called for a variety of reforms (many of

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[211] *See supra* Part II.B.

[212] *Rock*, 483 U.S. at 61.

[213] *See generally* Ashish S. Joshi, *Taint Hearing: Scientific and Legal Underpinnings*, 34 CHAMPION 36 (2010) (arguing that courts should determine the admissibility of child-witness testimony on the basis of Rule 602, which disqualifies a witness who does not testify from personal knowledge).

[214] There are differences between the use of police-generated witness testimony and the statements of child victims that may suggest the need for different remedies. For example, with young child victims, the first persons to question them about the possible assaults are family members or teachers, not law enforcement agents. Other individuals often involved in questioning include doctors, nurses, and social workers. Most often the first questioners are not trained to conduct interviews with child victims, nor are they equipped to videotape the interviews. *See* Kimberly Y. Chin, *"Minute and Separate": Considering the Admissibility of Videotaped Forensic Interviews in Child Sexual Abuse Cases After* Crawford *and* Davis, 30 B.C. THIRD WORLD L.J. 67, 84–85 (2010). Another difference is that in cases of alleged child abuse, a wrongful conviction usually means that no crime occurred, whereas erroneous eyewitness identifications and false confessions produce convictions of the wrong person. *See* Jacqueline McMurtrie, *The Role of the Social Sciences in Preventing Wrongful Convictions*, 42 AM. CRIM. L. REV. 1271, 1284 (2005).

On the question of how jurors perceive child-witness testimony, some studies suggest that jurors tend to view them as unreliable due to suggestibility. *See* Chin, *supra* at 85. However, other research indicates that jurors are likely to believe that a young child will not fabricate allegations of sexual abuse, even when the evidence shows that the interviewer suggested that something sexual occurred. *See* McMurtrie, *supra* at 1284–85. Thus, it is not entirely clear whether jurors are as likely to credit unreliable child-witness evidence as they are to credit unreliable police-generated witness testimony. *See infra* notes 298–07 and accompanying text.

[215] *See* Stephen J. Ceci & Richard D. Friedman, *The Suggestibility of Children: Scientific Research and Legal Implications*, 86 CORNELL L. Rev. 33, 71 (2000) (summarizing data showing a broad consensus that young children are highly suggestible and vulnerable to strongly suggestive questioning); Jean Montoya, *Something Not So Funny Happened on the Way to Conviction: The Pretrial Interrogation of Child Witnesses*, 35 ARIZ. L. REV. 927,

which have improved the quality of child-witness testimony[216]) and for courts to conduct "taint" hearings to determine the reliability of the child's statements.[217] Although courts do not often conduct taint hearings,[218] when they do, they generally invoke Rule 602 of the Federal Rules of Evidence, which conditions a witness's competency to testify on the witness's ability to testify from personal knowledge,[219] or the Due Process Clause.[220] These hearings have been conducted only in cases in which the child will testify, but in many cases the children do not testify.[221] Instead, prosecutors offer the testimony of adult witnesses who testify to the child's prior statements regarding the sexual assault. The hearsay rules permit a child's statements to be introduced by other witnesses,[222] just as other hearsay rules allow

933–40 (1993) (addressing social science research showing that suggestive pretrial "interrogation" of child witnesses can unwittingly manufacture false accusations); John E.B. Myers, *Taint Hearings for Child Witnesses? A Step in the Wrong Direction*, 46 BAYLOR L. REV. 873, 880–84 (1994) (noting a prevalence of overzealousness and excessive use of leading questions in interviews of children regarding possible sexual assault).

On a related note, witnesses with mental disabilities may also be vulnerable to the same types of issues that apply to child-witness testimony. For a discussion of the challenges facing a mentally disabled victim and witness in a sexual assault case, see generally Janine Benedet & Isabel Grant, *Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Evidentiary and Procedural Issues*, 52 MCGILL L.J. 515 (2007).

[216] *See* Myrna S. Raeder, *Distrusting Young Children Who Allege Sexual Abuse in Criminal and Maltreatment Cases: Why Stereotypes Don't Die and Ways to Facilitate Child Testimony*, 16 WIDENER L. REV. 239, 242–46 (2010) (addressing changes to protocols that have eliminated suggestive questioning of children and highlighting research that refutes other studies on the unreliability or suggestibility of young children).

[217] *See* Joshi, *supra* note 213, at 36 (calling for taint hearings to ascertain whether the child witness is competent to testify from personal knowledge); Ceci & Friedman, *supra* note 215, at 86–106 (addressing improvements in taint hearings, hearsay rules, use of expert witnesses, and videotaping); Montoya, *supra* note 215, at 940–86 (arguing for the videotaping of child-victim interviews and reform of the hearsay rules). However, in an article that predates most DNA exonerations, another author rejects reliability hearings (called "taint hearings") for child witnesses who have undergone interviewing regarding allegations of sexual assault on the basis that such hearings will make it more difficult to obtain convictions in these cases, thus putting children at greater risk of sexual assault. Myers, *supra* note 215, at 889. The author reached this conclusion despite acknowledging that taint hearings would improve the interviewing techniques used by government agents and safeguard fundamental fairness. *Id.* at 888–902.

[218] In most cases, either the child is old enough to testify without raising the concerns about the suggestibility of very young children, or the child need not testify at all. *See also infra* note 222 and accompanying text.

[219] *See* Joshi, *supra* note 213, at 38–40 (citing cases).

[220] *See* Myers, *supra* note 215, at 884–89 (discussing a seminal New Jersey Supreme Court decision, State v. Michaels, 642 A.2d 1372 (N.J. 1994)).

[221] *See* Ceci & Friedman, *supra* note 215, at 93; Chin, *supra* note 214, at 86.

[222] The Federal Rules of Evidence provide hearsay exceptions for the out-of-court statements of declarants that are made "for [purposes of] medical diagnosis or treatment." FED. R. EVID. 803(4). There is disagreement among lower courts, however, as to whether

police officers or informants to testify to the prior statements of defendants.[223] Thus, like police-generated witness testimony, child-victim statements made by adult witnesses become routinely admissible by operation of the hearsay rules, without any judicial reliability screening.

Other evidence rules have required rigorous reliability screening for various other types of lay witness testimony; however, with few exceptions, these rigorous standards in criminal cases have mostly applied to witnesses proffered by one party—the defense.[224] What is most remarkable about this

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this exception should admit statements regarding the identity of the perpetrator as those statements may not be pertinent to medical diagnosis or treatment. CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE § 8.42, at 837–39 (3d ed. 2003). The statements of children to doctors, nurses, and possibly social workers can generally qualify for admission under this exception. Statements to family members about current symptoms and pains, or emotions such as distress or fear are usually admissible under the hearsay exception for statements of a declarant's "then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as . . . mental feeling, pain, or bodily health)." FED. R. EVID. 803(3). Again, this exception would not ordinarily permit statements relating to past events, such as the cause of the current feelings or condition. The exception is restricted to "then existing" feelings and does not allow statements "of memory or belief to prove the fact remembered or believed." *Id.* If the statements are made close in time to the time when the assault took place, the statements may also qualify under the exception for excited utterances ("statement[s] relating to a startling event or condition, made while the declarant was under the stress of excitement [caused by the event or condition]"). FED. R. EVID. 803(2). *See generally* Myrna S. Raeder, *Finding the Proper Balance in Hearsay Policy: The Uniform Rules Attempt to Stem the Hearsay Tide in Criminal Cases Without Prohibiting All Nontraditional Hearsay*, 54 OKLA. L. REV. 631, 634, 639–41 (2001) (arguing that courts have read hearsay exceptions like excited utterances and medical statements in order to allow children's statements to be heard and advocating for the Uniform Rules of Evidence approach, which provides better guidance to courts and better assures trustworthiness).

The Supreme Court's approach to the Confrontation Clause poses an obstacle to the admission of the hearsay statements of children in sexual assault cases when they are made for the purpose of investigating a crime. *See* Chin, *supra* note 214, at 93–98. Statements made to police officers or social workers, if made for the purpose of reporting a crime, are considered "testimonial." Crawford v. Washington, 541 U.S. 36, 68 (2004). Testimonial statements are not admissible in a criminal case unless the witness is unavailable to testify and there was a prior opportunity for cross-examination. *Id.* Other nontestimonial statements made for purposes other than reporting a crime to law enforcement may be admissible under the hearsay exceptions, *see supra* this note, and the Confrontation Clause would not preclude admission.

[223] *See infra* notes 275–84. The reliability issues that surround child-witness hearsay statements parallel those of police-generated witness testimony. Although it is beyond the scope of this Article, it would appear that many of the same arguments for pretrial reliability hearings regarding police-generated witness testimony can also be made with regard to the hearsay statements of child witnesses.

[224] Other authors have noted the apparent bias in admitting prosecution evidence and excluding defense evidence. *See, e.g.*, Yvette J. Bessent, *Not So Fast: Admissibility of Polygraph Evidence and Repressed Memory Evidence When Offered by the Accused*, 55 U. MIAMI L. REV. 975, 975–76 (2001) (finding a "strong indication" that admittance depends on

apparent lack of evenhandedness is that the imbalance ought to run in the opposite direction. First, it is of course the government's burden to establish the defendant's guilt beyond a reasonable doubt.[225] For a trial to be fair, the government's evidence should meet reasonable standards of reliability. Second, the exclusion of defense evidence implicates the constitutional right of an accused to present a meaningful defense.[226] In contrast, the government and parties to a civil suit can assert no protected right to admit evidence. Thus, one would expect that reliability screening would apply with greater force to the prosecution than to the defense, but, ironically, the opposite is apparently true.[227]

The three types of prosecution evidence considered here undergo virtually no reliability screening, but defense witness testimony is routinely excluded or limited on reliability grounds.[228] In fact, there are several instances in which the same type of evidence may be admissible if offered by the prosecution but inadmissible on unreliability grounds if offered by the defense. The testimony of a jailhouse informant provides a poignant example. If a jailhouse cellmate steps forward and offers to testify for the prosecution that a defendant admitted committing a crime, this evidence

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which party seeks to offer the evidence and that courts admit polygraph evidence when offered by the prosecution but exclude it when offered by the defense); D. Michael Risinger, *Navigating Expert Reliability: Are Criminal Standards of Certainty Being Left on the Dock?*, 64 ALB. L. REV. 99, 131–32 (2000) (rejecting a general pro-prosecution bias, but nonetheless finding "serious specific pro-prosecution disparities" such as the nearly universal admission of "summarizational" or educational expert witnesses offered by the prosecution and the exclusion of a majority of such experts offered by the defense); *see also* Katherine Goldwasser, *Vindicating the Right to Trial by Jury and the Requirement of Proof Beyond a Reasonable Doubt: A Critique of the Conventional Wisdom About Excluding Defense Evidence*, 86 GEO. L.J. 621, 631–32 (1998) (arguing that state and federal courts too often exclude defense evidence of third-party exculpatory statements on unreliability grounds).

[225] *See* Goldwasser, *supra* note 224, at 633–36 (addressing the conflict between the exclusion of defense evidence and the principles that underlie the burden of proof in criminal cases).

[226] A defendant in a criminal case ostensibly enjoys a special due process right to offer evidence, deriving from the Compulsory Process or Confrontation Clauses of the Sixth Amendment. *See* Holmes v. South Carolina, 547 U.S. 319, 324 (2006).

[227] *See* Goldwasser, *supra* note 224, at 635 (arguing that exclusion of prosecution evidence on unreliability grounds is consistent with the burden of proof beyond a reasonable doubt, whereas a reliability-based exclusion of defense evidence is not).

[228] The same goes for expert witnesses as well. Forensic experts offered by the government are routinely admitted, in many cases despite the fact that they fail to meet the reliability standards set forth in *Daubert.* Defense experts, however, fare far less well. *See* Risinger, *supra* note 224, at 131–35 (discussing an empirical study finding pro-prosecution disparity in admitting "summarizational" or "educational" experts). Much of the blame for the admission of faulty forensic science can be placed at the feet of the defense bar, which largely failed to challenge the bogus science. *See* Garrett & Neufeld, *supra* note 11, at 2.

will encounter no evidentiary obstacles whatsoever.[229] However, if a jailhouse cellmate offers to testify for the defense regarding a third party's confession to the crime for which the defendant is being tried, this evidence will normally not be admitted unless the defense also shows "corroborating circumstances that clearly indicate the trustworthiness of the statement."[230]

The case law on the "right to present a defense" reveals just how many evidentiary rules have attempted to place special limits on the right of criminal defendants to present evidence, without imposing those same restrictions on prosecution evidence.[231] Although the Supreme Court has struck down or softened many of these restrictions, one is left to wonder why state evidentiary rules have attempted strict reliability gatekeeping only for defense evidence.[232] In the end, the courts either have it half right

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[229] As offered by the prosecution, the informant's testimony about the defendant's own statement is admissible under the hearsay rules as an "[o]pposing [p]arty's [s]tatement." *See* FED. R. EVID. 801(d)(2)(A).

[230] FED. R. EVID. 804(b)(3)(A) admits hearsay statements made by a declarant who is unavailable to testify and that are "against interest," which as applied here means the statement "had so great a tendency . . . to expose the declarant to civil or criminal liability . . . ." The declarant in this scenario is a third party who would presumably invoke the Fifth Amendment privilege not to testify regarding matters that would incriminate the person. Thus, the declarant is considered unavailable. *See* FED. R. EVID. 804(a)(1). For all other statements against interest, the exception requires only that the statement be "against interest" and that the declarant be "unavailable." However, an additional requirement applies to third-party statements offered to expose the declarant to criminal liability (thereby presumably relieving the defendant of liability): the statement must also be supported by "corroborating circumstances that clearly indicate its trustworthiness." *See* FED. R. EVID. 804(b)(3)(B).

[231] The rules considered by the Court over the years vary from categorical exclusion of certain types of defense evidence to rules that require certain guarantees of trustworthiness for the evidence to be admitted. *See* Chambers v. Mississippi, 410 U.S. 284, 302–03 (1973) (holding that a defendant's right to present a defense is violated by hearsay rules that combined to exclude defense witnesses who would testify to a third-party's confession and prevented the defense from cross-examining that same third party); Washington v. Texas, 388 U.S. 14, 22, 23 (1967) (striking down the categorical exclusion of testimony provided by persons charged as principals, accomplices, or accessories in the same crime when testifying as witnesses for each other, but which allowed the prosecution to call accomplices to testify against the defendant).

[232] Some attribute rules that disadvantage defendants and make convictions easier to obtain to a fear that defendants in criminal cases may too easily evade prosecution by fabricating a defense. *See, e.g.*, David Crump & Susan Waite Crump, *In Defense of the Felony Murder Doctrine*, 8 HARV. J.L. & PUB. POL'Y 359, 376 (1985) (defending the felony murder rule, which eliminates the requirement that the government prove criminal intent to kill, on the ground that "any other approach would unduly reward perjury [because] [t]he denial of harmful intent in such a situation is too facile."). The prospect of easy acquittals due to fabricated defenses that may raise reasonable doubts may lead some to cut defendants off at the pass by restricting the right to raise a defense at all. *See, e.g.*, People v. Williams, 841 P.2d 961, 971 (Cal. 1992) (Mosk, J., concurring) ("Beneath the surface of the majority opinion, there seems a fear that . . . a defendant may too easily fabricate a reasonable-and-

by screening defense evidence while erroneously failing to apply the same standards to prosecution evidence, or the courts have gotten it completely backwards since defendants should have a *greater* right to offer evidence given the defendant's constitutional right to present a meaningful defense.[233] Either way, it is obvious that reliability screening of police-generated witness testimony is long overdue.

IV. PRETRIAL RELIABILITY HEARINGS FOR POLICE-GENERATED WITNESS TESTIMONY

Critical evidence such as a confession or an eyewitness identification makes or breaks the government's case. Studies of DNA exonerations and jury behavior show that there are "islands of trouble" among the sea of criminal cases.[234] Suggestive or coercive tactics by the police can lead witnesses to make erroneous or false statements, especially when the witnesses are particularly vulnerable, like juveniles and the intellectually disabled or mentally ill.[235] Police officers can also contaminate the process by revealing information about the crime or suspect to the witness, prompting the witness to incorporate that information into his or her own statement. Evaluating the reliability of police-generated testimony requires a thorough understanding of the dangers of police–witness interactions and the emerging best practices for addressing those dangers. Although not as complex as evaluating the myriad types of scientific evidence, the task of understanding the pitfalls of eyewitness identifications, custodial interrogations, and the use of informants cannot practicably be taught to jurors during the course of a trial, nor would it be an efficient use of trial resources. Thus, the gatekeeping role rightly lies with judges.

Common sense tells us this gatekeeping should occur as early in the litigation process as possible.[236] For confessions based on custodial

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honest-belief defense through his own false testimony, and should accordingly be denied the defense unless he is supported by corroborating evidence.").

Findley argues that courts can suffer from the same tunnel vision as police and prosecutors. Instead of a system that protects the innocent, he observes an overall skewing of the judicial system in favor of the government. Findley, *supra* note 11, at 896.

[233] *See* Goldwasser, *supra* note 224, at 635–36.

[234] I borrow the term "islands of trouble" from Michael Risinger who used it to describe the "substructured" nature of wrongful convictions, which have been found to occur more often within some types of crimes, or under some circumstances, than others. *See* Risinger, *supra* note 42, at 785.

[235] *See supra* notes 110–15 and accompanying text.

[236] *See generally* Findley, *supra* note 11, at 911 (arguing that rules of evidence already incorporate some forms of gatekeeping for reliability). Among advocacy groups, the Justice Project had recommended pretrial reliability hearings for jailhouse informants and confessions. *See supra* note 126.

interrogations, Leo and Garrett have each made the case for pretrial reliability hearings.[237] Leo argues that the reliability issue should be considered only after the constitutional voluntariness issue.[238] He states that since truth or falsity is not relevant to the voluntariness inquiry, the court should not determine "reliability" first (in effect, finding the confession likely to be true), as that might improperly influence the courts' decisions on voluntariness.[239] Similar proposals have been made regarding informant testimony and eyewitness identifications. Natapoff has called for pretrial reliability hearings for police informant testimony.[240] Thus, experts writing in each of these fields have called upon the judiciary to protect the rights of the innocent by carefully screening key prosecution evidence before trial.

The New Jersey Supreme Court's momentous decision in *State v. Henderson* requires pretrial reliability hearings for eyewitness identifications obtained by suggestive means.[241] In embracing a new approach to judicial screening for identifications, New Jersey became the first state to require courts to engage in pretrial reliability hearings for a commonly admitted type of lay witness testimony in all criminal cases.[242] The court adopted the requirement upon the recommendations of a special master that the court had appointed to conduct extensive hearings. The *Henderson* opinion draws upon the voluminous scientific research and the testimony of numerous scientific experts considered by the special master, as well as the recommendations of the parties. As such, the decision provides an outstanding summary of the scientific literature on eyewitness identification as applied to criminal cases. It provides excellent guidance for lower courts in New Jersey on how to conduct pretrial reliability hearings for this type of evidence, and it can serve as a model for state courts across the country.

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[237] *See* LEO, *supra* note 10, at 289–91. Garrett argues that courts could question the ordinary presumption of reliability of confessions by assessing whether crucial facts were in fact volunteered by the defendant. Garrett, *supra* note 73, at 1111. The assessment would benefit most from access to a video recording of the interrogation, which is the leading reform proposed for interrogations. *See supra* notes 152–53 and accompanying text.

[238] LEO, *supra* note 10, at 290.

[239] *Id.*

[240] *See* NATAPOFF, *supra* note 2, at 190–91, 194–95.

[241] 27 A.3d 872 (N.J. 2011); *see also* State v. Chen, 27 A.3d 930 (N.J. 2011) (companion case applying the *Henderson* framework under state rules of evidence to eyewitness identifications tainted by private-party suggestion). For a full discussion of the *Henderson* decision, see *infra* notes 315–24 and accompanying text.

[242] Previously, Illinois was the only state to impose a statutory requirement to conduct pretrial reliability hearings for informant testimony, but this requirement applied only to capital cases. *See supra* note 183. With the recent repeal of the death penalty in Illinois, this provision is no longer needed. *See supra* note 8.

The breakthrough in New Jersey, while certainly a milestone, does not necessarily mean that other states will follow suit, and currently even New Jersey does not provide such hearings for confessions or informant testimony.[243] A critic of pretrial reliability hearings might argue that such hearings introduce inefficiencies by creating a trial within a trial and that they are unnecessary because trial procedures like cross-examination, jury instructions, and expert witnesses can adequately safeguard against wrongful convictions. One might also challenge the use of such a hearing as invading the province of the jury and misunderstanding the proper role of the judge as gatekeeper. Finally, a constant worry about reforms aimed at curbing wrongful convictions is that they will limit the availability of good, reliable evidence and impair the government's ability to obtain convictions in violent crime cases, thereby jeopardizing the public safety.

The following sections of the Article challenge this critique and outline the doctrinal basis for a court's authority to hold such pretrial hearings on reliability for all three forms of police-generated witness testimony considered here. They draw on the *Henderson* decision, as well as the lessons of the DNA exoneration cases, to provide guidance on the considerations that courts could take into account in assessing each form of evidence. By holding hearings on reliability, courts will incentivize the police and prosecutors to adopt practices that promote reliability: avoiding contamination of witness testimony; using less coercive or suggestive tactics, especially with vulnerable individuals; and properly documenting interviews, preferably through videotaping. By establishing best practices as the benchmark by which courts will review police practices in these areas, courts also necessarily broaden the scope of pretrial discovery to include the procedures by which these critical forms of evidence are produced. The hearings afford the court the opportunity to fashion appropriate intermediate approaches to less-than-reliable identifications, in addition to the all-or-nothing decision to admit or exclude.[244] As was explicitly mandated in *Henderson*, trial courts can produce factual findings at pretrial reliability hearings that serve to foster effective appellate review and advance other goals as well.[245]

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[243] Illinois represents a minor exception for informant testimony. *Id.*

[244] *Henderson*, 27 A.3d at 915, 918–19 (making this argument in the limited context of identification testimony).

[245] *Id.* at 928.

A. DISCOVERY AND PRETRIAL HEARINGS ON THE ADMISSIBILITY OF EVIDENCE

The early stages of the criminal trial process involve the gathering and evaluation of evidence, among other things. Defense attorneys normally file motions for discovery soon after a defendant is arraigned. This motion requests information pertaining to any and all pretrial identifications of the defendant by any eyewitnesses.[246] It also requests impeachment material, information about witnesses, and information about any and all statements attributed to the defendant by any witnesses. Any reform in the area of confessions, informant statements, and eyewitness identifications should begin with improved discovery mechanisms,[247] especially in the area of informant testimony.[248] A reliability challenge necessitates that defense counsel knows the circumstances under which the evidence was generated by the police. Thus, it necessarily encompasses a requirement that the government provide adequate discovery.[249]

In general, criminal discovery has not well served the function of eliminating trial by surprise, and this failing puts the innocent in extreme jeopardy.[250] The problem is most acute with regard to the use of police informants. Natapoff argues that prosecutors should have an affirmative duty to produce the pertinent impeachment information regarding any police-informant witness.[251] For various reasons, law enforcement may be reluctant to provide such information, even to prosecutors, and prosecutors

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[246] *See* Wise, Fishman & Safer, *supra* note 1, at 450–51.

[247] *See generally* Stephanos Bibas et al., *New Perspectives on* Brady *and Other Disclosure Obligations: Report of the Working Groups on Best Practices*, 31 CARDOZO L. REV. 1961 (2010) (reporting on the recommendations of working groups of academics, judges, social science experts, and practitioners regarding best practices for criminal discovery).

[248] *See infra* notes 251–52 and accompanying text.

[249] *See, e.g.*, *Henderson*, 27 A.3d at 923 (noting that by expanding upon the factors courts should consider when reviewing the admissibility of eyewitness identifications, the court had effectively broadened the defense right to pretrial discovery).

[250] Findley speaks even more broadly about the defendant's general disadvantage in evidence gathering:

> [C]riminal defendants are at a vast disadvantage in their ability to investigate and develop evidence. For the most part, the only way defendants can now gain access to crime scene evidence is through discovery, which means they must depend on the prosecutor to identify and disclose such information as the prosecutor believes the defense is entitled to have. But discovery is notoriously limited in criminal cases, especially when compared to the extensive and wide-open discovery available in civil cases. Ironically, litigants fighting over money have far more access to the facts and evidence than does an innocent person wrongly accused and facing many years or life in prison, or even death.

Findley, *supra* note 11, at 901 (footnotes omitted).

[251] *See* NATAPOFF, *supra* note 2, at 74–76, 192.

have few incentives to request impeachment material about their witnesses.[252]

With regard to confessions, the rules of evidence require that courts hold hearings out of the hearing of the jury on the admissibility of confessions.[253] Thus, it makes sense that the hearing would take place pretrial, at the same time as the likely challenge on constitutional grounds. The rules also call for holding hearings outside of the hearing of the jury for other preliminary matters as "justice so requires."[254] In cases in which eyewitness identification or informant testimony is the critical item of evidence, and where there is no reliable corroborating evidence, the identification or informant evidence poses a great risk of wrongly convicting the innocent defendant.[255] Thus, the "interests of justice" surely require hearings outside of the presence of the jury.

The nature of all three forms of police-generated witness testimony addressed here also calls for the hearings to be held *pretrial*.[256] If police-generated witness testimony is excluded on reliability grounds, in many cases the prosecutor will move to dismiss the case. Early resolution for an innocent defendant avoids an unnecessarily prolonged ordeal and maximizes judicial efficiency. Pretrial rulings also allow the parties to prepare for voir dire and trial.

B. JUDGING RELIABILITY UNDER THE RULES OF EVIDENCE

The rules of evidence vest courts with the discretion to exclude evidence that is shown to be both potentially unreliable and difficult for the jury to evaluate, thus posing a greater risk of precipitating an inaccurate verdict. The Supreme Court has made this abundantly clear in its application of the rules of evidence to scientific evidence. In *Daubert*,[257] the Court addressed the applicable standards for admitting scientific expert testimony. Rule 702 specifically governs scientific evidence and requires that it be based on valid scientific knowledge and that it will be helpful to the jury.[258] The Court interpreted Rule 702 as calling for a reliability analysis.[259] Presumably, the Court could have relied solely on Rule 702, but instead it also invoked Rule 403 in support of a judicial role to assess

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[252] *Id.*

[253] *See* FED. R. EVID. 104(c).

[254] *See* FED. R. EVID. 104(c)(3).

[255] *See supra* notes 173–76 and accompanying text.

[256] *See supra* notes 253–55 and accompanying text.

[257] Daubert v. Merrill Dow Pharm., Inc., 509 U.S. 579 (1993).

[258] FED. R. EVID. 702.

[259] *Daubert*, 509 U.S. at 589–93.

reliability.[260] The Court thereby linked its finding that Rule 702 requires "reliability" with Rule 403's grant of authority to courts to exclude relevant evidence where its probative value is substantially outweighed by the risks of unfair prejudice or misleading the jury.[261] The Court justified the heightened judicial oversight on the grounds that the nature of scientific opinion offered by an expert makes it at once more powerful *and* more difficult to evaluate.[262] The Court appropriately invoked Rule 403 as grounds for judicial gatekeeping on reliability because the rule applies *in conjunction* with other more specific rules of evidence and because its underlying purpose is to secure the integrity of the trial process.[263]

A similar reading of Rules 701 and 602 gives trial courts the discretion to conduct gatekeeping for lay witness testimony that presents grave risks of misleading the jury. Confessions, informant testimony, and eyewitness identification testimony are introduced as lay witness testimony.[264] Rule 701 requires that where lay witnesses offer opinion testimony, the testimony must be "rationally based on the witness's perception" and "helpful to . . . determining a fact in issue."[265] Rule 602 provides that witnesses must testify from "personal knowledge."[266] Eyewitnesses provide opinion testimony regarding the identity of the culprit, and experience shows that those opinions may be greatly affected by suggestive practices.[267] Similarly, when police officers or government informants testify to a defendant's incriminating statements they inherently communicate their own opinions that that defendant spoke voluntarily and

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[260] *Id.* at 594–95. Rule 403 provides: "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." FED. R. EVID. 403.

[261] *Daubert*, 509 U.S. at 594–95.

[262] *Id.* at 595.

[263] *See also infra* notes 269–72 and accompanying text.

[264] Lay witnesses are defined as all witnesses who are not expert witnesses. *See* FED. R. EVID. 701. In the common parlance of trial practice, these are considered "fact witnesses" in that they provide the testimony proving the facts of the case.

[265] *See* FED. R. EVID. 701.

[266] *See* FED. R. EVID. 602.

[267] The Advisory Committee's Notes contemplated that statements of identity and other estimates of matters such as size, weight, and distance would normally be admissible as opinions under Rule 701. *See* FED. R. EVID. 701 advisory committee's note (2000 Amendment). In interpreting a different rule of evidence, the Supreme Court refused to differentiate "factual findings" from "conclusions or opinion," instead determining that "factual findings" include "conclusions or opinions that flow from a factual investigation" and not simply "facts." *See* Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 163–64 (1988). Thus, courts can properly invoke Rule 701 in considering the admissibility of ostensibly "factual" statements that experience has shown are more akin to opinions that draw on a variety of factors and that can be affected by outside influences such as suggestive practices.

sincerely in implicating himself. Rules 701 and 602, considered together, authorize courts to screen such testimony to determine its reliability based on the extent to which the police followed best practices in obtaining the witness's testimony. In *State v. Chen*, a companion case to *Henderson* in New Jersey, the state high court came to this conclusion in the context of eyewitness identification evidence.[268]

As was done in *Daubert*, courts should also rely on Rule 403 as authority for reliability screening of police-generated lay witness testimony. Rule 403 "represents a key organizing principle for understanding the practical application and ethos of the Federal Rules of Evidence."[269] Stated more as a general principle than a specific rule, Rule 403, more than any other rule, makes the rules adaptable so that they retain force even under circumstances unforeseen to the drafters. It "epitomizes the trial judge's vast discretion in admitting or excluding evidence, a hallmark of our judicial system."[270] As one authority explains, Rule 403 gives courts leeway to exclude "relevant evidence [that may] confuse, or worse, mislead a trier of fact who is not properly equipped to judge the probative worth of the evidence."[271] Indeed, courts uniformly understand Rule 403 as a means of assuring fundamental fairness in the trial process and in so doing protecting against due process violations in the application of the rules of evidence.[272]

This reading of the rules of evidence dovetails with the objectives of the rules which call on courts to construe the rules to "promote the development of evidence law, to the end of ascertaining the truth and securing a just determination."[273] The rules are thus intended to adapt with advances in knowledge so as to safeguard the integrity of the trial process.

A finding that police-generated lay witness testimony presents lesser risks of unreliability might not justify exclusion. Such a finding would still be useful to the trial court in fashioning jury instructions that could be given during or after trial or in admitting expert testimony. The drafters envisioned that courts would weigh the efficacy of giving jury instructions during trial against the option of exclusion.[274]

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[268] State v. Chen, 27 A.3d 930, 937 (N.J. 2011).

[269] Aviva Orenstein, *Deviance, Due Process, and the False Promise of Federal Rule of Evidence 403*, 90 CORNELL L. REV. 1487, 1512 (2005).

[270] *Id.* at 1513.

[271] *See* MCCORMICK ON EVIDENCE, § 185 at 279 (John W. Strong ed., 5th ed. 1999).

[272] *See* Orenstein, *supra* note 269, at 1517–18.

[273] FED. R. EVID. 102.

[274] *See* FED. R. EVID. 403 advisory committee's note ("In reaching a decision whether to exclude on grounds of unfair prejudice, consideration should be given to the probable effectiveness or lack of effectiveness of a limiting instruction.").

Gatekeeping for police-generated lay witness testimony would provide more effective protection against wrongful conviction than the present free admission of the testimony under the hearsay rules. All three types of police-generated lay witness testimony addressed herein involve the admission of hearsay statements. Prosecutors offer the testimony of police officers and informants who testify to the defendant's incriminating statements, and eyewitnesses testify to their own previous statements identifying the defendant.[275] A defendant's incriminating statements are admitted as "[a]n [o]pposing [p]arty's [s]tatement";[276] an eyewitness's testimony about an earlier statement identifying the defendant is admitted as a "statement [that] . . . identifies a person."[277] Normally, the rule against hearsay bars witnesses from testifying to statements previously made "out of court" by themselves or others when offered to prove the truth of the matter asserted.[278] The rule against hearsay rests on reliability grounds.[279] However, the rule recognizes many exceptions for hearsay bearing indicia of trustworthiness.[280] Unlike other hearsay exceptions, a party's own statements (previously called "admissions") and statements of identification are categorically admissible despite the fact that they possess absolutely no guarantees of trustworthiness.[281] With regard to admissions, these are admitted instead on the ground that the maker of the statements is a party to the litigation (here, the defendant), so the party can simply explain or refute

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[275] *See* FED. R. EVID. 801(c).

[276] *See* FED. R. EVID. 801(d)(2)(A).

[277] *See* FED. R. EVID. 801(d)(1)(C).

[278] *See* FED. R. EVID. 801(c) ("'Hearsay' means a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement.").

[279] The rule against hearsay rests on four principal trustworthiness concerns, which arise from the fact that the speaker of the statement is not the person testifying. First, the speaker may have misperceived the condition or event in question, so the witness's testimony may be inaccurate. *See* MUELLER & KIRKPATRICK, *supra* note 222, § 8.2, at 695. Second, the speaker may have had a bad memory about the condition or event at issue. *Id.* at 695–96. Third, the speaker may not have been sincere about what happened but may have been shading the truth or blatantly lying. *Id.* at 696. Fourth, the speaker may have misspoken or misunderstood. *Id.*

[280] *See* MCCORMICK ON EVIDENCE, *supra* note 272, § 246, at 375.

[281] In a somewhat confusing manner, the hearsay rules have endeavored to make the exception for these forms of hearsay so strong that they designate admissions of a party opponent and statements of identification as "not hearsay" even though they fit the general definition of hearsay. *See* FED. R. EVID. 801(d). The designation as "not hearsay" is understood to take these statements outside of the bar against hearsay. For other forms of evidence, the rules simply provide an exception to the rule. *See* FED. R. EVID. 803–804. *See also* MCCORMICK ON EVIDENCE, *supra* note 271, § 254, at 393.

the statements.[282] When offered without reliability guarantees against a defendant in a criminal case, the defendant is put in a position where she either has to waive the privilege against self-incrimination and take the witness stand to refute the validity of the admissions or decline to testify and find other means of challenging the evidence.[283] Many defendants elect not to testify because doing so would expose them to crippling impeachment on the basis of their prior crimes.[284] Thus, the fail-safe envisioned by the admissions doctrine actually puts the innocent defendant between a rock and a hard place: either sacrifice the privilege against self-incrimination or sacrifice the ability to directly challenge highly persuasive yet unreliable evidence. Natapoff notes that innocent defendants with criminal records are most at risk of wrongful conviction and may even feel pressured to plead guilty although innocent to avoid harsher punishment if convicted at trial.[285]

The exception for statements of identification may be said to rest on notions of trustworthiness, but here the "trustworthiness" of the prior statement of identification is measured solely by comparison to highly suggestive in-court identifications.[286] Typically, a witness will have identified the defendant at some point prior to trial as part of the police investigation. The rule reflects a judgment that witnesses should be allowed to relate prior identifications and not be limited to highly suggestive and unreliable in-court identifications.[287] The Advisory Committee's Notes to the Federal Rules of Evidence find prior identifications to be more trustworthy because they are "made at an earlier time under less suggestive conditions."[288] Prior identifications, being made closer in time to the crime, will be more accurate than those done later in

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[282] MCCORMICK ON EVIDENCE, *supra* note 271, § 254 at 393–94; MUELLER & KIRKPATRICK, *supra* note 222, § 8.27, at 767–68.

[283] Necessitating a defendant's waiver of the privilege against self-incrimination weakens the privilege as a protection for the innocent. The privilege "constitutes one part, but an important part, of our accusatorial system which requires that no criminal punishment be imposed unless guilt is established by a large quantum of especially reliable evidence" produced by the government. MCCORMICK ON EVIDENCE, *supra* note 271, § 115, at 179.

[284] MUELLER & KIRKPATRICK, *supra* note 222, § 6.29, at 492–93.

[285] NATAPOFF, *supra* note 2, at 80.

[286] *See generally* Brandon L. Garrett, *Eyewitnesses and Exclusion*, 65 VAND. L. REV. 451, 462–63 (2012) (discussing the traditional preference for evidence of out-of-court identification, as opposed to in-court identification testimony).

[287] MUELLER & KIRKPATRICK, *supra* note 222, § 8.26, at 764–65. It should be noted that witnesses typically also provide an in-court identification, in addition to testifying to the out-of-court identification. Indeed, even in the rare case when a court excludes an out-of-court identification, courts still allow the witness to make an in-court identification. For a critique of this rule, see Garrett, *supra* note 286, at 463–64.

[288] *See* FED. R. EVID. 801(d)(1)(C) advisory committee's note.

time, such as at the trial.[289] However, the notion that they are made "under less suggestive conditions" than an in-court identification does not hold up to scrutiny. For one thing, the prior identification may have been made at a one-person show-up, which is just as suggestive as in-court identification. Most likely, the drafters had photo arrays and live lineups in mind, but even these have been shown to be highly suggestive if not conducted according to best practices.[290]

Trustworthiness is also enhanced by the fact that the witness must testify and be subject to cross-examination. [291] However, while demeanor evidence and cross-examination normally provide some opportunity for jurors to assess the credibility of a witness's testimony, here credibility is not an issue. The witnesses are "credible" in the sense of providing testimony they believe to be true; they are simply mistaken. Studies and DNA exonerations prove quite clearly that cross-examination is an insufficient means to refute the reliability of a misidentification.[292]

The traditional application of the hearsay rules as the only evidentiary screen for police-generated lay witness testimony can no longer be justified. Trial courts can invoke Rules 701, 403, and 104(a) as authority for an enhanced gatekeeping role.[293] *Daubert* made this same argument with

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[289] *See generally* Kenneth A. Deffenbacher et al., *Forgetting the Once-Seen Face: Estimating the Strength of an Eyewitness's Memory Representation*, 14 J. EXPERIMENTAL PSYCHOL: APPLIED 139, 142 (2008) (providing a meta-analysis of fifty-three "facial memory studies" showing that memory strength weakens as time passes).

[290] *See supra* note 130.

[291] The rule itself actually allows for third parties to testify to the witness's prior identification, without necessitating that the witness testify. MUELLER & KIRKPATRICK, *supra* note 222, § 8.26, at 766. The Supreme Court's decision in *Crawford*, however, requires as a condition of admissibility that the witness be subject to cross-examination by the defendant in order to satisfy the Confrontation Clause. *See supra* note 222.

[292] *See Beyond a Reasonable Doubt?*, *supra* note 10, at 1516.

[293] A more recent Supreme Court decision further supports the appropriateness of judicial oversight of evidentiary reliability under Rule 403. In *Holmes v. South Carolina*, the Court addressed the constitutionality of a state rule excluding defense evidence of a third party's guilt. 547 U.S. 319, 323 (2006). Holmes offered the testimony of several witnesses who placed another man, Jimmy McCaw White, in the victim's neighborhood on the morning of the attack, as well as four other witnesses who would testify that White had either admitted his guilt or acknowledged that Holmes was innocent. The South Carolina evidence rules prevented the defense from offering this testimony, while the rules allowed the prosecution to offer witness testimony placing Holmes near the victim's home within an hour of the killing. The rule excluded evidence of a third party's guilt "where there is strong evidence of [a defendant's] guilt, especially where there is strong forensic evidence." *Id.* at 329 (quoting State v. Holmes, 361 S.C. 333, 342 (2004)).

The United States Supreme Court overturned Holmes's conviction, finding that the South Carolina rule violated his right to present a defense. *Id.* at 331. However, the decision does not require that all evidence of third-party guilt must be admitted. Instead, the Court suggests that the better approach in Holmes's case would have been to evaluate the proffered

respect to scientific evidence.[294] In fact, the failure to exclude evidence that presents heightened risks of unfair prejudice is grounds for reversal. In *Old Chief v. United States*, for example, the Supreme Court found that the lower court had abused its discretion in failing to exclude on Rule 403 grounds relevant and otherwise admissible evidence offered to prove an element of the offense.[295] In that case, the concern was that the evidence created an unnecessary risk of unfair prejudice that could lead the jury to act on the basis of emotion and convict on this improper ground.[296] The rules of evidence empower the courts to screen evidence to ensure that the jury hears evidence that not only is relevant but also will not lead the jury to decide the case on improper grounds.[297]

For police-generated lay witness testimony, extensive studies show that these types of evidence have a powerful effect on juries and that juries—employing only "common sense"—are not effective in evaluating the reliability of such evidence.[298] Wrongful convictions also bring to light the fact that jurors may not appreciate the suggestiveness or coercive effects of certain police practices. In a related study, most lay people were shown to be incapable of identifying a leading question.[299] Further, "scientific research show[s] that jurors have limited knowledge of eyewitness factors and that the effect of many factors on eyewitness accuracy is not a matter of

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testimonial evidence under the balancing approach of Rule 403. *Id.* at 329. The Court explained:

> While the Constitution thus prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote, well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury.

Id. at 326. The Court implicitly faulted the South Carolina rule, which did not require the trial judge to "focus on the probative value or the potential adverse effects of admitting the defense evidence of third-party guilt." *Id.* at 329. Thus, the Court advocated a case-by-case balancing approach under Rule 403 to determining the admissibility of proffered lay testimony in a case in which a state rule called for excluding the evidence on reliability grounds.

[294] Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 595 (1993).

[295] 519 U.S. 172, 177–78 (1997).

[296] *Id.* at 191–92.

[297] *Cf.* General Electric Co. v. Joiner, 522 U.S. 136, 149 (1997) (Breyer, J., concurring) (discussing the importance of judicial gatekeeping in toxic tort cases in order that "courts administer the Federal Rules of Evidence . . . to achieve the 'end[s]' that the Rules themselves set forth, not only so that proceedings may be 'justly determined,' but also so 'that the truth may be ascertained'").

[298] For a thorough discussion of how jurors lack the ability to evaluate the reliability of eyewitness identifications, confessions, and informant testimony, see Findley, *supra* note 32, at 624.

[299] *See* McMurtrie, *supra* note 214, at 1285.

common sense."[300] Even when courts try to correct for these deficiencies by allowing expert testimony, other studies show jurors tend to be "skeptical of experts, especially defense experts, whose testimony goes against what they consider simple common sense."[301]

Since eyewitnesses are normally honestly mistaken *and* often highly confident when they testify, jurors have an even harder time evaluating the reliability of an identification. In some cases, both the investigating officer and the eyewitness may act with diligence and good faith in trying to obtain an accurate identification, and yet the identification may still be erroneous.[302] The use of suggestive procedures, confirmatory feedback, and the process of pretrial preparation all serve to increase a witness's level of confidence in the accuracy of the identification. Thus, if the primary proficiency of a jury is to evaluate witness "credibility," mistaken eyewitnesses present a particular challenge because their testimony is honest and confident, but totally wrong.

Police officers who obtain false incriminating statements from a suspect also testify honestly, and most likely confidently. Moreover, they testify in uniform, which undoubtedly adds some measure of credibility in the minds of most jurors. Thus, false statements present similar challenges for jurors who are asked to determine witness "credibility" and are not trained to evaluate the special risks of interrogation practices, especially as they apply to vulnerable suspects.

Indeed, studies also show that jurors do not believe that interrogation tactics are likely to elicit false confessions,[303] so there is a tendency toward overreliance on confession evidence.[304] For this reason, a confession obtained under circumstances likely to produce false statements will tend not to be rejected by the jury and will be extremely prejudicial to the defense. Suspects who confess falsely sometimes do so because the interrogation process so confuses them that they come to believe that they must be guilty when they confess.[305] In these cases, even videotapes of the

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[300] *See* Wise, Fishman & Safer, *supra* note 1, at 453.

[301] *See id.* at 453–54.

[302] *See id.* at 437–39, 454–55 (discussing good faith conduct of police and eyewitnesses in the erroneous identification of Ronald Cotton in a North Carolina rape case).

[303] *See* Iris Blandon-Gitlin, Katheryn Sperry & Richard A. Leo, *Jurors Believe Interrogation Tactics Are Not Likely to Elicit False Confessions: Will Expert Testimony Inform Them Otherwise?*, 16 PSYCHOL., CRIME & L. 1 (2010).

[304] *Bringing Reliability Back In*, *supra* note 131, at 524 (citing Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 1003 (2004) and Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429 (1998)).

[305] *See* LEO, *supra* note 10, at 210–11 (addressing persuaded false confessions).

identification process or of the interrogation may not prevent error. If jurors are supposed to determine whether a person's statement is credible, i.e., honest, then these statements would pass muster.

Finally, when police informants testify falsely, jurors also tend to credit their testimony, most likely minimizing the effects of police tactics that may tempt or coerce the informants to commit perjury.[306] Again, wrongful convictions have shown jurors to have difficulty determining the reliability of informant testimony. Courts are in a position to evaluate the adequacy of discovery about the informant's background, including any prior history of informing, and to determine the degree to which the police may have created incentives likely to cause a person to commit perjury.[307] Courts might even be receptive to allowing defense experts to testify at a pretrial reliability hearing regarding the dangers of informant testimony.

Judges are already tasked with making judgments about the admissibility of evidence such as police-generated lay witness testimony. Rule 104(a) gives courts a gatekeeping function for questions of evidentiary admissibility.[308] Indeed, the courts perform this function in passing on the constitutionality of confessions and eyewitness identifications. The hearsay rules, which clearly admit out-of-court statements identifying a person or statements made by an opposing party, render any hearsay objection pointless. If there were such a non-frivolous hearsay objection to be made, the decision would be left solely to the court under the operation of Rule 104.

One might imagine a different set of hearsay rules that actually required courts to determine whether the statements were obtained in such a way as to render the statements trustworthy. Our growing awareness of the reliability problems with police-generated lay witness testimony justifies the adoption of new hearsay rules of this type. Any hearsay rules that would require these types of testimony to demonstrate guarantees of trustworthiness would require trial courts to make the determination.

Courts routinely pass judgment on whether witness statements fit various hearsay exceptions, and these determinations require courts to evaluate the circumstances under which witnesses made their statements.

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[306] *See* NATAPOFF, *supra* note 2, at 77. Natapoff notes that innocent people with criminal associations or criminal records are at special risk of targeting by lying informants because "law enforcement and jurors alike are predisposed to believe in their guilt." *Id.* at 72.

[307] Natapoff analogizes police informants to expert witnesses. She argues that both types of witnesses are paid for their testimony, they purport to have a unique type of insider information, and their reliability can be difficult for jurors to evaluate. *Id.* at 195.

[308] Rule 104(a) provides: "The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege." FED. R. EVID. 104(a).

For example, the hearsay exception for excited utterances applies to the statements of children who are victims of abuse.[309] These statements are typically made to adult relatives, social service workers, or physicians who are called to testify at trial. Under the rule, the courts must determine whether the statement was "made while the declarant was under the stress of excitement [caused by the startling event or condition]."[310] The reliability justification for an exception to the hearsay rule is that "a condition of excitement . . . temporarily stills the capacity of reflection and produces utterances free of conscious fabrication."[311] It is beyond peradventure that the task belongs to trial courts to determine the state of mind of the declarant, the child victim, to determine whether the child uttered the statement under circumstances that provide guarantees of trustworthiness. Moreover, trial courts have relied on their knowledge of child development regarding the reactions of young children to sexual assault in finding that the excitement or alarm caused by such an event will be prolonged in younger children as opposed to adults.[312] Although not specifically required as elements of the excited utterance exception, courts have also noted other indicia of reliability, such as corroborating evidence of injury to the child and the fact that the child exhibits knowledge of sexual matters usually unknown to children of that age.[313] Countless similar examples can be given of the traditional fact-finding done by trial courts in performing evidentiary gatekeeping to determine whether evidence is sufficiently reliable to be admissible under various hearsay exceptions.[314]

Thus, Rule 104(a) places on trial courts the primary responsibility for determining the admissibility of almost all forms of evidence.[315] To be

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[309] *See* FED. R. EVID. 803(2); *see, e.g.*, United States v. Farley, 992 F.2d 1122, 1126 (10th Cir. 1993) (holding that hearsay statements of child victim of sexual assault were admissible under Federal Rule of Evidence 803(2)).

[310] *Id.*

[311] FED. R. EVID. 803(2) advisory committee's note.

[312] *See, e.g.*, Bugh v. Mitchell, 329 F.3d 496, 504 (6th Cir. 2003). In *Bugh*, the Third Circuit noted a "clear judicial trend in Ohio to recognize a liberalization of the requirements for an excited utterance when applied to young children victimized by sexual assaults." *Id.* (quoting State v. Bugh, No. 594, 1991 WL 38013, at *4 (Ohio Ct. App. March 14, 1991). The Sixth Circuit also commented approvingly of the Ohio appellate court's reliance on another of its decisions, in which it found the "'limited reflective powers of a three-year-old' and the lack of motive or reflective capacities to prevaricate the circumstances of an attack, as supporting the trustworthiness of a child's communications to others." *Id.* (citing State v. Wagner, 508 N.E.2d 164, 167 (Ohio Ct. App. 1986)).

[313] *Id.*; *see also* MUELLER & KIRKPATRICK, *supra* note 222, § 8.36, at 808.

[314] *See* MUELLER & KIRKPATRICK, *supra* note 222, § 1.10, at 31–37.

[315] Rule 104(b) carves out a narrow set of issues as to which the jury is said to make final determinations of "admissibility." The types of issues include evidence that is conditionally

admissible, hearsay statements such as eyewitness testimony, police testimony about a suspect's interrogation, and informant testimony should carry circumstantial guarantees of trustworthiness. The task of determining reliability would fall to the trial courts in the course of determining admissibility. Unfortunately, the hearsay rules fail to provide any check for reliability, but this does not relieve the court of providing such reliability screening upon request.

In sum, Rules 701 and 403 grant trial courts the discretion to conduct hearings to determine the admissibility of evidence that is both powerful and hard for jurors to evaluate for reliability. The refusal to exercise that discretion in conducting reliability hearings for police-generated lay witness testimony should constitute an abuse of discretion.

C. ASSESSING THE RELIABILITY OF POLICE-GENERATED WITNESS TESTIMONY

Each of the three types of police-generated lay witness testimony considered here presents different types of contamination risks, different considerations regarding proper documentation, and other distinct considerations regarding subject vulnerabilities and suggestive or coercive practices. Thus, in ruling on admissibility, courts would need to consider these different factors and the degree to which each bears on reliability for the particular type of evidence at issue.

As a general matter, we can identify four critical issues that should be addressed for each type of evidence.

First, the record of the witness's statement must be adequate. Did the police videotape the entirety of the interrogation, the interview with the eyewitness, or the interview with the informant? Did they photograph or videotape the lineup, photo array, or show-up?

Second, the record must show that the witness's statement is not contaminated or otherwise tainted. Did the police use suggestive or coercive means in obtaining an eyewitness's identification, a suspect's confession, or an informant's testimony? Was a blind administrator used to conduct the identification procedure? Did the police provide so great an inducement to a potential informant as to create an undue risk of perjury?

Third, the witness must not have been especially prone to making a false statement. To what extent was the eyewitness, suspect, or informant vulnerable to police suggestion or coercion due to youth, intellectual

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relevant, authenticity, and whether a witness has sufficient personal knowledge. *See id.* § 1.13, at 45–49. None of these issues can be said to have a bearing on a reliability assessment of police-generated lay witness testimony.

disability, mental illness, risk of deportation or prosecution, trauma or fear induced by crime victimization, etc.?

Fourth, other evidence must corroborate the witness's statement. Are other indicators of trustworthiness present, such as reliable corroborating evidence on the issue for which the testimony is offered? Did the interrogation or informant statement lead to new evidence such as stolen items or a murder weapon, for example? If an eyewitness identification is offered, to what extent does the initial description of the subject match the characteristics of the defendant? Do other factors such as the presence of a weapon or high stress indicate that the identification may be unreliable?

Obviously, each type of evidence presents different dangers, and experts have outlined more refined sets of best practices to guard against those dangers.

The New Jersey Supreme Court's decision in *Henderson* provides an excellent roadmap for lower courts in how to conduct a pretrial reliability hearing for eyewitness identification testimony.[316] Upon motion by the defense, trial courts should hold pretrial hearings to consider all relevant factors that have a bearing on the reliability of eyewitness identification. The court's decision catalogues all the relevant "estimator" variables that courts should consider, such as whether the witness made the viewing under high stress, whether a weapon was visible during a brief encounter, the witness's age, whether the witness was highly intoxicated, and whether the witness and defendant were of different races, among numerous others.[317] Courts should consider "system variables" (variables under the control of the state) including whether a live or photo lineup was conducted following "blind" procedures, whether the witness was given proper pre-lineup instructions, whether the live or photo lineup was properly constructed of look-alikes and a minimum of five fillers, whether the administrator avoided giving confirmatory feedback, whether the witness's confidence level in the identification was recorded, and whether a witness was asked to view a suspect more than once during an investigation.[318] With regard to show-ups, the court determined that show-ups held more than two hours after an event present a heightened risk of misidentification, and administrators should provide instructions to witnesses prior to all show-ups. Overall, the court expressed a preference for lineups but did not forbid show-ups under these circumstances.[319] Consistent with its prior decisions,

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[316] *See* State v. Henderson, 27 A.3d 872, 920–21 (N.J. 2011); *see also* State v. Chen, 27 A.3d 930 (N.J. 2011) (companion case applying *Henderson* under state rules of evidence to eyewitness identifications tainted by private-party suggestiveness).

[317] *Henderson*, 27 A.3d at 921–22.

[318] *Id.* at 895.

[319] *Id.* at 903–04.

identification administrators are required to "make a full record—written or otherwise—of the witness' statement of confidence once an identification is made."[320]

The *Henderson* decision limits a defendant's right to such a hearing to only those cases that involve suggestiveness. If a case does involve suggestiveness (a system variable), the lower courts are instructed to consider both estimator and system variables. At the hearing, "a defendant can cross-examine eyewitnesses and police officials and present witnesses and other relevant evidence linked to system and estimator variables."[321] Presumably, the defendant might be permitted to call expert witnesses at the hearing if appropriate. If only estimator variables are raised, then the defendant is not entitled to a hearing.[322] Given the substantially broader considerations as compared to the previous due process analysis, the court also found that defendants were entitled to greater pretrial discovery.[323] To prevail, defendants must meet the high burden of demonstrating that the identification poses "a very substantial likelihood of irreparable misidentification."[324] Even in cases in which the identification is admitted, however, the ruling envisions an expanded use of jury instructions, both at the end of the trial and during the trial.[325]

The *Henderson* framework will be criticized by some for not going far enough and by others for going too far. In general, however, it gives substance to the proposal made in this Article that courts should conduct pretrial reliability hearings for police-generated lay witness testimony such as identifications, confessions, and informant testimony. State supreme courts can implement such hearings on a statewide basis by adapting their

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[320] *Id.* at 900.

[321] *Id.* at 920.

[322] A defendant has the initial burden to show evidence of suggestiveness that could lead to mistaken identification. *Id.* at 916–17. Thus, reliability concerns based only on estimator variables—no matter to what extent those variables indicate the identification is unreliable—do not entitle a defendant to a hearing under this ruling. The court justified this limitation in part on pragmatic concerns about overwhelming the court system with demands for hearings and on the preference for judicial oversight in matters over which the police might be deterred from acting improperly. *Id.* at 923–24. The court also relied on a notion (refuted in this Article) that jurors, and not trial courts, should engage in fact-finding regarding the reliability of a witness's statements. *Id.* at 923. Ironically, the court states that it would be inappropriate for a trial court to find an identification unreliable solely on the ground, for example, that the witness was under "'too much' stress." *Id.* But this is precisely the type of fact that courts decide all the time in determining whether a witness made a statement while still under the stress of an event so as to qualify as an "excited utterance." *See supra* notes 310–12 and accompanying text.

[323] *Henderson*, 27 A.3d at 922–23.

[324] *Id.* at 920.

[325] *Id.* at 925. As a result, the court saw a reduced need for expert witnesses at trial. *Id.*

due process provisions in the manner done in New Jersey. Legislatures might also provide a statutory framework for such hearings. At the end of the day, however, the rules of evidence provide trial courts with the discretion to conduct extensive pretrial reliability screening for hearsay evidence, and they require courts to apply the rules so as to promote the growth and development of the law of evidence and safeguard the integrity and fairness of the trial process.

D. THE APPROPRIATENESS OF JUDICIAL GATEKEEPING

The jury system gives lay people an important participatory role, designed to protect the accused, in the criminal justice system. The theoretical basis for the jury trial is that jurors serve as a bulwark to protect against oppressive misuse of the prosecution power by the government.[326] By screening evidence for reliability, judges enhance the ability of the jury to protect the interests of the defendant. The jury's purpose, after all, is to protect the "fairness of the proceeding,"[327] and excluding unreliable prosecution evidence does not in any way interfere with the *defendant's right* to have the jury render a verdict on the facts.[328] As trials are currently structured, courts may refuse to enter a judgment of guilt if it is contrary to the great weight of the evidence, which may take into account the credibility of witnesses, but a judge may not convict when a jury finds the defendant not guilty. If a witness's testimony or the confession of a defendant is so tainted by suggestion or coercion as to render it unreliable, judges already have the authority to set aside a guilty verdict.[329] Thus, the trial court's role as currently defined already gives the courts enormous discretion in aiding the jury in its role to protect the defendant from an incorrect verdict. In federal courts and some other jurisdictions, judges are also empowered to comment to the jury on the weight of the evidence,

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[326] *See* JOHN GUINTHER, THE JURY IN AMERICA at xiii (1988) ("Thomas Jefferson and others have seen [the jury] as the public's line of defense against the state when it acts oppressively, and Jefferson, for that reason, once declared that the right to a trial by jury was more precious to the maintenance of a democracy than even the right to vote.").

[327] AMERICAN BAR ASSOCIATION, PRINCIPLES FOR JURIES & JURY TRIALS, princ. 1 & cmt. B, at 1–3 (2005).

[328] Recent case law on the right to a jury trial protects the defendant's Sixth Amendment right to have a jury decide factual issues that establish elements of the offense or that increase the maximum punishment for the offense. *See supra* note 29.

[329] *See* Ceci & Friedman, *supra* note 215, at 107 (addressing the possible role of the trial judge to refuse to enter judgment on a verdict of guilty if a child witness's statement or testimony is so tainted by suggestion that a guilty verdict cannot stand, and suggesting that such a ruling should be rare).

including factors that bear on the credibility of witnesses, including eyewitnesses.[330]

Understanding the factors that diminish the reliability of police-generated witness testimony is not a matter of common sense. For example, past studies showed that even judges do not have the expertise to evaluate the factors that affect an eyewitness identification's reliability.[331] Recent case law suggests at least some efforts by the judiciary to be better informed.[332] The development of such expertise by trial courts would enable them to make accurate findings at pretrial reliability hearings. Developing such expertise should already be a goal of judicial training. Similar training could raise judicial awareness of recurring problems with confessions and the use of informants as well. Expertise in these three forms of evidence would equip courts as a practical matter to rule on motions and to enter judgment on verdicts of guilt. More importantly, judges need the expertise to fulfill their ethical obligations to ensure the fairness of the trial process.[333] It also goes without saying that it is not feasible to provide this training to jurors during the course of a trial and expect individual jurors to develop anything close to genuine expertise.

Judicial findings at pretrial reliability hearings have the advantage of creating public awareness about the standards of evidentiary reliability pertaining to police-generated witness testimony. Judicial rulings on the record also make appellate review possible,[334] unlike decisions by individual juries whose errors cannot be corrected. Appellate review creates a jurisprudence informed by expert-witness testimony and outside research that could lead to the development of doctrines consistent with social science.[335] The development of such doctrines can effectively require

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[330] *Id.* at 106.

[331] *See* CUTLER & PENROD, *supra* note 83, at 175 (summarizing survey studies and concluding that judges are generally insensitive to factors that influence eyewitness identification accuracy).

[332] *See Eyewitness Identifications*, *supra* note 36, at 623–30.

[333] *See* Backus, *supra* note 43, at 961–71; *Eyewitness Identifications*, *supra* note 36, at 632 n.180. Some judges have also invoked their supervisory authority to ensure the fairness of the adversary system. *See id.* at 622.

[334] Creating a coherent body of law with mandatory appellate review was one of the goals that animated the development of the Federal Sentencing Guidelines. *See* Susan R. Klein & Sandra Guerra Thompson, *DOJ's Attack on Federal Judicial "Leniency," the Supreme Court's Response, and the Future of Criminal Sentencing*, 44 TULSA L. REV. 519, 521–22 (2009).

[335] *See Eyewitness Identifications*, *supra* note 36, at 633 (addressing state courts that have engaged in jurisprudential development of eyewitness identifications by taking judicial notice of social science research and developments in other jurisdictions); *cf.* Cheng, *supra* note 12, at 1281–84 (addressing the importance of independent judicial research to accurate admissibility decisions on scientific evidence).

the police to follow best practices.[336] Legislation has already begun to move in this direction in many jurisdictions, but the progress has been slow.[337] The judiciary can play an important role as a catalyst for these necessary changes.

Public judicial pronouncements demanding greater reliability of the trial process so as to avoid wrongful convictions can also further the educational goals of the criminal justice system. Courts play an essential role in giving voice to the values of our society.[338] Whereas today the public trial answers only the question of the defendant's guilt, pretrial reliability hearings would provide a public airing of the government's key evidence and necessitate a judicial declaration of reliability determined by reference to best practices. The process would give substance to the values espoused in the presumption of innocence and the right to a fair trial.

V. CONCLUSION

One former prosecutor responsible for sending an innocent man to prison for twenty-seven years sums up the reliability conundrum posed by faulty, uncorroborated testimonial evidence:

> In the criminal justice system, people are being convicted on one-witness cases. And what this says to me is we've got an inherent problem about how many of these cases we're getting wrong. And it's still going on today . . . . My question to everybody involved in this across the state and across the nation is what are we going to do about this? I don't know.[339]

Clearly, heartfelt apologies and handwringing are not enough.[340] Eyewitness identifications, confessions, and police-informant testimony

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[336] I have previously written about the important doctrinal breakthroughs at the state level in the area of eyewitness identifications. *See Eyewitness Identifications*, *supra* note 36, at 623–30. These breakthroughs have been based on state constitutional law, the court's supervisory authority, and state evidence rules. *Id.* at 622.

[337] *See supra* notes 133–39 and accompanying text.

[338] *See generally* DAVID R. DOW, AMERICA'S PROPHETS: HOW JUDICIAL ACTIVISM MAKES AMERICA GREAT (2009).

[339] John Council, *Witnesses to the Prosecution: Current and Former ADAs Who Helped Convict Exonerated Men Reflect*, TEX. LAW., June 9, 2008, at 1 (quoting former Dallas prosecutor James Fry).

[340] Not surprisingly, wrongly convicted persons receive apologies from judges, mistaken eyewitnesses, and even the true perpetrators. *See, e.g.*, Jennifer Peltz, *Imprisoned Man Falsely Accused of Rape Wins Release and Apology from Judge*, N.Y. L.J., Dec. 11, 2009, at 1, *available at* http://www.law.com/jsp/nylj/PubArticleNY.jsp?id=1202436239965&Imprisoned_Man_Falsely_Accused_of_Rape_Wins_Release_and_Apology_From_Judge; *Judge Apologizes, Ends '16-Year Nightmare': Man Wrongly Convicted of Bludgeoning Wife, Killing Unborn Child*, CHI. TRIB., June 22, 1996, at 17, *available at* http://articles.chicagotribune.com/1996-06-22/news/9606220178_1_dianna-d-aiello-kevin-lee-green-unsolved-slayings; *Rape Victim Apologizes to Wrongfully Convicted Man*,

present serious reliability problems, especially when the evidence is obtained from vulnerable individuals by coercive or suggestive means. The rules of evidence have traditionally viewed these types of problematic evidence as presumptively admissible without necessity for individualized reliability screening. The process leaves it solely to juries to reject any unreliable evidence. As the scores of DNA exonerations have shown, these types of prosecution evidence are fraught with dangers of unreliability that juries are unable to detect. Indeed, concerns about sentencing innocent people to death on the basis of faulty evidence has already prompted the recent abolition of the death penalty in New Mexico and Illinois,[341] and the adoption of the country's most restrictive death penalty statute in Maryland.[342] Unless we find ways to improve the quality of police-generated witness testimony, the criminal justice system will continue to convict the innocent.

The exclusion or limitation of unreliable prosecution evidence protects the innocent by ensuring the integrity of the trial process. A trial based on critical and unreliable evidence is simply unfair. It is no wonder that so many innocent people have been mistakenly convicted. Preventing wrongful convictions also furthers the important public safety goal of incapacitating dangerous individuals. As is often noted, when an innocent person is wrongly convicted, a guilty person remains at large, free to commit additional crimes.[343] Not only do more accurate investigative procedures prevent miscarriages of justice, but they also lead to the capture and punishment of the truly guilty individuals who might otherwise escape apprehension.

WRAL.COM (May 14, 2008), http://www.wral.com/news/local/story/2862438/; *True Perpetrator Apologizes to Wrongly Convicted Man*, NBC DFW (Apr. 16, 2009), http://www.nbcdfw.com/news/local/True-Perpetrator-Apologizes-To-Wrongly-Convicted-Man--.html; *see also* Abigail Penzell, *Apology in the Context of Wrongful Conviction: Why the System Should Say It's Sorry*, 9 CARDOZO J. CONFLICT RESOL. 145 (2007) (advocating apology as a psychological tool to promote healing for victim, exonerated individuals, and the community).

[341] *See* Deanna Bellandi, *Lawmakers: Ill. Governor. to Abolish Death Penalty*, ABC NEWS (Mar. 9, 2011), http://abcnews.go.com/US/wireStory?id=13091185 (reporting that Illinois had abolished the death penalty and noting that New Mexico had done the same in 2009).

[342] *See* Millemann, *supra* note 8, at 272–75 (noting that concern about convicting the innocent was one reason for new restrictions).

[343] *See e.g.*, N.Y. STATE JUST. TASK FORCE, http://www.nyjusticetaskforce.com/mission.html (last visited Feb. 14, 2012) (including in their mission statement "public safety" and recognizing in their task force description that "[w]rongful convictions . . . allow the actual perpetrator of the crime to go unpunished"); *Causes of Wrongful Conviction*, NEW ENG. INNOCENCE PROJECT, http://www.newenglandinnocence.org/knowledge-center/causes/ ("Nobody benefits from a wrongful conviction—except the real perpetrator who remains free to commit additional crimes.").