CAN *HENDERSON* OR *LAWSON* REPAIR THE GOLDEN STATE'S LESS-THAN-GOLDEN TREATMENT OF EYEWITNESS IDENTIFICATION REFORM? A CALL FOR JUDICIAL INTERVENTION IN CALIFORNIA

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INTRODUCTION

DeAndre Howard. Los Angeles, California. Convicted of first degree murder and attempted murder in 2003 after being identified in a photographic lineup by one witness who was standing ninety feet away with an obstructed view, and another witness who stated that she was not sure that she could identify the shooter.[1] Howard served ten years in prison before being exonerated based on conflicting eyewitness testimony that was not presented at the first trial.[2]

Maurice Caldwell. San Francisco, California. Convicted of murder in 1991 as a result of a showup identification procedure in which he was

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1. Univ. of Mich. Law Sch., *DeAndre Howard*, NAT'L REGISTRY EXONERATIONS (Dec. 27, 2013), http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4337.

2. *Id.*

brought in handcuffs to a witness's home, even though the witness stated she did not believe the shooter lived in the area (Caldwell lived in a housing project close by), and no other physical evidence linked Caldwell to the crime.[3] Caldwell served twenty years in prison before being exonerated.[4] His release can be attributed to the fact that the attorneys at the Northern California Innocence Project took his case, established that it would have been "physically impossible" for the witness to get a clear view of the crime given the lighting at the scene and located two other witnesses who were able to identify other men as the perpetrators.[5]

Glen Nickerson. San Jose, California. Convicted of two counts of murder and one count of attempted murder in 1987.[6] The victim first identified Nickerson the day after receiving brain surgery for his gunshot wound.[7] Despite his poor health and fragile condition, the victim stated that his confidence in the identification was "10 out of 10."[8] Two other witnesses then proceeded to corroborate this identification.[9] Nickerson served sixteen years in prison before being exonerated based on evidence that the victim's identification was not credible, evidence that the second witness's identification was improperly influenced by detectives who had also hidden exculpatory evidence and committed perjury, and a conclusion that the third witness's identification was unreliable since she failed to positively identify Nickerson in a photo lineup in the initial phases of the investigation.[10]

DeWayne McKinney. Orange County, California. Convicted of first degree murder and robbery in 1981 after police gathered random mug shots of Los Angeles gang members, presented them in a photographic lineup, and then proceeded to conduct a physical lineup where the witnesses cautiously identified McKinney based on "something . . . familiar" in his eyes.[11] These identifications led to McKinney's conviction, despite the fact

3. Univ. of Mich. Law Sch., *Maurice Caldwell*, NAT'L REGISTRY EXONERATIONS, http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3792 (last visited Feb. 23, 2016).

4. *Id.*

5. *Id.*

6. Univ. of Mich. Law Sch., *Glen Nickerson*, NAT'L REGISTRY EXONERATIONS, http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3801 (last visited Feb. 23, 2016).

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. Univ. of Mich. Law Sch., *DeWayne McKinney*, NAT'L REGISTRY EXONERATIONS, http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3456 (last updated Jan.

that evidence was presented at trial that he was home, on crutches, recovering from a leg injury.[12] McKinney was exonerated after nineteen years in prison once the Orange County District Attorney's Office received a letter stating that another man had committed the crime.[13]

DeAndre Howard, Maurice Caldwell, Glen Nickerson, and DeWayne McKinney are just a few of the many individuals in California, and across the United States, who have been falsely convicted based on eyewitness misidentification or suggestive identification procedures.[14] In fact, the Innocence Project predicts that eyewitness misidentification is the leading cause of false convictions across the U.S.,[15] estimating that it has played a part in over 70 percent of cases that have been subsequently overturned through the development of DNA testing.[16] Why are eyewitness misidentifications present in so many false convictions? Perhaps it can be partly attributed to the fact that eyewitness identification is the most common form of suspect identification used in the criminal justice system.[17] However, it can also likely be attributed to the fact that, despite over thirty years of scientific research and countless scholarly articles indicating that the accuracy of eyewitness identifications is being negatively affected by improper police procedures and malleable human memories, very little has been done to change the way that eyewitness identification is treated throughout the criminal investigation and in the courtroom.[18]

Eyewitness identification reform can be accomplished in a variety of ways, many of which can be categorized as either (1) procedural changes that can be implemented before, during, or immediately following the

23, 2014).

12. *Id.*

13. *Id.*

14. It has been estimated that over 500 individuals who were subsequently exonerated for their crimes were falsely convicted due in part to mistaken eyewitness identifications. Univ. of Mich. Law Sch., *% Exonerations by Contributing Factor*, NAT'L REGISTRY EXONERATIONS, http://www.law.umich.edu/special/exoneration/Pages/ExonerationsContribFactorsByCrime.aspx (last visited Feb. 23, 2016).

15. *Eyewitness Misidentification*, INNOCENCE PROJECT, http://www.innocenceproject.org/causes-wrongful-conviction/eyewitness-misidentification (last visited Feb. 24, 2016) (citing EDWIN BORCHARD, CONVICTING THE INNOCENT (1932)).

16. *Id.*

17. DAN SIMON, IN DOUBT: THE PSYCHOLOGY OF THE CRIMINAL JUSTICE PROCESS 50 (2012).

18. Robert Siegel, *New Recommendations Could Improve Eyewitness Testimony*, NAT'L PUB. RADIO (Nov. 18, 2014, 4:57 PM), http://www.npr.org/2014/11/18/365015946/new-recommendations-could-improve-eyewitness-testimony (noting that the problem of eyewitness misidentification and the accompanying research is not "novel," but that change has been "awfully slow when you consider that this research has been active since the 1970s").

actual identification,[19] or (2) legal changes that can be implemented as part of the judicial process.[20] Procedural changes that can be implemented before the identification can be mandated through legislation.[21] These include requiring police departments to adopt "best practices";[22] demanding that lineup instructions, procedures, and post-identification practices are performed in a manner consistent with what scientific research has determined to be the most effective;[23] or requiring law enforcement agencies to undergo training programs that educate officers about the dangers inherent in certain eyewitness identification procedures.[24] Changes that can be made after the identification and inside the courtroom include using more comprehensive jury instructions to caution jurors about the unreliability of eyewitness identification,[25] regularly using experts to educate jurors about the status of scientific research on human memory,[26] and finally, simply changing the admissibility standard for eyewitness identification testimony altogether.

There is little doubt that adopting legislation mandating widespread changes to law enforcement lineup procedures would have a positive effect on the reliability of eyewitness identification.[27] However, many states,

19. Eva G. Shell, *A Recipe for Mistaken Convictions: Why Federal Rule of Evidence 403 Should Be Used to Exclude Unreliable Eyewitness-Identification Evidence*, 46 SUFFOLK U. L. REV. 263, 265 (2013).

20. *See id.* ("[S]ome courts allow eyewitness-expert testimony and jury instructions on the topic of eyewitness-identification unreliability.").

21. *See Model Legislation*, INNOCENCE PROJECT, http://www.innocenceproject.org/free-innocent/improve-the-law/model-legislation (last visited Feb. 24, 2016) (providing examples of legislation that states could enact to improve the accuracy of eyewitness identification).

22. *See generally* DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, NCJ 178240, EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT (1999) (describing best practices available for law enforcement agencies).

23. *Eyewitness Identification Reform*, INNOCENCE PROJECT (June 10, 2015, 4:57 PM), http://www.innocenceproject.org/free-innocent/improve-the-law/fact-sheets/eyewitness-identification-reform.

24. *See* SIMON, *supra* note 17, at 76.

25. *See generally* Vitauts M. Gulbis, Annotation, *Necessity of, and Prejudicial Effect of Omitting, Cautionary Instruction to Jury as to Reliability of, or Factors to Be Considered in Evaluating, Eyewitness Identification Testimony—State Cases*, 23 A.L.R.4th 1089, 1092 (1983) (providing an overview of state cases addressing the question of "whether or not it is necessary . . . to give the jurors instructions cautioning them as to the reliability of eyewitness identification testimony" (footnote omitted)).

26. *See generally* Gregory G. Sarno, Annotation, *Admissibility, at Criminal Prosecution, of Expert Testimony on Reliability of Eyewitness Testimony*, 46 A.L.R.4th 1047 (1986) (providing an overview of both state and federal court cases discussing the admissibility of expert testimony on the issue of eyewitness reliability).

27. *See Eyewitness ID Reform*, INNOCENCE PROJECT FLA., http://floridainnocence.org/content/?page_id=68 (last visited Feb. 27, 2016) ("Several easy-to-implement procedures have been proven to significantly decrease the number of misidentifications.").

California included, have either been unsuccessful in their attempts at legislative reform, or have failed to try altogether. Therefore, this Note will argue that if widespread legislative and regulatory changes reflecting the current state of scientific research cannot be made to the identification process, then individual states like California should reconstruct the judicial framework for evaluating eyewitness testimony to account for scientific findings after the identification, inside the courtroom.

Part I of this Note provides a brief background regarding the history of the Supreme Court's treatment of eyewitness identification, the current standard of admissibility of eyewitness identification testimony at both the federal and state levels, and the status of scientific research into eyewitness identifications today. Part II describes the changes that two states, New Jersey and Oregon, have made to their judicial frameworks to reflect the current state of empirical research into the dangers of eyewitness misidentification. This Part will also highlight how these new tests differ from the *Manson* framework set forth by the Supreme Court in the 1970s, which is the prevailing test for admissibility of eyewitness evidence, on which California's existing framework is modeled. Part III will examine the pros and cons of New Jersey and Oregon's approaches, especially in light of their underlying goals of deterring improper police conduct and obtaining reliable verdicts. Part IV describes the history of eyewitness identification reform in California and suggests that in states like California, where attempts to pass legislation modifying police eyewitness identification procedures have been unsuccessful, judicial reform similar to that of Oregon's *Lawson* framework is necessary to ensure the integrity of the criminal justice system.

I. BACKGROUND

A. HISTORY OF SUPREME COURT JURISPRUDENCE

The current federal standard used to evaluate the admissibility of eyewitness identification testimony—and consequently, the standard used by forty-eight states as adopted through their own state court jurisprudence—was implemented almost forty years ago in the 1960s and 1970s through a series of Supreme Court cases, starting with three cases known as the *Wade* Trilogy.[28] These cases assessed various eyewitness

28. Tanja Rapus Benton et al., *Has Eyewitness Testimony Research Penetrated the American Legal System? A Synthesis of Case History, Juror Knowledge, and Expert Testimony*, *in* 2 HANDBOOK OF EYEWITNESS PSYCHOLOGY: MEMORY FOR PEOPLE 453, 487 (Rod C. L. Lindsay et al. eds., 2007); Dana Walsh, *The Dangers of Eyewitness Identification: A Call for Greater State Involvement to Ensure*

identification procedures at different stages of the criminal justice process, and ultimately set the stage for evaluating the reliability of eyewitness testimony under a due process framework.[29] The culmination of this eyewitness identification jurisprudence was presented in two seminal cases, *Neil v. Biggers*[30] and *Manson v. Brathwaite*.[31]

In *Biggers*, the Court held that in order to avoid "a very substantial likelihood of irreparable misidentification," courts should consider five factors when determining an identification's reliability: (1) "the opportunity of the witness to view the criminal at the time of the crime"; (2) "the witness' degree of attention"; (3) "the accuracy of the witness' prior description of the criminal"; (4) "the level of certainty demonstrated by the witness at the confrontation"; and (5) "the length of time between the crime and the confrontation."[32] Notably, these factors were derived from prior Supreme Court jurisprudence, and were not based on scientific or empirical evidence of reliability.[33] The *Biggers* decision led to a split among circuits, causing some to adopt a *per se* exclusion of eyewitness identification testimony when obtained through suggestive procedures.[34]

Fundamental Fairness, 36 B.C. INT'L & COMP. L. REV. 1415, 1425–28 (2013); Richard A. Wise et al., *Criminal Law: A Tripartite Solution to Eyewitness Error*, 97 J. CRIM. L. & CRIMINOLOGY 807, 812–15 (2007).

29. *See* Wise et al., *supra* note 28, at 812 ("In *Wade*, the Court held that because a post-indictment pre-trial lineup is a critical stage of a criminal proceeding, a defendant has a right under the Sixth Amendment to have an attorney present at a post-indictment lineup." (citing United States v. Wade, 388 U.S. 218, 237–38 (1967))); *id.* at 813 ("In *Gilbert*, the Supreme Court held that the State is not entitled to show that eyewitness testimony which was the direct result of an illegal post-indictment lineup could be substantiated by an independent source." (citing Gilbert v. California, 388 U.S. 263, 272–73 (1967))); *id.* ("*In Stovall*, . . . [t]he Court held that the totality of the circumstances must be examined when there is an alleged violation of due process in conducting an identification procedure." (citing Stovall v. Denno, 388 U.S. 293, 302 (1967))); *id.* at 813–14 ("[I]n *Simmons v. United States*, the Supreme Court . . . ruled that in-court identifications would be permissible, notwithstanding the use of suggestive photographs, as long as their use was necessary and the in-court identifications were reliable." (citing Simmons v. United States, 390 U.S. 377, 385–86 (1968))); *id.* at 814 ("[I]n *Kirby v. Illinois*, the Supreme Court clarified its holdings in *Wade* and *Gilbert* by ruling that an individual has a right to counsel in a pre-trial identification procedure only if it took place after criminal proceedings had been initiated against the defendant." (citing Kirby v. Illinois, 406 U.S. 682, 689 (1972))); *id.* ("[I]n *United States v. Ash*, the Supreme Court held that a defendant does not have a right to an attorney at a photo array . . . ." (citing United States v. Ash, 413 U.S. 300, 317 (1973))).

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

31. Manson v. Brathwaite, 432 U.S. 98 (1977). *See* Wise et al., *supra* note 28, at 814.

32. *Biggers*, 409 U.S. at 199–200.

33. *See* Margaret J. Lane, *Eyewitness Identification: Should Psychologists Be Permitted to Address the Jury?*, 75 J. CRIM. L. & CRIMINOLOGY 1321, 1331 (1984) ("Furthermore, a number of psychologists have argued that the 'reliability factors' used by the Supreme Court in *Biggers* lack an empirical basis and are inconsistent with psychological data.").

34. *Manson*, 432 U.S. at 110.

The Court, concerned about the implications of a *per se* bar on eyewitness identification testimony, finally set the record straight in 1977 with *Manson*. Concluding that "reliability is the linchpin in determining the admissibility of [eyewitness] identification,"[35] the Court held that lower courts must look at the "totality of the circumstances" when evaluating an identification's reliability.[36] Consequently, to determine whether a defendant's due process rights have been implicated under the *Manson* framework, courts must first determine whether the police procedures used in obtaining the identification were "impermissibly suggestive."[37] The burden of proving this first prong of the *Manson* test falls on the defendant.[38] Then, even if the court does find that the procedures were impermissibly suggestive, the prosecution can argue that there is nonetheless an independent basis for reliability.[39] The court will proceed to evaluate whether the "totality of the circumstances," viewed under the lens of the five *Biggers* factors, resulted in a reliable identification.[40] As long as the court finds that the reliability of the identification outweighs any dangers implicated by the suggestive police procedures, the identification testimony will be admissible.[41]

35. *Id.* at 114.

36. *Id.* at 113–14.

37. *Id.* at 107. Studies have shown that judges are more capable of identifying an impermissibly suggestive identification procedure when it contains some sort of identification bias (evidence that suggestive instructions were used), than when it contains some sort of presentation bias (evidence of suggestiveness due to its photographic or live form). Lori R. Van Wallendael et al., *Mistaken Identification = Erroneous Conviction? Assessing and Improving Legal Safeguards*, *in* 2 HANDBOOK OF EYEWITNESS PSYCHOLOGY, *supra* note 28, at 557, 560–61.

38. BRIAN L. CUTLER & STEVEN D. PENROD, MISTAKEN IDENTIFICATION: THE EYEWITNESS, PSYCHOLOGY, AND THE LAW 171 (1995).

39. *Id.* at 171–72.

40. *Manson*, 432 U.S. at 113–14.

41. There have been a number of studies that have set out to examine the abilities of jurors to determine the reliability of eyewitness identification testimony once it is admitted. Some studies have indicated that once this testimony is admitted, jurors have extreme difficulty accurately assessing its credibility. This research helps illuminate why the admissibility standards used by courts are so important. However, the research is vast, and an in-depth discussion of jurors' psychological understandings of eyewitness identification testimony is primarily outside the scope of this Note. *See* Melissa Boyce et al., *Belief of Eyewitness Identification Evidence*, *in* 2 HANDBOOK OF EYEWITNESS PSYCHOLOGY, *supra* note 28, at 501, 518 ("Jurors appear to base their decisions on whether to believe an eyewitness mostly on characteristics of the witness, such as confidence, which are not strongly related to eyewitness accuracy. Characteristics of the crime scene and the criminal tend to be overlooked, and system variables, which can have a great impact on eyewitness accuracy, are completely ignored when people are deciding whether a witness should be believed.").

B. THE SCIENTIFIC EVIDENCE

Since *Manson*, a "voluminous" number of studies have set out to examine the role of the *Biggers* factors in relation to the accuracy of eyewitness identification.[42] This research has established that, generally, eyewitness identifications are considerably less accurate than many would believe,[43] and, more specifically, that the *Biggers* factors, viewed in isolation, do not accurately reflect the reliability of eyewitness identification testimony.[44] Further, the research has also provided detailed information on a number of additional factors that may affect the accuracy of eyewitness identifications.[45] Most recently, the National Academy of Sciences issued the first "landmark" report reviewing and assessing this body of identification research.[46] The report has provided the scientific and legal communities with a comprehensive look into over thirty years of research.[47] The general findings of the committee are discussed below.

There are two main categories of variables that affect eyewitness

42. SIMON, *supra* note 17, at 51.

43. *Id.* at 53.

44. Melissa A. Piggott et al., *A Field Study on the Relationship Between Quality of Eyewitnesses' Descriptions and Identification Accuracy*, 17 J. POLICE SCI. & ADMIN 84, 87–88 (1990) (examining the effect of three *Biggers* factors (opportunity to view, description accuracy, and witness confidence) on eyewitness identification accuracy, and concluding that witnesses' "tendency to overestimate the duration of the initial incident," combined with a positive correlation between exposure duration and accuracy, indicates that duration exposure may not be reliable, that witnesses are more likely to be confident in making a decision to identify a perpetrator than in their decision to conclude that the perpetrator was not present in the lineup, and that description accuracy is not indicative of identification accuracy).

45. SIMON, *supra* note 17, at 57.

46. Josh Sanburn, *Behind the Messy Science of Police Lineups*, TIME (Oct. 3, 2014), http://time.com/3461043/police-lineups-eyewitness-science; *National Academy of Sciences Issues Landmark Report on Memory and Eyewitness Identification: Innocence Project Urges Adoption of Its Recommendations for Improving Police Identification Procedures*, INNOCENCE PROJECT (Oct. 2, 2014, 12:00 AM), http://www.innocenceproject.org/Content/National_Academy_of_Sciences_Issues_Landmark_Report_on_Memory_and_Eyewitness_Identification.php; Radley Balko, *New National Academy of Sciences Study Critical of Eyewitness Testimony*, WASH. POST (Oct. 3, 2014), http://www.washingtonpost.com/news/the-watch/wp/2014/10/03/new-national-academy-of-sciences-study-critical-of-eyewitness-testimony/.

47. *See generally* COMM. ON SCI. APPROACHES TO UNDERSTANDING & MAXIMIZING THE VALIDITY & RELIABILITY OF EYEWITNESS IDENTIFICATION IN LAW ENFORCEMENT & THE COURTS ET AL., IDENTIFYING THE CULPRIT: ASSESSING EYEWITNESS IDENTIFICATION 2 (2014) [hereinafter IDENTIFYING THE CULPRIT] ("The committee heard from numerous experts, practitioners, and stakeholders and reviewed relevant published and unpublished literature as well as submissions provided to the committee. In this report, the committee offers its findings and recommendations for identifying and facilitating best practices in eyewitness procedures for the law enforcement community; strengthening the value of eyewitness identification evidence in court; and improving the scientific foundation underpinning eyewitness identification.").

identification: *system variables* and *estimator variables*.[48] *System variables* are related to protocols and procedures within the control of law enforcement agencies and, consequently, can be changed and monitored through legislation or regulation.[49] Examples of *system variables* include lineup procedures, protocols for collecting and using witness confidence statements,[50] and communications between police officers and eyewitnesses.[51] Maurice Caldwell's identification demonstrates how *system variables* can lead to false identifications, considering the outcome may have been different if he had not been presented already handcuffed in a showup procedure.

Estimator variables, on the other hand, are "related to characteristics associated with the crime scene, perpetrator, and witness."[52] These variables cannot be controlled by the criminal justice system, as they are inherent in the criminal event itself and in the memory encoding process that follows.[53] Examples of *estimator variables* include the presence of a weapon, stress and fear, racial bias, exposure duration (the amount of time the witness had to observe the defendant's face during the crime), and the retention interval (the amount of time between the criminal event and the identification).[54] DeAndre Howard's identification demonstrates how *estimator variables*, such as the witness's obstructed view of the crime, can lead to inaccurate identifications.

The relationship between *system variables*, *estimator variables*, and identifications is complex.[55] Each variable may have a separate effect on the accuracy of an identification. For example, the National Academy of Sciences report notes that "[k]ey *system variables*, such as lineup procedures . . . and the collection/use of witness confidence statements, can have a marked influence over the validity of eyewitness identifications."[56] In particular, blinded or double-blinded lineups, in which the lineup

48. *Id.* at 16.

49. *Id.*

50. Witness confidence statements are statements collected immediately following the identification procedure, in which the witness states how confident he or she is of his or her selection. These statements seek to preserve the witness's measure of confidence at the time the identification was made, and protect against a witness reporting an inflated level of confidence later in the process after receiving confirmatory feedback from law enforcement officials. *Id.* at 108.

51. *Id.* at 17, 65.

52. *Id.* at 72.

53. SIMON, *supra* note 17, at 57–58.

54. *See* IDENTIFYING THE CULPRIT, *supra* note 47, at 92–99 (discussing the effect that each estimator variable has on eyewitness identifications in detail).

55. *See id.* at 100.

56. *Id.* at 76 (emphasis added).

administrator does not know the identity of the suspect,[57] are more likely to result in accurate identifications, as they help ensure that witnesses are not influenced by either conscious or subconscious cues from law enforcement officials.[58] Further, law enforcement's "maintenance of neutral pre-identification communications" is essential to ensuring that witnesses remain unbiased.[59] Neutral or minimal post-identification feedback from the lineup administrator is also ideal, as it prevents the witness from using the feedback to inflate her degree of confidence as to the accuracy of her own identification.[60] However, the effects of other *system variables* on accurate identifications are less conclusive. For example, the National Academy of Science committees could not determine whether sequential or simultaneous lineups[61] lead to more accurate identifications,[62] despite previous beliefs that sequential lineups were more likely to result in accurate identifications.[63]

Estimator variables can also have drastic effects on the reliability and accuracy of an identification.[64] For example, witnesses are more likely to make an accurate identification when the distance between the witness and suspect during the criminal event is minimal, the witness is of the same race and age group as the suspect, the witness is exposed to the suspect for a longer period of time, and the identification is made within a short period after the criminal event.[65]

For the most part, the findings in the National Academy of Sciences report are not groundbreaking. However, what is important is that the committee conclusively found that these *system* and *estimator* variables do have an effect on the reliability of eyewitness identification testimony. And, unfortunately, under the current *Manson* framework, there is no place for their recognition in the courtroom.

57. *Id.* at 24–25.

58. *Id.* at 92.

59. *Id.* at 91.

60. *Id*. at 92.

61. A sequential lineup is one in which suspects are presented to the witness one at a time, either through photographs or in person. A simultaneous lineup is one in which all the suspects are presented to the witness at the same time, either through photographs or in person. *Id.* at 77.

62. *Id.* at 3, 104.

63. *See* Paul R. Dupuis & R.C.L. Lindsay, *Radical Alternatives to Traditional Lineups*, *in* 2 HANDBOOK OF EYEWITNESS PSYCHOLOGY, *supra* note 28, at 179, 184 ("Comparing each lineup member with the memory of the criminal rather than with other lineup members was expected to reduce false selections.").

64. IDENTIFYING THE CULPRIT, *supra* note 47, at 92–93.

65. *Id.* at 96–99.

II. NEW JERSEY AND OREGON AS LEADERS IN JUDICIAL REFORM

A. NEW JERSEY AND STATE V. HENDERSON

In 2011, New Jersey became the first state to completely reconsider and depart from the Supreme Court's *Manson* standard.[66] *State v. Henderson*, a case that turned almost completely on eyewitness identification evidence,[67] involved a photographic lineup procedure that was not conducted until approximately two weeks after the crime.[68] During the lineup, the witness hesitated and stated that he was unsure whether he could make an identification.[69] Despite his uncertainty, he was ultimately pressured into picking a suspect, and the identification was subsequently used to convict the defendant, Larry Henderson.[70]

These facts provided the perfect foundation for the New Jersey Supreme Court to reevaluate its eyewitness identification admissibility standard. The court began by commissioning a Special Master to create a report evaluating the state of the scientific research into eyewitness misidentification.[71] The Special Master examined over 200 scientific articles,[72] "virtually all" of which were published after *Manson*.[73] These findings were summarized in a final report, much of which the court

66. *Id.* at 34; *New Jersey Supreme Court Issues Landmark Decision Mandating Major Changes in the Way Courts Handle Identification Procedures*, INNOCENCE PROJECT (Aug. 24, 2011, 12:00 AM), http://www.innocenceproject.org/Content/New_Jersey_Supreme_Court_Issues_Landmark_Decision_Mandating_Major_Changes_in_the_Way_Courts_Handle_Identification_Procedures.php; Beth DeFalco, *New Jersey Supreme Court Warns Eyewitness Identification Unreliable, Orders New Rules*, HUFFINGTON POST (Aug. 24, 2011, 12:23 PM), http://www.huffingtonpost.com/2011/08/24/new-jersey-court-eyewitness-id-evidence_n_935249.html ("New Jersey has long been at the forefront in identification standards.").

Other states have implemented measures to increase reliability without completely revising the *Manson* framework. *See, e.g.*, Walsh, *supra* note 28, at 1434–35 ("[T]he Utah Supreme Court criticized the inadequacies of the five *Biggers* factors [and] . . . adopted three additional factors to promote greater accuracy[,] . . . [t]he Wisconsin Supreme Court implemented more stringent standards to determine the admissibility of showups[, and] . . . the New York Court of Appeals . . . held that a pretrial identification procured using unnecessarily suggestive procedures would be excluded at trial under the New York Constitution." (footnotes omitted)).

67. State v. Henderson, 27 A.3d 872, 882 (N.J. 2011) (noting that "[t]he primary evidence against defendant" was the eyewitness identification).

68. *Id.* at 879–80.

69. *Id.* at 880–81.

70. *Id.* at 881, 883.

71. *Id.* at 877.

72. *Id.* at 884.

73. *Id.* at 892 (estimating that "more than two thousand studies related to eyewitness identification have been published in the past thirty years").

adopted in its opinion.[74]

Taken as a whole, the court found that the "scientific evidence presented [by the Special Master was] . . . both reliable and useful."[75] After recounting the complexities of the memory-encoding process,[76] the court indicated that it would base its ruling on the Special Master's scientifically conclusive opinion that *system* and *estimator variables* contribute greatly to the reliability of eyewitness identification, and do so more than the *Biggers* factors alone.[77] The court examined each *system*[78] and *estimator variable*[79] separately, and discussed how the treatment of each might affect the accuracy of an identification.[80] What resulted was a comprehensive guide as to how lower courts should view the presence or absence of individual *system* or *estimator variables*, and how these variables should be weighed in favor of reliability and admissibility.

The court, fueled by the desire that the law reflect the current state of scientifically accepted eyewitness identification research, then concluded that the admissibility framework needed to be revised.[81] Reasoning that the *Manson* framework did not meet either of its stated goals of providing an "adequate measure . . . [of] reliability" and deterring improper police conduct,[82] the Court set forth new standards.[83] Overall, the new *Henderson* framework not only accounted for both *system* and *estimator variables* when evidence of suggestiveness was presented, but also gave jurors the tools to better "understand and evaluate" eyewitness identification evidence in light of the scientific research.[84]

Under New Jersey's revised framework, the defendant still bears the initial burden of showing that an identification was obtained using

74. *Id.* at 877.

75. *Id.* at 916.

76. *Id.* at 894–95.

77. *See id.* at 895–96.

78. The system variables examined included blind/non-blind administration, pre-identification procedures, lineup construction, post-identification feedback, successive viewings, simultaneous and sequential lineups, composites, and showups. *Id.* at 896–904.

79. The estimator variables examined included stress, weapon focus, duration, distance and lighting, witness characteristics, characteristics of the perpetrator, racial bias, exposure to private actors, and speed of identification. *Id.* at 904–10.

80. *Id.* at 896–910.

81. *Id.* at 877–78.

82. *Id.* at 878.

83. *Id.* at 919 ("[C]hanges to the current system are needed[:] . . . the revised framework should allow all relevant system *and* estimator variables to be explored and weighted at pretrial hearings when there is some actual evidence of suggestiveness . . . .").

84. *Id.*

suggestive procedures.[85] In this first phase, New Jersey trial courts look at *system variables* for evidence of suggestibility.[86] A court can only consider the presence of *estimator variables* if there is still some question as to whether suggestive identification procedures were used.[87] If the defendant is able to meet his burden of demonstrating evidence of suggestibility, the burden then shifts to the state to show that the evidence was reliable.[88] In this stage of the evaluation, courts can consider both *system* and *estimator* variables, mirroring the "totality of the circumstances" approach that lies at the heart of the *Manson* test.[89] Finally, if the court decides that the identification is seemingly reliable, the ultimate burden shifts back to the defendant to prove that admitting the identification will result in a very substantial likelihood of irreparable misidentification.[90] Only if the defendant can prove this likelihood will the identification then be deemed inadmissible.[91]

B. OREGON AND STATE V. LAWSON

In 2012, Oregon followed in New Jersey's footsteps and became the second state to completely deviate from the *Manson* framework[92] in its own case, *State v. Lawson*.[93] As in *Henderson*, Oregon's case against

85. *Id.* at 920. This standard is a slight deviation from that set forth in *Manson* because it only requires the defendant to prove that the procedures were "suggestive" instead of "impermissibly suggestive." Carla Jones, *A New Age of Eyewitness Identification Evidence in Light of Modern Scientific Research: Why* State v. Henderson *Does Not Significantly Alter the Management of Eyewitness Identification Evidence*, 44 RUTGERS L.J. 511, 536 (2014).

86. *Henderson*, 27 A.3d at 920.

87. Jones, *supra* note 85, at 531.

88. *Henderson*, 27 A.3d at 920.

89. *Id.*

90. *Id.*

91. *Id.* ("[I]f after weighing the evidence presented a court finds from the totality of the circumstances that defendant has demonstrated a very substantial likelihood of misidentification, the court should suppress the identification evidence.").

92. Skye Nickalls, *The Catch-22 of Eyewitness ID: Juries Trust the Memory of Witnesses Even When They Shouldn't*, SLATE (Dec. 18, 2012, 8:12 AM), http://www.slate.com/articles/news_and_politics/jurisprudence/2012/12/oregon_supreme_court_on_eyewitness_ids_they_re_often_unreliable.html; Kim Murphy, *Oregon Supreme Court Ruling Questions Eyewitness Accuracy*, L.A. TIMES (Nov. 30, 2012), http://articles.latimes.com/2012/nov/30/nation/la-na-nn-oregon-supreme-court-eyewitness-20121130; Steve Duin, *Oregon Supreme Court Orders New Trial for Samuel Adam Lawson*, OREGONIAN (Nov. 29, 2012, 9:01 AM), http://www.oregonlive.com/news/oregonian/steve_duin/index.ssf/2012/11/oregon_supreme_court_orders_ne.html (noting that the Oregon Supreme Court "established new procedures for determining the admissibility of eyewitness identification evidence").

93. State v. Lawson, 291 P.3d 673 (Or. 2012). Prior to *Lawson*, the Oregon Supreme Court had adopted a due process–based framework nearly identical to *Manson*'s in *State v. Classen*, 590 P.2d 1198 (Or. 1979). The court's analysis in *Lawson* thus focused on Oregon's *Classen* framework, rather

defendant Samuel Lawson was based almost entirely on an eyewitness identification, which, in this case, was ultimately obtained from the victim's wife two years after the criminal event took place.[94] Immediately after the crime, the witness first described the perpetrator as "they," indicating that there may have been more than one individual.[95] Then, two weeks later, the witness stated she did not know the perpetrator and that she did not get a good view of him since he had put a pillow over her face.[96] Later, one month after the crime, the witness revised her statement and indicated that she remembered what the perpetrator was wearing but could not make any other identification.[97] Finally, after being exposed to pictures of Lawson dressed similarly to her previous description and to newspaper articles identifying him as the suspect, the witness identified Lawson, who had been at the witness's campsite on the day of the crime, as the perpetrator.[98]

Like the Supreme Court of New Jersey, the Oregon Supreme Court noted that the scientific evidence that had developed since *Manson* was too persuasive to ignore.[99] Notably, the court even recognized that the scientific research regarding eyewitness identification was still evolving.[100] However, despite the existence of ongoing research, the court held that an immediate change needed to be made because the *Manson* framework was inadequate for determining the reliability of eyewitness identification.[101] The court stated that this revised framework would continue to promote accountability and fairness in the criminal justice system and would make law enforcement, the bench, and the bar aware of the current state of scientific findings.[102]

The *Lawson* framework is based on the Oregon Evidence Code

than the *Manson* case, but the differences between *Classen* and *Manson* are minor and not pertinent to this Note. Thus, for the purposes of the following discussion, I have reframed the *Lawson* court's analysis of *Classen* in terms of the *Manson* framework.

94. *Oregon Supreme Court Establishes New Procedures to Determine the Admissibility of Eyewitness Identification Evidence*, INNOCENCE PROJECT (Nov. 29, 2012, 5:45 PM), http://www.innocenceproject.org/Content/Oregon_Supreme_Court_Establishes_New_Procedures_to_Determine_the_Admissibility_of_Eyewitness_Identification_Evidence.php.

95. *Lawson*, 291 P.3d at 678.

96. *Id.* at 679.

97. *Id.*

98. *Id.* at 679–80.

99. *See id.* at 678 ("[T]here have been considerable developments in both the law and the science on which this court previously relied in determining the admissibility of eyewitness identification evidence.").

100. *Id.* at 685–86.

101. *Id.* at 690.

102. *Id.* at 685, 688.

("OEC"), and stems from an underlying belief that evidence rules "articulate minimum standards of reliability."[103] The test begins with the presumption that eyewitness identification evidence, as information that can assist a trier of fact in determining whether a cause of action is more or less probable, is almost always relevant and admissible unless Oregon law or the U.S. Constitution indicates otherwise.[104]

However, unlike the *Manson* framework, here, if a criminal defendant wants to challenge the evidence as inadmissible, the initial burden falls on the prosecution.[105] Under OEC Rule 602, the state, as the proponent of the identification, must offer evidence showing that the witness had an "adequate opportunity to observe . . . the facts to which the witness will testify, and did, in fact, observe or perceive them, thereby gaining personal knowledge of the facts."[106] As part of this initial burden, the prosecution must also show that the witness's testimony is rationally based on his or her perceptions[107] and that the identification is helpful to understanding the testimony or determining the facts at issue.[108] Notably, while evidence that the witness observed the defendant's facial features will generally be sufficient to support an inference of identification, evidence that the witness observed "nonfacial" features such as race, clothing, weight, or height will generally not establish that the witness's testimony is rationally related to his or her identification.[109]

If the state succeeds in meeting this test, the burden then shifts to the defendant to show that the danger of unfair prejudice substantially outweighs the probative value of the identification.[110] In order to determine the probative value of the eyewitness testimony, a court "must examine the relative reliability of evidence produced by the parties," since the more reliable an identification is, the more probative value it will carry.[111] The *Lawson* court made a special point to note that this must be a separate determination because not all evidence that passes muster under the

103. *Id.* at 691.
104. *Id.*
105. *Id.* at 692.
106. *Id.*; OR. REV. STAT. § 40.315 (2013).
107. *Lawson*, 291 P.3d at 693. The requirement that the evidence is rationally based on the witness's perception must be proved "by a preponderance of the evidence that the witness perceived sufficient facts to support an inference of identification and that that the identification was, in fact, based on those perceptions." *Id*.
108. *Id.* at 692; OR. REV. STAT. § 40.405.
109. *Lawson*, 291 P.3d at 693.
110. *Id.* at 694.
111. *Id.*

requirements of OEC Rules 602 and 701 will necessarily have strong probative value.[112] A court must also consider whether the identification might unfairly prejudice the defendant.[113] In the case of eyewitness identifications, the question of unfair prejudice turns on whether the identification would potentially mislead the jury—for example, if the identification was obtained through suggestive police procedures.[114]

Once a court makes these determinations, it must perform the balancing test inherent in the OEC. If the danger of prejudice outweighs the probative value of the identification, the eyewitness testimony will not be admissible.[115] It is worth noting, however, that the court can decide to partially exclude the prejudicial aspects of an eyewitness identification.[116] For example, if a defendant can show that permitting an eyewitness to testify as to his degree of certainty would result in a danger of unfair prejudice, the court may exclude only that statement, allowing the actual identification to remain admissible.[117]

III. PINNING LAWSON AGAINST HENDERSON: THE PROS AND CONS TO EACH FRAMEWORK

Courts and scholars often cite two main goals for eyewitness identification reform: deterring improper police procedures and, relatedly, promoting reliable and accurate verdicts.[118] Therefore, it follows that in examining the pros and cons of the *Lawson* and *Henderson* frameworks, special attention should be paid to how successful each approach is both at furthering these goals and incorporating the current state of scientific

112. *Id.*

113. *Id.*

114. *Id.* at 695; OR. REV. STAT. § 40.160 (2013).

115. *Lawson*, 291 P.3d at 697.

116. *Id.* at 695, 697.

117. *Id.* at 695 ("[W]itnesses' self-appraisal of their certainty regarding identifications they have made, especially when elicited after they have received confirming feedback from suggestive police procedures, is a poor indicator of reliability. At the same time, jurors can find such statements persuasive, even when contradicted by more probative indicia of reliability. Accordingly, when such statements are presented at trial, they ordinarily have little probative value, but significant potential for unfair prejudice.").

118. *See, e.g.*, Manson v. Brathwaite, 432 U.S. 98, 111–12 (1977) ("There are, of course, several interests to be considered and taken into account. . . . *Wade* and its companion cases reflect the concern that the jury not hear eyewitness testimony unless that evidence has aspects of reliability. . . . The second factor is deterrence. . . . The third factor is the effect on the administration of justice."); JAMES J. TOMKOVICZ, CONSTITUTIONAL EXCLUSION: THE RULES, RIGHTS, AND REMEDIES THAT STRIKE THE BALANCE BETWEEN FREEDOM AND ORDER 295 (2011) ("Exclusion is necessary not only to prevent courtroom deprivations of due process rights, but also to discourage the authorities from employing unnecessarily suggestive identification techniques in future investigations.").

research on eyewitness misidentification. Without concrete and reliable information as to how each test has impacted subsequent identifications and convictions, the best way to differentiate between the frameworks is to look closely at their distinctions. There are two main differences between the New Jersey *Henderson* framework and the Oregon *Lawson* framework: (1) the *Henderson* test keeps the initial burden on the defendant, while in *Lawson*, this initial burden is shifted to the state; and (2) the *Henderson* framework is based on a due process analysis, while the *Lawson* framework is derived from the OEC.

A. THE BURDEN OF PROOF

Before looking at the impact that shifting the burden of proof has on furthering the goals of deterrence and reliability, it is important to understand the practical differences between having the initial burden on the state rather than on the defendant. Under the *Henderson* framework, like *Manson*, the defendant bears the initial burden of proving that the police procedures used to obtain the identification were "suggestive."[119] As mentioned above, during this stage of the evaluation, courts following the *Henderson* framework are free to consider evidence of present *system variables*, but cannot consider *estimator variables* unless there is already evidence of suggestiveness.[120]

However, in *Lawson*, the first prong of the admissibility standard is not about improper police procedures. Instead, under *Lawson*, the first determination relates to the witness's "personal knowledge" regarding the facts surrounding the identification, and the state bears the burden of showing that the eyewitness identification testimony is rationally related to the eyewitness identification procedure.[121] Because this is a broader determination than simply looking at the presence or absence of improper police conduct (although suggestive procedures may play a role in determining whether the testimony is rationally related to the identification), courts are permitted to look at *both system* and *estimator variables* during this first determination.[122] Under *Lawson*, the defendant

119. It is worth noting that *Henderson* deviates from the standard set forth in *Manson* by lowering the defendant's standard of proof from "impermissibly suggestive" to simply "suggestive." Jones, *supra* note 85, at 537–38 ("[T]here is no significant difference between the two threshold requirements as a means of police deterrence because the incentive for police to avoid using 'suggestive' procedures is the same as the incentive for the police to avoid using 'impermissibly suggestive' procedures under the *Manson* reliability test.").

120. *Id.* at 535.

121. *Lawson*, 291 P.3d at 692.

122. *Id.* at 693.

does still bear much of the burden of proving the presence of suggestive procedures: this has not changed. However, the timing is different: the defendant does not have to prove the presence of suggestive procedures, and consequently the danger of prejudice, until the state has already made a showing that the identification contains aspects of reliability. In sum, forcing the state to present evidence related to the reliability of the eyewitness testimony before the defendant is required to show the presence of suggestive procedures may allow a court following the *Lawson* framework to consider a broader range of variables affecting eyewitness misidentification at the outset of its analysis.[123]

Putting the initial burden on the state may positively impact the deterrence of suggestive police procedures for at least two reasons. First, since the initial burden of demonstrating the witness's "personal knowledge" may involve examining aspects of the actual identification procedure, law enforcement agencies may have more of an incentive to follow guidelines that result in more accurate identifications, such as using double-blinded lineup procedures or recording witness confidence statements. Second, even in the second stage of the analysis, where the defendant has the burden of proving that the probative value is outweighed by the danger of undue prejudice, a court could find that the presence of a suggestive *system variable* gives "rise to an inference of unreliability that is sufficient to undermine the perceived accuracy and truthfulness of an eyewitness identification."[124] This means that, under the *Lawson* framework, law enforcement's use of suggestive procedures can negatively impact an identification's admissibility in not one, but two separate instances.

Shifting the initial burden from the defendant to the state under the *Lawson* framework also likely promotes reliability. Even the Special Master who issued the report for *Henderson* noted the importance of putting the initial burden on the prosecution.[125] As mentioned above, the first prong of the *Lawson* framework requires the court to make a basic

123. Some might argue that this "personal knowledge" standard is actually more lenient than the "suggestive procedures" standard, since the personal knowledge standard simply requires that "as a matter of law, no trier of fact could find that the witness actually perceived the event about which he or she is testifying." JACK B. WEINSTEIN, WEINSTEIN'S EVIDENCE ¶ 602.03 (Joseph Fogel ed., 1996).

124. *Lawson*, 291 P.3d at 697.

125. *See* Report of the Special Master at 84, State v. Henderson, 27 A.3d 872 (N.J. 2011) (No. A-8-08) ("[I]t would be both appropriate and useful for the courts to handle eyewitness identifications in the same manner they handle physical trace evidence and scientific evidence, by placing at least an initial burden on the prosecution to produce, at a pretrial hearing, evidence of the reliability of the evidence.").

determination regarding the reliability of the eyewitness's testimony. This means that a court following *Lawson* is required to account for both *system* and *estimator variables* in this determination.[126] Giving the state the initial burden of presenting evidence to describe the extent of the eyewitness's personal knowledge promotes reliability because it requires the state to disclose any memory contamination that may have impacted the witness's testimony.[127] It also ensures that reliability is addressed during each stage of the admissibility framework, not only in the court's final determination, ultimately providing an additional safeguard for defendants.

B. DUE PROCESS VS. RULES OF EVIDENCE

The other main difference between *Henderson* and *Lawson* is that *Henderson*, like *Manson*, stems from a defendant's due process rights, while *Lawson*, which is based on the OEC, treats eyewitness identification like any other piece of trace evidence.[128] Some critics have noted that from an academic standpoint, New Jersey's due process framework might be superior because it "seems to capture more accurately the importance of a defendant's right to a fundamentally fair proceeding by deciding the admissibility of identification testimony on due process grounds."[129] However, impressions of superiority aside, it seems that having a due process framework as opposed to one based on the rules of evidence does not necessarily result in a more "fair" trial, and in fact may actually have the opposite result.

Due process is meant to guarantee a defendant protection against inappropriate police procedures in gathering evidence.[130] In other words, "a criminal defendant has a constitutional entitlement not to be wrongfully convicted because of a distortion of the fact-finding process attributable to misleading identification procedures."[131] Therefore, it would seem that having an admissibility framework based on due process rights would greatly promote deterrence. And generally, the due process framework is successful in achieving this goal because government officials are aware that any misconduct could result in the identification being barred as inadmissible.[132] However, just because due process guarantees a defendant

126. *Id*. at 84–85.

127. *Lawson*, 291 P.3d at 692.

128. Sandra Guerra Thompson, *Judicial Gatekeeping of Police-Generated Witness Testimony*, 102 J. CRIM. L. & CRIMINOLOGY 329, 331 (2012).

129. Walsh, *supra* note 28, at 1444.

130. Jones, *supra* note 85, at 527.

131. TOMKOVICZ, *supra* note 118, at 295.

132. *See id.* ("Unjustifiably suggestive processes that generate risks of convicting innocent

these protections does not necessarily mean that deterrence is ultimately *better* served through the due process framework.[133] The evidentiary framework also has built-in protections, such as considering the presence of suggestive procedures when determining a witness's personal knowledge or evaluating the danger of undue prejudice, which ultimately may promote deterrence as well as, if not better than, the due process framework.[134]

Whether a due process framework promotes reliability, and in turn a fair trial, to a greater extent than a framework based on evidentiary rules is also seemingly up for debate.[135] In general:

> The risks of injustice are in large part due to the inherent untrustworthiness of eyewitness identification that results from the limits of human capabilities and the willingness of jurors to credit questionable identification evidence. The . . . Fourteenth Amendment exclusion doctrine[] [was] not designed to address those sources of risk. The[] focus was the increased risk injected by distorting official procedures.[136]

Put more simply, there is nothing inherent in the due process doctrine that guarantees that admissible identifications are more reliable than they would be under an evidentiary framework. Critics have long proposed that "[r]egulations . . . and rules of evidence that authorize more extensive courtroom exploration of the infirmities that plague identification testimony have . . . been possible options for combating the dangers [of a due process analysis]."[137] Specifically, the rules of evidence grant trial courts a wider range of oversight in determining whether a piece of evidence is inadmissible because it presents a high risk of unreliability.[138] Overall, the *Lawson* evidentiary framework allows courts to consider the reliability of an identification based on all of the affecting *system* and *estimator variables* before even looking at whether suggestive procedures

persons are undesirable, and the suppression sanction seeks to prevent officers from employing such processes . . . .").

133. *Id.* at 297 ("Dissenting Justices and a number of critics have argued that the Court's refinements of the due process doctrine have undercut the deterrent efficacy of exclusion and that a more generous sanction is necessary to provide meaningful deterrence.").

134. The protections in the evidentiary framework require the state to bear some of the burden of proving no suggestive procedures were utilized; therefore, prosecutors may be inclined to encourage police departments to use "safe" procedures like double-blinded lineups and witness confidence statements.

135. Thompson, *supra* note 128, at 331 ("Traditionally, trial courts hold pretrial hearings for . . . 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." (footnote omitted)).

136. TOMKOVICZ, *supra* note 118, at 323–24.

137. *Id.* at 324 n.224.

138. Thompson, *supra* note 128, at 335.

were used. This promotes reliability perhaps even more than a due process framework, and therefore, may result in more fair trials and fewer false convictions based on eyewitness misidentifications.[139]

Further, keeping the admissibility standard justified by a defendant's right to due process may actually have the *opposite* effect and *encourage* unreliability. The *Lawson* court noted that a framework based on due process is at odds with its own goals of reliability[140] because it does not account for identifications that are unreliable in their own right, absent suggestive police procedures.[141]

The most recent Supreme Court decision regarding eyewitness misidentification was handed down in 2012 in *Perry v. New Hampshire*.[142] Despite speculation that this would be the Supreme Court's opportunity to modify the current eyewitness identification standard,[143] the Court held that it would not change the admissibility framework because in *Perry*, the suggestive identification was not orchestrated by the police.[144] The Court noted that the "potential unreliability of a type of evidence does not alone render its introduction at trial fundamentally unfair."[145] This would seem to imply that a due process framework does not afford defendants protections absent police misconduct, despite the fact that scientific research has

139. *See* Brandon L. Garrett, *Eyewitnesses and Exclusion*, 65 VAND. L. REV. 451, 456 (2012) ("[W]e should reconsider the path not taken: exclusionary rules to promote substantive reliability.").

140. State v. Lawson, 291 P.3d 673, 688 (Or. 2012) ("In light of the variables identified in the scientific research that we have briefly identified above . . . we conclude that the process outlined in [*Manson*] does not accomplish its goal of ensuring that only sufficiently reliable identifications are admitted into evidence.").

141. *See* Thompson, *supra* note 128, at 366–67 ("[D]ue process only protects against inappropriate evidence-gathering procedures. Bur unreliability due solely to other causes is not a sufficient ground for exclusion. 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." (footnote omitted)).

142. Perry v. New Hampshire, 131 S. Ct. 716, 721 (2012); Adam Liptak, *34 Years Later, Supreme Court Will Revisit Eyewitness IDs*, N.Y. TIMES (Aug. 22, 2011), http://www.nytimes.com/2011/08/23/us/23bar.html.

143. *See* Dahlia Lithwick, *See No Evil: Eyewitness Testimony May Be Unreliable, but the Supreme Court Doesn't Want to Be the One to Say So*, SLATE (Nov. 2, 2011), http://www.slate.com/articles/news_and_politics/supreme_court_dispatches/2011/11/perry_v_new_hampshire_the_supreme_court_looks_at_eyewitness_evid.html ("There is no area in which social science has done more to illuminate a legal issue. More than 2,000 studies on [eyewitness misidentification] have been published in professional journals in the past 30 years. This . . . case was meant to allow the law to catch up to the science." (quoting Liptak, *supra* note 142)).

144. *Perry*, 131 S. Ct. at 721.

145. *Id.* at 728; Adam Liptak, *Eyewitness Evidence Needs No Special Cautions, Court Says*, N.Y. TIMES (Jan. 11, 2012), http://www.nytimes.com/2012/01/12/us/supreme-court-says-witness-evidence-needs-no-special-cautions.html.

illuminated how inaccurate eyewitness identifications can be even absent improper police action. Under an evidentiary framework, however, a defendant might be awarded protection against an unreliable identification that was not orchestrated by police simply because of the potential presence of suggestive *estimator variables*.[146] This would mean that, generally, an evidentiary framework grants defendants additional protections, perhaps ultimately promoting reliability and credibility to a greater extent than a due process framework.

Despite revising its framework, the Oregon Supreme Court actually anticipates that most eyewitness identifications will still be admissible.[147] The court stated: "it is doubtful that issues concerning one or more of the *estimator variables* that . . . have [been] identified will, without more, be enough to support an inference of unreliability sufficient to justify the exclusion of the eyewitness identification."[148] However, despite the potential practical results of the burden shift and implications of using an evidentiary analysis, Oregon has still made a place for these *estimator variables* in the initial stages of evaluating eyewitness identification reliability, a feat that no other court has attempted to tackle.

IV. EYEWITNESS IDENTIFICATION REFORM IN CALIFORNIA

The first part of this Note described the *Manson* framework that is currently used by forty-eight states to evaluate the reliability of eyewitness identification, explained the status of current scientific research proving that the *Manson* framework is insufficient to meet its stated goals, and detailed two different states' attempts at judicial reform. In this next part, this Note examines the history of eyewitness identification reform in California and argues that, going forward, California courts must make changes to the existing judicial framework in order to promote the reliability of the state's criminal justice system.

Much has been written about the need for individual states to make their own changes to help minimize eyewitness misidentifications.[149] And

146. *See* Walsh, *supra* note 28, at 1442 ("Defendants can still raise evidentiary arguments, citing either the Federal Rules of Evidence or state evidence rules that allow judges to exclude evidence whose probative value is substantially outweighed by its prejudicial effect.").

147. State v. Lawson, 291 P.3d 673, 697 (Or. 2012).

148. *Id*. (emphasis added).

149. *See, e.g.*, Walsh, *supra* note 28, at 1453 ("If state courts choose experimentation over idleness and stagnation, criminal proceedings will be fairer and states can try different approaches."); Garrett, *supra* note 139, at 455 ("Law enforcement, state courts and legislatures do not have the luxury of remaining aloof from the problem, since they confront the consequences of eyewitness misidentifications first-hand.").

although New Jersey and Oregon have been the leaders in this type of judicial reform, other states have implemented smaller changes to the way they handle eyewitness identification procedures, whether through enforcing changes in police guidelines[150] or altering judicial treatment of particularly suggestive lineups, like showup procedures.[151] However, California has not been able to successfully implement any type of reform to help minimize the risk of admitting unreliable eyewitness identifications into the courtroom.

A. HISTORY OF CALIFORNIA'S EYEWITNESS IDENTIFICATION REFORM

On August 27, 2004, the California State Senate adopted a resolution to establish the California Commission on the Fair Administration of Justice.[152] The Commission was charged with the responsibilities of (1) studying the history of the California criminal justice system to determine how it had failed in the past, (2) examining how the California criminal justice system could be improved through safeguards and other measures of reform, and (3) recommending new ways to ensure that the future of the California criminal justice system would be "just, fair and accurate."[153] In 2008, after several years of research, the committee published its final report.[154] The report included specific suggestions about how the legislature, police agencies, judges, prosecutors, and defense attorneys could make changes to their existing practices to make

150. Benton et al., *supra* note 28, at 455 ("One recent attempt to correct [the problem of eyewitness misidentification] has been to focus attention . . . on the police procedures used to collect the identification evidence.").

151. Walsh, *supra* note 28, at 1434–35 ("The Wisconsin Supreme Court implemented more stringent standards to determine the admissibility of showups. . . . The [New York Court of Appeals] held that a pretrial identification procured using unnecessarily suggestive procedures would be excluded at trial under the New York Constitution. The court concluded that a showup conducted in front of two victims together was unnecessarily suggestive, but the error was harmless because there was a valid in-court identification." (footnotes omitted)); *id.* at 1434 ("The Utah court adopted three additional factors to promote greater accuracy, namely: (1) the witness's capacity to observe the event; (2) whether the identification was made spontaneously and remained consistent; and (3) the nature of the event being observed."); *Eyewitness Misidentification*, *supra* note 15 ("[Some] jurisdictions . . . have made eyewitness identification reform procedures part of their standard practice.").

152. *Charge*, CAL. COMMISSION ON FAIR ADMIN. JUST., http://www.ccfaj.org/charge.html (last visited Feb. 29, 2016).

153. *Id.*

154. *California Commission on the Fair Administration of Justice Announces Publication of Its Final Report and Recommendations. The Final Report is a Compliation* [sic] *of All Ten Reports Issued by the Commission Coupled with Background Information on the Commissioners, Their Process of Deliberation, and Subsequent Action Taken in Light of Its Work*, CAL. COMMISSION ON FAIR ADMIN. JUST. (Aug. 4, 2008), http://www.ccfaj.org/documents/press/Press29.pdf.

eyewitness identifications more reliable.[155]

However, even before issuing its final report, the Commission published recommendations regarding eyewitness identification reform.[156] In a press release issued in April 2006, the Commission noted that "there are reforms which can improve criminal investigation techniques and thus further the cause of justice in California[, and adopting] these reforms need not await the issuance of [the] final report."[157] The Commission, satisfied in its conclusion that wrongful convictions due to eyewitness misidentification existed in California, recommended that: (1) law enforcement agencies utilize double-blind identification procedures; (2) officers perform sequential photographic lineups when double-blinded procedures could not be performed; (3) police orchestrate showup identifications *only* if no probable cause existed to arrest the suspect; (4) witnesses receive instructions that the suspect may or may not be included in the lineup; (5) administrating officers video tape live lineups; (6) the witness record a statement of confidence at the conclusion of the lineup; (7) the officer preparing the lineup use a minimum of six suspects; (8) officers only present the lineup to one witness at a time; (9) training programs for judges, prosecutors, defense attorneys, and police be provided by the legislature; and (10) juries become acquainted with the dangers of eyewitness misidentifications through the use of jury instructions.[158]

The California legislature was responsive to these suggestions, and attempted to adopt legislation that would enable these reforms to be put in place.[159] Senate Bill 1544, which was introduced by Senator Carole Migden, would have required the Department of Justice to work with various other groups to develop guidelines regarding eyewitness identification procedures.[160] It was passed by both houses and enrolled to the governor on September 14, 2006.[161] However, despite massive support for the bill, Governor Arnold Schwarzenegger ultimately vetoed it on

155. *Id.*

156. Radley Balko, *Schwarzenegger Vetoes Justice*, FOX NEWS (Nov. 5, 2007), http://www.foxnews.com/story/2007/11/05/schwarzenegger-vetoes-justice/.

157. *For Release: Report and Recommendations Regarding Eye Witness Identification Procedures*, CAL. COMMISSION ON FAIR ADMIN. JUST. 1 (Apr. 13, 2006), http://www.ccfaj.org/documents/reports/ eyewitness/official/eyewitnessidrep.pdf.

158. *Id.* at 5–7.

159. Opinion, *Wrongful Convictions: California Is Guilty of Injustice*, L.A. TIMES (Aug. 11, 2009), http://articles.latimes.com/2009/aug/11/opinion/ed-lisker11.

160. S.B. 1544, 2005–06 Leg., Reg. Sess. (Cal. 2006).

161. *Text, SB-1544 Criminal Investigations: Eyewitness Identification: Lineups*, CAL. LEGIS. INFO., http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=200520060SB1544 (last visited Feb. 29, 2016).

September 30, 2006,[162] issuing the following statement:

> Improving the reliability and accuracy of eyewitness identifications is a laudable goal; however, SB 1544 would go too far in attempting to address the problems of unreliable eyewitness identifications. This bill would require that the Department of Justice (DOJ) and Commission on Peace Officer Standards and Training (POST) consult with law enforcement agencies, prosecutors, public defenders, and other legal experts in order to develop mandatory guidelines and policies for the collection and handling of eyewitness evidence.
>
> Eyewitness evidence is a critical part of the criminal justice process. Any changes to the procedures for criminal identification would have an undeniably significant impact to the manner in which our system operates. It is unthinkable that we would allow the DOJ and POST such unprecedented authority over a fundamental step in our criminal justice system. I cannot support a measure that circumvents the legislative process and denies the public and their elected representatives the chance to approve or deny a statewide policy that could have a life-altering impact on an individual participating in our justice system.[163]

The California Legislature was not content to simply accept Governor Schwarzenegger's veto. Instead, the next year, Senator Mark Ridley-Thomas introduced another bill, Senate Bill 756.[164] This bill was meant to incorporate some of the governor's concerns,[165] but still called upon the Department of Justice to work with law enforcement agencies to create new eyewitness identification procedure guidelines.[166] Again, Senate Bill 756 was vetoed by the governor because "[l]aw enforcement agencies must have the authority to develop investigative policies and procedures that they can mold to their own unique local conditions . . . rather than be restricted to methods created that may make sense from a broad statewide perspective."[167]

162. *Id.*; Balko, *supra* note 156 ("The reforms were backed by politicians from both parties. They were backed by both prosecutors and police officials who served on the commission. The reforms would added [sic] some formidable defenses against wrongful convictions in California. Naturally, they were opposed by the state's police organizations. And so last month, Gov. Arnold Schwarzenegger vetoed all three.").

163. S. JOURNAL, 2005–06 Leg., Reg. Sess. 5667 (Cal. 2007) (statement of Governor Arnold Schwarzenegger).

164. S.B. 756, 2007–08 Leg., Reg. Sess. (Cal. 2007); *Text, SB-756 Criminal Investigations: Eyewitness Identifications*, CAL. LEGIS. INFO., http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=200720080SB756 (last visited Feb. 29, 2016).

165. Henry Weinstein, *3 Wrongful Conviction Bills Advance*, L.A. TIMES (June 27, 2007), http://articles.latimes.com/2007/jun/27/local/me-wrongful27.

166. S.B. 756.

167. *2007 California Criminal Legislation: Meaningful Change, or Preserving the Status Quo?*, 13 BERKELEY J. CRIM. L. 97, 113 (2008).

It would seem that Governor Schwarzenegger's veto was based on arguments made by those opposing the bill, namely the California Peace Officers' Association.[168] The Association's main arguments were that: (1) adopting the legislation, and in turn the recommendations issued by the California Commission on the Fair Administration of Justice, would be placing too much confidence in scientifically unproven theories; and (2) adopting these "best practices" would be fiscally irresponsible, as it would require police agencies to have more personnel available to perform double-blinded lineups, in turn increasing the costs of conducting identification procedures.[169] By this time, however, one jurisdiction in California had already adopted these procedures and other states were in the process of adopting similar legislation, indicating that the scientific research was well on its way to being accepted.[170]

The Senate attempted to give eyewitness identification reform another chance in 2008 with Senate Bill 1591, introduced again by Senator Ridley-Thomas.[171] Unfortunately, this time, the bill did not even make it to the governor. The bill died in appropriations, not only due to the governor's same concerns regarding the flexibility of law enforcement agencies, but also because of the unavailability of the money the state would need to spend on implementing training programs and other educational tools in connection with the reform efforts.[172]

Since the Senate's proposals for reform in 2006, 2007, and 2008, the Assembly has introduced two bills, Assembly Bill 308 in 2011, and Assembly Bill 807 in 2013.[173] Assembly Bill 308 proposed that law enforcement officials "study and *consider* adopting the policies and procedures regulating eyewitness lineup identifications that [were] recommended by the California Commission on the Fair Administration of Justice."[174] The bill also proposed amending the Evidence Code to allow for expert testimony regarding the reliability of eyewitness testimony.[175]

168. S. Rules Comm., Floor Analysis of S.B. 756, 2007–08 Leg., Reg. Sess., at 5–6 (Cal. 2007).

169. *Id.*

170. Solomon Moore, *Exoneration Using DNA Brings Change in Legal System*, N.Y. TIMES (Oct. 1, 2007), http://www.nytimes.com/2007/10/01/us/01exonerate.html.

171. S.B. 1591, 2007–08 Leg., Reg. Sess. (Cal. 2008).

172. Herman Atkins, *Gov. Schwarzenegger Can't Wait Another Year*, INNOCENCE PROJECT (Sept. 11, 2008, 4:00 PM), http://www.innocenceproject.org/news-events-exonerations/2008/gov-schwarzenegger-canac-a-ac-t-wait-another-year .

173. A.B. 308, 2011–12 Leg., Reg. Sess. (Cal. 2011); A.B. 807, 2013–14 Leg., Reg. Sess. (Cal. 2013).

174. A.B. 308 (emphasis added).

175. *Id.*

However, after receiving affirmative votes, the bill was held under submission,[176] meaning that the author and committee agreed to work on and discuss the bill further.[177] Neither the Evidence Code nor the Penal Code was amended.[178] Assembly Bill 807 proposed similar measures to Assembly Bill 308, but also died "on inactive file."[179] As a result, even these simpler legislative attempts, which had not even mandated procedural reforms, could not muster enough support to become law in California.

B. CALIFORNIA CURRENTLY

Clearly, California has been unsuccessful in enacting legislation regarding eyewitness identification reform, despite the fact that this previously "unprecedented" legislation has since been implemented by a variety of states.[180] This means that in most jurisdictions in California, lineups are still conducted using the potentially suggestive police procedures that social science researchers have conclusively determined result in more inaccurate identifications.[181] To make matters worse, some of the jurisdictions that have failed to adopt better procedures continue to operate under the assumption that eyewitness identifications are entirely

176. *History, AB-308 Criminal Investigations: Eyewitness Identification: Lineups*., CAL. LEGIS. INFO., http://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill_id=201120120AB308 (last visited Mar. 9, 2016).

177. *Glossary of Legislative Terms*, CAL. ST. LEGIS., http://www.legislature.ca.gov/quicklinks/glossary.html#H (last visited Mar. 2, 2016).

178. *See History, AB-308 Criminal Investigations: Eyewitness Identification: Lineups*., *supra* note 176 (noting the current status of the bill is "from Senate committee without further action").

179. *History, AB-807 Criminal Investigations: Eyewitness Identification.*, CAL. LEGIS. INFO., http://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill_id=201320140AB807 (last visited Mar. 4, 2016).

180. Texas, New Jersey, Wisconsin, and North Carolina are among the states that have adopted new procedures for handling eyewitness identifications. Many of the procedures are the same as were recommended by the California Commission on the Fair Administration of Justice and which have been more recently endorsed by the National Academy of Sciences. *See Model Policy on Eyewitness Identification*, LAW ENFORCEMENT MGMT. INST. TEX., http://www.lemitonline.org/publications/documents/ewid_final.pdf (last visited Mar. 4, 2016) (listing Texas's model procedures for eyewitness identification); *Eyewitness Identification*, *supra* note 151 (linking to Wisconsin, New Jersey, and North Carolina's model policies).

181. Jack Leonard & Joel Rubin, *LAPD Reluctant to Change Its Handling of Photo Lineups*, L.A. TIMES (Aug. 24, 2012), http://articles.latimes.com/2012/aug/24/local/la-me-identification-20120825 ("In California, police and prosecutors have opposed uniform guidelines on conducting eyewitness identifications, arguing that claims of police influence are exaggerated."); Maurice Possley, *Despite Exonerations, Eyewitness ID Process Virtually Unchanged*, ORANGE COUNTY REG. (Aug. 21, 2013), http://www.ocregister.com/articles/police-382513-practices-departments.html (noting that some large California jurisdictions, such as Santa Clara County and San Francisco, have adopted eyewitness identification reform procedures, even though most jurisdictions within Orange County have not pushed for such reforms).

accurate and that revised practices are unnecessary.[182]

One way to remedy California's failure to adopt widespread eyewitness identification reform would be to try and reintroduce the type of legislation that was seen in 2006, 2007, and 2008,[183] especially considering that the main reasons Governor Schwarzenegger cited for his hesitation are now less applicable than they were at that time. For example, Governor Schwarzenegger had expressed an unwillingness to exercise control over law enforcement agencies and stated that the legislation "went too far." However, in the intervening years, many states and jurisdictions have adopted these procedures, indicating that the practices work, that widespread adoption is not an impermissible exercise of control over law enforcement officials, and that adopting this type of reform is a laudable attempt at making the criminal justice process more fair and reliable. The governor's financial concerns should also be mitigated. Few police departments today even conduct live lineups, making the costs of implementing blind or double-blind procedures less relevant.[184] Further, there now are other ways to reduce the costs associated with performing double-blind procedures, such as using computer-automated presentations or numbered sealed folders that are shuffled before being presented to the witness.[185]

However, given that there do not seem to be plans to reintroduce this legislation, and the unlikelihood that it would pass even if it were reintroduced, it becomes increasingly clear that, in California, the responsibility for promoting reliability lies with the judiciary.[186] The current admissibility standard in California is the same as the *Manson* framework, meaning that evidence of *system* and *estimator variables* is not

182. Possley, *supra* note 181 ("[T]he Orange County District Attorney has not pushed for the revised procedures, arguing that most eyewitness identifications are accurate.").

183. It is worth noting that there have been some recent efforts to ignite eyewitness identification reform in California. Audrey Redmond, *Eyewitness Identification Symposium Sparks Reform*, SANTA CLARA LAW (June 25, 2014), http://law.scu.edu/northern-california-innocence-project/eyewitness-identification-symposium-prompts-attendees-to-change-procedures/ ("Nearly 200 people attended the Northern California Innocence Project's (NCIP) Eyewitness Identification Best Practices Symposium at the University of San Francisco (USF) on May 21, 2014. The symposium . . . brought together police chiefs, district attorneys, social scientists and criminal justice reform advocates to discuss best practices for eyewitness identification procedures in California, and inspired some jurisdictions to make changes to their existing procedures.").

184. Sanburn, *supra* note 46, at 4.

185. IDENTIFYING THE CULPRIT, *supra* note 47, at 107.

186. *See* Shell, *supra* note 19, at 282 ("Judges, as the last line of defense against wrongful convictions, should exclude unreliable eyewitness-identification evidence, regardless of the particular jurisdiction's law enforcement procedures.").

taken into consideration when determining the reliability of an identification.[187] Consequently, the least dramatic departure from the existing framework would be to adopt a standard similar to New Jersey's. As mentioned above, the New Jersey *Henderson* standard is still grounded in due process and mirrors the *Manson* framework, and thus, the current California test. Adopting a framework similar to *Henderson*'s could promote reliability by bringing current scientific research into the courtroom. However, there is one glaring difference between California and New Jersey. New Jersey, under the *Henderson* framework, incorporates an additional layer of eyewitness misidentification protection since suggestive police procedures are minimized from the outset. This is due to the fact that, by the time the court adopted *Henderson*, New Jersey had already implemented state-wide "best practice" procedures for its law enforcement agencies.[188] Consequently, even if California was to modify the existing framework to adopt a test similar to New Jersey's standard, its eyewitness identifications would presumably still be less reliable than those admitted under *Henderson* because the initial procedural safeguards put in place in New Jersey are not currently present in California.

Therefore, California would be better advised to follow Oregon's approach. The evidentiary standard would give judges determining the reliability of an identification wider latitude in exploring the effects of individual variables on any given case.[189] It may seem that adopting Oregon's approach would result in a complete upheaval of the current framework, as it would involve shifting from a due process to an evidentiary analysis. However, trial courts can already look to the rules of evidence on their own when determining admissibility and reliability.[190] Therefore, this test would be easy for judges to implement. Further, as the *Lawson* court noted, the standard would still likely result in many admissible identifications, and judges would still have the power to only

187. *See* People v. Cunningham, 25 P.3d 519, 560–61 (Cal. 2001); People v. Ochoa, 966 P.2d 442, 443–44, 452 (Cal. 1998); People v. Johnson, 841 P.2d 1, 16–17 (Cal. 1992); People v. Gordon, 792 P.2d 251, 261–62 (Cal. 1990) (en banc).

188. *See* State v. Henderson, 27 A.3d 872, 912 (N.J. 2011) ("New Jersey became the 'first state in the nation to officially adopt the recommendations issued by the Department of Justice' and issue guidelines for preparing and conducting identification procedures." (quoting John J. Farmer, Jr., *Attorney General Guidelines for Preparing and Conducting Photo and Live Lineup Identification Procedures*, ST. N.J. OFF. ATT'Y GEN. (Apr. 18, 2001), http://www.state.nj.us/lps/dcj/agguide/photoid.pdf)).

189. *See* Thompson, *supra* note 128, at 334 ("Determining reliability in relation to . . . eyewitness identifications . . . involves a probabilistic assessment of the extent to which a variety of factors known to diminish the accuracy of [this] type[] of evidence are present in a given case.").

190. *Id.* at 335.

admit partial eyewitness identification testimony, so there would be no danger of adopting a *per se* bar. Lastly, these changes could be implemented quickly. Judges would not need to wait for the California Supreme Court to construct a new framework, as these evidence rules are already at their disposal.[191]

CONCLUSION

We have reached a point where, in 2016, the scientific evidence regarding the unreliability of eyewitness identification is essentially conclusive. As a whole, we know which practices help promote reliable identifications and which factors hinder the accuracy of the identification. Obviously, the best way to implement eyewitness identification reform would be to ensure that individual police departments implement "best practice" procedures in order to bolster reliability at the outset. This would in turn guarantee more accurate eyewitness identification evidence in the courtroom regardless of the judicial framework used to evaluate the reliability. And many states are increasingly implementing this type of reform.[192]

However, there are many different ways that states can make changes to eyewitness identification procedures to reflect the current state of scientific eyewitness misidentification research.[193] Almost all of these suggested reforms, not just procedural reforms, conclusively lead to more reliable identifications, and, in turn, more reliable eyewitness testimony, more reliable convictions, and a more reliable criminal justice system. It follows, then, that in states like California, where attempts at adopting procedural reforms have been unsuccessful, it is time for the judiciary to take action to ensure a more reliable criminal justice system. If the *Manson* test is replaced by a framework that better reflects the dangers inherent in eyewitness misidentification, jurors can begin to hear more reliable and

191. *Id.*

192. *See, e.g.*, *Illinois Enacts New Blind Lineup Law*, INNOCENCE PROJECT (Jan. 21, 2015, 12:55 PM), http://www.innocenceproject.org/news-events-exonerations/2015/illinois-enacts-new-blind-lineup-law; Harry Hitzeman, *Kane Prosecutor Pleased with New Lineup Law*, DAILY HERALD (Dec. 9, 2014, 4:48 PM), http://www.dailyherald.com/article/20141209/news/141208361/.

193. *See Massachusetts Jury Instructions Updated to Help Assess Reliability of Eyewitness Testimony*, INNOCENCE PROJECT (Jan. 13, 2015, 5:55 PM), http://www.innocenceproject.org/news-events-exonerations/2015/massachusetts-jury-instructions-updated-to-help-assess-reliability-of-eyewitness-testimony (noting that the Massachusetts Supreme Judicial Court implemented eyewitness identification reform by updating its jury instructions); Travis Andersen & Martin Finucane, *Jury Instructions on Eyewitness Testimony Updated: Guidance Said to Help Jurors Assess Reliability*, BOS. GLOBE (Jan. 12, 2015), http://www.bostonglobe.com/metro/2015/01/12/high-court-changes-jury-instructions-eyewitness-testimony-reflect-latest-science/Qo8FfCTeMeGrkYpKRYPRbL/story.html.

accurate eyewitness identification testimony. And, once that happens, stories similar to those of DeAndre Howard, Maurice Caldwell, Glen Nickerson, and DeWayne McKinney will hopefully cease to exist.