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Beyond Manson and Lukolongo: A Critique of American and Zambian Eyewitness Law with Recommendations for Reform in the Developing World

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**BEYOND MANSON AND LUKOLONGO: A CRITIQUE OF
AMERICAN AND ZAMBIAN EYEWITNESS LAW WITH
RECOMMENDATIONS FOR REFORM IN THE
DEVELOPING WORLD**

*Nicholas A. Kahn-Fogel**

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I. INTRODUCTION

For generations, scholars, scientists and legal practitioners have recognized the inherent unreliability of eyewitness identification evidence, and hundreds of exonerations in North America have now proven definitively that eyewitness misidentification is the leading cause of

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wrongful conviction. Faced with overwhelming proof of the high incidence of eyewitness error, American defense lawyers and social scientists have struggled to modernize the law by encouraging law enforcement agencies to implement more reliable identification techniques and by urging courts to adopt measures to guard against admission of tainted evidence. Despite the attention activists and scholars in the United States have focused on eyewitness unreliability, they have devoted little effort to exporting crucial reforms beyond the developed world to countries where the paucity of legal resources puts criminal defendants in greatest jeopardy of wrongful conviction. This is particularly unfortunate because, despite the daunting lack of legal resources in many developing countries, implementation of the most essential reforms of eyewitness identification techniques would be a relatively easy, inexpensive means of protecting the rights of the accused and drastically reducing the chances of convicting innocent people. This Article will examine the potential for eyewitness identification reform in the developing world, using Zambia as a case study. Further, it will analyze the form of legal directive best suited to effect that reform, with a comparative analysis of the development of and debate over eyewitness identification law in the United States.

It is now indisputable that eyewitness misidentification is the leading cause of wrongful conviction. As early as 1932, Edwin Borchard recognized eyewitness error as the primary reason for conviction of innocent people in his survey, *Convicting the Innocent: Errors of Criminal Justice*.¹ Since then, the advent of DNA testing has proven beyond question the severity of the problem.

Eyewitness misidentification contributed to more than 75% of the 225 convictions that have been overturned to date through DNA evidence.² Moreover, in a study of 340 exonerations between 1989 and 2003, including both DNA exonerations and non-DNA exonerations, Samuel Gross and several of his colleagues calculated that 64% of the exonerees had been identified by at least one eyewitness.³ The cases in which DNA evidence has been able to prove wrongful conviction definitively certainly

1. EDWIN M. BORCHARD, *CONVICTING THE INNOCENT* 367 (1932).

2. Innocence Project, Know the Cases, <http://www.innocenceproject.org/know/> (last visited Dec. 14, 2008); Innocence Project, Understand the Causes, <http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php> (last visited Dec. 14, 2008). A 1996 study of 28 DNA exonerations by the Department of Justice found eyewitness misidentification to be a major cause of wrongful conviction in most of the cases studied. U.S. DEP'T OF JUSTICE, NAT'L INST. OF JUSTICE, CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL 24 (1996), www.ncjrs.gov/pdffiles/dnaevvid.pdf.

3. Samuel R. Gross et al., *Exonerations in the United States: 1989 through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 542 (2005).

represent only a small portion of wrongful convictions based on mistaken identification.

The crime most likely to yield testable DNA evidence is rape.⁴ Yet, to take robbery (another crime where conviction will often depend on eyewitness identification) as an example for comparison, in 2007, Federal Bureau of Investigation statistics showed there were almost five times as many robberies as rapes in the United States.⁵ Virtually none of these robbery cases would have produced DNA evidence capable of providing conclusive proof of innocence.

Therefore, reform efforts to prevent wrongful conviction through eyewitness misidentification must focus on preventing misidentification in the first place. While the above studies focused primarily on North American exonerations, there is no reason to believe the problem of eyewitness error is any less severe in other parts of the world. If anything, poorly enforced procedural safeguards and lack of resources in many developing countries make the likelihood of misidentification even greater than in the United States.

Although there is general agreement within the scientific community about the reforms of identification procedures most critical to decreasing the likelihood of eyewitness error, there is considerable debate about the legal devices for ensuring compliance with best practices. In the United States, this debate has often centered on the choice between rules or standards as the most advantageous means of excluding tainted identifications and admitting evidence that can provide reliable proof of guilt. As developing countries begin to tackle the problems of eyewitness identification reform, they, too, must consider the kinds of legal norms best suited to protect legitimate and often competing interests in the criminal justice system. This Article will place special emphasis on the choice between rules and standards in eyewitness law and the question of which, in the context of developing countries, would strike the optimal balance between the important public interest in bringing criminals to justice and the fundamental rights imperative of protecting the innocent

4. In the Gross exoneration study, the authors noted that only the availability of DNA evidence in many rape cases could explain the fact that the 340 DNA and non-DNA exonerations in the study included 121 rape cases but only six robberies. Moreover, while 87% of all rape exonerations involved DNA evidence, only 19% of murder exonerations involved DNA, and the vast majority of that 19% also involved rape. *Id.* at 530-31.

5. In 2007 there were 90,427 reports of forcible rape. In the same year, there were 445,125 robbery offenses. Fed. Bureau of Investigation, Crime in the United States, 2007: Uniform Crime Reports (2006), http://www.fbi.gov/ucr/cius2007/offenses/violent_crime/forcible_rape.html; http://www.fbi.gov/ucr/cius2007/offenses/violent_crime/robbery.html.

against wrongful conviction. I will conduct this analysis by way of comparison of the development of and debate over eyewitness law in the United States with the situation in Zambia.

I hope this Article will contribute to current discourse in two ways. First, while there has been much discussion about eyewitness reform in the United States, there has been no scholarly consideration of the benefits and challenges of implementing eyewitness identification reforms in the developing world. Second, although this Article will consider the rules-standards dichotomy in the specific context of eyewitness identification reform in the United States and Zambia, the analysis may have broader implications about the kinds of legal directives generally best suited to developing countries. To date, the public discussion of rules and standards has not assessed their comparative advantages in developing nations.

In Part II of this Article, I will discuss the general framework of the rules-standards debate amongst legal scholars. In Part III, I will discuss the development of scientific knowledge about the fragility and imperfection of eyewitness evidence. In Part IV, I will consider the historical evolution of eyewitness law in the United States and of the various proposals for improving on the current due process standard for excluding eyewitness evidence, which the Supreme Court articulated over 30 years ago in *Manson v. Brathwaite*.⁶ While few commentators on eyewitness law reform have expressly referenced the broader discourse about the relative benefits of rules and standards, reform proposals have followed the fault lines of that debate. I will argue that, in the United States, whether reform ultimately involves retaining a standard-like norm for evaluating admissibility of eyewitness evidence or reverts to a rule-like per se exclusion of all evidence tainted by improper police procedures is less important than ensuring that the law develops to comport with scientific evidence about eyewitness memory.

Part V will be an examination of Zambia's legal system, with a particular focus on eyewitness identification practice, case law, and potential barriers to reform. Despite the astounding lack of legal resources in Zambia and other developing countries, simple, inexpensive reforms in eyewitness identification procedures could provide a highly effective safeguard for people with virtually no means of mounting effective defenses against criminal charges or of challenging wrongful convictions. Even countries with the most rudimentary legal infrastructures and with the greatest shortages of legal personnel could execute these reforms without unduly taxing extremely scarce resources, and the first step in that

6. *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977).

process should be to educate lawyers and jurists on the range of scientific scholarship on eyewitness memory and best practices for identification procedures. I will argue that governmental organization and political realities in Zambia make use of bright-line rules to enforce improvements in eyewitness identification procedures particularly desirable. Part VI will conclude this Article.

II. RULES VERSUS STANDARDS

Countless observers, from professors to Supreme Court Justices, have weighed in on whether rules or standards best translate underlying societal values into substantive justice.⁷ While many have considered the issue within a confined context, others have expounded broadly, with generalized prescriptions for how courts should devise legal directives.⁸ Throughout these commentaries, a common set of arguments emerges regarding the ostensible advantages and disadvantages of rules and standards.

Before explicating those arguments, it is worth offering a brief explanation of the common meanings legal scholars have in mind when they talk about rules and standards. Rules, generally speaking, offer precise, clearly delineated formulas for effectuating underlying policy choices. Thus, a rule meant to effectuate the normative judgment that emotionally and physically immature people should not operate motor vehicles might read, "No one under the age of 16 shall be allowed to have a driver's license." Standards, on the other hand, represent the attempt to apply core value judgments directly. Thus a standard might read, "Driver's licenses shall be issued only to people who are physically and emotionally mature enough to exercise reasonable care on the road." In practice, many legal directives fall on a continuum between pure rules and standards, but the marginal paradigms are useful for explaining the contours of the discourse.

It is obvious from the above examples that the choice between using rules and standards can affect legal outcomes. This choice can have

7. For general overview of the debate, see, e.g., H.L.A. HART, *THE CONCEPT OF LAW* 121-50 (1961); MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* 15-63 (1987); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 *HARV. L. REV.* 1685 (1976); Pierre Schlag, *Rules and Standards*, 33 *UCLA L. REV.* 379 (1985) (arguing that the debate is irresolvable and irreducible, and that it is impossible to examine the dialectic outside of its own terms).

8. Authors have applied the debate to almost every area of law. Kennedy, *supra* note 7, at 1703. For a broader prescriptive argument, see, e.g., Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 *U. CHI. L. REV.* 1175 (1989).

profound implications for both the manner in which courts deliberate and the way social actors order their behavior. Following are some of the traditional arguments about the form that legal directives should take.

A. *The Role of the Judiciary*

Rules, by their nature, constrain the decisionmaker to the relatively narrow function of mechanical application of the legal directive. In theory, rules leave little to no room for personal discretion, and the outcome of a process governed by rules is predetermined from the outset.⁹ In contrast, standards give the decisionmaker broad leeway to apply background values directly and to tailor the decision to the specific facts of the situation at hand.¹⁰ The choice of form, therefore, implies vastly different conceptions of the judicial function.

In general, those who favor rules envision the judiciary's role as confined to rote operation of norms, while other sectors of society maintain responsibility for deliberating over and balancing the core values associated with those norms.¹¹ In the United States, this position has become linked with mainstream political conservatism,¹² and it is now common for political pundits promoting positions considered conservative to decry the "activist" judiciary, lamenting over judges who make law instead of merely applying it. However, as Kathleen Sullivan points out, the association of rules with political conservatism is not a pre-ordained alliance.¹³ While the connection of popular conservative values with rules-based decisionmaking has characterized recent discourse, in previous incarnations of the rules-standards debate, the political relationships were reversed.¹⁴

Nonetheless, in a survey of the effects of rules and standards in private law, Duncan Kennedy argues that rules and standards represent a fundamental underlying conflict between the core values he labels

9. See, e.g., Alan K. Chen, *The Ultimate Standard: Qualified Immunity in the Age of Constitutional Balancing Tests*, 81 IOWA L. REV. 261, 282 (1995); Kathleen Sullivan, *The Supreme Court 1991 Term: Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 58 (1992).

10. Chen, *supra* note 9, at 282; Sullivan, *supra* note 9, at 58-59.

11. Justice Antonin Scalia notes that the role of the legislature is to formulate broad directives, while courts handle individual cases. Legislative norms that lack precision are criticized as undemocratic because they leave too much discretion in the hands of decisionmakers not directly accountable to the public. Scalia, *supra* note 8, at 1176.

12. Sullivan, *supra* note 9, at 26.

13. *Id.*

14. *Id.*

“altruism” and “individualism.”¹⁵ In Kennedy’s view, rules generally promote individualism, which he characterizes as a philosophy of personal responsibility for one’s profits and losses and the legitimacy of self-interest as the basis for a legal system.¹⁶ On the other hand, standards promote personal sacrifice for the greater good and distributive justice.¹⁷ Thus, it is possible to contextualize rules-standards arguments about the proper role of the judiciary as part of an underlying debate about the philosophical foundations of human society.

Keeping that division in mind, there are compelling arguments about rules and standards and the proper function of the judiciary that operate outside the confines of the discourse of what Kathleen Sullivan calls “street politics”¹⁸ and of philosophical divisions between individualism and altruism. From Justice Antonin Scalia’s perspective, a jurisprudence of rules is fundamental to the very legitimacy of the judiciary in a constitutional democracy.¹⁹ According to Scalia, a system of rules protects separation of powers by both constraining and emboldening the judiciary.²⁰

On the one hand, by limiting the scope of judicial decisionmaking, rules may prevent judges from interfering with the kinds of policy choices many people feel are best left to the political branches of government.²¹ In this regard, courts may strike down statutes that lack adequate precision as unconstitutionally vague, for such vagueness leaves too much discretion

15. Kennedy, *supra* note 7, at 1685.

16. *Id.* at 1685, 1713, 1716.

17. *Id.* at 1685, 1717-18, 1736.

18. Sullivan, *supra* note 9, at 26.

19. Rachel M. Pickens, *The Robin Hood Taking and the Court of Standards*, 4 APPALACHIAN J.L. 145, 146-47 (2005); Justice Scalia states that reliance on clear rules empowers the judiciary to make controversial decisions against a popular majority, but the use of standards does not provide a strong enough framework for judges to resist excesses of popular will. Scalia, *supra* note 8, at 1180. Sullivan describes Justice Scalia’s critique of standards as based on the notion that standards invite judges to decide cases based on their own preferences and intuitions, thus exceeding their constitutional authority. Sullivan, *supra* note 9, at 118.

20. Scalia, *supra* note 8, at 1179-80. As Frederick Schauer explains the confining nature of rules, “the essence of rule-based decision-making lies in the concept of jurisdiction, for rules, which narrow the range of factors to be considered by particular decision-makers, establish and constrain the jurisdiction of those decision-makers.” FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN THE LAW AND IN LIFE* 231-32 (1991).

21. As Sullivan notes, virtually no one supports the unadulterated and naïve view that judges should refrain entirely from policy-based decisionmaking. Nonetheless, this was the stated concern of the Reagan and Bush administrations when they asserted their policies of appointing judges who would not “legislate from the bench.” Sullivan, *supra* note 9, at 57-58.

in the hands of people other than democratically elected representatives.²² On the other hand, a system of rules empowers the judiciary by investing judicial decisions with the imprimatur of impartiality. This is particularly important because of the essential judicial function of protecting fundamental Constitutional imperatives against “occasional excesses of . . . popular will.”²³ If a judicial decision is the inevitable result of predetermined rules of law, as opposed to an expression of the personal policy preferences of the individuals on the bench, it is less susceptible to attack.²⁴ Coincidentally, Justice Scalia invoked a constitutional directive in eyewitness identification law to illustrate this point:

It is very difficult to say that a particular convicted felon who is the object of widespread hatred must go free because, on balance, we think that excluding the defense attorney from the line-up process in this case may have prevented a fair trial. It is easier to say that our cases plainly hold that, absent exigent circumstances, such exclusion is a per se denial of due process.²⁵

In other words, if judges have the backing of clear rules to support their decisions, they will be more likely to stand up to democratic pressure to violate Constitutional norms. Such pressure may manifest itself merely through public expression of popular sentiment, or it may take the form of the elected branches of government attempting to operate outside their constitutionally determined limits.²⁶ Thus, just as clear rules can confine courts to operation within the judicial sphere, they can protect against encroachment by other organs of government. This particular benefit of rules over standards may have special relevance in the context of developing countries, where the legislative and judicial branches are particularly susceptible to domination by the executive.²⁷

Despite these arguments, others assert the superiority of standards as a means of promoting responsibility and deliberation in the judiciary.²⁸ These commentators tend to disbelieve the notion that rules can constrain

22. Scalia, *supra* note 8, at 1176.

23. *Id.* at 1180.

24. *Id.*

25. *Id.*

26. *Id.*

27. Chen, *supra* note 9, at 283-84; *see also* Wallace Mendelson, *On the Meaning of the First Amendment: Absolutes in the Balance*, 50 CAL. L. REV. 821, 825-26 (1962); Sullivan, *supra* note 9, at 67-68.

28. Chen, *supra* note 9, at 283; *see also* Sullivan, *supra* note 9, at 67-68.

judges from engaging in political decisionmaking in any case,²⁹ and they contend that formulating legal directives as rules allows judges to avoid accountability for their holdings. The open balancing of standards, on the other hand, compels judges to articulate rational arguments for their judgments.³⁰ By forcing explicit reasoning for judicial decisions, standards may promote substantive justice better than rules, which, critics of rules-based decisionmaking say, merely mask underlying judicial policy analysis.³¹

B. *Fairness*

Defenders of both rules and standards tout their respective choice of form as most likely to promote fairness. Those who favor rules tend to stress the value of formal equality, arguing that rules oblige decisionmakers to act consistently when faced with similar cases.³² Standards, on the other hand, permit the decisionmaker to manipulate the results according to personal bias.³³ However, as even the staunchest defenders of rules-based decisionmaking concede, rules are both over and under-inclusive at the margins, in actuality obliging judges to treat substantively similar cases differently.³⁴ For example, the rule that anyone over the age of 18 may vote but that anyone under age 18 may not is meant to ensure that the franchise is extended only to people with the maturity to make informed, independent decisions about the candidates they choose. However, this rule inevitably disenfranchises some mature people under the age of 18 and permits voting by some impressionable and immature people over the age of 18 who, in reality, are not capable of making free and educated choices.

In contrast, a standard that allowed the decisionmaker to apply the background values directly could accommodate the idiosyncrasies of individual cases.³⁵ Thus, if the legal directive read “Only those who are

29. Chen, *supra* note 9, at 283; Mendelson, *supra* note 27, at 825-26; Sullivan, *supra* note 9, at 68.

30. Chen, *supra* note 9, at 283; Sullivan, *supra* note 9, at 68.

31. Sullivan, *supra* note 9, at 68.

32. *Id.* at 62. Sullivan describes arguments for rules as including fairness as formal equality, utility, liberty, and democracy. She then outlines traditional arguments for standards, including rationales based on fairness as substantive justice, utility, equality, and deliberation. *Id.* at 62-69.

33. *See also* Chen, *supra* note 9, at 283; *see also* Kennedy, *supra* note 7, at 1688; Sullivan, *supra* note 9, at 62.

34. Chen, *supra* note 9, at 283; *see also* Kennedy, *supra* note 7, at 1689; *see also* Sullivan, *supra* note 9, at 58; *see also* SCHAUER, *supra* note 20, at 149-55.

35. Chen, *supra* note 9, at 282-83; *see also* Sullivan, *supra* note 9, at 66.

capable of making knowledgeable decisions without undue influence or coercion from outside parties shall be allowed to vote,” decisionmakers applying the standard could account for mature 17-year olds and immature, incapable people over the age of eighteen. In terms of fairness, then, a choice of rules must represent the belief that the danger of personal prejudice from decisionmakers applying standards is worse than the inability of rules to accommodate the range of particularized facts in cases that fall outside the norm.³⁶

C. Utility

Likewise, there are arguments on both sides of the rules—standards debate about which form of directive maximizes social utility. Supporters of rules point out that bright-line rules enhance utility in two ways. First, clear rules eliminate the unpredictability of amorphous policy analysis by decisionmakers and enable members of society to order their behavior according to definite, foreseeable consequences.³⁷ The *ex ante* uncertainty attending standards, by contrast, can have a chilling effect on productive activity.³⁸ Second, rules advocates contend that rules put less stress than standards on limited judicial resources.³⁹ By providing simple formulas applicable to a broad spectrum of cases, rules allow decisionmakers to avoid intensive individualized balancing and policy analysis for each case, which use of standards entails.

In response to these arguments, supporters of standards-based decisionmaking assert that rules encourage socially unproductive behavior because they allow people with bad motives to engage in immoral activity while carefully skirting the boundaries of legal permissibility.⁴⁰ Standards, however, discourage undesirable conduct because those inclined to engage in manipulative practices know that decisionmakers can apply the more flexible legal directives to punish their harmful activities.⁴¹ Moreover, although rules may tax judicial resources less in each case, standards are a more adaptable form, with less necessity for frequent reconsideration as society evolves.⁴²

36. Kennedy, *supra* note 7, at 1689.

37. Sullivan, *supra* note 9, at 62.

38. *Id.*

39. *Id.* at 63.

40. Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 600 (1988); Sullivan, *supra* note 9, at 66.

41. Sullivan, *supra* note 9, at 62-63, 66.

42. *Id.* at 66.

When considering the various arguments put forth in favor of rules and standards, it is important to keep in mind Kennedy's warning about the illusory appeal of overgeneralization. Kennedy notes that social engineering arguments favoring one form of legal directive often appear valid, but when examined further, turn out to be no more convincing than reasoning in support of the opposite approach.⁴³ In the next section, I will demonstrate that the various proposals for formulating the due process protection against admission of tainted eyewitness evidence as a rule or a standard have measurable attendant benefits and costs.

I will argue, nonetheless, that in the United States, the balancing of the respective advantages of rules and standards in eyewitness law must be secondary to the imperative of ensuring that eyewitness law evolves to reflect what the last generation of social science has demonstrated about eyewitness memory and best practices for reducing misidentification and that either form of legal directive can advance this goal in the United States. I will argue in Part V, however, that the balancing of forms for eyewitness law in Zambia demonstrates the clear superiority of bright-line rules over standards. The twin dangers of executive subjugation of the legislative and judicial branches and of extreme shortage of legal resources may also make the choice of rules for eyewitness law in other developing countries better than the use of standards. With Kennedy's admonition about overgeneralization in mind,⁴⁴ I restrict this conclusion to eyewitness law. However, this analysis may have broader implications for the choice of form generally in the context of the developing world.

III. THE SCIENCE OF EYEWITNESS IDENTIFICATION

Hugo Munsterberg, an academic psychologist, launched the first wholesale attack on the legal system's faith in eyewitness testimony nearly 100 years ago, when he published *On the Witness Stand*.⁴⁵ In the 1890s, Munsterberg came to the United States to head Harvard's psychology laboratory.⁴⁶ In 1908, he published *On the Witness Stand*, cataloguing the groundbreaking results of extensive experiments that demonstrated a level of eyewitness fallibility previously unimagined and antithetical to intuitive

43. Kennedy, *supra* note 7, at 1704.

44. *Id.*

45. HUGO MUNSTERBERG, *ON THE WITNESS STAND: ESSAYS ON PSYCHOLOGY AND CRIME* 11-12 (1908).

46. Richard H. Ward, *Preface to the New Edition of HUGO MUNSTERBERG'S ON THE WITNESS STAND: ESSAYS ON PSYCHOLOGY AND CRIME* (1908)

notions about the nature of human memory.⁴⁷ Munsterberg's exposition revealed that not only were eyewitnesses likely to miss a huge percentage of the details of what they saw, but they were also prone to remember things that had never actually happened.⁴⁸ Moreover, Munsterberg's experiments showed that eyewitness confidence bore little relationship to the accuracy of an identification.⁴⁹

However, almost as soon as Munsterberg had published his research, John Henry Wigmore, the eminent legal scholar and dean of Northwestern Law School, published a response to Munsterberg's criticism in which he pointed out that psychology had less to offer the legal profession than Munsterberg claimed.⁵⁰ While psychological experiments might be able to demonstrate the general unreliability of eyewitness testimony, Munsterberg's research provided no tool for discerning whether a particular eyewitness was right or wrong and, thus, no means of reaching more reliable verdicts.⁵¹ Wigmore's criticism would continue to influence psychologists studying eyewitness error for much of the next century. As scientists studied the kinds of crime scene conditions that made misidentification more or less likely, they had little practical advice to offer the criminal justice system.⁵² By the time police and prosecutors had contact with eyewitnesses, the crimes were over, and psychologists could offer only retrospective analysis and general criticisms about eyewitness unreliability.

However, in the last three decades, scientists have produced a vast new body of research on variables within the control of the justice system that affect the likelihood of misidentification. This research, based on what social scientists have referred to as "system variables," reveals practical procedural reforms that law enforcement agencies can implement to ensure the highest probability of eyewitness accuracy.⁵³ The results of this research have nearly unanimous approval within the relevant scientific community, and the Department of Justice has endorsed many of the

47. See generally MUNSTERBERG, *supra* note 45.

48. *Id.* at 50-51.

49. *Id.* at 55-56.

50. John Henry Wigmore, *Professor Muensterberg and the Psychology of Testimony: Being a Report of the Case of Cokestone v. Muensterberg*, 3 ILL. L. REV. 399 (1909).

51. *Id.* at 421-24.

52. JAMES M. DOYLE, *TRUE WITNESS: COPS, COURTS, SCIENCE, AND THE BATTLE AGAINST MISIDENTIFICATION* 49-63, 83-99 (2005).

53. Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 LAW & HUM. BEHAV. 603, 610 (1998).

suggested reforms in its recommendations for law enforcement agencies around the country.⁵⁴

The major reforms social scientists have suggested are attempts to address two overarching and overlapping problems. First, the proposed reforms represent an effort to counteract the natural tendency of eyewitnesses to make inaccurate identifications based on the relative-judgment process.⁵⁵ Scientists have identified this process as the inclination of witnesses to pick the person who most resembles the culprit at an identification procedure, even when the real perpetrator is not present or his photo is not included in the procedure.⁵⁶ Second, the proposals address the problem of flaws in the design of a procedure or administrator bias, which can influence the witness's choice by suggesting the identity of the suspect.⁵⁷

Of course, if the actual perpetrator is present at an identification procedure, the propensity of witnesses to use the relative judgment process presents no problem.⁵⁸ The danger arises when the real culprit is absent from a lineup, photo array, or, worst of all, a one-on-one showup confrontation, and the witness uses relative judgment to identify the person who most resembles the true criminal.⁵⁹ Numerous experiments have shown that witnesses are likely to attempt an identification even when the perpetrator is absent and that the witnesses will simply pick the person who looks most like the real culprit.⁶⁰

Members of a specially appointed subcommittee of the Executive Committee of the American Psychology/Law Society (AP/LS) noted in their recommendations for lineups and photospreads, that amongst the most compelling experimental evidence for the role of the relative judgment process in eyewitness identification is a procedure called

54. U.S. DEP'T OF JUSTICE, TECHNICAL WORKING GROUP ON EYEWITNESS EVIDENCE, RESEARCH REPORT: EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT (1999).

55. Steven M. Smith et al., *Postdictors of Eyewitness Errors*, 7 PSYCHOL. PUB. POL'Y & L. 153, 155 (2001); Wells et al., *supra* note 53, at 10; Gary L. Wells & Eric P. Seelau, *Eyewitness Identification: Psychological Research and Legal Policy on Lineups*, 1 PSYCHOL. PUB. POL'Y & L. 765, 768-69 (1995).

56. *Supra* note 55.

57. Wells & Seelau, *supra* note 55, at 768-69.

58. Gary L. Wells, *What Do We Know About Eyewitness Identification?*, 48 AM. PSYCHOL. 553, 560 (1993).

59. Wells & Seelau, *supra* note 55, at 768-69.

60. See, e.g., Robert S. Malpass & Patricia G. Devine, *Eyewitness Identification: Lineup Instructions and the Absence of the Offender*, 66 J. APPL. PSYCHOL. 482, 482-89 (1981); Wells et al., *supra* note 53, at 553-71; Gary L. Wells et al., *The Selection of Distractors for Eyewitness Lineups*, 78 J. APPL. PSYCHOL., 835, 835-44 (1993); Gary L. Wells, *The Psychology of Lineup Identifications*, J. APPL. SOCIAL PSYCHOL. 14, 89-103 (1984).

removal without replacement.⁶¹ The experiment involves presentation of a staged crime to eyewitnesses who are then broken into two groups.⁶² The experiment administrators show the first group a lineup including the perpetrator, and then administrators record the witnesses' responses.⁶³ The administrators then show a second group of witnesses a lineup identical in every respect, except that they have removed the culprit.⁶⁴ If eyewitnesses base their identifications on true recognition, one would expect a similar percentage of people who identified the real perpetrator from the first lineup to pick "none of the above" when viewing the second lineup.⁶⁵ However, the results show the majority of people who correctly identified the culprit would simply have picked the most similar looking remaining participant when the actual criminal was absent.⁶⁶

While people have an inherent inclination to use relative judgments in making identifications, flaws in the structure and composition of an identification procedure can make misidentification more likely by reinforcing the tendency to engage in the relative-judgment process.⁶⁷ For example, when administrators of identification procedures tell a witness there will be a suspect present at the procedure or even simply fail to warn the witness the actual perpetrator may not be present, the chances the witness will attempt to identify someone even when the real culprit is in fact absent increase dramatically.⁶⁸ Similarly, when administrators fail to pick fillers (stand-ins who are not suspects and are known to be innocent) for a lineup or photo array who resemble the witness's description of the perpetrator, the suspect may stand out in a way that makes his

61. Wells et al., *supra* note 53, at 561, 614. As documented in the text and notes throughout this section, the AP/LS subcommittee's recommendations reflect the results of a vast body of research on the psychology of eyewitness identification.

62. Wells et al., *supra* note 53, at 614.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* at 614-15.

67. Shirley N. Glaze, *Selecting the Guilty Perpetrator: An Examination of the Effectiveness of Sequential Lineups*, 31 LAW & PSYCHOL. REV. 199, 201-02 (2007) (noting a majority of studies conclude that using sequential presentation of lineup participants reduces the effect of the relative-judgment process as compared to simultaneous presentation of the participants); Wells et al., *supra* note 53, at 632 (noting that picking lineup participants to match the eyewitness's description of the perpetrator can reduce the likelihood the witness will use the relative-judgment process to identify an innocent suspect); Wells & Seelau, *supra* note 55, at 769 (noting the failure to give warnings about possible culprit absence in a lineup increases relative judgment tendency).

68. Wells et al., *supra* note 53, at 615; Wells & Seelau, *supra* note 55, at 769; *see also* Malpass & Devine, *supra* note 60, at 483.

identification more likely, even if he is not the culprit.⁶⁹ Finally, if the administrator of an identification procedure knows the identity of the suspect, she may influence the witness's choice.⁷⁰ This influence may be intentional, or it may be entirely inadvertent.⁷¹

Unfortunately, witnesses who have viewed an identification procedure with some suggestive component are more likely to feel confident about the accuracy of their identifications than witnesses who took part in uncorrupted procedures.⁷² After exposure to flawed procedures, witnesses tend to remember having had better views of the perpetrator during the crime, to remember having paid a higher degree of attention to the perpetrator's features, and to feel more certain of the accuracy of their identifications.⁷³ The obvious and tragic irony is that the above described flaws in identification procedures, while increasing the apparent reliability of the eyewitness to an untrained observer, drastically reduce the chances of accurate identification and increase the likelihood that witnesses will pick innocent suspects when the real criminal is absent.⁷⁴ Thus, the AP/LS subcommittee has urged the implementation of four essential rules that can maximize the effectiveness of lineups and photo arrays by reducing the chances of misidentification without reducing the likelihood a witness will be able to identify the real perpetrator if he is present.⁷⁵

69. Wells et al., *supra* note 53, at 632; Wells & Seelau, *supra* note 55, at 780.

70. Amy L. Bradfield et al., *The Damaging Effect of Confirming Feedback on the Relation Between Eyewitness Certainty and Identification Accuracy*, 87 J. APPL. PSYCHOL. 112, 118 (2002); Wells et al., *supra* note 53, at 627.

71. Bradfield et al., *supra* note 70, at 118; Erik Lilquist, *The Role of the Death Penalty in America: Reflections, Perceptions, and Reform*, 41 U. RICH. L. REV. 897, 926-27 (2007); Wells et al., *supra* note 53, at 627.

72. See Bradfield et al., *supra* note 70, at 119; Gertrud Sophie Hafstad et al., *Post-identification Feedback, Confidence and Recollections of Witnessing Conditions in Child Witnesses*, 18 APPLIED COGNITIVE PSYCHOL. 901, 908-09 (2004); 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, 361 (1998).

73. Jeffrey S. Neuschatz et al., *The Effects of Post-Identification Feedback and Age on Retrospective Eyewitness Memory*, 19 APPLIED COGNITIVE PSYCHOL. 435, 441 (2005) (describing effects of post-identification confirming feedback); Wells et al., *supra* note 53, at 626; Wells & Bradfield, *supra* note 72, at 366 (describing effects of post-identification confirming feedback).

74. Wells & Seelau, *supra* note 55, at 780 (describing the benefits of picking lineup fillers to match the description of the suspect); Bradfield et al., *supra* note 70, at 118 (stating the importance of double-blind administration of lineups); see generally Malpass & Devine, *supra* note 60 (examining the effect of lineup instructions warning the eyewitness of possible perpetrator absence versus instructions suggesting the culprit is present).

75. Wells et al., *supra* note 53, at 627-36.

A. *Double-Blind Administration of Identification Procedures*

Perhaps the most critical reform of eyewitness identification procedures is to ensure they are conducted in accordance with one of the most basic tenets of scientific experimentation—a double-blind administration of the experiment. As the members of the AP/LS subcommittee noted, an identification procedure such as a lineup or photo array is essentially an experiment inasmuch as law enforcement personnel have a hypothesis about the identity of the criminal (the suspect), and they use the identification procedure to test the validity of that hypothesis.⁷⁶ In the case of an identification procedure, therefore, double-blind administration would require that neither the witness nor the administrator know the identity of the suspect prior to the administration of the procedure.⁷⁷

It is common knowledge within the scientific community that experimenter expectancy can influence the outcome of an experiment and, thus, a fundamental rule of scientific experimentation is blind administration.⁷⁸ Unfortunately, the general practice of most law enforcement agencies is to have personnel intimately familiar with the details and investigation of a case administer identification procedures themselves.⁷⁹ While experimenter expectancy can bias the outcome of any experiment, the close personal interaction between a lineup administrator and a witness makes corruption of the procedure particularly likely.⁸⁰ Suggestiveness from an administrator could be intentional, but even when the administrator tries to run the procedure in good faith, she may accidentally cue the witness with facial expressions, eye contact, or through the tone of her voice.⁸¹ However, by using administrators who do not know the identity of the suspect, law enforcement can easily eliminate the possibility that eyewitnesses will be influenced by any kind of suggestion from the administrator.⁸² This reform will inevitably increase the chance that any choice a witness makes at an identification procedure will be the product of that witness's true memory of the perpetrator.

76. *Id.* at 618.

77. *Id.* at 627.

78. *Id.*; see also ROBERT ROSENTHAL, EXPERIMENTER EFFECTS IN BEHAVIORAL RESEARCH 143-281 (1976).

79. Wells et al., *supra* note 53, at 627.

80. *Id.*

81. Bradfield et al., *supra* note 70, at 118; Wells et al., *supra* note 53, at 627.

82. Bradfield et al., *supra* note 70, at 118; Wells et al., *supra* note 53, at 627-28; Wells & Bradfield, *supra* note 72, at 375; Wells & Seelau, *supra* note 55, at 775-76.

B. Warnings About Possible Perpetrator Absence

Eyewitnesses are more likely to pick an innocent suspect when police fail to warn them that the perpetrator may not be in the lineup or photo array. Without such an instruction, the natural tendency of eyewitnesses is to attempt an identification based on the un-contradicted assumption that the culprit is amongst the participants in an identification procedure.⁸³ However, a mere explanation to the eyewitness that the perpetrator may or may not be present can reduce the rate of misidentification while having “no appreciable reduction of accurate identifications” when the culprit is present.⁸⁴ This reduced rate of misidentification stems from the warning’s effect of legitimizing a “none of the above” response and, thus, reducing the likelihood that the witness will use the relative-judgment process to choose the participant who most resembles the criminal when the criminal is not a participant in the procedure.⁸⁵

C. Composition of the Identification Procedure

Ensuring that the suspect does not stand out from other participants is another critical component in designing a reliable identification procedure.⁸⁶ The reasons for this rule are fairly straightforward. If the suspect stands out in some way, it may be clear to the eyewitness who the suspect is, and, as any scientist knows, one cannot rely on results from an experiment in which the research subject is able to discern the hypothesis.⁸⁷

Thus, the AP/LS subcommittee recommended that, in general, law enforcement should pick fillers for lineups and photo arrays who fit the description the eyewitness gave of the perpetrator.⁸⁸ For most situations, compliance with this rule makes it likely both that the procedure will not prejudice the suspect by calling special attention to him and that the members of the lineup or photo array will not look so similar to each other as to render the procedure ineffective.⁸⁹ So long as the suspect fits the general description of the perpetrator, picking fillers who also fit that

83. Wells et al., *supra* note 53, at 629-30.

84. *Id.* See also Malpass & Devine, *supra* note 60, at 487; Nancy Mehrkens Steblay, *Social Influence in Eyewitness Recall: A Meta-Analytic Review of Lineup Instruction Effects*, 21 LAW & HUM. BEHAV., 283, 287-89 (1997).

85. Wells et al., *supra* note 53, at 629.

86. *Id.* at 630.

87. *Id.*

88. *Id.* at 632.

89. *Id.*

description reduces the chance that the witness will use the relative-judgment process to make an incorrect identification of an innocent suspect.

In other words, if all members of the lineup or photo array fit the description of the culprit, an eyewitness using relative judgment to attempt an identification when the culprit is absent will be just as likely to identify one of the fillers (already known to be innocent) as to identify the innocent suspect.⁹⁰ On the other hand, if police pick fillers at random, the suspect is likely to be the only participant who resembles the description of the criminal, and the odds the witness will mistakenly identify him increase dramatically.⁹¹ Moreover, picking fillers based on the description of the perpetrator will usually result in a lineup with enough variety that the witness will be capable of making reasonable distinctions between the participants.⁹² Descriptions of perpetrators are usually fairly general, and matching the participants to the description will allow for a range of fillers who look similar enough to the description to prevent the suspect from standing out while at the same time not looking like a group of clones.⁹³ This may happen if police match fillers to the appearance of the suspect, and could render the witness's choice meaningless.⁹⁴

Of course, the overall goal is to avoid drawing undue attention to the suspect, and while the rule of matching fillers to the description of the perpetrator will usually accomplish that aim, there are some situations in which an alternative approach is superior.⁹⁵ For example, if the suspect himself does not resemble the description of the perpetrator, matching the fillers to that description would cause the suspect to stand out.⁹⁶ In these situations, the AP/LS subcommittee recommends that police design the identification procedure based on a combination of the description of the criminal and the appearance of the suspect.⁹⁷ Similarly, if the suspect has a unique feature that was not a part of the witness's description of the culprit, or if the suspect shares some feature with the culprit that the eyewitness failed to include in the description, adherence to the general rule of matching the fillers to the description of the perpetrator may run counter to the rule's purpose.⁹⁸ Thus, the overall rule is simply that the

90. Wells et al., *supra* note 53, at 632.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. Wells et al., *supra* note 53, at 632-34.

96. *Id.* at 632-33.

97. *Id.*

98. *Id.* at 633-34.

suspect should not stand out from the fillers.⁹⁹ Giving direction that police should pick fillers based on the description of the perpetrator is, in most cases, the most efficient way to effectuate that rule.

D. Contemporaneous Confidence Statements

Finally, the AP/LS subcommittee recommended that administrators of identification procedures take confidence statements from eyewitnesses immediately after the eyewitness has made an identification.¹⁰⁰ Given extensive proof that post-identification events can artificially inflate an eyewitness's memory of how confident she was at the time of an identification, this rule is necessary to preserve an accurate record of the eyewitness's level of certainty at the identification procedure.¹⁰¹ To this rule, I would add the recommendation that administrators of identification procedures take statements before the procedure about the eyewitness's opportunity to view the crime and level of attention at the time of the crime, since experiments have proven suggestiveness in an identification procedure also inflates the witness's memory of these factors.¹⁰²

It is, however, especially important to take contemporaneous confidence statements, because confidence is the single most important factor juries consider in gauging the accuracy of an eyewitness's identification.¹⁰³ Yet, even under ideal circumstances, accuracy bears only a modest relationship to confidence,¹⁰⁴ and if the witness has encountered post-identification suggestiveness, the jury may be particularly likely to overvalue the meaningless, inflated in-court statement of eyewitness confidence.

Perhaps the most commonly recommended reform not included in the Executive Committee's four core rules is sequential presentation for lineups and photo arrays.¹⁰⁵ Sequential presentation entails displaying members of a lineup or photo array to eyewitnesses one-by-one instead of

99. *Id.* at 630.

100. Wells et al., *supra* note 53, at 635.

101. Bradfield et al., *supra* note 70; Neuschatz et al., *supra* note 73, at 441; Wells & Bradfield, *supra* note 72, at 366-68; Wells et al., *supra* note 53, at 635.

102. Neuschatz et al., *supra* note 73, at 441; Wells & Bradfield, *supra* note 72, at 366-67.

103. Wells et al., *supra* note 53, at 620.

104. See, e.g., R.K. Bothwell et al., *Correlation of Eyewitness Accuracy and Confidence: Optimality Hypothesis Revisited*, 72 J. APPLIED PSYCHOL. 691 (1987).

105. See, e.g., Glaze, *supra* note 67; R.C.L. Lindsay & Gary L. Wells, *Improving Eyewitness Identification From Lineups: Simultaneous Versus Sequential Lineup Presentations*, 70 J. APPLIED PSYCHOL. 556 (1985); Nancy Steblay et al., *Eyewitness Accuracy Rates in Sequential and Simultaneous Lineup Presentations: A Meta-Analytic Comparison*, 25 LAW & HUM. BEHAV. 459 (2001).

simultaneously.¹⁰⁶ The witness is asked to make a decision about each participant in the lineup or photo array before moving on to the next person or photo.¹⁰⁷ Studies have shown that this procedural adaptation can reduce the tendency of witnesses to use the relative-judgment process.¹⁰⁸ With sequential presentation, witnesses are more likely to make absolute judgments, comparing each person in a lineup to her memory of the actual perpetrator.¹⁰⁹

While the AP/LS subcommittee considered sequential presentation possibly the most important reform not included in its core rules, it declined to adopt the reform as one of its primary recommendations.¹¹⁰ First, the four core rules are each beneficial independently, whether or not administrators implement other reforms.¹¹¹ The benefits of sequential presentation, on the other hand, may disappear if police do not follow other rules.

For example, the AP/LS subcommittee speculated that sequential presentation without blind administration could produce less accurate results than even non-blind simultaneous presentation because the administrator of the procedure would know exactly whom the witness was viewing at any given moment, thus producing a greater possibility of administrator influence on the witness's choice.¹¹² Furthermore, while the advantages of the other rules are intuitive and straightforward, the potential value of sequential presentation is evident only with a more sophisticated understanding of the relative-judgment process.¹¹³ Convincing courts, legislatures, and law enforcement to implement sequential presentation could thus be more difficult than other reforms. Finally, although the AP/LS subcommittee considered sequential lineup presentation undeniably desirable, studies released since the subcommittee's report have cast some doubt on the relative utility of sequential lineups.¹¹⁴ Thus, while sequential lineup presentation may

106. Wells et al., *supra* note 53, at 639.

107. *Id.*

108. Lindsay & Wells, *supra* note 105, at 562; Steblay et al., *supra* note 105, at 459; Wells et al., *supra* note 53, at 639.

109. Steblay et al., *supra* note 105, at 460.

110. Wells et al., *supra* note 53, at 639.

111. *Id.* at 640.

112. *Id.*

113. *Id.*

114. See, e.g., Roy S. Malpass, *A Policy Evaluation of Simultaneous and Sequential Lineups*, 12 PSYCHOL. PUB. POL'Y & L. 394 (2006) (arguing that in most situations, simultaneous lineups are superior to sequential lineups). A 2006 study of an Illinois pilot project reported higher rates of false negatives with sequential lineups than with simultaneous lineups. See Sheri H.

increase eyewitness accuracy, the current lack of consensus within the scientific community makes adoption of this technique a somewhat ambiguous proposition.

IV. AMERICAN LAW

While discourse between the scientific and legal communities about eyewitness identification started with Munsterberg and Wigmore, most accounts of modern eyewitness identification law in the United States begin with a trilogy of cases the Supreme Court decided on the same day in 1967.¹¹⁵ Before 1967, there was no constitutional regulation of eyewitness evidence, and the general rule was that any flaw in a pretrial identification procedure would affect only the weight and not the admissibility of the evidence at trial.¹¹⁶ However, in *United States v. Wade*, *Gilbert v. California*, and *Stovall v. Denno*, the Court held for the first time that Sixth Amendment and due process rights require exclusion of some eyewitness evidence. In *United States v. Wade* and *Gilbert v. California*, Justice Brennan wrote that a post-indictment lineup is such a critical stage of the criminal process that, unless there is “intelligent waiver,” absence of defense counsel at such a procedure requires per se suppression of the lineup evidence at trial.¹¹⁷ However, the Court held that the in-court identification would still be admissible if the prosecution could establish

Mecklenberg, REPORT TO THE LEGISLATURE OF THE STATE OF ILLINOIS: THE ILLINOIS PILOT PROGRAM ON SEQUENTIAL DOUBLE-BLIND IDENTIFICATION PROCEDURES (2006), http://www.psychology.iastate.edu/faculty/gwells/Illinois_Report.pdf. However, another study of the use of sequential double-blind identification procedures in Hennepin County, Minnesota found the sequential double-blind procedures used in that jurisdiction worked well and yielded suspect identification rates comparable to laboratory tests and comparable to rates in simultaneous lineups in other jurisdictions. Amy Klobuchar et al., *Improving Eyewitness Identifications: Hennepin County's Blind Sequential Lineup Pilot Project*, 4 CARDOZO PUB. L. POL'Y & ETHICS J. 381, 410 (2006). Moreover, the Illinois report has been criticized as flawed because, while the sequential procedures in the study were conducted by blind administrators, the administrators of the simultaneous lineups knew the identities of the suspects. See, e.g., Daniel L. Schacter et al., *Policy Forum: Studying Eyewitness Investigations in the Field*, 32 LAW & HUM. BEHAV. 3, 4 (2008). Schacter and colleagues conclude more field studies are necessary to “produce a final blueprint for procedural reform.” *Id.* at 4-5.

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

116. *Simmons v. United States*, 390 U.S. 377, 382 (1968).

117. *Wade*, 388 U.S. at 236-42; *Gilbert*, 388 U.S. at 272.

that the identification was not the result of the tainted pre-trial procedure, but, rather, the product of an independent source.¹¹⁸

In *Stovall v. Denno*, the Court held more generally that some identification procedures may be “so unnecessarily suggestive and conducive to irreparable mistaken identification” as to deny a defendant due process of law and that courts must suppress such evidence.¹¹⁹ However, the following year, the Court seemed to alter its approach to due process analysis of eyewitness identification evidence. In *Simmons v. United States*, considering the admissibility of evidence from a photo identification, the Supreme Court emphasized the probability that the defendant was actually guilty as a basis for its holding.¹²⁰ Highlighting the witnesses’ opportunities to view the perpetrator at the time of the crime and their confidence in their identifications at trial, the court asserted that the circumstances of the case “leave little room for doubt that the identification of Simmons was correct, even though the identification procedure employed may have in some respects fallen short of the ideal.”¹²¹ Eyewitness identification scholars have frequently urged that *Stovall* provided robust protection of due process rights against admission of tainted eyewitness evidence, and that the *Simmons* decision represented the beginning of the Court’s unraveling of that protection.¹²² As Professor Charles Pulaski noted in 1974, *Stovall* was a strict test protecting against admission of eyewitness identification evidence obtained through use of unreliable procedures, while *Simmons* was a more permissive approach, focusing on a broader conception of reliability by inquiring into the likelihood that the identification was actually accurate.¹²³

118. *Gilbert*, 388 U.S. at 272.

119. *Stovall*, 388 U.S. at 301-02.

120. *Simmons*, 390 U.S. at 385-86.

121. *Id.*

122. Jessica Lee, *No Exigency, No Consent: Protecting Innocent Suspects from the Consequences of Non-Exigent Show-Ups*, 36 COLUM. HUM. RTS. L. REV. 755, 785-89 (2005); Timothy P. O’Toole & Giovanna Shay, *Manson v. Brathwaite Revisited: Towards a New Rule of Decision for Due Process Challenges to Eyewitness Identification Procedures*, 41 VAL. U. L. REV. 109, 122-25 (2006); David E. Paseltiner, *Twenty Years of Diminishing Protection: A Proposal to Return to the Wade Trilogy’s Standards*, 15 HOFSTRA L. REV. 583, 589-90 (1987); Charles A. Pulaski, *Neil v. Biggers: The Supreme Court Dismantles the Wade Trilogy’s Due Process Protection*, 26 STAN. L. REV. 1097, 1104-10 (1974); Benjamin E. Rosenberg, *Rethinking the Right to Due Process in Connection with Pretrial Identification Procedures: A Proposal to Return to the Wade Trilogy’s Standard*, 79 KY L.J. 259, 264-68 (1991); Dori Lynn Yob, *Mistaken Identifications Cause Wrongful Convictions: New Jersey’s Lineup Guidelines Restore Hope, But are they Enough?*, 43 SANTA CLARA L. REV. 213, 229-30 (2002).

123. Pulaski, *supra* note 122, at 1104-09; *see also* Lee, *supra*, note 122, at 786-87.

Finally, in 1977, the Court formulated its current due process standard for admissibility of eyewitness evidence in *Manson v. Brathwaite*.¹²⁴ In *Manson*, the Court clearly announced its preference for a reliability-based standard rather than one designed to exclude evidence obtained through procedural impropriety.¹²⁵ The *Manson* Court determined that, in the event of unnecessarily suggestive procedures, courts should examine five reliability factors to determine whether, under the totality of the circumstances, the evidence is nonetheless reliable and, therefore, admissible.¹²⁶ Justice Blackmun, adopting the standard the Court had set forth in *Neil v. Biggers*, said courts should consider: 1) the opportunity of the witness to view the criminal at the time of the crime; 2) the witness's degree of attention; 3) the accuracy of the witness's 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.¹²⁷

From the foregoing overview, it is easy to see how the development of eyewitness identification law fits into the discourse on legal forms. The *Stovall* holding can be viewed as a more rule-like formulation: if the procedure is unnecessarily suggestive, then the evidence from that procedure is per se inadmissible. The core due process value of fairness is expressed through the exclusion of evidence obtained from flawed procedures. Like all rules, the *Stovall* holding had the potential for over-inclusiveness. Some witnesses might be able to make reliable identifications of perpetrators despite the police using unnecessarily suggestive identification procedures, but the requirement of per se suppression of such procedures prevented the prosecution from bolstering in-court identifications with introduction of the pre-trial identification evidence.

On the other hand, the *Manson* test is more standard-like: even if there is a faulty procedure, courts should look at the totality of the circumstances, using the five factors as guidelines to determine whether the identification was reliable. Under *Manson*, courts attempt to apply the background value of fairness more directly by trying to determine whether, in spite of a procedural defect, the witness actually identified the defendant

124. *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977) (citing *Neil v. Biggers*, 409 U.S. 188, 198 (1972)) (“It is the likelihood of misidentification which violates a defendant’s right to due process . . . Suggestive confrontations are disapproved because they increase the likelihood of misidentification . . .”).

125. *Id.*

126. *Id.* at 113-14.

127. *Id.* at 114.

correctly. In other words, the evidence will still be admissible if it seems likely the defendant is actually guilty. This individualized, discretionary approach asks judges to decide on a case-by-case basis whether the flawed evidence might nonetheless be reliable enough to be used in court.

Those who have written about the development of eyewitness identification law have tended to view *Stovall* as giving strong due process protection against faulty eyewitness evidence. These scholars have seen *Manson* as the Court's final betrayal of the rights guaranteed by *Stovall*.¹²⁸ Additionally, of the five states that have rejected *Manson*, three adopted formulations similar to the *Stovall* holding, believing that test to be more protective of due process rights.¹²⁹

Indeed, it is certainly true that *Manson* has proven inadequate as a safeguard against the admission of suggestive identification evidence. As noted above, three of the five reliability factors are artificially inflated in the wake of suggestive procedures, thus producing the ironic result that the use of suggestive identification procedures like post-identification feedback makes it more likely that courts will find the identification to have been reliable despite the unnecessary suggestiveness. In practice, courts have been extremely unlikely to use *Manson* to suppress suggestive identification evidence. In the only two published attempts to conduct anything approaching comprehensive analysis of judicial treatment of *Manson*, William J. Mueller noted that federal courts found eyewitness identification evidence unreliable and inadmissible in only two cases between May 1, 1983 and April 30, 1984, and Robert F. Redmond, Jr.

128. Lee, *supra* note 122, at 788-89; O'Toole & Shay, *supra* note 122, at 125; Paseltiner, *supra* note 122, at 592-93; Rosenberg, *supra* note 122, at 261; Yob, *supra* note 122, at 230.

129. Commonwealth v. Johnson, 650 N.E.2d 1257, 1260 (Mass. 1995) ("In cases involving an unnecessarily suggestive identification, we have adhered to the stricter rule of per se exclusion previously followed by the Supreme Court and first set forth in the *Wade-Gilbert-Stovall* trilogy."); People v. Adams, 423 N.E.2d 379, 384 (N.Y. 1981); State v. Dubose, 699 N.W.2d 582, 584-85 (Wis. 2005).

[W]e adopt standards for the admissibility of out-of-court identification evidence similar to those set forth in the United States Supreme Court's decision in *Stovall v. Denno*... We hold that evidence obtained from such a showup will not be admissible unless, based on the totality of the circumstances, the showup was necessary.

Dubose, 699 N.W.2d at 584-85. Utah and Kansas accepted *Manson*'s notion that unnecessarily suggestive identification techniques might still be admissible if the identification was reliable, but rejected the five-factor reliability test in favor of factors meant to comport with updates in scientific knowledge. State v. Hunt, 69 P.3d 571, 577 (Kan. 2003); State v. Ramirez, 817 P.2d 774, 780-81 (Utah 1991).

similarly found that there had been only two such federal suppressions between May 1, 1984 and April 30, 1985.¹³⁰ Such results are unsurprising given Justice Blackmun's rejection in *Manson* of a per se exclusionary rule, which he recognized would provide greater incentives for police to avoid suggestive procedures, in favor of a norm that would allow admission of evidence that is "reliable and relevant."¹³¹ There is general agreement amongst eyewitness scholars, however, that courts applying *Manson* regularly admit evidence that is far from reliable.¹³²

Yet it is far from clear that retention of the *Stovall* holding would necessarily have enhanced due process protection for defendants in eyewitness cases or, more generally, that a rules-based regime would set the optimal balance between safeguarding defendant rights in eyewitness cases and allowing juries to hear evidence that can, in fact, provide reliable proof of guilt. First, despite the assertions of commentators that the Supreme Court's shift away from *Stovall* represented the abandonment of a more protective due process norm, this notion appears, on closer inspection, dubious at best. As Rudolph Koch and Benjamin Rosenberg have noted, the Court in *Stovall* failed to distinguish between out-of-court and in-court identification evidence.¹³³

Consequently, some courts applying *Stovall* interpreted the opinion as requiring a single test for both the out-of-court and in-court identifications.¹³⁴ Other courts, however, read *Stovall* in line with *Wade* and *Gilbert* as requiring a two-part inquiry: if the out-of-court identification procedure was unnecessarily suggestive, that evidence would be excluded, but the in-court identification would still be allowed if it had an independent source.¹³⁵ In fact, the three states that have rejected *Manson* in favor of a *Stovall*-like approach have all adopted the two-part test, excluding unnecessarily suggestive out-of-court identification

130. Robert F. Redmond, Jr., *Identifications*, 74 GEO. L.J. 586, 591 n.693 (1986); William J. Mueller, *Identifications*, 73 GEO. L.J. 362, 367 n.626 (1984).

131. *Manson*, 432 U.S. at 112.

132. See generally Lee, *supra* note 122; O'Toole & Shay, *supra* note 122; Paseltiner, *supra* note 122; Rosenberg, *supra* note 122; Ruth Yaona, *Manson v. Brathwaite: The Supreme Court's Misunderstanding of Eyewitness Identification*, 39 J. MARSHALL L. REV. 539 (2006); Yob, *supra* note 122.

133. Rudolph Koch, *Process v. Outcome: The Proper Role of Corroborative Evidence in Due Process Analysis of Eyewitness Identification Testimony*, 88 CORNELL L. REV. 1097, 1110 (2003); Rosenberg, *supra* note 122, at 265-66.

134. Koch, *supra* note 133, at 1110.

135. *Id.* (citing *Smith v. Coiner*, 473 F.2d 877, 880-83 (4th Cir. 1973); *Rudd v. Florida*, 477 F.2d 805, 809 (5th Cir. 1973)).

evidence per se but allowing the in-court identification if the prosecution can demonstrate an independent source for it.¹³⁶

Yet this formulation provides virtually no protection for defendants and no real deterrent to police using suggestive procedures. As Richard Rosen pointed out in criticizing the independent source tests of *Wade* and *Gilbert*, prosecutors are generally perfectly satisfied with introducing only the in-court identification.¹³⁷ In fact, when evidence from an out-of-court identification is introduced, it is usually by the defense in an effort to attack the reliability of the eyewitness's testimony.¹³⁸ The in-court identification, however, will almost always be satisfactory to the prosecution, for, as Elizabeth Loftus has noted, "[a]ll the evidence points rather strikingly to the conclusion that there is almost nothing more convincing than a live human being who takes the stand, points a finger at the defendant, and says, 'That's the one!'"¹³⁹

But perhaps the most telling evidence of *Stovall*'s ineffectiveness is the case law produced in the nine months and six days between that decision and the supposed start of its undoing in *Simmons*. Of the 27 published federal cases that cited *Stovall* between June 12, 1967 and March 18, 1968, when the Supreme Court decided *Simmons*, ten considered directly whether admission of eyewitness identification evidence constituted a due process violation under *Stovall*.¹⁴⁰ Nine of those ten courts found that there

136. *Commonwealth v. Johnson*, 650 N.E.2d 1257, 1260 (Mass. 1995); *People v. Adams*, 423 N.E.2d 379, 384 (N.Y. 1981); *State v. Dubose*, 699 N.W.2d 582, 596 (Wis. 2005).

137. Richard A. Rosen, *Reflections on Innocence*, 2006 WIS. L. REV. 237, 249 (2006).

138. *Id.*

139. ELIZABETH LOFTUS, *EYEWITNESS TESTIMONY* 19 (1979).

140. *Hanks v. United States*, 388 F.2d 171, 174 (10th Cir. 1968) (finding admission of the identification evidence did not contravene the defendant's due process rights despite use of a showup identification, without identifying any urgent reason for conducting the showup, which occurred "sometime after the arrest of Hanks"); *United States v. Wright*, 404 F.2d 1256, 1259-61 (D.C. Cir. 1968) (remanding the case to the district court for further development of the facts to determine whether there was a due process violation); *United States v. Ball*, 381 F.2d 702, 703 (6th Cir. 1967); *United States v. Beard*, 381 F.2d 325, 328 (6th Cir. 1967); *United States ex rel. Bennett v. Myers*, 381 F.2d 814, 816-17 (examining suggestiveness under the totality of the circumstances and finding no problem in case in which habeas petitioner had not raised the issue himself); *Borum v. United States*, 409 F.2d 433, 436 n. 10 (D.C. Cir. 1967) (noting that appellant had not claimed under *Stovall* that identification was "so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law," the Courts held, without comprehensive analysis, that the record does not suggest there was a due process violation); *Crume v. Beto*, 383 F.2d 36, 38-41 (5th Cir. 1967); *Meier v. United States*, 384 F.2d 743, 744 (9th Cir. 1967) (citing *Stovall*, without any explicit analysis, and providing a cursory statement that "[n]othing in the record suggests a denial of due process"); *United States v. Quarles*, 387 F.2d 551, 556 (4th Cir. 1967) (citing *Stovall* for the proposition that *Wade* and *Gilbert* are not retroactive, the Court goes on to say there was no violation of defendant's Fifth Amendment rights, even if he was

had been no due process violation, and one remanded to the district court for further development of the facts.¹⁴¹ Of the ten cases, at least three involved showup identifications,¹⁴² and at one of those showups police made the defendant say the word “hurry” to assist with the identification.¹⁴³ In other words, of published federal cases, not a single court applying *Stovall* in the time before its supposed adulteration used the decision to suppress pre-trial identification evidence, let alone in-court identification evidence, even when that evidence was the product of highly suggestive procedures.¹⁴⁴

Of the 87 published state cases that cited *Stovall* before the *Simmons* decision, 31 directly considered whether due process required suppression of eyewitness evidence under *Stovall*.¹⁴⁵ Three of these courts held that

compelled to say “hurry” in a showup situation at a bank); *Wise v. United States*, 383 F.2d 206, 209-10 (D.C. Cir. 1967) (holding there was no due process violation under *Stovall* despite use of a showup identification).

141. The only case in which a federal court applying *Stovall*'s test (in the months before *Simmons*) to determine whether unnecessarily suggestive eyewitness identification evidence constituted a due process violation did not definitively determine there was no due process violation was *United States v. Wright*. The *Wright* court remanded the case for further development of the facts. *Wright*, 404 F.2d at 1259-61.

142. *Hanks*, 388 F.2d at 173-74; *Quarles*, 387 F.2d at 553-54; *Wise*, 383 F.2d at 207-08.

143. *Quarles*, 387 F.2d at 556.

144. See generally *Stovall*, 388 U.S. at 293.

145. *Bowman v. State*, 208 So. 2d 241, 242-43 (Ala. Ct. App. 1968) (holding there was no due process violation where witness identified defendant and co-defendant at a show-up in which they were the only two black people in the room); *Denmon v. State ex rel Eyman*, 437 P.2d 999 (Ariz. Ct. App. 1968) (holding, without discussing the circumstances of the identification, that facts alleged did not “render the confrontation ‘conducive to irreparable mistaken identification.’”); *People v. Caruso*, 68 Cal. 2d 183, 187-88 (Cal. 1968) (finding a due process violation under *Stovall* where defendant did not resemble any of the other four men in the lineup and reversing with option for state to prosecute again and prove independent source); *People v. Harris*, 67 Cal. 2d 866, 872 (Cal. 1967) (holding, without discussing specifics of the identification procedure, that lineup adequately guaranteed due process of law); *People v. Feggans*, 67 Cal. 2d 444, 448-49 (Cal. 1967) (holding there was no due process violation when witness identified defendant from four or five pictures and again at showup); *People v. Slutts*, 259 Cal. App. 2d 886, 891-93 (Cal. App. 2d 1968) (holding there was due process violation where officer drew beard on defendant's picture and no other pictures from photo array before one of witnesses made an identification, and, ultimately, that the violation was harmless error and, thus, did not require reversal); *People v. Blackburn*, 260 Cal. App. 2d 35, 43-44 (Cal. App. 2d 1968) (holding identification did not violate due process despite possibility that witnesses were shown pictures of defendant before identifying defendant from lineup and despite fact that perpetrator wore a fake nose, mustache, and glasses); *People v. Smith*, 259 Cal. App. 2d 814, 819-21 (Cal. App. 2d 1968) (finding photographs of the defendant shown to witnesses before in-court identification were not used to “prime” witnesses, so there was no due process violation); *People v. Douglas*, 259 Cal. App. 2d 694, 697-98 (Cal. App. 2d 1968) (remanding to trial court to resolve a factual dispute as to whether officer singled out defendant in

lineup); *Bradley v. State*, 206 So. 2d 657, 660 (Fla. Dist. Ct. App. 1968) (citing *Stovall* for the proposition that *Wade* and *Gilbert* were not retroactive, but continuing by holding that showup was not “so repugnant to the concepts of fair treatment as to vitiate the conviction or even to render the evidence inadmissible.”); *Marden v. State*, 203 So. 2d 638, 640 (Fla. Dist. Ct. App. 1967) (finding no due process violation where witness identified defendant at a showup while defendant sat in a police car); *People v. Harris*, 236 N.E.2d 281, 282-83 (Ill. App. Ct. 1968) (finding no due process violation where officer told witness, “We got the man,” before one-on-one identification at police station); *People v. Neiman*, 232 N.E.2d 805, 809-10 (Ill. App. Ct. 1967) (holding that nothing from identifications at lineup or preliminary hearing indicated presence of due process issues); *Reeves v. State*, 238 A.2d 307, 309-10 (Md. Ct. Spec. App. 1968) (citing *Stovall* for proposition that *Wade* was not retroactive and going on to say that defendant had not shown his lineup was conducted in an unfair or unreliable manner, and thus evidence was admissible); *Powell v. State*, 231 A.2d 737, 739 (Md. Ct. Spec. App. 1967) (holding that there was no showing the lineup was unfair or unreliable, citing *Stovall*, though defendant’s challenge had been based on argument that identification violated his state rights because he was displayed in lineup behind a screen, where he could not see his accusers); *State v. Keeney*, 425 S.W.2d 85, 90 (Mo. 1968) (finding no due process violation where witness identified the defendant in a showup at the scene of the crime shortly after the crime); *State v. Pollard*, 425 S.W.2d 106, 108 (Mo. 1968) (confusing *Wade*, *Gilbert*, and *Stovall*, the Court mistakenly asserted that a due process objection based on a claim that procedure was “unnecessarily suggestive and conducive to irreparable mistaken identification” did not apply retroactively, but court went on to dismiss objection to one-on-one showup identification because, the *Pollard* court said, there was an independent source); *State v. Blevins*, 421 S.W.2d 263, 266-67 (Mo. 1967) (holding no due process error where, before showup identification, police told one of witnesses, “We got the man. Will you come down and identify him.”); *State v. Batchelor*, 418 S.W.2d 929, 933-34 (Mo. 1967) (holding identification did not violate due process despite fact that witness identified defendant in a lineup in which defendant was only woman, appearing with three men); *State v. Hill*, 419 S.W.2d 46, 48-49 (Mo. 1967) (holding there was no due process violation where witness identified defendant in a showup at police station seven days after crime); *State v. Sears*, 155 N.W.2d 332, 334 (Neb. 1967) (holding there was no due process violation where defendant was identified in a showup, sitting in the back seat of a car with two plain clothes officers in front); *Burton v. State*, 437 P.2d 861, 862-63 (Nev. 1968) (holding there was no due process violation where four of the six lineup participants were suspects); *Calbert v. State*, 437 P.2d 628, 628-29 (Nev. 1968) (holding there was no due process violation where officer told witnesses there was a possible suspect in lineup); *State v. Sinclair*, 231 A.2d 565, 575-76 (N.J. 1967) (holding that showup identification in hospital on night of crime did not constitute a due process violation); *State v. Matlack*, 231 A.2d 369, 373 (N.J. 1967) (holding there was no due process violation where all witnesses had identified defendant in showups within a day of crime); *People v. Ballott*, 20 N.Y.2d 600, 605-07 (N.Y. 1967) (remanding for decision on whether there was an independent source despite an unnecessary showup identification); *People v. Brown*, 20 N.Y.2d 238, 242-43 (N.Y. 1967) (holding there was no due process violation even though the witness identified defendants, two black men, while they were alone in room with white police officer, two or three weeks after the crime); *Commonwealth v. Choice*, 235 A.2d 173, 174-75 (Pa. Super. Ct. 1967) (holding identification did violate due process despite fact that witnesses were brought into interrogation room where they observed part of interrogation and then identified defendant); *State v. Nelson*, 156 S.E.2d 341, 343 (S.C. 1967) (finding no due process violation in lineup composed of only three men, conducted two months after the crime); *Graham v. State*, 422 S.W.2d 922, 924-25 (Tex. Crim. App. 1968) (holding there was no due process violation, the Court noted there was nothing irregular about the lineups indicated in record); *Fogg v. Commonwealth*,

unnecessarily suggestive procedures had violated the defendants' due process rights.¹⁴⁶ However, not a single one of the state courts definitively used *Stovall* to suppress an eyewitness's in-court identification or to reverse a lower court judgment on the basis of admission of an unreliable in-court identification; in two of the three opinions holding there had been a due process violation, the courts gave prosecutors the opportunity to prove there was an independent source for the in-court identification,¹⁴⁷ and in the third opinion, the *Slutts* court held the due process violation was harmless error.¹⁴⁸

Moreover, in the vast majority of the state cases, courts found no due process problems whatsoever. Many of these cases involved egregiously flawed identification procedures.¹⁴⁹

Clearly, courts applying *Stovall* in the months before *Simmons* were not using that test to suppress the vast majority of the suggestive identification evidence that came before them. The likelihood of admission of in-court identifications and the rarity of suppression even of any pre-trial identification evidence under *Stovall* belie the popular notion that retention of that due process test would have provided significantly greater protection for defendants in eyewitness cases than *Manson*. The reason both *Manson* and *Stovall*-like formulations have proven inadequate likely

159 S.E.2d 616, 620-21 (Va. 1968) (holding there was no due process violation where witness admitted that Commonwealth's attorney may have said, prior to her identification, "The next man the police bring through that door will be the man in those pictures.").

146. *Caruso*, 68 Cal.2d at 187-188; *Slutts*, 259 Cal. App. 2d at 891-893; *Ballot*, 20 N.Y.2d at 605-07.

147. *Caruso*, 68 Cal. 2d at 189-90; *Ballot*, 20 N.Y.2d at 606-07.

148. *Slutts*, 259 Cal. App. 2d at 892-93.

149. *Batchelor*, 418 S.W.2d at 933, in which the eyewitness identified the defendant in a lineup in which she was the only woman, appearing with three men; *Brown*, 20 N.Y.2d at 242, in which the eyewitness identified the defendants at a showup at which they were the only black men in the room, accompanied by a white police officer, two to three weeks after the crime; *Choice*, 235 A.2d at 177, in which the eyewitness identified the defendant at a showup in an interrogation room, after observing police interrogate the defendant; *Nelson*, 156 S.E.2d at 343, in which the eyewitness identified the defendant in a lineup consisting of only three people, two months after the crime; *Fogg*, 159 S.E.2d at 621, in which the eyewitness admitted the commonwealth's attorney may have said "The next man the police bring through that door will be the man in the pictures," prior to the identification; *Bowman*, 208 So. 2d at 242, in which the eyewitness identified the defendant and his co-defendant at a showup in which they were the only black men in the room; *Harris*, 236 N.E.2d at 282-83, in which a police officer told the eyewitness, "We got the man," before the showup identification; *Blevins*, 421 S.W.2d at 265, in which a police officer told one witness, "We got the man," before the identification procedure; *Hill*, 419 S.W.2d at 48, in which the eyewitness identified the defendant in a showup at the police station seven days after the crime; *Burton*, 437 P.2d at 863, in which four of the six participants in the lineup were suspects; and *Calbert*, 437 P.2d at 628, in which a police officer told witnesses there was a possible suspect in the lineup.

has less to do with their formulations as either discretionary, case-by-case standards or bright-line rules than with the fact that neither test has provided courts with sound scientific guidance about the kinds of procedures most likely to lead to eyewitness misidentification.¹⁵⁰ While the *Stovall* Court acknowledged correctly that showup confrontations had been “widely condemned,”¹⁵¹ it provided no further explanation of the kinds of practices that could potentially render an identification procedure “unnecessarily suggestive.”¹⁵² Of course, the *Manson* Court’s holding was even less in accord with what science has now taught us about human psychology and eyewitness identification in that the *Manson* reliability factors are in direct conflict with science.¹⁵³ Far from helping to shed light on whether there is a reliable identification despite suggestive elements, the three subjective, self-reporting reliability factors are likely to indicate a higher degree of reliability as a result of that very suggestiveness, thus bolstering the worst procedures when courts use the factors to assess the totality of the circumstances.¹⁵⁴

The *Stovall* Court derived a rule-like directive to deal with due process limits on admission of eyewitness evidence, and the *Manson* Court replaced that approach with a standard-like norm for dealing with the problem, but the overarching shortcoming of both decisions is that neither reflects what social scientists have now learned about eyewitness identification.¹⁵⁵ Ultimately, either a per se exclusionary rule for unnecessarily suggestive identification evidence or a totality of the circumstances test for reliability would enhance due process protections for criminal defendants, so long as the directive provides guidelines in accordance with what science has taught us are the most crucial reforms for eyewitness identification procedures. For example, a *Stovall*-like rule could provide effective protections if it stated explicitly that courts should consider unnecessarily suggestive any procedure not conducted double-blind; procedures without contemporaneous witness statements of confidence and of opportunity to view and degree of attention at the time of the crime; procedures in which the fillers are not picked so as to avoid special emphasis on the suspect; and procedures in which police did not warn the eyewitness that the culprit may or may not be present.

150. *Stovall*, 388 U.S. at 301-02; *Manson*, 432 U.S. at 114-16.

151. *Stovall*, 388 U.S. at 302.

152. *Cf. Stovall*, 388 U.S. at 293 (no explanation on what might constitute “unnecessarily suggestive”).

153. *Manson* 432 U.S. at 117.

154. *Id.* at 110-12.

155. *Stovall*, 388 U.S. at 302; *Manson*, 432 U.S. at 110-12.

Likewise, a more *Manson*-like reliability test would still enhance due process protection so long as it included guidelines similar to those stated above for examining the “unnecessary suggestiveness” prong of the test and so long as it eliminated the subjective, self-reporting factors from the reliability analysis and replaced them with more scientifically sound criteria.¹⁵⁶ In other words, whether courts retain a standard-like totality of the circumstances test to determine ultimate admissibility, despite unnecessary suggestiveness, or revert to a per se rule that unnecessarily suggestive evidence must be suppressed, there is great need for a rule-like directive to guide courts in making at least the initial determination of whether the identification procedures were unnecessarily suggestive. Largely because they have not provided this kind of guidance, the few states that have rejected *Manson* have provided inadequate steps toward meaningful reform.¹⁵⁷

Massachusetts, New York, and Wisconsin have reverted to *Stovall*-like rules, with per se exclusion of unnecessarily suggestive pre-trial identification evidence. Utah and Kansas have retained a reliability test but revised the factors in an attempt to conform with recent science.¹⁵⁸ The shortcomings of all of these directives are the allowance for possible admission of in-court identifications, despite flawed pre-trial procedures, in Massachusetts, New York, and Wisconsin, and the lack of guidelines in any of the *Manson*-rejecting states as to what sorts of procedures qualify as being unnecessarily suggestive in the first place.¹⁵⁹

Of course, a *Stovall*-like rule that effectively guides courts as to the most egregious techniques, which must be considered unnecessarily suggestive, would exclude more evidence than a *Manson*-like standard, with a two-part analysis that provides similar guidance as to the “unnecessarily suggestive” prong but then engages in further analysis to determine reliability under the totality of the circumstances. With the former, the examination ends with the first step of determining unnecessary suggestiveness, and the latter allows for the possibility of admission even when the identification procedures are unnecessarily suggestive. Timothy O’Toole and Giovanna Shay have argued for revision of the constitutional standard in a manner similar to the above suggestion for a more effective version of *Stovall*, with per se exclusion of evidence that falls below certain minimum guidelines.¹⁶⁰ O’Toole and Shay compare

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

157. See *supra* text accompanying note 129.

158. See *supra* text accompanying note 129.

159. See *supra* text accompanying note 129.

160. O’Toole & Shay, *supra* note 122, at 136-41.

their proposal to prophylactic rules such as those mandated by *Miranda v. Arizona*,¹⁶¹ and their arguments adhere closely to the framework of the broader rules versus standards debate.¹⁶²

Yet reform of either test to reflect modern science would greatly increase due process protections, and it is not clear the rule-like formulation for determining admissibility would strike the best balance between protecting fundamental rights and ensuring the admission of reliable evidence of guilt. In the end, then, whether the second stage of eyewitness analysis should remain a totality of the circumstances standard or revert to a per se exclusionary rule, there must be a rule-like formulation to guide courts in making the first-stage determination of whether the identification procedures were unnecessarily suggestive. Without that guidance, courts applying both *Stovall* and *Manson* have allowed egregiously unreliable evidence into court.

V. ZAMBIAN LAW

After gaining independence from Britain in 1964, Zambia followed the path of many other post-colonial African countries; encouraging early signs that vigorous democracy might take hold gave way all too quickly to centralized, authoritarian dictatorship.¹⁶³ Within a decade of independence, Zambia's first president, Kenneth Kaunda, had abandoned any pretense of pluralistic democracy, outlawing all political parties but his own under a one-party constitution.¹⁶⁴ Zambia's independence constitution had blended elements of the United States Constitution and the Westminster model, with an executive president and a parliament, but even the independence constitution had set the country up for executive dominance.¹⁶⁵ Although 75 of the 80 members of parliament were elected, five were nominated by the president.¹⁶⁶ Moreover, the president would choose cabinet ministers, who were to serve at his pleasure, from

161. *Id.* at 140.

162. In discussing potential criticisms of their proposal for affirmative minimum guidelines for identification procedures and the alternative of retaining a standard-like balancing test, O'Toole and Shay consider traditional rules and standards arguments about utility, predictability, and the role of the judiciary. *Id.* at 144-47.

163. Muna B. Ndulo & Robert B. Kent, *The Constitutions of Zambia*, 30 ZAMBIA L.J. 1, 11 (1998).

164. *Id.* at 11. For further discussion of the transformation to one-party rule, see B.O. NWABUEZE, PRESIDENTIALISM IN COMMONWEALTH AFRICA 222-25 (1974).

165. Ndulo & Kent, *supra* note 163, at 6.

166. *Id.* at 8.

parliament.¹⁶⁷ This scenario substantially compromised legislative independence.

The judiciary initially featured a constitutionally created Court of Appeal (now called the Supreme Court), with unlimited appellate jurisdiction, and a High Court, with unlimited original jurisdiction.¹⁶⁸ At the bottom of the hierarchy were subordinate courts, overseen by magistrates, and local courts, which primarily administered customary law.¹⁶⁹ Subordinate courts and local courts were authorized by statute rather than by constitutional mandate.¹⁷⁰ While judges of the Court of Appeal and of the High Court could be officially removed only for infirmity or misbehavior, the President largely controlled their initial selection.¹⁷¹ Additionally, the President could appoint sitting judges to non-judicial government positions, thus forcing them to resign from the bench.¹⁷² President Kaunda used this practice to remove judges whose opinions he disfavored, creating an obvious detriment to judicial independence.¹⁷³

Moreover, throughout the 27 years of Kaunda's rule, Zambia remained in an official state of emergency.¹⁷⁴ The state of emergency established the legal pretense for widespread detentions without trial.¹⁷⁵ This practice is a serious encroachment on the ostensibly protected fundamental individual rights enumerated in the constitutions enacted during the period.¹⁷⁶ Even after the reintroduction of multi-party politics with the adoption of Zambia's Third Republican Constitution in 1991, the new President, Frederick Chiluba, continued to declare states of emergency periodically.¹⁷⁷ As documented in the United States Department of State's

167. *Id.* at 7.

168. *Id.* at 9.

169. *Id.*

170. Ndulo & Kent, *supra* note 163, at 9.

171. The President appointed judges to the Court of Appeal and the High Court with advice from a Judicial Service Commission, and the choice of Chief Justice was purely a presidential prerogative. *Id.* The requirement for parliamentary ratification of judges was not introduced until 1991, with the implementation of Zambia's third post-independence constitution. *Id.* at 18.

172. *Id.* at 9.

173. *Id.*

174. John Hatcher, *States of Siege/Emergency in Africa*, 37 J. AFRICAN L. 104, 104 (1993).

175. Ndulo & Kent, *supra* note 163, at 10.

176. *Id.*

177. See, e.g., MSN Encarta, Frederick Chiluba, http://encarta.msn.com/encyclopedia_761584047/Frederick_Chiluba.html (last visited Oct. 20, 2008); BBC News, State of Emergency Extended in Zambia, Jan. 30 1998, <http://news.bbc.co.uk/1/hi/world/africa/51863.stm> (last visited Oct. 20, 2008); BBC News, Zambian President Defends State of Emergency, Jan. 16, 1998, <http://news.bbc.co.uk/1/hi/world/africa/48059.stm> (last visited Oct. 20, 2008).

most recent human rights report on Zambia, the Zambian government continues to disregard prohibitions on arbitrary arrest and detention.¹⁷⁸

Executive dominance in Zambia has been entirely typical of post-independence Commonwealth Africa.¹⁷⁹ This executive supremacy may, to some extent, have been an inevitable consequence of the highly centralized colonial administrations that emerging African states inherited and replaced.¹⁸⁰ Additionally, traditional African attitudes toward authority figures may have contributed to the extreme consolidation of power in a single political leader.¹⁸¹ The ascendancy of African political leaders at the expense of judicial power to enforce individual rights has also been justified as necessary to propel economic development in these countries, which remain amongst the world's poorest.¹⁸² Whatever the reasons and justifications for this state of affairs, it has, without question, prevailed at the expense of fundamental rights of individual citizens.¹⁸³

In addition, widespread government corruption in Zambia threatens the integrity of judicial decisionmaking.¹⁸⁴ Such corruption, largely a symptom

178. U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, 2006 *Zambia*, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES (2007) [hereinafter *Zambia*, 2006], available at <http://www.state.gov/g/drl/rls/hrrpt/2006/78764.htm>.

179. Executive dominance and subjugation of other organs of government were the norm in early post-colonial Commonwealth Africa. Examples include the authoritarian governments of Julius Nyerere in Tanzania, Jomo Kenyatta in Kenya, Kwame Nkrumah in Ghana, Milton Obote (followed by Idi Amin) in Uganda, and the military dictatorships of Nigeria. See generally NWABUEZE, *supra* note 164. While expressing some optimism for the potential for reform spurred by pressure from international donors, Muna Ndulo discusses executive dominance throughout Southern Africa. Muna Ndulo, *Presidentialism in the Southern African States and Constitutional Restraint on Presidential Power*, 26 VT. L. REV. 769, 769-772 (2002).

180. The new African regimes inherited "the full panoply of colonial legislation, orders, ordinances, by-laws, and judicial precedents . . . upon which colonial authority had been based." H. Kwasi Prempeh, *Marbury in Africa: Judicial Review and the Challenge of Constitutionalism in Contemporary Africa*, 80 TUL. L. REV. 1239, 1265-66 (2006). Ultimately, it was "the inherited (subconstitutional) legal order, not the new constitutions, [that] 'offered African elites real power and the bureaucratic machinery with which to exercise it effectively.'" *Id.* at 1266 (quoting H.W.O. Okoth-Ogendo, *Constitutions Without Constitutionalism: Reflections on an African Political Paradox*, CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD 71 (Douglas Greenberg et al. eds., 1993)).

181. NWABUEZE, *supra* note 164, at 106-10.

182. The ideology of development came to be a wholesale justification for the continuation of the authoritarian aspects of colonial regimes and the subversion of rights-based constitutionalism. Prempeh, *supra* note 180, at 1266-68. Writing in 1974, B.O. Nwabueze discussed how the development rationale had been used to suppress individual rights and freedoms and to diminish judicial power, while enhancing the authority of political leaders. NWABUEZE, *supra* note 164, at 354.

183. Prempeh, *supra* note 180, at 1265.

184. U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, COUNTRY

of Zambian poverty, is prevalent at least in part because investigative units lack sufficient personnel to effectively police the problem.¹⁸⁵ As a result, government corruption frequently goes unchecked by the Zambian justice system, and officials regularly demand illegal payments with impunity.¹⁸⁶ While corruption is a problem in all branches of Zambian government, the Zambian judiciary is no exception.¹⁸⁷ For obvious reasons, this situation compromises the reliability of the Zambian justice system.

While both dominance of the executive and threats to judicial independence have certainly endangered the rights of criminal defendants in Zambia, perhaps the biggest threat to the rights of the accused throughout Zambian history has been the deficiency of resources available to criminal defendants. Despite a Constitutional right to a defense attorney,¹⁸⁸ the astounding dearth of lawyers available to represent criminal defendants renders that right virtually meaningless. According to the United States Department of State, Zambia's legal aid department employed only 14 lawyers to represent indigent defendants throughout the entire country in 2005.¹⁸⁹ Additionally, there are only 584 registered lawyers in private practice in all of Zambia.¹⁹⁰ These lawyers must conduct the entirety of the legal work for a nation of 11.5 million,¹⁹¹ and the vast majority of them are not representing the largely indigent criminal defendants brought before the courts.¹⁹² Although a statute passed in 2000 established a legal aid fund to induce private practitioners to represent indigent defendants, the success of the act depended on voluntary affiliation from private attorneys.¹⁹³ Up to this point, despite the

REPORTS ON HUMAN RIGHTS PRACTICES, 2007 Zambia, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES (2008) [hereinafter Zambia, 2007], available at <http://www.state.gov/g/drl/rls/hrrpt/2007/100511.htm>.

185. *Id.*

186. *Id.*

187. *Id.*

188. ZAMBIA CONST. (Constitution Act 1991) art. 18.

189. U.S. DEPARTMENT OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES 2005, *Zambia* (2006) [hereinafter Zambia, 2005], available at <http://www.state.gov/g/drl/rls/hrrpt/2005/61599.htm>. In 2000, the legal aid department employed only nine lawyers. U.S. DEPARTMENT OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES 2000, *Zambia* (2001), available at <http://www.state.gov/g/drl/rls/hrrpt/2000/af/index.cfm?docid=849>.

190. Interview with Edward Sakala, Executive Sec'y of the Law Ass'n of Zambia, in Lusaka, Zambia (Jan. 28, 2008).

191. *Zambia*, 2006, *supra* note 178.

192. *See Zambia*, 2005, *supra* note 189.

193. Writing in 2000, Alfred Chanda expressed pessimism about the viability of the legal aid fund. Chanda noted the fund's success depended not only on a large number of private practitioners

constitutional guarantee, few criminal defendants receive legal assistance.¹⁹⁴ Moreover, the roster of available lawyers shrinks daily as the country's devastating HIV epidemic continually claims the lives of more and more Zambians.¹⁹⁵

According to the most recent data, there are now nearly 15,000 people in Zambian prisons.¹⁹⁶ More than a third of these prisoners have not yet had trials.¹⁹⁷ Of the prisoners who have been convicted of crimes, the right to appeal is rendered meaningless by the lack of access to qualified defense lawyers.¹⁹⁸ With only a handful of attorneys regularly representing the thousands of people in Zambian prisons, effective justice for anyone accused or convicted of a crime in Zambia is a truly remote possibility.¹⁹⁹

Threats to the rights of criminal defendants due to lack of access to legal representation are compounded by the inadequacy of legal training for Subordinate Court magistrates.²⁰⁰ These magistrates oversee a large percentage of criminal trials in Zambia, yet very few of them are lawyers.²⁰¹ Additionally, though most magistrates are required to undergo legal training at the National Institute of Public Administration, the vast majority do not have university degrees.²⁰² The fact that most Zambian magistrates are not legal professionals increases the likelihood that those presiding over criminal trials in Zambia lack the analytical sophistication necessary to sort through complex legal issues surrounding the cases that come before them.

signing up, but also on adequate funding, which historically had been unavailable to any government institution other than the presidency. Alfred Chanda, *Gaps in the Law and Policy in the Implementation of the Convention on the Rights of the Child in Zambia*, 32 ZAMBIA L.J. 1, 15 (2000).

194. Zambia, 2005, *supra* note 189.

195. According to statistics from the U.S. Agency for International Development, 16% of Zambian adults are HIV positive. USAID/Zambia, HIV/AIDS Multisector, <http://www.usaid.gov/zm/hiv/hiv.htm> (last visited on Oct. 20, 2008).

196. Zambia, 2006, *supra* note 178.

197. According to the Zambia Human Rights Commission, there were 14,427 inmates in Zambian prisons in mid-2005. Of these, 4,938 were still awaiting trial. Zambia, 2005, *supra* note 189.

198. *Id.*

199. *Id.*

200. Marie Chêne, *Supporting Zambian Judicial Capacity to Handle Corruption Case*, 10 (Robin Hodess, Transparency International 2008), <http://www.u4.no/helpdesk/query.cfm?id=169> (last visited Oct. 20, 2008).

201. Interview with Ford M. Chombo, Deputy Registrar of the Supreme Court of Zambia, in Lusaka, Zambia (Dec. 28, 2007). In 2007, only 12 of 136 magistrates in Zambia were lawyers. Zambia, 2007, *supra* note 184.

202. Interview with Ford M. Chombo, *supra* note 201.

The perils posed by Zambia's extreme lack of legal resources certainly heighten the already serious risk posed by the inherent unreliability of eyewitness memory. Without the real possibility of effective legal representation, the likelihood that courts will be made aware of potential flaws in identification techniques is extremely low. Nonetheless, in the rare cases in which criminal defendants and appellants have had lawyers asserting their rights in court, the Zambian Supreme Court has been remarkably apt at recognizing the probability of error, and, in many cases, has reversed convictions at least in part because of faulty eyewitness evidence.²⁰³

The Supreme Court has, in fact, provided significant protection for defendants by requiring corroborative evidence in cases where eyewitness identification evidence is flawed.²⁰⁴ While Zambian courts generally determine whether eyewitness evidence is too weak to stand alone based on the totality of the circumstances,²⁰⁵ the Supreme Court has, in rule-like fashion, held broadly that in the event of unfair administration of a lineup, there is a *per se* requirement for corroborating evidence for a conviction to stand.²⁰⁶ Moreover, the Court has identified some basic circumstances, in which a lineup will be considered unfair.²⁰⁷

This alone makes Zambia's choice of legal directive for eyewitness evidence more effective, in many ways, than the pure totality of the

203. *See, e.g.*, *Lubinda v. The People* (1988) Z.L.R. 110 (Zambia) (overturning conviction where police failed to conduct a lineup without explanation, where cause of death of victim was not definitively established, and where description of watch worn by victim did not match the watch produced in court); *Lukolongo & Others v. The People* (1986) Z.L.R. 115 (Zambia) (reversing convictions of two of four appellants where appellants stood out in lineup because they were not wearing shoes and where confessions were not voluntary); *Situna v. The People* (1982) Z.L.R. 115 (Zambia); *Chimbo & Others v. The People* (1982) Z.L.R. 20 (Zambia) (overturning convictions where police made one appellant sit on a bench with other appellants and only one other man and asked eyewitness to identify the appellant, where confessions may have been involuntary, and where prosecution witness may have had motive to lie); *Crate v. The People* (1975) Z.L.R. 232 (Zambia) (reversing conviction where trial court failed to consider the possibility of honest mistake by the single eyewitness identifying the appellant); *Bwalya v. The People* (1975) Z.L.R. 227 (Zambia) (overturning conviction where only credible evidence against appellant was the uncorroborated identification of a single eyewitness); *Tiki & Others v. The People* (1975) Z.L.R. 194 (Zambia) (overturning conviction of one appellant where one prosecution witness failed to pick him from a lineup and only other evidence was the uncorroborated spontaneous identification of another witness).

204. *Lukolongo* (1986) Z.L.R. at 131.

205. *The People v. Phiri & Siagutu* (1980) Z.L.R. 249, 257 (Zambia).

206. *Lukolongo* (1986) Z.L.R. at 128.

207. *Id.*

circumstances test in *Manson*.²⁰⁸ By requiring corroboration in all cases where police conduct a lineup unfairly, Zambia has provided a real incentive for law enforcement personnel to construct and administer lineups without prejudicing suspects. In contrast, the U.S. Supreme Court has not identified any situation that courts must consider per se unnecessarily suggestive, triggering reliability analysis under the totality of the circumstances test. As a result, courts in the United States, without any guidance on the issue, have frequently held egregiously suggestive procedures not to be unnecessarily suggestive.²⁰⁹ Moreover, even in cases where courts applying *Manson* do find a procedure unnecessarily suggestive and reach reliability analysis, three of the five reliability factors remain in direct conflict with scientific knowledge about eyewitness memory.²¹⁰

Furthermore, though Zambian courts also look at the totality of the circumstances to determine the strength of eyewitness evidence in cases not involving an unfairly conducted lineup, the Zambian totality analysis may be somewhat more trustworthy than that used by courts in the United States because Zambian courts do not rely on all the misleading *Manson* factors. Rather, the only factor from *Manson* that Zambian courts seem to rely on is the opportunity to view.²¹¹ Though this factor, like confidence and degree of attention, may be skewed by suggestive procedures, it is also subject to at least some degree of objective verifiability.

Even so, the Zambian approach leaves too much room for error. Zambia's eyewitness law remains insufficient for three reasons. First, although the Supreme Court requires per se corroboration for unfair lineups, Zambian courts have not yet recognized many of the most important lessons of modern eyewitness science.²¹² As a result, courts are left in the dark on the full range of factors that make identification evidence undependable. Much like the *Stovall* rule,²¹³ then, Zambia's eyewitness law is somewhat ineffective despite its formulation in rule-like

208. *Manson v. Brathwaite*, 97 S. Ct. 2243 (1977).

209. *Id.* at 135.

210. Gary L. Wells & Deah S. Quinlivan, *Suggestive Eyewitness Identification Procedures and the Supreme Court's Reliability Test in Light of Eyewitness Science 30 Years Later*, LAW & HUM. BEHAV. (2008) (in press).

211. *See, e.g., Chinyama & Manda v. The People*, S.C.Z. Appeal No. 157 of 1995 ("The sole question which the court had to answer was whether the opportunity available to the witness [to view the perpetrator] was good or not.").

212. There is no record in Zambian case law of any judicial notice of any of the social science on eyewitness identification. Zambian courts have, however, identified a variety of situations that render an identification procedure unfair. *See infra* text accompanying notes 233-248.

213. *Stovall v. Denno*, 87 S. Ct. 1967 (1967).

terms, because it is not fully informed by scientific evidence on best practices for eyewitness identification. Second, though the requirement of corroborative substantiation provides some protection for defendants facing flimsy eyewitness evidence, the courts do not require suppression of the faulty evidence.²¹⁴ Rather, the flawed identification evidence remains admissible and is bolstered by any corroborating evidence.²¹⁵ This allows for the inclusion of unreliable data in support of a conviction, a serious impediment to obtaining accurate results in criminal trials.

Finally, in Zambia, the corroborating evidence may itself be the fruit of procedures violating the defendant's rights. In a 1976 decision,²¹⁶ the Zambian Supreme Court rejected the exclusionary rule of *Mapp v. Ohio*.²¹⁷ The Court held that physical evidence obtained in violation of the constitutional right to privacy is admissible because, despite its improper acquisition, it is relevant.²¹⁸ The result is that Zambian defendants may be convicted by a combination of unreliable eyewitness identification evidence and illegally obtained physical evidence. Clearly, the odds remain overwhelmingly against the accused.

A closer examination of a sample of Zambian eyewitness cases will help to illuminate the contours of that system's strengths as well as its ultimate inadequacy and need for reform. In 1986, in *Charles Lukolongo and Others v. The People*,²¹⁹ the Supreme Court articulated two principles that define Zambia's current approach to eyewitness law. In *Lukolongo*, the four appellants had been convicted of aggravated robbery and murder of two security guards in the course of robbing offices of the National Breweries and the Forest Department.²²⁰ They were all sentenced to death.²²¹ On appeal to the Supreme Court, the appellants' lawyer claimed the lineup at which three of the four appellants were identified was unfair because the appellants were the only participants not wearing shoes.²²² This, according to counsel, was a deliberate attempt by the police to make it easy for witnesses to identify the appellants.²²³ While Justice Chomba noted that, in fact, two of the remaining lineup participants were also

214. See, e.g., *Kabala & Masefu v. The People* (1981) Z.L.R. 102, 106 (Zambia).

215. *Id.*

216. *Liswaniso v. The People* (1976) Z.L.R. 277.

217. *Mapp v. Ohio*, 367 U.S. 643, 655-57 (1961).

218. *Liswaniso* (1976) Z.L.R. at 287.

219. *Lukolongo & Others v. The People* (1986) Z.L.R. 115.

220. *Id.* at 116.

221. *Id.*

222. *Id.* at 128.

223. *Id.*

shoeless, the Court held, nonetheless, that the shoelessness of the appellants rendered the lineup unfair.²²⁴

The Court then made two sweeping rulings with the potential to provide powerful protection against flawed eyewitness evidence. Relying in part on British precedent, the Court held that corroborating evidence is necessary to rule out the possibility of mistaken identification in all cases in which eyewitness evidence is of poor quality.²²⁵ This statement by the *Lukolongo* Court was of great importance for Zambian law.

Though previously the Court had frequently required corroborative evidence in eyewitness cases, especially in cases where only a single eyewitness had made an identification,²²⁶ Zambian courts had never before categorically stated that there must be additional evidence corroborating guilt to secure a conviction every time eyewitness evidence is flawed. In fact, the High Court, quoting a British treatise in a 1973 decision, had summed up the prior state of Zambian eyewitness law, saying, “[t]here is no rule of law or practice requiring corroboration of an identifying witness . . . It has, however, become the practice to warn juries to examine all evidence of visual identification with care, and unreliable evidence of identification may lead to a conviction being quashed . . .”²²⁷ From *Lukolongo* onward, however, the Zambian courts have consistently held that in cases where judges determine that eyewitness evidence is of poor quality, there can be no conviction without corroborating evidence.²²⁸

While the *Lukolongo* Court provided no specific guidance on how judges should generally assess the quality of eyewitness evidence, previous decisions reveal that Zambian courts should usually evaluate the strength of such evidence based on the totality of the circumstances.²²⁹ Seven years before *Lukolongo*, the High Court, considering eyewitness identification evidence in another robbery case, held that “[o]f course the adequacy of evidence of personal identification always depends on all the circumstances surrounding each case which must be decided on its

224. *Lukolongo* (1986) Z.L.R. at 115.

225. *Id.* at 131 (citing *R v. Turnbull & Another*, 1976 All E.R. 549).

226. *See, e.g.*, *Mkandawire & Others v. The People* (1978) Z.L.R. 46, 53 (Zambia); *Tiki & Others v. The People* (1974) Z.L.R. 194, 195 (Zambia); *Bwalya v. The People* (1975) Z.L.R. 227, 230 (Zambia).

227. *Zaloumis & Hill v. The People* (1973) Z.L.R. 67, 70 (Zambia) (quoting John Frederick Archbold et al., *Pleading, Evidence and Practice in Criminal Cases* ¶ 1009 (Sweet & Maxwell 37th ed. 1969)).

228. *Mtonga & Kaonga v. The People* (2000) Z.L.R. (Zambia); *Kalunga v. The People* (1988) Z.L.R. 90, 91 (Zambia).

229. *People v. Phiri & Siagutu* (1980) Z.L.R. 249, 257 (Zambia).

merits.”²³⁰ Using similar language, in considering the heightened potential for error in cases of single-eyewitness identifications, the Supreme Court confirmed in *Mvuma Kambanja Situna v. The People* that the operative norm for evaluating eyewitness evidence is the totality of the circumstances, stating that, “[i]f, in all the circumstances, the opportunity for a positive and reliable identification is poor, then it follows that the possibility of an honest mistake has not been ruled out unless there is some other connecting link between the accused and the offence which would render a mistaken identification too much of a coincidence.”²³¹ In other cases, the Court has, with greater precision, focused its analysis of the “opportunity for a positive and reliable identification” on the opportunity of the witness to view the perpetrator at the time of the crime.²³²

Although the *Lukolongo* Court’s unconditional statement that eyewitness identification evidence of poor quality always requires corroboration certainly marked a milestone for Zambian eyewitness law, the holding represented merely a clear-cut articulation of what had already been common practice in Zambian courts. For, as documented above, Zambian courts before *Lukolongo* had often required corroborative proof of guilt in cases where eyewitness evidence was weak. Yet the *Lukolongo* Court also issued an unquestionably revolutionary directive on unsound

230. *Id.*

231. *Situna v. The People* (1982) Z.L.R. 115, 117 (Zambia).

232. *See, e.g.,* Ngati, Chishimba & Chanda v. The People (2003) Z.L.R. (Zambia) (considering a case of single-witness identification, Justice Chriwa noted that the trial judge had been satisfied the eyewitness “had ample opportunity to observe the assailants and that her evidence was reliable . . .”); *Manongo v. The People* (1981) Z.L.R. 152, 155 (Zambia) (considering a case where two eyewitnesses had identified the appellant in a lineup, and one of the eyewitnesses had mistakenly identified someone else in a lineup, Chief Justice Silungwe wrote that the trial court had found both eyewitnesses to be truthful and reliable, emphasizing that the robbery “occurred during bright daylight [and] lasted for about ten minutes, during which time the witnesses said they had a good opportunity to observe and recognise the assailants . . .”); *Silungwe & Banda v. The People* (1981) Z.L.R. 286, 290-91 (Zambia) (assessing a robbery appeal in which an eyewitness had been unable to pick appellants from a lineup until police ordered appellants to stretch out their hands so the eyewitness could identify them from injuries, the Court considered the witness’s “opportunity to observe his assailants” at the time of the crime along with the evidence of the tainted lineup and agreed with the trial judge’s conclusion that “the crux of the matter is whether [the eyewitness] had ample time to observe the two people adequately for purposes of visual recognition to rule out any possibility of mistaken identification.”); *Mushala & Others v. The People* (1978) Z.L.R. 58, 62 (Zambia) (ruling that two lineups were unreliable, in part because police had shown the witnesses photos of the suspects before the lineups, the Court noted defense counsel’s argument that the identification evidence was unreliable as a whole because an eyewitness had seen the perpetrator in circumstances “so momentary and fleeting that [the witness] could not have had sufficient opportunity to observe the driver in the vehicle . . . and therefore the danger of an honest mistake could not be ruled out.”).

identification procedures. After deciding the absence of shoes on the appellants rendered the lineup unfair, the Court ruled that evidence from unfairly conducted lineups can never, without corroborating evidence, be the basis for a conviction.²³³ Ultimately, because of the flawed lineup, and because the government's offered corroborating evidence for two of the four appellants was also weak, the *Lukolongo* Court reversed the convictions of those appellants.²³⁴

Though the *Lukolongo* opinion did not specify the full range of techniques that might create unfairness in a lineup procedure, Justice Chomba did discuss basic practices Zambian courts had frowned upon.²³⁵ Addressing the situation in *Lukolongo* itself, the Court condemned as unfair any lineup in which police allow suspects to appear "manifestly and conspicuously different from the others as regards dress."²³⁶ Justice Chomba also remarked that police should not allow eyewitnesses to see suspects at the police station before conducting a lineup.²³⁷

Judges in previous cases discussed additional circumstances that current courts might use as guidelines on what constitutes an unfair lineup. In *Toko v. The People*, decided eleven years before *Lukolongo*, the Supreme Court held that it is improper for a witness who has made an identification at a lineup to have contact with a witness who has not yet seen the lineup.²³⁸ Interestingly, the *Toko* Court seemed on the verge of creating even stronger protection than the *Lukolongo* Court, as Justice Silungwe wrote that police doing anything to prevent a lineup from being "proper, fair and independent" could, "in a proper case, nullify the identification."²³⁹

Since *Toko*, the Supreme Court has, in one case, quoted this language with approval.²⁴⁰ But the Court did not definitively state what would constitute a "proper case" or precisely what it meant by "nullify," and it has never relied on *Toko* to actually quash eyewitness identification evidence, as opposed to merely requiring corroboration.²⁴¹ Nonetheless, in *Mtonga and Kaonga v. The People* the Court's decision to require mere corroboration instead of "nullifying" the identification evidence seemed to turn on its finding that, despite police showing photos of the appellants

233. *Lukolongo & Others v. The People* (1986) Z.L.R. 115, 128 (Zambia).

234. *Id.* at 131-32.

235. *Id.* at 130.

236. *Id.* at 128 (citing *Chisha v. The People* (1968) Z.L.R. 26 (Zambia)).

237. *Id.* (citing *Musonda v. The People* (1968) Z.L.R. 98 (Zambia)).

238. *Toko v. The People* (1975) Z.L.R. 196, 198 (Zambia).

239. *Id.*

240. *Mtonga & Kaonga v. The People* (2000) Z.L.R. (Zambia).

241. *Id.*

to eyewitnesses before a lineup, there was ample opportunity for the eyewitnesses to view the perpetrators at the time of the crime.²⁴² The *Mtonga and Kaonga* opinion provides potential for development of a two-tiered test. In such a test, unfair lineup procedures would automatically require corroboration, and, if there was also a poor opportunity to view the perpetrators at the time of the crime, the lineup evidence would be discarded altogether.²⁴³

This would certainly be stronger than *Manson*, for unfair procedures would automatically trigger a need for corroborating evidence. There would also be potential for exclusion of the identification evidence if the opportunity to view was poor. Nevertheless, the *Mtonga and Kaonga* Court did not make that potential rule explicit, and the Court has not revisited the issue since. As a result, though there have been few published Zambian opinions dealing with eyewitness law since *Lukolongo*, *Lukolongo* seems to remain the operative rule. In addition to the unfair lineup procedures described in *Lukolongo* and *Toko*, the High Court, quoting British commentary with approval, has said police should not describe the suspect to the eyewitness and should not ask the eyewitness, “‘Is that the man?’”²⁴⁴ Finally, the High Court has stated that there is a right to have a lawyer present at a lineup.²⁴⁵ However, the significance of this right is dubious at best, given the extreme scarcity of legal aid lawyers in Zambia, and given that there is no published case in which a Zambian court has considered the effect of a denial of the right.

One other situation merits brief consideration. In *Manongo v. The People*, Justice Silungwe, writing for the Supreme Court, said that failure to hold a lineup at all may, “in a suitable case result in acquittal.”²⁴⁶ In *Manongo*, the failure to hold a lineup did not, however, lead to reversal of the conviction because an eyewitness who had previously known the appellant had also made an identification, thus corroborating the showup identifications by the victims.²⁴⁷ Thus, the *Lukolongo* rule also seems applicable to the failure to hold a lineup at all.²⁴⁸

242. *Id.*

243. *Id.*

244. *The People v. Kamwandi* (1972) Z.L.R. 131, 136 (Zambia) (quoting HALSBURY’S LAWS OF ENGLAND, 3d ed., vol. 10, 439-40 (1952)) (Need to check Halsbury’s to confirm accuracy of quote and date of publication of 3d ed. Have not been able to get a copy of this).

245. *The People v. Chimbala* (1973) Z.L.R. 118, 124 (Zambia).

246. *Manongo v. The People* (1981) Z.L.R. 152, 156 (Zambia).

247. *Id.*

248. In one case after *Manongo*, the Supreme Court reversed a murder conviction where an eyewitness made a courtroom identification, but police had failed to conduct a lineup, there was no reliable corroborating evidence, and, ultimately the prosecution had failed to establish even the

The Zambian Supreme Court's holding in *Lukolongo*, like the *Stovall* rule, has great potential to enhance the accuracy of results in criminal trials by deterring law enforcement from using procedures that increase the likelihood of mistaken identification. Unlike *Manson*, the rule creates an automatic consequence to procedural unfairness: if police conduct an unfair lineup, evidence from the tainted procedure cannot support conviction without corroboration. This alone likely makes *Lukolongo* a more powerful deterrent against suggestive police procedures than *Manson*, and perhaps *Stovall*, given that the prohibition on "unfairness" in a lineup provides more clarity to judges than the ambiguous determination of "unnecessary suggestiveness."²⁴⁹ Courts in the United States, under both *Stovall* and *Manson*, have demonstrated their desperate need for guidance on the issue by regularly finding that horribly unfair procedures are not unnecessarily suggestive.²⁵⁰ On the other hand, the Zambian Supreme Court has not shied away from finding suggestive procedures "unfair" and has required corroboration in such circumstances.²⁵¹

Yet, as summarized above, *Lukolongo* remains insufficient to protect Zambian defendants against unreliable eyewitness evidence for three significant reasons. First, despite its formulation as a strict rule, *Lukolongo* suffers from the same deficiency as *Stovall*. Without sufficient guidance on the full array of practices that may render a lineup unfair, courts are left to make the determination on their own. In turn, courts may, as in *Stovall*, be unlikely to recognize the unfairness of many unsound identification techniques when confronted with them. In fact, there is no record in Zambian case law of any judicial awareness of even the basic best practices the AP/LS subcommittee recommended.

At the very least, Zambian judges should be aware of the importance of blind lineup administration, of obtaining contemporaneous statements of eyewitness confidence and opportunity to view at the time of the crime, of informing eyewitnesses of the possibility of perpetrator absence, and of best practices for selecting lineup fillers in ways that do not make the suspect stand out. Zambian lawyers should make efforts to inform the courts of what eyewitness science has revealed over the course of the last generation. To initiate this process, the first necessary step will be to educate lawyers, equipping them with the knowledge they need to ensure

cause of death of the apparent victim. See *Lubinda v. The People* (1988) Z.L.R. 110, 112 (Zambia).

249. *Lukolongo & Others v. The People* (1986) Z.L.R. 115, 128-29 (Zambia).

250. *Marson v. Brathwaite*, 432 U.S. 98, 117 (1977); *Stovall v. Denno*, 388 U.S. 293, 301 (1967).

251. *Mtonga & Kaonga v. The People* (2000) Z.L.R. (Zambia) (requiring corroboration where witnesses saw photos of appellant shortly before lineup); *Lukolongo* (1986) Z.L.R. at 128.

courts take notice of that science. Once Zambian courts do so, it could significantly strengthen the *Lukolongo* judgment.

A second reason *Lukolongo* offers inadequate security against tainted eyewitness evidence is that, even if police subjected a defendant to an unfair lineup, the effect is not to exclude the flawed evidence from consideration. Instead, corroborating evidence is required to support the tainted eyewitness identification, which can still contribute to conviction. The inherent nature of a requirement for supporting evidence clearly suggests that this is so. Moreover, Zambian courts have stated decisively that such flawed evidence may still play a part in proving guilt. In *Kabala and Masefu v. The People*, the Supreme Court, deciding appeals of robbery convictions, noted that police who placed appellants with visible facial injuries in a lineup in which other participants had no such injuries provided a clue to the witnesses as to the identity of the suspects.²⁵² Nonetheless, the Court held that, “this does not necessarily mean that the identification, as such, was worthless; all that it means is that, standing alone, that evidence is not sufficient to connect the appellants with the offence committed . . .”²⁵³ Again, in *Kenneth Mtonga and Victor Kaonga v. The People*, Justice Ngulube wrote for the Supreme Court that police showing pictures of the appellants to eyewitnesses before a lineup would not “nullify” the identification.²⁵⁴ Rather, all that was required was additional evidence to support the lineup evidence.²⁵⁵ In contrast, in the United States where courts relying on *Manson* find eyewitness evidence unreliable, the flawed evidence is rendered inadmissible and cannot contribute to a conviction.²⁵⁶ *Mtonga and Kaonga* seems to provide potential for development of a directive to exclude tainted eyewitness evidence when the lineup was unfair and there was a poor opportunity to view the perpetrators during the crime, but this remains unclear.²⁵⁷

Finally, *Lukolongo*'s potential to protect defendants facing tainted eyewitness evidence is diminished because the evidence used to corroborate flawed identifications may itself be the fruit of illegal police procedures. In *Liswaniso v. The People*,²⁵⁸ a 1976 decision, the Zambian

252. *Kabala & Masefu v. The People* (1981) Z.L.R. 102, 106 (Zambia).

253. *Id.* at 107.

254. *Mtonga and Kaonga* (2000) Z.L.R. (Zambia).

255. *Id.*

256. The U.S. Supreme Court cleared up confusion over whether due process analysis required separate tests for admissibility of in-court and out-of-court identification evidence in 1972 in *Niel v. Biggers*, when it declared the same due process standard would apply to in-court and out-of-court identification evidence. *Neil v. Biggers*, 409 U.S. 188, 198 (1972).

257. *Mtonga and Kaonga* (2000) Z.L.R. (Zambia).

258. *Liswaniso v. The People* (1976) Z.L.R. 277 (Zambia).

Supreme Court rejected *Mapp v. Ohio*, in which the U.S. Supreme Court formulated the exclusionary rule for evidence obtained in violation of the Fourth Amendment.²⁵⁹ In *Liswaniso*, the appellant, an assistant police inspector, had been convicted on a corruption charge for receiving a bribe to release an impounded car to its owner.²⁶⁰ However, the detective on the case obtained physical evidence, the bribe money, by falsifying a search warrant, swearing he believed the money to be in the appellant's house at a time when the detective himself had the money, prior to initiating the pre-arranged bribe.²⁶¹

Article 19 of Zambia's constitution at the time, which used identical language to the current constitution's Article 17,²⁶² stated that "[e]xcept with his own consent, a person shall not be subjected to the search of his person or his property or the entry by others onto his premises."²⁶³ Of course, this provision was subject to limitations including the allowance for searches conducted with valid warrants.²⁶⁴ However, in *Liswaniso*, the Zambian Court held that even illegally obtained evidence would be admissible because such evidence is "a fact (i.e. true) regardless of whether or not it violates a provision of the Constitution or some other law."²⁶⁵

The *Liswaniso* Court's holding extended beyond evidence procured through illegal search warrants to include all illegally obtained physical evidence, including evidence secured as a result of an involuntary confession.²⁶⁶ This broad ruling severely compromised the rights of criminal defendants in Zambia, where, even before *Liswaniso*, there had been a sordid history of human rights abuse. In fact, in several Zambian eyewitness cases Courts found credible evidence of coerced confessions,²⁶⁷ and physical evidence has often played a role in corroborating faulty eyewitness evidence.²⁶⁸

259. *Mapp* extended the judgment of *Weeks v. United States*, 232 U.S. 383, 393 (1914), which had applied the exclusionary rule to federal courts, to all state courts as well. *Mapp v. Ohio*, 367 U.S. 643, 654-55 (1961).

260. *Liswaniso v. The People* (1976) Z.L.R. 277, 279 (Zambia).

261. *Id.*

262. ZAMBIA CONST. (Constitution Act No. 18 of 1996) art. 17.

263. ZAMBIA CONST. (Constitution Act of 1973) art. 19.

264. *Liswaniso* (1976) Z.L.R. at 280.

265. *Id.* at 287.

266. *Id.*

267. *Lukolongo & Others v. The People* (1986) Z.L.R. 115, 124 (Zambia); *Chimbo & Others v. The People* (1982) Z.L.R. 20, 24 (Zambia); *Mkandawire & Others v. the People* (1978) Z.L.R. 46, 52 (Zambia).

268. *Kalonga v. The People* (1988) Z.L.R. 90, 91 (Zambia); *Lukolongo* (1986) Z.L.R. at 129

According to the Supreme Court in *Liswaniso*, the only remedy for defendants facing illegally obtained evidence would be criminal or civil sanctions for the offending police officer.²⁶⁹ Yet the possibility of private civil actions, at least, remains remote for average criminal defendants, especially given the severe shortage of lawyers to try such cases. In the end, *Liswaniso* reinforced a culture of law enforcement disrespect for human rights, increasing the likelihood of police being able to engage in abusive investigation techniques with impunity. The decision imperils the integrity of trials with flawed eyewitness evidence and of Zambia's entire criminal justice system.

VI. CONCLUSION

Ultimately, courts in the United States and in Zambia must reform their respective approaches to eyewitness evidence. Yet, as argued above, it is unclear in the United States whether retention of a standard-like reliability test or reversion to a per se exclusionary rule would best strike the balance between deterring unreliable police procedures and admitting relevant proof of guilt. Even if courts in the United States do retain a reliability test to determine admissibility, the *Manson* reliability factors must be revised so as not to conflict with science. Additionally, even if United States courts continue to rely on a totality of the circumstances standard, they must have more rule-like guidance at least in the initial determination of what constitutes an unnecessarily suggestive procedure.

Analysis of the Zambian situation must, however, lead to a different conclusion. Given the history of threats to judicial independence and of human rights abuse in Zambia, Zambian courts must exercise extraordinary vigilance to ensure police do not engage in practices likely to corrupt the results of criminal trials. As Justice Scalia noted, rules can both constrain and embolden the judiciary.²⁷⁰ Use of bright-line rules in eyewitness law may make it easier for Zambian judges to withstand external pressure and more difficult for corruption to impede the reliability of judicial decisionmaking.

The lack of adequate legal training for the majority of Zambian magistrates also makes judicial discretion on a case by case basis problematic. Direct application of background values through flexible

(Zambia); *Mukwakwa v. The People* (1978) Z.L.R. 347, 349 (Zambia); *Mkandawire and Others v. The People* (1978) Z.L.R. at 49, 54 (Zambia).

269. *Liswaniso*, 1978 Z.L.R. at 286 (Zambia).

270. Scalia, *supra* note 8, at 1179-80.

standards requires the analytical wherewithal to sort through intricate variations in factual situations and a deep understanding of how those variations may affect the values at stake. Without university-level legal training, many of the Zambian magistrates who oversee criminal cases may lack the competence to make such complex judgments reliably. Finally, the near certainty that any given defendant will not have meaningful legal representation makes the need for clear-cut rules prohibiting unfair eyewitness identification practices and providing consequences for non-compliance all the more dire. With the criminal process so drastically stacked against the accused, provision for automatic repercussions for procedural impropriety in the conduct of eyewitness procedures has the potential to prevent admission of unreliable evidence to a far greater extent than a standard-like directive.

As documented by authors like B.O. Nwabueze, Muna Ndulo, and H. Kwasi Prempeh, many of the problems described above persist throughout Commonwealth Africa. Thus, the recommendation for strict rules in eyewitness law in Zambia is likely equally salient regionally. Additionally, to the extent that developing countries throughout the world share crises regarding judicial independence, human rights abuse, and paucity of legal resources, rules are also likely superior in this area of the law throughout the developing world.

In Zambia, courts have already demonstrated a willingness to embrace strict rules in the realm of eyewitness identification law. The current rule in *Lukolongo* could be significantly strengthened, however, by providing courts with detailed guidance on the range of factors that make lineups unfair and unreliable and by converting the corroboration requirement into a rule that evidence from unfair lineups must be quashed entirely. This will take time, but the goal is entirely within reach. If Zambian courts take notice of the science of eyewitness identification, implementation of reforms such as those the AP/LS subcommittee recommended would be relatively straightforward. None of these reforms requires serious expenditure, and all could be taught easily to law enforcement personnel. However, the first necessary step in the process will be to educate Zambian lawyers and judges on the science American lawyers are already using in efforts to effect reform in the United States.

In assessing the value of extending this Article's analysis beyond the specific context of eyewitness law in the United States and Zambia, it is necessary to heed Duncan Kennedy's warning about the difficulty of generalizing recommendations on the form legal directives should take. Even so, it is possible at least to extrapolate from the Zambian situation to surmise that rules-based decisionmaking in the area of eyewitness law may be suitable in other developing countries, many of which share problems

like threats to judicial independence, human rights abuse, and scarcity of legal resources. Moreover, these problems may create an atmosphere in which bright-line rules can effectuate societal values better than standards in other areas of the law as well. Nonetheless, this Article does not attempt to identify those areas specifically. My hope, however, is that in addition to shedding light on the need for reform of eyewitness law, the Article may initiate a broader discourse on the issue of legal forms throughout the developing world.

