JUDICIAL GATEKEEPING OF SUSPECT EVIDENCE: DUE PROCESS AND EVIDENTIARY RULES IN THE AGE OF INNOCENCE

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I. INTRODUCTION

The law of evidence is largely about preventing the admission of unreliable or otherwise unfair evidence.[1] This goal underlies many of the rules, including, for example, those governing hearsay,[2] expert opinions,[3] and "best evidence."[4]

The Constitution, too, is concerned about fair trials, including admission of reliable evidence and enhancing the truth-seeking function of trials—especially so in criminal cases.[5] While the Constitution certainly protects other values as well, the various rights protected by the Fifth and Sixth Amendments in particular can be understood as largely focused on establishing mechanisms for ensuring reliability of the trial evidence and the trial process.

The growing number of exonerations over the past two-and-a-half decades, however, casts new doubts on the effectiveness of those rules and mechanisms for guarding against unreliable evidence.[6] At the very least, new understandings about wrongful convictions warrant re-examining the constitutional and evidentiary rules that have developed over time based upon assumptions about reliability and the effectiveness of those rules and trial processes. With the new and growing body of wrongful convictions, we now have an empirical basis for assessing those

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[1] *See* D. Michael Risinger, *Searching for Truth in the American Law of Evidence and Proof*, 47 GA. L. REV. 801, 802 (2013) ("The ideology of the trial process puts discovery of truth at center stage."); Sandra Guerra Thompson, Daubert *Gatekeeping for Eyewitness Identifications*, 65 SMU L. REV. 593, 596 (2012) (noting that excluding unreliable evidence is the "principal role of the rules of evidence"). The rules also of course address, although to a lesser extent, nonreliability concerns, such as protecting some privacy interests and the confidentiality of certain relationships through a variety of privileges.

[2] FED. R. EVID. 801–04.

[3] FED. R. EVID. 702.

[4] FED. R. EVID. 1001–05.

[5] Akhil Reed Amar, *Against Exclusion (Except To Protect Truth or Prevent Privacy Violations)*, 20 HARV. J.L. & PUB. POL'Y 457, 460 (1997) ("The structure of the Constitution basically advocates truthseeking procedures . . . .").

[6] Since 1989 there have been more than 300 exonerations based on postconviction DNA testing alone. THE INNOCENCE PROJECT, http://www.innocenceproject.org. The National Registry of Exonerations, recently launched jointly by the University of Michigan Law School and the Northwestern University School of Law, now lists more than 1,000 exonerations since 1989 based on all types of new evidence. THE NAT'L REGISTRY OF EXONERATIONS, http://www.law.umich.edu/special/exoneration/Pages/about.aspx.

rules and processes. Scholars have begun that inquiry in earnest. Some courts, especially at the state level, are also beginning to apply the lessons from the wrongful conviction cases when evaluating rules of evidence and procedure. At the federal constitutional level, however, the Supreme Court is oddly moving evidence doctrine in ways that appear out of synch with the lessons of the wrongful conviction cases.

This Article examines the rules—constitutional and otherwise—that govern the admissibility of potentially unreliable or untrue evidence. And it does so in light of the lessons from the wrongful conviction cases, joining the growing efforts to answer the call from scholars like Larry Laudan, who lament the dearth of "systematic study into the question of whether existing rules could be changed to enhance the likelihood that true verdicts would ensue"—an inquiry that he calls "legal epistemology."[7] This Article uses the new insights from the emerging body of cases where the rules failed to reach true verdicts to engage that inquiry into legal epistemology.

Drawing on the emerging empirical data, the Article concludes that the system can and should be adjusted to do a better job of guarding against undue reliance on flawed evidence. Taking error as a given,[8] the Article first considers the role of reliability screening as a constitutional concern. The challenge in constructing a coherent constitutional doctrine is finding a workable limiting principle. The wrongful convictions data provide an answer to that conundrum by identifying what might be called "suspect evidentiary categories"—a few types of evidence

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[7] LARRY LAUDAN, TRUTH, ERROR, AND CRIMINAL LAW: AN ESSAY IN LEGAL EPISTEMOLOGY 2–3 (2006).

[8] The scope of the wrongful convictions problem has been examined elsewhere by others. *See, e.g.*, Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523 *passim* (2005); Samuel R. Gross & Barbara O'Brien, *Frequency and Predictors of False Conviction: Why We Know So Little, and New Data on Capital Cases passim* (Univ. of Mich. Law Sch. Public Law Research Paper No. 93 & Mich. State Univ. Coll. of Law Legal Studies Research Paper No. 05-14 2007), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=996629; D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. CRIM. L. & CRIMINOLOGY 761 *passim* (2007); Marvin Zalman, *Qualitatively Estimating the Incidence of Wrongful Convictions*, 48 No. 2 CRIM. L. BULL. ART. 1 *passim* (2012).

that are both recurring features of wrongful convictions and not otherwise susceptible to correction through traditional trial mechanisms that, therefore, can and should be subjected to heightened scrutiny for reliability under the Due Process Clause. Four types of evidence, in particular, meet those criteria: eyewitness identifications, confessions, forensic science, and jailhouse informant or snitch testimony. Each is a leading contributor to wrongful convictions, yet each has proven stubbornly resistant to the corrective mechanisms of the adversary trial, in part because factfinders tend to misapprehend the risks inherent in each.[9] Recognizing their suspect status as uniquely dangerous evidence permits meaningful judicial gatekeeping under the Due Process Clause without unduly usurping the role of the jury.

Recognizing, however, that the Supreme Court is moving away from using constitutional doctrine to screen for reliability, this Article then considers other mechanisms for better ensuring reliable evidence and accurate trial outcomes. First, current trends in Supreme Court jurisprudence suggest an available alternative in the due process framework that focuses upstream of the trial process on regulating the police and prosecutorial conduct that generates some of the most suspect trial evidence. Increasingly, the Supreme Court is reshaping due process doctrine to address not the substance of the evidence used in trials, but the procedures used to produce the evidence—a trend that the late Bill Stuntz has lamented as part of a broader movement driving doctrine away from addressing substantive justice to a more formalistic focus on process.[10] In the context addressed here, this

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[9] *See* DAVID A. HARRIS, FAILED EVIDENCE: WHY LAW ENFORCEMENT RESISTS SCIENCE *passim* (2012) (discussing three of these types of evidence—eyewitness identifications, confessions, and forensic science evidence—and analyzing why current processes have been ineffectual in addressing their flaws).

[10] In Stuntz's last major work, he argues, among other things, for more direct focus on substantive justice, rather than the increasing focus on the "vast network of procedural rules the Supreme Court has crafted since the early 1960s." WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 302 (2011). Consistent with Stuntz's approach, my focus on the *substance* of the evidence is more directly related to substantive justice than is the Court's increasing focus on rules of procedure that only indirectly address the justness and accuracy of trial outcomes.

shift is reflected in reduced constitutional scrutiny of the reliability of evidence and more concern about the conduct (or misconduct) of police in generating evidence. If that is indeed to be the thrust of future due process analysis, then, this Article suggests, that scrutiny of police conduct can and should be employed in a more rigorous way to encourage best practices and discourage evidence-collection and production methods that run a high risk of producing false or misleading evidence.

Second, the Article assesses new applications of nonconstitutional evidence law that offer promise for filling the void in reliability review of such suspect types of evidence. With the growing recognition that these suspect categories of evidence are responsible for significant factual error, courts are beginning to rely on existing rules of evidence to screen for reliability. Most prominent among these rules are those that require witnesses to have personal knowledge of the matters about which they testify,[11] rules requiring that lay opinion be "both rationally based on the witness's perceptions and helpful to the trier of fact,"[12] and rules that permit courts to exclude relevant evidence if its probative value is significantly outweighed by its risk of unfair prejudice.[13] Re-invigorated application of these rules can be effective vehicles for screening out unreliable "suspect" evidence.

Finally, the Article considers remedies in addition to exclusion that might aid in the enterprise of mitigating the harm from flawed evidence. Principal among these are broader use of expert witnesses and jury instructions to educate factfinders about the counterintuitive but scientifically established qualities of these categories of suspect evidence. And because courts have proven reluctant to apply reliability-based exclusionary rules rigorously, the Article concludes by exploring options for partial exclusion—excluding the most objectionable parts of the evidence while permitting other parts—as an option that courts might be more likely to actually enforce.

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[11] *E.g.*, FED. R. EVID. 602.
[12] *E.g.*, FED. R. EVID. 701.
[13] *E.g.*, FED. R. EVID. 403.

II. EVIDENTIARY RELIABILITY AS A CONSTITUTIONAL CONCERN

The constitutional design of trials, including the constitutional rules that regulate the admission of evidence, is intended to protect against unreliable evidence and inaccurate factual judgments.[14] The Confrontation Clause, for example, is designed to provide a procedural mechanism for excluding evidence against an accused whose accuracy or reliability cannot be tested by trial processes—evidence not subject to confrontation and cross-examination. Likewise, one view of the Fifth Amendment privilege against self-incrimination is that it too is designed (at least in part) to guard against unreliable evidence that trial procedures cannot adequately protect. As Akhil Reed Amar puts it:

> What is the reason for the Fifth Amendment rule of exclusion, then? The reason is reliability. One basic concern is that when words are coerced from suspects—especially in a pre-*Gideon* world—the suspects might not have the advice of a lawyer. If suspects were forced to take the stand, clever prosecutors could make them look guilty even if they are not.[15]

Indeed, reliability makes its way directly into constitutional evidence law occasionally. Some cases, particularly those involving eyewitness identification evidence, suggest that unreliable evidence violates due process.[16]

But more often, and increasingly so in recent years, reliability *as an evidentiary matter* is viewed as a concern of extra-

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[14] As the Supreme Court has put it, "[t]he basic purpose of a trial is the determination of truth." Tehan v. United States *ex rel.* Shott, 382 U.S. 406, 416 (1966).

[15] Amar, *supra* note 5, at 464; *see also* Akhil Reed Amar & Renée B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857, 898 (1995) (noting that the privilege "serves the goal of reliability").

[16] *See, e.g.*, Neil v. Biggers, 409 U.S. 188, 198–99 (1972); Manson v. Brathwaite, 432 U.S. 98, 110–11 (1977).

constitutional dimension.[17] Constitutional criminal procedure by and large attempts to regulate the fairness of criminal trials through a variety of *procedural* rights: from the Sixth Amendment rights to counsel, to confront one's accusers, and to jury trials, and the requirement for unanimous jury verdicts; to the Fifth Amendment right against self-incrimination; to the Fourteenth Amendment due process rights to present a defense and to require proof beyond a reasonable doubt.[18] Issues related to the reliability of evidence, by contrast, are generally deemed outside the scope of constitutional regulation and are instead left to state law and the rules of evidence.[19]

Indeed, despite the Constitution's apparent concern for guarding against unreliable evidence and false convictions, reliability has rarely been invoked in constitutional doctrine as an

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[17] Alex Stein observes that the Supreme Court has interpreted the Constitution as imposing exacting demands on rules of procedure (which protect a litigant's participation rights at trial—the rights to contest and present evidence) and rules of decision (essentially burdens of proof), but that it imposes almost no constraints on evidential admissibility. *See generally* Alex Stein, *Constitutional Evidence Law*, 61 VAND. L. REV. 65 (2008). He notes that the Constitution imposes only very weak and ambiguous constraints on the admissibility of evidence:

> The standard for examining the constitutionality of an evidential or procedural rule under [the Due Process] Clause was whether the rule violated "the very essence of a scheme of ordered liberty" or "offend[ed] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."

Id. at 86 (second alteration in original) (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937) and Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)). This, he argues, is anomalous, as evidentiary rules (which address what he terms "informational risks") can affect the way the system skews risks of error, just as much as rules of procedure (which address "participatory risks") and burdens of proof ("decisional risks"). *See id*. at 68 ("Constitutional law protects people against decisional and participatory risks, but not against informational risks. This policy is inconsistent. If constitutional protections against decisional and participatory risks shield people from wrongful deprivation of their liberties and properties, why allow lawmakers and judges to chip away at these protections by distributing informational risks as they deem fit?").

[18] While all of these constitutional provisions are designed to enhance the fairness of criminal trials, some, such as the requirements for unanimous verdicts and proof beyond a reasonable doubt, are more accurately understood as not so much focusing on fairness in the sense of ensuring accuracy of verdicts but rather on fairly allocating the risk of error between the state and the accused. *See* LAUDAN, *supra* note 7, at 29 (noting that the intended result of these provisions is to distribute errors in such a way).

[19] Brandon L. Garrett, *Eyewitnesses and Exclusion*, 65 VAND. L. REV. 451, 452 (2012).

evidentiary matter. In those few occasions when judicial screening of evidence for reliability has been incorporated into constitutional doctrine, it has typically been considered as a basis for *excusing* a constitutional violation while *admitting* otherwise improperly developed evidence rather than as a basis for *excluding* evidence as unreliable.

For example, when the Supreme Court first tried to articulate a coherent Confrontation Clause doctrine in 1980 in *Ohio v. Roberts*,[20] it used reliability as a tool for saving unconfronted evidence. The Court reasoned that a literal reading of the Confrontation Clause—which would bar presentation of *all* hearsay and thus entirely negate all exceptions to the hearsay rule in criminal cases—would be "too extreme."[21] Accordingly, the Court created a test that permitted admission of hearsay (despite its literal violation of the right to confrontation), so long as the government could establish: first, that the witness was unavailable, and second, that the evidence was sufficiently reliable—that is, the statement bore adequate "indicia of reliability."[22] A judicial assessment of reliability thus led to admission of otherwise-barred evidence. But, conversely, a judicial assessment that otherwise-admissible evidence was *un*reliable was not alone a basis for excluding the evidence.

When the Court famously revisited this Confrontation Clause doctrine in *Crawford v. Washington* twenty-four years later, it backed off from the judicial role in evaluating reliability and reframed Confrontation Clause doctrine in a more categorical

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[20] 448 U.S. 56 (1980).

[21] *Id.* at 63. In what was perhaps a thoughtless throwback to old modes of Confrontation Clause analysis, the Court subsequently in *Michigan v. Bryant* reintroduced, at least in passing, the notion that reliability is a direct constitutional concern under the Confrontation Clause. 131 S. Ct. 1143, 1174 (2011) (Scalia, J., dissenting) ("[T]oday's decision is . . . a gross distortion of the law—a revisionist narrative in which reliability continues to guide our Confrontation Clause jurisprudence. . . ."). Subsequent Confrontation Clause decisions, however, have—more faithfully to *Crawford v. Washington*—made no further references to reliability as a decisional factor under the Confrontation Clause.

[22] *Roberts*, 448 U.S. at 66. Sufficient reliability under *Roberts* could be established either by showing that the statement fell "within a firmly rooted hearsay exception" or otherwise bore "particularized guarantees of trustworthiness." *Id.*

way.[23] Instead of assessing reliability, courts applying the Confrontation Clause now look to whether the out-of-court statement was "testimonial" in nature. If it is testimonial and not subject to cross-examination, the evidence is inadmissible, no matter how reliable a judge might deem it to be.[24] If the evidence is not testimonial, the Confrontation Clause poses no barrier to admission, no matter how unreliable it might be.[25] Subsequently, in *Whorton v. Bockting*, the Court acknowledged just how far this new approach moved the Confrontation Clause from its focus on reliability.[26] The Court remarked that the rule it developed in *Crawford* has only a "limited" relationship "to the accuracy of the factfinding process," and that it is "unclear whether *Crawford*, on the whole, decreased or increased the number of unreliable out-of-court statements that may be admitted in criminal trials."[27]

The context in which reliability review has played the most prominent role in constitutional doctrine has been in the way the Court assesses eyewitness identification evidence. In a series of decisions beginning in the 1960s and running through the 1980s, the Court held that the Due Process Clause imposes reliability-based constraints on the admissibility of eyewitness identification evidence. Beginning with *Stovall v. Denno* in 1967, the Court held that a criminal defendant could raise a constitutional evidentiary challenge to eyewitness evidence if the identification procedure involved "was so unnecessarily suggestive and conducive to irreparable mistaken identification that [the accused] was denied due process of law."[28]

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[23] 541 U.S. 36, 68–69 (2004).

[24] *Id.*

[25] *See* Davis v. Washington, 547 U.S. 813, 823–29 (2006) (describing the perimeter of the Confrontation Clause).

[26] 549 U.S. 406, 417–21 (2007).

[27] *Id.* at 419–20.

[28] 388 U.S. 293, 302 (1967); *see also* Simmons v. United States, 390 U.S. 377, 384 (1968) ("[C]onvictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on [a due process] ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."); Foster v. California, 394 U.S. 440, 443 (1969) (finding a due process violation because the identification procedures were so suggestive that they made the identifications "all but inevitable").

Subsequently, in *Neil v. Biggers*[29] and *Manson v. Brathwaite*,[30] the Court declared that reliability is the key to the due process concern. In *Biggers*, the Court stated plainly: "It is the likelihood of misidentification which violates a defendant's right to due process."[31] And in *Manson* the Court put it even more directly: "[R]eliability is the linchpin in determining the admissibility of identification testimony."[32]

But here again, the Court used reliability as an evidentiary standard for *admitting* otherwise-improper evidence, not as a freestanding basis for *excluding* unreliable evidence. *Biggers* and *Manson* created a two-step due process analysis. Drawing on the formulation first developed in *Stovall*, the Court declared that the first step is to determine if the identification was the product of an impermissibly or unnecessarily suggestive procedure.[33] But fearing that that standard would exclude too much evidence, the Court in *Biggers* and *Manson* added a second step: even if the identification procedure was unnecessarily or impermissibly suggestive, the identification evidence would be admissible nonetheless if the prosecution could show that, despite the suggestiveness, the identification was sufficiently reliable.[34] Thus, the *Biggers–Manson* due process test is one that largely uses reliability to excuse flawed evidence. Regardless, *Biggers* and *Manson* did appear to endorse, for a time at least, more directly than any other cases, the notion that evidential reliability itself is a due process concern.

In this regard, the eyewitness identification cases stood in rather stark contrast to the Court's confession and self-incrimination cases. In the self-incrimination context, courts had long recognized that part of the constitutional rationale for excluding coerced confessions was, as Akhil Reed Amar has

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[29] 409 U.S. 188 (1972).
[30] 432 U.S. 98 (1977).
[31] *Biggers*, 409 U.S. at 198.
[32] *Manson*, 432 U.S. at 114.
[33] *Biggers*, 409 U.S. at 198–99.
[34] *Manson*, 432 U.S. at 112.

suggested,[35] a concern that coerced confessions might be unreliable.[36] In *Brown v. Mississippi* in 1936, the Supreme Court reversed the murder convictions of three black tenant farmers that were based on confessions obtained after they were whipped, beaten, and tortured.[37] The Court suggested that involuntary confessions violate fundamental fairness because they are inherently untrustworthy.[38] Subsequently, however, the Court declared that reliability is not the central due process concern raised by involuntary confessions. In *Lisenba v. California*, addressing an allegedly coerced confession, the Court declared: "The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false."[39] The Court thus shifted its due process doctrine from a focus on excluding unreliable evidence to a goal of deterring oppressive and unfair police interrogation methods.

This shift was completed when the Court decided *Colorado v. Connelly* in 1986.[40] In that case, Connelly voluntarily approached police and confessed to having murdered a woman.[41] Authorities later learned that Connelly was a chronic schizophrenic who believed he was following the "voice of God" when he told police he had killed someone[42]—which raised significant doubts about both the voluntariness and reliability of his confession. Nonetheless, the Court ruled that the confession was voluntary in a constitutional sense and hence admissible because police had done nothing coercive or improper to induce the confession.[43] The Court made explicit the constitutional insignificance of evidential

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[35] *See* Amar, *supra* note 5, at 464 ("What is the reason for Fifth Amendment rule of exclusion, then? The reason is reliability.").

[36] *See* Richard A. Leo et al., *Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 WIS. L. REV. 479, 493–94 (discussing reliability as one reason for excluding coerced confessions).

[37] 297 U.S. 278, 282, 287 (1936).

[38] *Id.* at 283 (describing the proceedings and confessions as a "farce" and "spurious").

[39] 314 U.S. 219, 236 (1941).

[40] 479 U.S. 157 (1986).

[41] *Id.* at 160.

[42] *Id.* at 161.

[43] *Id.* at 167.

reliability: "A statement rendered by one in the condition of respondent might be proved to be quite unreliable, but this is a matter to be governed by the evidentiary laws of the forum . . . and not by the Due Process Clause of the Fourteenth Amendment."[44] The Due Process Clause, according to the Court, acts as a check on government misconduct or overreaching in obtaining or developing evidence, but not as an evidentiary test of the reliability of the evidence.[45]

Connelly thus set up, for a time, a seeming conflict in due process doctrine. For confessions, under *Connelly*, reliability is irrelevant as a due process concern. But for eyewitness identifications under *Biggers* and *Manson*, the Court had expressly declared that reliability is the "linchpin" of the due process analysis.[46]

That is how things stood until the Supreme Court decided *Perry v. New Hampshire* in 2012,[47] the first eyewitness identification case it had considered in the twenty-five years since *Manson*. In *Perry*, an eyewitness identified the defendant under suggestive circumstances, but the circumstances were not created by the police. The witness instead voluntarily walked to the window of her apartment and pointed to Perry, who was standing on the street below being questioned by other officers.[48] Seizing on *Manson*'s focus on reliability as the "linchpin" of the due process analysis, Perry argued that the absence of police overreaching or misconduct was irrelevant; use of the identification, he argued, would violate due process because the identification was made under suggestive circumstances that undermined reliability and created "a very substantial likelihood of irreparable misidentification."[49] Perry's argument was bolstered by the record of DNA exonerations over the previous twenty-plus years. These cases identified eyewitness error as the leading contributor to false

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[44] *Id.*

[45] *See* Keith A. Findley, *Innocence Protection in the Appellate Process*, 93 MARQ. L. REV. 591, 604 (2009) ("After *Connelly*, police coercion is all that matters . . . .").

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

[47] 132 S. Ct. 716 (2012).

[48] *Id.* at 722.

[49] *Id.* at 724 (quoting Simmons v. United States, 390 U.S. 377, 384 (1968)).

convictions—a feature present in more than 75% of DNA-exoneration cases.[50]

The Court nonetheless rejected Perry's argument, holding that neither suggestiveness nor the possibility of unreliable identification evidence it produces is of any constitutional moment unless the police engaged in inappropriate conduct to create the suggestiveness.[51] The Court explained:

> Our decisions . . . turn on the presence of state action and aim to deter police from rigging identification procedures, for example, at a lineup, showup, or photograph array. When no improper law enforcement activity is involved, we hold, it suffices to test reliability through the rights and opportunities generally designed for that purpose, notably, the presence of counsel at postindictment lineups, vigorous cross-examination, protective rules of evidence, and jury instructions on both the fallibility of eyewitness identification and the requirement that guilt be proved beyond a reasonable doubt.[52]

Hence, the Court concluded, "The Constitution . . . protects a defendant against a conviction based on evidence of questionable reliability, not by prohibiting introduction of the evidence, but by affording the defendant means to persuade the jury that the evidence should be discounted as unworthy of credit."[53] Apart from the Constitution's specific procedural protections, the Court held, "state and federal statutes and rules ordinarily govern the

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[50] *Id.* at 738 (Sotomayor, J., dissenting); BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 8–9 (2011) (stating 76% of wrongful convictions included eyewitness misidentification); JIM DWYER, PETER NEUFELD & BARRY SCHECK, ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION, AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED 246 (2000) (stating 84% of one sample of wrongful convictions involved eyewitness misidentification).

[51] *Perry*, 132 S. Ct. at 730.

[52] *Id.* at 721.

[53] *Id.* at 723.

admissibility of evidence, and juries are assigned the task of determining the reliability of the evidence presented at trial."[54]

The retreat from evidentiary reliability as a constitutional principle thus appears complete.[55] Even in the context of perhaps the most notoriously unreliable type of evidence—statements of jailhouse informants who offer evidence against an accused in hopes of obtaining benefits in their own cases (snitch testimony)—the Court has recently declared that the Due Process Clause imposes no reliability constraints. In *Kansas v. Ventris* the Court rejected a contention, raised by an *amicus* supporting Ventris, that jailhouse snitches "are so inherently unreliable" that the Court should craft a broad exclusionary rule for uncorroborated snitch statements.[56] Justice Scalia, writing for the Court, sounded a familiar theme in rejecting that proposal: "Our legal system, however, is built on the premise that it is the province of the jury to weigh the credibility of competing witnesses, and we have long purported to avoid 'establish[ing] this Court as a rule-making organ for the promulgation of state rules of criminal procedure.' "[57]

Little room appears to be left for seeking due process screening of evidence for reliability. Just *why* the Court mounted such a retreat from reliability as a constitutional concern, especially as studies of wrongful convictions drew attention to the pernicious and corrupting nature of certain types of unreliable evidence, requires some examination.

III. UNDERSTANDING CONSTITUTIONAL INDIFFERENCE TO EVIDENTIARY RELIABILITY

In part, this shift reflects the Court's resistance, as suggested by Justice Scalia's comment in *Ventris*, to constitutional doctrine that pushes the Court to become too directly involved in regulating state trial rules of admissibility and effectively turns the Constitution

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[54] *Id*.

[55] Note, however, that the Court did not disavow the *Biggers–Manson* use of reliability to rehabilitate otherwise-flawed eyewitness evidence. Nevertheless, the Court did make it clear that unreliability alone is of no constitutional consequence.

[56] Kansas v. Ventris, 556 U.S. 586, 594 n.* (2009).

[57] *Id*. (quoting Spencer v. Texas, 385 U.S. 554, 564 (1967)).

into a code of evidence. The Court has been reluctant to interpose direct judicial assessments of reliability as a constitutional requirement since historically the rules of evidence have been primarily a local or state concern. Justice Scalia expressed this concern forcefully in *Crawford*:

> Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined. . . .
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> The [overruled] *Roberts* test allows a jury to hear evidence untested by the adversary process, based on a mere judicial determination of reliability. It thus replaces the constitutionally prescribed method of assessing reliability with a wholly foreign one.[58]

Note, though, that Justice Scalia's argument is really that judicial assessments of reliability cannot be used to *admit* evidence in a way that conflicts with a constitutionally prescribed process. But those constitutional provisions do not bar judicial screening for reliability *in addition* to the specific constitutionally prescribed procedures—whether as a matter of local law or evidentiary rules *or* by application of other constitutional concerns, such as due process concerns with the fairness of admitting patently unreliable evidence. After all, those specific constitutional provisions were borne of a concern that government officials engaged in the process of developing, producing, or evaluating evidence against accused individuals "could not always be trusted to safeguard the rights of

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[58] Crawford v. Washington, 541 U.S. 36, 61–62 (2004).

the people."[59] That concern argues against constitutional rules for admitting evidence against the accused based on judicial assessments that it is reliable, but it says little about screening *out* unreliable evidence introduced by the government to inculpate the accused. Nonetheless, the underlying theme—that the Court desires to avoid too much regulation of criminal procedure and evidence—explains much about the Court's general resistance to reliability review.

In a related way, the reluctance to require as a constitutional matter any judicial screening of even notoriously unreliable evidence also stems from a fear that there would be no stopping point. The Court has frequently observed that all sorts of arguably unreliable evidence are admitted at trials, with the understanding that it is for the jury to assess what weight, if any, to give the evidence. The Court in *Perry*, for example, suggested that testimony about pretrial identifications did not deserve more rigorous scrutiny than other forms of potentially unreliable evidence.[60] The Court reasoned that all in-court identifications involve some elements of suggestion, but that such "potential unreliability" does not warrant heightened due process scrutiny.[61] If courts are required to screen eyewitness identifications for reliability, why not also other types of unreliable evidence, such as testimony from biased witnesses? Simply put, how can courts distinguish in a principled way some types of unreliable evidence from others?

The retreat from reliability screening also reflects a fundamental concern that courts simply cannot do a good job of assessing reliability. Assessing reliability raises normative and values questions—about matters like credibility and states of mind—that do not lend themselves well to modes of judicial analysis. Indeed, when the Court has tried to establish standards for assessing reliability, it has failed miserably. To the extent the Court requires assessment of eyewitness evidence for reliability, for example, the standards the Court established have been

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[59] *Id.* at 67.
[60] Perry v. New Hampshire, 132 S. Ct. 716, 728 (2012).
[61] *Id.*

roundly criticized as ineffectual and indeed contradicted by the social science research about the factors that are actually related to eyewitness reliability.[62] And in the Confrontation Clause context, one prominent argument Justice Scalia made for departing from the reliability-based standard in *Ohio v. Roberts* was that the reliability standard was so nebulous that it had led to wildly disparate results. Justice Scalia expressed this concern in *Crawford* when he wrote: "[W]e do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of 'reliability.' "[63] (Ironically, the Court apparently sees no similar problem with leaving the reliability of trial evidence to "the vagaries of the rules of evidence.") Even more to the point, Justice Scalia disparaged any notion that judges should screen for reliability because "[r]eliability is an amorphous, if not entirely subjective, concept."[64]

As much of this discussion suggests, concerns about basic constitutional structures are also at work. Arguments for constitutional reliability-based restrictions of evidence join the "free proof" debate. Advocates of free proof (or at least "freer proof")[65] contend that significant judicial prescreening of evidence

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[62] *Biggers* and *Manson* identify five factors that courts should consider when assessing eyewitness reliability: (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 at the confrontation; and (5) the time between the crime and the confrontation. Neal v. Biggers, 409 U.S. 188, 199–200 (1972); Manson v. Brathwaite, 432 U.S. 98, 114 (1977). These factors have been criticized as deeply flawed because they are inconsistent with the scientific research (for example, certainty is not a good gauge of accuracy), and because most of the factors are self-reported by the witness and hence subject to the very suggestiveness they are designed to offset. For good discussions of these flaws, see 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, 112 (2006), and Gary L. Wells & Deah S. Quinlivan, *Suggestive Eyewitness Identification Procedures and the Supreme Court's Reliability Test in Light of Eyewitness Science: 30 Years Later*, 33 LAW & HUM. BEHAV. 1, 9–18 (2009).

[63] *Crawford*, 541 U.S. at 61.

[64] *Id.* at 63.

[65] Michael Risinger describes "free proof" "in its strongest sense, [as] the complete absence of any rules of exclusion, and in a weaker sense, the absence of all rules of exclusion

for reliability undermines the "constitutional status of the jury."[66] As Robert Burns puts it, the notion that judges should screen evidence for reliability is premised on "a paternalistic judgment regarding the supposed limitations of jurors to assign evidence its appropriate weight."[67] Burns quotes Margaret A. Berger's assertion that

> [e]xcluding evidence on the ground that jurors are too ignorant or emotional to evaluate it properly may have been appropriate in England at a time when a rigid class society created a wide gap between royal judges and commoner juries, but it is inconsistent with the realities of our modern American informed society and the responsibilities of independent thought in a working society.[68]

IV. A CONSTITUTIONAL BASIS FOR JUDICIAL RELIABILITY SCREENING

Despite these concerns, however, good arguments can be made that the Constitution does have a role to play in limiting unreliable evidence. Each of the arguments against constitutional reliability norms can be answered. Indeed, while the Supreme Court has not been very responsive to the lessons from the wrongful conviction cases, scholars have taken note and have urged more exacting review of unreliable evidence. Whether as a matter of constitutional or evidence law, scholars have increasingly called for

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except irrelevance." D. Michael Risinger, *Inquiry, Relevance, Rules of Exclusion, and Evidentiary Reform*, 75 BROOK. L. REV. 1349, 1351 n.5 (2010).

[66] Robert P. Burns, *A Short Meditation on Some Remaining Issues in Evidence Law*, 38 SETON HALL L. REV. 1435, 1435 (2008); *see also* AKHIL AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 81–110 (1998) (discussing the centrality of the jury to the animating principles underlying all of the Bill of Rights).

[67] Robert P. Burns, *The Withering Away of Evidence Law: Notes on Theory and Practice*, 47 GA. L. REV. 691, 695 (2013).

[68] *Id.* at 742–43 (quoting 1 MARGARET A. BERGER ET AL., EVIDENCE, at iii (1994), *as reproduced in* United States v. Shonubi, 895 F. Supp. 460, 493 (E.D.N.Y. 1995), *vacated* 103 F.3d 1085 (2d Cir. 1997)).

reliability-based standards for admitting particular types of problematic evidence.[69]

A. HEIGHTENED REVIEW OF SUSPECT EVIDENTIARY CATEGORIES

While the rationales for avoiding constitutional tests for evidentiary reliability raise legitimate concerns, those concerns need not require us to accept flawed evidence and resulting wrongful convictions of the innocent without any substantive reliability screening. There are ways to distinguish this problematic evidence from other types of evidence, providing a principled way to screen some evidence for reliability but not others. First, courts could consider the lessons from the wrongful convictions cases and ask: what are the types of evidence that contribute most problematically to unjust convictions? Second, courts could look to those types of evidence where common sense is often wrong and correct assessment of reliability is counterintuitive—where specialized knowledge is required to properly assess reliability.[70] And the two categories happen, not coincidentally, to overlap. The "canonical" list of problematic types of evidence that most frequently contribute to wrongful convictions *and* that are not addressed effectively through traditional adversary testing includes eyewitness identifications, confessions, jailhouse snitch or informant testimony, and unvalidated forensic

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[69] Brandon Garrett, for example, advocates for "an accuracy-oriented approach to regulation of criminal trial evidence ." He argues that jurisdictions "should task judges with evaluating reliability of [eyewitness identification] evidence at hearings pretrial based on a social science framework . . ., and then at trial, if identification evidence is admitted, providing detailed instructions to educate jurors." Garrett, *supra* note 19, at 457; *see also* Findley, *supra* note 45, at 623–24 (arguing for meaningful judicial factual review of cases involving evidence likely to lead to wrongful convictions); *cf.* D. Michael Risinger, *Unsafe Verdicts: The Need for Reformed Standards for the Trial and Review of Factual Innocence Claims*, 41 HOUS. L. REV. 1281, 1311–12 (2004) (arguing for streamlined trial procedures whereby all proffers of evidence relevant to defendant's claim of innocence would be closely screened for reliability).

[70] "Eyewitness evidence poses a unique problem in that jurors see a seemingly powerful but suggestive in-court identification, while standard tools like cross-examination cannot show how the very memory of an eyewitness may have been altered by unsound identification procedures. . . ." Garrett, *supra* note 19, at 454.

science techniques and resulting evidence.[71] Robust social science research addressing each problematic type of evidence can now be incorporated into judicial decisionmaking so that the tests for screening this evidence for reliability can be made more effective and less "amorphous" and "subjective" than Justice Scalia fears about reliability screening in general.

Understanding the unique features of these particular types of evidence permits a constitutional jurisprudence that is coherent and limited, answering many of the objections to using the Due Process Clause to screen for reliability. These few types of evidence—that are both common contributors to wrongful convictions and are not adequately addressed through the adversary trial process—can be conceived of as "suspect evidentiary categories" that warrant heightened judicial attention. The doctrine can thus borrow loosely from Equal Protection Clause analysis. Just as the Court found a way to apply meaningful equal protection review in situations where it was most needed, without overly encroaching upon areas traditionally reserved for the political process, the Court can find a way to apply meaningful reliability review where it is most needed, without usurping the rules of evidence or the role of the jury. Under the Equal Protection Clause, the Court created the notion of "suspect classifications" to justify heightened judicial review of legislatively drawn distinctions affecting "discrete and insular minorities" for which the ordinary political process provides inadequate protection.[72] Similarly, recognizing "suspect evidentiary categories" can justify heightened scrutiny of the discrete types of evidence that most frequently produce wrongful convictions and for which the ordinary adversary trial processes provide inadequate safeguards.

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[71] Samuel R. Gross, *Convicting the Innocent*, 4 ANN. REV. L. & SOC. SCI. 173, 186 (2008).

[72] The "suspect classifications" doctrine was first introduced by the Supreme Court in the famous "Footnote Four" in *United States v. Carolene Products Co.*, 304 U.S. 144, 152–53 n.4 (1938). In that footnote, Justice Stone suggested that there were reasons to apply a heightened standard of judicial review to legislation aimed at discrete and insular minorities who lack the normal protections of the political process.

B. SUSPECT EVIDENCE AND FREE PROOF

A limited but significant exclusionary rule for unreliable evidence of this type meets most of the objections posed by free proof advocates. Some of the most influential free proofers recognize the need for some exclusionary rules in the interest of adjudicative accuracy. As Robert Burns puts it, "[b]ecause the applications of exclusionary rules are invariably categorical and always rob the jury of all the probative value that the excluded evidence has, I would invoke them *only if we are convinced that the powerful critical devices of the adversary trial are inadequate to appropriately weigh the evidence*."[73]

Burns recognizes that expert evidence is an example of the type of evidence warranting a judicial gatekeeping role.[74] He writes that "evaluating at least some expert evidence is indeed one of those areas where the devices of the trial are often unable to overcome the bureaucratic and market constraints that surround it."[75] Forensic science error is now known to be a leading cause of wrongful convictions. In February 2009, the National Academy of Sciences shook up the forensic science world when it issued its game-changing report finding that, with the exception of DNA analysis, almost all of the individualization forensic sciences lack a scientific foundation, a solid research base, or a demonstrated capacity to reliably link an individual with a particular piece of crime scene evidence.[76] Yet because forensic evidence appears "sciency," advocates have done a poor job challenging it, courts have only weakly screened it, and juries generally lack the capacity to evaluate it critically. And as we will see, the other

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[73] Burns, *supra* note 66, at 1437 (emphasis added).

[74] *Id.* at 1441.

[75] *Id.*

[76] NAT'L RES. COUNCIL, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD 4 (2009), *available at* http://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf ("[I]n some cases, substantive information and testimony based on faulty forensic science analyses may have contributed to wrongful convictions of innocent people. This fact has demonstrated the potential danger of giving undue weight to evidence and testimony derived from imperfect testing and analysis. Moreover, imprecise or exaggerated expert testimony has sometimes contributed to the admission of erroneous or misleading evidence.").

most frequent types of evidence in wrongful convictions—eyewitness identifications, confessions, and jailhouse snitch testimony—are also not subject to effective testing through the adversary trial process.

C. GOVERNMENT-CREATED EVIDENCE AS SUSPECT EVIDENCE

Addressing each of these types of evidence, other scholars have recently advocated more forcefully for a greater role for direct reliability review by judges as a measure to prevent wrongful convictions.[77] Sandra Guerra Thompson, for example, argues for a gatekeeping role for courts to assess the reliability of confessions, informant testimony, and eyewitness identifications in addition to forensic expert testimony.[78] Such evidence, she contends, should be subject to judicial reliability screening because it is itself the product of government action—it is "police-generated" evidence—that therefore must be subject to due process rules of fair play.[79] She explains that such

> evidence can be viewed as the *product* of the interaction between the individual, on the one hand, and the police investigator on the other. These types of evidence are not simply "found" in the way that a murder weapon may be found at a crime scene. Instead, a piece of these types of police-generated witness testimony may be likened to trace evidence, in that it must be carefully collected and processed in order to make accurate determinations. It is the interaction of the investigator with the individual

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[77] *See, e.g.*, Sandra Guerra Thompson, *Judicial Gatekeeping of Police-Generated Witness Testimony*, 102 J. CRIM. L. & CRIMINOLOGY 329, 329 (2012) (arguing that courts should take an active role as gatekeepers of police-generated evidence); Garrett, *supra* note 19, at 451–52 (arguing that judicial involvement in screening eyewitness identifications is backwards); Stein, *supra* note 17, at 69 (developing a theory of judicial control over evidence). In a related way, the late Bill Stuntz has criticized the prevailing emphasis on procedure over substance in criminal procedure. William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 37–41 (1997).

[78] Thompson, *supra* note 77, at 331.

[79] *Id.*

> giving statements that ultimately produces relevant evidence, and improper handling can contaminate or destroy the evidence.[80]

While there is much to this notion, it is not clear that the distinctive feature that separates this type of evidence from any other is simply that it is "police-generated." To some extent, all prosecution evidence is "police-generated," or more accurately "government-generated." Physical evidence, even more than witness testimony, constitutes the prototypical "trace evidence" that is traditionally understood as susceptible to contamination. Police typically collect physical evidence at the crime scene and can taint it—thereby "generating" false evidence—if they do not collect it properly. Likewise, virtually all witnesses are interviewed by police (and prosecutors), and their memories or testimony can be tainted by these interactions.[81] Indeed, all prosecution testimony is vetted by prosecutors before it is presented to the jury; if nothing else, it is framed and shaped during witness preparation.[82] Like confessions, informant statements, and eyewitness identifications, virtually everything presented to a jury by the government is thus subject to the same concern about reliability that Thompson has identified: "It is the interaction of the investigator [or prosecutor] with the individual giving statements that ultimately produces relevant evidence, and improper handling can contaminate or destroy the evidence."[83]

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[80] *Id.*

[81] Indeed, Thompson acknowledges that these three categories of evidence are not exclusive, and that "[t]here are clearly other types of testimonial evidence that may be generated by the police." *Id.* at 331 n.4.

[82] *See generally* Randolph N. Jonakait, *The Ethical Prosecutor's Misconduct*, 23 CRIM. L. BULL. 550 (1987). Elsewhere, Jonakait notes that "[a]ttorneys and other investigators interview witnesses before the trial, and those interviews, as much psychological research demonstrates, affect what the witnesses remember and relate." Randolph N. Jonakait, *Making the Law of Factual Determinations Matter More*, 25 LOY. L.A. L. REV. 673, 676 (1992) [hereinafter Jonakait, *Factual Determinations*]. As Dan Simon explains, "the 'raw evidence' perceived by the witness at the criminal event often undergoes editing, embellishment, and alteration." Dan Simon, *More Problems with Criminal Trials: The Limited Effectiveness of Legal Mechanisms*, 75 LAW & CONTEMP. PROBS. 167, 168 (2012).

[83] Thompson, *supra* note 77, at 331.

Yet there is something compelling about her notion that the genesis of these types of evidence presents a unique case for judicial reliability screening. Indeed, to the extent that the Supreme Court has mandated constitutional review of admissibility of evidence, it has felt most comfortable doing so when the government has engaged in procuring the evidence. In a series of cases, for example, the Court has held that the prosecutor's knowing use of perjured testimony violates due process.[84] The sense from most of these cases is that the due process violation arose, at least in part, because of the government's complicity in obtaining or offering false evidence.[85] More recently, while retreating from constitutional reliability review, the Supreme Court has acknowledged that much of what animates the constitutional rights it has recognized is a concern over the government's role in producing false evidence. In *Crawford*, Justice Scalia wrote for the Court that "[i]nvolvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse—a fact borne out time and again throughout a history with which the Framers were keenly familiar."[86] And in *Connelly* and *Perry*, the Court explicitly made government misconduct in producing the evidence the *sine qua non* of a constitutional violation related to,

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[84] *See* Mooney v. Holohan, 294 U.S. 103, 112 (1935) (per curiam) (holding that a conviction obtained by deliberate use of perjured testimony violated due process because it was as "inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation"); Napue v. Illinois, 360 U.S. 264, 269, 272 (1959) (ruling that a prosecutor's failure to correct use of testimony known to be false violated due process); Pyle v. Kansas, 317 U.S. 213, 215–16 (1942) (same).

[85] An argument can be made, however, that when truly false evidence is used at trial, the Due Process Clause focuses not just on government misconduct but also on the harm caused by introducing the false evidence itself. In *Giglio v. United States*, the Court found a due process violation when the prosecutor permitted a witness to testify falsely, even though the prosecutor was personally unaware of the lie. 405 U.S. 150, 154 (1972). There, a prosecution witness testified falsely that he had not been granted immunity in exchange for his testimony. Unbeknownst to that prosecutor, another prosecutor had granted the witness immunity. The Court found constitutional error, reasoning that, "whether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor. The prosecutor's office is an entity and as such it is the spokesman for the Government. A promise made by one attorney must be attributed, for these purposes, to the Government." *Id.*

[86] Crawford v. Washington, 541 U.S. 36, 56 n.7 (2004).

respectively, flawed confessions and eyewitness identifications. Thus, while eyewitness identifications, confessions, snitch testimony, and the like are perhaps not *uniquely* police-generated, they may be of special constitutional or evidentiary concern because they are often more *significantly* police-generated than other types of evidence offered by the government in criminal prosecutions.

D. THE DANGERS AND UNRESPONSIVENESS OF SUSPECT EVIDENCE TO ADVERSARY TESTING

As I have contended, these types of evidence create special reliability concerns for two additional reasons. First, they map so neatly onto what we now know to be the most common contributors to wrongful convictions. The study of wrongful convictions of the last two decades has taught us that confessions, snitch statements, and eyewitness identifications—along with forensic science evidence (which Thompson acknowledges, but does not discuss, although it too is almost always government-generated)—are among the types of evidence that most frequently contribute to factually erroneous convictions in criminal cases.[87]

Moreover, these types of evidence are indeed those that the traditional adversary process has proven unable to address adequately. Jurors bring community common sense to the task of assessing the reliability of evidence such as eyewitness identifications, but the social science research has demonstrated convincingly that such common sense is often disastrously wrong.[88] And because mistaken eyewitnesses are usually not lying

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[87] *See, e.g.*, GARRETT, *supra* note 50, at 6–10; DWYER, NEUFELD & SCHECK, *supra* note 50, at 246; SAMUEL R. GROSS & MICHAEL SCHAFFER, EXONERATIONS IN THE UNITED STATES, 1989–2012 (2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2092195.

[88] Findley, *supra* note 45, at 623–29; *see also* ELIZABETH F. LOFTUS, JAMES M. DOYLE & JENNIFER E. DYSART, EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL § 6-4 (4th ed. 2007) (comparing the accuracy of eyewitness testimony to other forms of evidence); ELIZABETH F. LOFTUS, EYEWITNESS TESTIMONY 9–11 (1996) (explaining errors in eyewitness testimony); John C. Brigham & Robert K. Bothwell, *The Ability of Prospective Jurors To Estimate the Accuracy of Eyewitness Identifications*, 7 LAW & HUM. BEHAV. 19, 20 (1983) (potential jurors are generally unaware of the unreliability of eyewitness-identification evidence); Kenneth A. Deffenbacher & Elizabeth F. Loftus, *Do Jurors Share a Common Understanding Concerning*

but are honestly mistaken, traditional tools such as cross-examination are largely ineffectual. The science is so complex and counterintuitive (e.g., eyewitness certainty has little relationship to accuracy,[89] the stress of a violent crime does not focus and heighten eyewitness perception but renders it far less reliable,[90] etc.), that educating jurors sufficiently about the actual processes that determine eyewitness accuracy is a nearly futile task. To the contrary, eyewitness testimony (along with confessions, snitch testimony, and forensic science evidence) "have a powerful effect on juries," so much so that "juries—employing only 'common sense'—are not effective in evaluating the reliability of such evidence."[91] As I have argued before, however, there is hope that judges, as sophisticated repeat players, *can* be educated about these matters so that they can make informed decisions about

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Eyewitness Behavior?, 6 LAW & HUM. BEHAV. 15, 24 (1982) (college students and Washington, D.C. citizens underestimated problems associated with the reliability of identifications); R.C.L. Lindsay et al., *Can People Detect Eyewitness-Identification Accuracy Within and Across Situations?*, 66 J. APPLIED PSYCHOL. 79, 80 (1981) (mock jurors "over-believed" witnesses in low-accuracy-eyewitness scenarios); Richard S. Schmechel et al., *Beyond the Ken? Testing Jurors' Understanding of Eyewitness Reliability Evidence*, 46 JURIMETRICS J. 177, 195–204 (2006) (survey data show that potential jurors misunderstand how memory generally works and how particular factors affect the accuracy of eyewitness testimony); Sandra Guerra Thompson, *Judicial Blindness to Eyewitness Misidentification*, 93 MARQ. L. REV. 639, 657 (2009) (criticizing judicial tolerance of suggestive identification practices in light of studies that show jurors' willingness to give credence to eyewitness identifications); Gary L. Wells & Michael R. Leippe, *How Do Triers of Fact Infer the Accuracy of Eyewitness Identifications? Using Memory for Peripheral Detail Can Be Misleading*, 66 J. APPLIED PSYCHOL. 682, 682 (1981) (mock jurors incorrectly assumed a positive correlation between accurate identification and memory of peripheral details).

[89] Steven Penrod, Elizabeth Loftus & John Winkler, *The Reliability of Eyewitness Testimony: A Psychological Perspective*, *in* THE PSYCHOLOGY OF THE COURTROOM 119, 155 (Norbert L. Kerr & Robert M. Bray eds., 1982); Gary L. Wells & Donna M. Murray, *Eyewitness Confidence*, *in* EYEWITNESS TESTIMONY: PSYCHOLOGICAL PERSPECTIVES 155, 169 (Gary L. Wells & Elizabeth F. Loftus eds., 1984).

[90] Kenneth A. Deffenbacher et al., *A Meta-Analytic Review of the Effects of High Stress on Eyewitness Memory*, 28 LAW & HUM. BEHAV. 687, 694 (2004); Charles A. Morgan III et al., *Accuracy of Eyewitness Memory for Persons Encountered During Exposure To Highly Intense Stress*, 27 INT'L J.L. & PSYCHIATRY 265, 274–77 (2004); Tim Valentine & Jan Mesout, *Eyewitness Identification Under Stress in the London Dungeon*, 23 APPLIED COGNITIVE PSYCHOL. 151, 159 (2008); Schmechel et al., *supra* note 88, at 196–97; Nancy Mehrkens Steblay, *A Meta-Analytic Review of the Weapon Focus Effect*, 16 LAW & HUM. BEHAV. 413, 420–21 (1992).

[91] Thompson, *supra* note 77, at 385 (citing Findley, *supra* note 45, at 624).

reliability, if pushed to apply the relevant social science research and if case law can be developed to assist them in that process.[92] Assigning that screening role to judges may thus be more than just paternalism; it may be a reflection of greater institutional capacity.

Fortunately, an empirically based case law to help guide judges is beginning to emerge, making judicial screening of eyewitness evidence for reliability far less amorphous and subjective than Justice Scalia feared about judicial assessments of reliability in general.[93] Notably, courts in New Jersey and Oregon have done the most to incorporate the social science research into the rules governing eyewitness identification evidence. In *State v. Henderson*[94] the New Jersey Supreme Court took the extraordinary step of appointing a Special Master to preside over a hearing to explore fully the scientific principles applicable in identification cases.[95] The Special Master heard from numerous leading experts in the field and amassed a record incorporating more than 200 publications on human perception and memory.[96] In the end, the court dramatically revised the applicable reliability standards that had been prescribed by the U.S. Supreme Court in *Biggers* and *Manson*[97]—which the science largely proved to be ineffectual as indicators of reliability—and replaced them with

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[92] Findley, *supra* note 45, at 623–24. There is even empirical evidence that, "at least under some conditions, people who are more knowledgeable are relatively less prone to falling prey to various cognitive biases." Jonathan J. Koehler, *Decision Making and the Law: Truth Barriers*, *in* WILEY-BLACKWELL HANDBOOK OF JUDGMENT AND DECISION MAKING (Gideon Keren & George Wu eds., forthcoming) (citing Richard E. Nisbett et al., *The Use of Statistical Heuristics in Everyday Inductive Reasoning*, 90 PSYCHOLOGICAL REV. 339 (1983); K.E. Stanovich & R.F. West, *Individual Differences in Rational Thought*, 127 J. EXPER. PSYCH.: GEN. 161 (1998); K.E. Stanovich & R.F. West, *Individual Differences in Reasoning: Implications for the Rationality Debate*, 23 BEHAV. & BRAIN SCI. 645 (2000); K.E. Stanovich & R.F. West, *On the Relative Independence of Thinking Biases and Cognitive Ability*, 94 J. PERSONALITY & SOC. PSYCH. 672 (2008)).

[93] *See supra* notes 58–59 and accompanying text.

[94] 27 A.3d 872 (N.J. 2011).

[95] *Id.* at 877.

[96] *Id.* at 884.

[97] *See supra* text accompanying note 62.

detailed criteria that the science suggests more closely correlate with reliability.[98]

Even more recently, the Oregon Supreme Court similarly—indeed even more radically—incorporated the new social science research into its reformulated standards for assessing eyewitness reliability. In *State v. Lawson*,[99] the Oregon court observed that there have now been more than 2,000 studies conducted on the reliability of eyewitness identifications and concluded that

> the scientific knowledge and empirical research concerning eyewitness perception and memory has progressed sufficiently to warrant taking judicial notice of the data contained in those various sources as legislative facts that we may consult for assistance in determining the effectiveness of our existing test for the admission of eyewitness identification evidence.[100]

Albeit as a matter of state evidence law rather than due process, the court then drew on that research to redesign the reliability test for admissibility of such evidence.[101] And to various lesser extents, courts in numerous other jurisdictions have begun developing a case law of reliability based on the scientific research.[102]

Similar analysis applies with the other leading causes of wrongful convictions. False confessions surprisingly are present in nearly one quarter of the wrongful convictions exposed by DNA

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[98] *Henderson*, 27 A.3d at 918–22.

[99] 291 P.3d 673 (Or. 2012).

[100] *Id*. at 685.

[101] *See infra* notes 150–56 and accompanying text.

[102] *See, e.g.*, State v. Ledbetter, 881 A.2d 290, 316 (Conn. 2005) (imposing an evidence-based requirement that juries be instructed that the real perpetrator might not be present in the lineup or photospread); Brodes v. State, 614 S.E.2d 766, 771 (Ga. 2005) (relying on the scientific research to eliminate consideration of witness certainty as part of the reliability test); State v. Dubose, 699 N.W.2d 582, 592–94 (Wis. 2005) (abandoning the Supreme Court's reliability criteria in "showup" cases (one-on-one identifications) based on the scientific research); Commonwealth v. Johnson, 650 N.E.2d 1257, 1261 (Mass. 1995) (abandoning the *Manson* reliability test); State v. Ramirez, 817 P.2d 774, 780–81 (Utah 1991) (tweaking the *Manson* test to make it more consistent with scientific principles); People v. Adams, 423 N.E.2d 379, 384 (N.Y. Ct. App. 1981) (abandoning the *Manson* reliability test).

testing.[103] Considerable research has now explored how and why such false confessions happen. Researchers have identified common patterns in interrogation practices that contribute to false confessions. These patterns include psychological tactics involving isolating the suspect, cutting off denials of guilt, making the suspect believe he or she is doomed—often through presentation of false or exaggerated evidence of guilt (the false evidence ploy)—and implicitly or explicitly threatening horrifying consequences absent a confession. To induce a confession, police then employ minimization strategies, such as suggesting sympathetic rationales involving reduced culpability that will make admissions more palatable to the accused and suggesting that confessing will lessen the consequences of the inevitable conviction.[104] The research has also provided solid, objective criteria that can be used to assess the reliability of confessions, which include examining the interrogations for the presence of such psychologically coercive tactics and the "fit" of an electronically recorded confession to the known facts about the crime—that is, examining whether the facts elicited in the confession are consistent with those established by other evidence and, even more importantly, whether the suspect was able to provide police with details of the crime that even the police did not know about and that were later confirmed as true by investigation.[105]

While jurors can certainly be educated about these factors, it is doubtful that jurors actually incorporate this information into the decisional process when assessing confessional reliability. The research suggests that jurors are capable of understanding and recognizing suggestive and coercive interrogation tactics. But jurors do not make the connection between those coercive tactics

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[103] *Understand the Causes*, THE INNOCENCE PROJECT, http://www.innocenceproject.org/understand/False-Confessions.php (last visited Jan. 31, 2013); *see* GARRETT, *supra* note 50, at 18 (finding that 16% of DNA exonerations involved false confessions).

[104] *See generally* GISLI H. GUDJONSSON, THE PSYCHOLOGY OF INTERROGATIONS AND CONFESSIONS: A HANDBOOK 10–21 (2003); AMINA MEMON ET AL., PSYCHOLOGY AND LAW: TRUTHFULNESS, ACCURACY AND CREDIBILITY 58–65 (2d ed. 2003); Richard A. Leo, *The Third Degree and the Origins of Psychological Interrogation in the United States*, *in* INTERROGATIONS, CONFESSIONS, AND ENTRAPMENT 37, 72–73 (G. Daniel Lassiter ed., 2004).

[105] *See* Leo et al., *supra* note 36, at 520–22.

and the possibility of false confessions. I have previously explained this problem in this way:

> Survey data indicate that potential jurors do not believe false confessions are much of a reality; they believe both that they are counterintuitive and unlikely. They believe false confessions are unlikely even if the suspect has been subjected to psychologically coercive interrogation tactics that have been shown to lead to false confessions from the innocent. Jurors recognize that psychological pressure and persuasion can be psychologically coercive, but they do not recognize that such techniques and coercion are capable of producing and are in fact associated with false confessions. In other words, the popular belief is that people do not falsely confess unless they are tortured or mentally ill. Potential jurors also harbor significant misconceptions about matters such as subtle interrogation pressures, the characteristics that make a person susceptible to confessing falsely, and the fact that police are "unskilled . . . at detecting truthful and untruthful statements." Truth-seeking is therefore not well served by deferring almost completely to juries and the lay understandings that they bring about false confessions.[106]

Jailhouse snitch or informant testimony—another leading contributor to wrongful convictions, present in approximately 16% of the DNA exoneration cases[107]—is little different. Despite the obvious reasons to doubt snitch testimony, research suggests that

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[106] Findley, *supra* note 45, at 628–29 (footnotes omitted) (citing Iris Blandón–Gitlin, Kathryn Sperry & Richard A. Leo, *Jurors Believe Interrogation Tactics Are Not Likely To Elicit False Confessions: Will Expert Witness Testimony Inform Them Otherwise?* 17 PSYCH., CRIME & L. 239, 242–57 (2011); and Danielle E. Chojnacki, Michael D. Cicchini & Lawrence T. White, *An Empirical Basis for the Admission of Expert Testimony on False Confessions*, 40 ARIZ. ST. L.J. 1, 5 (2008)).

[107] *Understand the Causes*, *supra* note 103; GARRETT, *supra* note 50, at 129.

such testimony is typically persuasive to juries because it sounds like confession evidence.[108] The testimony typically involves the informant testifying that, while confined with the defendant, the defendant confessed to the crime at issue in the trial. As with any other confession, it is hard for jurors to imagine why anyone would confess to a crime he or she did not commit. Moreover, despite its suspect source, informant testimony often sounds credible because informants can be very accomplished liars.[109]

Finally, the reliability risks that accompany scientific and expert testimony are already well known and recognized by the rules of evidence and the courts. Alone among the prominent contributors to wrongful convictions, the problematic nature of expert testimony is explicitly addressed by the rules of evidence in Federal Rule of Evidence 702.[110] And the Supreme Court, in *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, has interpreted Rule 702 to ostensibly require exacting scrutiny of the scientific foundation and reliability of such evidence.[111] This unique treatment of forensic expert testimony is explainable in part simply because the rules of evidence explicitly address such evidence, but the presence of the Rule does not alone explain why the Court chose to interpret it as such a (theoretically) formidable gatekeeping rule. A demanding search for reliability was by no means dictated by the language of the Rule. Indeed, many jurisdictions with identical rules for many years interpreted their rules to apply a much more deferential approach to admissibility of

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[108] *See* Jeffrey S. Neuschatz et al., *The Effects of Accomplice Witnesses and Jailhouse Informants on Jury Decision Making*, 32 LAW & HUM. BEHAV. 137, 142 (2008) (discussing an empirical study finding that informant testimony influences jurors to convict and that the jury's verdict is unaffected by the jurors' knowledge that the informant was given incentives to testify).

[109] The Canadian inquiry into the wrongful conviction of Thomas Sophonow concluded that jailhouse informants are "polished and convincing liars," that jurors give great weight to "confessions," and that jurors give "the same weight to 'confessions' made to jailhouse informants as they [do] to 'confessions' made to a police officer." *The Inquiry Regarding Thomas Sophonow: Jailhouse Informants, Their Unreliability and the Importance of Complete Crown Disclosure Pertaining To Them*, MANITOBA JUSTICE, http://www.gov.mb.ca/justice/publications/sophonow/jailhouse/what.html (last visited Apr. 20, 2013).

[110] *See* FED. R. EVID. 702 (detailing the standard for expert testimony).

[111] 509 U.S. 579, 589–96 (1993).

expert evidence.[112] More likely, the Supreme Court's demanding approach to expert testimony arose because "junk science" was first and most prominently raised as a concern in high-stakes civil litigation rather than criminal litigation (indeed, *Daubert* itself was such a case).[113] Big money concerns forced the issue to the forefront.

The empirical record suggests that the perceived problem with junk science in *civil* litigation has indeed been the primary focus of *Daubert* gatekeeping. Several studies of the impact of *Daubert* have concluded that it has had a significant impact on limiting flawed expert testimony in civil cases but almost no impact in criminal cases, at least with regard to evidence proffered by the prosecution.[114] *Daubert* motions to exclude state-proffered expert testimony almost always lose, despite the now-well-recognized scientific inadequacies of such evidence; defense-proffered evidence, by contrast, is frequently excluded under *Daubert*.[115]

Yet flawed forensic science testimony is a serious problem in criminal cases and one of the leading contributors to wrongful convictions. An analysis of the DNA-exoneration cases by Brandon Garrett and Peter Neufeld found that forensic science testimony was present in a majority of the wrongful convictions,

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[112] Before *Daubert*, many jurisdictions applied the well-known *Frye* "general acceptance" test, based on *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), which essentially deferred the reliability and hence admissibility question to the collective judgment of the relevant scientific community. A small minority of jurisdictions interpreted the Rule 702 language in an even more deferential way, concluding that it permitted admissibility of any expert testimony so long as it was relevant and helpful to the factfinder, with virtually no independent gatekeeping function assigned to the courts. *See* State v. Watson, 595 N.W.2d 403, 412 (Wis. 1999).

[113] *See, e.g.*, PETER W. HUBER, GALILEO'S REVENGE: JUNK SCIENCE IN THE COURTROOM (1991) (discussing the rise of "junk science" in context of various civil litigation).

[114] *See* Keith A. Findley, *Innocents at Risk: Adversary Imbalance, Forensic Science, and the Search for Truth*, 38 SETON HALL L. REV. 893, 939–43 (2008) (summarizing the data and citing D. Michael Risinger, *Navigating Expert Reliability: Are Criminal Standards of Certainty Being Left on the Dock?*, 64 ALB. L. REV. 99, 135 (2000); Paul C. Giannelli, *The Supreme Court's "Criminal"* Daubert *Cases*, 33 SETON HALL L. REV. 1071, 1076 (2003); Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 76, 81 (2008); Jennifer L. Groscup et al., *The Effects of* Daubert *on the Admissibility of Expert Testimony in State and Federal Criminal Cases*, 8 PSYCHOL. PUB. POL'Y & L. 339, 342 (2002)).

[115] Groscup et al., *supra* note 114, at 346.

and in those cases involving such evidence, 60% of the testimony was invalid.[116]

Given these new understandings, the Court's move away from a direct concern about reliability—that is, about substantive justice—is remarkable; it comes at a time when, for the first time ever, there is an awakened, empirically based sense that the existing procedural rules are not doing a good job of guarding against admission of unreliable evidence and resulting miscarriages of justice. With the advent of forensic DNA analysis in the late 1980s, for the first time there is a (growing) body of cases establishing that the system convicted an innocent person, and examination of those cases provides an understanding of what types of flawed and unreliable evidence produced those injustices.[117] Incongruously, the Supreme Court's increasing resistance to any sort of constitutionally based doctrine for restricting unreliable evidence comes just as society has entered into what Marvin Zalman has called the "age of innocence"—when the nature and risks of unreliable evidence have been recognized as never before.[118]

The developing record of false convictions thus establishes both a need for more direct focus on the reliability of these suspect evidentiary categories and a rationale for limiting due process reliability screening to these discrete categories of evidence. To effectuate such due process reliability screening, however, would require a reorientation of current Supreme Court jurisprudence in ways that the Court has not yet, at least, signaled any interest in doing.

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[116] Brandon L. Garrett & Peter J. Neufeld, *Invalid Forensic Testimony and Wrongful Convictions*, 95 VA. L. REV. 1, 9 (2009); *see also Unreliable or Improper Forensic Science*, THE INNOCENCE PROJECT, http://www.innocenceproject.org/understand/Unreliable-Limited-Science.php (discussing the prevalence of invalid forensic testimony).

[117] *See* Keith A. Findley, *Learning From Our Mistakes: A Criminal Justice Commission To Study Wrongful Convictions*, 38 CAL. WEST. L. REV. 333, 351–52 (2002) (calling for an empirical analysis of the criminal justice system aided by DNA evidence).

[118] Marvin Zalman, *An Integrated Justice Model of Wrongful Convictions*, 74 ALB. L. REV. 1465, 1499 (2010–2011).

V. CONSTITUTIONAL REGULATION OF POLICE AND PROSECUTOR CONDUCT THAT PRODUCES UNRELIABLE EVIDENCE

If the Court is not willing to demand even minimal reliability screening as a due process matter, an alternative suggested by the Court's jurisprudence is to look more critically at police and prosecutorial conduct. As noted, while the Court's constitutional doctrine has repeatedly emphasized that the Constitution plays no direct role in screening evidence for reliability, it has recognized that the Due Process Clause does impose constraints on state action in generating flawed evidence. Doctrinally, it is not altogether clear why the Court is more willing to consider constitutional restraints on the process that is due from police in generating evidence than from the courts that regulate its use for factual decisionmaking at trial, but that is undeniably the trajectory of recent jurisprudence.

Taken seriously, the implication then is that if police or prosecutor misconduct—defined as procedures or actions that create unnecessary suggestiveness, that somehow "rig" the evidence against the accused, or that are excessively coercive—is what violates due process, and if courts do not want to be in the business of assessing reliability, then courts must more aggressively review the state conduct that generates false evidence. A court's assessment of reliability then would be beside the point and should not be used to rehabilitate evidence produced through flawed procedures. That is to say, if procedural fairness, rather than substantive reliability, is really what the Due Process Clause protects, then it makes no sense to retain reliability as a one-way street that excuses misconduct, but that does not itself protect the accused from false evidence.[119] Thus, for example, in

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[119] It is important to keep in mind that reliability as used here is different than harmless error. The issue discussed here is what role, if any, reliability assessments should play in determining if police or prosecutors violated the defendant's due process rights under a regime in which the Court has declared that misconduct, not reliability, is the key. But harmless error is different; it accepts that a constitutional violation has occurred and asks the very different question of whether, given the violation, the harm from that error was sufficient to require reversing the conviction. Rejecting reliability assessments for forgiving police misconduct when determining whether there was a constitutional violation does not

the eyewitness identification context, doctrinal coherence under a police-or-prosecutor-based due process jurisprudence would argue for closing the loophole that permits evidence obtained through impermissibly suggestive procedures to be used to convict based on a court's assessment—utilizing a test that itself is deeply flawed—that the evidence is somehow reliable enough.

And, indeed, a few courts have begun to go down that path. Courts in Wisconsin, New York, and Massachusetts, for example, have rejected the reliability assessment for at least some types of suggestive identification procedures.[120] Recognizing that courts have not done a good job of assessing reliability (under the current flawed doctrine, identifications are almost never excluded as unreliable[121]) and that the factors that contribute to misidentifications are now well known in the extensive social science research, the courts have concluded that the only inquiry ought to be whether police engaged in unnecessary and impermissible suggestiveness. In those jurisdictions and in those types of cases, the state is no longer permitted to use the tainted evidence based upon a showing of reliability.[122]

That is also the direction toward which due process doctrine is trending in other areas.[123] It is already the rule under *Colorado v. Connelly* for confession evidence. Coercive police tactics that render a confession involuntary violate the Self-Incrimination Clause (made applicable to the states under the Due Process Clause of the Fourteenth Amendment), regardless of how reliable

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similarly require rejecting application of harmless error doctrine to assess whether the constitutional violation requires a new trial.

[120] *See* State v. Dubose, 699 N.W.2d 582, 585 (Wis. 2005); Commonwealth v. Johnson, 650 N.E.2d 1257, 1261 (Mass. 1995); People v. Adams, 423 N.E.2d 379, 384 (N.Y. Ct. App. 1981).

[121] *See* Findley, *supra* note 114, at 917 ("Indeed, of the first 200 DNA exoneration cases, not a single one of these wrongful convictions was reversed on appeal based upon a challenge to eyewitness testimony under the *Biggers* and *Brathwaite* test, even though eyewitness evidence was presented in seventy-nine percent of the cases, and even though with the benefit of postconviction DNA testing, it is now known that every one of those identifications was wrong.").

[122] *See supra* note 115.

[123] For a discussion of the emerging trend toward categorical approaches to rules of criminal procedure, see Jeffrey L. Fisher, *Categorical Requirements in Constitutional Criminal Procedure*, 94 GEO. L.J. 1493 (2006).

a court might believe the confession to be.[124] And, analogously, the Court no longer permits reliability assessments to trump Confrontation Clause violations under *Crawford v. Washington*.[125] Thus, while the Court has also begun to distance itself from reliability as the core principal for Due Process regulation of eyewitness evidence, its continued use of reliability assessments to trump improper and overly suggestive police-identification procedures once again introduces incoherence and inconsistency in constitutional evidentiary law.

The more the Court focuses on police misconduct in generating evidence, the more it creates a constitutional code of policing rather than a code of evidence. But that may be an acceptable—perhaps even preferable—approach to the concerns raised by the tainted evidence that produces wrongful convictions. Judicial regulation of police investigative conduct is hardly foreign to constitutional criminal procedure. Before the Court added the reliability prong to its eyewitness-identification due process analysis in *Biggers* and *Manson*, the Court's eyewitness identification cases suggested that identifications should be suppressed if the police engaged in unnecessarily suggestive behaviors.[126] And of course the Court has indicated a willingness to impose rules of conduct on the way police collect evidence in *Miranda v. Arizona*[127]—albeit with decidedly mixed results.[128]

More importantly, because the trial process has not proven to be very effective at sorting true from false evidence in these suspect categories,[129] the most efficacious approach might be to

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[124] *See supra* note 36 and accompanying text.

[125] *See supra* note 23 and accompanying text.

[126] *See* Foster v. California, 394 U.S. 440, 442–43 (1969) (evaluating police lineups from a constitutional perspective); Simmons v. United States, 390 U.S. 377, 384–86 (1968) (discussing constitutional limits on suspect identification); Stovall v. Denno, 388 U.S. 293, 301–02 (1965) (setting constitutional restraints on identification); Garrett, *supra* note 19, at 467.

[127] 384 U.S. 436 (1966).

[128] The literature on *Miranda* is, of course, enormous. For a recent discussion of the history and issues raised by *Miranda*, see Yale Kamisar, *The Rise, Decline and Fall (?) of* Miranda, 87 WASH. L. REV. 965 (2012).

[129] Dan Simon has extensively examined the diagnosticity of the trial process and has found it to be seriously inadequate in many respects. For example, cognitive biases make

improve the quality of the evidence upstream of the trial—during the police investigation.[130] I am not the first to make this suggestion. Randolph Jonakait, for example, reminds us that fact *development* is much more important to accurate adjudicative outcomes than are the rules that simply govern admissibility of evidence.[131] He notes that evidentiary rules of exclusion can lead to excluding unreliable or untrue evidence, but better investigations can provide greater access to the truth by *replacing* that unreliable evidence with trustworthy evidence as well.[132]

Moving forward, Michael Risinger, among others, advocates looking to the empirical evidence, mixed with a good dose of common sense, to set standards for reforming eyewitness procedures.[133] He notes that these reforms address evidence-creation "upstream from the trial."[134] But he then notes the link, which I am developing here, to reliability-based exclusionary rules: "Once we determine what processes should be mandated [for obtaining eyewitness identifications], then rules of exclusion at trial (evidence rules *stricti juris*) must then be put in place to protect the requirement of the mandated pre-trial processes—proper manifestations of the best kind of best evidence principle."[135] If investigations produce more reliable evidence, the strain on the truth-seeking functions of the adversary adjudicative process is minimized, and that is true whether one advocates free proof or judicial gatekeeping.

The benefits of that approach can only be realized if courts actually demand good police investigation practices.[136] If the focus is on police conduct, then courts must encourage "best practices." That is to say, as Brandon Garrett suggests, "[t]he regulation of

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post hoc judgments about truth and reliability very difficult. *See generally* Simon, *supra* note 82.

[130] *See* Findley, *supra* note 114, at 896–908.

[131] Jonakait, *Factual Determinations*, *supra* note 82, at 675.

[132] *Id.*

[133] Risinger, *supra* note 65, at 1361.

[134] *Id.* at 1366 n.45.

[135] *Id.*

[136] Note that *Miranda* was an experiment in this method of regulation that, by some accounts at least, did not work all that well.

eyewitness identifications should start with the fundamental requirement that law enforcement follow best practices when conducting identification procedures in the first instance, and it could include per se exclusion of courtroom identifications that follow prior identifications."[137]

In identifying best practices, courts are not adrift, wanting for guidance, given the plentiful social science research that elucidates empirically supported best practices. Indeed, some forward-looking law enforcement agencies, courts, and even legislatures have already adopted such practices as guidelines.[138] Where they have been adopted, courts have begun looking to these practices to measure the appropriateness of police conduct in individual cases.[139]

In the eyewitness identification context, best-practices guidelines cover a range of matters, including proper construction of lineups, such as proper selection of "fillers," proper instructions to witnesses at lineup procedures, double-blind administration of the procedures (identifications conducted in which neither the suspect nor the detective administering the procedure knows in advance which lineup member is the suspect), and sequential presentation of fillers and suspects (rather than the traditional simultaneous presentation, which research shows produces more false positives).[140] In other areas, such as confessions, guidelines also

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[137] Garrett, *supra* note 19, at 497. For a description of many of the "best practices" that can be implemented to improve the quality of evidence produced during investigations, see Keith A. Findley, *Toward a New Paradigm of Criminal Justice: How the Innocence Movement Merges Crime Control and Due Process*, 41 TEX. TECH L. REV. 133, 147–71 (2008).

[138] *See generally* INT'L ASS'N OF CHIEFS OF POLICE, TRAINING KEY 600: EYEWITNESS IDENTIFICATION; *Eyewitness Evidence: A Trainers Manual for Law Enforcement*, U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, NAT'L INSTITUTE OF JUSTICE (Sept. 2003), http://www.nij.gov/pubs-sum/188678.htm; STATE OF WISCONSIN, OFFICE OF THE ATT'Y GEN., MODEL POLICY AND PROCEDURE FOR EYEWITNESS IDENTIFICATION (2010), *available at* http://www.doj.state.wi.us/media-center/2009-news-releases/november-05-2009.

[139] *See Henderson*, 27 A.3d at 913–14; *see also* State v. Shomberg, 709 N.W.2d 370, 376 (Wis. 2006). *But see* State v. Drew, 740 N.W.2d 404, 406 (Wis. Ct. App. 2007) (noting, with apparent approval, that the trial court had held that, "while some of the procedures in the [Attorney General's] Model Policy were not followed, that was an issue for cross-examination and for the jury to weigh").

[140] *See generally* Gary L. Wells, *Eyewitness Identification: Systemic Reforms*, 2006 WIS. L. REV. 615.

exist—from requirements for electronic recording of interrogations to minimizing the extent to which the process is contaminated by disclosure of crime details to the suspect.[141]

Even where such written guidelines are inadequate or have not been adopted by police agencies, courts have the capacity to develop minimum standards. The Oregon and New Jersey Supreme Courts have recently shown the way, overseeing in-depth fact-finding proceedings designed to access the considerable empirical research on these topics and to set just the sorts of "best practices" requirements proposed here. Probably nothing better could be done to improve the quality of trial evidence, and hence the reliability of outcomes, than to demand that police employ such best practices. If police conduct is indeed the focus of due process demands, that conduct cannot be adequately measured without considering the extensive social science record on these matters.

To summarize, as a matter of due process, reliability might be made an explicit basis for screening evidence in the suspect evidentiary categories I have outlined, so long as that gatekeeping is based on scientifically sound criteria. Alternatively, if the Supreme Court is unwilling to create a due process right to gatekeeping based on reliability in these suspect evidentiary categories, it can employ the Due Process Clause to demand fair and reliable police-investigation practices that minimize the risks of tainting the evidence. What the Court should not do is continue to eschew evidentiary reliability as a due process demand but then turn to reliability assessments to excuse improper investigative techniques that run a significant risk of producing false evidence.

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[141] As Brandon Garrett puts it,

> An approach geared toward reliability might . . . look at whether a confession was contaminated by disclosed facts, and it might exclude portions of an interrogation where the suspect was not volunteering answers but simply repeating information that police provided, or it might simply exclude portions of an interrogation that were not electronically recorded.

Garrett, *supra* note 19, at 495–96.

VI. RELIABILITY SCREENING UNDER THE RULES OF EVIDENCE

Unconstrained by due process principles that might limit the focus to police or prosecutor misconduct in creating evidence, the rules of evidence offer perhaps a more realistic and flexible mechanism for protecting evidentiary reliability and accurate trial outcomes. Our new understandings about flawed evidence and wrongful convictions can be addressed by the rules of evidence—either the rules as currently drafted in most jurisdictions or as they might be amended. The rules of evidence already provide a mechanism for, if not a reality of, probing judicial scrutiny of at least some of this evidence—most notably, forensic science evidence.[142] But the rules do very little to focus scrutiny specifically on other types of evidence that we now know most frequently produce wrongful convictions. There are no rules that uniquely address the unreliability of eyewitness identifications, snitch testimony, or confessions.[143] For a set of rules expressly designed to achieve "the end of ascertaining the truth and securing a just determination,"[144] such omissions are curious, especially in an era when these types of evidence are empirically known to be problematic.

A number of scholars have noted this omission and have called for greater scrutiny, including pretrial reliability hearings, not only for eyewitness identification evidence and expert opinion

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[142] *See* FED. R. EVID. 702; Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 589–96 (1993). Numerous commentators have observed, however, that despite the promise of judicial scrutiny of prosecution-proffered forensic evidence, courts rarely apply *Daubert* rigorously to prosecution evidence (although the data suggest they do apply it rigorously to exclude defense-proffered expert testimony). *See* Margaret A. Berger, *Expert Testimony in Criminal Proceedings: Questions* Daubert *Does Not Answer*, 33 SETON HALL L. REV. 1125, 1125 (2003); Findley, *supra* note 114, at 934–35, 939–45; Peter J. Neufeld, *The (Near) Irrelevance of* Daubert *to Criminal Justice and Some Suggestions for Reform*, 95 AM. J. PUB. HEALTH S107, S107–10 (2005); Risinger, *supra* note 114, at 99, 131–32, 143–49.

[143] Under the common law, and to various degrees under current laws in the states, confessions require corroboration—a requirement designed to ensure at least some minimal measure of reliability. But the corroboration requirement, often known as the *corpus delicti* rule, usually demands little more than proof that the crime was actually committed. For a discussion of the *corpus delicti* rule, see *State v. Morgan*, 61 P.3d 460, 464–67 (Ariz. Ct. App. 2002).

[144] FED. R. EVID. 102.

testimony but also for confessions[145] and jailhouse snitch testimony.[146] At the same time, Sandra Thompson has pointed out that, while the Federal Rules of Evidence do not explicitly address these types of evidence, they do already include provisions that can be used to regulate the admission of unreliable eyewitness identification, confession, and jailhouse snitch (as well as expert) testimony.[147] To make the rules even more clearly applicable to these issues, she suggests a series of minor amendments to the rules.[148] Richard Leo, Peter Neufeld, Steven Drizin, and Andrew Taslitz take this suggestion a step further, outlining a detailed proposal for new rules establishing pretrial reliability hearings related to confession evidence.[149]

The Oregon Supreme Court's recent decision in *State v. Lawson* creates a blueprint for using the Rules in this way.[150] The court in *Lawson* ruled that, even if due process doctrine is confined to police misconduct or impermissible suggestiveness, the rules of evidence are not similarly constrained. The court observed that, "[a]s a matter of state evidence law[,] . . . however, there is no reason to hinder the analysis of eyewitness reliability with purposeless distinctions between suggestiveness and other sources of unreliability."[151]

The *Lawson* court thus rejected the federal due process test and instead constructed a new rules-based approach, showing how the rules of evidence can be used more efficaciously to exclude unreliable eyewitness evidence. *Lawson*'s new test looks to a

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[145] *See* RICHARD A. LEO, POLICE INTERROGATION AND AMERICAN JUSTICE 289–91 (2008); Leo et al., *supra* note 36, at 486–87; Richard A. Leo et al., *Promoting Accuracy in the Use of Confession Evidence: An Argument for Pre-Trial Reliability Assessments To Prevent Wrongful Convictions*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2215885.

[146] *See* ALEXANDRA NATAPOFF, SNITCHING: CRIMINAL INFORMANTS AND THE EROSION OF AMERICAN JUSTICE 194–95 (2009); THE JUSTICE PROJECT, JAILHOUSE SNITCH TESTIMONY: A POLICY REVIEW 3–4 (2007). The State of Illinois now requires, by statute, pretrial reliability hearings for informant testimony in capital cases. *See* NATAPOFF, *supra*, at 194.

[147] Thompson, *supra* note 77, at 379–89.

[148] *Id.* at 394–95.

[149] Leo et al., *supra* note 145.

[150] *See generally* James M. Doyle, *Oregon's Eyewitness Decision: Back to Basics*, THE CRIME REPORT (Dec. 13, 2012, 10:52 AM), http://www.thecrimereport.org/viewpoints/2012-12-oregons-eyewitness-decision-back-to-basics.

[151] State v. Lawson, 291 P.3d 673, 688–89 (Or. 2012).

collection of existing Oregon Rules of Evidence (which mirror the Federal Rules of Evidence) as tools for screening eyewitness evidence:[152]

- Rule 602 requires personal knowledge, including an opportunity to observe. If an eyewitness's opportunity to observe was too obscured by conditions at the time of the crime, eyewitness testimony might fail this requirement.[153]
- Rule 701, together with Rule 104(a), requires that the proponent of lay opinion establish by a preponderance of the evidence that the opinion is "both rationally based on the witness's perceptions and helpful to the trier of fact."[154] The court reasoned that, "[w]hen there are facts demonstrating that a witness could have relied on something other than his or her own perceptions to identify the defendant [i.e., suggestiveness], the state—as the proponent of the identification—must establish by a preponderance of the evidence that the identification was based on a permissible basis rather than an impermissible one, such as suggestive police procedures."[155]
- And of course, Rule 403 provides courts with the discretion to exclude even relevant and helpful evidence if its probative value is substantially outweighed by the risk of unfair prejudice. The *Lawson* court reasoned here: "As a discrete evidentiary class, eyewitness identifications subjected to suggestive police procedures are particularly susceptible to concerns of unfair prejudice. Consequently, in cases in which an

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[152] *Id.* at 749–63 (explaining court's test for admissibility of eyewitness evidence under Oregon's evidence code).

[153] *Id.* at 744.

[154] *Id.* at 754.

[155] *Id.* at 755.

> eyewitness has been exposed to suggestive police procedures, trial courts have a heightened role as an evidentiary gatekeeper because 'traditional' methods of testing reliability—like cross-examination—can be ineffective at discrediting unreliable or inaccurate eyewitness identification evidence."[156] Other courts and commentators are similarly recognizing the potential for Rule 403 to be used to exclude unreliable eyewitness testimony, even if the unreliability was not caused by police misconduct.[157]

The rules of evidence thus can indeed be used to ensure greater reliability, but only if they heed the lessons from the social science research.

VII. BEYOND ALL-OR-NOTHING

A. JUDICIAL RETRENCHMENT

One of the greatest challenges to rigorous screening of suspect evidence is the concern that excluding such evidence will too frequently result in depriving juries of true and accurate evidence in individual cases, thereby permitting the guilty to go free. While judges can be made aware of the risks that evidence might be false, when confronted with an actual case involving a serious crime, the evidence, even if flawed, can be very compelling to judges. When confronted with the choice between excluding the evidence (and perhaps letting the accused go free) or overlooking the flaws in the evidence, the impulse is strong to let the jury hear the evidence and sort it out. The binary choice between doing nothing and barring the evidence altogether makes regulation by exclusion an often ineffectual approach. The result is that such

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[156] *Id*. at 758.

[157] *See, e.g.*, State v. Hibl, 714 N.W.2d 194, 205–06 (Wis. 2006) (recognizing that Wisconsin's equivalent to Rule 403 "has a role to play in the context of the reliability of eyewitness identification evidence"); Leo et al., *supra* note 145, at 49, 62 (identifying Rule 403 as the "substantive legal underpinning" for a reliability test).

suspect evidence is almost never excluded, even when the flaws with the evidence are egregious.[158]

Likewise, when courts do adopt rigorous standards for admission of such evidence, the promise of strict enforcement is almost always promptly broken by doctrinal retrenchment. When the Supreme Court, for example, first dealt with the problem of eyewitness error, it announced a rule requiring the presence of counsel at pretrial lineup procedures.[159] When cases arose that would actually require exclusion of eyewitness evidence, the Court quickly retrenched, holding that the right to counsel applies only at live lineups, not photo arrays,[160] and separately holding that the right applies only at post-indictment lineups.[161] The Court's rationale for requiring counsel—that eyewitness identification evidence is fraught with risks of error that cannot be corrected at trial but that might be minimized by the presence of counsel at the identification procedure—was equally applicable to photo arrays and pre-indictment lineups, but the consequences of excluding evidence in these cases were too dire. Yet, because the vast majority of all identification procedures involve photo arrays, not live lineups, and occur prior to indictment or charging, that retrenchment rendered the right-to-counsel remedy virtually useless.

Similar retrenchment occurred when the Court turned to the Due Process Clause for a solution. As noted, the Court first declared that use of impermissibly suggestive procedures that "give rise to a very substantial likelihood of irreparable misidentification" would violate due process.[162] But when the implications of that rule became clear—exclusion of large numbers of identifications, including surely some that were accurate—the Court felt compelled to temper its rule by permitting the government to rehabilitate flawed evidence with a showing that

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[158] *See* Findley, *supra* note 45, at 596–601; Garrett, *supra* note 114, at 81, 85, 86, 90.
[159] United States v. Wade, 388 U.S. 218, 228–29 (1967).
[160] United States v. Ash, 413 U.S. 300, 320–21 (1973).
[161] Kirby v. Illinois, 406 U.S. 682, 691 (1972).
[162] Simmons v. United States, 390 U.S. 377, 384 (1968).

the evidence was nonetheless "reliable."[163] Given the choice of excluding the evidence altogether or letting the jury hear the evidence and figure out whether it was to be believed, and especially given the very flawed nature of the reliability test the Court constructed, courts have found almost all identification evidence to be sufficiently reliable; exclusion under the existing due process test is almost unheard of.[164]

Even as courts have become more enlightened about the problems of eyewitness error, retrenchment has been common in the face of a binary choice between letting the evidence in and excluding it altogether. Relying on the social science research and recognizing the flawed nature of the *Biggers–Manson* due process reliability test, the Wisconsin Supreme Court in *State v. Dubose* jettisoned the reliability prong of the due process test altogether.[165] Returning to the original due process test formulated in *Stovall v. Denno*,[166] the court in *Dubose* held that the onus was on police to use nonsuggestive procedures and that if police employed unnecessary suggestiveness, the evidence would be inadmissible; there would be no reliability-based second-guessing.[167] The evidence in that case was produced by a showup—presentation of a single suspect to a witness on the street shortly after the crime. Recognizing the inherent suggestiveness of such a procedure, the court declared that showup evidence would no longer be admissible unless exigent circumstances made that procedure necessary. Otherwise, such *unnecessary* suggestiveness would result in exclusion of the evidence.[168]

As a matter of simple logic, that rationale would suggest that any other type of unnecessarily suggestive procedure (such as a flawed lineup or photo array) should also result in exclusion of the evidence without regard to its judicially perceived reliability. But

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[163] Neil v. Biggers, 409 U.S. 188, 198–99 (1972); Manson v. Brathwaite, 432 U.S. 98, 112 (1977).

[164] *See* O'Toole & Shay, *supra* note 62, at 110.

[165] State v. Dubose, 699 N.W.2d 582, 592 (Wis. 2005).

[166] 388 U.S. 293 (1967), *overruled on other grounds by* Griffith v. Kentucky, 479 U.S. 314, 326 (1987).

[167] *Dubose*, 699 N.W.2d at 593–95.

[168] *Id.* at 599.

when confronted with the necessity of excluding suggestive photo-array-identification evidence, the Wisconsin courts blinked. The Wisconsin Court of Appeals ruled that the *Dubose* rule applied *only* to showup evidence; all other identification evidence would continue to be evaluated under the two-pronged *Biggers–Manson* test that the *Dubose* court had so roundly criticized.[169] The decision drew no principled distinction between suggestive showup procedures and suggestive photo arrays, but the Wisconsin Supreme Court denied review and let the decision stand.[170] The implications of exclusion were apparently too much for the courts.

All of this is to suggest that, while exclusion remains a critically important part of the solution, giving courts only the choice between full admission and complete exclusion may doom broad measures to guard against suspect evidence to failure. Counterintuitively, intermediate measures, short of full exclusion, might in the end strengthen the protections against unreliable evidence, because such measures might actually be enforced.

B. PARTIAL EXCLUSION

Intermediate measures come in at least two forms: (1) partial exclusion and expert testimony and (2) jury instructions. Partial exclusion means simply that a court might exclude some particulars of an identification, while permitting the witness to describe the identification in general terms.[171] If a witness, for example, was unable initially to provide a detailed description of the perpetrator but after being subjected to suggestiveness was able to recall details of the description that matched the suspect, the court might exclude the details as the parts that were most likely the product of the suggestions. Similarly, as the Oregon Supreme Court noted in *Lawson*, "a trial court could admit an eyewitness's identification, but find that the prejudicial effect of the accompanying statement of certainty that was created by

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[169] State v. Drew, 740 N.W.2d 404, 409 (Wis. Ct. App. 2007).

[170] *See* State v. Drew, 744 N.W.2d 297 (Wis. 2007) (denying petition for review).

[171] *See* Brandon L. Garrett, *Eyewitnesses and Exclusion*, 65 VAND. L. REV. 451, 488 (2012) (explaining and preparing to refund a partial exclusion approach).

suggestive police procedures substantially outweighed its limited probative value."[172] The court explained that such an approach fits neatly within Rule 403 of the Rules of Evidence: "[i]n essence, a partial exclusion order is no more than a determination under [Rule] 403 that the prejudicial effect of some testimonial evidence substantially outweighs its probative value."[173]

Partial exclusion could provide a remedy for other types of suspect evidence as well. Confronted with challenged confession evidence, for example, a court could exclude specific details in a confession, offered to make the confession more compelling, if those details were fed to the suspect by police.[174] Similar approaches could be taken with jailhouse snitch testimony. And some courts are already beginning to take that approach with regard to challenged forensic evidence, permitting, for example, ballistics, fingerprint, and handwriting experts to testify about observed similarities between the crime-scene evidence and the defendant's reference sample, but prohibiting the expert from declaring a "match" or from offering an opinion that the crime scene pattern evidence was created by the defendant, given that no real science permits such probability-based conclusions.[175] While

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[172] State v. Lawson, 291 P.3d 673, 695 (Or. 2012).

[173] *Id.*

[174] Such a rule would make electronic recording of interrogations all the more essential, because without recording it is nearly impossible to determine which facts were leaked to the suspect during the interrogation. *See* Leo et al., *supra* note 145, at 83.

[175] Declaring a match—understood to mean that the suspect was likely the source of the patterns found in the evidence—requires reference to valid population databases in order to determine the uniqueness of the patterns found and the statistical chances of a random match to those patterns. But, apart from DNA testing, none of the so-called forensic sciences have laid the scientific groundwork to permit such analyses or conclusions. *See* NAT'L RES. COUNCIL, *supra* note 76, at 3 (noting criticism levied by NAS study). Accordingly, a number of courts have limited expert testimony in the way described here. *See, e.g.*, United States v. Willock, 696 F. Supp. 2d 536, 572 (D. Md. 2010) (limiting the extent to which a firearms examiner can testify about the significance of matching fired bullet characteristics); United States v. Glynn, 578 F. Supp. 2d 567, 574–75 (S.D.N.Y. 2008) (preventing firearms analyst from saying more than "that a firearms match was 'more likely than not' "); United States v. Green, 405 F. Supp. 2d 104, 108–09 (D. Mass. 2005) (holding that a firearms analyst could "describe and explain the ways in which" the casings form compared guns were "similar" but could not "conclude that the shell casing [came] from a specific . . . pistol 'to the exclusion of every other firearm in the world' "); United States v. Hines, 55 F. Supp. 2d 62, 70–71 (D. Mass. 1999) (allowing handwriting expert to testify to

imperfect, such solutions might actually be implemented by courts, if made more explicitly part of the toolbox available for addressing the unreliability of suspect evidence.

C. EXPERT TESTIMONY & JURY INSTRUCTIONS

The other intermediate measures involve attempts to educate jurors about the nonintuitive features of suspect evidence that make it suspect, either through expert testimony or jury instructions. There are limits to this remedy, as the empirical evidence suggests that jurors, even when educated about things like snitch testimony and confessions, still find them compelling.[176] And there is a risk that courts will latch onto ineffectual jury instructions as an excuse not to employ more effective exclusionary orders. But, if applied properly and not allowed to usurp other remedies, both expert testimony and jury instructions can play a role.

While historically resistant to expert testimony on matters such as eyewitness identifications, courts are beginning to recognize the importance of such educational evidence. Increasingly, courts are permitting such testimony, and some are going so far as to find error in excluding it in some circumstances.[177] And at least with expert testimony on eyewitness identifications, the empirical

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similarities and dissimilarities between handwriting samples, but not to an exact match to the exclusion of all other samples).

[176] *See supra* notes 87–91 and accompanying text.

[177] *See, e.g.*, People v. McDonald, 690 P.2d 709, 727 (Cal. 1984) ("When an eyewitness identification of the defendant is a key element of the prosecution's case but is not substantially corroborated by evidence giving it independent reliability, and the defendant offers qualified expert testimony on specific psychological factors shown by the record that could have affected the accuracy of the identification but are not likely to be fully known to or understood by the jury, it will ordinarily be error to exclude that testimony."); *see also* State v. Guilbert, 49 A.3d 705, 735 (Conn. 2012) (finding reversible error for failure to admit expert testimony on reliability of eyewitness identification); Minor v. United States, 57 A.3d 406, 409 (D.C. 2012) (finding exclusion of expert eyewitness identification testimony to be reversible); State v. Clopten, 223 P.3d 1103, 1112 (Utah 2009) (overturning the court's de facto presumption against admissibility of eyewitness expert testimony); People v. LeGrand, 867 N.E.2d 374, 379 (N.Y. 2007) (finding error in exclusion of "expert testimony on the reliability of eyewitness identifications"); State v. Copeland, 226 S.W.3d 287, 302 (Tenn. 2007) (finding error during capital murder trial when it prohibited expert testimony on the issue of the reliability of eyewitness identification).

evidence suggests that expert testimony can help jurors make more informed decisions about reliability.[178] While courts are generally less receptive to expert testimony on false confessions and snitch testimony than they are on eyewitness identifications, the suspect nature of this evidence—both because of its now-established role in contributing to wrongful convictions and the counterintuitive nature of the factors underlying it[179]—argues strongly in favor of admitting expert testimony in these areas as well.

Other courts are looking to jury instructions as a way to educate jurors—and to sanction police and prosecutors for use of suggestive procedures (prosecutors loath instructions telling the jury that police may have tainted the evidence). That is a large part of the approach taken by the New Jersey Supreme Court in its sweeping eyewitness identification case, *State v. Henderson*, in 2011.[180] Other decisions have dabbled with jury instructions in the past, but what separates *Henderson* is the extent to which it surveys and incorporates the social science research and proposes specifically tailored and scientifically supported jury instructions that properly warn jurors of the real risks of contamination and error produced by suggestive procedures.[181] Prior attempts at jury instructions had come nowhere close to such useful guidance to juries. The well-known *Telfaire* instruction, for example, which many courts had emulated or referenced, was so vague, and in some ways misleading, that it did little to guard against misuse of eyewitness evidence; indeed, it may have made the situation even

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[178] *See* BRIAN L. CUTLER & STEVEN D. PENROD, MISTAKEN IDENTIFICATION: THE EYEWITNESS, PSYCHOLOGY, AND THE LAW 250, 264 (1995) (concluding from empirical evidence that expert testimony increases jurors' sensitivity to factors affecting the reliability of eyewitness testimony by helping them focus on those factors that are good predictors of reliability, rather than on poor indicators of accuracy, but does not overwhelm jurors or lead them to reject eyewitness identifications too readily); Jacqueline McMurtrie, *The Role of the Social Sciences in Preventing Wrongful Convictions*, 42 AM. CRIM. L. REV. 1271, 1276 (2005) (citing research demonstrating that expert testimony has been shown to be effective at "sensitizing jurors to eyewitness errors").

[179] *See supra* notes 87–88 and accompanying text.

[180] 27 A.3d 872 (N.J. 2011).

[181] *See id.* at 928 (explaining the context and reasoning motivating a change in the jury instruction framework).

worse.[182] To the extent that courts turn to jury instructions, they must bear in mind both that jury instructions inherently have only limited utility, and thus cannot be the only response to suspect evidence, and that, to the extent the courts do utilize instructions, they must be empirically based and specific, so that they can be a meaningful source of decisional information.

VIII. CONCLUSION

Suspect evidentiary categories—including eyewitness identifications, jailhouse snitch or informant testimony, confessions, and forensic expert testimony—pose unique problems for the reliability and accuracy of the truth-seeking functions of criminal trials. They are now known, based upon empirical research, to be the most common types of evidence to produce wrongful convictions of the innocent and to be uniquely

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[182] *See* United States v. Telfaire, 469 F.2d 552, 558–59 (D.C. Cir. 1972) (outlining model instructions). The *Telfaire* instruction, for example, informs juries, among other things, that the value of an identification "depends on the opportunity the witness had to observe the offender at the time of the offense and to make a reliable identification later." *Id*. at 558. The instruction elaborates:

> Whether the witness had an adequate opportunity to observe the offender at the time of the offense will be affected by such matters as how long or short a time was available, how far or close the witness was, how good were lighting conditions, whether the witness had had occasion to see or know the person in the past.

Id. Fair enough, but that hardly tells the jury anything it didn't know already. More problematically, it altogether *fails* to tell the jury what it needs to but probably doesn't know—that suggestiveness in the identification procedures can actually inflate the witness's sense of his or her opportunity to view the suspect and therefore affect self-reports about the opportunity to view (which are probably the only evidence presented on that point), making testimony on that issue itself suspect.

While the instruction contains some useful information, it also includes language like the following: "You may take into account both the strength of the identification, and the circumstances under which the identification was made." *Id*. This language suggests that witness confidence or certainty is a useful tool for assessing reliability. But the scientific research reveals that witness certainty is in fact a very weak indicator of accuracy. *See* Siegfried Ludwig Sporer et al., *Choosing, Confidence, and Accuracy: A Meta-Analysis of the Confidence–Accuracy Relation in Eyewitness Identification Studies*, 118 PSYCHOL. BULL. 315, 324 (1995) (highlighting the limits of confidence as an indicator of accuracy); 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, 360 (1998) (indicating distortions related to confidence).

unresponsive to adversary testing at trial and remediation by application of jury common sense. Both due process and the rules of evidence offer opportunities for correcting the failings of the criminal justice system in dealing with these problems. For due process to do the work, the Supreme Court will have to either reconceive its due process framework to permit direct focus on reliability as a constitutional concern for this limited group of evidence types, or it will have to invigorate its focus on the role of police and prosecutors in generating flawed evidence and demand more rigorous enforcement of best practices. Short of that, courts can and should employ the rules of evidence (either as currently drafted or amended) to demand rigorous, empirically based pretrial review of reliability and to construct remedies that courts might actually implement. The mounting empirical record about wrongful convictions of the innocent demands one of these courses; uninformed complacency and blind faith in the black box of the jury will no longer do.