REFORMING EYEWITNESS IDENTIFICATION PROCEDURES UNDER THE FOURTH AMENDMENT

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INTRODUCTION

Bobby Joe Leaster never committed a crime in his life. As a child, his worst misbehavior was sneaking off to go fishing when he was supposed to be in church.[1] On September 27, 1970, Bobby Joe was arrested and charged with a murder that he did not commit. Late that afternoon, a man named Levi Whiteside was shot and killed during a holdup at a neighborhood store. Bobby Joe was standing on a nearby street corner on his way to visit his nephew. Bobby Joe was wearing clothes that matched eyewitness descriptions of the man who killed Levi Whiteside. The police detained him and took him to Boston City Hospital where Kathleen Whiteside had just identified her husband's body. She had been administered sedatives twice already, but she was still hysterical. She had been present at her husband's murder, held at gunpoint by the assailant, and looked the perpetrator in the face for at least three minutes.[2] The police

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1. Charles Kenney, *Justice for Bobby Joe*, THE BOSTON GLOBE MAGAZINE, Feb. 28, 1988, *available at* http://www.nodp.org/ma/stacks/b_leaster.html.

2. Commonwealth v. Leaster, 479 N.E.2d 124, 126 (Mass. 1985).

presented only Bobby Joe to her, in handcuffs, asking, "Is this him?" She identified him. He spent fifteen years in prison as a result.[3]

The prosecutor did have corroborating evidence against Bobby Joe. At a grand jury hearing, a witness from the store also identified Bobby Joe.[4] Bobby Joe also told police that he was with his girlfriend at the time of the murder. When the police attempted to confirm his alibi with Bobby Joe's girlfriend, she denied it.[5] Subsequently, exculpatory evidence came to light. A Boston schoolteacher saw a photograph of Bobby Joe in a magazine article and knew that he had been wrongfully convicted. The schoolteacher had been near the scene moments after the murder and had seen two men fleeing, neither of whom were Bobby Joe. Bobby Joe was exonerated after spending 16 years in prison, from 1970 to 1986.[6]

Courts today continue to allow into evidence suggestive identification testimony similar to that in Bobby Joe's case. Currently, courts consider the admissibility of identification testimony under a Fourteenth Amendment procedural due process analysis.[7] If a court determines that a pretrial identification was unnecessarily suggestive, it then ascertains whether the suggestive procedure gave rise to a substantial likelihood of irreparable misidentification.[8] A court will find a substantial likelihood of irreparable misidentification only if the identification is found to be *unreliable*.[9] Therefore, even if the court concludes that a police identification procedure was suggestive, it may be admissible if the court finds that the identification is nevertheless likely to be accurate.[10] A court will balance the suggestiveness of the identification procedure against the likelihood that the identification is correct, resulting in an unprincipled rule of law that turns on the court's subjective assessment of the defendant's guilt.[11] As Bobby Joe's case demonstrates, courts will admit misidentifications, and juries will convict in reliance upon them.[12]

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3. *See* Kenney, *supra* note 1.
4. *Id.*
5. *Id.*
6. *Id.*
7. *See* Neil v. Biggers, 409 U.S. 188, 196 (1972).
8. *See* Manson v. Braithwaite, 432 U.S. 98, 107 (1977).
9. *Id.* at 114.
10. *Id.*
11. The Court's current due process approach has created significant confusion, and as a result, there is no uniformity between courts on the issue of whether corroborating evidence of guilt should be used to assess the validity of an identification. Seven circuit courts disagree about whether this factor should be included. The First, Fourth, Seventh, and Eighth Circuits

Given these serious drawbacks with the due process approach, this Article reexamines police eyewitness identification procedures[13] in the first instance under the Fourth Amendment. It explains why a suggestive lineup may properly be a Fourth Amendment concern. It also explores why such an analysis may be more effective in excluding identification testimony at trial because of the objectives of the Fourth Amendment's exclusionary rule.[14] Under this rule, all identification testimony resulting from suggestive lineups would be suppressed, whether or not the identification is thought to be accurate. Furthermore, a Fourth Amendment approach to lineups better lends itself to the imposition of clear and consistent guidelines than does the current due process analysis.

Analyzing lineups under the Fourth Amendment may accomplish two goals. First, if courts find it persuasive, it can correct the ways in which the courts have failed and provide the most effective means to protect the innocent from wrongful convictions resulting from misidentifications. Second, even if courts do not find it immediately persuasive, using a Fourth Amendment lens can still provide a useful basis for understanding the shortcomings of the current due process test under the Fourteenth Amendment. This Article raises many issues that will require significant dialogue before effective solutions may be reached. The regulations and criteria recommended in this Article are suggestions designed in hopes of sparking debate and furthering scholarly discussion.

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consider other evidence of guilt, while the Second, Third, and Fifth Circuits only look to the reliability of the identification itself. *See* Suzannah B. Gambell, *The Need to Revisit the* Neil v. Biggers *Factors: Suppressing Unreliable Eyewitness Identifications*, 6 WYO. L. REV. 189, 210 (2006).

12. *See* Timothy P. O'Toole & Giovanna Shay, Manson v. Braithwaite *Revisited: Towards a New Rule of Decision for Due Process Challenges to Eyewitness Identification Procedures*, 41 VAL. U.L. REV. 109, 110 (2006) (noting that eighty-eight percent of rape case exonerations and fifty percent of murder case exonerations have been due to misidentifications).

13. "Police eyewitness identification procedures" include lineups and show-ups and may be referred to hereinafter simply as "lineups." A "show-up" is an identification procedure where only one individual or photo is presented to the witness for possible identification.

14. The exclusionary rule, as it applies to the Fourth Amendment, has a remedial function. *See* Weeks v. United States, 232 U.S. 383, 391 (1914). The benefits of applying the exclusionary rule to eyewitness testimony outweigh the social cost. Application of the exclusionary rule in Fourth Amendment violations typically excludes valid evidence. However, application of the exclusionary rule for suggestive eyewitness identification procedures will often exclude invalid evidence, specifically misidentifications.

Section I discusses the problem of misidentifications. Misidentifications are the leading cause of wrongful convictions,[15] and many result from unregulated lineups and identification procedures.[16] Section II presents an overview of human memory function and discusses how suggestion influences memory. Section III demonstrates why lineups are a significantly unreliable police investigatory procedure and how suggestion pervades lineups. The accuracy of an eyewitness identification procedure rests largely on memory, a human function uniquely prone to molding, suggestive influence, and error.[17] Section IV reviews the current due process law regarding suggestive identification procedures. Currently, courts permit eyewitness identification testimony resulting from even highly suggestive identification procedures if the court determines that the identification was "reliable."[18] Courts use a set of factors to decide if an identification is "reliable," but these do not reliably indicate by themselves that the identification is accurate.[19]

Section V explains how a claim regarding an unregulated or suggestive lineup is supportable under the Fourth Amendment.[20] This Article proposes that an unregulated lineup is an unreasonable seizure under the Fourth Amendment. Although one might initially assume this notion lacks support, a closer look at the case law and intent of the Fourth Amendment will reveal that the unreasonable risk to the individual in a suggestive or unregulated lineup is a Fourth Amendment concern. Indeed, courts have suggested that the reliability of a police investigatory procedure is relevant in terms of the Fourth Amendment.[21] This Article proposes that, in addition to the physical intrusion of the seizure, the lack of reliability in

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

16. *Id.*

17. Elizabeth F. Loftus, *Memory Faults and Fixes*, ISSUES IN SCI. AND TECH., Summer 2002, at 43.

18. *See* Neil v. Biggers, 409 U.S. 188, 197 (1972).

19. *See* David E. Paseltiner, *Twenty-Years of Diminishing Protection: A Proposal to Return to the Wade Trilogy Standards*, 15 HOFSTRA L. REV. 583, 606 (Spring 1987).

20. The skeptical reader should withhold judgment and render a verdict after reading the entire Article.

21. *See, e.g.*, Davis v. Mississippi, 394 U.S. 721, 727 (1969). In *Davis*, the United States Supreme Court determined that the defendant could be fingerprinted with less than probable cause, in part because fingerprinting is a *reliable* scientific police investigatory procedure. *Davis* went as far as to comment that probable cause was not required because fingerprinting is not as prone to error as police investigatory procedures such as lineups.

eyewitness identification procedures also triggers Fourth Amendment protections.

Section VI recommends two types of procedural safeguards that should be required before courts admit identification testimony. First, there must be reasonable suspicion that the individual has committed the crime for which identification is sought. Section VI places this proposal in the context of the varying standards for different kinds of intrusions under current Fourth Amendment law. Second, nine guidelines should be used to evaluate lineups. This section briefly lays out these guidelines and explains why their use will significantly reduce the likelihood of misidentifications. Section VII then discusses exceptions to the use of these procedural safeguards.

This Article proposes that analyzing eyewitness identification procedures through a Fourth Amendment perspective will help clarify the problems with courts' current approaches. Such an assessment is a useful starting point to evaluate and highlight the issues surrounding the current standards. Viewing the suggestion involved with eyewitness identification procedures as a Fourth Amendment issue may seem unconventional initially. This Article does not intend to provide all of the answers and single-handedly create new standards for lineups under the Fourth Amendment. Rather, this Article's primary goals are to begin a discourse on the impact of the Fourth Amendment on identification procedures and to provide guidance in the area of reform for eyewitness identification procedures generally.

I. WRONGFUL CONVICTIONS

Available numbers regarding exonerations reflect only a small fraction of wrongful convictions and innocent individuals jailed and prosecuted. Many experts estimate that wrongful convictions may amount to as many as five percent of all convictions each year.[22] With the aid of DNA testing, exonerations now number 207 nationwide.[23] Yet, DNA testing may reveal only a very small percentage of the actual wrongful convictions, as only ten percent of felony cases

22. *See* Gambell, *supra* note 11, at 190 (citing ELIZABETH F. LOFTUS & JAMES M. DOYLE, EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL § 4-1 (3d ed. 1997)).

23. Innocence Project: Benjamin N. Cardozo School of Law, Yeshiva University, *Eyewitness Misidentification in Florida and Nationwide*, http://www.innocenceproject.org/docs/FloridaMistakenID.pdf. Exonerations are not limited to DNA testing. *See* Gross et al., *supra* note 15, at 524 (reporting that since 1989, 340 people have been exonerated after conviction of serious crimes).

involve biological evidence that could be utilized for testing.[24] In addition, not all of the ten percent are actually tested. Many accused who plead guilty or "no contest" to the crime are not eligible for DNA testing even if biological evidence exists.[25] National estimates indicate that there are at least 10,000 wrongful convictions each year.[26] Many more innocent people are arrested and prosecuted, though ultimately not convicted.

Misidentification accounts for more wrongful convictions than all other causes combined.[27] Recent studies and research confirm that an individual placed in an unregulated identification procedure incurs a substantial risk of being misidentified, jailed, and even wrongfully convicted.[28] In the first eighty-two DNA exonerations, mistaken eyewitness identification was a factor more than seventy percent of the time, making it the leading cause of wrongful convictions in DNA cases.[29] An example of a dangerously unreliable eyewitness identification procedure occurred in the highly publicized Duke lacrosse team case, in which the identification procedure involved only suspects.[30] This extreme example serves to remind us of the degree of error and significant suggestion in police lineups. Up to eighty percent of the time, juries believe witnesses making eyewitness identifications, regardless of whether the witnesses are correct.[31] Eyewitness identification testimony compels juries to convict.[32]

II. MEMORY AND SUGGESTION

A specific look at how memory functions and how suggestion operates illustrates why participation in unregulated lineups creates unreasonable risks of misidentification. Identification procedures

24. Comments of the Florida Innocence Initiative, Inc. at 5, *In re* Amendment to the Florida Rules of Criminal Procedure, Rule 3.853, No. SC05-1702 (Fla. amended/adopted Sept. 21, 2006).

25. The Justice Project, *FL: Post-Conviction DNA Testing Update and Death Row Exoneration*, THE CRIMINAL JUSTICE REFORMER: Vol. 3. No. 3. (Washington D.C.), Mar. 23, 2006, at 4, *at* http://www.thejusticeproject.org/about/newsletter/the-criminal-justice-1.html#FL.

26. *See* Gambell, *supra* note 11, at 190.

27. Gary L. Wells, *Eyewitness Identification: Systemic Reforms*, 2006 WIS. L. REV. 615, 623 (2006).

28. Id.

29. Richard A. Rosen, *Innocence and Death,* 82 N.C. L. REV. 61, 70 n.32 (2003).

30. *See* Aaron Beard, *Duke Prosecutor is Under Heavier Fire*, ASSOCIATED PRESS, Dec. 28, 2006, http://abcnews.go.com/US/wireStory?id=2756978.

31. Gary L. Wells et al., *Effects of Expert Psychological Advice on Human Performance in Judging the Validity of Eyewitness Testimony,* 4 LAW & HUM. BEHAV. 275, 278 (1980).

32. *Id.*

differ from other police investigatory procedures in that they solely rely on human memory.[33] Human memory consists of three basic systems: (1) encoding, (2) storage, and (3) retrieval.[34] "Encoding" is the initial processing of an event that results in a memory. "Storage" is the retention of the encoded information. "Retrieval" is the recovery of the stored information.[35] Errors can occur at each step. Contrary to common understanding of memory, not everything that registers in the central nervous system is permanently stored in the mind and particular details become increasingly inaccessible over time.[36]

In fact, details are often permanently lost.[37] To be mistaken about details in the recollection of an event is completely normal and not a function of a poor memory. We can even come to believe that we remember events that never actually occurred.[38] When people construct a memory, they gather fragments of what they have stored and fill in the gaps with what makes most sense to them.[39] Human beings recall events by adding these bits and pieces to their recollections based on their subjective understandings of the world. As Professors Loftus and Ketchum note, "Truth and reality, when seen through the filters of our memories, are not objective facts but subjective, interpretive realities."[40] Because these processes are unconscious, individuals generally perceive their memories as completely accurate and their reporting of what they remember as entirely truthful, no matter how distorted or inaccurate they, in fact, may be.[41] An individual's memories become distorted even in the absence of external suggestion or internal personal distress. Naturally, people tailor their telling of events to the listener and the context. Each act of telling or retelling changes the teller's memory of the

33. Confessions and interrogations are highly unreliable as well, because the results are dependent on the functioning of the human mind.

34. RICHARD GERRIG & PHILIP ZIMBARDO, PSYCHOLOGY AND LIFE 209–10 (17th ed. 2005).

35. *Id.*

36. *Id.*

37. *Id.*

38. ELIZABETH LOFTUS & KATHERINE KETCHAM, WITNESS FOR THE DEFENSE: THE ACCUSED, THE EYEWITNESS, AND THE EXPERT WHO PUTS MEMORY ON TRIAL 20 (1991).

39. *Id.*

40. *Id.*

41. *Id.*

event.[42] Loftus and Ketchum explain, "This is why a fish story, which grows with each telling, can eventually lead the teller to believe it."[43]

Many conditions such as fear, lighting, distance from the event, surprise, and personal biases all affect memory and recall.[44] For example, racial stereotypes may affect memory and recall. Preconceptions, conscious or unconscious, shape our memories. In one study, participants were shown four news stories, each containing an identical photograph of the same African-American man. The stories described: (1) a college professor, (2) a basketball player, (3) a non-violent crime, and (4) a violent crime. After viewing the photos and reading the stories, the participants were asked to reconstruct the photo of the man for each story by selecting from choices of facial features. The stories involving criminal conditions resulted in the selection of more pronounced characteristically African-American facial features. This was particularly true for the violent crime scenario.[45] Participants' preconceived notions and stereotypes affected their choices.

Human memory is indeed delicate, especially regarding victims and witnesses of crimes. Fear and traumatic events may impair the initial acquisition of the memory itself.[46] At the time of an identification, the witness is often in a distressed emotional state. Many victims and witnesses experience substantial shock because of their traumatic experiences that continue to affect them at the time of identification procedures. In eyewitness identification procedures, witness motivation to make an identification may also be very powerful. Such witnesses may seek rapid resolution and closure, possibly leading to hasty identifications of fillers[47] in the absence of

42. Laura Engelhardt, *The Problem with Eyewitness Testimony: Commentary on a Talk by George Fisher and Barbara Tversky*, 1 STAN. J. LEGAL STUD. 25, 27 (1999).

43. *Id*.

44. *Id.*

45. Penn State, *Readers' Memories Of Crime Stories Influenced By Racial Stereotypes*, SCIENCE DAILY, May 6, 2004, http://www.sciencedaily.com/releases/2004/05/040506073047.htm (last visited February 28, 2008).

46. *Id.* However, courts persist in erroneously believing that witnesses experiencing elevated emotional states produce more accurate recollections or perceptions. For example, in *Howard v. Bouchard*, 405 F.3d 459, 473 (6th Cir. 2005), the court found that the identification was admissible in part because the witness was in a heightened state of stress at the time of the event and presumably would better remember the perpetrator as a result.

47. A "filler" is a known innocent person placed in a lineup.

the true perpetrator. Furthermore, their recall is often distorted and untrustworthy because of their traumatic experiences.[48]

The presence of a weapon may also influence a witness's ability to recall the face of the perpetrator. Studies show that when a weapon is present during an event, perpetrator recognition ability is impaired.[49] The witness may be focusing on the weapon, instead of the culprit, during the criminal episode. In one study where the weapon was placed in a prominent location, recall was worse than when the weapon was partially hidden or off to the side.[50] Other studies indicate that the location of the weapon does not affect memory accuracy.[51] Another explanation may be that the witness is more alarmed and experiences a higher arousal level in the presence of a weapon, which in turn impairs memory acquisition. Some studies show an absence of the "weapon effect" in non-arousing classroom or laboratory settings.[52] A variety of other external factors influence and may impair a witness's ability to recall an event or the face of a perpetrator. For example, witnesses have difficulty identifying perpetrators cross-racially, which may relate to individual internal biases. Studies show accurate suspect identification rates are much greater under same-race conditions.[53] In addition, older adults have increased difficulty with cognitive performance and perform worse in identification procedures. Ironically, older adults who recall more details about a culprit are actually more likely to make false identifications.[54]

Memory and recall are highly susceptible to suggestion. For example, studies show that misinformation following an event may lead to incorrect recall of the event.[55] If a victim is told that the perpetrator was holding a gun after observing the perpetrator holding a knife, the victim may subsequently report that she recalls seeing the perpetrator holding a gun. Researchers have called this phenomenon

48. *See* Tom Singer, *To Tell the Truth, Memory Isn't that Good,* 63 MONT. L. REV. 337, 360 (2002).

49. *See* Nancy Steblay, *A Meta-analytic Review of the Weapon Focus Effect,* 16 LAW & HUM. BEHAV. 413, 413–24 (1992).

50. *See* Thomas H. Kramer, Robert Buckhout & Paul Eugenio, *Weapon Focus, Arousal, and Eyewitness Memory: Attention Must be Paid*, 14 LAW & HUM. BEHAV. 167, 167–84 (1990).

51. *See* Steblay, *supra* note 49.

52. *See* Kramer et al., *supra* note 50.

53. *See* Bruce W. Behrman & Sherrie L. Davey, *Eyewitness Identification in Actual Criminal Cases: An Archival Analysis*, 25 LAW & HUM. BEHAV. 475, 475–91 (2001).

54. *Id.*

55. *See* Singer, *supra* note 48.

the "misinformation effect." Witnesses who report such unconsciously adopted misinformation do so as rapidly and confidently as they would report an actual memory.[56]

Post-event information may also profoundly impair and alter a witness's recollection of an individual or event. In an illustrative study from 1974, Loftus and Palmer showed two separate groups of participants the same video of two speeding cars and asked them to estimate their speed. In one group the participants were asked, "How fast were the cars going when they smashed?" In the other group, the participants were asked, "How fast were the cars going when they contacted each other?" The participants who were asked about the "smashing" cars estimated the speeds as over 40 mph. Participants who were asked about the cars "contacting" each other estimated the speeds as only 30 mph.[57] When the participants were asked if they saw any broken glass (there was no broken glass), a third of the "smash" participants reporting seeing broken glass while only fourteen percent of the "contact" participants did so.[58] The choice of words influences participants' perceptions.

Human memory is fragile and decidedly prone to suggestive influence. When placed in the context of an eyewitness identification procedure, suggestion may have a powerful impact on a witness's memory and substantially alter the witness's identification testimony.

III. SUGGESTION IN LINEUPS

Individuals who participate in lineups are exposed to a substantial risk of misidentification resulting from suggestion. How does suggestion in identification procedures result in this risk to the suspect? Suggestion, in the context of eyewitness identifications, is the process by which a witness identifies an individual based on criteria other than the witness's independent memory of the event alone. It is surprisingly simple for a police identification procedure to become highly suggestive. Very subtle and completely inadvertent circumstances may influence a witness's choice during a lineup procedure. A witness may feel unconscious pressure to identify someone in the lineup in order to feel that she has not failed her job or disappointed the officer. Thus, a police officer's mere presence

56. *Id.*
57. *See* GERRIG & ZIMBARDO, *supra* note 34.
58. *Id.*

may exert powerful influence on the witness to make an identification not solely based on independent recall of the event. Even the most regulated identification procedure carries with it a high risk of misidentification.

The most well-meaning and hard-working police officer may inadvertently create a suggestive identification procedure. On the other hand, occasionally officers do a less than thorough job at creating a fair lineup, or they even employ intentional suggestion and influence on the witness to choose the suspect. Many police officers are no strangers to trickery and mischief in the name of apprehending criminals. The officer or lineup administrators may unconsciously suggest the identity of the suspect in a lineup in numerous, subtle ways. For example, if the suspect is number three in the lineup, the officer may tell the witness to take her time as she looks at number three. This may alert the witness to number three in the lineup. The officer may also falsely bolster the witness's confidence in the identification by making statements to her following the identification ("you picked the suspect"). These confirming statements ("confirming feedback") serve to reinforce the witness's belief that she identified the proper individual and may actually transform her memory of the event to correlate with her viewing of that suspect pursuant to the "misinformation effect."[59] Subsequently, the witness will appear highly confident of her identification at trial and influence the jury. Therefore, an earnest officer who knows the identity of the suspect, and in good faith believes in the suspect's guilt, may provide the eyewitness with confirming feedback that taints the witness's testimony at trial.

Despite human memory's delicate nature and identification procedures' unique susceptibility to bias and suggestion, courts routinely allow prosecutors to use suggestive eyewitness identifications as evidence against an accused. In part, this is a result of the view that suggestion in lineups as solely a due process issue. Wrongful convictions result.

59. *See* Wells, *supra* note 27, at 621.

IV. LINEUPS UNDER DUE PROCESS

The current law surrounding suggestive eyewitness identifications uses a due process analysis alone.[60] The current law's procedural due process view creates an inadequate rule largely because, if a court believes that an identification is correct, it will allow the identification into evidence, even if it is suggestive. Not only have the Supreme Court's protections of the 1960's been dismantled and misinterpreted, but in light of today's extensive research in the area of eyewitness identifications and human memory, the rules promulgated by the Supreme Court in the 1970's do not, in fact, adequately safeguard against misidentifications and wrongful convictions.

In the late 1960's, the United States Supreme Court recognized that defendants' due process rights may be violated as a result of suggestive police eyewitness identification procedures.[61] In 1967, the Supreme Court decided three cases involving eyewitness identification, often referred to as the "*Wade* Trilogy."[62] In *United States v. Wade*, the Court granted defendants the right to counsel at all post-indictment, live lineup eyewitness identification procedures.[63] The Court acknowledged the potential suggestive influence on a witness and the impact such evidence has on a defendant's outcome at trial.[64] Then, in *Gilbert v. California*, the Court addressed in-court identifications stemming from uncounseled out-of-court identifications. It held that an in-court identification may be admitted if it can be shown that the identification is based upon the witness's independent observation of the event and not the improper

60. *See* Manson v. Braithwaite, 432 U.S. 98, 99 (1977); Neil v. Biggers, 409 U.S. 188, 196 (1972) (noting that procedural due process governs pre-trial identification procedures). *Cf.* Baker v. McCollan, 443 U.S. 137, 152 (1979) (suggesting that an alleged violation of procedural due process challenges the adequacy of procedures provided by the state or municipality in effecting the deprivation of liberty or property). *See generally* 16B AM. JUR. 2D *Constit. Law* § 901 (2007).

61. *See* Palmer v. Peyton, 359 F.2d 199, 202 (4th Cir. 1966). *See also* Stovall v. Denno, 388 U.S. 293, 302 (1967) (finding that the defendant's due process rights were not violated although the identification procedure was admittedly suggestive in that the suspect was brought to the hospital and was the only individual presented to the witness).

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

63. United States v. Wade, 388 U.S. 218, 228 (1967) ("The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification.").

64. However, in *United States v. Ash,* 413 U.S. 300, 321 (1973), the Court declined to extend the defendants' right to counsel to photographic lineups.

identification procedure.[65] In the third case, *Stovall v. Denno*,[66] the Supreme Court recognized the need to evaluate identification procedures by considering the "totality of the circumstances."[67] *Stovall* requires that an identification be suppressed if it is "so unnecessarily suggestive and conducive to irreparable misidentification that [the accused] was denied due process of law."[68] The Court held that although the show-up identification procedure was suggestive, it did not violate the defendant's due process rights because of the police's need for immediate action.[69] The Court found that the show-up identification was imperative, given that the victim suffered potentially fatal wounds and was in jeopardy of imminent demise.[70] The level of suggestion and the necessity of the use of the show-up were balanced against one another to result in the admission of the identification testimony.[71] In *Simmons v. United States*, the Supreme Court declared that an identification procedure should be excluded only if "it was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."[72] The Court in *Simmons* used the circumstances surrounding the event itself to assess the likelihood of irreparable misidentification. The *Simmons* Court focused on whether the identification of the suspect was correct, rather than necessary.[73]

In 1977, the United States Supreme Court announced in *Manson v. Braithwaite* that even if a lineup is suggestive, it could still be admitted into evidence if it is found to be "reliable."[74] *Manson* rejected the per se exclusion of suggestive identifications and held that suggestive identifications may still be admissible if they are found to be otherwise adequately reliable.[75] This emphasis on reliability has led to the admission of eyewitness testimony stemming from highly suggestive identifications. The Court declared a two-tier test for determining the admissibility of police eyewitness identifications and

65. *See Gilbert*, 388 U.S. at 272.
66. *See Denno*, 388 U.S. at 293.
67. *See id.* at 302.
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*
72. 390 U.S. 377, 384 (1968).
73. *Id.* at 385 (concluding that the circumstances "leave little room for doubt that the identification of Simmons was correct").
74. Manson v. Brathwaite, 432 U.S. 98, 114 (1977).
75. *Id.* at 112–14.

courtroom identifications. First, it must be determined whether the pre-trial identification was unnecessarily suggestive.[76] If so, a court must ascertain whether, under the totality of the circumstances, the suggestive procedure gave rise to a substantial likelihood of irreparable misidentification.[77] The Court concluded that in order to ascertain if there is a substantial likelihood of irreparable misidentification, there must be an assessment of the *reliability* of the initial identification.[78] The *Manson* Court declared, "We therefore conclude that reliability is the linchpin in determining the admissibility of identification testimony. . . ."[79] What the Court meant by "reliability" is that the surrounding circumstances provide strong indicia of the accuracy of the identification. However, it is not realistic to try to formulate a test that attempts to assess the likelihood that a flawed lineup is correct. If one could assess this, courts would admit identifications that identify the guilty and exclude misidentifications.

The Court in *Manson* used the test established in its 1972 decision in *Neil v. Biggers* to determine when an identification procedure meets the test for reliability.[80] The *Biggers* Court enumerated several factors to determine if a suggestive identification is reliable: (1) the witness's opportunity to view the suspect; (2) the witness's degree of attention; (3) the accuracy of description; (4) the witness's level of certainty; and (5) the time between incident and confrontation, i.e., identification[81] (hereinafter referred to as the *Biggers* factors). In *Biggers*, the perpetrator grabbed the victim in a dimly lit area and raped her in a wooded area. The victim testified she could see her assailant well because the moon was full.[82] The Court found that these circumstances indicated a strong likelihood that the

76. *Id.* at 114.

77. *Id.* In *Manson*, an undercover police officer named Jimmy purchased narcotics from the seller and subsequently gave a description of the seller to another officer. This other officer later left a single photograph of the defendant on Jimmy's desk. Jimmy identified the defendant as the seller.

78. *Id.* at 112.

79. *Id.* at 114.

80. In *Neil v. Biggers*, the Court determined the factors to be considered in deciding the reliability of a suggestive identification. 409 U.S. 188, 199 (1972). In *Biggers*, the Court admitted the identification of a suspect based upon the presentation of a *single* photograph to the witness. It held that although presentation of only one photograph might be suggestive, it did not give rise to substantial likelihood of irreparable misidentification.

81. *Id.*

82. *Id.* at 194.

identification was accurate and stemmed from the witness's independent memory of the event.[83]

Some courts include other corroborating evidence of guilt as a sixth factor to the enumerated five *Biggers* factors.[84] The Second Circuit in particular recognizes the absurdity of using other corroborating evidence of guilt to support the introduction of eyewitness testimony into evidence. The Second Circuit has written, "Even where there was irrefutable evidence of the defendant's guilt, if an identification was made by a witness who, it transpired, was not even present at the event, we could hardly term the identification reliable."[85] On the contrary, the Seventh Circuit considers corroborating evidence of guilt when assessing the reliability of an identification procedure. In *United States ex rel. Kosik v. Napoli*,[86] the court found the identification reliable in part because the defendant was shown to have been driving the getaway car.

Bobby Joe Leaster spent fifteen years in prison in large part due to corroborating evidence of guilt.[87] According to Justice Marshall, "By importing the question of guilt into the initial determination of whether there was a constitutional violation, the apparent effect of the Court's decision is to undermine the protection afforded by the Due Process Clause."[88] Consideration of evidence of guilt should only take place in harmless error reviews—not due process reviews.[89]

The level of suggestion should be balanced against the reliability of the identification. The Court in *Manson* stated, "Against these [*Biggers*] factors is to be weighed the corrupting effect of the suggestive identification itself."[90] Many courts fail to balance reliability against level of suggestion and admit suggestive identifications if the *Biggers* factors are met.[91] These results are partly

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83. *Id.* at 201.

84. Seven circuit courts disagree about whether this factor should be included. The First, Fourth, Seventh, and Eighth Circuits consider other evidence of guilt; while the Second, Third, and Fifth Circuits look to the reliability of the identification itself. *See* Gambell, *supra* note 11.

85. Raheem v. Kelly, 257 F.3d 122, 140 (2d Cir. 2001).

86. 814 F.2d 1151, 1156–57, 1161 (7th Cir. 1987).

87. *See* Kenney, *supra* note 1.

88. *See* Manson v. Brathwaite, 432 U.S. 98, 128 (1977) (Marshall, J., dissenting).

89. *See id.* (stating that it is fundamentally unfair to use corroborating evidence of a defendant's guilt in any due process violation, and such evaluations should only be done in harmless error reviews).

90. *See Manson*, 432 U.S. at 114.

91. *See, e.g.*, United States v. Traeger, 289 F.3d 461, 474 (7th Cir. 2002). The Seventh Circuit found a photographic array, in which the defendant was the only remarkably large

a consequence of courts' struggles with the notion that nonetheless valid identifications may occur despite highly suggestive identification procedures. Courts seem unable to create a rule consistent with the due process viewpoint that can adequately discourage police from employing suggestive procedures, protect the innocent from misidentifications, and allow correct identifications into evidence.[92]

The due process reliability assessment that courts use today does not prevent irreparable misidentifications as it was intended to do. The *Biggers* factors do not provide a true indication of an accurate identification, because suggestion in the lineup significantly influences the reliability assessment. The majority of the *Biggers* factors rely on self-reports of the witness. However, self-reports of the witness are subject to the same witness's distortions of memory and are influenced by the same suggestion present in the eyewitness identification procedure. A court makes its reliability assessment subsequent to the lineup at a hearing on a defense motion to suppress eyewitness identification testimony. A court generally evaluates the *Biggers* factors from the witness's answers to questions at the hearing, well after the impact of the suggestive influence.

It is paradoxical, but the more suggestive an identification procedure is, the more reliable a witness will appear. For example, if an identifying witness is advised immediately after a lineup that she identified the suspect (suggestive "confirming feedback"), she will report a higher level of confidence in her identification. This report of

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individual, to be admissible at trial. The defendant was six feet five inches tall and weighed 350 pounds. Astonishingly, the court held that his lineup was not unduly suggestive. *Id.* The court went on to hold that even assuming that such a lineup was unduly suggestive it would nonetheless be admissible as meeting the *Biggers* factors for reliability. *Id.* The Sixth Circuit found a profoundly suggestive identification procedure to be admissible in *Howard v. Bouchard*, 405 F.3d 459, 476 (6th Cir. 2005). In *Howard*, the court concluded that a lineup where the witness viewed the defendant at the defense table with his lawyer one hour before the procedure was only "minimally suggestive." *Id.* at 470. In *Clark v. Caspari*, 274 F.3d 507, 511–12 (8th Cir. 2002), after an evaluation of the *Biggers* reliability factors, the Eighth Circuit admitted an identification (a show-up) where the witness viewed two African-American clerks surrounded by white police officers. There are steps courts should take to motivate police agencies to institute procedures to minimize suggestion. For example, police agencies could avoid blatant suggestion as occurred in *Traeger* with the creation of a national data bank with photographs of individuals to use in photographic lineups. In this way, photographs that match the description of the suspect and witness's description will be readily available to lineup administrators (even photographs of individuals with unusual characteristics).

92. Furthermore, the *Manson* and *Biggers* Courts did not consider the degree to which human memory is susceptible to police suggestive procedures. *See* Ruth Yacona, Manson v. Brathwaite*: The Supreme Court's Misunderstanding of Eyewitness Identification*, 39 J. MARSHALL L. REV. 539, 551 (2006).

confidence satisfies one of the *Biggers* factors and will indicate reliability of the identification to a court when, in truth, it may only be a reflection of the suggestion present in the lineup procedure. In fact, suggestive identifications result in witnesses giving responses that indicate greater reliability of the identification on all five of the *Biggers* factors..[93] This effect was demonstrated in an experiment in which witnesses were given confirming misinformation following a simulated identification where the culprit was not present. Some participants were given the suggestive comment that they identified the right person, and others were told nothing. The lineups were otherwise identical. Of the participants who were not subject to the suggestion, only fifteen percent indicated later that they were certain they identified the right person, but fifty percent of the participants who were given the suggestive information reported identifying the right person.[94] Furthermore, the participants who received the suggestive misinformation gave descriptions of the perpetrator that contained greater detail.[95] These witnesses also reported having a better view of the perpetrator and observing the culprit for a longer period of time. In other words, every *Biggers* factor improved in reliability under suggestive circumstances. Accordingly, the presence of the *Biggers* factors does not significantly reduce the likelihood of misidentification. A Fourth Amendment perspective of suggestive eyewitness identifications presents alternative solutions.

V. LINEUPS UNDER THE FOURTH AMENDMENT

The significant risk of misidentification from eyewitness identifications requires protection under the Fourth Amendment. First, a compelled identification procedure is a seizure and triggers the Fourth Amendment. Second, unregulated eyewitness identifications are prone to high levels of error and suggestion. Both the physical invasion and the risk of misidentification of the lineup require Fourth Amendment consideration. It is useful to examine how courts currently apply the Fourth Amendment to pre-arrest

93. Gary Wells, *What is Wrong With the* Manson v. Brathwaite *Test of Eyewitness Identification Accuracy?*, http://www.psychology.iastate.edu/faculty/gwells/Mansonproblem.pdf.

94. Amy L. Bradfield, Gary L. Wells & Elizabeth A. Olson, *The Damaging Effect of Confirming Feedback on the Relation Between Eyewitness Certainty and Identification Accuracy*, 87 J. APPLIED PSYCHOL. 116–18 (2002).

95. This is presumably from the participant's observation of the individual in the lineup, not the individual in the event.

police investigatory procedures. Ordinarily, a full seizure or arrest requires probable cause,[96] which means that the facts are such that a prudent person would *believe* that a suspect has committed, is committing, or is about to commit a crime.[97] When an individual's freedom of movement is restricted, he or she has been seized under the Fourth Amendment.[98] The Supreme Court wrote in *Terry v. Ohio*, "It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has seized that person."[99] Courts agree that a physical lineup constitutes a seizure under the Fourth Amendment.[100] The Fourth Amendment applies as fully to the investigatory stage as it does to arrest.[101] As the Supreme Court recognized in *Davis v. Mississippi*, "Investigatory seizures would subject unlimited numbers of innocent persons to the harassment and ignominy incident to involuntary detention."[102]

There are exceptions to the general rule that probable cause is required prior to a search or seizure. For example, as seen in *Terry v. Ohio*, officers may conduct investigatory stops of individuals on less than probable cause.[103] In order for an officer to stop (or detain) an individual, even briefly, the officer must have specific and articulable facts that reasonably warrant such an intrusion.[104] An investigatory stop, or "*Terry* stop," which requires reasonable or founded suspicion, exists when a reasonable person would feel that the person's right to move has been restricted.[105] Founded or reasonable suspicion is defined as "a particularized and objective basis, supported by specific and articulable facts, for suspecting a person of criminal activity."[106] Further, the law permits police to conduct a somewhat more intrusive privacy invasion under certain circumstances in the absence of probable cause when the officer has reasonable grounds to believe that the suspect may be armed.[107] In this circumstance, a limited

96. Terry v. Ohio, 392 U.S. 1, 16 n.12 (1968).

97. United States v. Puerta, 982 F.2d 1297, 1300 (9th Cir. 1992) (quoting United States v. Thomas, 835 F.2d 219, 222 (9th Cir. 1987)).

98. *See Terry*, 392 U.S. at 16.

99. *Id*.

100. *See In re* Armed Robbery, 659 P.2d 1092, 1094 (Wash. 1983) (en banc).

101. *See* Davis v. Mississippi, 394 U.S. 721, 726 (1969).

102. *Id*.

103. *Terry*, 392 U.S. at 16–17.

104. *Id.* at 21.

105. State v. Nishina, 175 N.J. 502, 510–11 (N.J. 2003) (quoting State v. Rodriguez, 172 N.J. 117, 126 (N.J. 2002) and *Terry*, 392 U.S. at 21).

106. BLACK'S LAW DICTIONARY 1487 (8th ed. 2004).

107. *See Terry*, 392 U.S. at 16.

"frisk" on the outer clothing is permissible for officer safety only.[108] The Court has reaffirmed that the probable-cause exception from *Terry* should be narrowly applied, noting that "[b]ecause *Terry* involved an exception to the general rule requiring probable cause, the Court has been careful to maintain its narrow scope."[109]

Some police–citizen encounters are permissible in the absence of any police suspicion of criminal activity. These include circumstances in which courts find that the citizen was free to leave and thereby not "seized" within the purview of the Fourth Amendment. Situations where the citizen is free to leave are often called "consensual encounters," implying that the citizen has given consent and that the citizen has no objection to the interaction with the police. However, in the majority of these situations, the police initiate the interaction. In many cases, consensual encounters escalate into limited seizures. In these situations, the legality of the stop is often an issue on appeal.[110]

Another form of police–citizen encounter requiring no suspicion of criminal activity is termed "community caretaking."[111] In these situations, police officers are performing duties consistent with civil emergencies or a citizen's personal crisis such as assisting in locating a lost child. For example, in *State v. Chisholm*,[112] an unmarked police car noticed a citizen had driven away with his hat still placed on his car and thus radioed a police car to help the citizen "save" his hat. Upon stopping the car to inform the citizen about his hat, the officer observed contraband between the passenger and the driver. The officer then arrested and charged the occupants. Thus, a citizen was seized and an arrest was legally accomplished without either probable cause or reasonable suspicion during a community caretaking activity.

Courts have found other non-testimonial investigatory searches and seizures to require less than probable cause. In *Davis v.*

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108. *Id.*

109. Dunaway v. New York, 442 U.S. 200, 210 (1979).

110. *See* Golphin v. State, 838 So. 2d 705 (Fla. Dist. Ct. App. 2003) (applying a "totality of the circumstances test" to conclude that temporary retention of a suspect's license was not a seizure when the suspect handed it over voluntarily); Piggot v. Commonwealth, 537 S.E.2d 618, 619 (Va. Ct. App. 2000) ("By retaining Piggot's identification, [the officer] implicitly commanded [him] to stay."); State v. Thomas, 955 P.2d 420, 423 (Wash. Ct. App. 1998) ("Once an officer retains the suspect's identification or driver's license and takes it with him to conduct a warrants check, a seizure within the meaning of the Fourth Amendment has occurred.").

111. Cady v. Dombroski, 413 U.S. 433, 441 (1973).

112. State v. Chisholm, 696 P.2d 41, 42 (Wash. Ct. App. 1985).

Mississippi, the Supreme Court found that, although the taking of fingerprints is no less subject to the constraints of the Fourth Amendment than other detentions, police may compel fingerprints in the absence of probable cause under certain specific circumstances.[113] The Court rationalized that the taking of fingerprints constitutes a less serious intrusion on personal liberty than other types of police searches and detentions. Saliva-swabbing for DNA testing does not require probable cause for comparable reasons.[114] Some states have enacted statutory guidelines for seeking "Nontestimonial Identification Orders" ("NTOs"). These rules define when officers may conduct certain investigatory searches and seizures such as DNA testing and fingerprinting. These NTOs generally mandate a showing of reasonable grounds to suspect that the person (suspect) committed the crime in question.[115] Courts, legislatures, and police agencies take very seriously pre-arrest investigatory intrusions under the Fourth Amendment, going as far as to seek court orders for such intrusions.

In 1971, the Second Circuit, in *Biehunik v. Feliceta*, specifically held that placing an individual in a lineup constitutes a seizure under the Fourth Amendment.[116] In *Biehunik*, the lower court issued an injunction preventing the appearance of sixty-two police officers in lineups because such compelled appearance constituted a "seizure" in the absence of a warrant or probable cause.[117] There was no basis to believe that all sixty-two officers had committed a crime. *Biehunik* held that probable cause was not necessary to compel the appearance of the officers in the lineups in part due to their roles as police officers.[118] The court reached this conclusion using the test announced

113. *See* Davis v. Mississippi, 394 U.S. 721, 727–28 (1969).

114. Bousman v. Iowa Dist. Ct. for Clinton County, 630 N.W.2d 789, 798 (Iowa 2001).

115. *See, e.g.*, IOWA CODE ANN. § 810.6 (West 2007). *See also* VT. R. CRIM. P. 41.1 (providing the authority for obtaining an NTO and requiring: (1) that there is probable cause to believe that an offense has been committed; (2) that there are reasonable grounds to suspect, or, in circumstances where constitutionally required, probable cause to believe, that the person named or described in the affidavit committed the offense; and (3) that the results of the specific nontestimonial identification procedures will be of material aid in determining whether the person named in the affidavit committed the offense).

116. *See* Biehunik v. Felicetta, 441 F.2d 228, 230 (2d Cir. 1971). This writer's research revealed very little law specifically indicating the Fourth Amendment status of the suspect during a lineup. *Biehunik* explicitly denoted that the suspect is seized during a lineup for Fourth Amendment purposes. Other cases simply considered the issue while implying or assuming the suspect was detained or seized for Fourth Amendment purposes. *See id.* ("A trustworthy police force is a precondition of minimal social stability in our imperfect society. . . .").

117. *Id*. at 229.

118. *Id.* at 230.

by the Supreme Court in *Camara v. Municipal Court*, finding that the governmental interest in the particular intrusion must be weighed against the offense to the individual's personal dignity and integrity.[119] The court in *Biehunik* found that the substantial public interest in ensuring police integrity outweighed the individual officer's privacy interests.[120] In *Biehunik*, police officers were compelled to submit to a lineup in the absence of any suspicion of criminal activity. Accordingly, what level of suspicion that a civilian has committed a crime should exist before requiring the civilian's appearance in a lineup? *Biehunik* indicates that an individual who is not a public official would require probable cause before a compelled appearance in a lineup. Yet, it seems extreme to hold that a civilian may not be placed in a lineup without probable cause, but a police officer may be compelled to participate in a lineup absent any suspicion of criminal activity whatsoever.[121] The Supreme Court of Washington has held that an individual may not be ordered to participate in a lineup where no probable cause exists to believe that the individual has committed the offense under investigation.[122] On the other hand, the Court of Appeals for the District of Columbia Circuit upheld the compelled appearance of an individual in a lineup on less than probable cause.[123] Neither court considered the risk of bias and error associated with lineups as relevant to the Fourth Amendment inquiry.

Courts generally equate the level of physical intrusion to the individual with the level of Fourth Amendment protection. Should the unusual risk associated with participation in a lineup provide the suspect with heightened Fourth Amendment protections? A simple look at the plain language of the Fourth Amendment provides guidance. The Fourth Amendment provides that "the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated. . . ."[124] The appropriate question pursuant to the language of the Amendment is: Is the seizure reasonable? With regard to

119. *See* Camara v. Mun. Court, 387 U.S. 523, 534–37 (1967) (using the terminology of "personal security" and "privacy" to describe the individual's rights in its balancing test).

120. *See Biehunik*, 441 F.2d at 230–31.

121. In part, this is why this Article proposes a specified suspicion standard that is more than founded suspicion but less than probable cause before compelling an individual's appearance in a lineup.

122. *See In re* Armed Robbery, 659 P.2d 1092, 1094–95 (Wash. 1983) (en banc).

123. Wise v. Murphy, 275 A.2d 205, 212–15 (D.C. 1971).

124. U.S. CONST. amend. IV.

unregulated identifications, the answer hinges on whether the reliability associated with an investigatory procedure is relevant to determine its reasonableness as a seizure under the Fourth Amendment. Eyewitness identification procedures are unusually unreliable. In fact, one finds it difficult to think of a pre-trial investigatory procedure less reliable.[125] Some jurisdictions are adopting procedural guidelines for the implementation of eyewitness identification, but these rules are not accompanied by any threat of exclusion in court to encourage their use by the police.[126] Misidentifications are the leading cause of wrongful convictions.[127] It follows that a significantly unreliable investigatory police procedure that may lead to misidentification and even wrongful conviction is unreasonable. Because an unregulated lineup is unreliable, and thus unreasonable, in light of its status as a seizure, such a lineup seems on its face to violate the Fourth Amendment.

However, simply looking at the plain language of the Fourth Amendment may not end the inquiry. Courts interpret reasonableness under the Fourth Amendment in terms of the level of intrusion.[128] As the Supreme Court stated in 1967 in *Camara v. Municipal Court*, "[T]here is no ready test for determining reasonableness other than by balancing the need to search (or seize) against the invasion which the search (or seizure) entails."[129] It may not be possible to proclaim that a seizure is unfair and therefore unreasonable through a mere review of the language of the Fourth Amendment. What factors do courts consider in evaluating the reasonableness of a seizure? Reasonableness involves balancing

125. *See* Miranda v. Arizona, 384 U.S. 436, 476 (1966). Police interrogations are also susceptible to suggestion and police coercion, and courts have responded to this lack of reliability with constitutional protection, i.e. "Miranda warnings."

126. STATE OF N.J. DEP'T OF LAW AND PUBLIC SAFETY ON ATTORNEY GENERAL GUIDELINES FOR PREPARING AND CONDUCTING PHOTO AND LIVE LINEUP IDENTIFICATION PROCEDURES (Apr. 18, 2001), *at* http://www.psychology.iastate.edu/FACULTY/gwells/njguidelines.pdf; U.S DEP'T OF JUSTICE, EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT (Oct. 1999), *at* http://www.ncjrs.gov/pdffiles1/nij/178240.pdf); CAL. COMM'N ON THE FAIR ADMIN. OF JUSTICE, REPORT AND RECOMMENDATION REGARDING EYEWITNESS IDENTIFICATION PROCEDURES (Apr. 13, 2006), *at* http://www.psychology.iastate.edu/faculty/gwells/California_Commission.pdf); WIS. ATT'Y GEN. OFFICE, REPORT ON MODEL POLICE AND PROCEDURE FOR EYEWITNESS IDENTIFICATION (Sept. 12, 2005), *at* http://www.thejusticeproject.org/press/reports/pdfs/Eyewitness Public.pdf .

127. *See* Gross et al., *supra* note 15.

128. *See* Camara v. Mun. Court, 387 U.S. 523, 534–37 (1967).

129. *Id.* at 536–37.

governmental interest against the intrusion.[130] Not only does an unregulated lineup involve an increased intrusion to the individual resulting from the risk of misidentification, but there is also a powerful governmental interest in protecting citizens from misidentification. Indeed, courts have linked Fourth Amendment reasonableness to the reliability or trustworthiness of an investigatory procedure. In *Davis v. Mississippi*, the Court compared a detention for purposes of obtaining fingerprints to one for lineup purposes. Holding that probable cause was not necessary to detain the defendant for fingerprinting, the Court noted that fingerprinting is a more *reliable* investigatory procedure than eyewitness identifications:

> Furthermore, fingerprinting is an inherently more reliable and effective crime-solving tool than eyewitness identifications or confessions and is not subject to such abuses as the improper line-up and the 'third-degree.'[131]

Therefore, at least in part because fingerprinting is more reliable and effective than eyewitness identifications, the Court found that less than probable cause was required. This supports the conclusion that the less reliable or effective an investigatory procedure is, the greater the Fourth Amendment concerns.

Courts subsequently have found the lack of reliability in an investigatory procedure to trigger heightened Fourth Amendment protections. In 1983, in *State v. Hall*, the Supreme Court of New Jersey held that only lineup procedures comparable in reliability to fingerprinting may be sustainable on less than probable cause.[132] The court, referring to language in *Davis*, stated:

> A detention for fingerprinting was also regarded as essentially a reliable, simple and expeditious proceeding that could be conducted fairly and without palpable abuse. Accordingly, we conclude that those identification procedures that are comparable to fingerprinting will be sustainable upon a showing of less than probable cause.[133]

The court in *Hall* proclaimed that lineups could be reliable and effective, thereby requiring less than probable cause, *when conducted*

130. *Id.*
131. *See* Davis v. Mississippi, 394 U.S. 721, 727 (1969).
132. State v. Hall, 461 A.2d 1155 (N.J. 1983).
133. *Id*. at 1161 (internal citations omitted).

properly and fairly.[134] The court did not specify how police agencies should be expected to assure that a lineup procedure be comparable to fingerprinting. With scientific knowledge about the bias and error associated with eyewitness identifications, procedural guidelines are the most rational means to achieve more reliable identification procedures. *Hall* holds explicitly that the level of prejudice toward the suspect affects whether or not an intrusion is improper for Fourth Amendment purposes. The fairness of the procedure and risk of error are directly connected to the level of intrusion for Fourth Amendment purposes.[135] The *Hall* court stated:

> Indeed, the Supreme Court in *Davis* observed that 'abuses' can occur in an investigatory detention, mentioning specifically an 'improper lineup.' As a result, in order to guarantee that the detention and accompanying intrusion is not improper or abusive, it must be accomplished in a fashion designed to produce the least amount of harassment of, interference with, or prejudice to the suspect.[136]

In many circumstances, the level of physical intrusion on an individual involved with an identification procedure may not be much greater than that required for a fingerprint or an investigatory detention. The level of physical intrusion varies widely in eyewitness identifications. It ranges from a very brief "show-up"[137] on the street to a live lineup at the police station requiring considerable time and effort on the part of the detainee. In fact, application of procedural safeguards will often result in a greater *physical* intrusion to the individual. The application of the guidelines proposed in this Article will necessarily increase the level of physical intrusiveness involved in any compelled eyewitness identification procedure. For example, it will require that the suspect be detained a longer period of time while a blind administrator and appropriate fillers are located. Does the Fourth Amendment permit or even require a greater physical intrusion to the person's body to protect him or her from the *potential* of some greater harm via misidentification? Given the frequency of

134. *See id*. at 1160–62.

135. *See* Bousman v. Iowa Dist. Court for Clinton County, 630 N.W.2d 789, 798 (Iowa 2001) (finding that less than probable cause is necessary for DNA testing in part because it is a valid investigatory technique).

136. State v. Hall, 461 A.2d 1155, 1162 (N.J. 1983) (quoting Davis v. Mississippi, 394 U.S. 721, 727 (1969)).

137. A show-up identification is characterized by the witness being presented with only one suspect for possible identification; no fillers are included. *See supra* note 13.

misidentifications and wrongful convictions, this potential harm is one that should be of serious governmental and public interest.

Courts have long recognized the risk of suggestion and prejudice in eyewitness identifications.[138] Yet, courts evaluate whether or not suggestive eyewitness identifications are constitutional solely through a due process analysis.[139] This due process perspective has failed to protect citizens from an unreasonable risk of misidentification. The law will most effectively protect citizens from the dangers of unregulated eyewitness identifications if courts recognize that the risks involved with lineups trigger heightened Fourth Amendment protections. The Fourth Amendment provides more specific protections than does a due process evaluation and, consequently, courts must consider the Fourth Amendment first. As the Supreme Court wrote in *Albright v. Oliver*, "Substantive due process should be reserved for otherwise homeless substantial claims, and should not be relied on when doing so will duplicate protection that a more specific constitutional provision already bestows."[140]

A Fourth Amendment analysis of unfairly suggestive eyewitness identification procedures will necessarily result in the exclusion of the identification testimony at trial. The current law's insistence on analyzing suggestive identifications through a due process lens creates an inadequate rule largely because, if courts believe a suggestive identification is nonetheless correct, they allow the identification into evidence. A Fourth Amendment consideration of an identification procedure should not assess whether or not the identification was, in fact, accurate despite the lineup's lack of fairness. For example, when a court determines whether the search of a defendant that located cocaine in the defendant's pocket was an unreasonable search under the Fourth Amendment, the court will not consider whether the substance was, in fact, cocaine. If the search was unreasonable, the court will exclude the drugs from evidence. In this example, there is no question that the individual was actually guilty.[141] But in the interest of regulating police conduct and protecting innocent citizens, the exclusionary rule applies. Otherwise, courts have no power to protect citizens from police misconduct.

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138. *See* United States v. Wade, 388 U.S. 218, 229, 236 (1967).

139. *See* Manson v. Braithwaite, 432 U.S. 98, 106 (1977).

140. Albright v. Oliver, 510 U.S. 266, 267 (1994).

141. Excluding, of course, situations in which the police may have planted the evidence on the defendant or where laboratory tests later reveal that the substance in question is not illegal.

Similarly, without excluding identification testimony resulting from unregulated identification procedures, courts lack any authority to encourage implementation of safeguards to protect the innocent against misidentifications resulting from suggestive identification procedures. The deterrence of abusive or unfair police conduct is a vital role of the exclusionary rule, especially when stemming from Fourth Amendment violations. The Supreme Court noted: "Ever since its inception, the rule excluding evidence seized in violation of the Fourth Amendment has been recognized as a principal mode of discouraging lawless police conduct."[142] Cases founded on due process claims are void of any discussion of the goal of deterrence of police misconduct via the exclusionary rule.[143] Courts' only authority to protect citizens from invasions of their liberty is through the exclusionary rule, as courts are otherwise powerless to influence or regulate police procedures. The exclusionary rule, as it applies to the Fourth Amendment, contains "remedial objectives," and courts have found that it applies only where the objective of deterrence can be furthered.[144]

Police often create bias and unfair identification procedures unwittingly. One could argue that the exclusionary rule cannot deter inadvertent conduct. However, it would be intellectually dishonest for a police agency to assert that it did not know that inadvertent influences on witnesses are commonplace in the absence of procedural safeguards. In other words, police know that regulating lineups is good police practice and that failure to regulate a lineup puts the suspect in jeopardy of misidentification. Failure to use specific procedural standards is not accidental. Further, "[g]ood faith is not a magic lamp for police officers to rub whenever they find themselves in trouble."[145] Courts should apply the exclusionary rule if it can reasonably be said to instill a "greater degree of care"[146] in officers in future investigations. The judiciary should not be less concerned with regulating police conduct in an eyewitness identification procedure than in more traditional searches and

142. *See* Terry v. Ohio, 392 U.S. 1, 12 (1968).

143. My research did not locate any discussion of the exclusionary rule as it applies to due process claims and the goal of deterring police misconduct.

144. United States v. Leon, 468 U.S. 897, 908 (1984) (quoting United States v. Calandra, 414 U.S. 338, 348 (1974)).

145. State v. Reilly, 76 F.3d 1271, 1280 (2d Cir. 1996).

146. Michigan v. Tucker, 417 U.S. 433, 447 (1974).

seizures.[147] Police conduct surrounding identification procedures requires regulation and judicial enforcement.

Courts should apply the exclusionary rule where the benefits of deterrence outweigh the social costs.[148] The potential social cost of applying the exclusionary rule to eyewitness identification testimony would be the inadmissibility of eyewitness testimony from one government witness. In some circumstances, the government may be unable to proceed with the charges. In many other cases, the prosecution will be capable of proceeding to trial with other identification testimony and other incriminating evidence, albeit with a weaker case. The social cost is exceedingly low when balanced against the conviction of an innocent person. The social cost from the application of the exclusionary rule in other Fourth Amendment violations involves the exclusion of unquestionably valid evidence. For example, when an illegal, warrantless search reveals drugs, a trial court will suppress the drugs. On the other hand, the social cost of excluding eyewitness testimony stemming from unregulated identification procedures includes the significant likelihood that the court is excluding invalid evidence. Therefore, application of the exclusionary rule to eyewitness testimony protects innocent citizens.

The benefit of applying the exclusionary rule to identification procedures is that it protects the innocent from wrongful conviction. This prospect is not speculative conjecture but rather a concrete reality, because faulty eyewitness identifications account for more wrongful convictions than all other causes combined.[149] This benefit far outweighs the social cost. A vital distinction between lineups and other police procedures triggering the Fourth Amendment is, in eyewitness identifications, innocent citizens may be arrested due to police misconduct. Police will not ordinarily arrest innocent citizens who are subject to other Fourth Amendment violations stemming from police misconduct,[150] precisely because the police will not

147. *Leon*, 468 U.S. at 906–07. Although the *Leon* Court refused to exercise the exclusionary rule if the police were exhibiting "good faith" when searching and securing evidence, the Court clarified that this "good faith" exception would be appropriate only with "reliable physical evidence," which does not include eyewitness identifications. *Id.* at 912–13.

148. For example, in *Hudson v. Michigan,* 547 U.S. 586 (2006), the Supreme Court found that violations of the knock and announce rule do not require application of the exclusionary rule. The Court held that the social cost of suppression of the evidence outweighed the benefits of deterring police non-compliance with the knock and announce rule.

149. *See* Gross et al., s*upra* note 15, at 542.

150. Examples of other police misconduct include violations of the knock and announce rule, lack of probable cause or founded suspicion, and failure to obtain a warrant.

discover any condemning evidence. The societal interest in regulating police conduct for the majority of other Fourth Amendment violations is to protect the innocent citizen's personal dignity and privacy. Conversely, a suggestive or unregulated lineup may produce damning but false eyewitness testimony that could result in the arrest and even conviction of an innocent citizen. The innocent citizen has more to lose as a result of police misconduct during a lineup than suffering mere embarrassment or personal indignities. The *Biggers* "reliability" assessment used by the courts is unsuccessful in determining a correct identification from an incorrect one. Accordingly, current law does not accurately recognize misidentifications and exclude them from evidence at trial, placing citizens in great jeopardy. Application of procedural safeguards will facilitate the identification of the truly guilty by helping to ensure that the witness has identified the suspect from her independent recollection of the event. Therefore, to apply a per se rule of exclusion for unregulated lineups is a unique application of the exclusionary rule, because it protects the innocent as well as encourages the arrest and conviction of the guilty.[151]

Identification procedures are a particularly fertile soil for police–citizen misunderstanding, police mischief, and citizen risk. Jerome H. Skolnick asks, "To what extent if at all is it proper for law enforcement officials to employ trickery and deceit as part of their law enforcement practices?"[152] He continues, "The reality is: Deception is considered by police—and the courts as well—to be as natural to detecting as pouncing is to a cat."[153] Indeed, deception may be a part of all aspects of police work from arrest to trial, but Skolnick states that the area where deception is most prevalent is in the investigatory stages. A quote from *Justice Without Trial* is appropriate here: "The policeman operates as one whose aim is to legitimize the evidence pertaining to a case, rather than as a jurist whose goal is to analyze the sufficiency of the evidence based on case law."[154] In short, Skolnick states that the police are "routinely permitted and advised to

151. Application of guidelines for lineups will serve the social mission of facilitating conviction of the guilty as well. Eyewitness testimony stemming from proper lineups with adequate safeguards will result in more frequent identifications of the guilty and stronger evidence at trial.

152. Jerome H. Skolnick, *Deception by Police*, 1(2) CRIM. JUSTICE ETHICS 40 (Summer/Fall 1982).

153. *Id.* at 40.

154. *Id.* at 43 (quoting JEROME SKOLNICK, JUSTICE WITHOUT TRIAL 214 (2d. ed. 1975)).

employ deceptive techniques and strategies in the investigative process."[155] Consequently, Fourth Amendment analysis of unregulated identification procedures is crucial to the fair administration of justice, because under the Fourth Amendment, courts may regulate police behavior and implement consequences for failure of police to use adequate procedural safeguards.

Like their treatment of coerced confessions, courts should suppress identification testimony stemming from a biased or unfair procedure. Courts agree that the use of a coerced confession against a defendant denies the defendant due process of law no matter how strong the other evidence against him at trial,[156] because the violated right is so fundamental. The similarities between a coerced confession and an unregulated identification procedure are obvious.[157] Both outcomes rely on the functioning of the human mind. Both procedures may be highly influenced by suggestion and psychological influence of police officers. Both types of evidence are persuasive to juries to convict. Both procedures may result in erroneous outcomes by both purposeful as well as inadvertent police behavior. Citizens placed in identification procedures merit protections similar to those individuals subjected to interrogations. Consequently, under a Fourth Amendment analysis, courts should suppress an identification stemming from an unreasonable suggestive identification seizure regardless of the culpability of the suspect.

According to Justice Brennan, "Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether these intrusions be termed 'arrests' or 'investigatory detentions.'"[158] How can one sensibly assert that unregulated, suggestive identification procedures do not invade and threaten an individual's personal security? Certainly, criminal accusation, jail, prosecution, and even wrongful conviction are among the most profound invasions of personal

155. *Id.* at 45.

156. *See* Payne v. State of Arkansas, 356 U.S. 560 (1958); *see also* Chapman v. California, 386 U.S. 18, 43 (1966) (Stewart, J., concurring) ("When involuntary confessions have been introduced at trial, the Court has always reversed convictions regardless of other evidence of guilt.").

157. There is one notable difference between the exclusionary rule as it applies to Fourth Amendment as opposed to Fifth Amendment violations. The Self-Incrimination Clause of the Fifth Amendment contains its own self-executing exclusionary rule. Conversely, Fourth Amendment remedies are judicially imposed sanctions and are not derived from the text of the amendment itself. *See* United States v. Patane, 542 U.S. 630, 640 (2004).

158. Davis v. Mississippi, 394 U.S. 721, 726–27 (1969).

security.[159] To say that the mere risk of these personal security invasions does not equate to an increased privacy concern would be intellectually short-sighted—as if to say that one only needs to wear a parachute after jumping out of the plane, not to don it while still on board. Once you are falling, you cannot put on the parachute. Once a misidentification has occurred, arrest and prosecution are imminent. It is too late for Fourth Amendment protections, and the wrongly accused is assured of suffering tremendous invasions of personal security that will affect the rest of the accused's life. To protect citizens from such invasions, the protections must be implemented prior to the eyewitness identification procedure itself.

VI. PROCEDURAL SAFEGUARDS

A. Specific Suspicion of Criminal Activity Required for Appearance in a Lineup

The Fourth Amendment does not provide a uniform legal criterion through which officers may compel an individual to participate in a lineup. Placing an individual in a lineup exposes him or her to substantial risk. The reality of everyday police work is that police routinely present individuals to victims and witnesses on the street for identification in the absence of any procedural safeguards.[160] Placing an individual in a lineup is a greater privacy intrusion for Fourth Amendment purposes than an "investigatory stop" but is less of an intrusion than arrest. Police frequently seek probable cause for arrest through eyewitness identification procedures. To require probable cause prior to an identification procedure may unfairly tie the officer's hands—it may require the officer to forego the apprehension of an unreasonable number of guilty individuals due to lack of probable cause for arrest. Consequently, this Article proposes

159. A person's right to privacy is also protected under Article 12 of the United Nations Universal Declaration of Human Rights, which states, "No one shall be subjected to arbitrary interference with his privacy, family, home, or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks." Universal Declaration of Human Rights, G.A. Res. 217A, Art. 12, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948). United Nations member countries are morally, if not legally, bound by such declarations. Certainly, misidentification qualifies as an attack upon honor or reputation. The very real threat of misidentification that accompanies an unregulated identification procedure requires legal protection under this provision.

160. This statement is based on interviews with multiple criminal defense attorneys and public defenders in Miami, Florida.

a new legal standard that will reasonably restrict which individuals may be placed as suspects in any identification procedures.[161] Police would have to meet this new legal criterion before they could compel an individual's appearance in a lineup. It is reasonable and desirable to propose a straightforward standard for identification procedures that would be similar to the current "reasonable suspicion" standard (i.e., *Terry* stop) but with the addition of a *particularized wrongdoing* component.[162] Under this proposed standard, the language to define the grounds for placing an individual in an identification procedure would nearly mirror the standard for investigatory detentions. It would state:

> *An individual may be placed in an identification procedure only if the officer has a particularized suspicion based upon an objective observation that the person being placed in the procedure has been engaged in the specific criminal wrongdoing observed by the witness.*

Should the government fail to meet the burden of proving that the officer possessed this level of suspicion prior to compelling an individual's attendance at a lineup, the trial court should exclude the identification. This standard would not differ from the current standard required for an investigatory stop, other than that the officer must have specific and articulable facts to reasonably believe that the suspect was in fact the culprit of the *specific crime* observed by the witness, as opposed to some generalized, unidentified wrongdoing. Application of such a standard is practical and understandable, and will diminish the peril in which a suspect is placed pursuant to even the most regulated lineup procedure.

B. Guidelines to Reduce Suggestion in Eyewitness Identification Procedures

Effective eyewitnesses identification warrants specific procedural guidelines to minimize suggestion and bias in the lineup. *State v. Hall* suggests that identification procedures predicated on less than

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161. See Wells, *supra* note 27, at 635–36, for an example of a similar standard. Gary Wells proposes a criterion that officers must have reasonable suspicion before placing an individual in a lineup. Wells does not suggest an exact definition of "reasonable suspicion," noting that it is a policy definition, not a scientific one. However, Wells states that it should be less than probable cause. *Id.*

162. A mere investigatory detention is acceptable whether or not the officer can identify the specific crime or wrongdoing in which the individual might have been engaged.

probable cause be admissible only if they are equivalent in reliability to fingerprinting.[163] Eyewitness identifications may never be as reliable as a scientific procedure like fingerprinting. Yet, implementing specific procedural guidelines that minimize prejudice and error will make identification procedures more reliable. Only if such guidelines accompany a lineup should a court sustain the lineup on less than probable cause under the Fourth Amendment.[164] Accordingly, this Article suggests nine specific guidelines to protect innocent citizens from misidentification for use during an identification procedure.[165] These guidelines include the use of blind administrators and a sufficient number of fillers who may each reasonably resemble the suspect.[166] Adopting mandatory procedures for eyewitness identifications is the most significant step police could take to reduce wrongful convictions.[167] As reflected in *Davis*, the reliability of police investigatory procedures triggers Fourth Amendment concerns.[168] Therefore, guidelines that maximize the reliability of lineups are important under the Fourth Amendment.

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163. *See* State v. Hall, 461 A.2d 1155, 1161 (N.J. 1983)

164. A Fourth Amendment analysis in no way negates the necessity for a due process inquiry. For example, although the existence of probable cause may not trigger the requirement for use of the guidelines under the Fourth Amendment, the lack of the use of guidelines may result in impermissible suggestion under a due process inquiry.

165. *See* Sarah Anne Mourer, *Prophylactic Guidelines for Florida Eyewitness Identifications* (on file with author).

166. *Id*. The following guidelines are suggested:

1. The lineup must be double blind.
2. The lineup must contain a minimum of five fillers.
3. The suspect must not stand out in the lineup.
4. The fillers must reasonably resemble either the suspect or the witness's description of the perpetrator.
5. Only one suspect must be included in the lineup.
6. The same fillers should not be reused when showing multiple lineups with different suspects to the same witness.
7. If the lineup is photographic:
    a. Select a photograph of the suspect that resembles the suspect's appearance or description at the time of the incident.
    b. Ensure that no writing or information on the photographs is visible to the witness.
    c. Preserve the photo array in the same condition as it was shown to the witness.
8. The lineup administrator must record both identification and/or non-identification results in writing.
9. A written statement of confidence must be taken from the witness immediately following an identification.

167. *Id.*

168. *See* Davis v. Mississippi, 394 U.S. 721 (1969).

The Fourth Amendment requires two steps to protect a suspect from an unfair and unreliable lineup procedure. First, police must have reasonable suspicion of criminal activity prior to conducting a lineup. Second, the lineup as conducted must continue to be reasonable in accordance with the Fourth Amendment. In fact, a lineup seizure may be viewed as a series of steps, each requiring Fourth Amendment protections. Generally, a suspect will first be detained requiring founded suspicion of criminal activity. Then, if the police obtain a heightened degree of specified founded suspicion, they may order the suspect to participate in a lineup. Lastly, as the lineup occurs and the suspect is actually exposed to the risk of misidentification, procedural guidelines are necessary under the Fourth Amendment. During all three phases of this police investigatory procedure, the citizen is placed in different and increasing levels of risk and intrusion under the Fourth Amendment. Consequently, each phase of the lineup investigatory procedure requires safeguards. Under a Fourth Amendment analysis, failure to use proper procedural guidelines in a pre-arrest compelled eyewitness identification procedure would result in exclusion of the identification testimony at trial.[169]

VII. EXCEPTIONS

The use of safeguards proposed in Section VI has two types of exceptions: (1) those identification procedures that do not trigger the Fourth Amendment, and (2) those that are "reasonable" under the Fourth Amendment without the safeguards. First, only a *compelled* appearance in a lineup would be considered a seizure thereby implicating Fourth Amendment concerns. One is not seized if he or she is free to leave.[170] Thus, giving consent to participate in a lineup would waive these procedural requirements because the police would not have seized the individual. Consent is a tricky issue when it comes to police–citizen encounters. When does a citizen know that he or she is free to refuse?[171] As noted earlier, "consensual police

169. Due process also requires the implementation of the above guidelines. This is a topic for a future article.

170. *See* United States v. Terry, 392 U.S. 1, 16 (1968); *see also* United States v. Mendenhall, 446 U.S. 544, 553–54 (1980).

171. This scenario brings to mind *Miranda v. Arizona*, 384 U.S. 436 (1966), and raises an inquiry as to whether officers should be required to advise citizens that they have the right to refuse to participate in a lineup in the absence of the procedural safeguards.

encounters" do not require any level of suspicion and do not trigger the Fourth Amendment. Bear in mind that officers do not (the vast majority of the time) ask the citizen for permission to approach prior to making the request for a driver's license, to participate in a lineup, or for other information. If the government intends to use consent as an exception its burden should be great.[172] The prosecution should be required to show that the consent was, in fact, informed. This would include informing the suspect of: (1) the right not to consent; (2) the risks of misidentification in an unregulated lineup or show-up; and (3) what rights the suspect is giving up, including the specific guidelines and level of suspicion normally required. The most expeditious and thorough procedure for obtaining such consent would be via a waiver form that officers could carry with them for the suspect to sign. This Article does not intend to advocate revamping the entire body of law regarding the police obligation to inform citizens of their right to refuse to a search. Currently, the police have no obligation to do so.[173] However, in the typical search and seizure, the innocent citizen has nothing to fear past embarrassment and inconvenience. The innocent citizen invited to participate in a lineup should fear misidentification and even wrongful conviction. One can easily imagine a scenario in which an innocent citizen would prefer to consent to a show-up on the street as opposed to a drive to the station to wait for a proper lineup. Yet, one can also easily surmise that this innocent citizen is completely unaware of the risk she is taking by participating in the show-up. Only adequate information regarding the risk of misidentification should render such consent voluntary.[174]

Other exceptions trigger Fourth Amendment concerns, but courts may find them reasonable in the absence of procedural safeguards. One example is identification procedures that take place following arrest. In this instance, probable cause that the individual committed the crime already exists. At this point, the Fourth Amendment may not protect the arrestee from the privacy invasion involved with a

172. *See* Mendenhall, 446 U.S. at 558–59 ("[A]lthough the Constitution does not require proof of knowledge of right to refuse [to consent to search] as *sine qua non* of an effective consent to search, such knowledge was highly relevant to determination that there had been consent." (quoting Schneckloth v. Bustamonte, 412 U.S. 218, 234 (1973))).

173. *See Schneckloth*, 412 U.S. 218.

174. Courts already hold that a *knowing* and intelligent waiver standard must be applied to test the waiver of counsel at a post-indictment lineup. *See id.* at 240; United States v. Wade, 388 U.S. 218 (1967).

lineup to the same degree. In fact, the Federal Rules of Criminal Procedure go as far as to state:

> Once an accused is lawfully in custody for one offense, the Government may place him in a lineup for any number of offenses it chooses without prior court authorization, so long as it can otherwise assure the presence of counsel at the lineup, that the lineup will be conducted in conformity with due process and presentment before a magistrate without undue delay.[175]

Furthermore, defendants have a right to counsel at post-arrest lineups.[176] An individual's Sixth Amendment right to counsel attaches when judiciary proceedings have begun against the individual (this includes the filing of information, arraignment, or preliminary hearing).[177]

Perhaps a sensible rule would be to require implementation of guidelines to minimize suggestion in lineups even following probable cause unless counsel is present.[178] As Justice Brennan stated in *United States v. Wade*,

> Since it appears that there is grave potential for prejudice, intentional or not, in the pretrial lineup, which may not be capable of reconstruction at trial, and since the presence of counsel itself can often avert prejudice and assure a meaningful confrontation at trial, there can be little doubt that . . . the post-indictment lineup [is] a critical stage of the prosecution at which [defendant is] as much entitled to such aid . . . as at the trial itself.[179]

One should recall that the existence of probable cause in no way negates the necessity for a due process inquiry.[180] This raises the issue of in-court identifications. Although any in-court identification is necessarily highly suggestive,[181] it will not trigger Fourth Amendment considerations. In-court identifications necessarily take place after the suspect is arrested and charged and after probable cause has been

175. FED. R. CRIM. P. 5(a).
176. *See* United States v. Wade, 388 U.S. 218 (1967).
177. Kirby v. Illinois, 406 U.S. 682, 688–89 (1972).
178. Post-arrest identification procedures constitute an extensive topic for a later article.
179. *Wade*, 388 U.S. at 236–37 (quoting Powell v. Alabama, 287 U.S. 45, 57 (1932)).
180. Due process should also require the implementation of the above guidelines. This is a topic for a future article.
181. The vast majority of the time, in-court identifications occur where a witness on the stand scans the courtroom to identify the defendant on trial. Usually, the defendant is quite obvious.

found by both the judge and government. In-court identification admissibility must remain a due process analysis.[182]

Exigent circumstances provide another exception.[183] It is in the public's interest to allow strictly limited exceptions relying on exigent circumstances. The reasonableness of an unregulated identification procedure "depends on a balance between the public interest and the individual's right to personal security. . . ."[184] An example of legitimate exigent circumstances can be found in *Stovall v. Denno*.[185] In *Stovall,* the defendant was the only suspect presented to a victim at the hospital—there were no fillers. However, the officers had reason to believe that the victim was mortally injured and would soon die.[186]

One could assert that a likely correct eyewitness identification obtained by illegal means might satisfy an inevitable discovery exception to the application of the exclusionary rule. Courts apply the inevitable discovery doctrine when it is determined that the police would have obtained the same evidence by other legal means.[187] For example, if the police obtain statements from a suspect that lead to incriminating evidence while violating the suspect's right against self incrimination, that evidence may still be admissible if it can be shown that the police would have located the evidence through other legal means anyway. When a court applies the inevitable discovery doctrine to determine whether an identification is correct, it operates under the presumption that, had the police used proper safeguards, the same suspect would have been identified anyway. However, this rationale fails on three grounds.

First, courts generally view the "inevitable discovery" doctrine as an exception to the "fruit of the poisonous tree" rule. Thus, most courts do not allow the admission of illegally obtained primary evidence under the inevitable discovery doctrine.[188] An eyewitness

182. *See* Gilbert v. California, 388 U.S. 263 (1967)

183. Exigent circumstances are those which present the officer with an emergency that requires immediate action. *See, e.g.*, Schmerber v. California, 384 U.S. 757, 770 (1966) ("The officer in the present case, however, might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened 'the destruction of evidence.'" (quoting Preston v. United States, 376 U.S. 364, 367 (1964))).

184. United States v. Brigoni-Ponce, 422 U.S. 873, 878 (1975).

185. 388 U.S. 293 (1967).

186. *Id*. at 295.

187. Nix v. Williams, 467 U.S. 431, 444 (1984).

188. *See id.* at 443 (involving suppression of derivative evidence and calling for a deterrence inquiry). *See also* United States v. Romero, 692 F.2d 699 (10th Cir. 1982) (holding that under

identification stemming from a suggestive procedure is not derivative but is the primary fruit of the police misconduct and should therefore not be eligible under the inevitable discovery exception.[189]

Second, the inevitable discovery rule applies only if the police do not benefit from the misconduct, i.e., the police may not be placed in a better position through a failure to act properly.[190] In other words, the law should not permit the police to further their investigations or obtain admissible evidence for trial by breaking the rules or through misconduct. Acquiring identification testimony through the use of police suggestion or a violation of the specified founded suspicion requirement is a benefit from police misconduct.[191]

Finally, to apply the inevitable discovery doctrine, it must be determined that the evidence would have actually been discovered. As it pertains to eyewitness identifications, an inevitable discovery analysis would call for the determination that the same witness would have identified the same suspect despite the suggestive or unfair lineup procedures. The Court claimed in *Nix v. Williams* that "inevitable discovery involves no speculative elements but focuses on

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the inevitable discovery exception to the exclusionary rule, unlawfully seized evidence is admissible if there is no doubt that police would have lawfully discovered evidence later); United States v. Strmel, 574 F. Supp. 793 (E.D. La. 1983) (finding that to fit within the inevitable discovery exception, the government must show with reasonable probability that the police would have uncovered the derivative evidence apart from the illegal actions).

189. However, some courts disagree that the inevitable discovery doctrine only applies to derivative evidence. United States v. Zapata, 18 F.3d 971, 979 (1st Cir. 1994) ("We decline to embrace the suggestion that courts should confine the inevitable discovery rule to cases in which the disputed evidence comprises a derivative, rather than primary, fruit of unlawful police conduct."). *See also* People v. Burola, 848 P.2d 958, 962 (Colo. 1993); United States v. Pimentel, 810 F.2d 366, 368 (2d Cir. 1987).

190. Julie M. Giddings, *The Interaction of the Standing and Inevitable Discovery Doctrines of the Exclusionary Rule: Use of Evidence Illegally Obtained from the Defendant and a Third Party*, 91 IOWA L. REV. 1063 (2006). *See also* Nix v. Williams, 467 U.S. 431, 443 (1984).

191. Conversely, it is arguable that the defendant should not unnecessarily benefit from the exclusion of eyewitness testimony by obtaining the ability to argue at trial the lack of any identification testimony. Such an argument by defense counsel may fairly "open the door" to the prosecution's introduction of the identification evidence. It is questionable whether the mere assertion at trial by defense counsel that the defendant did not commit the crime or the defendant's testimony that she is not the perpetrator would open the gates to the admissibility of previously excluded identification testimony. Imagine the scenario where the evidence at trial includes identification testimony from two eyewitnesses that was obtained through proper procedures. There exists also a pretrial identification from a third eyewitness that was suppressed due to lack of procedural safeguards. Shall this defendant be precluded from testifying regarding an alibi without the third witnesses' identification testimony then becoming admissible evidence? Shall her lawyer be prohibited from the defense of misidentification without such consequences? This Article hopes to spark future discussions and writings on these topics.

demonstrated historical facts capable of ready verification or impeachment."[192] Courts are unable to reasonably ascertain whether the witness would have identified the same suspect even in ideal circumstances. Therefore, this analysis is speculative and will not satisfy an inevitable discovery inquiry.

This Article focuses on the pre-arrest compelled appearance of an individual in a lineup—a situation that clearly triggers the Fourth Amendment, because the person's body is seized and the individual is not free to leave. There may be other exceptions not contemplated within the scope of this Article. For example, does the placement of one's photograph in an identification procedure implicate the Fourth Amendment and require protections? What if an individual is not even aware that her image was placed in an identification procedure as a suspect? The issue with regard to photographs would be whether the placement of an individual's photograph in an identification procedure is a search or seizure in terms of the Fourth Amendment.

The Supreme Court has held that the Fourth Amendment is triggered in some circumstances where the individual may not even be aware that he or she is being searched. For example, in *Kyllo v. United States*, the Court found that the following constitutes a search: The police used a heat-detecting device only on the outside of an individual's home. When the police discovered heat, they inferred that an illegal substance was inside the house from the existence of the heat on the exterior of the house.[193] Therefore, the Court held that the police investigatory procedure caused an invasion of privacy pursuant to the Fourth Amendment. What a person knowingly exposes to the public is not subject to Fourth Amendment protections.[194] Although one's photograph may be taken without Fourth Amendment implications, if the individual is in a location where the individual has no reasonable expectation of privacy, it is debatable whether the Fourth Amendment should limit what the government may subsequently do with that photograph. If we accept the premise that

192. *See Nix*, 467 U.S. at 444.

193. 533 U.S. 27 (2001).

194. *See* Katz v. United States, 389 U.S. 347 (1967) (finding that what a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection). *See also* Rawlings v. Kentucky, 448 U.S. 98 (1980) (holding that petitioner could not claim an expectation of privacy in friend's purse).

potential risk of harm and error equates to a Fourth Amendment privacy intrusion, then we may answer in the affirmative.[195]

VIII. SUMMARY AND RECOMMENDATIONS

The compelled physical appearance of an individual in an eyewitness identification procedure constitutes a seizure within the meaning of the Fourth Amendment. This Article presents the idea that the high probability of misidentification associated with unregulated eyewitness identification procedures requires Fourth Amendment protections. This risk of misidentification amounts to a significant privacy intrusion under the Fourth Amendment. This Article also explains why courts' current reliance solely on a procedural due process analysis of eyewitness identifications fails to protect citizens from misidentification and should not be the first constitutional consideration when determining the lawfulness of an identification procedure. It is simply not possible to separate the influence of insufficient procedural safeguards in a lineup from the validity of the ensuing identification. The *Biggers* factors dramatically fail to measure the accuracy of an identification. The influence of suggestion from the lack of adequate procedural safeguards increases the *appearance* of a correct identification without being a true indicator that the identification is actually valid. In other words, it is conjecture to presume that an unregulated lineup identified the true culprit.

The risk of misidentification from an unregulated lineup is well-documented. Numerous research and laboratory findings demonstrate that human memory is highly susceptible to suggestive influence. Eyewitness identification procedures are particularly susceptible to suggestion and bias. Courts cannot ignore this risk of error associated with identification procedures under the Fourth Amendment. Courts recognize that the physical aspect of a lineup is a privacy invasion pursuant to the Fourth Amendment. Cases such as *Davis v. Mississippi* also suggest that the lack of reliability of certain

195. Citizens may expect the police to exhibit a certain degree of care and reasonableness with a photograph, even if obtained legally. The Fourth Amendment may also require that the police utilize guidelines and safeguards with lineups involving photographs of individuals that may have been taken without initially implicating the Fourth Amendment. However, there are different implications involved with the use of a photo array, and this is a fertile issue for a future article. This issue is by no means clear.

pretrial investigatory procedures requires heightened Fourth Amendment protections.[196]

This Article further recommends the implementation of two procedural safeguards for use in eyewitness identifications. First, police must have a minimum of "specified suspicion" of criminal activity before requiring an individual to appear in a lineup. Second, specific procedural guidelines designed to minimize suggestion in the lineup should be required. Failure to utilize these procedural safeguards should result in the exclusion of any identification testimony at trial, because the purpose of the exclusionary rule as it pertains to the Fourth Amendment is to regulate police conduct. Such a rule is also in accord with general standards of fairness and justice.

This Article suggests that a due process inquiry occur after the assessment of Fourth Amendment claims. The benefits of the application of the exclusionary rule to identification testimony unaccompanied by procedural safeguards outweigh the social cost. No pretrial police investigatory procedure other than eyewitness identifications produces significant numbers of false arrests of innocent individuals. Regulation of eyewitness identification procedures will result in the protection of the innocent from arrest and wrongful conviction.

IX. CONCLUSION

Studies confirm that unregulated eyewitness testimony is often "hopelessly unreliable."[197] Misidentifications are the greatest single source of wrongful convictions in the United States.[198] Courts have historically recognized that the risks and hazards associated with unregulated lineups implicate procedural due process concerns.[199] Yet courts' current due process analyses are unsuccessful in ensuring fair lineup procedures and preventing wrongful convictions. A due process analysis alone is inadequate, in part because a due process analysis is essentially a fairness inquiry, and courts regard it as unfair to exclude a correct, yet suggestive identification, from evidence. On

196. Davis v. Mississippi, 394 U.S. 721, 727 (1969).
197. Commonwealth v. Johnson, 650 N.E. 2d 1257, 1262 (Mass. 1995).
198. *See* Gross et al., *supra* note 15.
199. *See* Neil v. Biggers, 409 U.S. 188, 196 (1972); Manson v. Braithwaite, 432 U.S. 98 (1977).

the other hand, the exclusionary rule, as it applies to the Fourth Amendment, functions to regulate police procedures and conduct.[200] Therefore, a Fourth Amendment analysis of suggestive identification procedures will result in exclusion of eyewitness testimony stemming from identification procedures that are unreasonable seizures, whether or not the resulting identifications are likely to be correct. Compelled identification procedures that are unregulated require exclusion under the Fourth Amendment.

Data regarding misidentifications proves there is significant risk in allowing unregulated identification procedures. Seizures involving such significant risk are not reasonable under the Fourth Amendment. The guidelines outlined here are based on scientific research regarding identification procedures and human memory. These safeguards would serve to minimize the risk of misidentification that is so prevalent in identification procedures. Furthermore, with these safeguards, eyewitness identifications admitted into evidence at trial would carry greater evidentiary value and greater weight with the jury. Prosecution cases would then be stronger. Procedural safeguards would also insulate the police from criticisms of biased eyewitness identifications, bolster public confidence in the police, and promote a more positive image of the police in general.

Given our more comprehensive understanding of human memory and the influence of suggestion, perhaps courts will appreciate eyewitness identification procedures in terms of both privacy and due process. If the reasonableness of a seizure is determined by balancing governmental interest against the intrusion, then the Fourth Amendment requires procedural safeguards for identification procedures on both accounts. The government has a strong interest in protecting citizens from misidentification. Further, the high risk of misidentification that accompanies an unregulated lineup equates to an increased security risk under the Fourth Amendment. The Supreme Court has long found that "[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."[201] As Bobby Joe Leaster's story shows, misidentifications do happen, despite strong indicia of

200. *See* United States v. Leon, 468 U.S. 897, 908 (1984).
201. Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 251 (1891).

reliability. One can hardly envision a governmental intrusion more serious and more offensive than wrongful accusation, jail, prosecution, conviction, or even death.