THE DANGERS OF EYEWITNESS IDENTIFICATIONS AND THE NEED FOR CHANGE IN IOWA

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I. INTRODUCTION

This Note examines the historical admissibility of eyewitness identification established by the Supreme Court in Manson v. Brathwaite,1 Iowa’s response thereto, and the subsequent treatment of the Brathwaite test by Iowa and federal courts. This Note explains the traditional identification procedures utilized by law enforcement and scientific psychology evidence determining the inherent unreliability and suggestiveness of those procedures. This Note assesses the reforms and

recommendations of leading psychologists and the Department of Justice and discusses their implementation by other jurisdictions. This Note concludes that experts should be allowed to testify about the proven unreliability of eyewitness identifications and that Iowa must institute statutory reforms to protect its citizens from wrongful convictions.

II. OVERVIEW OF THE CURRENT SITUATION

Misidentification by an eyewitness is the leading cause of wrongful convictions in the United States.1 Eyewitness identification plays a profoundly important role in the investigation, apprehension, and prosecution of criminal offenses; it is also likely the most common evidence in criminal prosecutions.2 Jurors attach great significance to eyewitness testimony, while members of the legal community increasingly doubt its accuracy.3 “One of the most powerful forms of evidence a prosecutor can . . . offer is a witness . . . who will point to the defendant in court and say, ‘That’s the man who did it.’”4 Wrongful convictions have gained increasing attention in the legal community since the inception of the Innocence Project in 1992 by Barry Scheck at the Benjamin A. Cardozo School of Law.5 The Project’s numerous exonerations based on DNA evidence6 and Illinois’s highly publicized moratorium on the death penalty in 2000—with its exoneration of thirteen death row inmates—have all contributed to the growing public attention to wrongful convictions.7


4. See HUFF ET AL., supra note 2, at 69.


misidentification phenomenon is not new, but has existed for centuries.\(^9\) The legal community has long recognized that the “vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification.”\(^10\) Most commentators on the subject of misidentifications draw support from Justice Frankfurter’s statement:

> What is the worth of identification testimony even when uncontradicted? The identification of strangers is proverbially untrustworthy. The hazards of such testimony are established by a formidable number of instances in the records of English and American trials. These instances are recent—not due to the brutalities of ancient criminal procedure.\(^11\)

Justice Frankfurter’s comments ring true today. Through case analyses of post-conviction DNA exonerations, mistaken identification has been shown to account for more wrongful convictions than all other causes combined.\(^12\)

The United States Department of Justice (DOJ) has recognized the fallibility of eyewitness identification, and in 1999 issued a guide for law enforcement on eyewitness evidence called the Eyewitness Evidence Guidelines.\(^13\) The DOJ Guidelines suggest policies and procedures for interviewing and instructing eyewitnesses; developing composites; preparing mug books; documenting procedures and recording witness recollections; conducting showups; and composing both photographic and live lineups.\(^14\) The Guidelines adopt many of the recommendations promulgated by expert psychologists, such as sequential photo lineups;

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14. Id. at 17–38.
open-ended questioning; refraining from providing confirming feedback to the witness after identification; limiting lineups to one suspect; collecting confidence statements from witnesses; and minimizing any characteristics that would cause the suspect to stand out amongst the fillers. Several states have adopted the DOJ’s recommendations and guidelines.

Iowa has not enacted any statutes incorporating these guidelines and recommendations. The Iowa Attorney General has not addressed the issues raised by the DOJ. Nor has the Iowa Department of Public Safety issued a state-wide policy or guideline for its officers regarding conducting identification procedures. Therefore, Iowa citizens are subject to a variety of identification procedures and policies, depending upon the investigating authority. The Iowa Supreme Court struck down a per se ban on the admission of expert evidence regarding eyewitness identifications in 1998. Iowa judges now have the discretion to admit or exclude expert testimony when identification of the defendant is an issue. The Iowa Court of Appeals recently reversed and remanded a conviction by holding that the defendant’s expert should have been allowed to testify regarding the suggestiveness of the photo array utilized, particularly because the identification through the photo array was the only evidence


18. The Iowa Attorney General has not issued any opinions related to identification procedures.

19. E-mail from Jessica Lown, Iowa Dep’t of Pub. Safety, to Erica Nichols (Nov. 8, 2007, 11:56 CST) (on file with author).

20. See, e.g., Wells, supra note 12, at 634–35 (discussing local control of law enforcement departments in the United States).


offered by the State.  

Psychology research has explained the inaccuracy of eyewitness identifications. Leading psychologists have studied various factors and characteristics involved in an eyewitness’s environment to determine their effect on the witness’s accuracy. A witness’s accuracy can be affected by the duration of his or her exposure to the perpetrator; the presence of a weapon; the seriousness of the crime; the level of stress, arousal, and violence of the environment; and cross-racial identifications. Psychologists have also studied the effects of suggestive procedures on identification accuracy and found that investigators can influence a witness unconsciously through their interrogation methods. Studies have also found bias and suggestiveness in an investigator’s instructions to witnesses before lineups, thus increasing the likelihood that a witness will make an erroneous positive identification.

III. THE CURRENT CONSTITUTIONAL STANDARD

The Supreme Court held that eyewitness identifications are admissible evidence and do not violate due process—even when unduly suggestive procedures prompted the identification—so long as the identification has sufficient aspects of reliability. The Court continues to uphold the factors it identified in Brathwaite, and turns a blind eye to psychology research and evidence which undermines the Brathwaite test. In Brathwaite, the Court held that reliability of the identification was the

23. Id. at *3.
24. See, e.g., John W. Sheperd & Hadyn D. Ellis, Face Recall—Methods and Problems, in PSYCHOLOGICAL ISSUES IN EYEWITNESS IDENTIFICATION 87, 111–12 (Siegfried Ludwig Sporer et al., eds., 1996) (describing conducted studies identifying the effects of malleable target characteristics).
25. See id. at 87–89.
27. See, e.g., id. at 45.
28. Id.
29. See Manson v. Brathwaite, 432 U.S. 98, 106 (1977) (“The central question, however, was whether under the totality of the circumstances the identification was reliable even though the confrontation procedure was suggestive.”) (citing Neil v. Biggers, 409 U.S. 188, 199 (1972)) (internal quotations omitted).
“linchpin” when determining whether the identification was admissible.\textsuperscript{31} The Court did not consider if the single photographic pretrial identification was suggestive because the prosecution acknowledged that the procedure was suggestive.\textsuperscript{32} The Court examined the precedent following its decision in \textit{Neil v. Biggers} and determined that there were two approaches to such identification evidence.\textsuperscript{33} The first approach focuses on the identification procedures used and requires exclusion of the out-of-court identification without examining reliability when the identification has been obtained through unnecessarily suggestive means.\textsuperscript{34} The second approach—ultimately adopted by the Court—considers the “totality of the circumstances” and “permits the admission of the confrontation evidence if, despite the suggestive aspect, the out-of-court identification possesses certain features of reliability.”\textsuperscript{35} The totality-of-the-circumstances approach allows admission of potentially tainted identification evidence when the court determines that the evidence is reliable based on the factors outlined by the Court in \textit{Neil}.\textsuperscript{36}

The Court’s reliability factors used to evaluate identification evidence and the likelihood of misidentification are:

\begin{itemize}
\item the opportunity of the witness to view the criminal at the time of the crime,
\item the witness’ [sic] degree of attention,
\item the accuracy of [the witness’s] prior description of the criminal,
\item the level of certainty demonstrated at the confrontation,
\item and the time between the crime and the confrontation.\textsuperscript{37}
\end{itemize}

Iowa has adopted the \textit{Brathwaite} approach and established a two-part test.\textsuperscript{38} The first prong asks if the identification procedure was

\begin{itemize}
\item \textit{Brathwaite}, 432 U.S. at 114.
\item \textit{Id.} at 109.
\item \textit{Brathwaite}, 432 U.S. at 110; \textit{see also} \textit{Simmons v. United States}, 390 U.S. 377, 384 (1968) (espousing a standard that convictions based on pretrial identifications using photographs will only be set aside if the “photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification”).
\item \textit{Brathwaite}, 432 U.S. at 110 (explaining that the totality test is an ad hoc analysis and limits the societal impact of the strict sanction of the exclusion rule in the first approach).
\item \textit{See id.} at 114 (citing \textit{Neil}, 409 U.S. at 199–200).
\item \textit{Id.} at 114–16 (applying the factors set out in \textit{Neil}, 409 U.S. at 199–200).
\end{itemize}
unnecessarily suggestive. If the identification is suggestive, the court must determine whether, under the totality of the circumstances, the identification at trial is “irreparably tainted.” The court derives this analysis in part from the Supreme Court’s decision in Neil and gives weight to the five factors identified therein when determining the reliability of eyewitness identification. The court further explains that this analysis is only engaged in “when a defendant claims the out-of-court [identification] procedure . . . was impermissibly suggestive.”

Identifications made through the use of photo spreads or arrays and mug shot books have been held admissible. Iowa has examined these identification procedures under the Brathwaite test and found photographic arrays to be constitutionally permissible. The Iowa Supreme Court held that a police officer’s statement to the eyewitness that a suspect was included in the photographic array was not suggestive enough to taint the identification procedure. The court reasoned that assuming a witness would not know that a suspect was included in the photo array without police prompting would be tantamount to insulting the average intelligence of the witness. In sum, Brathwaite continues to be the standard by which admission of identification evidence is evaluated.

IV. TRADITIONAL IDENTIFICATION PROCEDURES AND SUGGESTIVE FACTORS

There are many variations of the traditional identification procedures used by law enforcement across police jurisdictions. The varying standards and procedures are detrimental to accurate identifications, leading to misidentifications and wrongful convictions. A national survey

39. See id. at 829 (relying on Birch, 479 N.W.2d at 286).
40. See id. (citing Birch, 479 N.W.2d at 286).
41. See, e.g., State v. Folkerts, 703 N.W.2d 761, 764 (Iowa 2005).
42. Id.
43. See, e.g., Simmons v. United States, 390 U.S. 377, 383–84 (1968) (recognizing that despite hazards of misidentification, photo arrays have been widely and effectively used by law enforcement).
45. Id. at 87.
46. Id. (citation omitted).
48. See id. at 79–80.
of police officers demonstrated that many police officers do not receive training on how to conduct fair lineups and photo arrays. The survey also showed that smaller cities and counties did not utilize the same procedures as larger metropolitan areas. For example, officers reporting the use of sequential lineup techniques were mainly located in larger population areas. These results demonstrate the discrepancies encountered by the legal community and the need for uniformity.

An identification procedure can be affected by many factors. Psychologists refer to factors that influence a person’s ability to recognize and identify persons as variables, and differentiate between a variable that can be controlled by the criminal justice system and one that cannot. Psychologists explain that memory can be influenced by subsequent events. The Supreme Court has recognized that a witness’s recollection can become distorted by circumstances or subsequently by the police. Variables that can be controlled are often referred to as system variables. System variables include the selection of fillers or foils to be used in the photo array or lineup; the presentation of the photo array or lineup (simultaneously or sequentially); the instructions given to the witnesses (whether or not the suspect is included in the array); and the length of time between the incident and identification.

A. The Choice of Fillers for Lineups and Photo Arrays

A lineup or photo array can be suggestive if the fillers (non-suspects) used do not match the witness’s description of the perpetrator, or if the fillers do not plausibly resemble the suspect. Researchers have

49. See id.
50. See id. at 78 (discussing sequential lineup procedures).
51. Id.
52. See Narby et al., supra note 26, at 23 (stating that “[t]here are many factors that influence an individual’s ability to recognize and identify persons”).
53. See id. at 23–24 (distinguishing between “estimation variations” and “system variables”).
54. Id. at 23 (“Once the [identification] is encoded into memory, it is still not well protected; subsequent events can influence the stored information and thereby affect [the identification].”).
56. Wells, supra note 12, at 616.
58. See id. at 123–25 (“Having other lineup members who resemble the perpetrator in physical appearance affects lineup bias by protecting the suspect from the eyewitness’s tendency to make a positive identification.”).
documented that witnesses will make a relative judgment and choose the person who looks the most like the perpetrator—even in studies where the perpetrator was absent from the lineup. For example, when a suspect who matches the witness’s description is in a lineup with fillers who do not match the description, it is more likely that the witness will make an incorrect identification. Defendants have challenged lineups and photo arrays claiming suggestiveness because the fillers made the defendant stand out. Thus, the choice of fillers is extremely important for a fair identification procedure.

B. The Presentation of a Lineup or Photo Array

The presentation of the lineup or photo array is traditionally simultaneous. In other words, the witness is typically shown six photographs at once and asked to identify the perpetrator. Researchers have demonstrated that when shown a simultaneous lineup, witnesses will choose the person most closely resembling their memory of the perpetrator—a relative judgment. A sequential lineup, where the witness is shown one photo at a time, is the alternative to a simultaneous lineup. Research studies demonstrate that sequential lineups reduce the witness’s relative judgment. This procedure results in fewer misidentifications, presumably reducing the number of wrongful convictions.

C. Instructions and Comments to the Witness

Another system variable is the instructions or verbal comments made
by investigators to the witness during the identification procedure.\footnote{CUTLER & PENROD, supra note 3, at 115.} A police officer’s instructions may convey a strong impression that the suspect is in the lineup or array by not offering the witness the option that the perpetrator is not present in the lineup.\footnote{Id. at 115–16.} The comments made by investigators can also influence a misidentification—as demonstrated by researchers.\footnote{See Wells et al., supra note 66, at 66–67.} Psychologists have termed these comments “confirming feedback” and are typically comments such as, “Good, you identified the suspect,” or, “We thought this might be the one.”\footnote{Id. (citation omitted); Wells, supra note 12, at 621–22 (citation omitted).} Confirming feedback to a witness can reinforce a relative judgment and instill false confidence in a witness.\footnote{Wells et al., supra note 66, at 66–67; Wells, supra note 12, at 620–22.} Witnesses can be extremely confident in their identification and still be mistaken,\footnote{Jennifer Thompson, Op-Ed, I Was Certain, but I Was Wrong, N.Y. TIMES, June 18, 2000, § 4, at 15.} as illustrated by the infamous case of Ronald Cotton where the rape victim, Jennifer Thompson, identified Cotton out of a lineup and was told by the police that she chose the suspect the police thought “might be the one.”\footnote{Wells, supra note 12, at 622 (citation omitted).} Years later, Cotton was exonerated through DNA analysis.\footnote{Thompson, supra note 72.} Ms. Thompson and Mr. Cotton subsequently co-authored a book detailing the misidentification and exoneration.\footnote{JENNIFER THOMPSON-CANNINO ET AL., PICKING COTTON: OUR MEMOIR OF INJUSTICE AND REDEMPTION (2009).}

One study has shown that witnesses who received confirming feedback of their identification expressed more confidence in the certainty of their identification and were more willing to testify.\footnote{Douglass & McQuiston-Surrett, supra note 15, at 999.} Other researchers conducted a study wherein they gave potential witnesses biased and unbiased instructions.\footnote{CUTLER & PENROD, supra note 3, at 121–23.} The biased instructions included information that implied the perpetrator was in the lineup, and the unbiased instructions explicitly stated the perpetrator may not be in the lineup.\footnote{Id. at 121.} The research concluded that witnesses given the biased instructions were significantly more likely to make a positive, albeit false, identification.\footnote{Id. at 122.}
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D. Length of Time Between Incident and Identification

Researchers have also conducted studies evaluating accuracy of identification over different lengths of time delay between a witness’s identification and the crime. Psychologists refer to the time delay as the retention interval of the witness. These studies have shown what most people already believe—that memory declines over time. It is significant to note that longer delays led to fewer correct identifications and more false identifications in controlled studies.

E. Attention of the Witness During Incident

The post-identification feedback study also concluded that witnesses who were instructed that they would have to make an identification (assuming the witnesses would give the suspect more attention) were unable to make a more accurate identification compared to witnesses who were unaware they would be making an identification. This result is of interest given the weight the Supreme Court assigned a witness’s attention in Neil. The Court determined that the degree of attention given to a perpetrator by a witness was a reliability factor, and if a witness claimed to have given a great degree of attention, it would follow that the identification was reliable. The psychology research demonstrates that a witness who pays more attention to a perpetrator is no more likely to make an accurate identification than a witness who pays less attention during the commission of a crime. Thus, the Court’s emphasis on this factor is misplaced.

V. Results of Traditional Identification Procedures

These traditional identification procedures have contributed to false convictions, and thus the legal community should be wary of their use and receptive to suggestions to improve these procedures. Many wrongfully

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80. See, e.g., id. at 105–06.
81. See id.
82. Id. (indicating a “clear linear decline” of correct identifications over time).
83. Id. (discussing numerous experiments on memory retention); see also Narby et al., supra note 26, at 43–44 (same).
84. Douglass & McQuiston-Surrett, supra note 15, at 999, 1001–02.
86. See id. at 199–201.
87. See Douglass & McQuiston-Surrett, supra note 15, at 1002.
88. Huff ET AL., supra note 2, at 66 (stating that wrongful convictions tend to
identified defendants have been exonerated by DNA evidence.\footnote{See, e.g., Wells, \textit{supra} note 12, at 615.} It is also important to recognize that there are many crimes for which there is no DNA evidence available to correct the mistakes caused by misidentification.\footnote{Gary L. Wells, Frequently Asked Questions of Gary L. Wells, http://www.psychology.iastate.edu/~glwells/faq.htm (last visited Mar. 3, 2009).} Psychology experts have made suggestions to improve the traditional methods of identification utilized by our nation’s law enforcement.\footnote{See, e.g., \textit{id.}; see also U.S. DEP’T OF JUSTICE, \textit{supra} note 13, at 1–2.} These reforms primarily address the system variables discussed above, but it is also important to be aware of other variables experienced by witnesses.

A. Psychology Research Which Undermines the Reliability of Traditional Identification Procedures

There are additional factors that can affect the reliability of a witness's identification other than those set forth by the Court in \textit{Neil} and reiterated in \textit{Brathwaite}.\footnote{See Neil v. Biggers, 409 U.S. 188, 199–200 (1972); see also Manson v. Brathwaite, 432 U.S. 98, 114 (1977) (explaining the factors as: (1) the opportunity to view, (2) the degree of attention, (3) the accuracy of description, (4) the witness’s level of certainty, and (5) the time between the crime and the confrontation).} These additional factors are known in the scientific community as estimator variables and are not within the control of the justice system.\footnote{Wells et al., \textit{supra} note 15, at 582.} Research has shown that the seriousness of the crime; the presence of violence or a weapon; the experience of stress or arousal; and the presence of cross-racial perpetrators all influence the accuracy of a witness’s identification.\footnote{See, e.g., \textit{CUTLER & PENROD, supra} note 3, at 101–05; see also Narby et al., \textit{supra} note 26, at 37–42.} Psychologists have demonstrated that a person’s retention interval (memory) is affected by each of these factors.\footnote{See \textit{CUTLER & PENROD, supra} note 3, at 105 (stating that these factors “all have reliable effects on identification accuracy”).} For example, if a weapon is present, a witness’s attention is drawn to the weapon and not to the perpetrator’s facial characteristics. This is commonly referred to as weapon focus.\footnote{See Narby et al., \textit{supra} note 26, at 37.} Studies show that subjects who saw a weapon were less likely to be correct when making a subsequent identification.\footnote{See \textit{CUTLER & PENROD, supra} note 3, at 102.} The crime seriousness factor is intertwined with the stress
experienced by the witness. The more serious a crime is, the more stress the witness will experience, whether that seriousness is measured by violence or monetary worth of stolen/damaged objects. Psychologists have been unable to fully evaluate the effects of stress on a witness’s memory due to the ethical concerns of duplicating violent situations on unsuspecting study participants. Studies have been conducted using violent and nonviolent videos of crime reenactments. In these studies, increased violence showed a decrease in both identification accuracy and eyewitness recall. Researchers have concluded that high stress conditions result in lower memory accuracy. Stress of any kind influences a person’s ability to perceive complex events, and studies have demonstrated that persons under stress have a diminished ability to remember details. A witness under stress due to perceived danger during criminal events may experience the physical manifestations of stress, such as increased heart rate, respiration, blood pressure, and adrenaline. A witness’s perception and memory under such conditions are usually inaccurate according to behavior studies. A United States Navy study found that sixty-eight percent of the participants in the high-stress group that were shown a traditional photo spread made incorrect identifications. The same study also demonstrated that forty-nine percent of the participants in the high-stress group who were shown sequential photo spreads made correct identifications. The difference between being shown a sequential and simultaneous photo lineup is significant.

98. See Narby et al., supra note 26, at 38–39.
99. See id. at 39–40 (“[A]dequate laboratory research on the effects of such stress is lacking because of obvious ethical constraints. Despite the importance of knowledge in this area, one cannot simulate violent crimes and pose a threat to the wellbeing of naïve experimental subjects.”).
100. See, e.g., Wells et al., supra note 66, at 52.
101. Id.
103. HUFF ET AL., supra note 2, at 91.
104. Id.
105. Id.
107. Id.
B. *The Cross-Race Effect*

Another significant factor is the effect of cross-racial identification. This occurs when the perpetrator and the eyewitness are of different races.\(^{108}\) Several courts have recognized this phenomenon, and it has been referred to as the own-race effect and cross-racial impairment.\(^ {109}\) It is most common among white victims and black perpetrators.\(^ {110}\) Studies have concluded that the risk of misidentification is greater in other-race versus same-race identifications.\(^ {111}\) Researchers have demonstrated that witnesses are more likely to accurately identify persons of their own race, while misidentifying someone of a different race.\(^ {112}\) Experts recommend that foils or fillers in lineups be chosen by a member of the suspect’s own race\(^ {113}\) to protect suspects from the cliché that “they all look alike.”\(^ {114}\) The case of William Jackson illustrates the difficulty of cross-racial identification.\(^ {115}\) William Jackson was convicted of rape based on victim–eyewitness identification and spent nearly five years in prison before another man—also named Jackson—was indicted for the crimes.\(^ {116}\) Both Jacksons were African-American, wore “Afro hairstyles,” and were the same height.\(^ {117}\) The innocent Jackson was identified as the perpetrator by white eyewitnesses.\(^ {118}\)

Experts have established that a witness’s ability to testify accurately may be influenced by his retention interval, assimilation factors of subsequent information, and the confidence–accuracy relationship—all factors to which the court does not give any weight.\(^ {119}\) The retention interval is a statistical calculation of a witness’s ability to make an accurate identification over time.\(^ {120}\) The assimilation of subsequent information


\(^{109}\) *Id.* at 211 (citation omitted).

\(^{110}\) *Id.* (citation omitted).

\(^{111}\) See, e.g., Wells et al., supra note 66, at 52.

\(^{112}\) *Id.*

\(^{113}\) Narby et al., supra note 26 (discussing the influence of own-race bias in witness identification).

\(^{114}\) See Rutledge, *supra* note 108, at 214 (“Innocent people have been . . . stripped of their liberty simply because ‘they all look alike.’”) (citation omitted).

\(^{115}\) HUFF ET AL., supra note 2, at 69.

\(^{116}\) *Id.*

\(^{117}\) *Id.*

\(^{118}\) *Id.*

\(^{119}\) See Wells et al., supra note 66, at 54, 65–66.

\(^{120}\) See CUTLER & PENROD, supra note 3, at 105–06.
includes post-identification confirming feedback from an officer, as well as
the subsequent boost of false confidence possessed by the witness.\textsuperscript{121}
Courts give great weight to a witness’s confidence in the identification, despite new scientific evidence explaining that confidence does not mean
the identification was accurate.\textsuperscript{122}

VI. THE NEED FOR CHANGE

The legal community cannot be satisfied with the \textit{Brathwaite} test and
its progeny.\textsuperscript{123} This is amply demonstrated by the increasing reports of
DNA exonerations resulting from misidentification and wrongful
conviction and other jurisdictions adopting new identification
procedures.\textsuperscript{124} The law in this area is significantly outdated compared to
the developments in the social sciences.\textsuperscript{125} The legal community must take
steps to prevent mistakes from being made and protect the integrity of the
criminal justice system. Iowa has convicted the wrong person based on
mistaken eyewitness testimony.\textsuperscript{126} For example, the case of David
Feddersen in Dubuque forced an Iowa judge to admit that a mistake had
been made.\textsuperscript{127} Mr. Feddersen was convicted of rape based solely on the
victim’s identification.\textsuperscript{128} However, two years later, new evidence was
discovered that established his innocence.\textsuperscript{129}

A. Reforms in Other Jurisdictions

The DOJ issued several recommendations for reform in its
Eyewitness Evidence Guidelines in 1999.\textsuperscript{130} The DOJ Guidelines include
implementing sequential photo lineups; using open-ended questioning;
refraining from providing confirming feedback to the witness after

\textsuperscript{121} See Wells, \textit{supra} note 12, at 620–22.
\textsuperscript{122} See, e.g., Neil v. Biggers, 409 U.S. 188, 200–01 (1972) (relying on the fact
that the victim had “no doubt” as to the identity of the perpetrator); see also Wells, \textit{supra} note 12, at 620–22 (showing the problematic nature of inferring the accuracy of
identification from the confidence in an identification).
\textsuperscript{123} Manson v. Brathwaite, 432 U.S. 98 (1977).
\textsuperscript{124} See, e.g., The Innocence Project, \textit{supra} note 16.
\textsuperscript{125} See Feige, \textit{supra} note 2, at 28 (“The law . . . is desperately behind the
times.”).
\textsuperscript{126} Huff \textit{et al.}, \textit{supra} note 2, at 5.
\textsuperscript{127} \textit{Id.} at 5–6.
\textsuperscript{128} \textit{Id.}
\textsuperscript{129} \textit{Id.}
\textsuperscript{130} U.S. DEP’T OF JUSTICE, \textit{supra} note 13.
identification; limiting lineups to one suspect; collecting confidence statements from witnesses; and minimizing any characteristics that would cause the suspect to stand out amongst the fillers. Attorney General Janet Reno urged every jurisdiction to give the recommendations careful consideration when developing local protocols. To date, very few jurisdictions have adopted these guidelines.

New Jersey Attorney General John J. Farmer has issued guidelines for conducting lineups and photo arrays in response to wrongful convictions based on erroneous eyewitness identifications. The New Jersey guidelines incorporate many of the recommendations promulgated by the DOJ. These guidelines abolish the use of simultaneous lineups. The New Jersey guidelines also require law enforcement to utilize sequential viewing and double-blind testing of eyewitness identifications. New Jersey is the first state in the nation to adopt sequential photo lineups. New Jersey Attorney General Farmer has stated that the reforms will “narrow the risk that a mistake will be made” by a witness. New Jersey is unique because its Attorney General has the power to order that the new procedures be adopted state-wide.

Illinois has instituted statutory reforms to protect against further wrongful convictions, such as requiring all lineups to be recorded and disclosed to the defendant during discovery. The statute also requires that all photographs shown to eyewitnesses in a photo spread be disclosed to the defendant during discovery. The reform in the statute also requires that each eyewitness viewing a lineup or photo spread sign a form stating that the suspect might not be in the lineup and that the eyewitness is not obligated to make an identification. Further, the statute mandates that the eyewitness be informed that he or she should not assume the

131. See id.
132. Id. at iii.
134. Id.
135. Id.
137. Id.
138. Id. at B5.
140. Id.
141. Id. 5/107A-5(b)(1).
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An officer administering the lineup knows which person is the suspect.142 Lastly, the statute instructs that suspects should not appear substantially different from fillers based on the eyewitness’s prior description of the suspect or other factors that would draw attention to the suspect.143 Illinois has not yet adopted double-blind sequential lineups, but has funded a pilot study in three police departments.144

The North Carolina Legislature recently passed a bill that sets procedures for law enforcement when conducting a lineup.145 The California Commission for the Fair Administration of Justice has conducted hearings regarding implementation of reforms in lineup and photo array procedures.146 Santa Clara County, California, adopted reforms in 2002, including sequential procedures and a neutral officer administrator of the lineup or photo array.147 Wisconsin’s Attorney General has issued the Model Policy and Procedure for Eyewitness Identification.148 The Model Policy recommends that local departments adopt protocols that utilize a double-blind procedure (a neutral administrator of any lineup or photo array) and sequential presentation, among other safeguards.149 Four years ago, Boston Police and the Suffolk County District Attorney agreed to implement reforms, including double-blind sequential lineups.150 The Boston guidelines instruct officers to offer witnesses the choice of “none of the above” when viewing a photo array and aim to avoid confirming feedback by the police officers.151

Protective reformative measures are being adopted piecemeal across

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142. Id. 5/107A-5(b)(2).
143. Id. 5/107A-5(c).
144. See Sullivan, supra note 8, at 609; see also 725 Ill. Comp. Stat. Ann. 5/107A-10 (legislative establishment of pilot study).
147. Id.
149. See id. at 3.
151. Id.
the country, leading to inconsistencies and violations of equal protection. Reform at the state level is necessary to protect citizens. States must also act because federal constitutional reform is impractical and unlikely to occur in the foreseeable future. As a legal community, we cannot wait for the Supreme Court to revisit *Brathwaite* and recognize the unreliability of traditional identification procedures.

**B. Policies and Procedures in Iowa**

The Iowa Department of Public Safety does not have a written policy or procedure on how to conduct a lineup or compose a photo array.\(^{152}\) Some Iowa police departments utilize a computer program to select fillers for a photo array which has replaced mug shot books.\(^{153}\) However, the Iowa Department of Public Safety utilizes a form to guide its officers during the administration of a photographic lineup or array.\(^{154}\) This form contains photographic identification guidelines which require that a minimum of six photos be included, that all visible notations be blocked out so that all photos appear alike, and that the officer retain the photo display folder in the case file.\(^{155}\) The form’s guidelines also instruct the officer to give the eyewitness an “admonition,” which states that the person who committed the crime may or may not be included in the photo array and informs the witness that the officer cannot help him or her or confirm if his or her choice is a suspect in the investigation.\(^{156}\)

The Des Moines Police Department reports that it also utilizes an admonition to the witness that the person who committed the crime may not be in the lineup or photo array.\(^{157}\) Further, while its officers generally do not tell witnesses anything about their choice after identification has been made, the Des Moines Police Department does present all arrays simultaneously.\(^{158}\) The Clinton, Iowa Police Department has instituted its own reforms, modeled after the guidelines issued by New Jersey’s Attorney General.\(^{159}\) Despite these reforms, Iowa does not have a statute or a

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153. E-mail from Randy L. Dawson, Detective, Des Moines Police Dep’t, to Erica Nichols (Nov. 15, 2007, 15:57 CST) (on file with author).
155. *See* E-mail from James J. Saunders, Special Agent, Iowa Dep’t of Public Safety, to Erica Nichols (Nov. 9, 2007, 10:39 CST) (on file with author).
156. *See id.*
158. *Id.*
159. *See* Wells, *supra* note 90 (stating that the Clinton, Iowa, police chief
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 guideline dictating the proper procedure or requirements for lineups or photo arrays. Iowa should enact a statute similar to the Illinois statute or the New Jersey Attorney General’s guidelines to ensure adequate protection for its citizens from wrongful convictions. A statute would create and guarantee uniformity throughout the state. It would require all suspects to be treated uniformly when photo arrays or lineups were used to identify them. It would ensure that all eyewitnesses are given the same opportunity to correctly identify the perpetrator. Furthermore, the statute would be easy to implement. The statute would require police departments and law enforcement agencies to use sequential lineups—those that simply show the witness one photo at a time—instead of an array of six or more photos. This small change alone would reduce the impact of relative judgments on eyewitness identification.

Iowa Code section 810 prescribes procedures for non-testimonial identification, including obtaining fingerprints, handwriting samples, voice samples, photos, blood and saliva samples, and attendance at a lineup. If a jurisdiction can mandate these forms of identification, it can also mandate appropriate procedures for law enforcement to ensure that reliable identifications are made by eyewitnesses. Without a statewide policy, however, there is great discretion left to each individual police department and officer—increasing the chances that a false identification will occur. There are no procedures that require law enforcement to conduct a fair, non-suggestive lineup. Further, the Iowa Model Jury Instructions do not address the psychological factors that impact an accurate identification. The instruction is outdated and focuses on the opportunity of the witness to view the crime along with factors such as length of time, visibility conditions, and whether the witness knew the person previously. A proper jury instruction should also include guidance on psychological factors such as the cross-race effect, weapon focus, and confirming feedback supplied by law enforcement. Jury instructions can be useful, but are not as effective as expert testimony to persuade the jury regarding the reliability and credibility of an eyewitness identification.

ordered his department to follow the New Jersey guidelines in conducting lineups); see also Richard Willing, Police Lineups Encourage Wrong Picks, Experts Say, USA TODAY, Nov. 26, 2002, at 1A (referencing a new policy that bars detectives from the lineup room to prevent witness influence).

160.   IOWA CODE ANN. §§ 810.1, 810.8 (West 2009).
161.   IOWA CRIMINAL JURY INSTRUCTIONS § 200.45 (Iowa State Bar Ass’n 2007).
162.   Id.
VII. ROOM FOR IMPROVEMENT IN IOWA

Iowa’s current system of varying department standards and traditional methods of identification is unacceptable and detrimental to the justice system. For every false identification or wrongful conviction reported, the public confidence in law enforcement diminishes.

Identifications can be improved through the use of sequential and double-blind testing.163 This would be a relatively small procedural change in each law enforcement department that would reduce the number of witnesses making relative judgments.164 Officers in many jurisdictions have already made this procedural change without difficulty.165 A model policy could be as simple as requiring that a neutral officer, if available, show the witness one photo at a time in random order with simple instructions to the witness to take as much time as needed, and if the person the witness saw is present to identify him or her.166

A proactive statute would ensure compliance throughout the state and protection for all Iowa citizens. A statute could include a requirement that in cases in which eyewitness identification is the sole evidence offered by the prosecution, the validity and reliability of that identification must be determined by the court at a hearing under Iowa Rule of Evidence 5.104, in a manner similar to a Frye v. United States or Daubert v. Merrell Dow Pharmaceuticals, Inc. hearing.167 The court could also issue cautionary jury instructions regarding the unreliability of the identification and lack of corroboration by other evidence.168 The failure to enact a state statute requiring reforms in police procedures for lineups and admitting the unreliability of traditional identification methods will lead to varying degrees of litigation. Individual defendants will continue to request orders for double-blind lineups, and the courts will have the power to order

163. See Wells, supra note 12, at 625–30.
164. See, e.g., The Innocence Project, supra note 16.
165. See supra Part IV.A.
166. See The Innocence Project, supra note 16.
167. Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 580 (1993) (addressing the admissibility of expert scientific testimony and requiring under the Federal Rules of Evidence that a trial judge ensure that the evidence rests on a reliable foundation and is relevant); Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923) (establishing the pre-Daubert “general acceptance” test that requires that a scientific technique must be “generally accepted” in the scientific community to be admissible), superseded by FED. R. EVID. 702.
168. HUFF ET AL., supra note 2, at 151.
them. Even if the request is denied, defendants will pursue the matter at trial on cross-examination and on appeal.

Defendants can combat the influence of unreliable eyewitness testimony through pretrial motions for a double-blind, sequential lineup or by offering expert psychological testimony at trial. Experts such as Gary Wells at Iowa State University have conducted numerous field experiments regarding a witness’s ability to accurately identify a perpetrator. Experts have proven that numerous factors influence identification and have found no correlation between a witness’s confidence and accuracy of the identification. In Iowa, expert testimony regarding the factors influencing eyewitness identifications is admissible at the presiding judge’s discretion. Iowa courts have held that expert witnesses may testify regarding results of psychological studies that indicate the photo array used to identify the defendant was unduly suggestive. In State v. Palmer, the Iowa Court of Appeals found the conviction relied exclusively on uncorroborated eyewitness testimony, and found that expert testimony would have assisted the jury in determining the credibility of the witness’s selection of Palmer from the photo array.

Other jurisdictions have also allowed expert testimony as to the factors that affect human perception, memory, and the effect on an eyewitness’s ability to make an accurate identification. The Third Circuit, in United States v. Downing, established that Federal Rule of Evidence 702 permitted expert testimony regarding human perception and

170. See id. (“[E]ven the denial of the motion can be a significant tactical advantage in trial. Jurors should wonder why the police persist in an antiquated practice that regularly identifies the innocent people as the perpetrators of crimes they didn’t commit.”).
172. These factors include stress experienced by the witness, the violence of the situation, the presence of a weapon, the retention interval, and cross-race identification. See supra Part V.A.–B.
173. See supra Part IV.C.
176. See id. at *3–4.
memory and the reliability of eyewitness identifications.\footnote{Downing, 753 F.2d at 1232.} In its decision, the Third Circuit rebutted the traditional notions that such an expert would invade the province of the jury,\footnote{\textit{See id.} at 1231 (explaining that “under certain circumstances . . . expert testimony . . . can assist the jury in reaching a correct decision”).} and that such issues could be adequately addressed on cross-examination.\footnote{\textit{See id.} at 1229–30 (“We have serious doubts about whether the conclusion reached [by other courts] is consistent with . . . Rule 702.”) (citations omitted).} The court noted that most people—and therefore jurors—believe that stress increases the accuracy of an individual’s perception,\footnote{\textit{Id.} at 1231–32.} contradicting the scientific psychological evidence that stress reduces a person’s ability to perceive, retain, and retrieve memories.\footnote{\textit{See supra} Part V.A.}

\section*{VIII. CONCLUSION}

Iowa must take action to prevent further miscarriages of justice from occurring due to outdated theories on the reliability of eyewitness identification. The implementation of a statute creating uniform procedures for law enforcement when using photo arrays and lineups is imperative. A statute must require sequential lineups done by a neutral officer, eliminate confirming feedback with proper admonitions, and minimize cross-race effects by allowing officers of the race of the suspect to choose the fillers used in the array. The problem of mistaken identifications and wrongful convictions extends beyond individual defendants because for each wrongfully identified defendant, the actual perpetrator is left free to walk the streets of Iowa without repercussion.\footnote{See HUFF ET AL., \textit{supra} note 2, at 150.} As a legal community, we have a responsibility to the citizens of Iowa to protect alleged defendants from avoidable mistakes. We cannot simply rely on DNA exonerations to prevent miscarriages of justice in Iowa.

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\item \footnote{B.A., University of Illinois-Springfield, 2005; J.D., Drake University Law School, 2009.}
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