Errors in Eyewitness Evidence

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New Jersey’s Supreme Court recently issued a landmark ruling reforming the state’s approach to assessing the reliability of eyewitness evidence. Similar reforms in other jurisdictions could save countless defendants from wrongful conviction; eyewitness misidentification contributed to the convictions of over 75% of the 273 prisoners now proved innocent by DNA, and many other innocents certainly languish in prison for crimes in which DNA evidence has not been produced, collected, or preserved.

But unless the Supreme Court of the United States updates the constitutional standard for evaluating eyewitness evidence, other jurisdictions will certainly continue to follow the outdated framework the Court adopted 34 years ago in Manson v. Brathwaite. In Manson, the Court held that in cases involving unnecessarily suggestive identification procedures, judges determining the admissibility of contested eyewitness evidence should weigh the corrupting effect of the flawed procedure against five reliability factors: the opportunity of the witness to view the perpetrator at the time of the crime; the witness’s degree of attention; the accuracy of the witness’s prior description of the criminal; the witness’s level of certainty in his identification; and the time between the crime and the confrontation. But the Supreme Court has never provided guidance on the range of identification practices that increase the odds of misidentification, and courts assessing Manson’s reliability factors regularly do so in ways that conflict with what we now know about the way human memory operates. Although the Court has accepted certiorari on a new eyewitness case, the issues that case presents will likely allow the Court to avoid addressing the core flaws in the Manson test—flaws that permit and even encourage judges to ignore current scientific knowledge about how best to conduct eyewitness identification procedures and to evaluate testimony shaped by questionable procedures.

Awareness of the shortcomings of eyewitness testimony significantly predated our understanding of how to handle the problem. In 1906 Hugo Munsterberg—head of Harvard’s psychology laboratory—published a devastating account of the inaccuracy of eyewitness reports, On the Witness Stand, showing that eyewitnesses were likely to forget crucial elements of what they had seen—and to fill in gaps in their memories with invented details. Similarly, in Convicting the Innocent (1932), Edwin Borchard counted eyewitness misidentification amongst the most common causes of wrongful conviction.

But for years the legal system seemed helpless to address the problem. In 1909, the eminent evidence scholar John Henry Wigmore pointed out that none of Munsterberg’s conclusions gave judges and juries any way to determine whether a particular eyewitness was mistaken. For much of the rest of the 20th century, this remained a valid criticism, and when the Supreme Court formulated the Manson standard in 1977, its intuitive approach to assessing eyewitness evidence still seemed to make good sense.

The past generation of research by experimental psychologists, however, has yielded incontrovertible evidence of the subtle ways the composition and administration of lineups and other identification procedures can influence witnesses’ choices. This research also demonstrates that flaws in identification procedures often artificially inflate a witness’s certainty in his identification, his memory of the quality of his opportunity to view a perpetrator at the time of a crime and his memory of the degree of attention he paid during the crime, all of which are
factors the *Manson* court prescribed for gauging the reliability of evidence from potentially tainted lineups.

Unfortunately, courts have largely disregarded this science. In the first empirical analysis of the application of *Manson*, I have analyzed nearly 1,500 federal cases that applied the standard between 1977 and 2010. The results are discouraging. First, courts very rarely use *Manson* to suppress identification evidence. Second, most defendants who challenged identification evidence under *Manson* have had legitimate claims that some feature of the identification procedures increased the odds that witnesses had erred. More disturbingly, courts have regularly held that flawed identification procedures are perfectly acceptable. And in assessing the reliability of evidence from imperfect procedures, courts have frequently measured and credited witness certainty after exposure to a suggestive lineup, when science has established that that very certainty is likely the product of suggestion, not the eyewitness’s true memory.

The Supreme Court could correct these problems with specific guidance on which identification procedures increase the likelihood of misidentification and with clear instructions that courts must not measure certainty or other subjective, self-reporting components of eyewitness evidence at times when the measurement will undermine, rather than reinforce, the integrity of the underlying reliability inquiry. Every year, more exonerations demonstrate that eyewitness misidentification remains the most common cause of wrongful conviction. So far the Court has chosen to do nothing.

Jurists have always struggled with how to make legal rules empirically valid. In the sixth century, under Justinian’s Digest, if evidence was uncertain, it might nonetheless qualify as a half proof, and two half proofs added up to an incontrovertible complete proof. Sadly, for those subject to Justinian’s rules, the Digest missed the nuances of logical probability: Two suggestive but inconclusive pieces of evidence cannot be added to produce 100% certainty of guilt, though taken together they may fractionally decrease the odds of innocence.

Justinian can be forgiven. The attempt to quantify evidentiary probabilities to resolve disputes was a progressive innovation over Germanic traditions of gauging a witness’s veracity through torture or armed conflict. Fifteen hundred years later, we cannot forgive courts that willfully turn blind eyes to scientific discoveries capable of reducing wrongful convictions and freeing those facing wrongful imprisonment by the state, a nightmare beyond comprehension for those of us lucky enough not to have endured it.

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