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DAUBERT GATEKEEPING FOR EYEWITNESS IDENTIFICATIONS

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ABSTRACT

A key function of trial courts is their gatekeeping responsibility, by which they advance the truth-seeking function of the trial process. This Article makes the rather unremarkable argument that a "reliability paradigm" undergirds almost every rule in the Federal Rules of Evidence (FRE). For most rules, the evidentiary foundation required for admitting evidence ensures the reliability of the evidence. Courts effectively conduct gatekeeping merely by applying the rules such as the hearsay exceptions in FRE 803 and 804. For other rules, the reliability paradigm has informed the interpretation of the rules, as was the case for FRE 702 in Daubert v. Merrell Dow Pharmaceuticals, Inc. *A general thesis of this Article is that it is especially appropriate for courts in criminal trials to engage in gatekeeping for evidence fraught with reliability issues because it is highly prone to misleading the jury and causing a wrongful criminal conviction.*

This Article applies the holistic interpretation of the rules of evidence seen in Daubert *to eyewitness identification, the leading cause of wrongful convictions. This analysis illustrates the manner in which courts should apply evidentiary reliability gatekeeping to eyewitness identifications. Numerous scientific studies and overturned convictions show that traditional trial protections such as the right to counsel and cross-examination do not suffice to prevent wrongful convictions. Jurors do not possess the specialized knowledge necessary to evaluate the reliability of eyewitness identifications properly, nor is it feasible for them to obtain this knowledge during trial. Unfortunately for the wrongly accused, identification testimony has traditionally received a free pass under the rules of evidence, and the Supreme Court has recently reaffirmed that due process does not provide meaningful reliability screening (ironically, citing the "protective rules of evidence" as one of the sources of regulation).*

This Article examines a pair of recent New Jersey cases that attempt to provide more effective screening for eyewitness identification. While the cases do advocate the use of best practices by law enforcement in obtaining eyewitness identifications, the Article contends that the rulings impose substantive and procedural limitations that will make the new gatekeeping regime largely ineffective. The immediacy of the erroneous identification challenge demands assertive judicial oversight. In the absence of legislative reform, trial courts can abate the leading cause of wrongful convictions only by fully embracing the gatekeeping role provided under the rules of evidence. Daubert *teaches that judicial initiative can start the rule revision*

process that encourages the Advisory Committee to make appropriate amendments. The last section of the Article makes some preliminary suggestions for amendments to the FRE (and state counterparts) that would substantially elucidate the gatekeeping process necessary to prevent wrongful convictions caused by misidentification.

"These rules shall be construed so as to administer every proceeding fairly . . . and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination."—Federal Rules of Evidence Rule 102 Purpose.

I. INTRODUCTION

DOES the law of evidence require courts to exclude unreliable evidence? Oddly enough, this basic question of evidence law has no simple answer. In some circumstances, the federal rules have been interpreted to require a "gatekeeping" assessment of reliability by the trial court as a condition precedent to admissibility, such as with scientific expert testimony under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[1] On the other hand, several other rules contain elements considered guarantees of trustworthiness that must be proved by the proponent. The hearsay rules generally operate this way.[2] Ostensibly, they exclude hearsay on reliability grounds, but then make numerous exceptions for hearsay that by their nature possess indicia of reliability.[3] In effect, when a proponent proves the elements of a hearsay exception, this also establishes the trustworthiness of the statement.

However, not all hearsay exceptions turn on reliability. Federal Rule of Evidence (Rule) 801(c), for example, designates certain hearsay statements as "not hearsay," freely admitting such statements without regard to trustworthiness.[4] Traditionally, eyewitness identification evidence has received this "not hearsay" treatment.[5]

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1. Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 587–89 (1993) (holding that FRE 702 did not incorporate a "general acceptance" test as a basis for assessing admissibility of scientific expert testimony, but rather 702 required courts to assess reliability of the evidence); *see also* Kumho Tire Co. v. Carmichael, 526 U.S. 137, 147–49 (1999) (holding that the *Daubert* standard also applies to technical expert testimony and other expert testimony based on specialized knowledge).

2. FED. R. EVID. 803 advisory committee's note ("The present rule proceeds upon the theory that under appropriate circumstances a hearsay statement may possess circumstantial guarantees of trustworthiness sufficient to justify nonproduction of the declarant in person at the trial even though he may be available.").

3. The rules define hearsay as a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. FED. R. EVID. 801(c). For examples of hearsay exceptions based on reliability considerations, see FED. R. EVID. 803, 804. *See also infra* notes 69–74 and accompanying text.

4. FED. R. EVID. 801(d); *see also* Sam Stonefield, *Rule 801(d)'s Oxymoronic "Not Hearsay" Classification: The Untold Backstory and a Suggested Amendment*, 5 FED. CTS. L. REV. 1, 2 (2011).

5. FED. R. EVID. 801(d)(1)(C).

Eyewitness testimony involves the admission of out-of-court statements that would normally be considered hearsay, but Rule 801 artificially reclassifies them as "not hearsay."[6] In criminal cases, this has meant that trial courts admit eyewitness identifications—a critical type of prosecution evidence—without screening them for reliability under the rules of evidence.[7] While other hearsay exceptions require proponents to prove that the statements possess characteristics indicative of trustworthiness, Rule 801 instead makes identification evidence categorically admissible on the sole condition that the eyewitness testifies and is subject to cross-examination.[8] Now that the steady stream of DNA exonerations has shown eyewitness identification evidence to be a leading cause of wrongful convictions,[9] the traditional admission of this error-prone evidence without judicial oversight for reliability can no longer be tolerated.

The principal role of the rules of evidence is to safeguard the search for truth by ensuring the reliability of evidence.[10] This reliability paradigm underlies virtually every evidentiary rule and advances the main objective of the rules. To those ends, most of the rules require some form of reliability gatekeeping by the trial court as a condition precedent to the admissibility of evidence. A review of the Federal Rules of Evidence (FRE) shows that each evidence rule can be categorized under one of five categories corresponding to its purpose.[11] By far, the largest category of rules consists of those advancing the reliability of the trial process.[12] In some cases, the court's gatekeeping role is weak, but in most cases it is strong, depending on the extent to which reliability coincides with credibility. When reliability turns largely on a finding of witness credibility, the jury plays a greater role in deciding reliability.[13]

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6. *Id.*

7. The Supreme Court outlined a due process test ostensibly based on reliability in *Manson v. Brathwaite*, 432 U.S. 98, 114–16 (1977). This test is based on scientifically incorrect and incomplete factors, and it does not properly screen identification evidence for reliability. *See infra* notes 168–75 and accompanying text.

8. *See infra* notes 266–75 and accompanying text.

9. The Innocence Project of the Cardozo School of Law reports a total of 289 post-conviction DNA exonerations in United States history. *See Innocence Project Case Profiles*, INNOCENCE PROJECT, http://www.innocenceproject.org/know/ (last visited May 19, 2012). Five additional cases involve non-DNA exonerations. *See Non-DNA Exonerations*, INNOCENCE PROJECT, http://www.innocenceproject.org/know/non-dna-exonerations.php (last visited May 19, 2012). *See generally* BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG (2011) (addressing a study of the first 250 DNA exoneration cases).

The number of wrongfully convicted persons whose cases do not include DNA evidence most likely exceeds the DNA cases many times over, but those cases are much harder to prove. By some estimates, the actual number of people wrongly convicted of felonies each year may be in the thousands. *See* Richard A. Wise, Clifford S. Fishman & Martin A. Safer, *How to Analyze the Accuracy of Eyewitness Testimony in a Criminal Case*, 42 CONN. L. REV. 435, 440 (2009); Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 523–24 (2005).

10. *See* Appendix; *see also infra* Section II.A.

11. *See* Appendix; *see also infra* notes 48–52 and accompanying text.

12. *Id.*

13. *See infra* notes 114–15 and accompanying text.

Using eyewitness identification testimony as an illustration, this Article argues that unless a rule fits within one of the narrowly circumscribed areas of departure from the reliability paradigm, courts should construe evidentiary rules in a manner that promotes trial outcome reliability. The stated purpose of the rules of evidence is to guide courts in furthering the development of evidence case law so as to maximize the accuracy of trial verdicts.[14] The reliability paradigm is even reflected in the procedural rules that leave most evidentiary gatekeeping to trial judges.[15] The usual practice of tasking the jury with evaluating eyewitness identification represents a failure of courts to exercise their proper gatekeeping role,[16] especially because eyewitness identification evidence is critical prosecution evidence, and jurors are not equipped to evaluate it properly.[17]

The DNA exonerations have led scholars of wrongful convictions, as well as reform groups, to call for "pretrial reliability hearings" for eyewitness identifications and other leading causes of wrongful convictions, such as confessions and informant testimony.[18] Such hearings would re-

14. *See infra* notes 47–55 and accompanying text (discussing FRE 102 and construing rules to promote the growth and development of the law of evidence).

15. *See infra* notes 116–24 and accompanying text.

16. In addition to the evidentiary gatekeeping role played by trial judges, judges also have the responsibility to ensure the fairness of trial proceedings as a matter of judicial ethics and in their supervisory role over the administration of justice. *See* Sandra Guerra Thompson, *Eyewitness Identifications and State Courts as Guardians Against Wrongful Conviction*, 7 OHIO ST. J. CRIM. L. 603, 632 n.180 (2010) [hereinafter *Eyewitness Identifications*]; Mary Sue Backus, *The Adversary System Is Dead; Long Live the Adversary System: The Trial Judge as the Great Equalizer in Criminal Trials*, 2008 MICH. ST. L. REV. 945, 961–70. Some judges have also invoked their supervisory authority to ensure the fairness of the adversary system. *See* Thompson, *Eyewitness Identifications*, *supra*, at 622.

17. *See infra* notes 253–59 and accompanying text on juror assessments of reliability.

18. *See* RICHARD A. LEO, POLICE INTERROGATION AND AMERICAN JUSTICE 289–91 (2008) (recommending pretrial reliability hearings for confessions); ALEXANDRA NATAPOFF, SNITCHING: CRIMINAL INFORMANTS AND THE EROSION OF AMERICAN JUSTICE 194–95 (2009) (recommending pretrial reliability hearings for informant testimony); Sandra Guerra Thompson, *Judicial Gatekeeping of Police-Generated Witness Testimony*, 102 J. CRIM. L. & CRIMINOLOGY (forthcoming 2012) (manuscript at 1–2) (on file with Soc. Sci. Res. Network Elec. Paper Collection) [hereinafter *Judicial Gatekeeping*] (recommending pretrial reliability hearings for eyewitness identifications, confessions, and government informant testimony). *See generally* Keith A. Findley, *Innocents at Risk: Adversary Imbalance, Forensic Science, and the Search for Truth*, 38 SETON HALL L. REV. 893, 911 (2008) (arguing that rules of evidence already incorporate some forms of gatekeeping for reliability). Reform groups such as the Innocence Project and the now-defunct Justice Project have also called for pretrial reliability hearings. *See* State v. Henderson, 27 A.3d 872, 915–16 (N.J. 2011) (addressing Innocence Project recommendations regarding reliability hearings for eyewitness identifications); THE JUSTICE PROJECT, ELECTRONIC RECORDING OF CUSTODIAL INTERROGATIONS: A POLICY REVIEW 2–4 (2007) (on file with author) (calling for pretrial reliability hearings for confessions); THE JUSTICE PROJECT, JAILHOUSE SNITCH TESTIMONY: A POLICY REVIEW 3–4 (2007) (on file with author) (calling for pretrial reliability hearings for informant testimony). The state of Illinois has adopted a statute that requires pretrial reliability hearings for government informant testimony in capital cases and provides seven factors for courts to consider in determining reliability. *See* NATAPOFF, *supra*, at 194. In the past I have also argued in favor of a corroborating evidence rule to better ensure the reliability of eyewitness identification, see Sandra Guerra Thompson, *Beyond a Reasonable Doubt? Reconsidering Uncorroborated Eyewitness Identification Testimony*, 41 U.C. DAVIS L. REV. 1487, 1497 (2008) [hereinafter *Beyond a Reasonable Doubt?*], as well as greater judicial oversight under state constitutional law, state

semble the type contemplated in the Supreme Court's landmark decisions on scientific and technical evidence—*Daubert* and *Kumho Tire Co. v. Carmichael.*[19] This Article treats the wrongful convictions literature and reform proposals as a starting point for a discussion about the proper application of the FRE, the lessons of *Daubert*, and the role of judges as evidentiary gatekeepers.

Nothing can be more unfair than a criminal trial dominated by prosecution evidence that experience and scientific studies have shown to be both frequently unreliable and difficult for jurors to evaluate for reliability. It is especially offensive when the unreliability derives primarily from the conduct of government officials in gathering the evidence, as is often the case.[20] Under these circumstances, the trial court's gatekeeping role is most compelling. Yet due to the free pass given to identification evidence under the traditional reading of the hearsay rules, courts have neglected to conduct reliability screening for this critical prosecution evidence. The only screening has been to apply the flawed and toothless due process test of *Manson v. Brathwaite.*[21]

The growing awareness of the failures of due process screening under *Manson* has led some state courts to tweak the *Manson* test for purposes of state constitutional law, but these efforts still fall short of broad reliability gatekeeping.[22] Recently, the New Jersey Supreme Court in *State v. Henderson* rejected the *Manson* test in favor of farther-reaching reliability assessment for identification evidence that the defendant alleges is tainted by police suggestion.[23] Then, in *State v. Chen*, the court extended this broad reliability gatekeeping under the state's rules of evidence for cases not involving police suggestion, but rather private actor suggestion.[24] Unfortunately, for a variety of reasons, *Henderson* and *Chen* fail to fully embrace the gatekeeping role of a trial court.[25]

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rules of evidence, and the courts' supervisory powers. *See* Thompson, *Eyewitness Identifications*, *supra* note 16, at 607, 622.

19. Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 590 (1993); Kumho Tire Co. v. Carmichael, 526 U.S. 137, 137 (1999); *see also* Gen. Elec. Co. v. Joiner, 522 U.S. 136, 138–39 (1997) (applying abuse of discretion standard of appellate review to *Daubert* rulings).

20. *See* Thompson, *Judicial Gatekeeping*, *supra* note 18, at 3 (addressing the coercive or suggestive tactics that police officers sometimes use to obtain eyewitness identifications, confessions, and informant testimony).

21. *See* 432 U.S. 98, 110 (1977) (holding that due process does not require exclusion of unnecessarily suggestive identification evidence unless it is unreliable under a five-factored "totality of circumstances" test); *see also infra* notes 169–76 and accompanying text.

22. *See* Thompson, *Eyewitness Identifications*, *supra* note 16, at 623–26.

23. State v. Henderson, 27 A.3d 872, 919–26 (N.J. 2011) (holding that state due process requires pretrial reliability hearings for identifications tainted by police suggestiveness); *see also infra* notes 169–73 and accompanying text.

24. State v. Chen, 27 A.3d 930, 937 (N.J. 2011) (holding that identification tainted by highly suggestive circumstances caused by a private actor entitles defendant to a pretrial reliability hearing under the rules of evidence); *see also infra* notes 194–98 and accompanying text.

25. *See infra* notes 210–16 and accompanying text.

As this Article shows, the rules of evidence give courts a clear mandate to ensure the integrity of the trial as a truth-seeking mechanism by evaluating evidentiary reliability as a condition precedent to admission for most forms of evidence. The gatekeeping role allows courts the options of admission and exclusion, but conducting such hearings before trial also offers the advantage of a more considered use of intermediate palliatives such as jury instructions[26] and expert testimony. Moreover, effective judicial gatekeeping would necessitate an explicit finding announced in open court that certain police practices render evidence unreliable, creating an incentive for the police to follow best practices.[27] Appellate courts would then play an important role in overseeing the gatekeeping process.[28] Thus, pretrial gatekeeping for reliability has the potential to bring about important systemic changes and to encourage a sophisticated jurisprudence on the science and law of eyewitness identifications. In this sense, *Henderson* and *Chen* represent an important leap forward in clearly articulating the evidentiary need for gatekeeping and the scientifically-based factors courts should consider.

The Article urges trial courts to reconsider the manner in which they apply the rules governing the admissibility of eyewitness identification testimony. As currently written, a faithful reading of the rules is consistent with the reliability paradigm of the FRE to better protect against the possibility of wrongful conviction. Such a refined interpretation of the rules would address a pressing need and is likely to spur rule reform, as was the case in *Daubert* and its progeny.[29] Ideally the rules of evidence would be revised to make reliability gatekeeping for identification evidence explicit and to define detailed criteria for evaluating this critical evidence.

Part II of the Article addresses the reliability paradigm in evidence law and the role of trial courts in conducting reliability gatekeeping. First, it defines the concept of reliability as the operative principle that underlies virtually all the substantive rules of evidence. By closely examining the five categories of evidence rules, one can better appreciate the dominant role that reliability plays in defining most of the evidentiary rules. This Part distinguishes the concept of evidentiary *reliability*, which the court

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26. Jury instructions on eyewitness identifications can be given before the witness testifies, which may be preferable to giving them at the end of the trial. *See infra* note 215 and accompanying text.

27. Of course, judicial gatekeeping is not possible without proper documentation of the interactions between investigators and witnesses, preferably by videotape recording. Pretrial defense discovery of the videotapes and other documents relating to the testimonial evidence is also necessary. *See* Thompson, *Judicial Gatekeeping*, *supra* note 18, at 58. In the case of jailhouse informants, commentators have called for courts to impose an affirmative duty on prosecutors to obtain information on the informant's criminal background and history as a witness in other cases, so as to disclose all the pertinent information to the defense before trial. NATAPOFF, *supra* note 18, at 192–94.

28. For an article calling for heightened reliability review at the appellate level, see Keith A. Findley, *Innocence Protection in the Appellate Process*, 93 MARQ. L. REV. 591, 592 (2009).

29. *See infra* notes 150–52 and accompanying text.

should evaluate in the first instance, from the concept of witness *credibility*, which only the jury should assess.

In addition, Part II demonstrates that the rules of evidence include procedural rules that clearly call for judicial gatekeeping for evidentiary reliability. This part concludes with a closer examination of the Supreme Court's opinion in *Daubert*, which teaches important lessons on the centrality of reliability and the proper application of Rule 403 to evidentiary gatekeeping.

In Part III, this Article examines recent decisions of the New Jersey Supreme Court and the United States Supreme Court in the area of eyewitness identification. It evaluates the pair of recent New Jersey decisions that make great strides in requiring the consideration of well-established social science research on identification reliability. At the same time, Part III points out the shortcomings in these decisions. In *Henderson v. New Jersey*, for example, the court sets the expectation that reliability gatekeeping will not affect the admissibility of identification evidence but will merely result in greater use of jury instructions.[30] In *Chen v. New Jersey*, the court misapplies the rules of evidence, resulting in erroneously placing the burden to prove inadmissibility on the defense.[31] On the federal level, the Supreme Court broke little new ground in *Perry v. New Hampshire*, which, like *Henderson*, refused to extend the scope of due process protection to cases not involving police suggestion.[32] Unreliable identifications, if caused by factors other than improper police suggestion, warrant no due process screening under either *Henderson*[33] or *Perry*.[34] Interestingly, *Perry* points to the rules of evidence as the proper vehicle for litigating claims of unreliability.[35]

Part IV provides an example of how judges might best carry out their gatekeeping function as applied to eyewitness identifications. This discussion reveals a gaping hole in the rules of evidence—that this type of evidence is freely admitted despite the fact that, in some cases, eyewitness identifications have substantial indicia of unreliability, especially since they tend to be procured improperly. Amending the rules to require courts to perform effective reliability screening for identification evidence would make explicit the courts' gatekeeping responsibility and encourage the development of detailed criteria for reliability assessments, which would also enable meaningful appellate review.[36]

30. 27 A.3d 872, 925–26 (N.J. 2011).
31. 27 A.3d 930, 942 (N.J. 2011).
32. 132 S. Ct. 716, 718 (2012).
33. *Henderson*, 27 A.3d at 877.
34. *Perry*, 132 S. Ct. at 718.
35. *Id.* at 719–20.
36. *See generally* Findley, *supra* note 18, at 893.

II. RELIABILITY AND THE JUDICIAL GATEKEEPING FUNCTION

A criminal trial provides a forum to determine the guilt or innocence of persons accused of crimes by the government. Each participant in this public spectacle plays an important role. The truth-seeking mission of the trial process provides a key role for the community through the jury system.[37] The Constitution gives the accused a right to a jury of the accused's peers. The jury system serves as a protection for individuals against the possibility of misuse of prosecutorial powers to oppress political dissidents.[38] Thus, community members who serve on juries do so as a means of protecting defendants who stand accused by the government.[39]

Consistent with this vision of the jury trial, a variety of rules govern the way in which trials are conducted. Constitutional rules, rules of criminal procedure, and the rules of evidence apply simultaneously and often in overlapping ways. The following sections focus on the key role played by the rules of evidence in defining the respective responsibilities of the judge and the jury in the trial process. While the jury's role may be to guard defendants against government overreaching, the rules of evidence recognize that trial courts must protect criminal defendants from jury error. Many rules of evidence call upon courts to prevent jurors from hearing evidence when it is both (1) highly persuasive to jurors who assign it great probative weight and (2) a type that jurors are generally unable to evaluate accurately for reliability.[40] Thus, especially in criminal cases, trial judges play a key role in ensuring the accuracy of a trial by enforcing

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37. The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defen[s]e." U.S. CONST. amend. VI. *See generally* JAMES OLDHAM, TRIAL BY JURY: THE SEVENTH AMENDMENT AND ANGLO-AMERICAN SPECIAL JURIES 25–44 (2006) (discussing the fact-finding role of the jury and the role of the judge to determine questions of law).

38. As the Supreme Court noted in *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000), the jury system "'guard[s] against a spirit of oppression and tyranny on the part of rulers,' and acts 'as the great bulwark of [our] civil and political liberties.'" According to 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 540–41 (4th ed. 1873), trial by jury has been understood to require that "*the truth of every accusation*, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbours . . . ." (quoting 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 343 (1769) (emphasis added)). *See generally* JOHN GUINTHER, THE JURY IN AMERICA at xiii (1988) ("Thomas Jefferson and others have seen [the jury] as the public's line of defense against the state when it acts oppressively, and Jefferson, for that reason, once declared that the right to a trial by jury was more precious to the maintenance of a democracy than even the right to vote.").

39. The Sixth Amendment gives *the accused* the right to have a jury determine the elements of the crime, including any fact that increases the maximum punishment. *Apprendi*, 530 U.S. at 490; *see also* OLDHAM, *supra* note 37, at 39–40.

40. *See, e.g.*, *infra* notes 75–81 (addressing character evidence rules), 57–62 (addressing FRE 403), and 138–44 (addressing justification for gatekeeping of scientific evidence).

the rules of evidence, most of which are designed to further the search for truth.

A. THE RELIABILITY PARADIGM

An examination of the purposes of the FRE, and of evidentiary rules in general, must start from the obvious premise that the rules are designed as a guide for litigants and judges to determine the procedural and substantive issues regarding the admissibility of various types of evidence. Litigants invoke the rules during the course of trials, and trial courts enter their rulings by assessing the evidence in question in relation to the rule that is invoked.[41] Jurors hear testimony and review documents or other physical evidence that the trial judge admits. Courts frequently guide jurors in how they should assess the evidence by providing "limiting instructions" or other jury instructions.[42] The rules do not task jurors with determining the *admissibility* of evidence as such.[43] Moreover, appellate courts are highly deferential to evidentiary rulings by trial courts.[44] Thus, as between trial judge and jury, the most powerful institutional player in determining the admissibility of evidence is clearly the trial judge.[45] Jurors play a passive role in simply receiving the evidence that judges allow them to hear and considering it in the manner in which judges instruct.[46]

In making difficult admissibility determinations, courts have long been

41. Of course, in practice, judges have no freestanding authority to act as "'evidence police;' . . . the rules govern only to the extent that they are invoked or ignored by trial lawyers." Daniel D. Blinka, *Ethics, Evidence, and the Modern Adversary Trial*, 19 GEO. J. LEGAL ETHICS 1, 6 (2006). Nonetheless, when a litigant does invoke the rules, the court is thrust into the role of "evidence police," at least with regard to the particular objection raised.

42. *See generally Overview: Importance of Proper Instructions in Admitting Evidence*, FEDERAL JURY INSTRUCTIONS RESOURCE PAGE, http://federalevidence.com/node/893 (last visited May 19, 2012).

43. Federal Rule of Evidence 104(a) instructs courts to "decide any preliminary question about whether . . . evidence is admissible." Ostensibly, Rule 104(b) reserves a minor role for the jury to determine the admissibility of conditionally relevant evidence. The Advisory Committee's notes reflect a concern that questions of conditional relevance should be decided by the jury lest the "functioning of the jury as a trier of fact . . . be greatly restricted and in some cases virtually destroyed." However, scholars have criticized the rule as erroneous and viewed it instead as a rule that justifies a court in excluding evidence that is not supported by an adequate foundation. FED. R. EVID. 104. *See* Dale A. Nance, *Conditional Relevance Reinterpreted*, 70 B.U. L. REV. 447, 448, 489–505 (1990) (arguing that the conditional relevance rule finds support in a "best evidence principle" and rejecting the United States Supreme Court's opinion in *Huddleston v. United States*, 485 U.S. 681 (1988), as poorly decided in failing to give adequate justification for the decision to admit evidence of prior crimes).

44. Gen. Elec. Co. v. Joiner, 522 U.S. 136, 143 (1997) (applying abuse of discretion standard of appellate review to *Daubert* rulings).

45. For a discussion of the legitimacy and value of judges exercising discretion in the application of the FRE, see David P. Leonard, *Power and Responsibility in Evidence Law*, 63 S. CAL. L. REV. 937, 967 (1990) (demonstrating that the rules reflect the drafters' choice to create "flexible standards [that] would more effectively fulfill the Rules' core principles than a system of fixed rules with many exclusionary provisions").

46. *See supra* note 43.

guided by the underlying purposes of the rule of evidence at issue.[47] Courts also take a broader view of the overriding concerns that motivate the entire body of rules, as well as the judge's principal function in ruling on evidence.[48] The FRE can be sorted under five main rubrics: (1) rules advancing societal interests other than the search for truth; (2) procedural rules for applying the evidence rules; (3) rules reflecting notions of fairness in the advocacy system; (4) rules ensuring the reliability of the trial process; and (5) rules serving the goal of judicial efficiency.[49] Of the five categories, the rules ensuring evidentiary reliability represent the largest category.[50] In fact, almost all of the Rules of Evidence can be seen as requiring courts to screen evidence so that the jury considers only sufficiently reliable evidence.[51] This should not surprise us since the objectives of the rules are to ascertain the truth and produce just determinations.[52]

The following sections explore the concept of evidentiary reliability, as contrasted with witness credibility, and further define each of the five types of evidentiary rules. By providing a closer look at the overwhelming number of rules designed to promote verdict accuracy, this Section demonstrates the primacy of reliability as the overriding purpose of the rules of evidence. The procedural rules, as well as evidence jurisprudence, make clear that trial courts play an important role in evaluating evidentiary reliability, leaving it to the jury to assign weights to the evidence and to perform the related task of judging witnesses' credibility. In most cases, courts evaluate reliability simply by determining admissibility

47. For an essay arguing that the Rules drafters sought to leave sufficient flexibility for courts to address unforeseen situations, see Eileen A. Scallen, *Interpreting the Federal Rules of Evidence: The Use and Abuse of the Advisory Committee Notes*, 28 LOY. L.A. L. REV. 1283, 1283 (1995).

48. *See infra* notes 145–49 and accompanying text.

49. *See* Appendix.

50. *See* Appendix (showing that 59 of the 68 Federal Rules promote reliability of the trial process, as compared to the next largest category, the procedural rules, representing 15 of the 68 Rules of Evidence). Of course, the total number of rules does not necessarily correspond with the volume of evidence admitted or excluded under any particular type of rule, but it does reflect the drafters' overriding concern to safeguard the integrity of the trial process.

51. David S. Schwartz makes a similar argument in a recent article in reference to rules he considers foundational or "implicit" in the "underlying structure," such as Rules 602, 701, and 901, as well as 104(b). *See* David S. Schwartz, *A Foundation Theory of Evidence*, 100 GEO. L.J. 95, 100 (2011). He refers to the underlying theory of evidence as "foundation," by which he means that proponents must show that the evidence makes "a case-specific assertion of fact that must be *probably true* in order to lend support to a legal claim." *Id.* at 98 (emphasis added). Thus, he writes: "The existing rules of foundation, with their 'evidence sufficient to support a finding' standard, ask the judge to screen offers of evidence to make sure they are believable by a rational jury. Such evidence must be specifically assertive and probably true; without those characteristics, evidence cannot be logically relevant." *Id.* at 171. The *reliability* of evidence is to be contrasted with the *credibility* of evidence. The jury's central function is to evaluate the *credibility* of each side's evidence. The ultimate question of the weight of each side's evidence will depend on the jury's assessment of the *credibility* of the witnesses. *See infra* notes 90–110 and accompanying text.

52. *See* FED. R. EVID. 102.

under various rules, such as the hearsay exceptions in Rules 803 and 804.[53] In other cases, the court's gatekeeping discretion may be fairly weak.[54] Nonetheless, it is fair to say that courts possess a gatekeeping function for virtually all evidence.[55]

1. Reliability Defined

As used in this Article, "reliability" refers to the nature of the evidence in furthering the objectives of the FRE to ascertain truth. In other words, reliability means accuracy, and evidentiary reliability promotes accuracy in the outcome of the trial process. The most obvious type of evidentiary reliability involves the admission of evidence that provides accurate information. Thus, for example, scientific evidence that is found to be "reliable"—the term chosen by the Supreme Court in *Daubert*—derives from an accurate foundation of scientific data upon which courts can rely to increase the likelihood of reaching a trial verdict that reflects the truth.[56] "Scientific" evidence found unreliable is thus excluded because the conclusions drawn from it are likely to be wrong.

Rule 403 and other, similar rules regulate reliability in a second, less obvious way by empowering courts to exclude evidence that has a tendency to distort the trial process because of its potential effect on the jury.[57] The Rule allows judges to exclude evidence on the ground that its "probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, [or] . . . misleading the jury,"[58] among other considerations.[59] The term "probative value" here refers to its

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53. FED. R. EVID. 803, 804.

54. *See infra* note 75 and accompanying text.

55. Arguably, Rule 801(d)(2) allows admissions of a party opponent without regard to unreliability; however, the declarant's presence in court as a party opponent provides some assurance that any unreliability of the statements can be brought to light. *See* FED. R. EVID. 801(d)(2). Thus, even this rule contemplates some assurance of reliability.

56. Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 589–90 (1993); *see also infra* notes 138–43 and accompanying text. I recognize that the terms "reliable" and "accurate" (or "valid") are not used interchangeably in science, as they are in law. *See* Simon A. Cole, *Forensic Science and Wrongful Convictions: From Exposer to Contributor to Corrector*, 46 NEW EM. L. REV. 711 (2012). The interpretation of "reliability" in this Article speaks only to the reliability (in the sense of apparent accuracy based on the best available analysis) of a critical and persuasive item of evidence. When the circumstances show an identification was obtained under highly "unreliable" conditions, this evidence presents an inordinate risk of wrongful conviction, especially in the absence of other strong identification evidence. Given that the burden of proof in criminal cases reflects a strong systemic preference to avoid wrongful convictions (as opposed to wrongful acquittals), it is appropriate to interpret the objectives stated in Rule 102 to "ascertain[ ] the truth and secur[e] a just determination" as also reflecting this same strong preference to avoid wrongful convictions. *See* FED. R. EVID. 102.

57. *See* FED. R. EVID. 403; *see generally* Victor J. Gold, *Federal Rule of Evidence 403: Observations on the Nature of Unfairly Prejudicial Evidence*, 58 WASH. L. REV. 497, 503 (1983) (observing that Rule 403 gives courts the discretion to exclude evidence when "it has a tendency to cause the trier of fact to commit inferential error"); *see also* FED. R. EVID. 404–12.

58. FED. R. EVID. 403.

59. Rule 403 also lists other grounds for exclusion, including "undue delay, wasting time, or needlessly presenting cumulative evidence." *Id.*

value or weight as proof in a party's case.[60] Credible witness testimony on critical aspects of a party's case will have great probative value, without which a party may not be able to present a full picture of the events in question. Allowing both parties to admit as much probative evidence as they deem necessary promotes the advocacy system's goal of seeking the truth.

Yet not all witness testimony is admissible. When probative evidence also has an inordinate tendency to inflame the passions or prejudices of the jury or to confuse or mislead them, the rules give trial courts the discretion to exclude or limit such evidence.[61] Emotional reactions and confusion on important issues will distort a jury's ability to make rational, well-informed judgments. Emotions such as fear, revulsion, or disdain will lead jurors to assign more or less weight (or probative value) to certain evidence than it in fact deserves, thus distorting the truth-seeking process.[62] Excluding evidence that is substantially more "unfairly prejudicial" than it is probative will eliminate substantial distortions that could skew the jury's decisionmaking and lead to an inaccurate verdict. Similarly, the Rules exclude evidence that is unfairly misleading because jurors lack the ability to evaluate it properly. Thus, Rule 403 empowers judges to exclude evidence not because it is likely wrong, but because the risk posed by the jury's inability to properly evaluate the evidence increases the chance of an inaccurate verdict.

2. *Promoting the Reliability of Trial Verdicts*

Most of the Federal Rules of Evidence call for the exclusion of evidence on reliability grounds to prevent inaccurate verdicts. As shown in the Appendix, many rules serve multiple purposes at once, but almost all of the rules regulate evidence at least partly on reliability grounds.[63] The best evidence rule, for example, requires production of the original or a duplicate of any non-collateral writing, recording, or photograph if it is available.[64] The rule expresses a preference for the production of the document or recording over live testimony, which may be unreliable.[65]

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60. *See* Old Chief v. United States, 519 U.S. 172, 180–85 (1997) (addressing the process for evaluating probative value, which is done by comparing the evidence to other relevant evidence available to prove the same matter).

61. *Id.* at 180–81 (addressing judicial authority to exclude evidence under Rule 403).

62. *See* Gold, *supra* note 57, at 506.

63. One may quibble with one or another purpose assigned to a particular rule. The study is not intended as a scientific empirical exercise but rather as a rough guide or visual aid. The sheer volume of rules designed to serve reliability purposes is beyond question, even if one can dispute a particular categorization.

64. *See* FED. R. EVID. 1002, 1001, 1004(d). The rule allows for exceptions when items are lost or destroyed through no fault of the proponent, among others. *See, e.g.*, FED. R. EVID. 1004(a)–(c).

65. The Advisory Committee's notes to Rule 1003, for example, explain that duplicates "serve[ ] equally as well as the original" in situations "[w]hen the only concern is with getting the words and other contents before the court with accuracy and precision." FED. R. EVID. 1003 Advisory Committee's notes. By implication, oral testimony of witnesses would not provide the same accuracy and precision as documents or recordings. As a rule of preference, the best evidence rule does not necessarily call for oral testimony to be

Other rules that require courts to conduct gatekeeping to advance the interest of evidentiary reliability include the rules on witness qualification,[66] the rules on expert witness testimony,[67] and the rules for authenticating evidence,[68] to name a few.

The FRE state a categorical exclusion of hearsay statements due to the inability to test either the reliability or the credibility of the out-of-court "declarant" who made the statement.[69] The Rules reflect a preference

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excluded on reliability grounds, but it insists that the most reliable form of evidence *available* be admitted. The rule serves the dual purpose of advancing the fairness of the advocacy system by excluding oral testimony when the more reliable forms of the evidence were lost or destroyed in bad faith. *See* FED. R. EVID. 1004(a).

66. Rule 601 requires that witnesses be competent to testify, and Rule 603 requires that they take an oath or affirm that they will testify truthfully. Each of these requirements furthers the reliability of the trial process in obvious ways. *See* FED. R. EVID. 601, 603.

67. *See* FED. R. EVID. 702–05; *see also infra* Section II.C.

68. Rules 901 and 902 govern the authentication of evidence. FED. R. EVID. 901, 902. Interestingly, here is an area where the *admissibility* of evidence is ultimately decided by the jury. Rule 104(a) leaves to courts the task of determining the admissibility of evidence as a general matter. However, Rule 104(b) provides that "[w]hen the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist." FED. R. EVID. 104(b). Courts have determined that, with regard to proving the authenticity of evidence, the evidence is not relevant unless there is evidence sufficient to support a finding that the evidence is authentic. For example, merely testifying that a white powder is cocaine is insufficient to prove that the substance introduced at trial is actually cocaine. Additional evidence must be proffered to establish the reliability of any finding that the substance is cocaine. If a chemist testifies that the substance tested positive for cocaine in reliable scientific testing, then that testimony would be sufficient—if the chemist is found to be credible by the finder of fact. The decision whether to credit testimony or other evidence offered on the issue of authenticity is thus technically left to the jury as a matter of "admissibility." *See, e.g.*, Huddleston v. United States, 485 U.S. 681, 689–90 (1988) (finding that admissibility of evidence under Rule 404(b) raises a question of conditional relevancy, and the court's role is simply to determine whether there is sufficient evidence on which the jury can find the evidence relevant under Rule 104(b)). Even so, however, the trial court plays a role in "admitting" the evidence if there is sufficient evidence to support such a finding by the jury. *Id.* at 690. In somewhat elliptical fashion, the Advisory Committee's notes explain the rationale for FRE 104(b):

> If preliminary questions of conditional relevancy were determined solely by the judge, as provided in subdivision (a), the functioning of the jury as a trier of fact would be greatly restricted and in some cases virtually destroyed. These are appropriate questions for juries. Accepted treatment, as provided in the rule, is consistent with that given fact questions generally. The judge makes a preliminary determination whether the foundation evidence is sufficient to support a finding of fulfillment of the condition. If so, the item is admitted. If after all the evidence on the issue is in, pro and con, the jury could reasonably conclude that fulfillment of the condition is not established, the issue is for them. If the evidence is not such as to allow a finding, the judge withdraws the matter from their consideration.

FED. R. EVID. 104(b) Advisory Committee's notes (internal citations omitted). Thus, even in an area in which the jury ostensibly plays a fact-finding role in admitting evidence, the court in the first instance determines whether there is sufficient evidence to support such a finding. To do otherwise would allow the jury to consider evidence upon which there is an insufficient basis supporting authenticity, and that would introduce unreliability.

69. *See* FED. R. EVID. 801(c) (defining hearsay); 802 (stating that hearsay is not admissible except as provided by the FRE, other rules prescribed by the Supreme Court, or a federal law). The Advisory Committee's notes to Rule 801(a), which define a "statement" for purposes of the hearsay rule, note that motivations for the hearsay rule are to exclude statements that are "untested with respect to the perception, memory, and narration (or

for live witnesses who give in-court testimony rather than those who would testify to the out-of-court statements of another.[70] Mueller and Kirkpatrick's treatise on evidence explains the nature of the risks of unreliability inherent in hearsay statements:

> At the heart of the hearsay doctrine is the conviction that out-of-court statements are generally an inferior kind of proof. . . .
>
> One risk is that the speaker may misperceive the condition or event in question. [There are three concerns regarding the speaker's observation.]
>
> One centers on the sensory capacities of the speaker. . . . Another centers on his mental capacity, which means mostly his judgment and ability to process and make sense of whatever he sees and hears. Both concerns are affected by attitudes, expectations, [and] psychological conditions . . . that might bear on opportunity to observe. Any or all these factors might prove critical, and being wary does not so much imply a skeptical view of human capabilities as a cautious attitude toward factfinding.
>
> Another risk is that the speaker might err in calling to mind the events or conditions he observed. We commonly think of memory as fading over time. . . .
>
> Psychologists report that recollecting does not involve retrieving a datum stored in the mind in static condition (as it might rest in computer memory): It is better understood as creating a new mental image that is affected by—indeed partly comprised of—subsequent memories along with today's impressions and ideas. . . .
>
> . . .
>
> Another risk is insincerity, meaning that the speaker might shade the truth or blatantly falsify.[71]

In sum, the rules do not preclude a witness's testimony out of concerns that the *witness* is not "credible"—that is, a person who should not be believed. Rather, it is the absence of the *declarant* in court that makes the witness's testimony untrustworthy, because the declarant may be insincere (i.e., not credible), unreliable (due to memory issues), or both.[72] The inability to judge a declarant's credibility or reliability makes out-of-court statements untrustworthy.[73] The Advisory Committee provided numerous exceptions to the rule on the grounds that those types of hear-

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their equivalents) of the actor" and to address concerns with the "possibility of fabrication" and "questions of sincerity" of evidence. FED. R. EVID. 801(a) Advisory Committee's notes.

70. The general exclusion of hearsay reflects this preference. *See* FED. R. EVID. 801–04. The Confrontation Clause of the Sixth Amendment also forbids the government from offering the out-of-court "testimonial" statements of witnesses against a defendant. To admit a witness's testimonial statements, the government must show that the witness is unavailable and that the defendant had a prior opportunity to cross-examine the witness. Crawford v. Washington, 541 U.S. 36, 68 (2004).

71. MUELLER & KIRKPATRICK, EVIDENCE § 8.2, at 695–96 (3d ed. 2003). Interestingly, the hearsay risks closely coincide with many of the risks associated with eyewitness identifications. *See infra* notes 63–68 and accompanying text.

72. MUELLER & KIRKPATRICK, *supra* note 71, § 8.2, at 695–96.

73. *Id.*

say "may possess circumstantial guarantees of trustworthiness,"[74] consistent with the reliability rationale for the rule.

The FRE also generally exclude character evidence in criminal cases on reliability grounds (making special exceptions for sexual assault and child molestation cases).[75] Character evidence does not accurately indicate a person's guilt or innocence of a particular offense. As Mueller and Kirkpatrick explain: "[W]hile a persons' [sic] propensities ["character"] are a useful gauge of likely behavior patterns over a period of time, they are *less accurate* when used to decide what happened on one particular occasion because people do not always act in accordance with their propensities."[76]

Justice Jackson has also pointed out that character evidence can lead to unreliable verdicts because jurors will have a tendency to assign such evidence more weight than it deserves.[77] Thus, although the character evidence itself may be accurate in the sense of conveying accurate information relevant to an assessment of the defendant's character, it introduces unreliability because it will not be properly discounted by the jury. As Justice Jackson writes,

> The inquiry [into character] is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. . . [I]ts disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice.[78]

The limitations on the use of character evidence thus promote reliability in the same manner as Rule 403.[79] In an assault case, for example, the government may not rely on the testimony of witnesses who would testify to the defendant's violent tendencies to prove that the defendant attacked the victim on the particular occasion in question.[80] Prosecutors should instead prove their cases with evidence pertaining specifically to the event in question. Evidence of a violent character introduces unreliability due to its potential to anger jurors who might punish the defendant for being a bad person or for past crimes.[81] Alternatively, jurors might exercise less care in ensuring that the government has proved every element beyond a reasonable doubt. If the defendant is shown to be a "bad guy," jurors might lose interest in carefully considering the evidence and requiring the government to prove guilt beyond a reasonable doubt. In-

74. *See* FED. R. EVID. 803 Advisory Committee's note.

75. *See* FED. R. EVID. 404(a)(1) (prohibited uses of character evidence); FED. R. EVID. 413(a) (permitted uses of similar crimes in sexual assault cases); FED. R. EVID. 414(a) (permitted uses of similar crimes in child-molestation cases).

76. MUELLER & KIRKPATRICK, *supra* note 71, § 4.11, at 183–84 (emphasis added).

77. Michelson v. United States, 335 U.S. 469, 475–76 (1948).

78. *Id.*

79. *See supra* notes 57–60 and accompanying text.

80. *See* FED. R. EVID. 404(a).

81. MUELLER & KIRKPATRICK, *supra* note 71, § 4.11, at 183.

nocent defendants with violent histories therefore would be at greater risk of wrongful conviction.

3. Other Purposes Generally Coincide with Reliability

The rules pursue three other substantive purposes besides reliability: advancing societal goals outside of the litigation context, promoting judicial efficiency, and promoting fairness within the advocacy system.[82] In almost every instance, these goals operate as coincidental purposes to the central purpose of verdict reliability.[83] For example, Rule 407 prohibits evidence of subsequent remedial measures when offered to prove a party's negligence.[84] To illustrate the reliability rationale for this rule, imagine that an automobile driver sues a train company after having a serious collision with a train. Rule 407 prohibits the plaintiff from offering evidence of the fact that the railroad implemented safety improvements to the railroad crossing immediately following the accident.[85] The rule advances verdict reliability because proof of a subsequent remedial measure may not be reliable evidence of the defendant's negligence.[86] The defendant is negligent only if a reasonable person operating a railroad would have foreseen the particular danger in question. The fact that the railroad—*with the benefit of hindsight*—opted to make safety improvements does not necessarily mean that the danger was foreseeable *before the accident.* Thus, admission of this evidence might mislead the jury on the question of negligence and contribute to an inaccurate verdict.

In addition, Rule 407 reflects a coincidental purpose not to deter parties such as business owners from taking remedial measures after accidents and other mishaps for fear of increasing their liability in tort.[87] The purpose of not deterring remedial measures advances an important societal interest in public safety, a goal that lies outside the realm of trial advocacy.

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82. *See* Appendix. The fifth type of rule is non-substantive. These rules establish proper procedures or consist only of definitions. They are "rules of evidence" only in name. These rules include Rule 101 (outlining the application of the rules to federal courts and providing definitions for a few basic terms such as "civil case"), Rule 1001 (defining terms pertaining to the best evidence rule), Rule 1008 (explaining functions of court and jury in applying the "best evidence" rule), Rule 1101 (delineating the applicability of the rules to certain federal courts and to certain cases and proceedings), Rule 1102 (referencing statutory authorization for amendments), and Rule 1103 (stating that the rules may be cited as the Federal Rules of Evidence).

83. *See* Appendix.

84. FED. R. EVID. 407. The Rule also prohibits the use of evidence of subsequent remedial measures to prove other things such as "culpable conduct; a defect in a product or its design; or a need for a warning or instruction." *Id. See also* Appendix.

85. *See* FED. R. EVID. 407.

86. *See id.* advisory committee's note (stating that subsequent remedial measures are "not in fact an admission [of negligence], since the conduct is equally consistent with injury by mere accident or through contributory negligence").

87. *Id.* (discussing the "social policy of encouraging people to take, or at least not discouraging them from taking, steps in furtherance of added safety").

Finally, Rule 407 also allows exceptions in the interest of fairness in the advocacy process. To comprehend this category of rules, one might think of a trial as a game and the rules of evidence as governing the game. The players of the game make choices about what evidence to offer and how to challenge the evidence offered by their opponents. Sometimes a party may take unfair advantage of an opponent by exploiting the protections afforded to that party under the rules. With subsequent remedial measures, the general prohibition on the use of this evidence protects parties taking such measures from the use of these measures as adverse evidence; however, the party can "open the door" to the evidence by disputing "ownership, control, or the feasibility of precautionary measures."[88] When a party disputes an issue such as feasibility, the FRE consider the party to have "opened the door" for the opponent to prove feasibility.[89] It would be a perversion of justice to allow the party to dispute the feasibility of a safety measure that it has already taken and not allow the opposing party to put that evidence before the jury. Thus, Rule 407's protective cloak no longer applies if a party disputes an issue on which the fact that the party has implemented the subsequent remedial measure is probative evidence. In the interest of adversarial fairness, the FRE essentially discourage a party from unfairly exploiting their protections.

Evidentiary privileges arguably represent the only type of evidence rule (other than the few purely procedural or definitional provisions)[90] that do not advance the search for truth.[91] Evidentiary privileges instead promote the integrity of important relationships like that between spouses.[92] Protecting the spousal relationship promotes societal goals such as maintaining strong marriages and families, which foster a more stable and productive society. These rules impede the search for truth by *excluding* certain evidence, rendering the presentation of a party's case incomplete, not by *admitting* evidence that introduces inaccurate, misleading, or prejudicial information and makes the trial less reliable. In other words, these rules do not allow for the admission of unreliable evi-

88. *See* FED. R. EVID. 407.

89. *See* FED. R. EVID. 407 advisory committee's note ("The requirement that the other purpose [of admitting the evidence, such as feasibility] be controverted calls for automatic exclusion unless a genuine issue be present and allows the opposing party to lay the groundwork for exclusion by making an admission [of feasibility].").

90. *See supra* note 82 and accompanying text.

91. *See* Katherine Goldwasser, *Vindicating the Right to Trial by Jury and the Requirement of Proof Beyond a Reasonable Doubt: A Critique of the Conventional Wisdom About Excluding Defense Evidence*, 86 GEO. L.J. 621, 643 n.133 (1998). At the same time, one might argue that the attorney-client privilege advances the search for truth by protecting the relationship of client and counsel and thereby advancing the efficacy of legal representation. Thus, the attorney-client privilege may paradoxically both impede and advance the search for truth.

92. MUELLER & KIRKPATRICK, *supra* note 71, § 5.31, at 397 ("The rationale for the [spousal] testimonial privilege is to protect the harmony and sanctity of the marital relationship."); *id.* § 5.32, at 400–01 ("The rationale of the [spousal communications] privilege is to protect the privacy and trust of the marital relationship and enable spouses freely to communicate and confide in one another.").

dence. Rather, they operate to exclude potentially reliable evidence.[93] They affect the "search for truth" by increasing the likelihood that a party will be unable to prove the issues otherwise provable with the excluded evidence.[94] When a privilege excludes defense evidence, it increases the possibility of a wrongful conviction. When it excludes prosecution evidence, it increases the possibility of a wrongful acquittal.

Concerns about the potential for evidentiary privileges to impede the search for truth have led courts to construe privileges narrowly and recognize numerous exceptions.[95] In so doing, courts have minimized any major, unnecessary distortion of the truth-seeking process. Experience has shown that rules of this type have not so impeded the search for truth as to call their justifiability into question, nor does the existence of these rules suggest that the drafters of the FRE were unconcerned with reliability.[96] On the contrary, at most this category of rules reflects a concession to the reliability paradigm, a recognition that the search for truth must sometimes yield to more important societal interests.

In summary, with the exception of evidentiary privileges, rules that advance secondary purposes also advance reliability. The vast majority of the remaining rules are based solely on a reliability rationale, and a handful of rules are purely procedural. From this examination, one can clearly see the reliability paradigm that forms the theoretical foundation of the Federal Rules of Evidence.

4. Evidentiary "Reliability" Versus Witness "Credibility"

Evidentiary reliability is to be distinguished from witness credibility. The distinction is critical because it is understood that the role of the jury is to evaluate witness credibility and to determine how much weight to assign evidence in "finding the facts."[97] Trial courts, on the other hand,

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93. Trammel v. United States, 445 U.S. 40, 50 (1980) (stating that testimonial exclusionary rules and privileges contravene the fundamental principle that "the public . . . has a right to every man's evidence") (internal citations and quotations omitted).

94. The attorney-client privilege also promotes an instrumental objective of facilitating the rendition of legal services, which may improve the functioning of the adversary system and have a possibly salutary effect on the search for truth.

95. *Trammel*, 445 U.S. at 50. (Evidentiary privileges "must be strictly construed and accepted only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth. (internal citations and quotations omitted)").

96. Congress rejected the drafters' proposed evidentiary privilege rules, deciding instead that privileges should continue to be developed by the courts at common law "in the light of reason and experience." *See* FED. R. EVID. 501. Thus, the FRE do not actually contain rules defining the scope of evidentiary privileges.

97. McCormick refers to the distinction between facts found by the court and those reserved for the jury as one between "preliminary questions of fact arising on objections" as opposed to the historical facts pertaining to the merits of the case. *See* MCCORMICK ON EVIDENCE § 53, at 234–38 (5th ed. 1999). The treatise explains that the rules of evidence such as the hearsay rules frequently exclude relevant evidence unless the court finds that certain foundational or preliminary facts exist. The task of making these findings of fact falls to the court within its authority over evidentiary admissibility under Rule 104. *Id.* at 234. As to these foundational issues, "[t]he judge acts as a factfinder in determining the

make preliminary factual findings solely as part of admissibility determinations, most of which involve implicit reliability assessments.[98]

The best illustration of the credibility/reliability distinction is found in the rules that regulate witness impeachment. The rules presuppose that some lay witnesses will be less credible (i.e., worthy of belief) than others.[99] Clearly, the testimony of an untruthful witness, if believed, would lead to an unreliable outcome, but not because the substance of the testimony is inherently unreliable, misleading, or prone to evoke unfair prejudice. The unreliability arises from facts and circumstances that make *that particular witness* unworthy of belief. For example, a witness in a breach of contract case may offer testimony about the number of products the defendant delivered to the plaintiff's business. The witness's credibility may be called into question because she is the mother of one of the parties and thus viewed as biased in favor of that party.[100] The substance of her testimony is not inherently "unreliable" in the sense that we usually trust witnesses to give fairly accurate accounts of "what happened" in a typical case.[101] However, the witness may nonetheless be less "credible" because of her strong bias due to the familial relationship. The

existence of the foundational fact. The judge may consider the credibility of the foundational testimony. Thus, the judge can decide to disbelieve the proponent's testimony even if it is facially sufficient." *Id.* at 236. On the other hand, jurors must render a verdict on the evidence, which requires both assessing the credibility of witnesses and weighing evidence to make the factual determination of whether the defendant should be held civilly or criminally liable. In only a few instances do the FRE assign jurors a preliminary factfinding role on evidentiary matters; these pertain to evidence for which the logical relevancy depends on the existence of a preliminary fact. *Id.* at 236–37. The Rules explicitly apply this procedure to findings about a witness's personal knowledge under Rule 602 and authentication under Rule 901. *Id.* at 238.

98. *Id.* at 234–36.

99. For example, the Rules specifically regulate the impeachment of a witness's "character for truthfulness," which is presumably tarnished by evidence of past misdeeds not resulting in convictions, as well as evidence of past convictions. *See* FED. R. EVID. 608, 609. A witness may also lack credibility based on the testimony of another witness who may give a negative opinion of the witness's character for truthfulness or may report that the witness has developed a bad reputation for character for truthfulness. *See* FED. R. EVID. 608. Additionally, witnesses who testify inconsistently with their prior statements are viewed as less credible than those who tell a consistent story. *See* FED. R. EVID. 612.

100. In addition to bias or improper motive, witnesses may also be impeached on other grounds such as having a bad character for truth, which can be proved by showing their prior criminal histories or bad acts, or through opinion or reputation testimony of another witness. MUELLER & KIRKPATRICK, *supra* note 71, §§ 6.23–.29, at 476–94. A witness's testimony may also be impeached on the grounds of a lack of mental or sensory perception or that the witness made prior inconsistent statements. *Id.* §§ 6.21, at 473–75 & 6.40, at 519–24.

The FRE explicitly regulate certain types of impeachment. *See* FED. R. EVID. 608 (nonconviction misconduct); FED. R. EVID. 609 (prior convictions); FED. R. EVID. 613 (prior inconsistent statements). The FRE are silent on other traditional forms of impeachment, but the courts have nonetheless recognized these as proper forms of impeachment. *See* MUELLER & KIRKPATRICK, *supra* note 71, §§ 6.19–.21, at 466–75 (addressing impeachment by showing the witness's bias or motive to lie or by showing a lack of mental or sensory capacity); *id.* §§ 6.43–.44, at 529–35 (addressing impeachment by contradiction).

101. If there are unusual circumstances that might render the witness's account unreliable (such as the witness being too young, mentally unstable, or intoxicated at the time), jurors are capable of assessing the reliability of this type of testimony. In contrast, jurors have been shown to lack the necessary understanding of the factors affecting the reliability

FRE do not contemplate that courts should exclude the testimony of witnesses who may be lacking in credibility. Rather, the witnesses should be permitted to testify—assuming the testimony is admissible under the rules[102]—and the opposing party is allowed to impeach the witness's credibility.[103] The impeachment process allows the jury to assign the proper weight to the testimony based on the witness's credibility.[104]

In the American adversarial system, impeachment during cross-examination represents the quintessential clash of adversaries from which truth emerges.[105] Thus, although a judge could in theory find a thoroughly impeachable witness to be so lacking in credibility as to be of no legitimate value to the jury, the FRE do not contemplate that the court will preclude the witness from testifying on credibility grounds.[106] The Rules instead allow any qualified witness to testify.[107] Of course, other rules such as the hearsay rules might limit the testimony the witness would be allowed to offer, but the limitations would be based on purposes other than a lack of credibility.[108] Witness credibility alone *never* poses an obstacle

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of eyewitness identifications of strangers, such as weapon-focus effects, the effects of suggestion, and cross-race identifications. *See infra* notes 198–200.

102. Any concerns about the reliability of the witness's testimony are addressed by the evidence rules, such as the hearsay rules, as applied by the court in deciding admissibility and, in the final analysis, by the jury, which is qualified to make such judgments in the ordinary case. *See supra* notes 69–74 and accompanying text.

103. *See* FED. R. EVID. 607.

104. *See* MUELLER & KIRKPATRICK, *supra* note 71, § 6.18, at 464–65 (describing five modes of impeaching a witness's credibility).

105. *See* STEVEN LUBET, MODERN TRIAL ADVOCACY: ANALYSIS & PRACTICE 79 (2009) (describing cross-examination as the hallmark of the Anglo-American system of adversarial justice); MCCORMICK ON EVIDENCE, *supra* note 97, § 19, at 87–88 (noting that "[f]or two centuries, common law judges and lawyers have regarded the opportunity to cross-examine as an essential safeguard of the accuracy and completeness of testimony"); *see also* William Wayne Justice, *The Origins of* Ruiz v. Estelle, 43 STAN. L. REV. 1, 7 (1990) (describing the adversarial system as involving "two antagonistic parties of roughly equal strength who become embroiled in a dispute").

106. The court is empowered simply to control the impeachment process so that it advances the search for truth. *See* FED. R. EVID. 611(a) (providing for cross-examination by leading questions and allowing the judge to "exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to . . . make those procedures effective for determining the truth.").

107. At one time, the common law evidence rules restricted certain classes of people from testifying, such as parties, spouses of parties, accomplices, convicted felons, children, and atheists. *See* MUELLER & KIRKPATRICK, *supra* note 71, § 6.2, at 420. The FRE significantly liberalized witness qualifications, allowing even children and the insane to testify if shown to understand the oath. *Id.* (discussing Rule 601). "Lay witness" refers to any non-expert witness. *See* FED. R. EVID. 701, 702 (regulating the extent to which expert and non-expert witnesses may testify in the form of opinion).

108. *See supra* note 46 and accompanying text. In the criminal context, constitutional rules may also affect the admissibility of lay witness testimony. Often constitutional tests focus on the appropriateness of police procedures in gathering the evidence, which may affect reliability, but reliability per se is generally not a sufficient ground for exclusion. *See* Mark A. Godsey, *Reliability Lost, False Confessions Discovered*, 10 CHAP. L. REV. 623, 624–28 (2007) (tracing historical treatment of reliability in confessions law to the present day, where it is no longer an independently relevant factor); Paul Marcus, *It's Not Just About Miranda: Determining the Voluntariness of Confessions in Criminal Prosecutions*, 40 VAL. U. L. REV. 601, 609–11 (2006) (discussing *Colorado v. Connelly*, 479 U.S. 157, 163 (1986)); Thompson, *Judicial Gatekeeping*, *supra* note 18, at 39 n.191 (observing that "iden-

to witness testimony.[109] The rules leave it to the jury to evaluate the witness's demeanor evidence and to hear impeachment evidence to determine whether a witness is worthy of belief.[110]

Even in this area quintessentially reserved for jurors, the rules ascribe to trial judges the task of safeguarding the search for truth by policing the presentation of impeachment evidence. Procedurally, Rule 611 explicitly charges trial courts to "exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to . . . make those procedures effective *for determining the truth.*"[111] Substantively, the impeachment rules that pertain to witness *credibility* explicitly set aside a role for the judge to ensure the *reliability* of the impeachment evidence.[112] Reflecting the same kinds of concerns that underlie Rule 403, the FRE call on the court to balance the right of an opposing party to impeach a witness against the need for the witness's testimony.[113] Witness credibility should not be attacked in such a way as to unfairly prejudice the party offering the witness's testimony, because this could cause a jury to behave irrationally and render an unreliable verdict. In other words, a party's impeachment evidence should *reliably* inform the jury's judgment of the witness's *credibility.*

For instance, a witness may have prior criminal convictions that jurors should consider in deciding whether to believe the witness, but not all prior convictions have a bearing on a witness's character for truthfulness (i.e., credibility), and some may be too remote in time to have much relevance to the witness's present credibility.[114] Such prior convictions would serve only to evoke a negative emotional reaction, causing the jury to give less weight to the witness's testimony and potentially skewing the outcome against the party offering the testimony without justification in fact. Impeachment rules such as Rule 609 call on trial courts to assess impeachment evidence to assure that it promotes the accuracy of the trial verdict, leaving the jury only to weigh the evidence in light of witness credibility.[115]

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tification does not violate due process unless threshold finding is made that police used suggestive practices, thus courts do not reach reliability issue unless the police are found to have acted improperly").

109. The rules do not make the lack of credibility a valid ground for disqualifying a witness. *See* FED. R. EVID. 601–05. Long-standing practice leaves credibility matters to the jury for a variety of reasons. *See generally* RANDOLPH N. JONAKAIT, THE AMERICAN JURY SYSTEM 51–59 (2003) (addressing the rationale for designating credibility as a jury issue).

110. *See supra* notes 99–104.

111. FED. R. EVID. 611 (emphasis added); *see also supra* note 105 and accompanying text.

112. *See* FED. R. EVID. 608–10, 613.

113. *See* FED. R. EVID. 609.

114. *Id.*

115. Again, in the ordinary case, any concerns about unreliability of the witness's testimony would also be judged by the jury in the final analysis. *See supra* note 51. The court makes the initial reliability determination by applying the FRE (and to a lesser extent constitutional rules) in its gatekeeping capacity. *Id.*

B. Some Procedural Provisions Call for Judicial Gatekeeping

Even some of the provisions that govern the procedural aspect of the evidentiary process support the argument that courts bear the primary responsibility for reliability gatekeeping.[116] These rules do not bear directly on the substantive question of the admissibility of unreliable evidence because they are purely procedural, not literally "rules of evidence." Nonetheless, the procedural rules support the proposition that trial courts should determine questions of admissibility, which by implication assigns courts a gatekeeping function to screen evidence for reliability.

For example, several of the FRE delineate the role of judge and jury in the trial process, and these reserve a greater role for the jury on questions that involve "credibility" more than they involve "reliability." Rule 104, for example, clearly defines the institutional role of the judge as gatekeeper.[117] The judge should determine general questions of admissibility,[118] and Rule 104(a) and (b) outline the procedures for the court to follow depending on the type of evidence. To reiterate, since most admissibility rulings turn on the court's determination of the presence of indicia of reliability, the court's role effectively involves reliability screening.

Additionally, Rule 104(c) sets out certain protections for criminal cases to guard against a jury even hearing evidence of a confession before the court has ruled on its admissibility.[119] The same protection applies when the accused is a witness, upon request by the defense,[120] or simply when justice requires.[121] Once a court finds evidence to be inadmissible, the Rules direct that "[t]o the extent practicable, the court must conduct a jury trial so that inadmissible evidence is not suggested to the jury by any means."[122]

Thus, the FRE clearly contemplate that trial courts will make admissibility determinations and carve out special procedural protections in criminal cases so that the jury cannot even hear sensitive evidence before the court has ruled it admissible. In such cases, the court would not be able to "unring the bell" by issuing a jury instruction to disregard the evidence or to consider the evidence for only a limited purpose.[123] Moreover, courts must prevent jurors from hearing any inadmissible evidence to the extent practicable. These procedural rules underscore the importance of the judge's role in screening evidence so as to protect criminal

116. For a list of the FRE and their respective purposes, see Appendix.

117. Rule 104(a) establishes the court's gatekeeping role for most evidence, while Rule 104(b) gives the court a more limited screening function. *See supra* note 43.

118. *Id.*

119. Fed. R. Evid. 104(c)(1).

120. Fed. R. Evid. 104(c)(2).

121. Fed. R. Evid. 104(c)(3).

122. Fed. R. Evid. 103(d).

123. Rule 105 requires such a limiting instruction upon request if evidence is admitted for one purpose but not another. Fed. R. Evid. 105.

defendants from the risk that the jury will wrongly convict by hearing unreliable, inadmissible evidence.[124]

C. *DAUBERT* GATEKEEPING AND THE ROLE OF RULE 403

The Supreme Court's opinion in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* interpreted the Federal Rules of Evidence to require reliability gatekeeping in the area of scientific expert testimony.[125] The decision portended a new era of judicial oversight of scientific evidence, which by most accounts is not yet fully developed.[126] The failures of reliability gatekeeping have been particularly disappointing in criminal cases.[127]

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124. Rule 1008 provides another good example of the judicial gatekeeping rule. For purposes of the best evidence rule, Rule 1008 ordinarily reserves to the court the task to "determine[ ] whether the proponent has fulfilled the factual conditions for admitting other evidence of the content of a writing, recording, or photograph." FED. R. EVID. 1008. The rule necessarily tasks the jury with certain findings that necessarily involve credibility determinations, such as whether "an asserted writing . . . ever existed," "another one produced at the trial or hearing is the original," or "other evidence of content accurately reflects the content." *Id.* The Advisory Committee's notes explain that the court may determine issues such as the loss of originals (justifying the admission of oral testimony), which merely involves the "administration of the rule." FED. R. EVID. 1008 Advisory Committee's notes. However, questions such as whether an asserted non-collateral writing ever existed go to the merits of the case and turn on credibility. *Id.* Even so, the rule gives courts a weak form of gatekeeping "in accordance with Rule 104(b)" on these issues. *See supra* note 43.

125. Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 589 (1993).

126. *See, e.g.*, Lisa Heinzerling, *Doubting* Daubert, 14 J.L. & POL'Y 65, 70–74, 82–83 (2006) (observing that courts have improperly applied *Daubert* to admit some junk science and exclude some reliable science and arguing that the Supreme Court should model the proper means of conducting *Daubert* screening). *But see* Victor E. Schwartz & Cary Silverman, *The Draining of* Daubert *and the Recidivism of Junk Science in Federal and State Courts*, 35 HOFSTRA L. REV. 217, 273 (2006) (finding that some courts have failed to apply *Daubert* rigorously or faithfully, but *Daubert* has limited admissibility of junk science). Concerns about bias among experts persist as well, but this is due to the adversarial nature of the process, and not a criticism of *Daubert* or its implementation. Nonetheless the existence or perception of bias affects the ability of fact finders to make appropriate decisions. *See, e.g.*, Yvette J. Bessent, *Admissibility of Polygraph Evidence and Repressed Memory Evidence When Offered by the Accused*, 55 U. MIAMI L. REV. 975, 975–76 (2001) (finding a "strong indication" that admittance depends on which party seeks to offer the evidence and that courts admit polygraph evidence when offered by the prosecution but exclude it when offered by the defense); Christopher Tarver Robertson, *Blind Expertise*, 85 N.Y.U. L. REV. 174, 177–78 (2010); Joseph Sanders, *Science, Law, and the Expert Witness*, 72 LAW & CONTEMP. PROBS. 63, 75–77 (2009). To remedy this problem, others have encouraged courts to appoint experts themselves or to conduct independent research on scientific issues as a means of improving the quality of their gatekeeping decisions. *See, e.g.*, Edward K. Cheng, *Independent Judicial Research in the* Daubert Age, 56 DUKE L.J. 1263, 1270–72 (2007). However, some scholars have credited *Daubert* with moving courts toward a more "inquisitorial posture" in assessing the quality of experts. *See, e.g.*, Sanders, *supra*, at 87.

127. The criticisms of *Daubert*'s failings are particularly scathing in the criminal context. *See, e.g.*, COMM. ON IDENTIFYING THE NEEDS OF THE FORENSIC SCIENCE CMTY., NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD (2009) (finding that wide range of forensic disciplines lack validity); M. Neil Browne & Ronda R. Harrison-Spoerl, *Putting Expert Testimony in its Epistemological Place: What Predictions of Dangerousness in Court Can Teach Us*, 91 MARQ. L. REV. 1119 (2008) (testimony and nonscientific opinions, citing the example of a frequent government expert on terrorism); Simone Ling Francini, Note, *Expert Handwriting Testimony: Is the Writing Really on the Wall?*, 11 SUFFOLK J. TRIAL & APP. ADVOC. 99,

Nonetheless, the decision offers important lessons for properly interpreting the rules of evidence.

For seventy years before *Daubert*, courts had admitted scientific evidence under the *Frye* "general acceptance" standard.[128] If the particular scientific expert opinion rested on a scientific foundation that was "generally accepted" in the relevant scientific community, then the courts would accept the opinion as sufficiently reliable for admission into evidence.[129] Over time, concerns grew regarding the proliferation of expert testimony, the admission of "junk science" in civil toxic tort litigation, and the ability of bad science to result in unfair findings of liability.[130] The Supreme Court responded to these concerns by addressing the admissibility of expert testimony in *Daubert*.[131]

When the Federal Rules of Evidence were adopted, the new Rule 702 made no mention of the *Frye* standard.[132] The omission created an interpretive dilemma for the courts that went unresolved until almost twenty years later in *Daubert*. Instead of adopting the "general acceptance" standard, Rule 702 provided: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise . . ."[133]

Thus, even without explanation in the Advisory Committee's notes, the rule simply omitted the "general acceptance" standard and did not explicitly provide an alternate method of testing the evidence for reliability.

Faced with this interpretive dilemma, the Court read Rule 702—in the context of the entire body of the rules of evidence—as requiring reliability gatekeeping for scientific expert testimony. The Court stated:

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100 (2006) (arguing that adhering to *Daubert* standards of admissibility would preclude admission of handwriting expertise but that the federal courts of appeal have failed to adhere to those standards); Brandon L. Garrett & Peter J. Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions* 95 VA. L. REV. 1, 89–91 (2009) (courts typically admit prosecution forensic evidence in a highly deferential manner and do not provide funds for defense experts); Susan Haack, *Irreconcilable Differences? The Troubled Marriage of Science and Law*, 72 LAW & CONTEMP. PROBS. 1, 22 (2009) (noting that *Daubert* "has had startling[ly] little effect" on the admission of forensic evidence in criminal cases despite the variable quality of such testimony); Michael Risinger, *Navigating Expert Reliability: Are Criminal Standards of Certainty Being Left on the Dock?*, 64 ALB. L. REV. 99, 99–100 (finding that in civil cases, courts hold plaintiffs to high reliability standards while in criminal cases, the government is not held to the same strict standards of reliability).

128. *Daubert*, 509 U.S. at 585 (citing Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923)).

129. *Id.* at 586.

130. *See, e.g.*, Schwartz & Silverman, *supra* note 126, at 224–26 (addressing the public policy basis of *Daubert* in addressing concerns about junk science in toxic tort cases).

131. *Id.* at 224; *see also Daubert*, 509 U.S. at 595–96 (noting respondent's apprehension that "befuddled juries [will be] confounded by absurd and irrational pseudoscientific assertions" under the Court's gatekeeping regime).

132. *Daubert*, 509 U.S. at 588.

133. FED. R. EVID. 702 (2010) (repealed Dec. 1, 2011).

> That the *Frye* test was displaced by the Rules of Evidence does not mean . . . that the Rules themselves place no limits on the admissibility of purportedly scientific evidence. Nor is the trial judge disabled from screening such evidence. To the contrary, under the Rules the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.[134]

The Court derived the requirement of reliability from the fact that the rule applied to "scientific . . . knowledge."[135] "Scientific" implied information derived by means of the scientific method, meaning that any "[p]roposed testimony must be supported by appropriate validation—*i.e.*, 'good grounds,' based on what is known."[136] The term "knowledge" referred to "any body of known facts or to any body of ideas inferred from such facts or accepted as truths on good grounds."[137] The Court derived from the concept of "scientific knowledge" a "standard of evidentiary reliability" requiring judicial gatekeeping.[138] However, in its next decision on expert testimony, *Kumho Tire Co. v. Carmichael*, the Court backed away from its apparent reliance on the definition of "scientific," on which evidentiary reliability seemed to rest.[139] Instead, it explained that "it is the Rule's word 'knowledge,' not the words (like 'scientific') that modify that word, that 'establishes a standard of evidentiary reliability.'"[140] Thus, the simple word "knowledge" implied that the rule only admitted evidence that is sufficiently reliable.

The decision in *Daubert* next addressed the issue of gatekeeping. As a preliminary matter, the Court recognized that the issue was whether the proponent of the evidence could satisfy the "standard of evidentiary reliability" required under the rule.[141] The responsibility for making this determination falls upon trial courts, which are tasked with this gatekeeping responsibility under Rule 104(a).[142] The Court stated: "Faced with a proffer of expert scientific testimony, then, the trial judge must determine at the outset, pursuant to Rule 104(a)," whether the evidentiary reliability standard has been met.[143] Thus, the gatekeeping role of the trial judge for scientific evidence was derived primarily from Rule 104(a) and not

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134. *Daubert*, 509 U.S. at 589 (citation omitted).

135. *Id.* at 590.

136. *Id.*

137. *Id.*

138. *Id.* The Court also provided some guidance to lower courts by outlining some of the factors that trial courts should consider in determining reliability. *Id.* at 592–95.

139. 526 U.S. 137, 147 (1999).

140. *Id.* (quoting *Daubert*, 509 U.S. at 589–90). The Court conceded that *Daubert* spoke only of "scientific" knowledge, but it did so "'because that [wa]s the nature of the expertise' at issue." *Id.* at 148 (quoting *Daubert*, 509 U.S. at 590).

141. *Daubert*, 509 U.S. at 590.

142. Rule 104(a) states: "The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege." FED. R. EVID. 104(a).

143. *Daubert*, 509 U.S. at 592.

based on Rule 403 as some have proposed in other contexts.[144]

The final interpretive lesson of the *Daubert* methodology lies in the message that courts should interpret a particular rule in the context of other pertinent rules. The Court explained:

> Throughout, a judge assessing a proffer of expert scientific testimony under Rule 702 should also be mindful of other applicable rules. [The Court cites Rules 703 and 706 as examples.] . . . Finally, Rule 403 permits the exclusion of relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury."[145]

Rules 703 and 706 pertain specifically to the admissibility of expert testimony, whereas Rule 403 applies generally to all forms of evidence. From Rule 403, the Court derived further support for the general proposition that the trial court's role is to oversee evidentiary reliability screening. The Court inferred a gatekeeping role by quoting Judge Weinstein, who wrote: "Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it. Because of this risk, the judge in weighing possible prejudice against probative force under Rule 403 of the present rules exercises more control over experts than over lay witnesses."[146]

Reference to Rule 403 served to pinpoint the source of a trial court's gatekeeping role in that the Rule's purpose is to protect the opponent of evidence from the admission of misleading (and hence, truth-distorting) evidence. Trial courts have a duty to prevent the jury from hearing evidence that is both "powerful and quite misleading because of the difficulty in evaluating it."[147]

However, while the Court referred to Rule 403 in discussing the role of the trial court, it did not apply it directly. Rule 702 serves as "the primary locus of [the gatekeeping] obligation," and the other rules serve only to guide the courts in interpreting the substance and procedure to be followed in applying Rule 702.[148] As a result, the burden to establish reliability remains with the proponent of the evidence, and the proponent must carry this burden by the typical evidentiary quantum of a preponderance of the evidence.[149] If the Court had applied Rule 403 directly, it would have implied that the evidence was otherwise admissible, and thus the opponent of the evidence would bear the burden to prove that the evidence's misleading nature "substantially outweighs" its probative value. By its terms, Rule 403 gives an opponent of evidence a last chance

144. *See, e.g.*, LEO, *supra* note 18, at 289–90 (on pretrial reliability hearings for confessions); NATAPOFF, *supra* note 18, at 194 (on pretrial reliability hearings for informant testimony).

145. *Daubert*, 509 U.S. at 595 (internal citations omitted).

146. *Id.* (quoting Jack B. Weinstein, *Rule 707 of the Federal Rules of Evidence Is Sound; It Should Not Be Amended*, 138 F.R.D. 631, 632 (1991)).

147. *Id.* (internal citations and quotations omitted).

148. *Id.* at 589.

149. *Id.* at 595 n.10.

to have *otherwise admissible* evidence excluded. Rule 702, on the other hand, provides the evidentiary foundation that the proponent of expert testimony must satisfy in order for the testimony to be found admissible in the first place.

In the years following *Daubert*, the Supreme Court handed down several other decisions providing further guidance on the application of Rule 702.[150] Then in 2000, the drafters amended Rule 702 "in response to *Daubert* . . . and to the many cases applying *Daubert*."[151] The Advisory Committee explains: "[t]he amendment affirms the trial court's role as gatekeeper and provides some general standards that the trial court must use to assess the reliability and helpfulness of proffered expert testimony."[152] Thus, the Supreme Court initiated the change in the judicial role in handling expert testimony, and the rule drafters acted only after the courts had worked out many of the finer points of the process. *Daubert* and its progeny identified a gatekeeping role in Rule 702 using the plain language as a starting point, despite the fact that the rule said nothing specifically about judicial gatekeeping or reliability. The Court went beyond a simple reading of Rule 702 by considering it within the context of the overall structure of the FRE and in relation to other relevant provisions such as Rules 104(a), 403, 703, and 706. Only after the Supreme Court had ironed out a number of remaining questions related to Rule 702 over the course of several years did the Advisory Committee revise the rule to comport with judicial practice.

III. RECENT CASE LAW ON EYEWITNESS IDENTIFICATION SUPPORTS EVIDENTIARY GATEKEEPING BUT FALLS SHORT

The burgeoning volume of wrongful convictions brought to light by the efforts of various Innocence Projects and the invention of DNA testing have led to piecemeal efforts to improve the reliability of eyewitness identification evidence by law enforcement agencies, reform groups, state legislatures, and state high courts across the country.[153] The changes have aimed to improve the process by which the police gather identification testimony.[154] Reducing the incidence of police suggestion in the collection of identification evidence represents an important goal for the criminal justice system.

In considering the landscape of eyewitness identification reform, "front-end" quality assurance might include the adoption of best prac-

150. *See, e.g.*, Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999); Gen. Elec. Co. v. Joiner, 522 U.S. 136 (1997).

151. FED. R. EVID. 702 advisory committee's note.

152. *Id.*

153. For a discussion of the development of best practices for law enforcement, see Sandra Guerra Thompson, *What Price Justice? The Importance of Costs to Eyewitness Identification Reform*, 41 TEX. TECH L. REV. 33 (2008) (comparing principle features of best practices) [hereinafter *What Price Justice?*].

154. *Id.* at 43–54.

tices by law enforcement that can improve the quality of the evidence brought to court. To date, only a minority of states have instituted best practices as a matter of state law.[155] Thus, in most states, law enforcement agencies can legally continue to follow the same suggestive practices that have produced wrongful convictions in the past.[156]

For their part, a few state courts have adopted "back-end" remedial measures such as jury instructions and expert testimony that can improve the accuracy of the deliberative process.[157] These remedies provide jurors with greater information about the possible weaknesses of the testimony *after* it has been heard in court.

In attempts to prevent jurors from hearing unreliable identification evidence, a few courts have also tweaked the federal due process test (for state due process purposes) to provide somewhat better reliability screening.[158] However, no state court engaged in broad-based reliability screening until the New Jersey Supreme Court undertook the task in the 2011 decisions in *State v. Henderson*[159] and *State v. Chen.*[160] *Henderson* and *Chen* break new ground by putting the focus on judicial gatekeeping for evidentiary reliability at the point when it is proffered, *before* it is heard by the jury.

In *Henderson*, the court, by means of the appointment of a special master, engaged in a comprehensive study of the scientific literature on eyewitness identification reliability factors. The decision provides a roadmap for lower courts in conducting reliability gatekeeping as a matter of state constitutional law for cases involving police suggestion. Following on the heels of *Henderson*, the court in *Chen* extended reliability gatekeeping pursuant to the rules of evidence to cases not involving police suggestion.[161] Together, *Henderson* and *Chen* represent a major advance in the conceptualization of reliability gatekeeping by trial courts. Both decisions focus on whether identification evidence is sufficiently reliable to be admitted against an accused in a criminal case, first as a matter of constitutional law in *Henderson* and then pursuant to the rules of evidence in *Chen*.

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155. *Id.* at 61–62.

156. *Id.*

157. *See* Thompson, *Eyewitness Identifications*, *supra* note 16, at 628–30 (discussing case law). *See also* Tillman v. State, 354 S.W.3d 425, 442 (Tex. Crim. App. 2011) (holding that trial court abused its discretion when it excluded reliable, relevant expert testimony that would have assisted the jury).

158. *See* Thompson, *Eyewitness Identifications*, *supra* note 16, at 623–26. Ostensibly, the federal due process test turns on reliability, but in fact the test has proven virtually futile in preventing the admission of unreliable identification. *See* Sandra Guerra Thompson, *Judicial Blindness to Eyewitness Misidentification*, 93 MARQ. L. REV. 639, 642 (2009) (finding no state appellate decision in a one-year empirical study of state appellate case law that excluded identification as inadmissible on due process grounds). Moreover, in *Perry v. New Hampshire*, the Court recently made clear that reliability considerations alone—without the presence of police suggestion—cannot trigger due process protection. *See infra* notes 220–24 and accompanying text.

159. 27 A.3d 872, 878 (N.J. 2011).

160. 27 A.3d 930, 942–43 (N.J. 2011).

161. *Id.* at 940.

Unfortunately, *Henderson* practically instructs lower courts to continue to admit identifications as usual, calling for jury instructions (and not expert testimony) as the means of addressing reliability issues.[162] The expectation set in *Henderson* to continue admitting identifications while adopting a more aggressive use of jury instructions seriously undercuts the potential of pretrial gatekeeping to change the status quo in a meaningful way. *Chen* also falls short by misapplying the interpretive lessons of *Daubert* regarding the gatekeeping function of the trial court. The opinion misapplies Rule 403 and imposes an extremely high burden on the defendant to prove the grounds of *exclusion*, rather than placing the burden on the prosecution to prove the reliability of the evidence by a preponderance of the evidence as a precondition to *admission*. Thus, *Henderson* and *Chen* provide a glimpse of comprehensive reliability gatekeeping, but the implementation of this new evidentiary review has low potential to reduce wrongful convictions.

A. *Henderson* and *Chen* Define New Identification Reliability Frameworks Under State Due Process and Rules of Evidence

In *State v. Henderson*, the New Jersey Supreme Court rejected the federal due process test for eyewitness identifications outlined in *Manson v. Brathwaite*[163] for purposes of determining state due process claims, outlining a broader, science-based approach. In *Henderson*, the defendant challenged the eyewitness identification evidence as unconstitutionally unreliable, alleging that the officers had "intervened during the identification process and unduly influenced the eyewitness."[164] In an unusual move, the New Jersey high court appointed a special master to preside over a hearing on remand to consider the continued viability of the *Man-*

162. *Henderson*, 27 A.3d at 923, 925.

163. *Id.* at 918–24 (adopting broad reliability review in lieu of the federal test set forth in *Manson v. Brathwaite*, 432 U.S. 98 (1977)). The New Jersey Supreme Court had previously embraced *Manson* in *State v. Madison*, 536 A.2d 254 (N.J. 1988). Henderson, 27 A.3d at 929.

164. *Id.* at 877. In *Henderson*, the eyewitness, James Womble, witnessed the murder of his friend, Rodney Harper, who was shot to death. *Id.* at 879. As the shooter and his accomplice left, the accomplice warned Womble not to "rat [him] out," saying, "I know where you live." *Id.* at 879. When the police interviewed Womble on the day of the killing, he gave an account denying that he had witnessed the murder. *Id.* Ten days after the shooting, detectives confronted Womble about inconsistencies in his story. *Id.* (Womble would later claim that these officers threatened to charge him in connection with the homicide.) Womble now agreed to "'come clean,'" and he led police to Clark who, in turn, named Henderson as his accomplice. *Id.* at 879–80. Womble identified Henderson in a photo array as Clark's companion. *Id.* at 880. For his part, Henderson admitted he was at the scene, but he denied watching or assisting in the shooting. *Id.* During a pretrial *Wade* hearing on the eyewitness identification's admissibility, testimony was adduced that two weeks after the shooting Womble had eliminated all but two photos, one of which was Henderson's, but he was unable to identify Henderson. *Id.* at 881; *see also* United States v. Wade, 388 U.S. 218 (1967). Officers encouraged Womble to "'just do what you have to do, and we'll be out of here.'" *Henderson*, 27 A.3d at 881. Womble testified during the *Wade* hearing that one of the detectives "nudg[ed]" him to select the photo of Henderson. *Id.* Even so, he did not recant the identification at trial. *Id.*

son framework as a matter of state constitutional law.[165] The hearing covered over 200 publications regarding human memory and eyewitness identification, and the special master heard from several distinguished experts.[166] After reviewing the voluminous information documented by the special master, the supreme court found the current *Manson* framework had proved inadequate to deal with the inherent shortcomings of eyewitness identifications.[167] Despite the State's protestations that the "Court should defer to other branches of government to deal with the evolving social scientific landscape," the court opined that it "remain[ed] the Court's obligation to guarantee that constitutional requirements are met, and to ensure the integrity of criminal trials."[168]

The court rejected the *Manson* test for several reasons.[169] Under *Manson*, due process only applies to cases that feature "impermissibly suggestive" police practices.[170] If a court finds that an identification is tainted by impermissibly suggestive procedures, then the court turns to the question of whether the identification is nonetheless sufficiently reliable to be admitted. Reliability is determined by considering a five-factored "totality of the circumstances" test.[171] The court found that three of the five factors—the opportunity to view the crime, the witness's degree of attention, and the level of certainty at the time of the identification—are based on self-reports by the witnesses.[172] However, self-reports can be skewed by suggestive police practices in the first place, so a test that relies heavily on self-reported factors may yield a false determination of reliability.[173]

In addition, *Manson* does a poor job of deterrence because it ironically rewards the most suggestive practices. As the court explained:

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165. *Id.* at 884.

166. *Id.* at 884–85.

167. *Id.* at 885–919.

168. *Id.* at 913–14. The court also required law enforcement officers to record witness confidence statements at the time of the identification because scientific studies show witness confidence and witness memory can be distorted by confirmatory feedback. *Id.* at 913–14, 926. The court cited its supervisory authority over state courts contained in the New Jersey Constitution, art. VI, § 2, ¶ 3. *See id.* at 914.

169. *Id.* at 918–20. For a discussion of the many failings of the *Manson* test, see Thompson, *Eyewitness Identifications*, *supra* note 16, at 608–21.

170. This restriction on the scope of due process protection was confirmed by the United States Supreme Court after *Henderson* was decided in *Perry v. New Hampshire*, 132 S. Ct. 716, 731 (2012).

171. *Henderson*, 27 A.3d at 890. To assess the totality of the circumstances, the Court specified five considerations taken from its prior decision in *Neil v. Biggers*, 409 U.S. 188, 199–200 (1972). *Id.* These five factors include: "(1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy his prior description of the criminal; (4) the level of certainty demonstrated at the confrontation; and (5) the time between the crime and the confrontation." *Id.* (internal citations and quotations omitted).

172. *Id.* at 918. The state of Utah has modified the five factors to eliminate the "witness confidence" factor as scientific studies have found no correlation between witness confidence and reliability. *See* Thompson, *Eyewitness Identifications*, *supra* note 16, at 625–26. They have also added other factors such as whether the identification was cross-racial, which has been shown to reduce reliability. *Id.*

173. *Henderson*, 27 A.3d at 918.

> The irony of the current test is that the more suggestive the procedure, the greater the chance eyewitnesses will seem confident and report better viewing conditions. Courts in turn are encouraged to admit identifications based on criteria that have been tainted by the very suggestive practices the test aims to deter.[174]

The court also faulted the typical way in which courts have applied the *Manson* test. Although ostensibly the reliability determination should be based on a "totality of the circumstances," in fact courts apply the *Manson* five-factored test as a checklist, and thus do not consider a wide array of other factors that bear on reliability.[175] The court also faulted the existing framework for its "all-or-nothing" approach of limiting courts to the options of suppression or admission,[176] rather than sanctioning the use of intermediate remedies such as the use of jury instructions and expert testimony.

Rejecting the *Manson* test, the New Jersey court adopted a "revised framework."[177] The court held that a defendant still retains the initial burden to show "evidence of suggestiveness that could lead to a mistaken identification."[178] Police officers can affect the accuracy of an eyewitness's memory by using suggestive practices that distort memory, such as by using lineups or photo arrays that make a suspect "stand out" or that may artificially inflate a witness's confidence in the accuracy of the identification.[179] The factors over which the legal system has control and which can introduce suggestiveness are referred to as "system variables."[180] The court cited the extensive scientific research and expert testimony that was heard at the remand hearing and cited in the opinion of the special master. Based on this research, the court identified nine types of system variables that lower courts should take into account:

> (1) whether the lineup procedure involved blind or double-blind administration to ensure the administrator had no knowledge of where the suspect appeared in the photo array or lineup;
>
> (2) whether neutral, pre-identification instructions were utilized warning that the suspect may not be present in the lineup and that the witness should not feel compelled to make an identification;
>
> (3) whether the lineup contained only one suspect embedded among at least five innocent fillers and that the suspect did not stand out from other members of the lineup;
>
> (4) whether the witness received any information or feedback from the administrator about the suspect or crime before, during, or after the identification procedure;

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174. *Id.*
175. *Id.* at 919.
176. *Id.* at 918–19.
177. *Id.* at 919.
178. *Id.* at 920.
179. For a more comprehensive discussion of suggestive practices, see Thompson, *Beyond a Reasonable Doubt*, *supra* note 18, at 1504–06.
180. *Id.*

(5) whether the administrator recorded the witness's statement of confidence immediately after the identification and before the possibility of any confirmatory feedback;

(6) whether the witness viewed the suspect more than once as part of multiple identification procedures and whether the police used the same fillers more than once;

(7) whether a "showup" was used more than two hours after the event and whether the police warned the witness that the suspect might not be present and the witness should not feel compelled to make an identification;

(8) whether law enforcement had elicited from the eyewitness whether he or she had spoken with actors other than law enforcement and, if so, what was discussed; and

(9) whether the witness had made any failed attempts to identify the culprit, either identifying no one or misidentifying a filler.[181]

Once the defendant offers proof of suggestion, the state would be required to show that the identification was nonetheless reliable.

Henderson requires trial courts to consider both "system" and "estimator variables," which refer to the factors affecting reliability that pertain solely to the eyewitness and the circumstances surrounding the initial viewing of the culprit or the viewing of the suspect when the identification was made.[182] The court addressed eight estimator variables and their effects on witness memory, plus the five *Manson* factors:

(1) whether there was high stress during the crime;

(2) whether a weapon was visible during a crime of short duration (weapon focus effects);

(3) duration of time witness saw event;

(4) the distance between the witness and perpetrator and the lighting conditions;

(5) characteristics of the witness such as whether witness was under the influence of alcohol or drugs, as well as the age of witness;

(6) characteristics of the perpetrator such as use of disguise or whether perpetrator had different facial features, such as beards, at the time of the crime;

(7) time between crime and identification (memory decay); and

(8) the presence of cross-racial identification.[183]

The following chart shows the numerous factors relating to eyewitness reliability for which the court reviewed scientific literature, and it shows the effects the court found each of the factors have on the reliability of a particular identification:

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181. *Henderson*, 27 A.3d at 920–21; *see also* Thompson, *Beyond a Reasonable Doubt?*, *supra* note 18, at 1501–06.

182. *Henderson*, 27 A.3d at 920–21; *see also* Thompson, *Beyond a Reasonable Doubt?*, *supra* note 16, at 1499.

183. *Henderson*, 27 A.3d at 921. For a list of the five *Manson* factors, see *supra* note 171.

TABLE 1
RELIABILITY FACTORS AND THEIR EFFECTS AS OUTLINED IN *HENDERSON*

Suggestive Practices	**Effect**	**Estimator Variables**	**Effect**
Suggestive Police Practices **("System Variables")**		High Stress	–
Non-Blind Administration	–	Weapon Focus	–
Fail to Give Instructions	–	Duration of Event	+ or –
Suggestive Lineups or Photo Arrays*	–	Distance & Lighting	+ or –
Confirmatory Feedback	–	Elderly & Children	–
Recording Confidence Statements	E	Own-Age Identifications by Elderly Witnesses	+
Multiple Viewings (e.g., use of previously viewed mugshot in photo array)	–	Intoxication	–
Simultaneous Administration**	I	Use of Disguises (sunglasses, hats, masks, changes in facial hair)	–
Showups (more than 2 hours after the crime)	–	Memory Decay over Time	–
Police Questioning on Private Actor Suggestiveness	E	Cross-Racial Identification	–
Other Failed Identification Attempts	–	Speed of Identification	I
Private Actor Suggestive Practices		Opportunity to View Criminal at Time of Crime	+ or –
Cross-Witness Information Sharing and Confirmatory Feedback	–	Degree of Attention	+ or –

+ = Increases reliability
– = Decreases reliability
E = Facilitates better evaluation of identification reliability
I = Court found the evidence regarding the factor's effect on reliability to be inconclusive
*The court considered three factors: (1) suspects should not "stand out" but should "be included in a lineup of 'look-alikes'"; (2) the lineup should include a minimum of five fillers; and (3) lineups should not feature more than one suspect. *Henderson*, 27 A.3d at 897–98.
**The court found the evidence on simultaneous versus sequential administration of lineups and photo arrays to be inconclusive. Unfortunately, the decision predates by one month the report of a distinguished group of scientists confirming the superiority of sequential administration based on extensive field studies. *See* GARY L. WELLS ET AL., A TEST OF THE SIMULTANEOUS VS. SEQUENTIAL LINEUP METHODS: AN INITIAL REPORT OF THE AJS NATIONAL EYEWITNESS IDENTIFICATION FIELD STUDIES § ix (2011) ("The results are consistent with decades of laboratory research showing that the sequential procedure reduces mistaken identifications with little or no reduction in accurate identifications.").

By outlining the many reliability factors affecting eyewitness identifications, *Henderson* represents a considerable jurisprudential development on the subject of eyewitness identification.[184] In particular, the court

184. I take issue with one finding made by the court. As Table 1 shows, the court found the evidence on sequential administration of lineups to be inconclusive. A more recent, blue-ribbon study now proves the superiority of sequential lineups. *See supra* tbl. 1, n.**. Sequential lineups had already been recommended under New Jersey's Attorney General Guidelines, as well as in other states. *See* Thompson, *What Price Justice?*, *supra* note 153,

made important findings about the difficulty jurors have in properly evaluating identification reliability factors. The court recognized the special master's finding that jurors are "'largely unfamiliar' with scientific findings and 'often hold beliefs to the contrary.'"[185] In one study, juror beliefs differed from expert opinion on identification reliability on 87% of the issues.[186] The study found only a minority of jurors agreed with the importance of pre-lineup instructions, the effects of the accuracy-confidence relationship, weapon focus, and cross-race bias.[187] *Henderson* found that jurors "'gave disproportionate weight to the confidence of the witness [as] . . . the most powerful predictor of verdicts' regardless of other variables."[188]

Yet there were several significant shortcomings that minimize the case's actual impact. First, the court, apparently following the same misguided reasoning as the United States Supreme Court, found that due process is not triggered unless the defendant shows police suggestiveness.[189] This differed from the approaches of the special master as well as defendant and amici, who all endorsed pretrial hearings when either system or estimator variables existed.[190] As Table 1 shows, identifications can be unreliable for a wide variety of reasons, some of which are attributable to improper police actions (generally known as "system variables") and others which are not. In *Henderson*, the court made much of the need to dispense with the federal test in favor of a more comprehensive, science-based test including system and estimator variables that better gauge reliability. By limiting due process claims to those that raise system variables, the court excludes from coverage those cases implicating only estimator variables.[191] *Henderson* aimed both to promote reliability and to "deter police misconduct."[192] However, if preventing the use of

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at 45–48; *Henderson*, 27 A.3d at 901. *See also* LAW ENFORCEMENT MGMT. INST. OF TEX., MODEL POLICY ON EYEWITNESS IDENTIFICATION (calling for sequential photo arrays and live lineups), *available at* http://www.lemitonline.org/publications/documents/ewid_final.pdf.

185. *Henderson*, 27 A.3d at 910.

186. *Id.* (citing Tanja Rapus Benton et al., *Eyewitness Memory Is Still Not Common Sense: Comparing Jurors, Judges and Law Enforcement to Eyewitness Experts*, 20 APPLIED COGNITIVE PSYCHOL. 115, 118 (2006)).

187. *Id.*

188. *Id.* at 911 (citing Brian L. Cutler et al., *Juror Sensitivity to Eyewitness Identification Evidence*, 14 LAW & HUM. BEHAV. 185, 186–87 (1990)).

189. I have previously critiqued the *Manson* rule requiring proof of suggestiveness. *See* Thompson, *Eyewitness Identifications*, *supra* note 16, at 610–13.

190. *Henderson*, 27 A.3d at 922–23.

191. *Id.* The court explains its decision:

> Remedying the problems with the current *Manson/Madison* test requires an approach that addresses its shortcomings: one that allows judges to consider all relevant factors that affect reliability in deciding whether an identification is admissible; that is not heavily weighted by factors that can be corrupted by suggestiveness; that promotes deterrence in a meaningful way; and that focuses on helping jurors both understand and evaluate the effects that various factors have on memory—because we recognize that most identifications will be admitted in evidence.

Id. at 919.

192. State v. Chen, 27 A.3d 930, 942 (2011) (explaining reasoning in *Henderson*).

highly unreliable evidence is critical to a fair criminal trial, then this limitation arbitrarily protects against only a subset of highly unreliable identifications.

The situation might have been remedied had the court authorized pretrial reliability hearings for all cases raising reliability concerns that were not already covered under the state due process test. After all, the rules of evidence do aim to promote verdict accuracy,[193] even if this is not a principal concern of due process. However, *Chen* makes clear that hearings under the New Jersey Rules of Evidence are likewise severely limited.[194] In a bizarre twist of logic, the court found that evidentiary reliability hearings should only reach cases where there is suggestiveness *by private actors* (who cannot be deterred) and—to make the logic even more bizarre—since private actors cannot be deterred, the defendant would have to meet a higher threshold of showing *highly* suggestive circumstances.[195] The court imposed this restriction while at the same time stating that "[a]bsent police involvement, . . . [its] principal concern is reliability."[196]

The court uses additional strained reasoning to explain the refusal to review cases involving only estimator variables. The explanation implies that judging reliability when only estimator variables are at issue somehow infringes on the jury's domain. In *Henderson*, the court stated:

> [I]t is difficult to imagine that a trial judge would preclude a witness from testifying because the lighting was "too dark," the witness was "too distracted" by the presence of a weapon, or he or she was under "too much" stress while making an observation. How dark is too dark as a matter of law? How much is too much? What guideposts would a trial judge use in making those judgment calls? In all

193. *See supra* notes 63–81 and accompanying text.

194. The court in *Henderson* suggested that "enhanced [juror] instructions" would remedy the failure to review for unreliability on the grounds of estimator variables alone. *Henderson*, 27 A.3d at 923. The court sought to minimize the volume of hearings on account of the "practical impact of [the] ruling" which "might overwhelm the system with little resulting benefit." *Id.*

195. *Chen*, 27 A.3d at 942–43. *Chen* involved private actor suggestiveness that was alleged to have affected the identification. In that case, Helen Kim had been attacked in her home by an unidentified assailant wielding a knife and telephone cord. *Id.* at 933. Kim met with police, who were unable to locate the suspect. *Id.* When Kim drew a picture of the woman later that evening, her husband thought it could possibly be the defendant, Cecilia Chen. *Id.* at 934. The husband showed Kim five to ten pictures from a website, and Kim claimed to be "ninety percent positive" that her attacker was Chen, except for the lack of black-rimmed glasses. *Id.* Kim's sister would then draw glasses on the photo, after which Kim looked at the photographs at least five more times during the first month after the attack. *Id.* Following a police investigation, Chen was indicted. *Id.* Police presented Kim with a photo array for the first time twenty-two months after the attack, and Kim identified Chen as her attacker. *Id.* Applying these standards to the case at issue, the Court found that the effect of Kim's husband upon her eyewitness identification of Chen during the photo lineup was "so highly suggestive that a pretrial hearing [was] warranted to assess the admissibility of [Kim's] identification evidence." *Id.* at 944.

196. *Id.* at 942. So concerned was the court about limiting the availability of hearings that both *Henderson* and *Chen* specifically instruct trial courts to end the hearing at any time if "defendant's threshold allegation of suggestiveness [was] groundless." *Id.* at 943.

> likelihood, the witness would be allowed to testify before a jury and face cross-examination designed to probe the weaknesses of her identification.[197]

The New Jersey Supreme Court seems to view these "judgment calls" as more appropriately left to the jury without any prior screening by the trial court. This position is both wrong and in conflict with its previously stated rule for cases involving police suggestion. The task of assessing an assortment of factors to determine the overall reliability of eyewitness identification may be a difficult task that involves "judgment calls." For example, if a suspect stands out in a lineup, how much does he stand out? If the police used non-blind procedures, used multiple identification procedures, included two suspects in the same photo array, or unnecessarily used a showup more than two hours after the crime, how much would these suggestive practices affect the reliability of the identification? These judgment calls and others like them are precisely what New Jersey's lower courts must make in cases involving police suggestiveness. Whether reliability is reduced due to police suggestiveness, private actor suggestiveness, or estimator factors such as the use of disguises or cross-racial identifications, assessing the extent of unreliability involves judgment calls of the type required by reliability gatekeeping.

Moreover, the question of identification reliability is not the same as whether the witness's identification testimony is "credible," which is a principal judgment for the jury. The reliability judgment does not turn on sincerity. Eyewitnesses are usually sincere but often honestly mistaken,[198] and the error is exacerbated by a false and inflated confidence in the accuracy of the identification.[199] In other words, the judgment regarding eyewitness testimony involves two separate issues: (1) credibility, i.e., sincerity, which turns on witness demeanor as well as grounds for impeachment; and (2) reliability.[200]

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197. *Henderson*, 27 A.3d at 923.

198. *Id.* at 889 (citing Jules Epstein, *The Great Engine that Couldn't: Science, Mistaken Identity, and the Limits of Cross-Examination*, 36 STETSON L. REV. 727, 772 (2007)); *see also infra* note 253.

199. The court understood that witness credibility is not the important issue with eyewitness identification. Rather, the inquiry focuses on reliability. As the court stated:

> We presume that jurors are able to detect liars from truth tellers. But as scholars have cautioned, most eyewitnesses think they are telling the truth even when their testimony is inaccurate, and "[b]ecause the eyewitness is testifying honestly (i.e., sincerely), he or she will not display the demeanor of the dishonest or biased witness." Instead, some mistaken eyewitnesses, at least by the time they testify at trial, exude supreme confidence in their identifications.

Henderson, 27 A.3d at 889 (citing Epstein, *supra* note 198, at 772).

200. I concede that the credibility/reliability divide is not without some messiness. For example, mental and sensory perception have always been considered grounds for impeachment, and these factors go more to witness reliability although they have been treated as pertinent to "credibility." MUELLER & KIRKPATRICK, *supra* note 71, § 6.21, at 473–75. I would distinguish the ordinary assessment of mental or sensory perception (e.g., was the witness wearing the glasses she needs to see well at a distance?) as being simple, common-sense assessments from the non-intuitive, science-based assessments of eyewitness reliability for which the judiciary is better suited to develop expertise (e.g., what is the

Like *Henderson*, *Chen* also marks an important advance in our treatment of eyewitness identification, although its success is also tempered by the narrow reach of the rule.[201] The most important breakthrough lies in the court's authorization of pretrial reliability hearings under the New Jersey Rules of Evidence "in light of the . . . trial courts' gatekeeping function."[202] Like the United States Supreme Court in *Daubert*, the New Jersey high court cited a panoply of rules that together support trial court gatekeeping. First, the court observed that only relevant evidence is admissible under the state's counterpart to FRE 402.[203] Next, the court cited rule 403's well-worn proposition that even if evidence possesses probative value, it may be excluded when "the risk of . . . undue prejudice, confusion of issues, or misleading the jury substantially outweighs its probative value."[204] The court then concluded that evidence should be excluded only if its probative value is substantially outweighed by the risk of undue prejudice or misleading the jury.[205] The court also cited Rule 602, which requires that witnesses have personal knowledge[206] and that witnesses' "'opinions and inferences' must be 'rationally based on the[ir] perception'" under Rule 701.[207] With all of these rules in mind, the court noted that trial courts possessed a gatekeeping function to prevent unreliable evidence from being introduced at trial.[208] Further, it observed that trial courts could enforce this function through preliminary hearings under Rule 104.[209]

Chen seems at first blush to represent a dramatic departure from the traditional application of the rules of evidence, which freely admitted eyewitness identifications under the only specifically applicable rule, Rule 801(d)(1)(C). *Chen* instead relies on a cluster of rules that, taken together, authorize reliability gatekeeping, and it specifies that this gatekeeping process should include the broad range of scientifically-based reliability factors outlined in *Henderson*.[210] However, gatekeeping implies a preliminary determination of *admissibility*, under *Daubert*.

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cumulative effect of the fact that the identification was cross-racial, involved a weapon, and was obtained by suggestive police tactics?).

201. *See supra* notes 194–96 and accompanying text.

202. State v. Chen, 27 A.3d 930, 937 (N.J. 2011).

203. *Id.* *Compare* N.J. R. EVID. 402, *with* FED. R. EVID. 402 (dictating that only relevant evidence is admissible).

204. *Chen*, 27 A.3d at 937 (internal citations and quotations omitted). *Compare* N.J. R. EVID. 403, *with* FED. R. EVID. 403 (prohibiting introduction of evidence whose probative value is substantially outweighed by the danger of unfair prejudice, as well as potentially misleading the jury or confusing the issue).

205. *Chen*, 27 A.3d at 937.

206. *Id.* *Compare* N.J. R. EVID. 602, *with* FED. R. EVID. 602 (stating a witness may testify "only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter").

207. *Chen*, 27 A.3d at 937. *Compare* N.J. R. EVID. 701, *with* FED. R. EVID. 701 (discussing criteria for lay person opinion).

208. *Chen*, 27 A.3d at 937.

209. *Id.* at 937. *Compare* N.J. R. EVID. 104, *with* FED. R. EVID. 104 (stating that a trial court "must conduct any hearing on a preliminary question so that the jury cannot hear it if . . . justice so requires").

210. *Chen*, 27 A.3d at 938. *See also supra* tbl. 1.

Chen instead places an initial burden on the State to show reliability, but does not require the State to meet the *Daubert* preponderance standard applied. Instead, the court in *Henderson* and *Chen* borrows from the same *Manson* test that it rejected in *Henderson*[211] and puts the "ultimate burden" on the defendant to show "a very substantial likelihood of irreparable misidentification."[212] This burden requires the defense to show not only a high likelihood that the identification *process* was unreliable, but also that the *identification itself* was very likely and "irreparabl[y]" wrong.[213] The court is surprisingly frank in appraising the difficulty of meeting this burden, admitting (as in *Henderson*) that regardless of whether there is a hearing, the "identification evidence will likely be presented to the jury."[214]

Notwithstanding that the new gatekeeping framework ultimately endorses the status quo of identification admissibility, *Henderson* and *Chen* make other important contributions. For example, they introduce novel intermediate remedies. The court adopted the Innocence Project's recommendation that jury charges could be given *during trial and before the witness testifies* "if warranted."[215] It is an important development for trial courts to be permitted to issue jury instructions during trial and before the jury hears the witness's testimony. This would raise jurors' awareness of factors bearing on reliability such as cross-racial identifications or the effects of confirmatory feedback prior to hearing the testimony. Second, the court concluded that in "rare cases" judges could redact parts of eyewitness identification testimony "consistent with *Rule* 403."[216] This, too, represents a significant new tool available to trial courts for addressing identification unreliability.

In summary, *Henderson* and *Chen* mark a significant advance in recognizing the importance of eyewitness identification procedures and how suggestiveness from both state and non-state actors may influence such identifications. The New Jersey Supreme Court went to great lengths in

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211. *See supra* notes 159–91 and accompanying text.

212. State v. Henderson, 27 A.3d 872, 878 (N.J. 2011); *Chen*, 27 A.3d at 942. *Manson* requires the defendant to show that there is "a very substantial likelihood of irreparable misidentification." *Manson*, 432 U.S. 98, 116 (1977) (citing Simmons v. United States, 390 U.S. 377, 384 (1968)).

213. The reference to "irreparable" misidentification derived from *Manson* might be read to mean that some misidentifications can be repaired, in the sense that the eyewitnesses can later correct their mistakes and recant their misidentifications. Scientific evidence shows that the opposite is true, a fact of which the court was aware. *See Henderson*, 27 A.3d at 878.

214. *Id.* Perhaps not surprisingly, the court assumed that cross-examination and jury instructions would provide sufficient protection against erroneous eyewitness identifications. *See id.* at 925 ("Expert testimony may also be introduced at trial, *but only if otherwise appropriate.*") (emphasis added); *see also Chen*, 27 A.3d at 943. The court would support "tailored jury instructions" while discouraging courts from allowing expert witnesses. *Henderson*, 27 A.3d at 920. It explained, "with enhanced jury instructions, there will be less need for expert testimony." *Id.* at 925.

215. *See Henderson*, 27 A.3d at 924 (requesting that the court adopt jury instructions that can be read to the jury both before eyewitness testimony and at the close of trial).

216. *Id.* at 925 (emphasis in original).

appointing a Special Master and examining the vast array of social-science research on the subject. At the same time, however, these cases exemplify courts' continuing reluctance to implement reliability gatekeeping as a procedural norm. Rejecting the recommendations of the Special Master, the New Jersey high court established lofty burdens for defendants to even obtain pretrial hearings, downplayed the need for defense expert witnesses, and touted jury instructions as a cure-all.[217] On the other hand, *Chen*, for all its shortcomings, does stand for the proposition that a holistic view of the rules of evidence governs the admissibility of eyewitness identifications. Properly applied, a more expansive reading of the rules (as also seen in *Daubert*)[218] would better protect against wrongful conviction based on misidentifications.

B. *Perry v. New Hampshire* Reaffirms Reliability of Identifications as an Evidentiary Concern

In *Perry v. New Hampshire*, the United States Supreme Court bypassed the opportunity to broaden the protections of the due process clause to protect a defendant against the admission of identification testimony on general unreliability grounds not involving improper suggestion by the police.[219] The New Jersey high court in *Henderson* came to the same conclusion but then rejected the federal *Manson* test as inadequate to safeguard due process for cases that *do* involve police suggestiveness.[220] In contrast, the United States Supreme Court did not address the issue of whether the *Manson* test provided adequate protection. The Court faced the issue of identification reliability absent improper police suggestion and simply found that *Manson* did not apply. Unfortunately, the Court also rejected the notion of gatekeeping by the courts to assure identification reliability.[221] This dicta in *Perry* directly conflicts with *Daubert*,[222] as well as *Manson*, which ostensibly calls for the exclusion of identifications that are unduly suggestive and unreliable.[223]

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217. *See supra* notes 160, 212–14, and accompanying text. This preference for jury instructions is unfortunate in light of the research suggesting that expert witness testimony is superior to jury instructions for apprising jurors about identification reliability factors. *See* Michael Leippe, *The Case for Expert Testimony About Eyewitness Memory*, 1 Psychol. Pub. Pol'y & L. 909 (1995) (arguing for admission of expert testimony); *see* Christian Sheehan, Note, *Making the Jurors the "Experts": The Case for Eyewitness Identification Jury Instructions*, 52 B.C. L. Rev. 651, 674 (2011) (acknowledging general view that expert testimony is more effective than jury instructions).

218. *See supra* notes 145–49 and accompanying text.

219. Perry v. New Hampshire, 132 S. Ct. 716, 730 (2012).

220. *Henderson*, 27 A.3d at 924 ("we favor enhanced jury charges to help jurors perform" the ultimate task of evaluating identification reliability). Given the acknowledged complexity of the many subjects and the difficulty jurors have in understanding them, it is odd that the court embraces the cheap expedient of jury instructions as a generally sufficient remedy.

221. The Court writes, "Our unwillingness to enlarge the domain of due process as Perry and the dissent urge rests, in large part, on our recognition that the jury, not the judge, traditionally determines the reliability of evidence." *Perry*, 132 S. Ct. at 728.

222. *See supra* notes 150–52 and accompanying text.

223. *See Perry*, 132 S. Ct. at 728.

So what protections do apply to cases involving unreliability not caused by state action? The Court wrote:

> When no improper law enforcement activity is involved, we hold, it suffices to test reliability through the rights and opportunities generally designed for that purpose, notably, the presence of counsel at postindictment lineups, vigorous cross-examination, *protective rules of evidence*, and jury instructions on both the fallibility of eyewitness identification and the requirement that guilt be proved beyond a reasonable doubt.[224]

In other words, the Court refused to change the status quo. In fact, Justice Sotomayor complained in her dissenting opinion that the majority ignored the "vast body of scientific literature" that confirmed "every concern [about wrongful convictions] our precedents articulated nearly a half-century ago."[225] At least for the time being, federal courts will continue to rely on the traditional safeguards that have failed to prevent wrongful convictions. The "presence of counsel at postindictment lineups" is a right more imagined than real.[226] Nor has vigorous cross-examination or the use of jury instructions proved particularly helpful in preventing wrongful convictions.[227]

Interestingly, the Court also mentions "protective rules of evidence" as an existing safeguard against unreliable identification evidence.[228] Perhaps the Court meant to signal a need to apply the existing rules in a more protective manner, or perhaps the word "protective" simply made the majority feel better about denying any genuine reliability gatekeeping under the due process clause. At the end of the day it seems clear: Either the Federal Rules of Evidence must become more "protective," or wrongful convictions based on misidentifications may continue unabated.[229]

IV. CORRECTING COURSE: RELIABILITY GATEKEEPING FOR EYEWITNESS IDENTIFICATION EVIDENCE

The recent decisions in New Jersey recognize that the rules of evidence vest courts with gatekeeping authority for eyewitness identification evi-

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224. *Id.* at 721 (emphasis added).

225. *Id.* at 738 (Sotomayor, J., dissenting).

226. *Id.* at 721 (majority opinion); *see* Thompson, *Beyond a Reasonable Doubt?*, *supra* note 18, at 1509–11.

227. Thompson, *Beyond a Reasonable Doubt?*, *supra* note 18, at 1514–18 (addressing ineffectiveness of jury instructions). Cross-examination has always been available as a trial safeguard, but it has not prevented wrongful convictions, the vast majority obtained after trial. *See* GARRETT, *supra* note 9, at 150 (only 6% of DNA exonerations involved convictions by guilty plea [so 94% obtained after trial]).

228. *Perry*, 132 S. Ct. at 721.

229. In theory, reliability gatekeeping could also be conducted by police and prosecutors. Rules of criminal procedure might also require better police procedures, thus minimizing the incidence of law enforcement suggestion. *See* Thompson, *What Price Justice?*, *supra* note 153, at 42–43 (citing state procedural rules requiring best practices in obtaining eyewitness identifications).

dence.[230] In most cases, the gatekeeping consists of simply determining whether proffered evidence meets the requirements of particular rules, most of which were designed to promote outcome trustworthiness. In the case of identification evidence, the only rule specifically on the subject provides no genuine reliability assurance,[231] but other rules regulating the admissibility of lay witness testimony also apply. As the previous sections showed, the New Jersey Supreme Court relied on Rules 104, 402, 403, 602, and 701 to provide adequate support for extending reliability gatekeeping to eyewitness identification evidence. In many ways, that approach resembled that in *Daubert*.[232] Moreover, as the Supreme Court stated in *Daubert*, it is especially important for courts to screen evidence for reliability when the type of evidence has a powerful effect on juries and when it is hard to evaluate for reliability.[233] Studies and numerous DNA exonerations prove that jurors find identification evidence to be convincing, even when such testimony is not reliable.[234]

Daubert and its progeny emerged during a period of perceived crisis in the introduction of "junk science."[235] The requirement of evidentiary reliability flowed from one word in Rule 702—the requirement that the testimony convey "knowledge." In Rule 702, viewed in conjunction with the other rules pertaining to expert testimony, as well as Rules 403 and 104(a), the Court fashioned a gatekeeping process. The decision responded to the need for greater assurance of accuracy, during a time when there were growing concerns about the proliferation of bad science in toxic tort cases. The Court took it upon itself to spell out a gatekeeping role where the language of the rules did not clearly do so. Only *after* the Court had established the new parameters for gatekeeping in a series of cases did the rule drafters step in to amend the rules.[236]

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230. *See* State v. Chen, 27 A.3d 930, 937 (N.J. 2011). The use of such hearings has also been proposed for other police-generated lay witness testimony such as confessions that result from custodial interrogations as well as police informant testimony. *See* Thompson, *Judicial Gatekeeping*, *supra* note 18, at 48. Illinois provides for pretrial reliability screening for informant testimony in capital cases and provides seven factors courts should take into account. *See* 725 ILL. COMP. STAT. ANN. 5/115-21; *see also* NATAPOFF, *supra* note 18, at 192–94 (discussing Illinois statute on pretrial reliability hearings for informant testimony in capital cases).

231. *See infra* notes 267–75 and accompanying text.

232. *See supra* notes 203–10 and accompanying text.

233. *See supra* note 146 and accompanying text.

234. *See* BRIAN L. CUTLER & STEVEN D. PENROD, MISTAKEN IDENTIFICATION: THE EYEWITNESS, PSYCHOLOGY, AND THE LAW 143–68, 171–209 (1995) (noting jurors' lack of knowledge about factors affecting eyewitness identifications and jurors' inability to detect unreliable identifications). Similar concerns have been made regarding jurors' abilities in evaluating confessions and informant testimony. *See* LEO, *supra* note 18, at 266 (addressing the weight that jurors give to confession evidence and the "tunnel vision"—i.e., the tendency to discount other inconsistent evidence—that it creates); NATAPOFF, *supra* note 18, at 77–78 (noting that jurors too often rely on false informant testimony and that one psychological study showed that jurors disregard the fact that informants are compensated for their testimony).

235. *See supra* note 130.

236. *See supra* notes 150–52 and accompanying text.

For better or worse, similar judicial initiative is needed today, and as with scientific evidence, court rulings will likely spur amendment of the Rules. The innocence movement and hundreds of DNA exonerations present an even more compelling need for courts to play a proactive role in ensuring the integrity of the justice system.[237] A few state legislatures and some law enforcement agencies have made progress in improving the quality of investigative practices, but the pace of progress is slow.[238] In the meantime, cases continue to come before the courts with identification evidence tainted by suggestive practices or other factors that suggest the evidence is unreliable. Since in most jurisdictions police practices have not changed,[239] we can safely assume that the conditions that made wrongful convictions possible in the past still exist unabated in most places.

The recent decision of the United States Supreme Court in *Perry v. New Hampshire* reaffirms that, at least according to current jurisprudence, due process provides no protection against unreliable identifications in the absence of police suggestiveness.[240] Even in cases involving police suggestiveness, the *Manson* test has proved ineffective and misleading as a means of testing reliability.[241] So what trial safeguards exist for curbing this leading cause of wrongful convictions? The Court in *Perry* was content to continue relying on the same traditional trial safeguards, ignoring the fact that hundreds of DNA exonerations prove that the safeguards have not worked.[242]

Might some of these trial safeguards be improved? In *Perry*, the Court spoke of the "protective rules of evidence," knowing full well that the rules of evidence as presently applied provide no protection.[243] Perhaps the Court meant to suggest that the rules of evidence have the potential to become "protective" if so interpreted by the courts and revised by the Advisory Committee.

The following sections provide a framework for interpreting the FRE so as to provide protective gatekeeping for eyewitness identification testimony. The subsequent sections address proposed amendments to the Rules that would specifically define the gatekeeping function and enhance the safeguards against wrongful conviction.

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237. *See* Thompson, *Eyewitness Identifications*, *supra* note 16, at 631–33. Judicial ethics and the courts' supervisory authority to safeguard the integrity of the judicial system also support judicial initiative in applying rules of evidence in a more protective manner. *Id.*

238. *See* Thompson, *What Price Justice?*, *supra* note 153, at 42–43.

239. *Id.*

240. Again, the same might be said with regard to confessions and informant testimony. *See supra* note 18.

241. *See* Thompson, *Eyewitness Identifications*, *supra* note 16, at 608–21.

242. *See* Perry v. New Hampshire, 132 S. Ct. 716, 721 (2012) (emphasis added).

243. The Court was undoubtedly aware of the fact that the rules of evidence had not prevented a great number of wrongful convictions. *See, e.g.*, *id.* at 738 (Sotomayor, J., dissenting) ("Eyewitness misidentification is the single greatest cause of wrongful convictions in this country") (internal citations and quotation omitted).

A. The Lessons of *Daubert* as Applied to the Evidence Rules on the Admissibility of Lay Witness Testimony

The Supreme Court in *Daubert* found a "standard of evidentiary reliability" in Rule 702's requirement that the testimony consist of "knowledge."[244] The requirement that the testimony "assist the trier of fact" further supported the standard of reliability "as a precondition to admissibility."[245] In similar fashion, Rule 701 should create a standard of evidentiary reliability for eyewitness identification evidence.[246] The rule requires the proponent of "opinion" testimony by a lay witness to establish that the testimony is "rationally based on the witness's perception" and will be "helpful" to the jury.[247] Without delving into the metaphysical question of how to differentiate "fact" from "opinion,"[248] suffice it to say that eyewitness identification testimony is clearly a judgment based on a complex set of factors, and it can fairly be considered an opinion for purposes of this rule. The New Jersey high court in *Chen* thought so.[249] Thus, the court found that the proponent of identification evidence should show that it is "rationally based on . . . perception."[250]

If an erroneous identification is obtained through suggestive practices by the police or a private actor, the erroneous identification will cause a permanent distortion in the witness's memory of the culprit's face, resulting in testimony that cannot be said to be rationally based on the witness's actual perception of the culprit. Alternatively, if a witness views a suspect under conditions in which it is highly unlikely that the identification is reliable, the testimony cannot be said to be rationally based on perception. This is true despite a witness's apparent confidence level, which will be falsely inflated by confirmatory feedback or simply by the nature of the pretrial process itself.[251] For the same reasons, Rule 602 is also applicable. Rule 602 requires courts to find sufficient evidence to support a finding that a witness "has personal knowledge of the matter."[252]

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244. *Daubert*, 509 U.S. 579, 590 (1993); *see also supra* notes 132–40 and accompanying text.

245. *Daubert*, 509 U.S. at 591–92.

246. Fed. R. Evid. 701 provides: "If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is: (a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702."

247. *Id.*

248. *See* Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 163–64 (1988) (finding that the term "factual finding" in Rule 803(8)(C) includes "conclusions or opinions that flow from a factual investigation" and not simply "facts").

249. State v. Chen, 27 A.3d 930, 937 (N.J. 2011).

250. *Id.* (internal citations and quotations omitted).

251. *See supra* notes 185–88.

252. Fed. R. Evid. 602. The court in *Chen* relied on both Rules 701 and 602 in outlining its gatekeeping role. *Chen*, 27 A.3d at 937. Resting the gatekeeping role on Rule 602 means that the courts would have to find that "no reasonable juror" could find that the witness had personal knowledge of the culprit's identity. Presumably, the witness's testimony would be found to be the product of police or private actor suggestion. Courts

Hearing unreliable identification testimony will not be helpful to the jury. Unreliable identification evidence will mislead the jury for three important reasons. First, the witness will testify truthfully but mistakenly.[253] Second, the witness will have honest but falsely inflated confidence in the accuracy of the identification, which may be due to confirmatory feedback as well as the nature of the pretrial process.[254] This inflated confidence will also cause distortions in the witness's assessment of the events.[255] Third, jurors place great weight on witness confidence.[256] Moreover, especially when an innocent person is tried for a crime based on a misidentification, prosecutors will typically emphasize

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sometimes conduct "taint" hearings pursuant to the due process clause or Rule 602 in cases involving child witnesses to determine whether the child's testimony is the product of improper suggestion or whether it is based on true memories of abuse. *See* Ashish S. Joshi, *Taint Hearing: Scientific and Legal Underpinnings*, CHAMPION, Nov. 2010, at 36; *but see* John E.B. Myers, *Taint Hearings for Child Witnesses? A Step in the Wrong Direction*, 46 BAYLOR L. REV. 873 (1994) (rejecting taint hearings as a matter of due process on grounds that they would make convictions for child abuse difficult to obtain). In the case of confessions, it makes more sense to rely on Rule 602, rather than Rule 701. It is harder to view confessions as "opinions," and in every confession case challenging the reliability of the confession, the defendant who disavows the reliability of his or her own statement provides sufficient evidence that the statement is not the product of personal knowledge. *See* Sharon L. Davies, *The Reality of False Confessions—Lessons of the Central Park Jogger Case*, 30 N.Y.U. REV. L. & SOC. CHANGE 209, 231–42 (2006) (arguing for a broader gatekeeping role for confessions based on Rule 602 and reasoning by analogy to *Daubert*; personal knowledge is called into question when defendant challenges the reliability of his or her own incriminating statement).

253. Countless studies show that witnesses are honestly mistaken at high rates. *See, e.g.*, Gary L. Wells & Elizabeth A. Olsen, *Eyewitness Testimony*, 54 ANN. REV. PSYCHOL. 277, 291 (2003) (noting reports from two studies of actual cases of filler identification rates of 20% and 24% and observing that these rates may be underestimated because police often do not distinguish between witnesses who choose filler and those who make no choice).

254. Witness confidence is profoundly increased by confirmatory feedback. *See, e.g.*, Amy Bradfield Douglass & Nancy Steblay, *Memory Distortion in Eyewitnesses: A Meta-Analysis of the Post-identification Feedback Effect*, 20 APPLIED COGNITIVE PSYCHOL. 859 (2006) (meta-analysis confirms findings of dramatic distortions of witness confidence from post-identification confirmatory feedback). However, witness confidence can be artificially inflated by the confirmatory feedback of co-witnesses. *See* C.A. Elizabeth Luus & Gary L. Wells, *The Malleability of Eyewitness Confidence: Co-Witness and Perseverance Effects*, 79 J. APPLIED PSYCH. 714, 720 (1994) ("Eyewitnesses who were led to believe that their co-witness's identification corroborated their own were perceived to be more accurate, be more persuasive, have had a better view, and give better descriptions of the thief than were eyewitnesses who were led to believe that their co-witness's identification was in disagreement."); John S. Shaw, III & Kimberley A. McClure, *Repeated Postevent Questioning Can Lead to Elevated Levels of Eyewitness Confidence*, 20 LAW & HUM. BEHAV. 629 (1996) (finding that even simple nonmisleading post event questioning by police officers or during pretrial preparation can elevate eyewitness confidence).

255. *See supra* note 254 and accompanying text.

256. *See, e.g.*, Gary L. Wells et al., *Accuracy, Confidence, and Juror Perceptions in Eyewitness Identification*, 64 J. APPLIED PSYCHOL. 440, 446 (1979) (finding that witness confidence was unrelated to witness accuracy and that jurors' decisions to believe the witness are highly related to their ratings of the witnesses' confidence); Gary Wells & Michael R. Leippe, *How Do Triers of Fact Infer the Accuracy of Eyewitness Identifications? Using Memory for Peripheral Detail Can Be Misleading*, 66 J. APPLIED PSYCHOL. 682, 686 (1981) (demonstrating that jurors incorrectly assessed accuracy of witnesses' identification of criminal based on witnesses' ability to correctly describe peripheral trivia); *see also* State v. Henderson, 27 A.3d 872, 910 (N.J. 2011).

in jury statements the importance of eyewitness testimony and its sufficiency for *alone* proving guilt beyond a reasonable doubt.[257] Indeed, in Brandon Garrett's study of 250 DNA exonerations, prosecutors were also found to emphasize eyewitness certainty,[258] a scientifically invalid indicator of accuracy in most cases.[259]

Like the expert opinion addressed in *Daubert*, the admissibility of lay opinion testimony under Rule 701 is a question of admissibility for the trial courts under Rule 104(a).[260] As such, as with Rule 702, the proponent of the evidence must prove by a preponderance of the evidence that the opinion is supported by an adequate basis in fact.[261] The witness's opinion must be based on first-hand knowledge so as to support the reliability of the inference.[262]

In applying this standard of evidentiary reliability, courts will find it useful to establish a set of factors that have a bearing on reliability. The Court in *Daubert* outlined a number of criteria for judging scientific reliability.[263] The New Jersey Supreme Court also addressed numerous system and estimator variables, as well as suggestion by private actors, for lower courts to consider in judging reliability.[264]

The Court in *Daubert* also urged trial judges to "be mindful of other applicable rules."[265] The only rule that specifically addresses the admissibility of identification evidence is Rule 801(d)(1)(C), which traditionally has admitted statements of identification without any reliability screening.[266] Rule 801(d)(1)(C) permits testimony by a declarant who "identifies a person as someone the declarant perceived earlier."[267] The rule

257. *See* GARRETT, *supra* note 9, at 5, 79–80 (2011) (discussing how misidentifications played a central role in wrongful convictions in which defendants were later exonerated by DNA).

258. *Id.* at 79.

259. *See supra* note 256.

260. Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 592 (1993).

261. *Id.* at 592 n.10.

262. *See* FED. R. EVID. 701 advisory committee's notes to the 2000 amendment (opinion must be "based upon a layperson's personal knowledge").

263. *Daubert*, 509 U.S. at 592–95.

264. State v. Henderson, 27 A.3d 872, 920–22 (N.J. 2011).

265. *Daubert*, 509 U.S. at 595. The Court identified Rules 703 and 706 as two additional rules specifically pertaining to expert witnesses that might provide some guidance to lower courts in assessing the reliability of scientific evidence. *Id.*

266. Rule 801(d)(1)(C) designates statements of identification as "not hearsay" despite the fact that they meet the definition of hearsay. *See* FED. R. EVID. 801(d)(1)(C). As such, they are exempt from the rule making hearsay inadmissible. *See* FED. R. EVID. 802.
I have previously voiced similar concerns about incriminating statements made during custodial interrogations that are freely admitted under FRE 801(d)(2)(A). This rule admits the out-of-court statements of an opposing party without any reliability gatekeeping. Prosecutors traditionally rely on the rule to admit the incriminating statements of criminal defendants such as confessions made during custodial interrogation or incriminating statements ostensibly made to a jailhouse informant. *See* Thompson, *Judicial Gatekeeping*, *supra* note 18, at 46.

267. Rule 801(d)(1) states:

> A Declarant-Witness's Prior Statement. The declarant testifies and is subject to cross-examination about a prior statement, and the statement:
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> . . .

requires only that the "declarant testifies and is subject to cross-examination about [the] prior statement."[268] This has meant that eyewitness identification testimony has been freely admitted with only the additional protections of the anemic due process test. The rule, drafted in 1975, predates the innocence movement and the steady stream of DNA exonerations that have raised awareness about reliability concerns.[269] It also predates the development of less suggestive protocols for law enforcement.[270]

Nonetheless, the Advisory Committee's notes indicate that reliability motivated the drafting of the rule. While Rule 801(d)(1)(C) takes as a given that eyewitnesses will be allowed to identify the alleged perpetrators of crimes in court, it views the choice as between a highly suggestive in-court identification and an earlier out-of-court identification.[271] The Advisory Committe assumed that the out-of-court identification will be obtained under less suggestive circumstances.[272] The notes state: "The basis [of the rule] is the generally unsatisfactory and inconclusive nature of courtroom identifications as compared with those made at an earlier time under less suggestive conditions."[273] Thus, it is consistent with a reading of the rules that the drafters favored out-of-court identifications on the assumption that the identifications would be conducted under less suggestive circumstances than a highly suggestive in-court identification.[274]

In light of modern awareness of the factors that reduce identification reliability and the development of best practices for the police, it would be within a court's discretion to read Rule 801(d)(1)(C) as advocating that the least suggestive means be used by law enforcement. Indeed, given the drafters' concern for admitting the most reliable identifications, courts would be well advised to take into account other factors besides police suggestiveness in determining whether the identification evidence is sufficiently reliable to be admitted.[275]

Rule 403 was the last applicable rule discussed in *Daubert*.[276] The Court cited Rule 403 only for the proposition that the rules authorize gatekeeping to prevent juries from hearing evidence that has a tendency

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(C) identifies a person as someone the declarant perceived earlier.
FED. R. EVID. 801(d)(1).

268. *Id.*

269. *See supra* note 9 and accompanying text.

270. *See* Thompson, *What Price Justice?*, *supra* note 153, at 42–43.

271. FED. R. EVID. 801(d)(1)(C) advisory committee's note.

272. *Id.*

273. *Id.*

274. *See* Brandon L. Garrett, *Eyewitnesses and Exclusion*, 65 VAND. L. REV. (forthcoming 2012) (manuscript at 457) (on file with author) (arguing that in-court identifications should be per se excluded if there is a prior out-of-court identification and any flaws with out-of-court identifications explained to the jury).

275. *Cf.* State v. Henderson, 27 A.3d 872, 920–921 (N.J. 2011) (providing a non-exhaustive list of "estimator variables" or factors pertaining to the eyewitness's inherent reliability independent of any effects caused by law enforcement or the legal system).

276. Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 595 (1993).

to be misleading. Expert evidence, being both powerful and difficult to evaluate, has the potential to mislead juries and lead to unreliable verdicts.[277] The same argument applies with equal force to identification testimony. Jurors find eyewitness identification testimony to be powerful, and they have difficulty evaluating its reliability.[278]

Two points warrant emphasizing in light of the extremely high and unprecedented nature of the burden placed on defendants in *Henderson* and *Chen*. The New Jersey cases imposed on defendants the requirement of proving a "very substantial likelihood of irreparable misidentification."[279] In effect, the court required defendants to prove that it is practically certain that the eyewitness is wrong. The burden of proving the admissibility of identification evidence under Rule 701 should rest with the proponent—the prosecutor—who must prove reliability by a preponderance. Gatekeeping implies a determination of whether to allow evidence to pass through the gate. The New Jersey approach instead assumed the evidence will come in as usual and then made it almost impossible for defendants to toss it back out. Even Rule 403 does not require the opponent of otherwise admissible evidence to prove the evidence is almost certainly wrong, only that the risk of unfair prejudice or misleading the jury substantially outweighs its probative value.[280] Moreover, *Daubert* did not apply Rule 403 in interpreting Rule 702—it was applying Rule 702. Courts should similarly apply Rule 701 with the same assessment of burdens as applied in *Daubert* to Rule 702.

B. Amending the Evidence Rules for Identification Evidence to Make the Reliability Requirement Explicit

Full-blown, individualized reliability screening represents a dramatic departure from past practices. Without specific guidance in the rules, courts will need to draw upon the language of existing rules in defining a reliability gatekeeping role. In time, the rules will warrant re-examination so that they may be amended to provide explicit protections against identification evidence that is so unreliable as to put innocent defendants in jeopardy. The following are a few modest proposals intended to begin a dialogue on rules revision.[281]

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277. *See id.* at 595 & n.10.

278. *See id.* at 595.

279. State v. Henderson, 208, 289 (N.J. 2011); *see* State v. Chen, 27 A.3d 930, 943 (N.J. 2011); *see also supra* notes 189–91 and accompanying text.

280. Rule 403 provides: "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." FED. R. EVID. 403.

281. The pattern jury instructions might also be amended to give explicit guidance to trial courts on scientifically-based jury instructions and the circumstances in which they should be given. Several state high courts have adopted rules requiring jury instructions on eyewitness identification issues under certain circumstances. The Connecticut Supreme Court established a mandatory jury instruction advising jurors in the event that the police fail to follow proper procedures when obtaining identification testimony. State v. Ledbetter, 881 A.2d 290, 316 (Conn. 2005). The New Jersey Supreme Court required a specific

1. Revising Rule 801(d)(2)(C) to Better Ensure Reliability of Identification Evidence

Amending the hearsay rule represents the most effective way to bring about a new approach to admitting identification testimony. The provision could be amended to incorporate reliability gatekeeping in much the same way that Rule 702 was amended after *Daubert*.[282] Rule 702 now explicitly calls for reliability screening for expert scientific testimony.[283] Among other things, it requires courts to determine whether expert testimony is the "product of reliable principles and methods" and that the expert "has applied these principles and methods reliably to the facts of the case."[284] In like manner, Rule 801(d)(1)(C) can be amended as follows:

> (d) **Statements That Are Not Hearsay.** A statement that meets the following conditions is not hearsay:
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> . . .
>
> (1) **A Declarant-Witness's Prior Statement.** The declarant testifies and is subject to cross-examination about a prior statement, and the statement:
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> . . .
>
> (C) identifies a person as someone the declarant perceived earlier. *In a criminal case, the statement must be: (1) obtained through methods that provide circumstantial guarantees of trustworthiness; (2) the declarant must have been capable of reliably perceiving the person under the circumstances at the earlier time; and (3) the declarant must have been capable of reliably identifying the person at the time the statement was made.*[285]

A simple change such as this can officially usher in a new approach to admitting critical prosecution evidence.[286] It would require an evaluation

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instruction sensitizing jurors to the effects of cross-racial identification in cases in which the identification plays a central role and there is no corroborating evidence. State v. Cromedy, 727 A.2d 457, 461–67 (N.J. 1999). As noted above, the same court in *Henderson* recently authorized such instructions to be given during trial before the eyewitness testifies. *See Henderson*, 27 A.3d at 916; *see also supra* note 214 and accompanying text. The Georgia Supreme Court has directed lower courts in the state to *refrain* from giving a jury instruction advising jurors to take into account witness certainty in evaluating identification reliability. Brodes v. State, 614 S.E.2d 766, 769 (Ga. 2005). While witness certainty was once thought to indicate identification accuracy, studies have now shown that witness certainty at trial does not indicate accuracy.

282. *See* FED. R. EVID. 702 advisory committee's note; *see also supra* notes 151–52 and accompanying text.

283. FED. R. EVID. 702.

284. *Id.*

285. A similar change could also be applied to admissions obtained by law enforcement for use in criminal cases to incorporate reliability screening for confessions and jailhouse informants. *See supra* note 18 and accompanying text.

286. For a similar argument in the context of the admissibility of child witness hearsay testimony, see Jean Montoya, *Something Not So Funny Happened on the Way to Conviction: The Pretrial Interrogation of Child Witnesses*, 35 ARIZ. L. REV. 927, 984–85 (1993) (arguing for hearsay legislation to implement a trustworthiness inquiry prior to the admission of all children's out-of-court statements, providing courts with guidance by enumerating factors pertinent to trustworthiness of children's hearsay).

of the system variables and other possible private actor suggestiveness variables that can taint an identification process.[287] The rule would also take into account the characteristics of the witness (so-called "estimator variables") that affect reliability, both at the time of the crime and when making the identification.[288]

2. *Revising Rule 104(c) to Require Hearings Outside the Presence of the Jury*

Rule 104(c) requires that hearings be held outside the presence of the jury under three circumstances: (1) if the hearing involves the admissibility of a confession; (2) when the defendant testifies and so requests; and (3) if justice so requires.[289] Traditionally, trial courts already conduct pretrial hearings on the constitutionality of eyewitness identification evidence, so adding a hearing on evidentiary grounds imposes no additional burden on the courts as compared to conducting the hearing during trial. Indeed, because of the highly persuasive nature of identification testimony, jurors should not be permitted to hear the testimony before the court has conducted adequate reliability gatekeeping.

As currently written, Rule 104(c) applies specifically to a defendant's out-of-court confession or in-court testimony.[290] The rule merely puts into effect the constitutional rule set forth in *Jackson v. Denno*.[291] In addition, the rule recognizes that there may be other situations in which evidentiary hearings should be held outside the presence of the jury. Thus, courts have the discretion to hold such hearings when "justice so requires."[292] This provision clearly extends judicial discretion to prevent jurors from hearing other evidence whose prejudicial potential parallels the powerful effect of a confession.

The powerful nature of identification evidence justifies treatment similar to that for confessions under 104(c). The rule should be amended to create a new subsection (3), making the current subsection (3) into a new subsection (4). The amended rule would read:

> (c) **Conducting a Hearing So That the Jury Cannot Hear It.** The court must conduct any hearing on a preliminary question so that the jury cannot hear it if:
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> . . .

287. *See supra* notes 180–82 & 187 and accompanying text; *see also* State v. Chen, 27 A.3d 930, 942–43 (N.J. 2011).

288. *See supra* notes 182–83 and accompanying text.

289. Rule 104(c) states: "The court must conduct any hearing on a preliminary question so that the jury cannot hear it if: (1) the hearing involves the admissibility of a confession; (2) a defendant in a criminal case is a witness and so requests; or (3) justice so requires." FED. R. EVID. 104(c).

290. FED. R. EVID. 104(c) (requiring a hearing so that the jury cannot hear it if "(1) the hearing involves the admissibility of a confession; (2) a defendant in a criminal case is a witness and so requests").

291. *See* FED. R. OF EVID. 104(c) advisory committee's note (citing Jackson v. Denno, 378 U.S. 368 (1964)).

292. FED. R. EVID. 104(c)(3).

(3) the hearing involves the admissibility of a statement of identification and a defendant in a criminal case so requests; or[293]

(4) justice so requires.

As this rule is not constitutionally required, it is in keeping with the adversary process to require defense counsel to request the exclusion of the jury from a hearing on identification admissibility.

This amendment to Rule 104(c) is further supported by the reasoning underlying Rule 103(d), which states that "[t]o the extent practicable, the court must conduct a jury trial so that inadmissible evidence is not suggested to the jury by any means."[294] This rule is premised "on the supposition that a ruling which excludes evidence in a jury case is likely to be a pointless procedure if the excluded evidence nevertheless comes to the attention of the jury."[295] The Advisory Committee cites *Bruton v. United States*, in which the Supreme Court rejected the palliative of jury instructions as a cure for the admission of the defendant's own incriminating statements offered through the confession of a co-defendant.[296] In *Bruton*, the Court explained the futility of jury instructions in removing the effect of a confession from the jurors' minds:

> The fact of the matter is that too often such admonition against misuse is intrinsically ineffective in that the effect of such a nonadmissible declaration cannot be wiped from the brains of the jurors. The admonition therefore becomes a futile collocation of words and fails of its purpose as a legal protection to defendants against whom such a declaration should not tell. . . . The Government should not have the windfall of having the jury be influenced by evidence against a defendant which, as a matter of law, they should not consider but which they cannot put out of their minds.[297]

In like fashion, a pivotal moment in a trial comes when eyewitnesses tell the jury that they identified the defendant as the person who committed the crime. Countless studies confirm that jurors tend to believe eyewitness identification testimony, especially when it is stated with high confidence by a witness.[298] The likelihood of misuse of unreliable identification evidence justifies measures to protect against the jury hearing the evidence before it is determined to be admissible. Considering Rules 103 and 104 in combination, courts clearly have the discretion—and arguably commit error to refuse—to hold pretrial hearings on the reliability of eyewitness identification evidence, just as they must for confessions. To provide more explicit guidance for trial courts, Rule 104(c) could be

293. The current subsection (3) that provides for hearings outside the jury's hearing when "justice so requires" would be retained as a new subsection (4). *Id.*

294. FED. R. EVID. 103(d).

295. FED. R. EVID. 103(c) advisory committee's note (citing Bruton v. United States, 389 U.S. 123 (1968)).

296. *Id.* (citing *Bruton*, 391 U.S. at 123).

297. *Bruton*, 391 U.S. at 129 (quoting Delli Paoli v. United States, 352 U.S. 232, 247–48 (1957)).

298. *See supra* note 256 and accompanying text; *see also* State v. Henderson, 27 A.3d 872, 910–11 (N.J. 2011).

amended to require a hearing outside the hearing of the jury to determine the admissibility of eyewitness identification testimony.

3. *Revising Rule 702 to Require Certain Expert Testimony on Eyewitness Identifications*

Judicial practices on the admission of expert testimony have begun to shift. In the past, courts typically denied proffered defense experts on identification reliability factors. Increasingly, however, trial courts have gained awareness of the importance of expert testimony. In fact, a number of states have interpreted their state counterparts to Rule 702 to mandate the admission of expert testimony under certain circumstances. In Utah and Tennessee, for example, the high courts essentially mandated the admission of expert testimony in cases in which the eyewitness identifies a stranger and one or more reliability factors is present.[299] The Tennessee court rejected the trial court's finding that direct and cross-examination sufficed to inform the jury about reliability concerns, noting that "[t]imes have changed."[300] The Texas high court found it to be an abuse of discretion to exclude reliable and relevant expert testimony that would have assisted the jury in understanding the eyewitness's testimony.[301] Other states have taken a more restrictive approach and only require the admission of expert testimony when identification is the critical evidence in the government's case and there is no corroborating evidence.[302] State courts are much less likely to state that the factors affecting eyewitness reliability are within the common experience of the jury as they once did.[303]

Given the importance of the issue, it may be appropriate to consider a revision to Rule 702 to specify the appropriateness of expert testimony on eyewitness identification. The rules should, at a minimum, adopt the restrictive rule for criminal cases. Rule 702 would be divided into two main parts, with the second part being a new section pertaining to eyewitness identifications in criminal cases:

> **Rule 702. Testimony by Expert Witnesses**
>
> (1) A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise . . .

299. *See* State v. Clopten, 223 P.3d 1103, 1112 (Utah 2009); State v. Copeland, 226 S.W.3d 287, 301 (Tenn. 2007).

300. *Copeland*, 226 S.W.3d at 299.

301. *See* Tillman v. State, 354 S.W.3d 425, 442 (Tex. Crim. App. 2011).

302. *See* State v. Wright, 206 P.3d 856, 864 (Idaho Ct. App. 2009); People v. McDonald, 690 P.2d 709, 727 (Cal. 1984); *cf.* Manley v. State, 672 S.E.2d 654, 660 (Ga. 2009) (upholding exclusion of identification expert because adequate corroborating evidence existed); State v. Buell, 489 N.E.2d 795, 804 (Ohio 1986).

303. *See* State v. Chapple, 660 P.2d 1208, 1220–21 (Ariz. 1983) (finding an abuse of discretion when trial court's exclusionary rule was based on a determination that the testimony was within the common experience of the jury); Commonwealth v. Christie, 98 S.W.2d 485, 490 (Ky. 2002).

(2) *In criminal cases, a witness who is qualified as an expert on a relevant issue affecting the reliability of an eyewitness's identification shall be permitted to testify if the identification is critical to the government's proof and there exists no substantial corroborating evidence.*

State courts may choose to take an even more liberal approach to admissibility, as in Utah and Tennessee. One potential problem with the corroboration requirement in the restrictive approach proposed here is that courts may rely on the existence of multiple eyewitnesses as corroboration, when in fact all of the eyewitnesses may have been subject to the same suggestive practices or other factors that result in multiple misidentifications.[304] Moreover, a false identification at the beginning of an investigation can cause investigators to develop "tunnel vision," a confirmatory bias that may lead to the gathering of other false evidence.[305] At least for the time being, there would be some benefit in a rule that makes it an abuse of discretion to exclude expert testimony on eyewitness reliability—regardless of the showing of relevance and necessity made by the defense. It is simply too late in the day to continue sanctioning the blanket rejection of expert testimony as not helpful to the jury because eyewitness identification involves a "credibility determination within the ken of the ordinary judge and juror."[306] A great many state courts and federal circuits have moved in the direction of admitting expert testimony already, so the rule would simply move the rest of the courts in the same direction.

V. CONCLUSION

In December of 1995, Juan Smith was convicted of first-degree murder in New Orleans, Louisiana, on the basis of the sole testimony of Larry Boatner.[307] No other physical evidence connected Smith to the crime.[308] On January 10, 2012, over fifteen years later, the United States Supreme

304. *See* GARRETT, *supra* note 9, at 50 (In a study of 250 DNA exoneration cases, "36% [of those that included a misidentification] (68 of 190 exonerees) were identified by multiple eyewitnesses, some by as many as three or four or five.").

305. *See* Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 292 (defining tunnel vision as the "compendium of common heuristics and logical fallicies, to which we are all susceptible, that lead actors in the criminal justice system to focus on a suspect, select and filter the evidence that will build a case for conviction, while ignoring or suppressing evidence that points away from guilt.") (internal citations and quotations omitted). Studies find that wrongful convictions often include more than one type of false evidence. *See, e.g.*, *Know the Cases: Kenneth Adams*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Kenneth_Adams.php (last visited May 9, 2012) (discussing a wrongful conviction caused by eyewitness misidentification, false confessions/admissions, and unvalidated or improper forensic science); *Know the Cases: George Rodriguez*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/George_Rodriguez.php (last visited May 9, 2012) (discussing a wrongful conviction caused by eyewitness misidentification and invalidated or improper forensic science); *Know the Causes: Josiah Sutton*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Josiah_Sutton.php (last visited May 9, 2012).

306. United States v. Brien, 59 F.3d 274, 276 (1st Cir. 1995); *see also* United States v. Kime, 99 F.3d 870, 884 (8th Cir. 1996).

307. Smith v. Cain, 132 S. Ct. 627, 629–30 (2012).

308. *Id.* at 630.

Court reversed the conviction in an 8–1 decision.[309] It turns out that the eyewitness had repeatedly told the police that he had not seen the faces of the gunmen and could not identify them if he saw them.[310] However, this information was not turned over to the defense. It surfaced years later during post-conviction proceedings when the defense found it in police files.[311] While the *Smith* case turned on a violation of the disclosure rules in *Brady v. Maryland*,[312] the case nonetheless underscores yet again (like so many DNA exonerations based on misidentifications) the perils of leaving it to jurors to determine the reliability of eyewitness identification testimony, especially in the absence of corroborating evidence.[313]

The hearsay rules normally protect against the admission of unreliable out-of-court statements. In the case of statements of identification, the drafters of the FRE thought Rule 801(d)(1)(C) provided adequate measures of reliability in the presence of the declarant as a witness who could be cross-examined and the use of "less suggestive" procedures (than an in-court identification) in obtaining out-of-court identifications. Unfortunately, experience shows that this regime of automatic admission of an eyewitness's identification testimony without affirmative proof of reliability causes systemic failure. Courts should take the reliability paradigm of the Federal Rules of Evidence seriously and read the rules in the holistic manner adopted by the Supreme Court in *Daubert*. The trial court's gatekeeping authority exists in Rules 104(a), 701, 602, and 403, not to mention in the reliability aims of Rule 801(d)(1)(C).

The dangers of wrongful conviction persist. Exoneration cases represent the "tip of the iceberg," and misidentifications put more innocent people behind bars and on death row than any other type of error.[314] Due process will not provide protection, and neither will other trial safeguards such as the presence of counsel or cross-examination. As was true with scientific evidence in *Daubert*, identification evidence has a powerful effect on jurors, and jurors cannot accurately assess its reliability. Trial courts are the final backstop. Judges can receive training to develop the expertise necessary to evaluate eyewitness reliability, and they can hear from experts as well. The rules of evidence put them in charge of minding the gate. The very purpose of the rules is that evidentiary decisions should "promote the development of evidence law, to the end of ascertaining the truth and securing a just determination."[315] Judicial leadership in promoting criminal trial reliability in this manner will pave the way for amendments to the rules that will more explicitly delineate admissibility criteria and proper procedure.

309. *Id.* at 631.
310. *Id.* at 629–30.
311. *Id.*
312. Brady v. Maryland, 373 U.S. 83, 87 (1963).
313. *See generally* Thompson, *Beyond a Reasonable Doubt?*, *supra* note 18, at 1540–43 (arguing for a corroborating evidence requirement for eyewitness identification testimony).
314. *Id.* at 1491–93.
315. FED. R. EVID. 102.

APPENDIX

THE FEDERAL RULES OF EVIDENCE AND THEIR RESPECTIVE PURPOSES

Sandra Guerra Thompson

Rule #	Title	Purpose(s)
101	Scope; Definitions	[Procedural]
	Purpose	Reliability & Judicial Efficiency
103	Rulings on Evidence	Reliability & [Procedural]
104	Preliminary Questions	Reliability & [Procedural]
105	Limiting Evidence That Is Not Admissible Against Other Parties or for Other Purposes	Reliability & [Procedural]
106	Reminder of or Related Writings or Recorded Statements	Reliability & Advocacy System
201	Judicial Notice of Adjudicative Facts	Reliability & Judicial Efficiency
301	Presumptions in Civil Cases Generally	Reliability, Societal Goals, & [Procedural]
302	Applying State Law to Presumptions in Civil Cases	Societal Goals & [Procedural]
401	Test for Relevant Evidence	Reliability
402	General Admissibility of Relevant Evidence	Reliability
403	Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons	Reliability & Judicial Efficiency
404	Character Evidence, Crimes or Other Acts	Reliability & Advocacy System
405	Methods of Proving Character	Reliability & [Procedural]
406	Habit; Routine Practice	Reliability
407	Subsequent Remedial Measures	Reliability, Societal Goals, & Advocacy System
408	Compromise Offers and Negotiations	Reliability, Societal Goals, & Advocacy System
409	Offers to Pay Medical and Similar Expenses	Reliability & Societal Goals
410	Pleas, Plea Discussions, and Related Statements	Reliability, Societal Goals, & Advocacy System
411	Liability Insurance	Reliability & Societal Goals
412	Sex Offense Cases: The Victim's Sexual Behavior or Predisposition	Reliability & Societal Goals
413	Similar Crimes in Sexual Assault Cases	Reliability & Societal Goals
414	Similar Crimes in Child-Molestation Cases	Reliability & Societal Goals
415	Similar Acts in Civil Cases Involving Sexual Assault or Child Molestation	Reliability & Societal Goals

501	Privilege in General*	Societal Goals
502	Attorney-Client Privilege and Work Product; Limitations on Waiver	Societal Goals & Advocacy System
601	Competency to Testify in General	Reliability
602	Need for Personal Knowledge	Reliability
603	Oath or Affirmation to Testify Truthfully	Reliability
604	Interpreter	Reliability
605	Judge's Competency as a Witness	Reliability
606	Juror's Competency as a Witness	Reliability
607	Who May Impeach a Witness	Reliability
608	A Witness's Character for Truthfulness or Untruthfulness	Reliability
609	Impeachment by Evidence of Criminal Conviction	Reliability
610	Religious Beliefs or Opinions	Reliability & Societal Goals
611	Mode and Order of Examining Witnesses and Presenting Evidence	Reliability & [Procedural]
612	Writing Used to Refresh a Witness's Memory	Reliability
613	Witness's Prior Statement	Reliability & [Procedural]
614	Court's Calling or Examining a Witness	Reliability & [Procedural]
615	Excluding Witnesses	Reliability
701	Opinion Testimony by Lay Witnesses	Reliability
702	Testimony by Expert Witnesses	Reliability
703	Bases of an Expert's Opinion Testimony	Reliability
704	Opinion on an Ultimate Issue	Reliability
705	Disclosing the Facts or Data Underlying an Expert's Opinion	Reliability
706	Court-Appointed Expert Witnesses	Reliability
801	Definitions that Apply to [the Hearsay] Article; Exclusions from Hearsay	Reliability & Advocacy System
802	The Rule Against Hearsay Rule	Reliability
803	Exceptions to the Rule Against Hearsay—Regardless of Whether the Declarant Is Unavailable as a Witness	Reliability
804	Exceptions to the Rule Against Hearsay—When the Declarant Is Unavailable as a Witness	Reliability
805	Hearsay Within Hearsay	Reliability
806	Attacking and Supporting the Declarant's Credibility	Reliability
807	Residual Exception	Reliability
901	Authenticating or Identifying Evidence	Reliability
902	Evidence That Is Self-Authenticating	Reliability
903	Subscribing Witness's Testimony	Reliability & [Procedural]
1001	Definitions That Apply to This [The Best Evidence Rule] Article	[Definitions]
1002	Requirement of the Original	Reliability

1003	Admissibility of Duplicates	Reliability
1004	Admissibility of Other Evidence of Content	Reliability
1005	Copies of Public Records to Prove Content	Reliability
1006	Summaries to Prove Content	Reliability
1007	Testimony or Statement of a Party to Prove Content	Reliability
1008	Functions of the Court and Jury	[Procedural]
1101	Applicability of the Rules	[Procedural]
1102	Amendments	[Procedural]
1103	Title	[Procedural]

* The attorney-client privilege also advances the reliability of the trial process by facilitating effective legal representation. To what extent effective legal representation furthers the search for truth is hard to say except that it can help a client avoid an unjust outcome.

Comments


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