The Supreme Court's Actual Innocence Problem

How the Supreme Court of the United States Has Failed to Reduce Wrongful Convictions

By

Nathan Goetting

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This book is dedicated to my sons, Lucas Augustine Goetting and Samuel Nathan “Shemp” Goetting, the best readers I know.

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Foreword

By Jennifer Tiedemann

I was honored to be asked to write the foreword for the book you're about to read. I'm not a lawyer, nor am I any sort of constitutional expert. But as Nathan's editor at Discourse, the magazine where most of the essays that became this book got their start, I've been fortunate to see the formation of this book from its early days, to see the ideas and thought process that informed it.

And I can tell you that *you're* also fortunate to now have this book in hand, because Nathan's work in the pages ahead gives an exceptionally complete account of the myriad ways in which wrongful convictions are reached, and how American courts—led by the nation's top court—are complicit in perpetuating these injustices. This account is important not just for the legal experts among us, but for anyone who wants to ensure that our courts are truly on the side of justice.

In the fall of 2022, when Nathan approached Discourse with the idea for a series of essays detailing how U.S. courts—and first and foremost, the Supreme Court—perpetuate wrongful convictions I jumped at the chance to help bring them to life. By being able to read Nathan's work and discuss it with him, I was able to take a one-on-one seminar taught by one of the brightest minds in the field of criminal justice.

What initially piqued my interest about reading Nathan's essays? I'm a true crime fan, and any follower of the genre knows that

wrongful convictions are unfortunately not a rare occurrence. I remember hearing one such story that really made my jaw drop: the case of Clarence Elkins. In 1998, his mother-in-law, Judith Johnson, was sexually assaulted and murdered late at night in her Ohio home. His niece had been in the house at the time of the murder and was also assaulted; when interviewed by police, she said that the perpetrator looked a lot like her Uncle Clarence.

Even though there was no physical evidence tying him to the murder, he was convicted based on the young girl's testimony and sentenced to 55 years in prison. The girl later recanted her testimony, saying she truly couldn't be sure if the man she saw was indeed her uncle; yet the court let the conviction stand. After the verdict, independent DNA tests revealed a male DNA profile at the scene that didn't match Elkins. Again, the court did not budge: Elkins' motion for a new trial was denied.

It turned out, though, that a neighbor of Johnson's, Earl Mann, was a registered sex offender who'd been released from prison just before the murder: The timing was no doubt suspicious, and Elkins' wife and attorneys had come to suspect that Mann might have been the actual murderer. Mann was later convicted of raping three young girls and returned to prison—and it just so happened that he was in the same cell block as Elkins. Elkins was able to collect Mann's DNA via a discarded cigarette butt and send it to his attorneys for testing. Sure enough, the DNA on the cigarette butt matched the male DNA profile from the crime scene. Mann had raped and murdered Elkins' mother-in-law, and Elkins was exonerated and released from prison after six-and-a-half years.

As unbelievable as the entire story is, one question boggled my mind the first time I heard it: How could any court allow this sort of thing to happen, particularly when there's actual DNA proof that the accused didn't commit the crime?

While the arrival of the DNA Revolution in the 1980s helped to keep more innocent people out of prison, it was by no means a perfect panacea that erased all possibilities of a wrongful conviction. After all, there are several ways in which uncertainty can introduce itself into a criminal case. Our understanding of science is ever-evolving, and a set of scientific findings that once would have convicted a person might not do so today. Fire science is a great example of that: What was once thought of as a reliable form of evidence is on much shakier ground today. It follows, then, that convictions in some past arson cases are shadowed by doubt.

Uncertainty can also come from human errors. Our own eyes—the way in which we observe the world—often fail us, as happened in Clarence Elkins' case. So do our memories. Even with the best intentions, mistakes can happen. But these mistakes lead to miscarriages of justice.

With these failures, those involved may want to see justice done. But many people wrongfully go to prison because of bad actors, too. Prison snitches may offer up false information in order to secure better conditions for themselves; meanwhile, innocent people take the rap.

These examples of how we get to wrongful convictions are just some of those you'll read about in this book. And as Nathan will explain, a big reason for why wrongful convictions happen is that

courts too often shirk their responsibility to ensure that criminal proceedings result in just outcomes. On top of evolving scientific facts, courts' application of science is not infallible: They may use outdated, now-faulty information to determine the accused's fate. But others are more insidious; the Supreme Court has shown itself to be overly tolerant of false confessions, for example, and seemingly unwilling to step in and change the rules that allow incentivized testimony from criminal informants.

Wrongful convictions are a complicated and sensitive topic, and looking at how courts are making the problem worse makes it even more complicated and sensitive. But without a doubt, Nathan is the right person to take on the subject. He treats the topic with prudence, offering detailed yet accessible explanations of legal underpinnings, history, and heartrending stories of real people affected by court system failures. He is careful to present not only the complex issues that lead to wrongful convictions, but also the ways in which the nation's highest court is reinforcing bad laws and bad science.

Nathan's commitment to fairness in his approach to his subject is unparalleled. During the writing and editing process, he showed a constant commitment to ensuring that his words represented the truth, free from any biases. In an era in which politics and court decisions have become increasingly intertwined, Nathan's work is refreshingly clear of these entanglements. What you'll read in the pages ahead is a balanced, thoughtful, nuanced text on the persistent problem of wrongful convictions and what can be done to ameliorate the issue. It is truly a gift to the field of criminal justice.

It's no wonder that the work that led to this book has garnered so much respect from the academic community, from his immediate peers to those across the country. In March of 2024, Nathan presented his essays at the Annual Meeting of the Academy of Criminal Justice Sciences, which earned him Adrian College's Creative Activity, Research, and Scholarship Award, a faculty-wide recognition for the best contribution to one's field in that year.

American courts, all the way up to the U.S. Supreme Court, have too often perpetuated imperfections and failures in criminal justice, instead of working to rectify them. That shakes the very foundation of the concept that an accused person is innocent until proven guilty. Nathan's work puts a necessary spotlight on the ways in which courts subvert justice for the wrongfully accused *and* crime victims, and it's hopefully an important step toward a fairer system for everyone.

Preface

I was an intern for the Cooley Innocence Project as a law student in 2006. The Innocence Project is a network of legal clinics that investigates and litigates the cases of prison inmates who claim that they're innocent and can be exonerated by DNA evidence.

I was assigned eight cases. Like most Innocence Project interns, I dug into these inmates' histories trying to figure out if they might have been wrongly convicted. Some seemed pretty obviously guilty. Some I wasn't sure of. I soon became convinced that two of them were in prison for rapes they hadn't committed. After I visited both of them in prison and listened to them speak, I was sure of it.

We couldn't get either of them out. In both cases, there was no evidence left from the crime scene for us to test. There was nothing we could do. They had been convicted and sentenced after what the law considered to be a fair trial. That would be the end of it.

I moved on but the knowledge that innocent people, including these two, remained in prison was never far from my thoughts. I left the Innocence Project but the Innocence Project never left me.

Fifteen years later, I learned that, after 32 years in prison for a murder he hadn't committed, one of my eight had finally been exonerated and would soon be released. It wasn't either of the two whose imprisonment had been haunting me. Instead, it was one of my "maybes."

How reliable is the American system of crime and punishment if the two inmates I was convinced were innocent couldn't be exonerated, but one whose innocence had seemed far less clear was now free? It occurred to me that the number of wrongfully imprisoned inmates might be even higher than I suspected.

Gilbert Poole Jr.'s exoneration in 2021 gave me the frustration, restlessness, and sense of urgency I needed to begin writing. The result, four years later, is this book.

Chapter 1
Introduction

Before the DNA Revolution of the late twentieth century, there was a shared belief among most Americans that the nightmare scenario of the wrongfully convicted prison inmate often described in literature and popular entertainment, like Dr. Richard Kimble in the television show "The Fugitive," was largely a myth, or at worst an unfortunate aberration. Politicians, judges and lawyers who maintained our criminal justice system and had a stake in promoting its fairness might acknowledge particular miscarriages of justice, but usually cited their rarity as proof of the reliability of criminal trials.

Judge Learned Hand, whose writings remain a staple in law school curricula, wouldn't even acknowledge that much error. He famously wrote in a 1923 judicial opinion that "[O]ur procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream."[1] This notorious and oft-cited[2] quote may be the dimmest and most harmful statement ever written by an otherwise brilliant judge.

Currently, the National Registry of Exonerations lists more than 3,650 wrongful convictions since 1989,[3] hundreds of which were overturned thanks to the development of DNA testing, which proved innocence to a scientific certainty. Judge Hand's absolute faith in our criminal procedures was misplaced. Some nightmares are real. Who knows how many of Judge Hand's "ghosts" were convicted and sentenced to death or long stretches in prison before

DNA testing turned our attention to this problem haunting our courtrooms?

The American criminal justice system has always been guided, at least in theory, by William Blackstone's famous ratio: "[I]t is better that ten guilty persons escape than that one innocent suffer."[4] John Adams, defending the despised British soldiers who killed American colonists during the Boston Massacre, explained that Blackstone's ratio was also essential to public safety. He understood that a certain number of wrongdoers will always escape justice, he said.

> But when innocence itself is brought to the bar and condemned, especially to die, the subject will exclaim it is immaterial to me whether I behave well or ill, for virtue itself is no security…. [I]f such a sentiment as this should take place in the mind of the subject, there would be an end to all security whatsoever.[5]

Adams believed that wrongful convictions are criminogenic. They spread contempt for the law, make law-abiding behavior seem pointless, and stimulate political and social collapse. Benjamin Franklin thought Blackstone didn't go far enough in favor of the accused. He wanted the burden carried by the state to be heavier, so he increased the ratio to 100 to 1.[6]

Founding Fathers like Adams and Franklin envisaged criminal trials that would embody two great Enlightenment ideals: the pursuit of truth and the protection of individual liberties. The former would be realized through fact-finding and reasoned argument, the latter through procedural rules that made

conviction possible only after impressive proof of guilt had been presented.

By failing to reckon with the harsh truths about the flaws in our criminal procedures, the Supreme Court has proven itself an obstacle to the realization of both these ideals. Its rulings are perpetuating an enormous problem that it has a constitutional duty to shrink. Exonerations have occurred "in numbers never imagined before the development of DNA tests," former Justice David Souter wrote in a 2006 dissenting opinion.[7]

Today in courtrooms around the country, juries issue erroneous verdicts they could have gotten right had the court ruled differently or been willing to reverse a few key cases. Due to its intransigence, the rights of the accused—including, most tragically, the *falsely* accused—remain in peril. Most DNA exonerees, including the 35 released from death row,[8] were convicted under constitutional rules authorized by the Supreme Court and were given what current law considers a fair trial.

Gilbert Poole Jr. was released from prison in 2021 after serving 32 years for a murder he didn't commit. The crime was horrific. The autopsy states that the victim had been beaten, bruised, bitten, stabbed eight times, and had his throat cut after putting up a tremendous fight that seemed to have injured his attacker. Like many others, Poole's conviction was based on junk science testimony, which Supreme Court case law too often allows juries to consider, and law enforcement misconduct (in the form of hiding exculpatory evidence), which the court's jurisprudence fails to adequately deter or punish.

Poole's incarceration was needlessly protracted by the Supreme Court's strict habeas corpus rules, which slam the courthouse door shut on countless inmates who claim, as Poole did, that newly discovered evidence proves they are actually innocent. (After years of legal wrangling, Poole finally won a DNA test. The results confirmed that he had contributed none of the biological evidence found at the crime scene and that some of the blood found next to the victim's body belonged to an unknown individual—almost certainly the actual perpetrator.)[9]

Unlike any other investigative technique, DNA testing can, in certain cases involving biological evidence, prove irrefutably whether the accused is guilty of the crime with which he's been charged. Barry Scheck, one of the co-founders of the Innocence Project, said in a 2000 interview that DNA testing has exposed "a total system failure."[10] He was right.

Studying the common features of exoneration cases has enabled us to do something never before possible: determine how and why the system fails. Scholarship on this subject over the past few decades has been prolific and the consensus virtually universal: There are seven critical defects in our criminal investigation and adjudication processes—breakdowns in the rules of constitutional criminal procedure—that lead most directly to wrongful convictions:

- **Eyewitness misidentifications:** Research has shown that human memory is far less reliable than we once thought. Suggestive police identification procedures, such as lineups, that steer witnesses toward the selection of

suspects police already believe to be guilty, can result in unreliable eyewitness trial testimony.

- **False confessions:** The ancient presumption that the innocent don't confess to crimes—especially violent ones like rape and murder, and especially to law enforcement, whose job is to punish them—is a canard. Police interrogation techniques are, in fact, often *too* effective. They can elicit admissions from the innocent as well as the guilty.

- **Law enforcement misconduct:** Police and prosecutors can manufacture guilty convictions despite a defendant's innocence in various ways. The most common is to simply hide exculpatory evidence from the defense. Concealing evidence of innocence violates the defendant's constitutional rights, but the Supreme Court has interpreted these rights so narrowly and has proven itself so unwilling to punish and deter guilty law enforcement officers that such violations remain fairly routine.

- **Lying police informants:** Law enforcement snitches are incentivized to lie on the witness stand. After cutting deals with prosecutors for immunity or a reduced sentence, their liberty—and in capital cases, their very lives—depend on providing useful information to the state. They're often eager to point their fingers at the innocent in exchange for what is being offered.

- **Incompetent defense attorneys:** The vast majority of criminal defendants, including those who are innocent,

cannot afford lawyers. What's true in commerce is also often true in the courtroom—you get what you pay for. While many public defenders are excellent, and some are downright heroic, they are generally overwhelmed, underpaid, under-resourced and often unable to put up the kind of valiant fight at trial needed to defeat the state's case.

- **Junk science:** DNA testing has put the lie to, or at least called into question, many other forms of forensic evidence once thought to be highly reliable but were often only as accurate as the particular scientist conducting the test. In Gilbert Poole Jr.'s case, for instance, the state's forensic odontologist testified that Poole's teeth matched the bite marks on the victim. We now know that they didn't. As in Poole's case, forensic testimony often involves "matching," which we know can be subjective, inexact and unreliable.

  As forensic science advances, the Supreme Court must allow lower courts to reverse convictions in cases where defendants were convicted based on outdated and discredited theories. The tragic story of Shirley Ree Smith, described in Chapter 7, is a callous example of the court prioritizing formal rules over newly discovered scientific truths, even when the results are unconscionable.

- **The unwillingness of courts to consider post-conviction actual innocence cases:** A criminal defendant's presumption of innocence ends with his conviction. Appellate courts generally review cases to determine whether the trial was conducted fairly, not whether the

> accused is actually innocent. Getting a post-conviction court to hear an actual innocence claim, as opposed to an unfair trial claim, can be a Herculean effort.

Forensic DNA testing, also known as "genetic fingerprinting," has exposed the causes of wrongful convictions—and yet the Supreme Court has perpetuated each of these seven problem areas or, in some cases, made them even worse. In our system of government, the Supreme Court is the ultimate arbiter of the Constitution and the guarantor of individual liberties. While many state governments and the other two branches of the federal government can, and in many cases have, made real reforms, in the end the problem of wrongful convictions is the Supreme Court's to fix. It's high time it got started.

Chapters 2-9 of this book describe the afore-mentioned causes of wrongful convictions. Chapters 10-12 reckon with two other areas of unjust Supreme Court negligence that, while related to the actual innocence problem, aren't quite as directly connected to it.

Chapter 10 explains how the court's rulings over nearly the past century have enabled law enforcement to trick and manipulate citizens into committing crimes. Many of these defendants are perfectly innocent prior to the government's effort to convert them into criminals. Unlike those described in the preceding chapters, these defendants actually commit the acts that put them behind bars. However, their conduct is the product of underhanded, invasive, morally repugnant investigative techniques that the Supreme Court has refused to rule unconstitutional. In these cases, law enforcement creates crimes for the purpose of solving them.

While doing so, police often behave worse than those they seek to punish.

The cost of wrongful convictions goes up incalculably in a nation with the death penalty. Over the past few decades, there have been a few high-profile examples of wrongfully executed inmates.[11] Many more have been executed whose guilt was doubtful but whose innocence hasn't been completely proved.[12]

Chapters 11 and 12 deal with the primary faults of the Supreme Court's death penalty jurisprudence directly. They argue that, while the actual innocence problem adds a special urgency, the death penalty must be abolished for other reasons, as well. The Supreme Court's actual innocence problem and its capital punishment problem are intimately connected. The combination of the two result in the worst possible injustice.

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[1] U.S. v. Garsson, 291 F. 646, 649 (S.D.N.Y. 1923).

[2] Judge Hand's quote has been used countless times by those seeking to convince others, as I am, of the magnitude of the actual innocence problem. Because he was a jurist whose excellence on the bench is still widely respected, it exemplifies how deeply entrenched the unwillingness to accept the problem has been, especially by those who work at the highest levels of our criminal justice system. For examples *See* Jed S Rakoff, *Why the Innocent Plead Guilty and the Guilty Go Free: And Other Paradoxes of our Broken Legal System* 35 (2021); Ames Grawert, *Wrongful Convictions: Why they happen, and why they can be so hard to fix.*, (Oct. 5, 2018), https://www.brennancenter.org/our-work/analysis-opinion/wrongful-convictions.

[3] *The National Registry of Exonerations*, National Registry of Exonerations https://www.law.umich.edu/special/exoneration/Pages/about.aspx.

[4] William Blackstone, Commentaries on the Laws of England 358 (1765).

[5] *Adams's Argument for the Defense: 3–4 December 1770*, https://founders.archives.gov/documents/Adams/05-03-02-0001-0004-0016.

[6] Benjamin Franklin, *The Writings of Benjamin Franklin*, Albert H Smyth, ed., vol. 9, 293 (1906).

[7] Kansas v. Marsh, 548 U.S. 163, 195 (2006).
[8] Innocence Project https://innocenceproject.org/dna-and-wrongful-conviction-five-facts-you-should-know/.
[9] Ken Otterbourg, *Gilbert Poole, Jr.*, National Registry of Exonerations (May 24, 2023), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5979.
[10] *Barry Scheck*, FRONTLINE (January 11, 2000), https://www.pbs.org/wgbh//pages/frontline//shows/case/interviews/scheck.html.
[11] *See* Los Tocayos Carlos. By James Liebman, Shawn Crowley, Andrew Markquart, Lauren Rosenberg, Lauren Gallo White and Daniel Zharkovsky. Print version, 43 Columbia Human Rights Law Review 711, 711-1152 (2012); Paul C. Giannelli, *Junk Science and the Execution of an Innocent Man*, 7 N.Y.U. J.L. & LIBERTY 221, 221-22 (2013).
[12] *Executed But Possibly Innocent*, Death Penalty Information Center https://deathpenaltyinfo.org/policy-issues/policy/innocence/executed-but-possibly-innocent.

Chapter 2
Screen Out Unreliable Eyewitnesses

It's natural to trust that our memories are usually accurate, since memories are the source materials by which we understand ourselves and the world around us. We revisit them regularly, not just for the pleasure of reminiscing, but for guidance as we navigate our way through life. We treasure some memories—and we're haunted by others. In the end, sometimes they are all we have. To distrust one's own memory, especially regarding the important moments of our lives, is a kind of self-abnegation. If we don't believe our own memory, then what is real?

When jurors hear witnesses testify, under oath, that they watched a defendant on trial commit a horrific crime, that they're completely certain of what they saw and that they'll never forget the face of the man holding the knife or squeezing the trigger, jurors are overwhelmingly likely to believe them. The trust we have in memory is even stronger when the witness is also the victim of a violent crime, for whom jurors under-standably feel tremendous sympathy. The problem is that we now know this trust is frequently misplaced.[1] Eyewitness misidentification is the leading cause of wrongful convictions. It has sent countless innocent defendants to prison—and left the actual perpetrators free to re-offend.

Our understanding of human memory has changed dramatically since the onset of the DNA Revolution in criminal forensics in the 1980s. "[M]emory does not work like a videotape recorder. You

don't just record the event and play it back later," explains psychologist Elizabeth Loftus.[2] We don't recall perceptions stored in our minds; we "reconstruct" them. "Our representation of the past takes on a living, shifting reality," Loftus and co-author Katherine Ketcham write.[3] A memory is like a canvas on which, after the original picture appears, we're forever painting and erasing.

The first significant study of wrongful convictions published in the United States was Edwin Borchard's "Convicting the Innocent," released in 1932.[4] It profiled 65 exoneration cases of various types of crimes from around the country—and 29 of them were the result of witnesses identifying innocent defendants. The Innocence Project reports that as of April 2020, "69% of DNA exonerations—252 out of 367 cases—have involved eyewitness misidentification."[5] Before he was exonerated by DNA testing in 1993, Kirk Bloodsworth[6] spent years on death row for allegedly raping and murdering a nine-year-old girl, and he had been misidentified by no fewer than five eyewitnesses.[7]

Usually, witnesses testify in good faith, and so they're often devastated when they learn that their testimony helped imprison someone innocent. This was certainly the case with Jennifer Thompson,[8] who, while being attacked, made a conscious effort to remember her rapist's face, only to pick a completely innocent suspect out of a lineup and again identify him as the perpetrator during his trial. Witnesses are often completely honest and devastatingly erroneous at the same time.

External influence, especially in the form of police suggestiveness, can direct how memories are reconstructed. When officers nudge

witnesses in the direction of particular suspects—whether unconsciously or, as we'll see below in the case of Barion Perry, unavoidably—during identification procedures, it can spell disaster. Memory gaps and vague perceptions, as when a terrified victim tries to remember a face when he or she was naturally focused on a weapon, often cause the victim to superimpose a face suggested by police during a lineup onto the attacker. And police routinely implant false memories, often without trying.

To some extent, the Supreme Court has always been aware of this problem. In *U.S. v. Wade*,[9] decided in 1967, the court recognized the impact eyewitnesses have on juries and ruled that (some) police lineups were "critical stages" of criminal prosecutions that often determined the outcome of trials. "The lineup is most often used," the court wrote, "to crystallize the witnesses' identification of the defendant for future reference."[10] That is, police are already fairly certain prior to the lineup that the suspect is guilty. The purpose of the lineup isn't so much to help the police find the culprit as it is to lock the suspect's face into the memory of the witness so he or she will testify confidently at trial. Such confident testimony is often enough to doom a defendant.

Suggestive lineups steer witnesses toward the selection of a particular participant by making him or her stand out, which happened in the case of *Foster v. California*.[11] In that case, police arranged a lineup in which Walter B. Foster was taller than the other participants by about a half foot. To expose and deter suggestive police lineups—that is, to avoid police implantation of false memories—the court ruled in *Wade* that the Sixth Amendment guaranteed suspects the right to have an attorney present. However, the court limited its ruling to lineups conducted

after the suspect has been indicted or otherwise formally charged by a judge. At this stage in the process, the accused has transitioned from suspect to defendant and the need for a lawyer is especially "critical" because the government, having already zeroed in on a particular individual, is conducting the lineup in preparation for trial.

However, most identification procedures take place pre-indictment, and for that reason no defense counsel is present to guard against police misconduct. Foster was uncounseled during his lineup, for example. In *Stovall v. Denno*,[12] decided in 1967 along with *Wade*, police, fearing a stabbing victim might die at any time, brought a suspect to the victim's hospital room for a "show-up." Show-ups are one-person confrontations between witnesses and suspects, often conducted on-scene and impromptu rather than at a police station. In this case, a black suspect, Theodore Stovall, was surrounded by five white police officers and handcuffed to one of them when the victim identified him. There were also two white members of the prosecutor's team in the room. Show-ups are notoriously suggestive and unreliable because they point a finger directly at the suspect. Witnesses inevitably and rationally believe that the officers seized the suspect for a good reason. A number of courts have ruled that show-ups are "inherently suggestive."[13] In *Stovall*, the police could hardly have announced more clearly that they'd found the bad guy if they'd put fangs on him and splashed blood on the front of his shirt.

Theodore Stovall had gone before a judge prior to being identified. However, the show-up took place prior to the court's ruling in *Wade*. The court ruled that *Wade* should not be retroactively

applied and Stovall had no Sixth Amendment right to have a lawyer present during the show-up.[14]

In *Stovall*, the court ruled that the suspect's protection against suggestive identification procedures instead derives from the Fourteenth Amendment's Due Process Clause, which guarantees fundamental fairness throughout the criminal process. Regarding *Stovall*, the court decided that that the victim's identification, while obtained during manifestly suggestive procedures, could nonetheless be used against him at trial because the process was not "so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law."[15] The key word in this sentence is "unnecessarily." The admissibility of certain identifications, no matter how egregiously suggested, the court decided, can be redeemed by exigent circumstances.

Wade and *Stovall* were decided during the heyday of the Warren Court's criminal procedure revolution, when concern for the rights of the accused was at its zenith. But since 1967, the court has, for the most part, continually enhanced the power of law enforcement officers. Freshly stocked with five appointees from Republican presidents, in 1977 the court extended the power it granted the government in *Stovall* and a subsequent case, *Neil v. Biggers*,[16] to also include testimony derived from procedures in which police made no effort at all to minimize suggestiveness. In *Manson v. Brathwaite*,[17] the court decided that identifications from unnecessarily suggestive processes could be admitted, no matter how brazenly police manipulated witnesses, if, after applying a complicated five-prong reliability test that examined the "totality of the circumstances," trial court judges believed there was not "a very substantial likelihood of irreparable misidentification."[18]

These reliability screenings would occur during pretrial hearings, outside the presence of juries. Judges would arrive at their decisions after considering, for example, how clearly the witness could see the perpetrator, and how much attention the witness paid to the perpetrator during the commission of the crime—factors that require analyses that are to some degree inexact and subjective. Exoneration data show that in an alarming number of cases, the failures of this filtration process, and the court's general reluctance to bar questionable eyewitness testimony, have been devastating.[19]

The qualifying language in the *Brathwaite* standard[20] typifies the shift from the civil libertarian vision of the 1960s Warren Court, which tightened judicial oversight of police lineups in *Wade*, to the more law enforcement-friendly Burger Court of the 1970s almost perfectly. A mere likelihood of misidentification isn't enough to keep the identification from the jury. The likelihood must be "very substantial." Moreover, a substantial likelihood of mere misidentification isn't enough. The misidentification must be "irreparable." Justice Thurgood Marshall, who had battled the government in criminal cases as a lawyer, seemed to intuit that the wrongful conviction floodgates had been opened. Dissenting, he wrote, "In my view, the Court's totality test will allow seriously unreliable and misleading evidence to be put before juries. Equally important, it will allow dangerous criminals to remain on the streets."[21]

By the time the court revisited its ruling in *Brathwaite* in 2012, the continued pace of DNA exonerations had thoroughly exposed the "suggestive lineup-to-wrongful conviction" pipeline. Data on DNA exonerations presented in briefs to the court arguing for

reform were compelling and often coupled with harrowing tales of freed inmates whose lives had been broken and scarred. Instead of overruling or minimizing the harmful effects of *Brathwaite*, the court made things worse. It ruled in *Perry v. New Hampshire*[22] that certain suggestive and unreliable identifications are allowed to be used by prosecutors without even subjecting them to the weak and deferential totality test required by the *Brathwaite* decision. While one might be tempted to give the court the benefit of the doubt for ruling as it did in *Brathwaite* back in 1977, when crime rates were high and DNA exoneration data didn't yet exist, the court deserves no such quarter with its ruling in *Perry*. It was a clear statement that reducing wrongful convictions wasn't a high priority.

In *Perry*, a police officer interviewed a witness in the fourth-floor hallway of an apartment building about suspected car burglaries that had just occurred in the adjoining parking lot. Prior to the interview, the witness had seen a different police officer standing next to the suspect, Barion Perry, in the parking lot while looking down from a window. When the interviewing officer asked the witness to describe the perpetrator's appearance, she responded that he was "a tall black man." When asked for a more detailed description, the witness gestured to the window and, according to the interviewing officer's later testimony, said the perpetrator "was the man that was in the back parking lot standing with the police officer."[23] Though unwittingly administered, this type of show-up, involving a suspect standing next to a police officer at the crime scene at 2:30 a.m., undeniably carries a high risk of implanting false images in the reconstructed memories of witnesses.

While the circumstances of Barion Perry's identification may have been less suggestive than the hospital room confrontation in *Stovall*, involving the black defendant cuffed and surrounded by seven white members of the investigation team, subsequent facts suggest the particular identifying witness in *Perry* was actually far less reliable. A month later, she could not identify Perry as the perpetrator in a photographic lineup.[24] The prosecutor didn't put her on the stand at trial. However, the officer was allowed to describe her identification at the apartment complex. The jury convicted Perry.

The court's path should have been clear: When the suspect is a stranger to the victim (as opposed to a familiar face), all identifications derived from gratuitously suggestive identification procedures should be categorically excluded from trial. However, the court ruled in the opposite direction. It not only maintained the ineffective screening system it had put in place with *Brathwaite*, but it also decided that some of the most suggestive procedures and unreliable identifications needn't even be screened. The opinion, written by Justice Ruth Bader Ginsburg, focused on deterring and punishing bad policing rather than minimizing wrongful convictions and limited *Brathwaite* pretrial reliability hearings to only unnecessarily suggestive procedures caused by police misconduct. The witness in Barion Perry's case had looked out the window at the suspect on her own, not at the prompting of police. Because the police had done nothing wrong, the court reasoned, Perry was denied even the right to challenge the identification's reliability at a hearing.

In 1952, the court ruled that when law enforcement practices become so irrational, arbitrary and indecent and that they "shock

the conscience," the Fourteenth Amendment's Due Process Clause requires that they be prohibited.[25] When prosecutors seek convictions based on eyewitness testimony known to be unreliable and known to cause wrongful convictions, as the Supreme Court now allows them to, their conduct rises to this high standard.

In *Perry*, the court expresses faith that rigorous cross-examination by defense attorneys, testimony of expert witnesses on memory and wise judicial instructions will enable juries to recognize for themselves when eyewitnesses are unreliable. "The jury, not the judge, traditionally determines the reliability of evidence," Justice Ginsburg informs us.[26] As Edwin Borchard wrote in "Convicting the Innocent" back in 1932, "[T]he ways of juries are strange."[27] Stranger, it seems, than Justice Ginsburg and her colleagues in the *Perry* majority were willing to appreciate.

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[1] *In Focus: Eyewitness Misidentification*, Innocence Project https://innocenceproject.org/in-focus-eyewitness-misidentification/.
[2] *Elizabeth Loftus*, FRONTLINE (February 25, 1997), https://www.pbs.org/wgbh/pages/frontline/shows/dna/interviews/loftus.html.
[3] Elizabeth Loftus & Katherine Ketcham, Witness for the Defense 20 (1991).
[4] Edwin M. Borchard, *Convicting the Innocent: Sixty-Five Actual Errors of Criminal Justice* (1932).
[5] Innocence Project https://innocenceproject.org/how-eyewitness-misidentification-can-send-innocent-people-to-prison/.
[6] Innocence Project https://innocenceproject.org/cases/kirk-bloodsworth/.
[7] Rob Warden, *Kirk Bloodsworth*, National Registry of Exonerations (April 28, 2022), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3032.
[8] *Healing as a crime survivor of a wrongful conviction*, Innocence Project https://innocenceproject.org/healing-as-a-crime-survivor-of-a-wrongful-conviction/.
[9] U.S. v. Wade, 388 U.S. 218 (1967).
[10] *Id*. at 240.

[11] Foster v. California, 394 U.S. 440 (1969).
[12] Stovall v. Denno, 388 U.S. 293 (1967).
[13] *See* Blanco v. State, 452 So.2d 520, 524 (1984); Commonwealth v. Johnson, 420 Mass. 458, 461 (1995).
[14] Stovall, *supra* note 12 at 302.
[15] *Id*.
[16] Neil v. Biggers, 409 U.S. 188 (1972).
[17] Manson v. Brathwaite, 432 U.S. 98 (1977).
[18] *Id*. at 116.
[19] *Exoneration Detail List*, https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx?SortField=MWID&View=%7Bfaf6eddb-5a68-4f8f-8a52-2c61f5bf9ea7%7D&FilterField1=MWID&FilterValue1=8%5FMWID&FilterField2=DNA&FilterValue2=8%5FDNA&SortDir=Asc.
[20] Some scholars refer to this as the "Manson Test." *See* Benjamin Wiener, Comment, *Revisiting the Manson Test: Social Science as a Source of Constitutional Interpretation*, 16 U. PA. J. CONST. L. 861 (2014). I have followed the example set by the Supreme Court in *Perry v. New Hampshire* and used "Brathwaite" for short citations. *See* Perry v. New Hampshire, 565 U.S. 228, 239 (2012).
[21] Brathwaite, s*upra* note 17 at 128.
[22] Perry, *supra* note 20.
[23] *Id.* Brief for Petitioner at 4.
[24] *Id*. at 234.
[25] Rochin v. California, 342 U.S. 165 (1952).
[26] Perry, *supra* note 20 at 245.
[27] Borchard, *supra* note 4 at 181.