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Manson v. Brathwaite Revisited:Towards a New Rule of Decision for Due Process Challenges

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Giovanna Shay and Timothy O'Toole

Abstract

A major cause of wrongful convictions is mistaken eyewitness identification. The leading Supreme Court case governing due process challenges to identification procedures, Manson v. Brathwaite, is almost 30 years old, and does not account for decades of social science research on eyewitness I.D. In fact, parts of the Manson test designed to ensure reliability run counter to research findings. In this piece, O'Toole and Shay describe the problems with the Manson test, and propose a new rule of decision for due process challenges to identification procedures.

Manson v. Brathwaite Revisited: Towards a New Rule of Decision for Due Process Challenges To Eyewitness Identification Procedures

By Timothy P. O'Toole[1] and Giovanna Shay[2]

Introduction

Almost 30 years ago, in *Manson v. Brathwaite*,[3] the Supreme Court set out a test for determining when due process requires suppression of an out-of-court identification produced by suggestive police procedures. The *Manson* Court rejected a per se exclusion rule in favor of a test focusing on whether an identification infected by suggestive procedures is nonetheless reliable when judged in the totality of the circumstances.[4] The purpose of this article is two-fold: to demonstrate that the *Manson* rule of decision fails to safeguard due process values, in part because it does not account for the intervening social science research, and to initiate a conversation about how a more effective rule of decision could be constructed.

To use the vocabulary introduced by Prof. Mitchell Berman, the *Manson* Court identified both an operative constitutional proposition and a rule of decision for due process challenges to identification procedures.[5] The operative constitutional proposition identified by the *Manson* Court was that the Due Process Clause of the Fourteenth Amendment requires "fairness" in identification procedures, and, specifically, "reliability."[6] "[R]eliability is the linchpin," Justice Blackmun wrote for the Court.[7] The *Manson* rule of decision thus provides that, even if a procedure is determined to be unnecessarily suggestive, results will nonetheless be admitted if they are deemed reliable based on five factors: "the opportunity of the witness to view the criminal at the time of the crime, the witness's degree of attention, the accuracy of the witness's prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation."[8]

Sadly, the rule of decision set out in *Manson* has failed to meet the Court's objective of furthering fairness and reliability. The results have been tragic. Since 1989, 340 people have been exonerated in the United States after having previously been

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[3] 432 U.S. 98 (1977).
[4] 432 U.S. at 113-14.
[5] Mitchell Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 15 (March 2004). *See also* Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (January 1984).
[6] 432 U.S. at 113.
[7] *Id.* at 113-14.
[8] *Id.* at 114.

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convicted by juries of serious crimes.[9] Media reports of exonerations have now become commonplace.[10] Mistaken eyewitness identification was a leading cause of these wrongful convictions, by one estimate accounting for 88% of the erroneous rape convictions and 50% of the false murder convictions.[11] The Department of Justice has issued a report analyzing twenty-eight DNA exonerations and concluding that inaccurate eyewitness testimony was "the most compelling evidence" in the majority of these cases.[12] Indeed, questions have even been raised about whether Texas executed an innocent teenager, Ruben Cantu, in 1993, after police allegedly pressured the only eyewitness, an illegal immigrant who was shown Cantu's photograph repeatedly, to identify the boy.[13]

The Ronald Cotton case, a DNA exoneration, provides a particularly compelling example of the dangers of mistaken identification. In the early morning hours of July 29, 1984, an intruder sexually assaulted a college student named Jennifer Thompson in her North Carolina home.[14] Two days later, Ms. Thompson viewed a photo array containing six pictures, one of them of a man named Ronald Cotton.[15] Ms. Thompson initially chose two pictures from the array, including Cotton's photo.[16] She examined these two pictures and told police that Cotton's photo "looks most like" the assailant.[17] About a week later,

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[9] Samuel R. Gross et al., *Exonerations in the United States 1989 through 2003*, J. OF CRIM. L. & CRIMINOLOGY, at 524 (Winter 2005). *See also* Michael L. Radelet, William S. Lofquist, Hugo Adam Bedau, *Prisoners Released From Death Rows Since 1970 Because of Doubts About Their Guilt*, 13 THOMAS M. COOLEY L. REV. 907 (1996) (describing 68 cases of death row inmates "later released because of doubts about their guilt.")

[10] *See* BARRY SHECK, PETER NEUFELD, JIM DWYER, ACTUAL INNOCENCE 276 (2001); LOLA VOLLEN & DAVE EGGERS, SURVIVING JUSTICE: AMERICA'S WRONGFULLY CONVICTED AND EXECUTED (2005). *See, e,g,* Barbara Novovitch, *Free After 17 Years for a Rape That He Did Not Commit*, NEW YORK TIMES, December 22, 2004; Colin Garrett, *Another DNA Exoneration, Another Death Row Inmate Freed,* THE CHAMPION, at 47 (December 2004), John M. Broder, *Starting Over, 24 Years After a Wrongful Conviction*, NEW YORK TIMES, June 21, 2004; Adam Liptak, *Houston DNA Review Clears Convicted Rapist, and Ripples in Texas Could be Vast*, NEW YORK TIMES, March 11, 2003; David Firestone, *DNA Test Brings Freedom, 16 Years After Conviction*, NEW YORK TIMES, June 16, 1999.

[11] Gross et al., *supra* note ____, at 544.

[12] U.S. DEP'T OF JUSTICE, CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL 24 (June 1996).

[13] Lise Olsen, *The Cantu Case: Death and Doubt. Did Texas Execute an Innocent Man? Eyewitness Says He Felt Influenced by Police to ID the Teen as the Killer*, HOUSTON CHRONICLE, November 21, 2005, at __.

[14] *State v. Cotton*, 394 S.E. 2d 456, 457 (Ct. App. N.C. 1990).

[15] *Id.* at 461 (Johnson, J., dissenting).

[16] *Id.*

[17] *Id.*

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Ms. Thompson viewed a live line-up in which Cotton was the only participant whose picture also had been in the photo array.[18] Ms. Thompson was told to pick the man who looked the most like her assailant.[19] She told police that she was deciding between participants numbers four and five, but stated that number five "looks the most like him."[20] In 1986, Ms. Thompson testified at trial, and again identified Mr. Cotton, who was convicted.[21] Describing these events years later, Ms. Thompson said, "I knew this was the man. I was completely confident. I was sure."[22] In 1987, Ms. Thompson again identified Mr. Cotton when he was granted a new trial.[23] At the retrial, she told authorities that she had never seen another man, Bobby Poole, who claimed to be her attacker.[24] Eleven years after Ms. Thompson's first identification, in 1995, Ronald Cotton was exonerated by DNA evidence.[25] DNA testing demonstrated that Bobby Poole—who ultimately pled guilty to the rape of Jennifer Thompson—was the real culprit.[26] Writing years after the exoneration, Jennifer Thompson said, "I live with constant anguish that my profound mistake cost [Mr. Cotton] so dearly."[27]

Exonerations like Ronald Cotton's have illustrated what many have long suspected: eyewitnesses make mistakes in identifying strangers.[28] Of course, there are no doubt many more cases in which innocent people were convicted based on faulty eyewitness identification but never exonerated: for obvious reasons, DNA exonerations are more common in crimes involving sexual assault than in, for example, shootings or purse-snatchings.[29] And due to scarce resources usually only the most serious convictions are accorded the level of scrutiny that can produce a conclusive exoneration. Nonetheless, even an under-reported rate of exonerations suggests that protections designed to vet the reliability of eyewitness identification evidence—and of most interest here the *Manson* due process test—are not up to the task.[30]

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[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] Jennifer Thompson, *I Was Certain, But I Was Wrong*, N.Y. TIMES, June 18, 2000.
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *Id.* at 523-24, 542.
[29] SCHECK, NEUFELD & DWYER, ACTUAL INNOCENCE at xx.
[30] The most recent experience in Virginia shows the number of wrongful convictions produced by eyewitness identifications may be substantial. In 2004, Gov. Mark Warner ordered scientists to conduct DNA testing on a small, randomly-selected percentage of sexual assault cases tried between 1973 and 1988 to determine if a more widespread DNA testing of the hundreds of convictions obtained during that time would be warranted. Of the 31 cases reviewed, two exonerations occurred. In other words, 6 percent of the randomly sampled cases tested resulted in exonerations. Predictably, both Virginia exonerations involved convictions that relied heavily on eyewitness testimony.

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The most obvious problem with the *Manson* rule is that the factors it sets out have proven not to be good indicators of reliability. Indeed, *Manson* is a prime example of Prof. Kermit Roosevelt's observation that, "decision rules that made sense when adopted may lose their fit."[31] During the past three decades, and at an increasing pace over the past 10-15 years, research has demonstrated that some of the *Manson* reliability factors can be skewed by faulty police practices, and that the list as a whole is substantially incomplete.[32] Psychologists including Gary L. Wells, Elizabeth Loftus, Brian Cutler, Steven Penrod, and others have conducted studies demonstrating that human memory for strangers' faces is fallible and identifying the circumstances in which people's ability to remember strangers' faces is particularly prone to error.[33] Eyewitnesses are vulnerable to suggestion;[34] their confidence in their picks is not necessarily strongly correlated with their accuracy;[35] and their confidence level is malleable and can be infected by suggestive procedures.[36]

The problem with the *Manson* rule of decision, however, runs even deeper than any issues with individual reliability factors. The *Manson* factors have become reduced to a "checklist" to determine reliability, and a "checklist' is a poor means of making a determination as subtle, fact-intensive, and case-specific as whether a given eyewitness identification is reliable despite the use of suggestive police procedures. Even if an eyewitness identification meets all five of the *Manson* factors, it may prove to be unreliable for reasons that the *Manson* Court could not have imagined. Yet because the Court has decreed a litmus test—or at least because the lower courts have read it that way—the unreliable identification will be admitted. Indeed, the *Manson* factors have been reified. As described below in Part ___, in the minds of many courts, it appears that there can be no due process problem if a number of these factors can be gleaned from the record. This mode of operating appears to us to be akin to the phenomenon of

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See Michael D. Shear and Jamie Stockwell, *DNA Tests Exonerate 2 Former Prisoners*, WASH. POST., December 15, 2005, at A01.

[31] Kermit Roosevelt, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 VA. L. REV. 1649, 1686 (November 2005).

[32] Gary Wells, *What is Wrong With the Manson v. Brathwaite Test of Eyewitness Identification Accuracy?*, www.psychology.iastate.edu/faculty/gwells/homepage.htm.

[33] *See* Gary Wells, *Eyewitness Identification Evidence: Science and Reform*, THE CHAMPION, at 12 (April 2005) (surveying the psychological literature in this area); Gary L. Wells & Elizabeth A. Olson, *Eyewitness Testimony*, 54 ANNU. REV. PSYCHOL., at 277 (2003).

[34] *See* Bill Nettles, Zoe Sanders Nettles, Gary L. Wells, *Eyewitness Identification: "I Notice You Paused on Number Three,"* at 10, THE CHAMPION (November 1996).

[35] *See* Gary L. Wells, Elizabeth A. Olson, and Steve D. Charman, *The Confidence of Eyewitnesses in Their Identifications From Lineups*, CURRENT DIRECTIONS IN PSYCHOLOGICAL SCIENCE, at 151 (2002).

[36] *See* Gary L. Wells & Amy L. Bradfield, *"Good, You Identified the Suspect": Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience*, 83 (3) J. APPLIED PSYCHOLOGY, at 360 (1998).

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"constitutional calcification" described by Prof. Roosevelt: an outmoded rule of decision is mistaken for the constitutional operative proposition.[37]

Criticism of the *Manson* rule has come from many quarters and taken varied forms. For years, psychologists have attempted to make their research findings known to the legal and criminal justice communities, and to change police procedures.[38] Naturally, defense attorneys also have sought to use this research to best advantage, attempting to get experts admitted to discuss the failings of eyewitness identification, or to have juries instructed that eyewitnesses can be mistaken.[39]

Legal commentators have criticized the *Manson* test as a poor way of determining which identifications should be excluded at trial on grounds of unreliability.[40] Some have suggested that the Court adopt a rule of *per se* exclusion of identifications that are the product of suggestive police procedures,[41] loosen the standards for admitting expert testimony on eyewitness identification,[42] require corroboration for eyewitness identifications in some circumstances,[43] or mandate certain police procedures.[44]

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[37] Roosevelt, *Constitutional Calcification*, 91 VA. L. REV. at 1692-93.

[38] *See*, *e.g.*, Gary L. Wells, *Police Lineups*, 7 PSYCHOL. PUB. POL'Y & L. 791 (December 2001); Gary L. Wells, et al., *From the Lab to the Police Station: A Successful Application of Eyewitness Research*, AMERICAN PSYCHOLOGIST, at 581 (June 2000) (documenting collaboration of the Technical Working Group for Eyewitness Evidence that resulted in the 1999 National Institute of Justice (NIJ) report)); Wells, *Eyewitness Identification Evidence*; G.L. Wells, M. Small, S. Penrod, R Malpass, S. Fulero, and C.A.E. Brimacombe, *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 (6) LAW AND HUMAN BEHAVIOR 603, 618 (1998).

[39] *See*, *e.g.*, Lisa Steele, *Trying Identification Cases: An Outline for Raising Eyewitness ID Issues*, THE CHAMPION, at 8 (November 2004).

[40] B. Rosenberg, *Rethinking the Right to Due Process in Connection with Pretrial Identification Procedures: An Analysis and a Proposal*, 79 KY. L.J. 259 (Winter 1990-91); S. Grossman, *Suggestive Identifications: The Supreme Court's Due Process Test Fails to Meet Its Own Criteria*, 11 U. BALT. L. REV. 53 (1981-82); D. Paseltiner, *Twenty-Years of Diminishing Protection: A Proposal to Return to the Wade Trilogy's Standard*, 15 HOFSTRA L. REV. 583 (Spring 1987).

[41] Rosenberg, *supra* note 21, at 306, 314; Paseltiner, *supra* note 21, at 604. *See also* Jessica Lee, *No Exigency, No Consent: Protecting Innocent Suspects From Consequences of Non-Exigent Show-Ups*, 36 COLUM. HUMAN RIGHTS L. REV. 755 (Summer 2005); Margery Malkin Koosed, *The Proposed Innocence Protection Act Won't – Unless It Also Curbs Mistaken Eyewitness Identification*, 63 OHIO ST. L. J. 263 (2002).

[42] Rosenberg, *supra* note 21, at 310; Robert J. Hallisey, *Experts on Eyewitness Testimony in Court – A Short Historical Perspective*, 39 HOWARD L.J. 237 (Fall 1995); David M. Shofi, *The New York Courts' Lack of Direction and Discretion Regarding the Admissibility of Expert Identification Testimony*, 13 PACE L. REV. 1101 (Winter 1994); Connie Mayer, *Due Process Challenges to Eyewitness Identification Based on Pretrial Photographic Arrays*, 13 PACE L. REV. 815 (Winter 1994); Cindy T. O'Hagan, *When Seeing is Not Believing: The Case for Eyewitness Expert Testimony*, 81 GEO. L. J. 741

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Some state courts have attempted to respond to the criticism of *Manson*. A number of local appeals courts have interpreted their state constitutions to afford greater due process protections than the federal Constitution as interpreted by *Manson*.[45] Others have adopted a refined version of the *Manson* test on state law grounds,[46] or have mandated special jury instructions in some circumstances.[47]

In recent years, local legislatures and law enforcement agencies have made efforts to improve identification procedures. The National Institute of Justice (NIJ) of the Department of Justice (DOJ) has published a report on DNA exonerations,[48] and two guides on protocols for conducting eyewitness identifications.[49] States including New Jersey, Virginia, and Wisconsin and cities including Seattle and Minneapolis have adopted police procedures for line-ups based on best practices from the psychological literature.[50]

(1993); Wayne T. Westling, *The Case for Expert Witness Assistance to the Jury in Eyewitness Identification Cases*, 71 OR. L. REV. 93 (1992).

[43] *See*, e.g., Radha Natarjan, *Racialized Memory and Reliability: Due Process Applied to Cross-Racial Eyewitness Identification*, 78 N.Y.U. L. REV. 1821 (2003).

[44] *See, e.g.,* Jake Sussman, *Suspect Choices: Lineup Procedures and the Abdication of Judicial Authority*, 27 N.Y.U. REV. L. & SOC. CHANGE 507 (2001-2002).

[45] *See State v. Dubose*, 699 N.W. 2d 582, 596-97 (Wis. 2005); *Commonwealth v. Johnson*, 420 Mass. 458 (Mass. 1995); *People v. New York*, 53 N.Y. 2d 241 (N.Y. 1981).

[46] *State v. Hunt*, 275 Kan. 811, 818-19 (Kan. 2003); *State v. Ramirez*, 817 P.2d 774 (Utah 1991).

[47] *See*, *e.g.*, *Brodes v. State*, 614 S.E. 2d 766, 771 (Ga. 2005) (recognizing that it is error for trial courts to instruct jurors to consider a witness's confidence in evaluating the credibility of their identification); *State v. Cromedy*, 158 N.J. 112, 132 (N.J. 1999) ("A cross-racial instruction should be given only when, as in the present case, identification is a critical issue in the case, and an eyewitness['] cross-racial identification is not corroborated by other evidence giving it independent reliability.")

[48] NATIONAL INSTITUTE OF JUSTICE RESEARCH REPORT, CONVICTED BY JURIES, EXONERATED BY SCIENCE (1999).

[49] NATIONAL INSTITUTE OF JUSTICE, EYEWITNESS EVIDNECE: A GUIDE FOR LAW ENFORCEMENT (1999); NATIONAL INSTITUTE OF JUSTICE, EYEWITNESS EVIDENCE: A TRAINER'S MANUAL FOR LAW ENFORCEMENT (October 2003).

[50] Gina Kolata & Iver Peterson, *New Jersey Is Trying New Way for Witnesses to Say, "It's Him,"* NEW YORK TIMES, July 21, 2001; Karin Brulliard, *Revamping Virginia's Police Lineups*, THE WASHINGTON POST, at C01, March 6, 2005; *Police Lineups' Flaws Spur New Approach*, CHICAGO TRIBUNE, at 1, February 7, 2005. *See also* Scott Ehlers, *Eyewitness Identification: State Law Reform*, THE CHAMPION, at 34 (April 2005) (surveying state legislative reform efforts). *See* www.innocenceproject.org, last checked on ______________, for a complete list of jurisdictions that have implemented or are implementing improved eyewitness identification procedures.

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Despite all of the criticism and reform efforts, however, the nation's highest Court has yet to confront the need to overhaul *Manson*'s outdated rule. Advocates are increasingly calling on the Court to do just that.[51] This article attempts to demonstrate that *Manson* must be revisited, and to open a conversation about what rule of decision would best further the operative constitutional propositions of "fairness" and "reliability" identified by the *Manson* Court. Any new rule of decision should, as Professors Meares and Harcourt have argued, take account of the considerable social science research in this area.[52] Further, it is our view that the new rule should provide affirmative minimum guidelines for the conduct of identification procedures.

I. The Psychological Research

In the time since the Supreme Court decided *Manson*, psychologists have made great strides in understanding how people remember strangers' faces, and, specifically, some of the factors that cause mistaken identifications. The fundamental problem is that human perception and memory do not work like a video recorder—while a camera simply stores information for later recall, human memory is both subjective and malleable.[53] Prof. Wells has described eyewitness identification evidence as a form of "trace evidence"; instead of leaving a physical trace like blood stains or fingerprints, however, eyewitness evidence leaves a "memory trace" in the mind of the observer.[54] The question is how to extract this evidence without damaging it.[55]

Researchers have identified a number of sources of error in eyewitness evidence. For example, psychologists have documented a "relative judgment" dynamic affecting simultaneous lineups, which are lineups in which all suspects are presented to the witness at the same time.[56] The relative-judgment process occurs when the witness selects the member of the lineup who most resembles his or her memory of the culprit, relative to the other members of the lineup.[57] An experiment using two photo spreads—one

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[51] The authors are aware of at least two cert petitions filed this year asking the U.S. Supreme Court to reexamine *Manson*. *See Perez v. United States*, No. 05-596, 2005 WL 3038542, *cert. denied* March 3, 2006 (arguing that the certainty factor must be reconsidered in light of psychological research and state courts' rejection of it); *Ledbetter v. Connecticut*, No. 05-9500, *cert petition filed*, March 1, 2006.

[52] Tracey L. Meares & Bernard Harcourt, 90 J. CRIM. L. & CRIMINOLOGY 733, 743, 797 (2000).

[53] D.A. Louw & A. Venter, *The Relationship Between Memory and the Recall of Specific Details*, 23 MED. & L. 625, at 626 (2004).

[54] G.L. Wells, et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 (6) LAW AND HUMAN BEHAVIOR 603, 618 (1998).

[55] *Id.*

[56] G. Wells & E. Olson, *Eyewitness Testimony*, 54 ANNU. REV. PSYCHOL. 277, at 279 (2002).

[57] G. Wells & E. Seelau, *Eyewitness Identification: Psychological Research and Legal Policy on Lineups*, 1(4) PSYCHOLOGY, PUBLIC POLICY, & LAW 765, 768-69 (1995).

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containing the culprit and one from which the culprit was absent—demonstrated that, once the culprit was removed from the photo array, many witnesses simply picked another person, presumably the one that they thought looked the most like him.[58] It is for this reason that researchers have recommended instructing witnesses that the culprit might not be present in the lineup, a simple measure demonstrated in one experiment to reduce mistaken identifications from 78% to 33%.[59] Psychologists also have recommended that law enforcement authorities use sequential lineups, in which the witness is shown a series of suspects, one at a time, and asked to make a decision about each one individually.[60]

Another problem that psychologists have documented in the context of lineups and photo arrays is the "experimenter-expectancy" effect, in which the person conducting the identification procedure—whether consciously or unconsciously—directs the witness's attention to the suspect.[61] In order to combat this problem, researchers have recommended that law enforcement agencies implement "double-blind" procedures for conducting lineups or photo arrays, in which the detective conducting the identification procedure does not know which person is the suspect.[62] Psychologists point out that "double-blind" procedures are standard in scientific experiments, and that identification procedures are properly considered a type of experiment.[63]

The relationship between an eyewitness's confidence and his or her accuracy—of great relevance to one of the *Manson* factors—has been the subject of extensive research.[64] The confidence-accuracy correlation varies depending on the circumstances, but many studies indicate that, even at its highest, it is fairly modest.[65] Some studies indicate that, in poor witnessing conditions, the correlation between confidence and

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[58] Wells & Seelau, *supra* note___, at 770.
[59] Wells & Seelau, *supra* note___, at 769. *See also* Wells et al, *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 (6) LAW AND HUMAN BEHAVIOR, , at 628-29.
[60] Wells & Seelau, *supra* note___, at 772; Wells et al, *Eyewitness Identification Procedures*, *supra* note ____, at 639.
[61] Wells & Seelau, *supra* note___, at 775-78.
[62] Wells et al., *Eyewitness Identification Procedures*, 22 (6) LAW AND HUMAN BEHAVIOR, at 627; G. Wells & E. Olson, *Eyewitness Testimony*, 54 ANNU. REV. PSYCHOL. 277, 289 (2002).
[63] *Id.*
[64] *See* G. Wells, E. Olson & S. Charman, *The Confidence of Eyewitnesses in Their Identifications From Lineups*, 11 (5) CURRENT DIRECTIONS IN PSYCHOLOGICAL SCIENCE 151 (October 2002); Neil Brewer, Amber Keast, and Amanda Rishworth, *The Confidence-Accuracy Relationship in Eyewitness Identification: the Effects of Reflection and Disconfirmation on Correlation and Calibration*, 8(1) J. EXPERIMENTAL PSYCHOLOGY 44 (2002); S. Penrod & B. Cutler, *Witness Confidence and Witness Accuracy: Assessing Their Forensic Relation*, 1(4) PSYCHOLOGY, PUBLIC POLICY & LAW 817 (1995).
[65] G. Wells, et al., *The Confidence of Eyewitnesses, supra* note ____, at 152.

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accuracy can be non-significant, or even negative.[66] A recent study co-authored between Prof. Gary Wells and Prof. Neil Brewer suggests that confidence statements made at the time of the identification may be meaningful, but Professors Wells and Brewer caution that the same probably is not true of confidence statements made in court. They explain that the confidence statements in their study were "protected from the biasing effects of any of the typical social influences that . . . can operate between the time of making an identification and giving testimony in the courtroom."[67]

This distinction is significant because the most troubling aspect of eyewitness confidence is that it is highly malleable. For example, seemingly innocuous confirmatory feedback to the witness from the person conducting the line-up, (e.g., "Good, you got him!" or "You got the right guy") has been demonstrated to increase confidence.[68] Even routine procedures can enhance confidence artificially: briefing the witness about the types of questions to expect on cross-examination,[69] questioning the witness repeatedly,[70] or telling the witness that another witness picked the same suspect.[71] Unfortunately, many of these effects have been demonstrated to inflate the certainty of inaccurate witnesses more than that of accurate witnesses.[72]

Most disturbing, post-identification feedback from the line-up administrator not only inflates a witness's certainty about her choice, but also affects her perception of her opportunity to view the event.[73] "For example, confirming feedback has been shown to influence witnesses' accounts of how much attention they paid to the face of a perpetrator, how good their view was, and how well they thought they made out the

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[66] Kenneth A. Deffenbacher, *Eyewitness Accuracy and Confidence: Can We Infer Anything About Their Relationship?*, 4(4) LAW AND HUMAN BEHAVIOR 243, 253 (1980).
[67] Neil Brewer, Gary L. Wells, *The Confidence-Accuracy Relationship in Eyewitness Identification: Effects of Lineup Instructions, Foil Similarity and Target-absent Base Rates*, *forthcoming in* J. OF EX. PSYCH: APP. (Date).
[68] G. Wells & A. Bradfield, *"Good, You Identified the Suspect": Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience*, 83 (3) JOURNAL OF APPLIED PSYCHOLOGY 360, 374 (1998).
[69] S. Penrod & B. Cutler, *Witness Confidence & Witness Accuracy: Assessing Their Forensic Relation*, 1(4) PSYCHOLOGY, PUBLIC POLICY, AND THE LAW 817, 827 (1995).
[70] S. Penrod & B. Cutler, *supra* note ___, at 827.
[71] G. Wells & E. Seelau, *supra* note ____, at 774-75.
[72] A. Bradfield, G. Wells, & E. Olson, *The Damaging Effect of Confirming Feedback o the Relation Between Eyewitness Certainty and Identification Accuracy*, 87 (1) JOURNAL OF APPLIED PSYCHOLOGY 112 (2002); S. Penrod & B. Cutler, *Witness Confidence and Witness Accuracy*, at 827.
[73] C. Semmler, N. Brewer, G. Wells, *Effects of Postidentification Feedback on Eyewitness Identification and Nonidentification Confidence*, 89 (2) JOURNAL OF APPLIED PSYCHOLOGY 334 (2004); G. Wells. & A. Bradfield, *"Good, You Identified the Suspect": Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience*, 83 (3) JOURNAL OF APPLIED PSYCHOLOGY, at 366.

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details of the perpetrator's face."[74] A confirming feedback remark "not only inflates the eyewitnesses' recollections of how confident they were at the time, it also leads them to report that they had a better view of the culprit, that they could make out details of the face, that they were able to easily and quickly pick him out of a lineup, that his face just 'popped out' to them, that their memorial image of the gunman is particularly clear, and that they are adept at recognizing faces of strangers."[75]

The problems with the *Manson* rule of decision are fairly obvious in light of the psychological research, and have been described by Prof. Gary Wells in a forthcoming article.[76] Three of the five *Manson* factors—the witness's opportunity to view, the witness's degree of attention, and the witness's level of certainty—are generally self-reported by the witness, and self-reports of memory are "notoriously unreliable."[77] The witness's level of certainty is suspect because, as discussed above, the confidence-accuracy correlation is weak.[78] Moreover, the witness's assessment of her confidence, her opportunity to view, and her degree of attention may all be distorted by post-identification feedback from the police, repeated questioning, or preparation to testify.[79]

Even more fundamentally, as Prof. Wells has pointed out, the *Manson* inquiry is flawed because the suggestive nature of the police procedures actually taints the reliability factors, thus undermining the intended purpose of the second step of the analysis.[80] In other words, the factors that should provide an independent assurance that an identification was not tainted by suggestive police procedures are themselves infected by the suggestive identification methods. Put another way, the *Manson* rule of decision is self-fulfilling.

II. The *Manson* Rule of Decision

How did the Court arrive at the *Manson* rule of decision with these five factors that are now so problematic? In *Manson*, the Court adopted what Prof. Charles Pulaski termed in a prescient 1974 article a "permissive construction of the due process test."[81] *Manson* constituted a type of compromise—a step backward from the protections that the Court had instituted in a trilogy of 1967 eyewitness identification decisions.

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[74] Semmler, Brewer & Wells, *Postidentification Feedback and Confidence*, at 335.
[75] Wells and Bradfield, *"Good, You Identified the Suspect,"* at 374.
[76] Wells, *What is Wrong With the Manson v. Brathwaite Test?*, *available at* www.psychology.iastate.edu/faculty/gwells/homepage.htm.

[77] *Id.*
[78] Wells, Olson & Charman, *Confidence of Eyewitnesses*, *supra* note ____, at 152.
[79] Wells & Bradfield, *"Good, You Identified the Subject," supra* note ____, at 367.
[80] *Id.* at 374-75.
[81] Charles A. Pulaski, *Neil v. Biggers: The Supreme Court Dismantles the Wade Trilogy's Due Process Protection*, 26 STAN. L. REV. 1097, 1111 (1973-74).

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In 1967, the Supreme Court decided three eyewitness identification cases—*United States v. Wade*,[82] *Gilbert v. California*,[83] and *Stovall v. Denno*.[84] *Wade* instituted what some consider a type of prophylactic rule,[85] concluding that the Sixth Amendment entitled the defendant to the assistance of counsel at a post-indictment line-up.[86] In reaching this conclusion, the *Wade* Court noted the "vagaries of eyewitness identification,"[87] and the "potential for improper influence" at line-ups,[88] and concluded that, "the presence of counsel itself can often avert prejudice and assure a meaningful confrontation at trial."[89] Citing *Miranda*, the *Wade* Court noted that its decision was not meant to stifle reform of identification procedures, and that it "in no way creates a constitutional straitjacket which will handicap sound efforts at reform, nor is it intended to have this effect."[90]

In *Wade* and its companion case, *Gilbert*, the Supreme Court addressed when the government could nonetheless introduce in-court identifications despite earlier uncounseled out-of-court identifications by the same witness; the *Gilbert* Court held that the government could only introduce the in-court identifications if it demonstrated by clear and convincing evidence that they "were based upon observations of the suspect other than the lineup indentification,"[91] i.e., had an independent source.[92] Thus, if the prosecution could satisfy this hurdle, it could elicit an in-court identification, even if it could not "bolster" the in-court identification with evidence of a tainted out-of-court identification.[93]

In the final case of the *Wade* trilogy, *Stovall*, the Supreme Court said that the *Wade* rule was not retroactive. The *Stovall* Court criticized a show-up identification procedure that was used in that case, but concluded that, although suggestive, it did not constitute a violation of due process based on the "totality of the circumstances," in which "an immediate hospital confrontation" between the critically-wounded victim and the suspect was "imperative."[94]

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[82] 388 U.S. 218 (1967).
[83] 388 U.S. 263 (1967).
[84] 388 U.S. 293 (1967).
[85] *Contrast* Henry P. Monaghan, *The Supreme Court 1974 Term: Foreword Constitutional Common Law*, 89 HARV. L. REV. 1, 20 & nn. 106-07, 23 (1975) (categorizing the *Wade* rule as a prophylactic rule), *with* Joseph D. Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 NW. U. L. REV. 100, 119 (1985) (arguing that *Wade* was improperly categorized as prophylactic).
[86] 388 U.S. at 236.
[87] *Id.* at 228.
[88] *Id.* at 233.
[89] *Id.*
[90] *Id.* at 239.
[91] *Wade*, 388 U.S. at 240.
[92] *Gilbert*, 388 U.S. at 273.
[93] Pulaski, 26 STAN. L. REV. at 1101.
[94] *Stovall*, 388 U.S. at 302.

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The following year, in *Simmons v. United States*, the Supreme Court seemed to shift the *Stovall* formulation substantially.[95] In considering whether a photo identification procedure violated due process, the Court cited *Stovall* for the proposition that the procedure there had not been "unnecessary"—a description that seemed to accurately reflect *Stovall*'s holding—but then went on to examine the circumstances surrounding the identification itself, ultimately concluding that they "leave little room for doubt that the identification of Simmons was correct."[96] As Prof. Pulaski has explained, the "reworded language of the *Simmons* due process test suggested a very different inquiry . . . . Instead of focusing solely on the necessity and suggestivity of the procedures used by police, the Court then asked the far broader question of how likely it was that the eyewitness misidentified the defendant?"[97] The *Simmons* due process test "attributed critical importance to the nature and extent of the witness's ability to observe the offender at the scene of the crime, a factor *Stovall* did not consider."[98]

Thus, as explained by Prof. Pulaski, after *Simmons*, there existed two competing versions of the due process test for eyewitness identification. The "strict" construction as exemplified by *Stovall* weighed the "suggestiveness of the proceeding against the necessity of its use."[99] The "permissive" construction exemplified by *Simmons* declined to deem suggestive procedures due process violations "if the witness had an opportunity at the time of the crime to identify the offender accurately."[100] The second, more permissive approach conceived of the due process rule "as a protection against the admission of unreliable evidence, rather than as a bar to the use of unreliable procedures."[101]

In 1972, in *Neil v. Biggers*, the Supreme Court adopted the permissive construction of the due process case, at least with respect to pre-*Stovall* cases.[102] The Court reasoned that, since the offense and trial in *Biggers* occurred prior to the Court's decision in *Stovall*, deterrence of police misconduct—one of the major rationales for the "strict" formulation—was not an issue.[103] The *Biggers* Court concluded that a show-up did not violate due process if "under the totality of the circumstances the identification was reliable even though the confrontation procedure was suggestive."[104] The Court

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[95] Pulaski, 26 STAN. L. REV. at 1108.
[96] *Simmons*, 390 U.S. at 385.
[97] *Id.* at 1108.
[98] Pulaski, 26 STAN. L. REV. at 1108.
[99] *Id.* at 1112.
[100] *Id.* at 1112.
[101] *Id.*
[102] 409 U.S. 188, 199-200 (1972).
[103] *Id.* at 199.
[104] *Id.* at 199. *See* Pulaski, 26 STAN. L. REV. at 1116 ("Since a major purpose of the strict test is to deter police from arranging unnecessarily suggestive confrontations, the Court suggested in *Neil* that no deterrent function would be served by applying a strict construction of the *Stovall* rule to a pre-*Stovall* case.")

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identified for the first time "the factors to be considered in evaluating the likelihood of misidentification include[ing] the opportunity of the witness to view the criminal at the time of the crime, the witness's degree of attention, the accuracy of the witness's prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation."[105]

Writing in 1974, between the Court's decisions in *Biggers* and *Manson*, Prof. Pulaski warned that adopting the *Biggers* test for post-*Stovall* cases would "eliminate whatever incentives remained . . . to adopt standardized regulations describing how the police should conduct identification procedures."[106] "So long as the prosecution can demonstrate that the witness had some opportunity to observe the offender at the time of the crime," he explained, "the witness can make an in-court identification and can testify concerning the pretrial identification regardless of the suggestiveness of the pretrial proceedings."[107]

The *Manson v. Brathwaite* case in 1977 represented the final gasp of the pure suggestivity/necessity approach previously followed in *Stovall*. In *Manson*, the Supreme Court weighed the suggestivity/necessity *per se* rule of *Stovall* against the reliability/totality of the circumstances approach of *Simmons* and *Biggers* in favor of a reliability-based approach, holding that reliability is the linchpin in determining the admissibility of identification testimony for both pre- and post-*Stovall* confrontations."[108] *Manson* concluded that "[t]he factors to be considered are set out in *Biggers.*"[109] Thus, the "permissive" construction of the due process clause—with its emphasis on overall reliability of the identification, rather than on the impermissibly suggestive nature of the procedures used—became the test for all out-of-court identification challenges.

Four years after *Manson*, another decision of the Supreme Court watered down the *Manson* reliability approach even more than Prof. Pulaski had feared. In *Watkins v. Sowders*, the Supreme Court said that a defendant challenging the reliability of an identification produced by unnecessarily suggestive procedures had no entitlement to a separate, pretrial hearing to determine reliability.[110] "[T]he proper evaluation of evidence under the instructions of the trial judge is the very task our system must assume juries can perform," the Supreme Court wrote in *Watkins*.[111] "[T]he *only* duty of a jury in cases in which identification evidence has been admitted will often be to assess the reliability of that evidence," the Court reasoned.[112] Thus, under *Watkins*, the determination of whether the witness had adequate opportunity to observe the offender can be made by the jury, thus rendering the due process analysis nearly indistinguishable from a general credibility

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[105] *Id.* at 199-200.
[106] Pulaski, 26 STAN. L. REV. at 1120.
[107] *Id.*
[108] *Manson*, 432 U.S. at 114.
[109] *Id.*
[110] *Watkins v. Sowders*, 449 U.S. 341 (1981).
[111] *Id.* at 347.
[112] *Id.*

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determination, and taking away the one real judicial check on the untethered use of unreliable identifications that *Manson* had seemed to provide.

In his 1974 article, Prof. Pulaski warned that the rule of decision ultimately adopted in *Manson* would create incentives for trial courts to admit identifications that were the product of suggestive procedures. "The *Neil [v. Biggers]* decision suggests that the constitutionally required quantum of evidence necessary to surmount due process objections to identification confrontations is quite small," he wrote[113] "[S]ome trial judges may very well conclude that finding the 'elemental facts' in the defendant's favor entails a relatively greater risk of reversal on appeal than does finding those facts in favor of the prosecution," he continued.[114] Sadly, 30 years of experience with the *Manson* rule of decision has borne out Prof. Pulaski's prediction that the *Biggers* test later adopted in *Manson* would "reduce[] the due process test to a handy device by which courts can legitimately overlook suggestive confrontations."[115]

III. The Poor Fit Between the *Manson* Rule of Decision and the Operative Constitutional Propositions of Fairness and Reliability

In this section, we discuss a number of lower court opinions demonstrating the poor fit of the *Manson* rule of decision with the constitutionally operative propositions of fairness and reliability. These cases illustrate numerous police actions that are unnecessarily suggestive: using show-ups, including a suspect's photograph in repeated identification procedures, questioning witnesses repeatedly, allowing witnesses to remain together when making their picks, and otherwise suggesting by comments or actions that the police believe the suspect to be the culprit. Many of these suggestive procedures could have been avoided simply by implementing double-blind procedures.

Our point here, however, is not merely to provide examples of police missteps. It is to illustrate that the *Manson* rule of decision fails to achieve the purpose of furthering fairness and reliability—because many of the so-called reliability factors are not good proxies for accuracy (e.g., subjective statements of certainty), because suggestive police procedures can infect the factors that allegedly guarantee reliability, and because an overall reliability determination cannot be made effectively by picking out certain factors in isolation. Our purpose is to illustrate that, in a world in which a determination of reliability based on the totality of the circumstances is costly, many courts are applying *Manson* in a way that is rote and mechanistic.

Federal Court Decisions

In *United States v. Wong*, a case involving the prosecution of a Green Dragon gang member in a restaurant shooting, the Second Circuit concluded that an identification

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[113] *Id.* at 1119.
[114] *Id.*
[115] Pulaski, 26 STAN. L. REV. at 1120.

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was reliable despite the fact that the witness expressed doubts and had seen the shooter for only a few seconds, as she ducked under the table.[116] The witness in *Wong* viewed three photo arrays; she picked Wong out of the third array, saying the photo "looked like the shooter."[117] At the first lineup, the witness indicated that the defendant "looked like him" but that she couldn't be sure "because of the height." At that point, the detectives told her, "we can't just take a 'possibly,'" and dimmed the lights, ostensibly to make the lighting more like the lighting in the restaurant.[118] The witness then identified Wong, although she said he was "taller than she remembered the gunman to be."[119] Despite the witness's clear inability to identify the shooter without substantial coaching, and despite the detectives' having repeatedly communicated their belief to the witness that they had the right man, the Second Circuit concluded that the detectives' actions had not rendered the lineup impermissibly suggestive, and that, even if they had, the identification was nonetheless reliable because the witness "observed the gunman after she ducked under the table at the restaurant, staring him in the face for 'two to three seconds' before he turned away."[120]

In *United States v. Jasper*,[121] a case out of the Fourth Circuit, two witnesses worked with a police artist to develop a sketch of two intruders who had beaten and robbed them in their home.[122] Police then presented the two witnesses with a photo array of six African-American men.[123] One witness identified Mr. Jasper but the second witness was unable to positively identify anyone. The detective conducting the photo array with the second witness then pointed out Mr. Jasper and stated that she should have been able to pick him as well. Not surprisingly, both witnesses subsequently identified Mr. Jasper in court.[124] The Fourth Circuit affirmed admission of the identification by reciting the five *Manson* factors and concluding summarily: "We have reviewed the record and find that although the photo array itself and accompanying identification procedure were not ideal, neither was impermissibly suggestive."[125] The Appeals Court wrote, "[b]oth witnesses testified confidently in their in-person, in-court identifications," and that, "[t]he weight and trustworthiness of [the witnesses'] identification testimony properly was left to the jury."[126]

In *Clark v. Caspari*,[127] the Eighth Circuit found reliable identifications by two liquor store clerks who had viewed the two handcuffed African-American suspects

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[116] *United States v. Wong*, 40 F.3d 1347 (2d Cir. 1994).
[117] *Id.* at 1358.
[118] *Id.* at 1358.
[119] *Id.*
[120] *Id.* at 1360.
[121] 8 Fed. Appx. 168 (4th Cir. 2001).
[122] *Id.* at 169-70.
[123] *Id.* at 170.
[124] *Id.*
[125] *Id.* at 170.
[126] *Id.*
[127] 274 F.3d 507 (8th Cir. 2002).

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"surrounded by white police officers, one of whom was holding a shotgun."[128] The Court focused on three factors: both clerks had come face-to-face with the robbers during the robbery; only 30 minutes had elapsed between robbery and show-up; and the police had refrained from saying anything expressly suggestive to the witnesses at the show-up.[129] "Although the record reveals that the police may have made several inquiries about the identity of the suspects before receiving a positive identification," the Court wrote, "there is no evidence to suggest that their questions were designed to elicit a particular response."[130] Thus, despite classic and completely unnecessary suggestivity in the show-up, and repeated questioning by the police, the Court determined that the identifications were reliable because the suspects were rounded up quickly and the detectives did not verbalize their obvious belief that they had apprehended the culprit.

In *Howard v. Bouchard*,[131] the Seventh Circuit rejected the notion that seeing the defendant in court at the defense table with his counsel about one hour before the lineup could have unduly infected witnesses' identification, terming this lapse only "minimally suggestive."[132] Applying *Manson*, the court concluded that the identifications were reliable despite the fact that the eyewitnesses had been passing by in a moving truck in an area lit by street lamps at the time of the early-morning shooting, and had seen the shooter only during three intervals ranging from "a split-second" to "about a minute and a half," at distances ranging from three to forty feet.[133] The Seventh Circuit reached this conclusion in part based on the fact that "the eyewitnesses were participating in a repossession, which by its stressful nature generally demands heightened attention,"[134] as well as based on the witnesses' subjective expressions of certainty.[135]

<u>State Court Decisions</u>

The *Manson* rule of decision also produces rote and unconvincing analysis in state court opinions. An example is *State v. Thompson*,[136] in which the Appellate Court of Connecticut affirmed the denial of a motion to suppress an identification despite the fact that the police officer who had transported the witness to the show-up had asked the witness to make an identification of the person who was "probably the shooter."[137] The officer told the witness: "[W]e believe we have the person. We need you to identify him."[138] The police drove the witness in a police car to the location where the suspect

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[128] *Id.* at 511.
[129] *Id.* at 512.
[130] *Id.*
[131] 405 F.3d 459 (6th Cir. 2005).
[132] *Id.* at 470.
[133] *Id.* at 472-73.
[134] *Id.* at 473.
[135] *Id.* at 473.
[136] 81 Conn. App. 264 (Conn. App. 2004).
[137] *Id.*
[138] *Id.*

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had been apprehended.[139] Training spotlights and headlights on the defendant, they removed him from the back of the police car for a show-up.[140] The trial court denied the defense motion to suppress, noting that the witness had a "good, hard look"; that the identification occurred less than two hours after the shooting;[141] and that the witness was very certain of his identification.[142] On appeal, despite the fact that the state conceded that the show-up was unnecessarily suggestive,[143] the Appellate Court affirmed the trial court's conclusion that the identification was reliable, citing precedent that, "a good hard look will pass muster even if it occurs during a fleeting glance."[144] The appeals court also noted that the witness had indicated "a high level of certainty" in his identification,[145] but did not address how the officers' comments could have inflated the witness's subjective assessment of his certainty.

Another example from Connecticut is *State v. Cook*, where the Connecticut Supreme Court concluded that a convenience store clerk's identification of an alleged robber was reliable despite the fact that the robber had worn a bandanna over the lower part of his face.[146] The identification procedure in *Cook* was not a traditional line-up or photo array. On the night of the robbery, police told the witness they had picked up a suspect, but that they didn't need her to identify the man.[147] The witness was then contacted by the prosecutor from a neighboring town, who was preparing another robbery case against the defendant. That prosecutor showed the witness evidence recovered from the suspect, as well as the surveillance videotape from the witness's store, and pointed out to the witness that the items on the tape were similar to the evidence recovered from the suspect. At trial in the case arising from the robbery of the witness's store, the witness testified that the defendant "resembled" the man who had robbed her store.[148] Despite the obvious flaws in this "procedure," the Connecticut Supreme Court concluded that it was not suggestive, and then applied *Manson* to determine that, even if it had been suggestive, the witness's identification of the suspect was nonetheless reliable.[149] The Court pointed out that the witness had described her confidence level as "85 to 90 percent certain,"[150] but did not consider how the actions of police could have artificially inflated her level of confidence.

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[139] *Id.*
[140] *Id.*
[141] *Id.* at 272.
[142] *Id.*
[143] *Id.* at 272.
[144] *Id.* at 273 (citing *State v. Ledbetter*, 185 Conn. 607 (1981)).
[145] *Id.*
[146] 817 A.2d 670 (Conn. 2003).
[147] *Id.* at 829-30.
[148] *Id.*
[149] *Id.* at 834-38.
[150] *Id.* at 837-38.

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In *State v. Johnson*,[151] an Ohio case, a juvenile murder defendant, Brandon Johnson, was identified by the decedent's wife at a "bind-over" hearing in juvenile court, which effectively transferred the case to the adult criminal court.[152] The witness had failed to identify Mr. Johnson from a photo array the month following the incident.[153] At a bind-over hearing about seven months later, she pointed out the defendant.[154] The Ohio appellate court described the scene: "[The] defendant was dressed in clothing from the Department of Youth Services and may have been handcuffed and . . . he was the only young African-American male seated at the defense table."[155] Not surprisingly, the decedent's wife identified him.[156] Pointing him out, she said, "Those eyes, those eyes. I will never forget those eyes."[157] Later, when Mr. Johnson was tried for the murder in adult court, the government sought to introduce the wife's identification, and the defense moved to suppress.[158] The trial court granted the motion to suppress, but the Tenth District of the Court of Appeals of Ohio reversed.[159] The appellate court candidly acknowledged the suggestive circumstances of the identification at the bind-over hearing,[160] but concluded that, pursuant to *Biggers* and *Manson*, the identification was reliable,[161] based on the fact that the witness had seen the two gunmen for about "70 to 75 seconds" at the time of the shooting, and that she said she was within a few feet of the man who shot her husband "staring at the person who had a gun, his eyes."[162] It did not matter, the appellate court reasoned, that the witness had earlier failed to pick Mr. Johnson from a photo array: the juvenile court judge and prosecutor at the bind-over hearing testified that the witness had been "certain" in her identification.[163]

Finally, in a Mississippi case, *Bynum v. State*,[164] Tommy Bynum was charged with robbery in connection with a purse-snatching. During the incident, the robber had struggled with the victim in a parking lot before grabbing her purse.[165] The victim testified that the attack lasted several seconds.[166] One week after the attack, the victim was shown a photo array and picked two people out of it—Mr. Bynum and another person.[167] The victim stated that Mr. Bynum "looked the most like the attacker."[168] Four

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[151] 2005 WL 1953065 (Ct. App. Ohio 10th Dist. 2005).
[152] *Id.* at *1.
[153] *Id.* at *5.
[154] *Id.* at *4.
[155] *Id.* at *15.
[156] *Id.*
[157] *Id.* at *6.
[158] *Id.*
[159] *Id.* at *16.
[160] *Id.* at *15.
[161] *Id.* at *14-16.
[162] *Id.* at *15.
[163] *Id.* at *15.
[164] 2005 WL 894796 (Miss. App. 2005).
[165] *Id.* at *2.
[166] *Id.* at *3.
[167] *Id.*

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days later, the victim was shown a second photo array. This array contained Mr. Bynum's picture, but not the photograph of the other person that the complainant had picked from the first array.[169] Predictably, the victim picked Mr. Bynum as the assailant, this time making the identification "positively and unequivocally."[170] There were two other eyewitnesses to the purse-snatching. One was unable to pick the assailant out of a photo array, but later identified Mr. Bynum as the robber.[171] The third identified Mr. Bynum from a photo line-up and testified that he was "100% certain."[172] The defense moved to suppress all three eyewitness identifications, but the trial court concluded that "the cumulative testimony of the three eyewitnesses identified Bynum" as the robber.[173] In a conclusory paragraph, the Court of Appeals of Mississippi applied the *Biggers* factors and affirmed denial of the motion to suppress,[174] without addressing whether it was problematic for the trial court to consider the three witnesses' identifications "cumulatively," in determining whether each identification was reliable.

Of course, not all courts are blind to *Manson*'s potential failings when that rule is applied reflexively and without any meaningful consideration of the actual reliability of the identification. Some lower courts recognize the weaknesses of the *Manson* test, but nonetheless feel bound by precedent to apply it.[175] Others conclude that the psychological research provides reason to apply *Manson* carefully,[176] and demand rigor in its application.[177] Still others have rejected or refined the *Manson* test as a matter of state law,[178] or mandated special jury instructions regarding eyewitness identifications pursuant to their supervisory authority.[179] Unfortunately, many other lower courts

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[168] *Id.*
[169] *Id.*
[170] *Id.*
[171] *Id.* at *4.
[172] *Id.*
[173] *Id.*
[174] *Id.*
[175] *See*, *e.g.*, *State v. Chance*, 2005 WL 1668890 at *5 (Minn. App. 2005) (unpublished decision) ("Although it is true that recent research casts substantial doubt over the relationship between witness confidence and witness accuracy, any change in established precedent must be left to the supreme court.")
[176] *See*, *e.g.*, *Bernal v. People*, 44 P.3d 184 (Colo. 2002) (en banc) (discussing psychological research and remanding for a more complete evidentiary hearing).
[177] *See*, *e.g.*, *Brisco v. Phillips*, 2005 WL 1660800 at *13 (E.D.N.Y. 2005).
[178] *See*, *supra*, notes ____, for state constitutional decisions rejecting *Manson*.
[179] *See*, *e.g.*, *State v. Ledbetter*, 275 Conn. 534 (Conn. 2005) (rejecting Defendant's claim that Connecticut Constitution required abandonment of *Biggers* factors and instead mandating that, in situations in which line-up administrator failed to instruct witness that suspect may not be present in the line-up, trial court charge jury regarding the risk of misidentification).

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continue to apply *Manson* mechanically, in a manner that undermines the values of "fairness" and "reliability."[180]

Again, our point here is not that the cases discussed in this section allowed mistaken identifications into evidence. To our knowledge, the defendants in these cases have not been exonerated, and we don't know whether any of these individuals have credible claims of actual innocence. The facts recited in these appellate decisions, however, provided substantial indications both of unnecessarily suggestive police procedures and of potentially unreliability of the identifications—indications that courts applying the *Manson* test completely ignored in their analysis. Our purpose in describing these lower court decisions, then, is merely to illustrate that the rule of decision announced by *Manson* produces a type of analysis that is not a good fit for the constitutional operative propositions of fairness and reliability. In many instances in the reported decisions, courts merely search the record for any evidence of the five *Manson* reliability factors, list them, and conclude summarily that the identification was nonetheless reliable. Although such opinions are easy to lampoon, the problem is not just that courts are issuing poorly-reasoned decisions. After all, it is legitimately difficult to make case-by-case reliability determinations in an area as subtle as eyewitness identifications, and the *Manson* factors provide courts with a heuristic. The problem is that the *Manson* heuristic is not a good tool for achieving the stated goal of reliability.

IV. Towards a New Rule of Decision

In this article, we describe a problem in the world, a problem in the law, and the beginnings of a proposed solution. The problem in the world is complicated and somewhat intractable: the imperfect nature of human perception and memory, which, despite its flawed character, provides evidence that is necessarily the basis of many criminal prosecutions. The problem in the law is that the *Manson* rule of decision was poorly constructed for its task, and has, in Prof. Roosevelt's terms, "lost fit" in light of the developments in the social science.[181] The tough part is, of course, is the third task—coming up with a proposed rule of decision to replace *Manson*. Although we do not offer a comprehensive scheme in this article, we hope to spark discussion by advocating a decision rule for federal due process challenges that includes some minimal affirmative guidelines for conducting identification procedures.

Why Due Process Challenges to Identification Procedures Matter

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[180] We have focused in this section on cases in which courts apply a mechanistic reliability analysis. Some courts, however, do not even get to the second prong, conducting cursory inquiries into suggestive police procedures. *See*, *e.g.*, *Hartridge v. United States*, ___ A.2d ___, 2006 WL 722020 (D.C. 2006) (concluding that identification procedure was not unnecessarily suggestive when police showed homicide witness a stack of photographs in which the defendant was the only person pictured that she did not know).

[181] Roosevelt, 91 VA. L. REV. at 1686.

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Not surprisingly, there are a number of ways to address the problem of faulty eyewitness identifications, besides suppressing evidence out out-of-court identification procedures through due process challenges. Many experts working in the field have focused their energies at an earlier point in the criminal justice process, attempting to stop erroneous identifications from being made through reforms in identification procedures.[182] Other advocates have focused instead on curative measures at trial. Some have promoted admitting expert testimony on eyewitness identification, to educate jurors about its problems.[183] Still others have counseled better jury instructions on the potential problems of eyewitness identification.[184]

We believe that although such measures are helpful and even necessary, they do not alleviate the need to revisit *Manson* and its rule of decision. The strategy of going to the source by improving police procedures is clearly an important one, but it will take time. To date, only a few jurisdictions have instituted wholesale reforms.[185] The system cannot wait for reforms to eyewitness identification procedures to stem the tide of faulty identifications. Moreover, reforms of law enforcement practices will not address the problem of the decades of cases that are already in the pipeline.

Many curative measures at trial—such as instructions on eyewitness identification or expert testimony—allow suspect eyewitness identifications to go to the jury, where their persuasive effect may outweigh their reliability. Most importantly, it is simply not feasible to admit an expert in every routine robbery case, particularly given the reality of serious funding limitations in indigent defense systems around the country.[186] As Prof. Wells has pointed out, there are probably fewer than fifty well-qualified eyewitness identification experts and over 77,000 eyewitness identification cases per year in the U.S.[187]

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[182] Gary L. Wells, Roy S. Malpass, R.C.L. Lindsay, Ronald P. Fisher, John W. Turtle, Solomon M. Fulero, *From the Lab to the Police Station: A Successful Application of Eyewitness Resarch*, AMERICAN PSYCHOLOGIST 581 (June 2000).
[183] *See* Edward Stein, *The Admissibility of Expert Testimony About Cognitive Science Research on Eyewitness Identification*, LAW, PROBABILITY & RISK (December 2003); Michael Leippe, *The Case for Expert Testimony About Eyewitness Memory*, PSYCHOLOGY, PUBLIC POLICY, AND THE LAW (December 1995); Roger B. Handberg, *Expert Testimony on Eyewitness Identification: A New Pair of Glasses for the Jury*, AMERICAN CRIMINAL LAW REVIEW (Summer 1995).
[184] Wells, *Eyewitness Identification*, *supra* note ____, at *20.
[185] *See supra*, note ____.
[186] *See* AMERICAN BAR ASSOCIATION, GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE – A REPORT ON THE RIGHT TO COUNSEL IN CRIMINAL PROCEEDINGS (2005).
[187] *Id.* at *19.

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As for jury instructions, although the law must rely on the assumption that jurors follow them,[188] their actual efficacy is debatable. As Justice Scalia has candidly acknowledged, "The rule that juries are presumed to follow their instructions is a pragmatic one, rooted less in the absolute certitude that the presumption is true than in the belief that it respresents a reasonable practical accommodation of the interests of the state and the defendant in the criminal justice process."[189] Studies of juror instructions on eyewitness identification indicate that they are not an effective safeguard against wrongful conviction.[190]

Many observers, including the Supreme Court in *Watkins*, suggest that cross-examination alone can uncover unreliable identifications.[191] This approach ignores the unique power and danger of eyewitness identification testimony. The persuasive effect of eyewitness identification testimony has been remarked upon by lawyers and commentators for decades. In his dissent in *Watkins*, Justice Brennan explained that he believed that jurors should know nothing about eyewitness identifications subject to suppression because of "[t]he powerful impact that much eyewitness identification evidence has on juries."[192] Justice Brennan quoted Prof. Elizabeth Loftus' seminal work, *Eyewitness Testimony*: "All the evidence points rather strikingly to the conclusion that there is almost *nothing more convincing* than a live human being who takes the stand, points a finger at the defendant, and says, 'That's the one!'"[193]

Subsequent scientific research has further confirmed that Justice Brennan's concerns were well-founded. Jurors have a poor understanding of factors that can undermine the reliability of eyewitness identification.[194] Even more troubling, jurors tend to "over-believe" eyewitnesses. Studies demonstrate that jurors have difficulty distinguishing accurate from inaccurate witnesses. In one study, mock jurors believed 62% of eyewitnesses witnessing in poor conditions, when only 33% of such witnesses were in fact accurate.[195] In another study, eyewitness confidence was a better predictor of conviction by mock jurors than eyewitness accuracy.[196] In that study, eyewitnesses who identified an innocent suspect convinced 70% of mock jurors to convict, while

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[188] *See*, *e.g.*, *Richardson v. Marsh*, 481 U.S. 200, 211 (1987).
[189] *Id.*
[190] Brian L. Cutler & Steven D. Penrod, *supra* note ___, at 255.
[191] 449 U.S. 341, 349 (describing "the time-honored process of cross-examination as the device best suited to determine the trustworthiness of testimonial evidence.")
[192] *Watkins*, 449 U.S. at 352-53 (Brennan, J., dissenting).
[193] *Watkins*, 449 U.S. at 353 (Brennan, J., dissenting)(quoting Elizabeth Loftus, EYEWITNESS TESTIMONY 19 (1979).
[194] *See generally* Richard S. Schmechel, Timothy P. O'Toole, Catharine Easterly, Elizabeth F. Loftus, *Beyond the Ken? Testing Jurors' Understanding of Eyewitness Reliability Evidence*, 46 JURIMETRICS J.___ (2006).
[195] CUTLER & PENROD at 184.
[196] R.C.L. Lindsay, Gary L. Wells, and Fergus J. O'Connor, *Mock-Juror Belief of Accurate and Inaccurate Eyewitnesses*, 13(3) LAW AND HUMAN BEHAVIOR) 337 (1989).

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eyewitnesses who identified a guilty party produced only a 68% rate of conviction.[197] In short, jurors believe eyewitnesses even when they are wrong, and find eyewitness identification testimony so persuasive that it may well color their view of all of the evidence in the case.

Finally, because the use of suggestive procedures and unreliable identifications almost always occur with eyewitnesses who honestly believe their own mistaken identification, cross-examination is nearly useless. A certain-but-wrong witness will have the demeanor of a truth-teller and will not be shaken by confrontation. A paradigmatic example of this type of witness is Jennifer Thompson, the courageous woman who honestly but mistakenly identified Ronald Cotton as the man who raped her, and, after his DNA exoneration eleven years later, came forward to say publicly and repeatedly, "I was certain, but I was wrong."[198] Research has shown that mistaken witnesses will not only genuinely believe in their own identification, but will also now honestly remember the circumstances of their identification as being more favorable than they truly were.[199] Nor can such witnesses be easily impeached through a demonstration of objective unreliability, given that jurors often do not understand what factors make one seemingly-convincing identification more reliable than another, and given that expert testimony (even where admissible) is impractical to present on a routine basis.

For these reasons, we argue that suppression of out-of-court identification procedures that were rendered unreliable by unduly suggestive police procedures remains an important part of the solution to the problem of faulty identifications. And as a result, a new rule of decision is required to replace the outmoded *Manson* test. But what form should this new rule take?

How to Construct a New Rule of Decision to Replace *Manson*

The first and most obvious step in constructing a new rule of decision is to disavow the *Manson* reliability checklist. The reliability factors are not only discredited, they also are poorly suited to the task of ensuring fairness and reliability in out-of-court identification procedures. Indeed, the *Manson* reliability factors have functioned in such a way as to create safe harbor provisions, but not ones that, to borrow Prof. Susan Klein's terms "instrumentally advance[]" due process clause values or "offer[] bright-line guidance for officers in the field."[200] All too often, if a police officer, prosecutor, or trial court elicits from a witness a subjective statement of confidence, or a subjective statement that the witness got a "good look," the identification will be deemed reliable and admitted. Thus, the *Manson* checklist creates an incentive to elicit a statement of confidence, but not necessarily to use procedures that are reliable. Moreover, rote

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[197] *Id.* at 337.
[198] Jennifer Thompson, *I Was Certain, But I Was Wrong*, N.Y. TIMES, June 18, 2000.
[199] *See supra*, note ___.
[200] Susan Klein, *Identifying and (Re)Formulating Prophylactic Rules, Safe Harbors, and Incidental Rights in Constitutional Criminal Procedure*, 99 MICH. L. REV. 1030, 1045-46 (March 2001).

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application of factors such as certainty that are acknowledged by the social science to be only weakly correlated with reliability undermines respect for the courts. As the DNA exonerations have now demonstrated, moreover, *Manson* routinely allows the juries to consider mistaken eyewitness testimony thus failing in its avowed purpose of preventing wrongful convictions based on this testimony. It is time for *Manson* to go.

The more difficult question—and the one worthy of discussion—is what should replace the *Manson* rule. At a minimum, as Professors Tracey Meares and Bernard Harcourt have argued, any new constitutional rule of criminal procedure should take account of the social science.[201] Prof. Klein has argued that eyewitness identification is a "prime candidate" for "new prophylactic . . . procedures to protect a defendant's right to a fair trial in light of the unreliability of eyewitness testimony."[202] Acknowledging the social science research about the problems of human memory and the weak confidence-accuracy correlation, and pointing to the fact that "studies have shown misidentification to be one of the most frequent causes of the conviction of the innocent," Prof. Klein concludes, "[t]he best candidate for countering these injustices is a new rule . . . that would require proper procedures and guidelines for lineups, show-ups, and photo arrays."[203]

Although we agree in large measure, we must recognize at the outset that this route was considered and rejected by the Supreme Court in *Manson*. In his *Manson* concurrence, Justice Stevens wrote, "the arguments in favor of fashioning new rules to minimize the danger of convicting the innocent on the basis of unreliable eyewitness testimony carry substantial force."[204] "Nevertheless," he concluded, "I am persuaded that this rulemaking function can be performed more effectively by the legislative process than by a somewhat clumsy judicial fiat, and that the Federal Constitution does not foreclose experimentation by the States in the development of such rules."[205]

But it must be remembered that the *Manson* debate occurred in a different time and under different circumstances than the current debate over the proper role of eyewitness identification testimony in the judicial system. The social science has evolved and changed dramatically, as we have pointed out elsewhere in this article. In addition, the *Manson* Court did not have 30 years worth of evidence demonstrating that a reliability test would be completely ineffective in protecting the judicial system from the dangers of mistaken eyewitness testimony. We now know to a certainty, however, that

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[201] Tracey L. Meares & Bernard Harcourt, 90 J. CRIM. L. & CRIMINOLOGY 733, 743, 797 (2000) ("[W]e suspect, and we hope, that more infusion of social science will likely highlight potential biases, will inspire judges to make more narrow, limited and provisional decisions, and, at a minimum, will hold judges more accountable.")
[202] Klein, *Identifying and (Re)Formulating Prophylactic Rules*, 99 MICH. L. REV. at 1064-66.
[203] *Id.*
[204] 432 U.S. at 113 (Stevens, J., concurring).
[205] *Id.*

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such convictions have occurred fairly routinely and that *Manson* has done nothing to prevent them.

It is simply beyond dispute, moreover that the criminal justice landscape itself has changed dramatically since *Manson*. Indeed, as recently as 1995, just before the explosion of DNA exonerations become known, the Supreme Court described meritorious innocence claims as "extremely rare." [206] In the past decade, however, literally hundreds of DNA exonerations have provided irrefutable evidence that wrongful convictions are far less "rare" than anyone—including advocates for the innocent—ever imagined. Thus, although Justice Stevens' cautious attitude toward limitations on the use of eyewitness evidence were certainly warranted based on what was known in 1977, it is impossible to justify similar caution today—when we know both that the *Manson* approach has failed and that substantial agreement has arisen in the social science community over the efficacy of certain police procedures in the eyewitness context.

Thus, the only real objection to our proposal must rest entirely on a general objection to prophylactic rules themselves. It is beyond the scope of this article to mount a full-scale defense of the legitimacy of so-called prophylactic rules. But those rules have a substantial pedigree in American jurisprudence, which is why a variety of legal scholars have continued to defend their use. Legal scholars beginning with Prof. David Strauss have defended prophylactic rules by questioning the subdivision of types of constitutional interpretation, arguing that "[c]onstitutional law is filled with rules that are justified in ways that are analytically indistinguishable from the justifications for the *Miranda* rules."[207] More recently, but in a similar vein, Prof. Daryl Levinson has criticized "rights essentialism," arguing that [r]ights are dependent on remedies not just for their application to the real world, but for their scope, shape, and very existence."[208]

Although prophylactic rules have been called into question by some commentators,[209] and criticized by some Supreme Court justices in the *Miranda* context,[210] the Court has continued to utilize such rules in appropriate cases. Indeed, Prof. Roosevelt has pointed out that the Court, in an opinion written by Justice Thomas and joined by Justice Scalia, has adopted such an approach to the procedure for appointed appellate counsel for indigents who conclude that an appeal is frivolous and move to withdraw.[211] The Court set out a procedure for such lawyers to follow in *Anders v. California*,[212] but, in *Smith v. Robbins*, the Court also made clear that the *Anders* procedure was "a prophylactic one," and that "the States are free to adopt different

[206] *Schlup v. Delo*, 513 U.S. 298, 321 (1995).
[207] David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV.190, 195 (Winter 1988).
[208] Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 858-59 (May 1999).
[209] Joseph D. Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 NW. U. L. REV. 100 (March 1985).
[210] *Dickerson v. United States*, 530 U.S. 428, 450 (2000) (Scalia, J., dissenting).
[211] Roosevelt, *Constitutional Calcification*, 91 VA. L. REV. at 1670-71.
[212] 386 U.S. ___, 744 (DATE).

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procedures, so long as those procedures adequately safeguard a defendant's right to appellate counsel."[213]

Having employed Prof. Berman's lexicon of "operative constitutional propositions" and "decision rules" throughout this article, we have thrown in our lot with the "taxonomists"— that is, we find labels to be helpful in discussing different types of constitutional interpretation.[214] But while a willingness to use labels has often been associated with criticism of prophylactic rules,[215] we see no meaningful difference between so-called prophylactic rules and other forms of judicial remedies. As Prof. Roosevelt has argued, decision rules may or may not closely track operative constitutional provisions; they may over-enforce or under-enforce, depending on issues including institutional competence, costs of error, frequency of unconstitutional action, legislative pathologies, enforcement costs, and the need for guidance for other government actors.[216] In other words, so-called prophylactic rules are just another type of decision rule, and decision rules are ubiquitous in constitutional adjudication.[217]

Adopting an affirmative statement of procedures as a decision rule can lessen the adjudicative burden on the lower courts. Prof. Strauss explained that the Supreme Court adopted the *Miranda* rule of decision because "a case-by-case review . . . was severely testing its capacities, and those of the lower courts."[218] Prof. Roosevelt concurs: "the voluntariness determination was difficult for courts to make on the basis of a paper record that might reveal very little about the actual tone and tenor of an interrogation."[219] This rationale holds true in the context of eyewitness identification procedures as well. Just as a case-by-case determination of voluntariness strained the Courts in the coerced confessions cases, case-by-case determinations of reliability impose burdens on the lower courts. Prof. Andrew Taslitz has argued that "freestanding due process has often generated specific doctrines too weak to serve the goal of truth-seeking," in particular choosing "flexible utilitarian balancing tests" over clear rules.[220] Indeed, one way of understanding the disastrously rote application of the *Manson* reliability factors is as a reaction to a task that is very difficult, resource-intensive, and not suited to the tool that has been provided.

We submit that the Court should adopt a decision rule that institutes minimal affirmative guidelines for the conduct of identification procedures. These guidelines

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[213] 528 U.S. 259, 265 (2000). *See* Roosevelt*, Constitutional Calcification*, 91 VA. L. REV. at 1671; Klein, *Identifying and (Re)Formulating Prophylactic Rules,* 99 MICH. L. REV.at 1042-43.
[214] Berman, *Constitutional Decision Rules*, 90 VA. L. REV. at *8.
[215] *See*, *e.g.*, Grano, *Prophylactic Rules in Criminal Procedure*, 80 NW. U. L. REV. at ___.
[216] Roosevelt, *Constitutional Calcification*, 91 VA. L. REV. AT 1659-67.
[217] Berman, *Constitutional Decision Rules*, 90 VA. L. REV. AT *61.
[218] *Id.* at 208-09.
[219] Roosevelt, *Constitutional Calcification*, 91 VA. L. REV. at 1672.
[220] Andrew Taslitz, *What Remains of Reliability: Hearsay and Freestanding Due Process After Crawford v. Washington*, 20 CRIM. JUST. 39, 48 (Summer 2005).

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would be selected to address major issues affecting the structural integrity of the procedures—not to dictate every step. Identifications that run afoul of the minimal guidelines would be excluded. However, courts also would remain free to exclude identifications that are the products of procedures that—while not running afoul of the minimum guidelines—nonetheless are so suggestive as to render the identification unreliable.

In our view, the single most important guideline would be the implementation of double-blind procedures, "in which the administrator is not in a position to unintentionally influence the witness's selection."[221] Double blind procedures are a fundamental part of scientific and social science research.[222] If double blind procedures are used, they will automatically eliminate a number of problems that the social science research has documented, including the experimenter-expectancy effect and the problem of confirming feedback.[223]

Other fundamental affirmative guidelines for any such rule of decision could track the recommendations of the U.S. Department of Justice National Institute of Justice manual EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT,[224] the 2004 American Bar Association report on eyewitness testimony,[225] or the model policy recently adopted by the State of Wisconsin.[226] Prof. Taslitz has advocated the adoption of a number of measures recommended in the ABA report, practices "so strongly supported by the scientific research and so essential to avoiding mistaken identifications that ignoring any one of these requirements should presumptively constitute a due process violation."[227]

Obviously, "non-suspect fillers should be chosen to minimize any suggestiveness that might point toward the suspect."[228] Law enforcement should "[s]eparate witnesses and instruct them to avoid discussing details of the incident with other witnesses."[229] In addition, law enforcement should "[a]void multiple identification procedures in which the same witness views the same suspect more than once."[230] Officers also should caution

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[221] STATE OF WISCONSIN, MODEL POLICY AND PROCEDURE FOR EYEWITNESS IDENTIFICATION (September 2005).
[222] Gary Wells, *et al.*, *Eyewitness Identification Procedures*, 22(6) L. & HUMAN BEHAVIOR at 627-28.
[223] *Id.*
[224] U.S. DEP'T OF JUSTICE, EYEWITNESS EVIDENCE 27 (October 1999).
[225] AMERICAN BAR ASSOCIATION, REPORT IN SUPPORT OF THE CRIMINAL JUSTICE SECTION RESOLUTION ON EYEWITNESS TESTIMONY, available at http://www.abanet.org/leadership.2004/annual/dailyjournal/111c.doc (2004).
[226] STATE OF WISCONSIN, MODEL POLICY AND PROCEDURE FOR EYEWITNESS IDENTIFICATION (2005).
[227] Andrew Taslitz, *What Remains of Reliability: Hearsay and Freestanding Due Process After Crawford v. Washington*, 20 CRIM. JUST. 39, 53 (Summer 2005).
[228] *Id.* at 3.
[229] U.S. DEP'T OF JUSTICE, EYEWITNESS EVIDENCE at 27.
[230] *Id.*

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witnesses prior to viewing a photo array or line-up, with instructions that track those suggested by the DOJ, informing them that: 1) "[i]t is just as important to clear innocent persons from suspicion as to identify guilty parties"; 2) "[i]ndividuals present in the lineup may not appear exactly as they did on the date of the incident"; 3) "[t]he person who committed the crime may or may not be present in the group of individuals; 4) "[r]egardless of whether an identification is made, the police will continue to investigate the incident."[231] Finally, each witness should be asked to make a statement of how certain she is of her pick immediately after making the identification, in order to avoid the distorting effects of post-identification feedback.[232]

Our proposed solution helps to address the problem in the real world. A decision rule with affirmative guidelines provides clear guidance to law enforcement, and possesses significant deterrence value. Affirmative guidelines are not equivalent to, and, indeed, are far superior to, the *per se* exclusion rule advocated by the prisoner and dissenters in *Manson*.[233] While a *per se* exclusionary rule would penalize police for procedures deemed after the fact to be impermissibly suggestive—forcing police to guess about what is allowed—affirmative guidelines provide true *ex ante* guidance. This is the same benefit as the *Miranda* rule: clear, simple guidelines are relatively simple for the police to integrate into their work.[234] While police might engage in gamesmanship to circumvent the rules, with clear guidelines, courts are able to clamp down on such practices, as the Supreme Court did recently in condemning "question-first" practices that undermine the effectiveness of the *Miranda* warning.[235]

Moreover, while many exclusionary rules restrict the availability of otherwise reliable evidence, our proposed decision rule excludes only evidence for which the government has foregone easily-available means of ensuring reliability. Thus, it has the added benefit of aiding the truth-seeking process. Put differently, our rule could reduce the number of mistaken identifications. For example, police would not have shown Ronald Cotton's photo to Jennifer Thompson before asking her to make a pick from a live lineup in which he participated.[236] They would not have instructed her to choose the man who looked the most like her assailant.[237] Ms. Thompson would have been asked to state her subjective level of certainty at the time she made her identification, so that it was not inflated later by repeated questioning, the effects of trial preparation, or confirming feedback from police or prosecutors. Although we will never know for sure,

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[231] *Id.*
[232] WISCONSIN MODEL POLICY at 3.
[233] *Manson*, 432 U.S. at 128 (Marshall and Brennan, J.J., dissenting).
[234] *See* Meares & Harcourt, *Transparent Adjudication*, 90 J. CRIM. L. & CRIMINOLOGY at 759 (discussing studies that suggest "that the *Miranda* procedures are effective . . . in assuring the accused an opportunity to exercise their right of silence.")
[235] *See*, *e.g.*, *Missouri v. Seibert*, 542 U.S. 600, 609-17 (2004) (concluding that "question-first" tactics rendered *Miranda* warnings functionally ineffective and thus warranted suppression of confession).
[236] *State v. Cotton*, 394 S.E. 2d at 461.
[237] *Id.*

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these measures could have helped to avert the wrongful conviction of Ronald Cotton, obviously benefiting Mr. Cotton, but also saving Ms. Thompson much pain and protecting the community from Bobby Poole.

Our proposed decision rule also addresses the problem in the law. Any decision rule that is adopted will sometimes exclude reliable identifications, or admit unreliable identifications.[238] A rule with proposed affirmative guidelines, however, would be easier for courts to administer than the *Manson* test. It would also put the focus where it should be—on unnecessarily suggestive police procedures—rather than on reading the tea leaves to guess whether an identification is, in fact, reliable. This type of determination is better-suited to courts' institutional competence, and the resulting analysis would be a better fit to the constitutional operative propositions of the due process clause—fairness and reliability.

An example helps to illustrate the benefits of our proposed rule of decision. In *Wong*, the Green Dragon gang member case, rather than struggling to determine whether a witness's fleeting glimpse of a gunman was reliable, the court would have had clear direction to exclude the identification when it learned that the detectives had pressured her to make an identification, saying, "we can't just take a possibly."[239] Conversely, a court that knew that detectives had adhered scrupulously to the minimum guidelines would not have been forced to become mired in details about the witness's view of the gunman, subjective level of certainty, etc. The court could have rested certain both that it was applying a clear rule correctly, and that the use of the guidelines procedures would have reduced the likelihood of an actual mistake.

The affirmative guidelines set out by the Court under our proposed rule of decision would be the minimum requirements for identification procedures, not necessarily co-extensive with the requirements of due process. In Prof. Lawrence Sager's terms, the federal constitutional rule of decision would "under-enforce" due process.[240] Other branches of the federal government, state and local governments, and various law enforcement agencies would remain free to enact more detailed or protective rules for conducting identification procedures, as Justice Stevens suggested in his *Manson* concurrence.[241] As Prof. Klein has explained, this type of approach "allows the Court to change the rules by accepting alternate rules provided by Congress, state legislators, federal and state law enforcement agencies and state judges, who may have better knowledge of the circumstances encountered or facts on the ground, and who may be better institutionally-suited to playing factfinder."[242]

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[238] Roosevelt, *Constitutional Calcification*, 91 VA. L. REV. at ___.
[239] 40 F.3d at 1358.
[240] Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (April 1978).
[241] 432 U.S. at 118-19 (Stevens, J., concurrence).
[242] Klein, *Identifying and Formulating Prophylactic Rules*, 99 MICH. L. REV. at 1060.

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Certainly, there are useful measures that local jurisdictions might choose to implement that are not included on our list. For example, Wisconsin has chosen to implement sequential line-up rules, because research demonstrates that the sequential line-up format—in which the suspect and fillers are presented one at a time instead of simultaneously—reduces the relative judgment problem.[243] Local jurisdictions also may choose to require videotaping of identification procedures, as the ABA study recommended.[244] Videotaping would enable defense counsel, the court, and fact-finders to assess the fairness of these procedures, as well as the witness's apparent level of certainty at the time the witness made his or her pick, before the distorting effects of any type of post-identification feedback. While these two measures may be extremely worthwhile and reduce the number of faulty identifications, we do not include them in our list of fundamental affirmative guidelines because, in our judgment, they are more resource-intensive, more difficult to implement, and not as fundamental to the overall integrity of the identification process.

Even if the Supreme Court is reluctant to adopt a decision rule for federal due process challenges that includes affirmative guidelines for identification procedures, it should adopt such rules for identification procedures in the federal system as a matter of its supervisory authority.[245] Implementing such procedures under the Court's supervisory authority would not only improve the quality of adjudication in the federal system, but also would promote further debate about how to guard against faulty identifications. This is a worthy goal in and of itself.

Conclusion

The problem of faulty eyewitness identifications is an enduring one, which probably will remain with us as long as human beings witness crimes. Nonetheless, there are many reasons to continue to confront the problem. Much is at stake: the lives of the wrongly accused like Ronald Cotton and Ruben Cantu; the peace-of-mind of honest but mistaken victims like Jennifer Thompson; and the safety of communities in which true offenders remain on the street while the wrongfully convicted languish behind bars. Even more fundamentally, the legitimacy of our criminal justice system is shaken when an unreliable identification is admitted, particularly one that is the product of suggestive police procedure.

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[243] WISCONSIN MODEL POLICY at 5.
[244] AMERICAN BAR ASSOCIATION, REPORT IN SUPPORT OF THE CRIMINAL JUSTICE SECTION RESOLUTION ON EYEWITNESS TESTIMONY, available at http://www.abanet.org/leadership.2004/annual/dailyjournal/111c.doc (2004).
[245] *See Dickerson*, 530 U.S. at 437 ("This Court has supervisory authority over the federal courts, and we may use that authority to prescribe rules of evidence and procedure that are binding in those tribunals.") *See*, *e.g.*, *Mallory v. United States*, 354 U.S. 449 (1957), *McNabb v. United States*, 318 U.S. 332 (1943) (exercising supervisory authority to exclude defendant's confession obtained during unlawful detention).

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The *Manson* test erodes the integrity of the system not only because, like other elements of criminal procedure, it sometimes gets cases wrong. At an even more fundamental level, applying a decision rule that has not kept pace with the science, and that produces rote analysis, threatens the legitimacy of the criminal justice system. No one benefits when some of the most high impact decisions in criminal prosecutions are made based on meaningless formalisms.

Although it is daunting, the legal community must remain engaged in a dialogue with researchers in the field of psychology, and must attempt to respond to the lessons that science teaches. The complexity of this dialogue requires a flexible and responsive rule of decision in due process challenges to identifications—one that leaves room for the law to account for further advances in our understanding of human memory and perception.

It is time to revisit *Manson*. We hope that this article will contribute to serious debate about how best to construct a decision rule to replace *Manson*, and about whether minimum affirmative guidelines for identification procedures can play a role in that project.

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