

Fall 2006

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

Timothy P. O'Toole

Giovanna Shay

Follow this and additional works at: <https://scholar.valpo.edu/vulr>



Part of the [Law Commons](#)

Recommended Citation

Timothy P. O'Toole and Giovanna Shay, *Manson v. Brathwaite Revisited: Towards a New Rule of Decision for Due Process Challenges to Eyewitness Identification Procedures*, 41 Val. U. L. Rev. 109 (2006).

Available at: <https://scholar.valpo.edu/vulr/vol41/iss1/2>

This Article is brought to you for free and open access by the Valparaiso University Law School at ValpoScholar. It has been accepted for inclusion in Valparaiso University Law Review by an authorized administrator of ValpoScholar. For more information, please contact a ValpoScholar staff member at scholar@valpo.edu.



MANSON *v.* BRATHWAITE REVISITED: TOWARDS A NEW RULE OF DECISION FOR DUE PROCESS CHALLENGES TO EYEWITNESS IDENTIFICATION PROCEDURES

Timothy P. O'Toole* and Giovanna Shay**

I. INTRODUCTION

Almost 30 years ago, in *Manson v. Brathwaite*,¹ 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.² 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 Professor Mitchell Berman and employed by Professor Kermit Roosevelt, the *Manson* Court identified both an operative constitutional proposition and a rule of decision for due process challenges to identification procedures.³ 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."⁴ "[R]eliability is the linchpin," Justice Blackmun wrote for the Court.⁵ 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

* Chief, Special Litigation Division, Public Defender Service for the District of Columbia.

** Robert M. Cover Clinical Teaching Fellow, Yale Law School.

¹ 432 U.S. 98 (1977).

² *Id.* at 113-14.

³ Mitchell Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 15 (2004). See also Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984); Richard H. Fallon, *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274, 1305-06 (2006); Kermit Roosevelt, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 VA. L. REV. 1649, 1653 (2005).

⁴ 432 U.S. at 113.

⁵ *Id.* at 114.

110 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 41]

view the criminal at the time of the crime, the witness's degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation."⁶

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 convicted by juries of serious crimes.⁷ Media reports of exonerations have now become commonplace.⁸ 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.⁹ The Department of Justice has issued a report analyzing twenty-eight DNA exonerations and concluded that inaccurate eyewitness testimony was "the most compelling evidence" in the majority of these cases.¹⁰ Questions have 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

⁶ *Id.*

⁷ Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 524 (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, 916 (1996) (describing 68 cases of death row inmates "later released because of doubts about their guilt").

⁸ See BARRY SCHECK, PETER NEUFELD & JIM DWYER, *ACTUAL INNOCENCE* 275-76 (2001); LOLA VOLLEN & DAVE EGGERS, *SURVIVING JUSTICE: AMERICA'S WRONGFULLY CONVICTED AND EXECUTED* (2005). See, e.g., John M. Broder, *Starting Over, 24 Years After a Wrongful Conviction*, N.Y. TIMES, June 21, 2004, at A13; David Firestone, *DNA Test Brings Freedom, 16 Years After Conviction*, N.Y. TIMES, June 16, 1999, at A22; Colin Garrett, *Another DNA Exoneration, Another Death Row Inmate Freed*, 28 CHAMPION 47 (2004); Adam Liptak, *Houston DNA Review Clears Convicted Rapist, and Ripples in Texas Could Be Vast*, N.Y. TIMES, Mar. 11, 2003, at A14; Barbara Novovitch, *Free After 17 Years for a Rape that He Did Not Commit*, N.Y. TIMES, Dec. 22, 2004, at A22.

⁹ Gross et al., *supra* note 7, at 544. See Daniel S. Medwed, *Anatomy of a Wrongful Conviction: Theoretical Implications and Practical Solutions*, 51 VILL. L. REV. 337 (2006) (discussing the role that mistaken eyewitness identification played in the wrongful conviction of David Wong and potential reforms to eyewitness identification procedures generally); Arnold H. Loewy, *Systemic Changes that Could Reduce the Conviction of the Innocent* 4-5 (Aug. 30, 2006) UNC Legal Studies Research Paper No. 927223, available at <http://ssrn.com/abstract=927223>.

¹⁰ U.S. DEP'T OF JUSTICE, NAT'L INST. OF JUSTICE, *CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL* 28 (1996), available at <http://www.ncjrs.gov/pdffiles/dnaevid.pdf> [hereinafter NAT'L INST. OF JUSTICE, *CONVICTED BY JURIES, EXONERATED BY SCIENCE*].

repeatedly, to identify the boy.¹¹ Even the “blue” state of Connecticut has been affected: earlier this year, James Tillman was exonerated by DNA evidence in a 1988 sexual assault case based on eyewitness identification.¹²

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.¹³ Two days later, Ms. Thompson viewed a photo array containing six pictures, one of them of a man named Ronald Cotton.¹⁴ Ms. Thompson initially chose two pictures from the array, including Cotton’s photo.¹⁵ She examined these two pictures and told police that Cotton’s photo “looks most like” the assailant.¹⁶ About a week later, Ms. Thompson viewed a live line-up in which Cotton was the only participant whose picture also had been in the photo array.¹⁷ Ms. Thompson was told to pick the man who looked the most like her assailant.¹⁸ She told police that she was deciding between participants numbers four and five, but stated that number five “looks the most like him.”¹⁹ In 1986, Ms. Thompson testified at trial, and again identified Mr. Cotton, who was convicted.²⁰ Describing these events years later, Ms. Thompson said, “I knew this was the man. I was completely confident. I was sure.”²¹ In 1987, Ms. Thompson again identified Mr. Cotton when he was granted a new trial.²² At the retrial, she told authorities that she had never seen another man, Bobby Poole, who claimed to be her attacker.²³ Eleven years after Ms. Thompson’s first identification, in 1995, Ronald Cotton

¹¹ 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 CHRON., Nov. 20, 2005, at A1.

¹² Matt Burgard, *His Challenge Now: Freedom (Wrongly Convicted, Tillman is Formally Exonerated)*, HARTFORD COURANT, July 12, 2006, at A1; Matt Burgard & Elizabeth Hamilton, *Dogged Pursuit Freed Inmate: Lawyers Kept Up Hunt Until Finding Key DNA*, HARTFORD COURANT, June 11, 2006, at A1; Lisa Siegel, *Connecticut Innocence Project Discovers Wrongful Conviction*, CONN. L. TRIB., June 6, 2006.

¹³ *State v. Cotton*, 394 S.E.2d 456, 457 (N.C. Ct. App. 1990).

¹⁴ *Id.* at 461 (Johnson, J., dissenting).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Jennifer Thompson, *I Was Certain, But I Was Wrong*, N.Y. TIMES, June 18, 2000, at D15.

²¹ *Id.*

²² *Id.*

²³ *Id.*

was exonerated by DNA evidence.²⁴ DNA testing demonstrated that Bobby Poole—who ultimately pled guilty to the rape of Jennifer Thompson—was the real culprit.²⁵ Writing years after the exoneration, Jennifer Thompson said, “I live with constant anguish that my profound mistake cost [Mr. Cotton] so dearly.”²⁶

Exonerations like Ronald Cotton’s have illustrated what many have long suspected: eyewitnesses make mistakes in identifying strangers.²⁷ 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.²⁸ And due to scarce resources, usually only the most serious convictions are afforded 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.²⁹

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 Professor Kermit Roosevelt’s observation that, “decision rules that made sense when adopted may lose their fit.”³⁰ During the past three decades, and at an increasing pace over the past ten to fifteen years, research has demonstrated that some of the *Manson* reliability factors can be skewed by faulty police practices, and that the

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ SCHECK, NEUFELD & DWYER, *supra* note 8, at xv.

²⁹ The most recent experience in Virginia shows the number of wrongful convictions produced by eyewitness identifications may be substantial. In 2004, Governor 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 more widespread DNA testing of the hundreds of convictions obtained during that time would be warranted. Of the thirty-one cases reviewed, two exonerations occurred. In other words, 6% of the randomly sampled cases tested resulted in exonerations. Predictably, both Virginia exonerations involved convictions that relied heavily on eyewitness testimony. See Michael D. Shear & Jamie Stockwell, *DNA Tests Exonerate 2 Former Prisoners*, WASH. POST, Dec. 15, 2005, at A01.

³⁰ Roosevelt, *supra* note 3, at 1686-87.

list as a whole is substantially incomplete.³¹ 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.³² In fact, studies indicate that: eyewitnesses are vulnerable to suggestion;³³ their confidence in their picks is not necessarily strongly correlated with their accuracy;³⁴ and their confidence level is malleable and can be infected by suggestive procedures.³⁵

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 subtle, fact-intensive, and case-specific determination as to 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 still 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 the Court's decree that way—the unreliable identification will be admitted. Indeed, the *Manson* factors have been reified. As described below in Part IV, 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 is akin to the phenomenon of “constitutional calcification” described by Professor Roosevelt: an outmoded rule of decision is mistaken for a constitutional operative proposition.³⁶

³¹ Gary Wells, *What is Wrong With the Manson v. Brathwaite Test of Eyewitness Identification Accuracy?*, www.psychology.iastate.edu/faculty/gwells/homepage.htm (last visited Aug. 5, 2006) [hereinafter Wells, *What is Wrong*].

³² See Gary Wells, *Eyewitness Identification Evidence: Science and Reform*, 29 CHAMPION 12 (2005) [hereinafter Wells, *Eyewitness Identification Evidence*] (surveying the psychological literature in this area); Gary L. Wells & Elizabeth A. Olson, *Eyewitness Testimony*, 54 ANN. REV. PSYCHOL. 277 (2003).

³³ See Bill Nettles, Zoe Sanders Nettles & Gary L. Wells, *Eyewitness Identification: “I Notice You Paused on Number Three,”* 20 CHAMPION 10, 11 (1996).

³⁴ See Gary L. Wells, Elizabeth A. Olson & Steve D. Charman, *The Confidence of Eyewitnesses in Their Identifications from Lineups*, 11 CURRENT DIRECTIONS PSYCHOL. SCI. 151, 151 (2002).

³⁵ See Gary L. Wells & Amy L. Bradfield, *“Good, You Identified the Suspect”: Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience*, 83 J. APPLIED PSYCHOL. 360, 360 (1998).

³⁶ Roosevelt, *supra* note 3, at 1692-93.

114 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 41]

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.³⁷ Naturally, defense attorneys also have sought to use this research to their best advantage, attempting to get experts admitted to discuss the failings of eyewitness identification, or to have juries instructed that eyewitnesses can be mistaken.³⁸

Legal commentators have criticized the *Manson* test as a poor way of determining which identifications should be excluded at trial on grounds of unreliability.³⁹ Some have suggested that the Court adopt a rule of per se exclusion of identifications that are the product of suggestive police procedures,⁴⁰ loosen the standards for admitting expert testimony on eyewitness identification,⁴¹ require corroboration for eyewitness

³⁷ See, e.g., Gary L. Wells et al., *From the Lab to the Police Station: A Successful Application of Eyewitness Research*, 55 AM. PSYCHOL. 581 (2000) (documenting collaboration of the Technical Working Group for Eyewitness Evidence that resulted in the 1999 National Institute of Justice report, *Eyewitness Evidence: A Guide for Law Enforcement*); Wells, *Eyewitness Identification Evidence*, *supra* note 32; Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 LAW & HUM. BEHAV. 603, 618 (1998) [hereinafter Wells et al., *Eyewitness Identification Procedures*]; Gary L. Wells, *Police Lineups*, 7 PSYCHOL. PUB. POL'Y & L. 791 (2001).

³⁸ See, e.g., Lisa Steele, *Trying Identification Cases: An Outline for Raising Eyewitness ID Issues*, 28 CHAMPION 8 (2004).

³⁹ Suzannah B. Gambell, *The Need To Revisit the Neil v. Biggers Factors: Suppressing Unreliable Eyewitness Identifications*, 6 WYO. L. REV. 189 (2006); Steven P. Grossman, *Suggestive Identifications: The Supreme Court's Due Process Test Fails To Meet Its Own Criteria*, 11 U. BALT. L. REV. 53, 58 (1981); David E. Pasettiner, *Twenty-Years of Diminishing Protection: A Proposal To Return to the Wade Trilogy's Standard*, 15 HOFSTRA L. REV. 583, 605 (1987); Benjamin E. Rosenberg, *Rethinking the Right to Due Process in Connection with Pretrial Identification Procedures: An Analysis and a Proposal*, 79 KY. L.J. 259, 275 (1991); Ruth Yacona, *Manson v. Brathwaite: The Supreme Court's Misunderstanding of Eyewitness Identification*, 39 J. MARSHALL L. REV. 539 (2006); Keith Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases* 347-48 (June 2006), University of Wisconsin Law School Legal Studies Research Paper Series Paper No. 1023, available at <http://ssrn.com/abstract=911240>.

⁴⁰ Pasettiner, *supra* note 39, at 605; Rosenberg, *supra* note 39, at 306, 314; Yacona, *supra* note 39, at 595-60. See also Margery Malkin Koosed, *The Proposed Innocence Protection Act Won't—Unless It Also Curbs Mistaken Eyewitness Identification*, 63 OHIO ST. L.J. 263, 264 (2002).

⁴¹ Robert J. Hallisey, *Experts on Eyewitness Testimony in Court—A Short Historical Perspective*, 39 HOW. L.J. 237, 238 (1995); Connie Mayer, *Due Process Challenges to Eyewitness Identification Based on Pretrial Photographic Arrays*, 13 PACE L. REV. 815, 859 (1994); Rosenberg, *supra* note 39, at 310; Wayne T. Westling, *The Case for Expert Witness Assistance to the Jury in Eyewitness Identification Cases*, 71 OR. L. REV. 93 (1992); Cindy T. O'Hagan, Note, *When Seeing Is Not Believing: The Case for Eyewitness Expert Testimony*, 81 GEO. L.J. 741, 755 (1993); David M. Shofi, Comment, *The New York Courts' Lack of Direction and Discretion Regarding the Admissibility of Expert Identification Testimony*, 13 PACE L. REV. 1101, 1132 (1994).

identifications in some circumstances,⁴² or mandate certain police procedures.⁴³

Some state courts have attempted to respond to the criticism of *Manson* by interpreting their state constitution or other state law to provide more protection than *Manson*. Utah and Kansas have adopted a refined version of the *Manson* test on state law grounds, using reliability factors that have a firmer grounding in the social science.⁴⁴ New York and Massachusetts require the automatic suppression of unnecessarily suggestive identification procedures.⁴⁵ Wisconsin requires suppression of show-up identifications, in which a single suspect is presented to the witness, unless the use of the procedure was necessary under the circumstances.⁴⁶ Citing the *Dubose* decision, the New Jersey Supreme Court has recently indicated a willingness to consider a state constitutional claim based on the psychological research if a record is made in the trial court.⁴⁷

State courts have also attempted to mitigate the effects of *Manson* through other measures, like special jury instructions. The Connecticut Supreme Court recently used its supervisory authority to mandate a special jury instruction in cases that the police failed to inform the witness that the suspect might not be present in the photo array or line-up.⁴⁸ The Georgia Supreme Court has directed that trial courts should no longer instruct jurors to consider the eyewitness's confidence in evaluating his identification.⁴⁹ New Jersey has mandated a special instruction on cross-racial identification in some cases.⁵⁰ Most recently,

⁴² See, e.g., Radha Natarjan, *Racialized Memory and Reliability: Due Process Applied to Cross-Racial Eyewitness Identification*, 78 N.Y.U. L. REV. 1821, 1845-48 (2003).

⁴³ See, e.g., Jake Sussman, *Suspect Choices: Lineup Procedures and the Abdication of Judicial Authority*, 27 N.Y.U. REV. L. & SOC. CHANGE 507, 508 (2001-02).

⁴⁴ *State v. Hunt*, 69 P.3d 571, 577 (Kan. 2003); *State v. Ramirez*, 817 P.2d 774, 780-81 (Utah 1991).

⁴⁵ *Commonwealth v. Johnson*, 650 N.E.2d 1257, 1261 (Mass. 1995); *People v. Adams*, 423 N.E.2d 379, 383-84 (N.Y. 1981).

⁴⁶ See *State v. Dubose*, 699 N.W.2d 582, 596-97 (Wis. 2005).

⁴⁷ *State v. Herrera*, 902 A.2d 177, 180-81 (N.J. 2006).

⁴⁸ See, e.g., *State v. Ledbetter*, 881 A.2d 290 (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).

⁴⁹ 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).

⁵⁰ *State v. Cromedy*, 727 A.2d 457, 467 (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

the New Jersey Supreme Court exercised its supervisory authority to mandate that law enforcement officers make a written record documenting the out-of-court identification procedure, "including the place where the procedure was conducted, the dialogue between the witness and the interlocutor, and the results."⁵¹

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 exonerations⁵² and two guides on protocols for conducting eyewitness identifications.⁵³ 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 psychological literature.⁵⁴ 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.⁵⁵ 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

eyewitness's cross-racial identification is not corroborated by other evidence giving it independent reliability.").

⁵¹ State v. Delgado, 902 A.2d 888, 897 (N.J. 2006).

⁵² NAT'L INST. OF JUSTICE, CONVICTED BY JURIES, EXONERATED BY SCIENCE, *supra* note 10.

⁵³ U.S. DEP'T OF JUSTICE, NAT'L INST. OF JUSTICE, EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT (1999), available at <http://www.ncjrs.gov/pdffiles1/nij/178240.pdf>; U.S. DEP'T OF JUSTICE, NAT'L INST. OF JUSTICE, EYEWITNESS EVIDENCE: A TRAINER'S MANUAL FOR LAW ENFORCEMENT (2003), available at <http://www.ncjrs.gov/nij/eyewitness/188678.pdf>.

⁵⁴ Karin Brulliard, *Revamping Virginia's Police Lineups*, WASH. POST, Mar. 6, 2005, at C01; Gina Kim, *Police Lineups' Flaws Spur New Approach*, CHI. TRIB., Feb. 7, 2005, at CN1; Gina Kolata & Iver Peterson, *New Jersey Is Trying New Way for Witnesses To Say, "It's Him,"* N.Y. TIMES, July 21, 2001, at A1. See also Scott Ehlers, *Eyewitness Identification: State Law Reform*, 29 CHAMPION 34 (2005) (surveying state legislative reform efforts); Gary L. Wells, *Eyewitness Identification: Systematic Reforms*, 2006 WIS. L. REV. 615 (2006) [hereinafter Wells, *Systematic Reforms*].

⁵⁵ The authors are aware of at least two cert petitions filed this year asking the United States Supreme Court to reexamine *Manson*. See *Perez v. United States*, No. 05-596, 2005 WL 3038542 (Nov. 10, 2005), *cert. denied*, 126 S. Ct. 1464 (2006) (arguing that the certainty factor must be reconsidered in light of psychological research and state courts' rejections of it); *State v. Ledbetter*, 881 A.2d 290 (Conn. 2005), *cert. denied*, 126 S. Ct. 1798 (2006).

this area.⁵⁶ How should such a rule be constructed? The new rule should provide affirmative minimum guidelines for the conduct of identification procedures—what some term “prophylactic rules.” Professor Susan Klein has argued that eyewitness identification procedures are a “prime candidate” for the implementation of prophylactic rules.⁵⁷ Such rules would provide clear guidance to law enforcement and easily administrable tests for trial courts. Moreover, as Professor Klein has pointed out, affirmative minimum guidelines would improve eyewitness identification procedures, and reduce the likelihood of mistaken identification.⁵⁸

Prophylactic rules are particularly helpful in a situation in which case-by-case adjudication is unwieldy. The classic example is the Supreme Court’s *Miranda* decision. Numerous commentators have noted that *Miranda* replaced an unmanageably fact-intensive voluntariness decision with clear rules.⁵⁹ Because it requires case-by-case reliability determinations, the *Manson* rule of decision shares the weaknesses of the pre-*Miranda* voluntariness regime—it is both resource-intensive and poorly-suited to courts’ capacities. In much the same way that the *Miranda* warnings have provided clear guidance, a rule of decision instituting minimum affirmative guidelines for identification procedures—based on the psychological research—would provide better guidance for both police and trial courts.

Such guidelines could draw on the numerous models and recommendations that have been issued about eyewitness identification practices.⁶⁰ They would require that police implement double-blind procedures, use non-suspect fillers chosen to minimize suggestivity, separate witnesses, caution witnesses that the culprit may not appear in the line-up or photo array, avoid exposing the witness to multiple line-

⁵⁶ Tracey L. Meares & Bernard Harcourt, *Supreme Court Review: Transparent Adjudication and Social Science Research in Constitutional Criminal Procedure*, 90 J. CRIM. L. & CRIMINOLOGY 733, 743, 797 (2000). In recent years the Court has demonstrated a willingness to consider research findings in revisiting constitutional rules. *Id.* See, e.g., *Roper v. Simmons*, 543 U.S. 551, 569 (2005); *Atkins v. Virginia*, 536 U.S. 304, 318 nn.23-24 (2002) (drawing on psychological literature to determine that Eighth Amendment bars the execution of the mentally retarded and juveniles).

⁵⁷ Susan R. Klein, *Identifying and (Re)Formulating Prophylactic Rules, Safe Harbors, and Incidental Rights in Constitutional Criminal Procedure*, 99 MICH. L. REV. 1030, 1064-65 (2001).

⁵⁸ *Id.*

⁵⁹ Fallon, *supra* note 3, at 1305-06; Roosevelt, *supra* note 3, at 1671-72; David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 208-09 (1988).

⁶⁰ See *supra* notes 37-54.

up procedures with the same suspect, and ask witnesses to make a statement of their certainty at the time they make a pick.

The proposed rule of decision permits continued innovation. Professor Klein has pointed out that prophylactic rules may be changed as social science evolves or state officials produce alternative solutions.⁶¹ Congress cannot “simply erase” prophylactic rules, Professor Roosevelt has written, as demonstrated by the Supreme Court’s reaffirmation of *Miranda* in *Dickerson*.⁶² Nonetheless, legislatures and local governments can experiment with alternative methods of safeguarding the constitutional right at issue, provided they do not fall below the floor set out by the prophylactic rule.⁶³

We now turn to a more detailed discussion of the problems with the *Manson* rule of decision. In Part II, the psychological research that has been conducted in the nearly three decades since *Manson* was decided is outlined. Part III discusses the development of the *Manson* rule of decision in Supreme Court jurisprudence. In Part IV, the way that *Manson* typifies what Professor Roosevelt described as the “poor fit” between a constitutionally operative proposition and a rule of decision is described.⁶⁴ Finally, Part V returns to a more detailed defense of the proposed solution—minimum affirmative guidelines for identification procedures.

II. 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.⁶⁵ Professor Wells has described eyewitness identification evidence as a form of “trace evidence”; instead of leaving a physical trace like blood stains or fingerprints, eyewitness evidence leaves a

⁶¹ Klein, *supra* note 57, at 1060.

⁶² Roosevelt, *supra* note 3, at 1672 (discussing *Dickerson v. United States*, 530 U.S. 428 (2000)).

⁶³ *Id.* at 1671-72.

⁶⁴ *Id.* at 1692-93.

⁶⁵ D.A. Louw & A. Venter, *The Relationship Between Memory and the Recall of Specific Details*, 23 MED. & L. 625, 626 (2004).

“memory trace” in the mind of the observer.⁶⁶ The question is how to extract this evidence without damaging it.⁶⁷

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.⁶⁸ 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.⁶⁹ An experiment using two photo spreads—one 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 the culprit.⁷⁰ 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%.⁷¹ 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.⁷²

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.⁷³ 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.⁷⁴ Psychologists point out that “double-blind”

⁶⁶ Wells et al., *Eyewitness Identification Procedures*, *supra* note 37, at 618.

⁶⁷ *Id.*

⁶⁸ Wells & Olson, *supra* note 32, at 279.

⁶⁹ Gary L. Wells & Eric P. Seelau, *Eyewitness Identification: Psychological Research and Legal Policy on Lineups*, 1 PSYCHOL. PUB. POL’Y & L. 765, 768-69 (1995).

⁷⁰ *Id.* at 770.

⁷¹ *Id.* at 769. See also Wells et al., *Eyewitness Identification Procedures*, *supra* note 37, at 628-29.

⁷² Wells & Seelau, *supra* note 69, at 772; Wells et al., *Eyewitness Identification Procedures*, *supra* note 37, at 639.

⁷³ Wells & Seelau, *supra* note 69, at 775-78.

⁷⁴ Wells et al., *Eyewitness Identification Procedures*, *supra* note 37, at 627; Wells & Olson, *Eyewitness Testimony*, *supra* note 32, at 289.

procedures are standard in scientific experiments, and that identification procedures are properly considered a type of experiment.⁷⁵

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.⁷⁶ The confidence-accuracy correlation varies depending on the circumstances, but many studies indicate that, even at its highest, it is fairly modest.⁷⁷ Some studies indicate that, in poor witnessing conditions, the correlation between confidence and accuracy can be non-significant, or even negative.⁷⁸ A recent study co-authored between Professor Gary Wells and Professor 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 is probably 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”⁷⁹

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, (“Good, you got him!” or “You got the right guy.”) has been demonstrated to increase confidence.⁸⁰ Even routine procedures can enhance confidence artificially: briefing the witness about the types of questions to expect on cross-examination,⁸¹ questioning the witness repeatedly,⁸² or telling the witness that another witness picked the same suspect.⁸³ Unfortunately, many of these effects

⁷⁵ Wells et al., *Eyewitness Identification Procedures*, *supra* note 37, at 627.

⁷⁶ See Neil Brewer, Amber Keast & Amanda Rishworth, *The Confidence-Accuracy Relationship in Eyewitness Identification: The Effects of Reflection and Disconfirmation on Correlation and Calibration*, 8 J. EXPERIMENTAL PSYCHOL. 44 (2002); S. Penrod & B. Cutler, *Witness Confidence and Witness Accuracy: Assessing Their Forensic Relation*, 1 PSYCHOL. PUB. POL'Y & L. 817 (1995); Wells, Olson & Charman, *supra* note 34, at 151.

⁷⁷ Wells, Olson & Charman, *supra* note 34, at 152.

⁷⁸ Kenneth A. Deffenbacher, *Eyewitness Accuracy and Confidence: Can We Infer Anything About Their Relationship?*, 4 LAW & HUM. BEHAV. 243, 253 (1980).

⁷⁹ Neil Brewer & Gary L. Wells, *The Confidence-Accuracy Relationship in Eyewitness Identification: Effects of Lineup Instructions, Foil Similarity and Target-Absent Base Rates*, 12 J. EXPERIMENTAL PSYCHOL: APPLIED 11 (2006).

⁸⁰ Wells & Bradfield, *supra* note 35, at 374.

⁸¹ Penrod & Cutler, *supra* note 76, at 827.

⁸² *Id.*

⁸³ Wells & Seelau, *supra* note 69, at 774-75.

have been demonstrated to inflate the certainty of inaccurate witnesses more than that of accurate witnesses.⁸⁴

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.⁸⁵ "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 details of the perpetrator's face."⁸⁶

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.⁸⁷

The problems with the *Manson* rule of decision are fairly obvious in light of the psychological research, and have been described by Professor Gary Wells in a forthcoming article.⁸⁸ 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."⁸⁹ The witness's level of certainty is suspect because, as discussed above, the confidence-accuracy correlation is weak.⁹⁰ Moreover, the witness's assessment of her confidence, her opportunity to view, and her degree of

⁸⁴ Amy L. Bradfield, Gary L. Wells & Elizabeth A. Olson, *The Damaging Effect of Confirming Feedback of the Relation Between Eyewitness Certainty and Identification Accuracy*, 87 J. APPLIED PSYCHOL. 112, 113, 118 (2002); Penrod & Cutler, *supra* note 76, at 827.

⁸⁵ Carolyn Semmler, Neil Brewer & Gary L. Wells, *Effects of Postidentification Feedback on Eyewitness Identification and Nonidentification Confidence*, 89 J. APPLIED PSYCHOL. 334 (2004); Wells & Bradfield, *supra* note 35, at 366.

⁸⁶ Semmler, Brewer & Wells, *supra* note 85, at 335.

⁸⁷ Wells & Bradfield, *supra* note 35, at 374.

⁸⁸ Wells, *What is Wrong*, *supra* note 31.

⁸⁹ *Id.*

⁹⁰ Wells, Olson & Charman, *supra* note 34, at 152.

122 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 41

attention may all be distorted by post-identification feedback from the police, repeated questioning, or preparation to testify.⁹¹

Even more fundamentally, as Professor Wells 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.⁹² 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.

III. 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 Professor Charles Pulaski termed in a prescient 1974 article a “permissive construction of the due process test.”⁹³ *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.

In 1967, the Supreme Court decided three eyewitness identification cases—*United States v. Wade*,⁹⁴ *Gilbert v. California*,⁹⁵ and *Stovall v. Denno*.⁹⁶ *Wade* instituted what some consider a type of prophylactic rule,⁹⁷ concluding that the Sixth Amendment entitled the defendant to the assistance of counsel at a post-indictment line-up.⁹⁸ In reaching this conclusion, the *Wade* Court noted the “vagaries of eyewitness identification”⁹⁹ and the “potential for improper influence” at line-ups,¹⁰⁰ concluding that the “presence of counsel itself can often avert prejudice

⁹¹ Wells & Bradfield, *supra* note 35, at 367.

⁹² *Id.*

⁹³ Charles A. Pulaski, Neil v. Biggers: *The Supreme Court Dismantles the Wade Trilogy's Due Process Protection*, 26 STAN. L. REV. 1097, 1111 (1974).

⁹⁴ 388 U.S. 218 (1967).

⁹⁵ 388 U.S. 263 (1967).

⁹⁶ 388 U.S. 293 (1967).

⁹⁷ Compare Henry P. Monaghan, *The Supreme Court 1974 Term, Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 20, 23, 106-07 (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, 119-22 (1985) (arguing that *Wade* was improperly categorized as prophylactic).

⁹⁸ *Wade*, 388 U.S. at 237.

⁹⁹ *Id.* at 228.

¹⁰⁰ *Id.* at 233.

and assure a meaningful confrontation at trial.”¹⁰¹ 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.”¹⁰²

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 identification”¹⁰³ (i.e., had an independent source).¹⁰⁴ 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.¹⁰⁵

In the final case of the *Wade* trilogy, *Stovall v. Denno*, 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.”¹⁰⁶

The following year, in *Simmons v. United States*, the Supreme Court seemed to shift the *Stovall* formulation substantially.¹⁰⁷ 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.”¹⁰⁸ As Professor Pulaski has explained, the “reworded language of the *Simmons* due process test . . . suggested a very different inquiry.”¹⁰⁹ Instead of

¹⁰¹ *Id.* at 236.

¹⁰² *Id.* at 239.

¹⁰³ *Id.* at 240.

¹⁰⁴ *Gilbert v. California*, 388 U.S. 263, 272 (1967).

¹⁰⁵ Pulaski, *supra* note 93, at 1101.

¹⁰⁶ *Stovall v. Denno*, 388 U.S. 293, 302 (1967).

¹⁰⁷ Pulaski, *supra* note 93, at 1108.

¹⁰⁸ *Simmons v. United States*, 390 U.S. 377, 385 (1968).

¹⁰⁹ Pulaski, *supra* note 93, at 1108.

124 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 41

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. 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.”¹¹⁰

Thus, as explained by Professor 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 for its use.”¹¹¹ 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.”¹¹² 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.”¹¹³

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.¹¹⁴ 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.¹¹⁵ 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.”¹¹⁶ The Court identified for the first time

the factors to be considered in evaluating the likelihood of misidentification includ[ing] the opportunity of the witness to view the criminal at the time of the crime, the witness’ degree of attention, the accuracy of the witness’ prior description of the criminal, the level of certainty

¹¹⁰ *Id.*

¹¹¹ *Id.* at 1113.

¹¹² *Id.* at 1112.

¹¹³ *Id.*

¹¹⁴ 409 U.S. 188, 199-200 (1972).

¹¹⁵ *Id.* at 199.

¹¹⁶ *Id.* See Pulaski, *supra* note 93, 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.” *Id.*

demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.¹¹⁷

Writing in 1974, between the Court's decisions in *Biggers* and *Manson*, Professor 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."¹¹⁸ "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."¹¹⁹

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* and opted for a reliability-based approach, holding that "reliability is the linchpin" in determining the admissibility of identification testimony for both pre- and post-*Stovall* confrontations.¹²⁰ *Manson* concluded that "[t]he factors to be considered are set out in *Biggers*."¹²¹ 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 Professor 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.¹²² "[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

¹¹⁷ *Biggers*, 409 U.S. at 199.

¹¹⁸ Pulaski, *supra* note 93, at 1120.

¹¹⁹ *Id.*

¹²⁰ *Manson v. Braithwaite*, 432 U.S. 98, 114 (1977).

¹²¹ *Id.*

¹²² *Watkins v. Sowders*, 449 U.S. 341, 349 (1981).

126 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 41

Watkins.¹²³ “[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.¹²⁴ Thus, under *Watkins*, the determination of whether the witness had adequate opportunity to observe the offender can be made by the jury. Therefore, the due process analysis is nearly indistinguishable from a general credibility determination, and the one real judicial check on the untethered use of unreliable identifications that *Manson* had seemed to provide is removed.

In his 1974 article, Professor 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.¹²⁵ He continued, “[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.”¹²⁶ Sadly, thirty years of experience with the *Manson* rule of decision has borne out Professor 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.”¹²⁷

IV. THE “POOR FIT” BETWEEN THE MANSON RULE OF DECISION AND THE OPERATIVE CONSTITUTIONAL PROPOSITIONS OF FAIRNESS AND RELIABILITY

In this part, a number of lower court opinions are discussed to demonstrate, again using Professor Roosevelt’s terms, the “poor fit” of the *Manson* rule of decision with the constitutionally operative propositions of fairness and reliability.¹²⁸ 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.

¹²³ *Id.* at 347.

¹²⁴ *Id.*

¹²⁵ Pulaski, *supra* note 93, at 1119.

¹²⁶ *Id.*

¹²⁷ *Id.* at 1120.

¹²⁸ Roosevelt, *supra* note 3, at 1686.

Many of these suggestive procedures could have been avoided by simply implementing double-blind procedures.

The 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 (for example, 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. 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.

A. *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 was reliable despite the fact that the witness had seen the shooter for only a few seconds as she ducked under the table, and later expressed doubts.¹²⁹ The witness in *Wong* viewed three photo arrays and picked Wong out of the third array, saying the photo “looked like the shooter.”¹³⁰ 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.¹³¹ The witness then identified Wong, although she said he was “taller than she remembered the gunman to be.”¹³² Despite the witness’s clear inability to identify the shooter without substantial coaching and 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.”¹³³

¹²⁹ 40 F.3d 1347, 1360 (2d Cir. 1994).

¹³⁰ *Id.* at 1358.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.* at 1360.

In *Clark v. Caspari*,¹³⁴ the Eighth Circuit found reliable identifications by two liquor store clerks who had viewed the two handcuffed African-American suspects “surrounded by white police officers, one of whom was holding a shotgun.”¹³⁵ The Court focused on three factors: both clerks had come face-to-face with the robbers during the robbery; only thirty 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.¹³⁶ “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.”¹³⁷ 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*,¹³⁸ 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’ identifications, terming this lapse only “minimally suggestive.”¹³⁹ 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.¹⁴⁰ 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[,]”¹⁴¹ and based on the witnesses’ subjective expressions of certainty.¹⁴²

¹³⁴ 274 F.3d 507 (8th Cir. 2002).

¹³⁵ *Id.* at 511.

¹³⁶ *Id.* at 512.

¹³⁷ *Id.*

¹³⁸ 405 F.3d 459 (6th Cir. 2005).

¹³⁹ *Id.* at 470.

¹⁴⁰ *Id.* at 472-73.

¹⁴¹ *Id.* at 473.

¹⁴² *Id.*

B. *State Court Decisions*

The *Manson* rule of decision also produces rote and unconvincing analysis in state court opinions. An example is *State v. Thompson*,¹⁴³ 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.”¹⁴⁴ The officer told the witness: “[W]e believe we have the person. We need you to identify him.”¹⁴⁵ The police drove the witness in a police car to the location where the suspect had been apprehended.¹⁴⁶ Training spotlights and headlights on the defendant, they removed him from the back of the police car for a show-up.¹⁴⁷ The trial court denied the defense motion to suppress, noting that the witness had a “good, hard look,” the identification occurred less than two hours after the shooting,¹⁴⁸ and the witness was very certain of his identification.¹⁴⁹ On appeal, despite the fact that the state conceded that the show-up was unnecessarily suggestive,¹⁵⁰ 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.”¹⁵¹ Additionally, the appellate court also noted that the witness had indicated “a high level of certainty” in his identification,¹⁵² but did not address how the officers’ comments could have inflated the witness’s subjective assessment of his certainty.

In *State v. Johnson*,¹⁵³ 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.¹⁵⁴ The witness had failed to identify Mr. Johnson from a photo array the month following the incident.¹⁵⁵ At a bind-over hearing about seven months later, she pointed out the defendant.¹⁵⁶ The

¹⁴³ 839 A.2d 622 (Conn. App. Ct. 2004).

¹⁴⁴ *Id.* at 629.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 630 (citing *State v. Ledbetter*, 441 A.2d 595 (Conn. 1981)) (emphasis omitted).

¹⁵² *Id.*

¹⁵³ 836 N.E.2d 1243 (Ohio Ct. App. 2005).

¹⁵⁴ *Id.* at 1248.

¹⁵⁵ *Id.* at 1249.

¹⁵⁶ *Id.* at 1248.

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.”¹⁵⁷ Not surprisingly, the decedent’s wife identified him.¹⁵⁸ Pointing him out, she said, “Those eyes, those eyes. I will never forget those eyes.”¹⁵⁹ 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.¹⁶⁰ The trial court granted the motion to suppress, but the Tenth District of the Court of Appeals of Ohio reversed.¹⁶¹ The appellate court candidly acknowledged the suggestive circumstances of the identification at the bind-over hearing,¹⁶² but concluded that, pursuant to *Biggers* and *Manson*, the identification was reliable,¹⁶³ because 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.”¹⁶⁴ 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.¹⁶⁵

Finally, in a Mississippi case, *Bynum v. State*,¹⁶⁶ 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.¹⁶⁷ The victim testified that the attack lasted several seconds.¹⁶⁸ One week after the attack, the victim was shown a photo array and picked two people out of it—Mr. Bynum and another person.¹⁶⁹ The victim stated that Mr. Bynum “looked the most like the attacker.”¹⁷⁰ Four days later, the victim was shown a second photo array. This array contained Mr. Bynum’s picture, but not the photograph of the

¹⁵⁷ *Id.* at 1258.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 1250 (internal quotations omitted).

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 1259.

¹⁶² *Id.* at 1258.

¹⁶³ *Id.* at 1258-59.

¹⁶⁴ *Id.* at 1259.

¹⁶⁵ *Id.*

¹⁶⁶ 929 So.2d 324 (Miss. Ct. App. 2005).

¹⁶⁷ *Id.* at 327.

¹⁶⁸ *Id.* at 329.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

other person that the complainant had picked from the first array.¹⁷¹ Predictably, the victim picked Mr. Bynum as the assailant, this time making the identification “positively and unequivocally.”¹⁷² 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.¹⁷³ The third identified Mr. Bynum from a photo line-up and testified that he was “100% certain.”¹⁷⁴ 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.¹⁷⁵ In a conclusory paragraph, the Court of Appeals of Mississippi applied the *Biggers* factors and affirmed denial of the motion to suppress,¹⁷⁶ 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.¹⁷⁷ Others conclude that the psychological research provides reason to apply *Manson* carefully,¹⁷⁸ and demand rigor in its application.¹⁷⁹ Still others have rejected or refined the *Manson* test as a matter of state law,¹⁸⁰ or mandated rules pursuant to their supervisory authority.¹⁸¹ Unfortunately, many other lower courts continue to apply *Manson* mechanically, in a manner that undermines the values of “fairness” and “reliability.”

Again, the 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 do not know

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.* at 330.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *See, e.g.,* State v. Chance, No. A04-948, 2005 WL 1668890, at *5 (Minn. Ct. App. July 19, 2005). “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.” *Id.*

¹⁷⁸ *See, e.g.,* Bernal v. People, 44 P.3d 184 (Colo. 2002) (discussing psychological research and remanding for a more complete evidentiary hearing).

¹⁷⁹ *See, e.g.,* Brisco v. Phillips, 376 F. Supp. 2d 306, 319-20 (E.D.N.Y. 2005).

¹⁸⁰ *See supra* notes 44-47 (providing constitutional state decisions rejecting *Manson*).

¹⁸¹ *See supra* notes 48-51 (providing decisions under state courts’ supervisory authority).

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 potential unreliability of the identifications—indications that courts applying the *Manson* test completely ignored in their analysis. The 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.

V. TOWARDS A NEW RULE OF DECISION

This Article describes 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. Human perception and memory are imperfect in nature, but despite their flawed characters, they provide 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 Professor Roosevelt's terms, "lost fit" in light of the developments in social science.¹⁸² The tough part, 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, 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.

A. *Why Due Process Challenges to Identification Procedures Matter*

Not surprisingly, there are a number of ways to address the problem of faulty eyewitness identifications, besides suppressing evidence of out-of-court identification procedures through due process challenges. Many experts working in the field have focused their energies at an

¹⁸² Roosevelt, *supra* note 3, at 1686.

earlier point in the criminal justice process, attempting to stop erroneous identifications from being made through reforms in identification procedures.¹⁸³ 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.¹⁸⁴ Still others have counseled better jury instructions on the potential problems of eyewitness identification.¹⁸⁵

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.¹⁸⁶ 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.¹⁸⁷ As Professor 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.¹⁸⁸

As for jury instructions, although the law must rely on the assumption that jurors follow them,¹⁸⁹ their actual efficacy is debatable. As Justice Scalia has candidly acknowledged, “The rule that juries are

¹⁸³ Wells et al., *Eyewitness Identification Procedures*, *supra* note 37; Wells, *Systematic Reforms*, *supra* note 54.

¹⁸⁴ See Roger B. Handberg, *Expert Testimony on Eyewitness Identification: A New Pair of Glasses for the Jury*, 32 AM. CRIM. L. REV. 1013 (1995); Michael Leippe, *The Case for Expert Testimony About Eyewitness Memory*, 1 PSYCHOL. PUB. POL'Y & L. 909-59 (1995); Edward Stein, *The Admissibility of Expert Testimony About Cognitive Science Research on Eyewitness Identification*, 2 LAW, PROBABILITY & RISK 295 (2003).

¹⁸⁵ Wells, *Eyewitness Identification Evidence*, *supra* note 32, at 20.

¹⁸⁶ See *supra* note 54.

¹⁸⁷ 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* 7 (2005).

¹⁸⁸ Wells, *Eyewitness Identification Evidence*, *supra* note 32, at 19.

¹⁸⁹ See, e.g., *Richardson v. Marsh*, 481 U.S. 200, 211 (1987).

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 represents a reasonable practical accommodation of the interests of the state and the defendant in the criminal justice process.¹⁹⁰ Studies of juror instructions on eyewitness identification indicate that they are not an effective safeguard against wrongful conviction.¹⁹¹

Many observers, including the Supreme Court in *Watkins*, suggest that cross-examination alone can uncover unreliable identifications.¹⁹² 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.”¹⁹³ Justice Brennan quoted Professor Elizabeth Loftus’s 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!’”¹⁹⁴

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.¹⁹⁵ 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.¹⁹⁶ In another study, eyewitness confidence was a better predictor of conviction by mock jurors than eyewitness accuracy.¹⁹⁷ In that study, eyewitnesses who

¹⁹⁰ *Id.*

¹⁹¹ Penrod & Cutler, *supra* note 76, at 834.

¹⁹² *Watkins v. Sowders*, 449 U.S. 341, 349 (1981) (describing “the time-honored process of cross-examination as the device best suited to determine the trustworthiness of testimonial evidence”).

¹⁹³ *Id.* at 352-53 (Brennan, J., dissenting).

¹⁹⁴ *Id.* at 353 (quoting ELIZABETH LOFTUS, *EYEWITNESS TESTIMONY* 19 (1979)).

¹⁹⁵ See generally Richard S. Schmechel et al., *Beyond the Ken? Testing Jurors’ Understanding of Eyewitness Reliability Evidence*, 46 *JURIMETRICS J.* 177 (2006).

¹⁹⁶ Penrod & Cutler, *supra* note 76, at 820.

¹⁹⁷ R.C.L. Lindsay, Gary L. Wells & Fergus J. O’Connor, *Mock-Juror Belief of Accurate and Inaccurate Eyewitnesses*, 13 *LAW & HUM. BEHAV.* 333, 337 (1989).

identified an innocent suspect convinced 70% of mock jurors to convict, while eyewitnesses who identified a guilty party produced only a 68% rate of conviction.¹⁹⁸ 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 other 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."¹⁹⁹ 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.²⁰⁰ Such witnesses cannot 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.²⁰¹ 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?

¹⁹⁸ *Id.* at 336.

¹⁹⁹ Thompson, *supra* note 20.

²⁰⁰ See *supra* notes 78-79.

²⁰¹ While DNA exonerees have tried to bring civil rights lawsuits alleging constitutional violations arising from faulty eyewitness identification procedures, some courts have concluded that suppression is the only remedy. See, e.g., Johnson v. Rollins, No. 4:04 CV967-SNL, 2006 WL 2546807 (E.D. Mo. Aug. 31, 2006).

B. *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 identifications. Indeed, the *Manson* reliability factors have functioned in such a way as to create safe harbor provisions, but not ones that, to borrow Professor Susan Klein's terms "instrumentally advance" Due Process Clause values or "offer[] bright-line guidance for officers in the field."²⁰² All too often, if a police officer, prosecutor, or trial court elicits a subjective statement of confidence from a witness, 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 application of factors such as certainty that are acknowledged by social science to be only weakly correlated with reliability undermines respect for the courts. As the DNA exonerations have now demonstrated, *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. Professor 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."²⁰³ 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[.]" Professor Klein concludes, "The best candidate for countering these injustices is a new rule . . . that would require proper procedures and guidelines for lineups, show-ups, and photo arrays."²⁰⁴

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

²⁰² Klein, *supra* note 57, at 1045-46.

²⁰³ *Id.* at 1063-64.

²⁰⁴ *Id.* at 1064-65.

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.”²⁰⁵ “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.”²⁰⁶

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 thirty 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 such convictions have occurred fairly routinely and that *Manson* has done nothing to prevent them. In fact, because jurors tend to over-value eyewitness identification testimony, *Manson* may have affirmatively contributed to the conviction of the innocent.²⁰⁷

Moreover, 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.”²⁰⁸ 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’s cautious attitude toward limitations on the use of eyewitness evidence was 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.

²⁰⁵ *Manson v. Brathwaite*, 432 U.S. 98, 117 (1977) (Stevens, J., concurring).

²⁰⁶ *Id.* at 117-18 (citations omitted).

²⁰⁷ Siegfried Ludwig Sporer, *Eyewitness Identification Accuracy, Confidence, and Decision Times in Simultaneous and Sequential Lineups*, 78 J. APPLIED PSYCHOL. 22, 23 (1993). See also *Perez v. United States*, No. 05-0596, 2005 WL 3038542, at *8-*9 (Nov. 10, 2005).

²⁰⁸ *Schlup v. Delo*, 513 U.S. 298, 321 (1995).

138 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 41]

In light of this emerging consensus, the Court should adopt a decision rule that institutes minimum affirmative guidelines for the conduct of identification procedures. These guidelines 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 minimum guidelines would be excluded. However, courts also would remain free in extraordinary cases to exclude identifications that are the products of procedures that, while complying with the minimum guidelines, are nonetheless so suggestive as to render the identification unreliable.

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.”²⁰⁹ A report by the National Institute of Justice in 1999 explained that “investigators’ unintentional cues (e.g., body language, tone of voice) may negatively impact the reliability of eyewitness evidence,” and that “such influences could be avoided if ‘blind’ identification procedures were employed.”²¹⁰ For this reason, double blind procedures are a fundamental part of scientific and social science research.²¹¹ 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.²¹² Such protections may be even more important in the context of a criminal investigation, because, as Professors Findley and Scott have recently described in their article on the problem of tunnel vision, police and other investigators are under tremendous pressure to close criminal cases and remove violent criminals from the streets.²¹³

Other fundamental affirmative guidelines for any such rule of decision could track the recommendations of the *Eyewitness Evidence*

²⁰⁹ WISCONSIN DEP’T OF JUSTICE, BUREAU OF TRAINING AND STANDARDS FOR CRIMINAL JUSTICE, MODEL POLICY AND PROCEDURE FOR EYEWITNESS IDENTIFICATION 3 (2005), available at <http://www.doj.state.wi.us/dles/tns/EyewitnessPublic.pdf> [hereinafter MODEL POLICY AND PROCEDURE FOR EYEWITNESS IDENTIFICATION].

²¹⁰ NAT’L INST. OF JUSTICE, EYEWITNESS EVIDENCE: A TRAINER’S MANUAL FOR LAW ENFORCEMENT, *supra* note 53. Although recognizing the value of double-blind procedures, the NIJ report did not recommend them at that time because of the difficulties in implementation. *Id.*

²¹¹ Robert Rosenthal, *Experimenter and Clinician Effects in Scientific Inquiry and Clinical Practice*, PREVENTION & TREATMENT, Oct. 2002, at 1-12; Wells et al., *Eyewitness Identification Procedures*, *supra* note 37, at 627-28.

²¹² See *supra* note 210.

²¹³ Findley & Scott, *supra* note 39, at 323-37.

Guide for Law Enforcement of the National Institute of Justice of the United States Department of Justice,²¹⁴ the 2004 American Bar Association report on eyewitness testimony,²¹⁵ or the *Model Policy and Procedure for Eyewitness Evidence* recently adopted by the State of Wisconsin.²¹⁶ Professor 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.”²¹⁷

Obviously, “non-suspect fillers [should be] chosen to minimize any suggestiveness that might point toward the suspect.”²¹⁸ Law enforcement should “[s]eparate witnesses and instruct them to avoid discussing details of the incident with other witnesses.”²¹⁹ In addition, law enforcement should “[a]void multiple identification procedures in which the same witness views the same suspect more than once.”²²⁰ Officers also should caution witnesses prior to viewing a photo array or line-up, with instructions that track those suggested by the DOJ, informing them that: (1) “it is just as important to clear innocent persons from suspicion as to identify guilty parties”; (2) “individuals present in the lineup may not appear exactly as they did on the date of the incident”; (3) “the person who committed the crime may or may not be present in the group of individuals”; and (4) “regardless of whether an identification is made, the police will continue to investigate the incident.”²²¹ 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.²²²

²¹⁴ NAT'L INST. OF JUSTICE, A GUIDE FOR LAW ENFORCEMENT, *supra* note 53; NAT'L INST. OF JUSTICE, A TRAINER'S MANUAL FOR LAW ENFORCEMENT, *supra* note 53.

²¹⁵ AMERICAN BAR ASSOCIATION, REPORT IN SUPPORT OF THE CRIMINAL JUSTICE SECTION RESOLUTION ON EYEWITNESS TESTIMONY (2004), available at <http://www.abanet.org/leadership.2004/annual/dailyjournal/111c.doc> [hereinafter RESOLUTION ON EYEWITNESS TESTIMONY].

²¹⁶ MODEL POLICY AND PROCEDURE FOR EYEWITNESS IDENTIFICATION, *supra* note 209.

²¹⁷ Andrew Taslitz, *What Remains of Reliability: Hearsay and Freestanding Due Process After Crawford v. Washington*, 20 CRIM. JUST. 39, 53 (2005).

²¹⁸ MODEL POLICY AND PROCEDURE FOR EYEWITNESS IDENTIFICATION, *supra* note 209, at 3.

²¹⁹ NAT'L INST. OF JUSTICE, EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT, *supra* note 53, at 27.

²²⁰ MODEL POLICY AND PROCEDURE FOR EYEWITNESS IDENTIFICATION, *supra* note 209, at 3.

²²¹ NAT'L INST. OF JUSTICE, EYEWITNESS EVIDENCE: A TRAINER'S MANUAL FOR LAW ENFORCEMENT, *supra* note 53, at 40.

²²² MODEL POLICY AND PROCEDURE FOR EYEWITNESS IDENTIFICATION, *supra* note 209.

The proposed solution of affirmative minimum guidelines for line-ups and photo arrays 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*.²²³ 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 that are relatively simple for the police to integrate into their work.²²⁴ 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.²²⁵

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.²²⁶ They would not have instructed her to choose the man who looked the most like her assailant.²²⁷ 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, these measures could have helped to avert the wrongful conviction of Ronald Cotton, obviously benefiting Mr. Cotton, saving Ms. Thompson much anguish, and protecting the community from Bobby Poole.

²²³ *Manson v. Brathwaite*, 432 U.S. 98, 128 (1977) (Marshall, J. and Brennan, J., dissenting).

²²⁴ See Meares & Harcourt, *supra* note 56, at 759 (discussing studies that suggest “that the *Miranda* procedures are effective . . . in assuring the accused an opportunity to exercise their right of silence”).

²²⁵ 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).

²²⁶ *State v. Cotton*, 394 S.E.2d 456, 461 (N.C. Ct. App. 1990).

²²⁷ *Id.*

The 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.²²⁸ 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 attempting to discern 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.'"²²⁹ 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 been certain both that it was applying a clear rule correctly, and that the use of the guideline 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 Professor Lawrence Sager's terms, the federal constitutional rule of decision would "under-enforce" due process.²³⁰ Professor Monaghan and others have suggested that prophylactic rules such as those set out in *Miranda* over-enforce constitutional norms mandating more than the Constitution requires.²³¹ On the other hand, the proposed decision rule is interstitial, and does not attempt to catalogue all of the ways in which an identification procedure might be so unnecessarily suggestive as to violate due process. Conversely, we do not pretend to

²²⁸ See generally Roosevelt, *supra* note 3.

²²⁹ United States v. Wong, 40 F.3d 1347, 1358 (2d Cir. 1994).

²³⁰ Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978).

²³¹ Monaghan, *supra* note 97, at 22-23. See Fallon, *supra* note 3, at 1302-04 (discussing Monaghan).

142 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 41]

imagine all of the reforms that might reduce the likelihood of false identification. 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.²³² Professor Klein has explained that 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.”²³³

Certainly, there are useful measures that local jurisdictions might choose to implement that are not included on the list. For example, Wisconsin has chosen to implement sequential line-up rules, because most 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.²³⁴ Local jurisdictions also may choose to require videotaping of identification

²³² *Manson v. Brathwaite*, 432 U.S. 98, 118-19 (1977) (Stevens, J., concurring).

²³³ Klein, *supra* note 57, at 1060.

²³⁴ MODEL POLICY AND PROCEDURE FOR EYEWITNESS IDENTIFICATION, *supra* note 209. Early studies of implementation of sequential double-blind line-up procedures have produced promising results. Anecdotal reports from New Jersey, Boston, and other jurisdictions seem to indicate that most jurisdictions using sequential procedures are pleased with the results. One forthcoming study of the Hennepin County, Minnesota experience with sequential double-blind procedures suggests that such procedures work satisfactorily and as predicted by laboratory studies. See Amy Klobuchar, Nancy K. Mehrkens Steblay & Hilary Lindell Caligiuri, *Improving Eyewitness Identifications: Hennepin County's Blind Sequential Lineup Project*, 4 CARDOZO PUB. L. POL'Y & ETHICS J. 381 (2006). A well-publicized report of an Illinois pilot project, however, suggested, that sequential double-blind procedures actually produced a higher rate of known false negatives than the simultaneous procedures currently used by the police. See REPORT TO THE LEGISLATURE OF THE STATE OF ILLINOIS: THE ILLINOIS PILOT PROGRAM ON SEQUENTIAL DOUBLE-BLIND IDENTIFICATION PROCEDURES (2006), available at <http://www.chicagopolice.org/IL%20Pilot%20on%20Eyewitness%20ID.pdf>. But the Illinois report has been widely criticized because of the manner in which it was conducted: there was no protocol for the conduct of the simultaneous line-ups, and they were not double-blind. Kate Zernike, *Questions Raised Over New Trend in Police Lineups*, N.Y. TIMES, Apr. 19, 2006, at A1. Thus, it is impossible to compare the performance of the simultaneous and sequential procedures based on the Illinois report alone. *Id.* Criticisms of the Illinois project and data from the forthcoming Hennepin study are summarized in a hand-out by Dr. Nancy Steblay. Nancy Steblay, *Observations on the Illinois Lineup Data*, http://www.psychology.iastate.edu/FACULTY/gwells/Stebly_observations_on_the_illinois_data.pdf (last visited Aug. 22, 2006). This area is ripe for additional field research, particularly after researchers design a set of protocols that can avoid some of the problems in the Illinois study.

procedures, as the American Bar Association study recommended.²³⁵ Videotaping would enable defense counsel, the court, and fact-finders to assess the fairness of these procedures and 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, the list of fundamental affirmative guidelines does not include them because they are more resource-intensive, more difficult to implement, and not as fundamental to the overall integrity of the identification process.

The proposed affirmative guidelines would apply to identification line-ups and photo arrays. "Show-up" procedures, in which a single suspect is displayed to the witness, usually shortly after the offense, obviously raise suggestivity concerns as well. However, without data about how often show-ups conducted close in time to an incident clear innocent suspects, we are reluctant to call for a complete ban. And hopefully technology will soon progress to the point where police with laptops and digital cameras can construct photo arrays in their squad cars. For the time being, however, a version of the *Stovall* or *Dubose* rules should be used for show-ups.

In *Stovall*, the Supreme Court acknowledged that "[t]he practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned," but nonetheless concluded that the confrontation in the witness's hospital room was "imperative," given that the witness might not have lived long enough to make another identification.²³⁶ Unfortunately, as discussed in Part III, in *Simmons*, *Biggers*, and *Manson*, the Supreme Court turned the focus from the necessity of using the challenged procedure to the overall reliability of the witness's identification. Subsequently, commentators have urged that the *Stovall* rule be resurrected with respect to show-ups.²³⁷ In a 2005 show-up case, *Wisconsin v. Dubose*, the Wisconsin Supreme Court announced that "evidence obtained from an out-of-court showup is inherently suggestive and will not be admissible unless, based on the totality of the circumstances, the procedure was necessary."²³⁸

²³⁵ RESOLUTION ON EYEWITNESS TESTIMONY, *supra* note 215.

²³⁶ *Stovall v. Denno*, 388 U.S. 293, 302 (1967).

²³⁷ Jessica Lee, *No Exigency, No Consent: Protecting Innocent Suspects from Consequences of Non-Exigent Show-Ups*, 36 COLUM. HUM. RTS. L. REV. 755 (2005).

²³⁸ *State v. Dubose*, 699 N.W.2d 582, 593-94 (Wis. 2005).

In applying a *Stovall-Dubose* rule to show-ups, courts should make clear that they must be conducted soon after the incident: research has demonstrated that witnesses' show-up identifications become markedly less reliable twenty-four hours after a crime.²³⁹ In addition, although a *Stovall-Dubose* rule would allow imperative or exigent show-ups, the *Dubose* Court has said that it does not permit other types of suggestivity commonly seen in show-up cases—the presence of handcuffs or squad cars, for example.²⁴⁰

C. *Potential Criticisms of a Rule of Decision Based on Affirmative Guidelines*

A number of potential criticisms of the proposed rule of decision can be anticipated. Some will object to the proposal because they doubt the legitimacy of prophylactic rules generally. 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 Professor 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.”²⁴¹ More recently, but in a similar vein, Professor 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.”²⁴²

Although prophylactic rules have been called into question by some commentators,²⁴³ and criticized by some Supreme Court justices in the *Miranda* context,²⁴⁴ the Court has continued to utilize such rules in appropriate cases. Indeed, Professor 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.²⁴⁵ The Court set out a procedure for such

²³⁹ Lee, *supra* note 237, at 770. See A.D. Yarmey et al., *Accuracy of Eyewitness Identifications in Show-ups and Lineup*, 20 LAW & HUM. BEHAV. 459, 464 (1996).

²⁴⁰ *Dubose*, 699 N.W.2d at 594.

²⁴¹ Strauss, *supra* note 59, at 195.

²⁴² Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 858-59 (1999).

²⁴³ See Grano, *supra* note 97.

²⁴⁴ *Dickerson v. United States*, 530 U.S. 428, 450 (2000) (Scalia, J., dissenting).

²⁴⁵ Roosevelt, *supra* note 3, at 1671.

lawyers to follow in *Anders v. California*,²⁴⁶ but, in *Smith v. Robbins*, the Court made clear that the *Anders* procedure was “a prophylactic one,” and that “the States are free to adopt different procedures, so long as those procedures adequately safeguard a defendant’s right to appellate counsel.”²⁴⁷

Having employed Professor Berman’s lexicon of “constitutional operative propositions” and “decision rules” throughout this Article, we are in some sense what Professor Berman might describe as “taxonomists”—that is, we find labels to be helpful in discussing different types of constitutional interpretation.²⁴⁸ But, while a willingness to use labels has often been associated with criticism of prophylactic rules,²⁴⁹ there is no meaningful difference between so-called prophylactic rules and other forms of judicial remedies. As Professor 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 (as catalogued by Professor Roosevelt): institutional competence, costs of error, frequency of unconstitutional action, legislative pathologies, enforcement costs, and the need for guidance for other government actors.²⁵⁰ Professor Fallon has used the term “judicially manageable standards” to describe the tests that the Court crafts, which he says are distinct from the “constitutional norms” themselves.²⁵¹ In other words, so-called prophylactic rules are just another type of decision rule or judicially manageable standard, and such rules are common in constitutional adjudication.²⁵²

Adopting an affirmative statement of procedures as a decision rule can lessen the adjudicative burden on the lower courts. Professor Strauss has 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.”²⁵³ Professor 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.”²⁵⁴ This rationale holds

²⁴⁶ 386 U.S. 738, 744 (1967).

²⁴⁷ 528 U.S. 259, 265 (2000). See Klein, *supra* note 57, at 1042-43; Roosevelt, *supra* note 3, at 1671.

²⁴⁸ Berman, *supra* note 3, at 9.

²⁴⁹ See generally Grano, *supra* note 97.

²⁵⁰ Roosevelt, *supra* note 3, at 1659-67.

²⁵¹ Fallon, *supra* note 3, at 1277-78.

²⁵² Berman, *supra* note 3, at 61.

²⁵³ Strauss, *supra* note 59, at 208-09.

²⁵⁴ Roosevelt, *supra* note 3, at 1672.

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. Professor 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.²⁵⁵ Indeed, one way of understanding the 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.

Other advocates and commentators may criticize the proposed rule of decision for a different reason—arguing that the Court should either adopt a per se rule of exclusion or broaden the *Dubose* rule beyond the show-up context, to exclude unnecessarily suggestive line-ups and photo arrays that were not necessary under the circumstances.²⁵⁶ Professor Keith Findley of the University of Wisconsin, amicus in *Dubose*, would argue that an advantage of the *Dubose* rule of decision is that it can be revised easily in light of emerging social science. Rather than incorporating the current social science literature directly into the constitutional rule of decision, it places the responsibility on the defense bar to keep abreast of the developments in the research and argue that outdated procedures are unnecessarily suggestive.²⁵⁷

There are many good things about the *Dubose* rule. It is certainly preferable to *Manson*, and, in fact, as discussed above, a *Dubose* rule for show-ups should be used. Nonetheless, prophylactic rules for line-ups and photo arrays possess a number of advantages. First, they provide *ex ante* guidance to the police, which will reduce the number of mistaken identifications and relieve courts of making after-the-fact assessments of whether the police procedure was unnecessarily suggestive. Second, they provide structure for trial courts’ assessments, so that they do not devolve into the type of rote and mechanistic analysis described in Part IV. The *Dubose* rule shifts the focus from the reliability to the suggestivity prong of *Manson*. In the context of show-ups, the analysis is straightforward: a show-up is easy to identify, and the *Dubose* Court said that show-ups are “inherently suggestive.”²⁵⁸ However, the

²⁵⁵ Taslitz, *supra* note 217, at 48.

²⁵⁶ See *supra* notes 40-43.

²⁵⁷ Wisconsin v. Hibl, 714 N.W.2d 194 (2006); University of Wisconsin Law School, *Non-Party Brief of the Wisconsin Innocence Project of the Frank J. Remington Center* 8 (2005), available at <http://www.law.wisc.edu/webshare/02i6/dubose.pdf>.

²⁵⁸ State v. Dubose, 699 N.W.2d 582, 593-94 (Wis. 2005).

suggestivity determination for line-ups and photo arrays is less clear-cut (for example, does the background or the lighting draw attention to the suspect?). Under *Manson*, trial courts currently issue at least as many superficial suggestivity analyses as reliability determinations, albeit some of the most egregious are in the show-up context.²⁵⁹ We fear that a per se exclusion or *Dubose* rule for photo arrays and line-ups would generate even more empty suggestivity decisions.

Perhaps the most significant argument against our proposal for prophylactic rules is that affirmative guidelines based on the social science at the time of their adoption will not keep pace with new research findings. The response is that the prophylactic rules proposed are not intended to dictate an elaborate set of procedures, but rather to set a minimum floor based on fundamental safeguards. The affirmative guidelines advocated—such as double-blind procedures—are nearly universally accepted among the research community. Improved eyewitness identification procedures that remain the subject of research and debate—for example sequential identification procedures—could be adopted by state and local governments but would not be mandated by the prophylactic rules we advance.

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,²⁶⁰ as the New Jersey Supreme Court did in *Delgado*.²⁶¹ In *Dickerson*, the Supreme Court acknowledged that it possesses

²⁵⁹ See, e.g., *Hartridge v. United States*, 896 A.2d 198, 223 (D.C. 2006) (finding that the 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); *Lyles v. State*, 834 N.E.2d 1035, 1045 (Ind. Ct. App. 2005) (finding that the identification procedure was not unduly suggestive when defendant was “the only African-American” and “presented for identification in handcuffs standing between two police officers at the edge of a line of police cars”); *People v. Delarosa*, 813 N.Y.S.2d 610 (N.Y. App. Div. 2006) (“The fact that defendant was in handcuffs standing next to a police officer when viewed by the witnesses does not render the procedure unduly suggestive as a matter of law.”); *People v. Clark*, 810 N.Y.S. 2d 264 (N.Y. App. Div. 2006) (same as *Delarosa*); *People v. Gil*, 803 N.Y.S.2d 634 (N.Y. App. Div. 2005) (finding that the fact that defendant was handcuffed and that witness was told that police had a suspect in custody did not render show-up unduly suggestive).

²⁶⁰ *Dickerson v. United States*, 530 U.S. 428, 437 (2000). See, e.g., *Mallory v. United States*, 354 U.S. 449, 455-56 (1957); *McNabb v. United States*, 318 U.S. 332, 340-42 (1943) (exercising supervisory authority to exclude defendant’s confession obtained during unlawful detention).

²⁶¹ *State v. Delgado*, 902 A.2d 897, 888 (N.J. 2006).

supervisory authority over the federal courts, and that it “may use that authority to prescribe rules of evidence and procedure that are binding in those tribunals.”²⁶² Implementing eyewitness identification 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.

VI. 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, we must confront the problem and remedy what we can, given the current state of the science. Much is at stake: the lives of the wrongly accused like Ronald Cotton; 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 procedures.

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 invites rote analysis, threatens the legitimacy of the criminal justice system. No one benefits when some of the most significant decisions in criminal prosecutions are made based on meaningless formalisms.

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.

²⁶² 530 U.S. at 437.