22. The Law and Science of Eyewitness Testimony in Criminal and Civil Cases

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Eyewitnesses and Exclusion

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INTRODUCTION

The U.S. Supreme Court’s due process jurisprudence regulating the eyewitness identifications used in tens of thousands of criminal cases each year is not just flawed, but backwards. The Court’s highly deferential due process test uses factors that have been
the subject of longstanding legal and scientific criticism.\(^1\) In this Article, I argue that the test has a different fundamental flaw. While ostensibly focused on the problem of reliability, the Court’s test, as interpreted under a well-established line of cases, encourages the judge to admit the least reliable evidence: an eyewitness identification in the courtroom. In the courtroom, there is no lineup. It is all too obvious who the defendant is, sitting at counsel’s table. Yet, as Justice William Brennan wrote, “[T]here 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!’ ”\(^2\)

An irony of modern constitutional criminal procedure is that in the one area in which the Court intervened specifically to improve the reliability of trial evidence it may have permitted the opposite result. Much of constitutional criminal procedure seeks to regulate the fairness of criminal trials through procedural rights such as the right to counsel, the right to confront adverse witnesses, the right to not incriminate oneself, the right to exclude illegally obtained evidence, or the right to a determination of guilt beyond a reasonable doubt. However, issues relating to the accuracy and reliability of evidence are not usually of constitutional import and are typically left to state evidence law and the trial judge’s discretion.\(^3\)

The Court’s eyewitness jurisprudence is different. In its historic 1977 ruling in *Manson v. Brathwaite*, the Court emphasized that “reliability is the linchpin” for evaluating eyewitness identification procedures.\(^4\) The Court adopted two approaches to regulating identifications. The first, adopted in 1967’s *United States v. Wade*, was a typical criminal procedure approach that recognized a

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procedural right to counsel at postindictment lineups. The second, adopted in *Manson*, barred unduly suggestive identification techniques if the identification was also deemed unreliable.

The Court’s reliability-based due process test was on a collision course with reality. When *Manson* was decided, social scientists had just embarked on a course of experimental research that would revolutionize our understanding of human memory. As John Monahan has observed, of “all the substantive uses [of] social science in law . . . nowhere is there a larger body of research than in the area of eyewitness identification.” Social scientists showed how memory is not like a videotape, but rather is constructed in a dynamic fashion. As a result, commonly used identification procedures can distort memory and can even produce false identifications. Following the *Manson* test, a judge may excuse the most blatant coaching of an eyewitness by citing to “reliability” factors. Yet, social scientists showed that the factors judges use do not correspond with reliability. For example, one factor, eyewitness confidence, is not a sign of reliability, but it is highly malleable and may be the product of police suggestion. Even modestly comforting feedback after the identification, like telling an eyewitness, “Good, you identified the suspect,” can make the eyewitness far more confident.

In the decades after *Manson* was decided, hundreds of individuals would be convicted based on eyewitness identifications, but these individuals would later be proven innocent by DNA testing. Those high-profile wrongful convictions made the dangers of eyewitness misidentifications more salient than ever before. In a

5. United States v. Wade, 388 U.S. 218, 228 (1967); see infra Part I.B.


9. For example, the Department of Justice convened in 1998 a task force that played a crucial role in creating awareness about the need to adopt sound eyewitness identification procedures. The report cited as its impetus both a “growing body” of social science research and “[r]ecent cases in which DNA evidence has been used to exonerate individuals convicted primarily on the basis of eyewitness testimony.” See Department of Justice, Technical Working Group for Eyewitness Evidence, NCJ 178240, Eyewitness Identiﬁcations: A Guide for Law Enforcement, at iii (1999), available at https://www.ncjrs.gov/pdffiles1/ncj/178240.pdf (“Recent cases in which DNA evidence has been used to exonerate individuals convicted primarily on the basis of eyewitness testimony have shown us that eyewitness evidence
recent book, I present a study exploring the role that eyewitness evidence played in the trials of the first 250 DNA exonerees. Just as social scientists would have predicted, the vast majority were convicted following suggestive identification procedures and initially uncertain eyewitnesses became absolutely certain by the time of trial. If jurors had fully appreciated how tentative those eyewitnesses were initially and the potential impact of suggestive procedures, they might not have so readily convicted the defendants.

Responding to these developments, there has been a nationwide movement to reform criminal procedure to promote greater accuracy and to prevent wrongful convictions. The Supreme Court has taken note of, but has not responded to, these developments; in its recent decision in Perry v. New Hampshire, the Justices showed little interest in thinking about the due process test, much less rethinking it. That case did not involve a lineup, but rather a situation in which police claimed they did not intentionally arrange a one-on-one identification. Most troubling, though was that the majority opinion suggested, in ruling that the Manson test did not apply, that eyewitness testimony did not deserve different treatment than other forms of potentially unreliable evidence. The Court noted that “all in-court identifications” involve “some elements of suggestion,” but suggested that such “potential unreliability” does not counsel additional due process regulation. On the other hand the Court emphasized: “We do not doubt either the importance or the fallibility of eyewitness identifications.” Eyewitness evidence poses a unique problem in that jurors see a seemingly powerful but suggestive in-court identification, while standard tools like cross-examination cannot show how the very memory of an eyewitness may have been altered by unsound identification procedures; Justice Sotomayor countered in dissent that suggestion impairs “meaningful cross-examination.” The majority did, however, suggest that careful jury instructions and expert testimony are important “safeguards” in the


11. See id. at 48; infra Part I.D.
14. Id. at 727.
15. Id. at 728.
16. Id. at 732 (Sotomayor, J., dissenting).
Law enforcement, state courts and legislatures do not have the luxury of remaining aloof from the problem, since they confront the consequences of eyewitness misidentifications first-hand. Many have improved their identification procedures. Some states and many more local jurisdictions have adopted double-blind lineups, which psychologists have long recommended. In a double-blind lineup, the officer does not know which person is the suspect, and the eyewitness is told that the officer does not know. That simple procedure can effectively prevent suggestion from contaminating identifications. An important field study has also now confirmed the advantage of conducting identification procedures in a sequential fashion so that images are shown to the subject one at a time.

What happens if the police do not follow best practices, and the police fail to use, say, a double-blind lineup? At that point, the question for a judge is whether to exclude that identification or to admit it. Yet, a judge may exclude the prior identification but still allow the eyewitness to identify the defendant in the courtroom. As I will develop, state courts have used “independent source” rules to allow courtroom identifications despite inadmissible out-of-court identifications by the same eyewitness. These rules have gone largely unnoticed by scholars but have been adopted almost universally.

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17. Id. at 729.
18. See infra Part III.B.
19. See infra Part I.C (discussing this practice and other recommendations).
21. No one has carefully examined state and federal rulings adopting this so-called “independent source” or “independent reliability” test for admitting subsequent or in-court eyewitness identifications. The leading practice guide to eyewitness testimony provides the only account of the doctrine of independent source as a more general “pivotral strategic problem,” and briefly discusses the “extraordinary lengths” courts may go to admit in-court identifications. See ELIZABETH F. LOFTUS, JAMES M. DOYLE & JENNIFER E. DYSART, EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL § 8-18 (4th ed. 2007) (“[C]ourts have gone to truly extraordinary lengths to accept very limited opportunities to observe independent sources.”). I have located two scholars who have written about the potential danger of such rulings. Sandra Guerra Thompson, in an important article on the role of state courts in reforming criminal procedure more generally, discusses such decisions in several states. See Sandra Guerra Thompson, EYEWITNESS IDENTIFICATIONS AND STATE COURTS AS GUARDIANS AGAINST WRONGFUL CONVICTION, 7 OHIO ST. J. CRIM. L. 603, 628–31 (2010). Katherine Kruse, in an insightful analysis of reform efforts in Wisconsin, cites to the potential corrosive effect of such “independent source” rules. See Katherine R. Kruse, Instituting Innocence Reform: Wisconsin’s New Governance Experiment, 2006 WIS. L. REV. 645, 722 n.367. Moreover, very few commentators have discussed in-court identifications generally.
no uncertain terms, judges explain that they allow the courtroom
identification because of the “independent” memory that the
eyewitness supposedly has from the time of the crime.

This pernicious doctrine of “independent source” came from a
conflation of the two separate strands in the Court’s eyewitness
identification jurisprudence. It was misappropriated from Sixth
Amendment rulings on a right to counsel at a preindictment lineup.
Indeed, the doctrine had its origins in Fourth Amendment search and
seizure law.\textsuperscript{22} The concept of an independent source then found its
way into cases ostensibly dealing with the substantive issue of the
reliability of an identification. Had lower courts properly understood
the Supreme Court’s due process cases, to say nothing of the social
science research on eyewitness memory, they would not so liberally
allow courtroom identifications. By contrast, evidence law has, in its
way, long recognized that the drama of a courtroom identification
should not supplant prior identification procedures intended to test an
eyewitness’s memory. Courts have permitted the introduction of out-
of-court identifications as a special hearsay exception precisely
because they are far more reliable than courtroom identifications that
may just confirm what came before.\textsuperscript{23} From not only a social science
perspective, but also an evidence law perspective, the regulation of
eyewitness identifications has it backwards.

At a time when the Supreme Court has eroded the strength of
the exclusionary rule for procedural violations, in particular search
and seizure violations,\textsuperscript{24} and has held reliability is not of due process
concern if police did not “arrange” an eyewitness identification,\textsuperscript{25} we
should reconsider the path not taken: exclusionary rules to promote
substantive reliability. In the eyewitness context, criminal procedure
rules could be revisited to reverse the focus of exclusion. I propose a
partial exclusion approach. Exclusion is a blunt instrument. Judges

\textit{Infra} note 44. \textit{But see} Loftus et al., \textit{supra}, §8-17(d) (advising lawyers on how to best litigate an
in-court identification).

\textsuperscript{22} I have found one reference, in a state practice guide, to the questionable origins of this
so called “independent” analysis. \textit{See} 41 George E. Dix & Robert O. Dawson, \textit{Texas Practice:
Criminal Practice \& Procedure} § 14.39 (2d ed. 2001) (“The Texas case law shows some
tendency to interject independent source considerations into analysis of defendants’ due process
claims. This unfortunately confuses the differences between the two constitutional concerns at
issue . . . .”). Few judges have noted the flaws in such an approach, although a few dissenting
judges have done so. \textit{See infra} notes 134–35.

\textsuperscript{23} \textit{See} Fed. R. Evid. 801(d)(1)(C) (stating hearsay exception for prior statement that is
“one of identification of a person made after perceiving the person”).

\textsuperscript{24} \textit{See}, e.g., Herring v. United States, 555 U.S. 135, 137 (2009) (holding exclusionary rule
did not apply to warrantless arrest caused by negligent police recordkeeping error).

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are understandably reluctant to completely exclude the testimony of a key eyewitness, perhaps the victim of a serious crime. That evidence may be crucial to maintaining a criminal prosecution. Today courts almost always allow courtroom identifications, but they sometimes bar prior identifications. Instead, courts should per se exclude courtroom identifications if there was a prior identification, but they should sometimes admit out-of-court identifications. The result will encourage greater attention to procedures used out-of-court, when the eyewitness’s memory was most fresh, reliable, and accurate.

I am not sanguine that this change will occur, given careless judicial rulings and, as a result, limited incentives of defense counsel to properly litigate these issues. However, improved eyewitness procedures are increasingly required by state courts and statutes. Directing my observations to criminal procedure reformers, I argue that courtroom identifications following prior identifications should be per se excluded. More broadly, eyewitness identification testimony should be regulated by factors informed by social science. First and foremost, jurisdictions should ensure that proper identification procedures are conducted in the first instance. Second, they should task judges with evaluating reliability of the evidence at hearings pretrial based on a social science framework and not the Manson test, and then at trial, if identification evidence is admitted, providing detailed instructions to educate jurors. Social scientists have for some time outlined best practices for conducting sound identification procedures, and as a second step, the Henderson decision in New Jersey provides an early model for a framework to govern the use of eyewitness evidence in court. Finally, I suggest that an accuracy-oriented approach to regulation of criminal trial evidence has broader applications for criminal procedure and for future scholarship.

I. EYEWITNESS PROCEDURE AND PSYCHOLOGY

A. Eyewitness Identification Procedures

Each year as many as 80,000 eyewitnesses (and perhaps many more) make identifications of suspects in criminal investigations. We do not have adequate information about how many eyewitnesses make identifications of suspects, how many do not, and what happens in the

26. See infra Part III.B.
27. See State v. Henderson, 27 A.3d 872 (N.J. 2011); see infra Part I.C.
cases where eyewitnesses do make identifications. Eyewitnesses can be crucial evidence of guilt in robbery, assault, rape, and other commonly prosecuted offenses. How do police determine whether an eyewitness can identify a culprit? Police know full well that eyewitness memory is fallible, just as judges, lawyers, and social scientists have long known this fact. Police try to test the eyewitness's memory. Police use a range of techniques. If a suspect is found shortly after the crime, police may present that suspect to the eyewitness directly. Such a one-on-one procedure, called a showup, is inherently suggestive. Police may use such a procedure only in the hours immediately following an incident, in order to quickly identify the perpetrator or rule out the suspect and continue their investigation. Showups are particularly risky for the police. Because there are no fillers, or other known-innocent people included in addition to the suspect, a mistake is more likely to result in the witness identifying an innocent person as the guilty party. And if the eyewitness is unsure, there is a greater risk that a guilty person might not be identified.

If police do not immediately locate a suspect, they may try to show an eyewitness books or computerized collections of mug shots. If
that also fails, police may ask the witness to work with a police sketch artist or with a computer program to generate a composite image that can be used in “wanted” postings. When police eventually locate a suspect, they conduct an identification procedure to test the eyewitness’s memory. In a live lineup, a suspect stands in a row of “filler” individuals and the witness looks at the group from behind one-way glass. In the past few decades, police have mostly stopped using live lineups because it is so difficult and time-consuming to find people who look similar to a suspect. Instead, they use photo arrays, typically a standard set of six photos (called a “six-pack”).

Procedures for creating photo arrays and conducting lineups were traditionally passed on by senior officers through word of mouth. Although police departments have detailed procedures, manuals, and training on a host of subjects—ranging from traffic stops to use of force—many, if not most, police departments still do not have any written procedures or formal training on how to conduct lineups or photo arrays. Perhaps, however, this is starting to change in reaction to high-profile eyewitness misidentifications. Unfortunately, archival

32. See Gary L. Wells & Deah S. Quinlivan, Suggestive Eyewitness Identification Procedures and the Supreme Court’s Reliability Test in Light of Eyewitness Science: 30 Years Later, 33 LAW & HUM. BEHAV. 1, 16 (2009) (stating that a “large percentage of jurisdictions in the U.S. use only photographs and never use live lineups”).

33. Few surveys of police policies have been conducted, although one national is currently in progress. See Erica Goode & John Schwartz, Police Lineups Start to Face Facts: Eyes Can Lie, N.Y. TIMES, Aug. 28, 2011 http://www.nytimes.com/2011/08/29/us/29witness.html?_r=1&scp=1&sq=policy%20linups%20start%20face%20facts&st=cse (noting that the Police Executive Research Forum has begun a survey on the topic from 1,400 randomly selected police departments). Separate questions remain as to compliance with written policies, even if they do reflect best practices on paper. Id. (“[E]ven in departments that have enacted changes, police officers sometimes fail to comply with the new procedures.”). A prior national survey with responses from 220 of 500 departments found that seventy-four percent of officers learned how to handle lineups from another officer, forty-four percent from court rulings and case law, forty-two percent from course work or professional instruction, while eighteen percent cite to learning from specific rules and regulations and thirty-one percent from general written guidelines. Michael S. Wogalter, Roy S. Malpass & Dawn E. McQuiston, A National Survey of U.S. Police on Preparation and Conduct of Identification Lineups, 10 PSYCHOL. CRIME & L. 69, 72 (2004). In addition, most officers (fifty-eight percent) reported a lack of “formal training in eyewitness identification techniques.” Id. at 79. Single-state surveys have been conducted. For example, a survey by the Virginia Crime Commission found that at least twenty-five percent of departments still had no written policy on the subject—despite enactment of legislation five years earlier requiring that some form of written procedure be adopted. See Chelyen Davis, Panel Head Favors New Rules on Police Lineups, FREE LANCE-STAR (Fredericksburg, Va.), Sept. 9, 2010, http://fredericksburg.com/News/FLS/2010/092010/09092010/574245. A survey of lineup procedures in Texas found only twelve percent of responding departments had any written policies; legislation requiring written policies was subsequently enacted. See Tony Plohetski, Police Pen New Rules for Photo Lineups, AUSTIN AM.-STATESMAN, May 8, 2009, at A1.
studies also suggest that unnecessary showups are quite common together with other flawed identification procedures.\textsuperscript{34} 

If there is a trial, identifications may occur in court. The courtroom identification is obviously highly suggestive. The defendant is sitting at the counsel’s table, perhaps in prison clothing. There are no fillers and there is no lineup. And the identification may follow emotionally charged testimony by the victim describing a crime—a victim who, in the conclusion of the testimony, points out the culprit to the jury.\textsuperscript{35} The courtroom identification may simply serve to confirm what came before. The procedures that came before may have been suggestive or shoddy. The eyewitness may have previously been uncertain. But in court, the eyewitness may appear supremely confident and will have no trouble picking out the defendant and pointing him out to the jury. As the Tenth Circuit has explained:

Because the jurors are not present to observe the pretrial identification, they are not able to observe the witness making that initial identification. The certainty or hesitation of the witness when making the identification, the witness’s facial expressions, voice inflection, body language, and the other normal observations one makes in everyday life when judging the reliability of a person’s statements, are not available to the jury during this pretrial proceeding. There is a danger that the identification in court may only be a confirmation of the earlier identification, with much greater certainty expressed in court than initially.\textsuperscript{36} 

Judges could strictly regulate courtroom identifications in several ways. First, they could insist that police conduct a proper lineup before trial, out of the courtroom. Police can demand that a defendant participate in a lineup. However, judges are often reluctant to order police to conduct a lineup when police or prosecutors decline to do so, citing to the absence of a constitutional right to a lineup.\textsuperscript{37}

\textsuperscript{34} Bruce W. Behrman & Sherrie L. Davey, \textit{Eyewitness Identification in Actual Criminal Cases: An Archival Analysis}, 25 \textit{Law & Hum. Behav.} 475, 479 (2001) (noting that in 271 cases analyzed, 258 field showups were used; however, multiple showups could occur in each case); Gonzalez et al., supra note 31, at 555 (“In our sample showup identifications were over three times more common than lineups, and follow-up research currently underway in Washington and Michigan suggests that showups are frequently used.”); Sandra Guerra Thompson, \textit{Judicial Blindness To Eyewitness Misidentification}, 93 \textit{Marq. L. Rev.} 639, 646 (2009) (“[S]how-ups constitute one of the most commonly used identification procedures.”).


\textsuperscript{36} United States v. Robertson, 19 F.3d 1318, 1323 (10th Cir. 1994) (quoting United States v. Domina, 784 F.2d 1361, 1368 (9th Cir. 1986)).

\textsuperscript{37} See, e.g., People ex rel. Blassick v. Callahan, 279 N.E.2d 1, 3 (Ill. 1972) (“We have specifically rejected the contention that on [sic] in-court identification of an accused without a lineup denies due process of law.”); People v. Bradley, 546 N.Y.S.2d 437, 437 (App. Div. 1989) (“A criminal defendant does not have a constitutional right to participate in a lineup whenever he requests one.”); People v. Grady, 506 N.Y.S.2d 922, 932 (Sup. Ct. 1986) (“[I]t is undisputed that there is no constitutional requirement that a defense-requested in-court lineup be conducted.”).
Second, judges could also require the use of a lineup in the courtroom in order to make the courtroom identification a more meaningful test of the eyewitness’s memory. Courts rarely require the use of such “special procedures,” however, though they are more willing to do so where the eyewitness had never been asked to view a lineup before trial. 38 Courts generally reject arguments that in-court identifications are inherently suggestive. 39 Judges may reject requests by defense lawyers to order a double-blind lineup. 40 Judges may view the courtroom identification as pure theater or a witness demonstration, but, as we will see, they also seem to think that the presence of counsel and the solemnity of testimony under oath in a courtroom makes the courtroom identification more, not less, reliable.

Acting on their own initiative, defense lawyers have sometimes tried to make the courtroom identification a real memory test. Enterprising defense lawyers have seated people who looked like the defendant next to them or have seated the defendant out in the courtroom. Under these circumstances, eyewitnesses were unable to identify the defendant. 41 Judges have responded harshly. The Second Circuit called substituting the position of the defendant without permission of the judge a “trick” that could be subject to bar discipline. 42

But see Evans v. Superior Court, 11 Cal. 3d 617, 625 (1974) (“[D]ue process requires . . . that an accused, upon timely request therefor [sic], be afforded a pretrial lineup in which witnesses to the alleged criminal conduct can participate . . . when eyewitness identification is shown to be a material issue and there exists a reasonable likelihood of a mistaken identification which a lineup would tend to resolve.”).

38. United States v. Archibald, 756 F.2d 223, 223 (2d Cir.1984) (“[S]pecial procedures are necessary only where (1) identification is a contested issue; (2) the defendant has moved in a timely manner prior to trial for a lineup; and (3) despite that defense request, the witness has not had an opportunity to view a fair out-of-court lineup prior to his trial testimony or ruling on the fairness of the out-of-court lineup has been reserved.”). Such procedures are within the discretion of the trial court. Domino, 784 F.2d at 1369.

39. See Evan J. Mandery, Legal Development: Due Process Considerations of In-Court Identifications, 60 ALB. L. REV. 404–09; see also State v. Smith, 512 A.2d 189, 193 (Conn. 1986) (“We know of no authority which would prohibit, as unduly suggestive, an exclusively in-court identification.” (quoting Mangrum v. State, 270 S.E.2d 874, 876 (Ga. Ct. App. 1980)).


41. People v. Gow, 382 N.E.2d 673, 675 (Ill. App. 1978) (describing how eyewitness identified person seated next to defense counsel); Fredric D. Woocher, Note, Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification, 29 STAN. L. REV. 969, 969 n.3 (1977) (“A judge in New York City developed his own system to check on the frequency of mistaken identifications. In ten cases in which the identification of the accused was virtually the only evidence, the judge permitted defense attorneys to seat a look-alike alongside the defendant. In only two of the ten cases was the witness able to identify the defendant.”).

42. United States v. Sabater, 830 F.2d 7, 9 (2d Cir. 1987).
conviction for doing so, calling the conduct “unprofessional” but also an “actual obstruction of justice.” Several state courts have followed suit.\(^{43}\)

In contrast, certain evidentiary rules recognize the inherent limitations of courtroom identifications preceded by prior identifications. For routine identifications of documents or acquaintances, there would be no reason to have tested the witness’s memory using a lineup. However, for stranger identifications, police will typically have conducted a prior identification to test the witness’s memory. Those prior identifications will generally be admissible. This is because the Federal Rules of Evidence recognize prior identifications as a special hearsay exception, for the reason that they are understood to be far more reliable than courtroom identifications. The Advisory Committee Notes to Federal Rule of Evidence 801(D)(1) explain, “The basis [for the hearsay exception] is the generally unsatisfactory and inconclusive nature of courtroom identifications as compared with those made at an earlier time under less suggestive conditions.”\(^{44}\)

While traditionally such out-of-court prior statements were treated as hearsay, the modern rule is to admit them, and nearly all states that previously did not admit them changed their rules in response to the 1975 federal revisions.\(^{45}\)

The Senate Report (“the Report”) noted three reasons supporting the modern rule. First, the Report repeated the reliability concern cited by the Advisory Committee: “Since these identifications take place reasonably soon after an offense has been committed, the witness’s observations are still fresh in his mind. The identification occurs before his recollection has been dimmed by the passage of

\(^{43}\) United States v. Thoreen, 653 F.2d 1332, 1339–40 (9th Cir. 1981); see People v. Simac, 641 N.E.2d 416 (Ill. 1994) (affirming conviction for direct criminal contempt of attorney who substituted the position of the defendant without permission from the judge); Miskovsky v. State ex rel. Jones, 586 P.2d 1104, 1108 (Okla. Crim. App. 1978) (explaining source of the contempt finding was counsel’s failure to gain permission from the court before substituting another person for the defendant). Interestingly, one judge dissented in the Illinois case, stating, “After a thorough review of the record, I believe that defense counsel was acting in good faith to protect his client from a suggestive in-court identification.” Simac, 641 N.E.2d at 424 (Nickels, J., dissenting).

\(^{44}\) See FED. R. EVID. 801(d)(1)(C) (hearsay exclusion for prior statement that is “one of a series of prior consistent statements made after the perception of the[t]estifying[t] person.”); see also Gilbert v. California, 388 U.S. 263, 272 n.3 (1967) (“It was [sic] been held that the prior identification is hearsay, and, when admitted through the testimony of the identifier, is merely a prior consistent statement. The recent trend, however, is to admit the prior identification under the exception that admits as substantive evidence a prior communication by a witness who is available for cross-examination at trial.”).

time.” The Report also explained that suggestion could “influence the witness to change his mind” between the time of the earlier identification and trial. Finally, the Report noted a strategic concern that “if any discrepancy occurs between the witness’ in-court and out-of-court testimony, the opportunity is available to probe, with the witness under oath, the reasons for that discrepancy so that the trier of fact might determine which statement is to be believed.” Unless the prior identification is admissible, the defense attorney has no means to explore how the eyewitness came to identify the defendant at trial.

Perhaps because courtroom identification procedures are so thinly regulated, very little scholarship has examined the special problems that courtroom identifications raise or the way that these problems undermine the jurisprudence of eyewitness identifications. Evan Mandery has argued that courtroom identifications should be per se excluded and certainly should not be treated more deferentially than out-of-court identifications, and I agree. As I will argue, the problem runs deeper. We cannot understand due process rules surrounding eyewitness identification procedures apart from the problem of courtroom identifications. In a case that goes to trial, there may be both prior lineups and a courtroom identification. There may even be a courtroom identification at a preliminary hearing and another at trial before the jury. (In the vast majority of cases that are resolved by a guilty plea, there may sometimes be multiple identification procedures conducted, but admissibility issues do not arise.) As I will describe, over time, the Court’s jurisprudence failed to differentiate those multiple identifications, and lower courts have since exacerbated the problem. Next, I try to untangle those rulings.

B. From Stovall to Manson

1. The Supreme Court Intervenes in Eyewitness Identification: Stovall, Wade, and Gilbert

The Supreme Court has long recognized “[t]he vagaries of eyewitness identification” where “the annals of criminal law are ripe

47. Id.
48. Id.
49. See Mandery, supra note 39, at 389 (“[W]hile the constitutional issues surrounding pre-trial identifications have been widely litigated and explored by scholars, little attention has been paid to the issues raised by in-court identifications.”).
with instances of mistaken identification.” The Court added that “a major factor contributing to the high incidence of miscarriage of justice from mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification.” In a trilogy of decisions announced in 1967, the Court began to regulate eyewitness identifications to help avert misidentifications. At the time, the Court’s intervention looked like the beginnings of a new approach toward regulating the reliability of trial evidence. The Court adopted the following two different approaches to the problem: a Sixth Amendment right-to-counsel approach and a due process approach. In each of the two lines of cases the Court had to reckon with the problems posed by courtroom identifications.

In Stovall v. Denno, the Court examined a showup procedure in which the suspect was taken to the hospital where a victim was recovering, was presented to the victim alone, and handcuffed to police officers. Though noting a showup is inherently suggestive, and for that reason the procedure has been “widely condemned,” the Court acknowledged that showups may sometimes be necessary in exigent circumstances. However, the Court then held that an “unnecessarily suggestive” procedure that is “conducive to irreparable mistaken identification” denies due process of law and results in exclusion of the identification from the jury. This was new. Prior to Stovall, any police use of suggestion was just evidence for the jury to weigh when assessing the weight of the eyewitness identification.

In two other cases the Court also discussed police suggestion, but it adopted a different approach to the problem, one that recognized a right to counsel at a lineup procedure. In United States v. Wade, the Court held that, once indicted, an accused has a right to a lawyer present at a lineup. As a result, any lineup lacking counsel must be excluded and not introduced into evidence at trial. However, the prosecutors would have “the opportunity to establish by clear and convincing evidence that the in-court identifications were based upon observations of the suspect other than the lineup identification.”

51. Id.
55. Id. at 240.
The Court concluded that unless the in-court identification might also be suppressed, a rule suppressing the out-of-court identification would serve little purpose:

The State may then rest upon the witnesses’ unequivocal courtroom identifications, and not mention the pretrial identification as part of the State’s case at trial. Counsel is then in the predicament in which Wade’s counsel found himself—realizing that possible unfairness at the lineup may be the sole means of attack upon the unequivocal courtroom identification, and having to probe in the dark in an attempt to discover and reveal unfairness, while bolstering the government witness'[s] courtroom identification by bringing out and dwelling upon his prior identification.56

Thus, the Court recognized that the courtroom identification is less reliable than prior identifications. Further, to the extent that the prior identifications are suggestive or unreliable, the only way to bring that out is to admit them. The Court, having identified the central problem, did not suggest a clear solution, which would have been to exclude the “unequivocal” courtroom identification while permitting litigation of prior identifications. Instead, the Court held that a judge must examine several factors to decide whether to allow the courtroom identification, including the following: “the prior opportunity to observe the alleged criminal act,” any “discrepancy between any pre-lineup description and the defendant’s actual description,” any prior identifications or failures to identify the defendant, and “the lapse of time between the alleged act and the lineup identification.”57

By examining those flexible factors, on remand the lower court can decide whether the in-court identification had an “independent origin.”58 Of course, if a judge decides that, based on those factors, the courtroom identification has an “independent origin,” then an illegal pretrial identification may be suppressed (although the defendant may choose to introduce it at trial), but the judge may allow the courtroom identification that would clearly be affected by what went on before. How can a courtroom identification be independent? The Court noted in Wade that “the accused’s conviction may rest on a courtroom identification [that is] in fact the fruit of a suspect pretrial identification which the accused is helpless to subject to effective scrutiny at trial.”59 There are stronger arguments that an identification could have an “independent origin” in court if the pretrial identification was not suggestive. After all, the lineups in Wade, by the Court’s account, were conducted properly, with five to six

56. Id. at 240–41.
57. Id. at 241.
58. Id. at 242.
59. Id. at 235.
fillers all dressed with strips of tape similar to that worn by the bank robber. The defect was the procedural failure to provide counsel.

In *Gilbert v. California*, the Court similarly dealt with whether a courtroom identification could take place. A series of suggestive identifications took place postindictment and without counsel; over one hundred witnesses viewed the same lineup at the same time in a large auditorium and everyone discussed their identifications. The Court remanded and ordered the state court to determine whether such an identification, conducted without counsel in violation of *Wade*, had an independent source. The Court explained, “The admission of the in-court identifications without first determining that they were not tainted by the illegal lineup but were of independent origin was constitutional error.” Thus, the Court established a rule that an “independent” basis could result in the admission of the in-court identifications, even, in theory, following suggestive prior lineups. The Court has repeatedly reaffirmed this ruling.

The *Wade/Gilbert* rule is of limited significance today. After all, having the right to a lawyer present at a lineup is not a significant protection. Other right-to-counsel protections are far more consequential. Suspects who invoke their *Miranda* rights and obtain an attorney can cut off an interrogation that might have otherwise resulted in a confession. In contrast, having a lawyer present at a lineup will not prevent the lineup from occurring. At best, it may discourage police from making any obviously suggestive cues during the lineup itself, though with the cost of potentially turning the lawyer into a trial witness disqualified from further representation. Nor does the rule do any work in the vast majority of cases involving eyewitnesses. That is because the Court has repeatedly weakened the

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60. *Id.* at 220.

61. *Gilbert v. California*, 388 U.S. 263, 272 n.3 (1967) (“It was [sic] been held that the prior identification is hearsay, and, when admitted through the testimony of the identifier, is merely a prior consistent statement. The recent trend, however, is to admit the prior identification under the exception that admits as substantive evidence a prior communication by a witness who is available for cross-examination at trial.”).

62. *Id.* at 270 & n.2.

63. *Id.* at 272. In contrast, the Court found a per se exclusionary rule as to the pretrial identification based on the denial of counsel at the lineup. *Id.* at 273.

64. *E.g.*, Moore v. Illinois, 434 U.S. 220, 231 (1977); Coleman v. Alabama, 399 U.S. 1, 21 (1970) (Harlan, J., concurring in part and dissenting in part) (“The *Wade* rule requires the exclusion of any in-court identification preceded by a pretrial lineup where the accused was not represented by counsel, unless the in-court identification is found to be derived from a source ‘independent’ of the tainted pretrial viewing.”).

rule—in part, by subsequently holding that there is no right to counsel for a photo array. The vast majority of identifications are not live but are now chiefly conducted using photo arrays.

2. *Manson* and the Modern Two-Step Inquiry

In decisions immediately following the 1967 trilogy, the Court indicated that an identification should be suppressed if the police engage in egregious suggestion. In *Foster v. California*, the Court ruled that, because a “tentative” witness only became sure after repeated suggestive showups and lineups, all identifications should be suppressed; “[i]n effect, the police repeatedly said to the witness, ‘This is the man.’” For a short time, the *Wade/Gilbert* line of cases began to converge with the *Stovall* line. In *Simmons v. United States* the Court held that, when deciding whether to allow a courtroom identification following a suggestive pretrial identification, the judge should examine whether the earlier identification was “so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.” As Justice Marshall later explained,

The inquiry mandated by *Simmons* is similar to the independent-source test used in *Wade* where an in-court identification is sought following an uncounseled lineup. In both cases, the issue is whether the witness is identifying the defendant solely on the basis of his memory of events at the time of the crime, or whether he is merely remembering the person he picked out in a pretrial procedure.

However, the cases then diverged as the Court took a different tack in due process cases not raising Sixth Amendment right-to-counsel violations. The Court became concerned that a rule excluding out-of-court identifications that resulted from unnecessary suggestion would lead to the exclusion of reliable eyewitness evidence. The Court proposed a new two-step inquiry in *Neil v. Biggers*, which was then adopted in 1977 by the Court in *Manson*. That *Manson* test is the current due process test that courts must follow.

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71. Neil v. Biggers, 409 U.S. 188, 199 (1972). The Court did not have occasion to rule on whether that test should supplant the *Stovall* test in that case, since the lineup in question predated the Court’s *Stovall* ruling. *Id.* at 200.
First, following the *Manson* test, a court asks whether the procedure used was “unnecessarily suggestive.” Then the court asks whether the identification was nevertheless “reliable.” A judge has broad discretion to evaluate the record and decide whether there is evidence that the identification is “reliable.” The *Biggers* factors adopted by the Court in *Manson* include: (1) the eyewitness’s opportunity to view at the time of the crime itself; (2) the eyewitness’s degree of attention; (3) the accuracy of the description that the eyewitness gave of the criminal; (4) the eyewitness’s level of certainty at the time of the identification procedure; and (5) the length of time between the crime and the identification procedure.

This due process test is somewhat different than the *Wade* test. If there is a right-to-counsel violation at the lineup, under *Wade*, a court asks whether the courtroom identification has an “independent source” and examines factors relating to reliability. If instead there was suggestion at the lineup, the court more directly looks at whether the identification is reliable. The *Manson* “reliability” factors are slightly different than the nonexclusive list in *Wade*. The main addition that the *Manson* Court made to the *Wade* factors was the fourth factor—the certainty of the eyewitness. Adding that factor was a significant misstep, however, as psychologists would convincingly show over the next three decades.

**C. Social Science Research**

The *Manson* Court emphasized that “reliability is the linchpin in determining the admissibility of identification testimony.” In the decades since the Court settled on its due process test, however, social scientists have shown just how unhelpful and flawed each of the *Manson* factors are for evaluating the reliability of an identification. Their findings demonstrated just how susceptible eyewitness memory is to cues or suggestions, intended or not, by the administrator of a lineup.

Eyewitness identifications are designed to be a test of a witness’s memory. Pioneering psychologists Elizabeth Loftus and Gary Wells, followed by many others, realized beginning in the late 1970s that eyewitness memory can be tested in lab experiments. A

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73. *Id.* at 113.
74. *Id.*
75. *See id.* (directing judges to weigh the *Biggers* factors against the “corrupting effect of the suggestive identification itself”).
76. *Id.* at 114; *Biggers*, 409 U.S. at 199–200.
77. *Manson*, 432 U.S. at 114.
now vast body of social science research has demonstrated that most of the five *Manson* “reliability” factors do not correlate at all with the reliability of an eyewitness’s identification.\(^{78}\) One factor—the passage of time from the crime to the identification—strongly affects reliability; however, the effects are so pronounced in the immediate hours and days following the crime that judges would have to exclude a large number of identifications if they emphasized that factor.\(^{79}\) In contrast, the seemingly objective factor, the ability of a person to describe another accurately, is not correlated one way or another with reliability.\(^{80}\) The remaining factors are particularly crucial to the analysis—and they are deeply flawed. The certainty of an eyewitness, the opportunity of a witness to view the attacker, and the degree of attention paid by the eyewitness are not independent measures of reliability. Instead, the procedures police use affect the so-called reliability factors.

A series of studies has shown that jurors rely strongly on the confidence of the eyewitness.\(^{81}\) Yet, confidence is not highly correlated with accuracy. The correlation is highly variable. In fact, a mistaken eyewitness may appear particularly confident. Why? A factor that strongly affects confidence is suggestion by the administrator. Expectations of the administrator affect the confidence of the eyewitness even if the suggestion is unconscious. The eyewitness may perceive cues that the police never intended to convey. That is why social scientists have long recommended that police administer double-blind lineups where the police officer does not know who is the

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\(^{78}\) A white paper by the American Psychology-Law Society summarized the state of the research and provides four recommendations for reforming eyewitness identification procedures. Wells et al., *supra* note 31, at 603; see also Wells & Quinlivan, *supra* note 32 at 7–8 (explaining lack of correlation between eyewitness description and accuracy of identification).


suspect, and the eyewitness knows that the officer does not know.\textsuperscript{82} The way that police construct the lineup can enhance confidence. If police stack the lineup so that one photo stands out, the eyewitness not only will be more likely to identify the person highlighted, but the eyewitness will predictably be more certain.\textsuperscript{83} Feedback or reinforcement after the identification can also have a dramatic effect on confidence. If police say, “Good job, you picked the right one,” then the eyewitness will tend to be far more certain. If police tell the eyewitness that a suspect had been arrested and would be present in the lineup, the eyewitness will likewise tend to be far more certain.\textsuperscript{84} Finally, studies suggest that repeated identification procedures create an enhanced risk that a witness will identify an innocent suspect.\textsuperscript{85} Even permitting more than one “lap” or viewing of a photo array increases the risk of errors.\textsuperscript{86} Likewise, routine preparation for trial, or even the suggestion that an eyewitness will later be cross-examined concerning an identification, has the effect of making an eyewitness more certain.\textsuperscript{87}

The two prongs of the \textit{Manson} test can undermine each other. Suggestion does not just make an uncertain eyewitness feel more confident, but it affects all of the other factors that the Supreme Court included in the \textit{Manson} test. Memory is malleable. Suggestion will

\textsuperscript{82} Wells et al., \textit{supra} note 31, at 627–29.

\textsuperscript{83} \textsc{Loftus et al.}, \textit{supra} note 21, § 4–9. For an important field study documenting advantages of a sequential procedure, showing lineup members to witnesses one at a time rather than simultaneously, see \textsc{Wells, Steblay & Dysart}, \textit{supra} note 20.

\textsuperscript{84} \textsc{See Loftus et al.}, \textit{supra} note 21, § 4–8(b) (describing study by Roy Malpass and Patricia Devine, and noting eighteen other studies demonstrating higher false identification when such biased instructions were provided); Amy Douglass & Nancy Steblay, \textit{Memory Distortion in Eyewitnesses: A Meta-Analysis of the Post-Identification Feedback Effect}, 20 \textsc{Applied Cognitive Psychol.} 859, 864–65 (2006) (discussing how positive post-identification feedback increases witness confidence in identification).


\textsuperscript{86} \textit{See}, e.g., Nancy K. Steblay et al., \textit{Sequential Lineup Laps and Eyewitness Accuracy}, 35 \textsc{Law & Hum. Behav.} 262, 271 (2011) (describing studies that find repeat viewings, or “laps,” increase choosing rates and error rates, with particularly high error rates among witnesses who choose to view a second time).

\textsuperscript{87} \textsc{Loftus et al.}, \textit{supra} note 21, § 6-2; Steven Penrod & Brian Cutler, \textit{Witness Confidence and Witness Accuracy: Assessing Their Forensic Relation}, 1 \textsc{Psychol. Pub. Pol’y & L.} 817, 827 (1995).
EYEWITNESSES AND EXCLUSION

affect the details that an eyewitness remembers. The eyewitness may recall having seen the culprit for a longer period of time and will recall having had a better look at the culprit. The five Manson factors poorly assess “reliability.” They are circular, and highlight the very features of eyewitness memory that may be most profoundly affected by suggestion. Yet, a court may excuse serious police suggestion by saying that an eyewitness identification is nonetheless “reliable.”

Still more problematic, in the situation where there are multiple eyewitness identifications, a court may allow a courtroom identification despite an earlier suggestive identification. The jury then sees the now-confident eyewitness in court pointing at the defendant. As Gary Wells puts it, “[E]yewitness identification evidence is among the least reliable forms of evidence and yet is persuasive to juries.” One reason is that the jury does not see what occurred before. The earlier lineups may not even have been documented. The jury will instead hear the eyewitness describe what he saw.

In the typical situation in which the eyewitness is a victim, the jury will hear the details of a stressful, if not frightening, encounter. The eyewitness may then briefly recount the photo arrays or lineups, but she may not remember the details of those procedures. The eyewitness then will be asked how sure she is that the defendant is the culprit. Finally, the eyewitness will point out the defendant in the courtroom. The courtroom identification that the jurors see will be more dramatic, and may be made with more confidence, than the identifications that came before the trial. Further, the trial setting is inherently suggestive, as well as public. While there have not been field studies of courtroom identifications, there is every reason to think that in a courtroom setting “conformity is at its peak” since “pressure is high and . . . judgments are made without anonymity.”

Despite this now vast body of social science evidence, the Court has not reconsidered its test; has denied certiorari petitions asking that the test be revisited in light of social science research; and, as I will develop, has not intervened when states adopted standards that

89. Wells & Bradfield, supra note 8, at 374.
90. Wells et al., supra note 31, at 605.
91. Mandery, supra note 39, at 416; see also Wells & Quinlivan, supra note 32 (“Although experiments have not directly tested the question of in-court identifications that occur after a pretrial lineup, our understanding of transference and commitment effects leads to the reasonable inference that a mistaken identification prior to trial is likely to be replicated during an in-court identification.”).
carelessly apply if not distort the *Manson* test. Justice Sotomayor, dissenting in *Perry*, argued that concerns with the adequacy of the due process rule “should have deepened” based on a “vast body of scientific literature” and concluded that “[i]t would be one thing if the passage of time had cast doubt on the empirical premises of our precedents. But just the opposite has happened.”

Although we now know far more about the sources of eyewitness unreliability, long before social scientists began investigating eyewitness misidentification it was, as Samuel Gross put it, “an old and famous problem.” Police are most familiar with the problem because it significantly affects their investigations. In actual police lineups, eyewitnesses choose known innocent fillers an average of thirty percent of the time, according to available archival and field studies. Those common misidentifications are of less consequence because it is obvious there is an error when a filler is picked. However, they harm police investigations since an eyewitness who has selected a filler may be “burned,” or viewed by jurors with more suspicion should that eyewitness later identify a true suspect. If an eyewitness picks an innocent suspect and not a filler, the consequences may be more serious. DNA exonerations have raised the profile of eyewitness errors in cases that went further, resulting in convictions overturned only years later through DNA testing.

In *Convicting the Innocent*, I examine the trial transcripts of the first 250 DNA exonerees. Eyewitnesses misidentified seventy-six percent of the exonerees (190 of 250 cases). I expected to see a large body of eyewitness misidentifications in these cases. After all, DNA testing is most readily used to exonerate individuals convicted of rape, and such cases often involve a victim eyewitness. However, when I began studying those unusual trials, I feared that I would not be able to say very much about the eyewitness misidentifications. After all, we

92. *See, e.g.*, Petition for a Writ of Certiorari at 3–4, Perez v. United States, 547 U.S. 1002 (2006) (No. 05-596), 2005 WL 3038542 (certiorari petition seeking review of *Biggers* and *Manson* test based on new empirical studies); State v. Ledbetter, 881 A.2d 290, 304–06 (Conn. 2005) (Connecticut Supreme Court rejecting constitutional challenge, citing “scientific studies” to the five factor test of *Biggers and Manson*).


94. *Gross*, *supra* note 81, at 395.

95. *Perry*, 132 S. Ct. at 728 (citing Brief for American Psychological Association as Amicus Curiae as “describing research indicating that as many as one in three eyewitness identifications is inaccurate”); *Wells & Quinlivan*, *supra* note 32, at 6; *see also HENDERSON REPORT, supra* note 6, at 15–16 (providing an overview of error rates found in archival studies, together with results from field studies and laboratory experiments).

96. *GARRETT, supra* note 7, at 7.

97. *Id.* at 9.
do not often have records of what transpired during the identification procedures; police usually do not document them. Yet, the trial records alone told a troubling story. In the vast majority of those cases, seemingly powerful eyewitness testimony was flawed.

One high-profile case provides an example of how the lack of regulation of in-court identifications affects the use of eyewitness identification procedures.98 Neil Miller was facing charges of aggravated rape in Massachusetts in 1990. Someone raped and robbed the victim in her apartment. Miller’s defense was one of mistaken identification. He maintained that he had never met the victim nor been to her apartment.99

Neil Miller’s defense attorney was concerned that photo arrays had been conducted in a suggestive manner. About a month after the attack, the detective brought an array of nine photos for the victim to view. From that array, she selected two photos, but was not sure if she could pick out either individual as the attacker.100 One of the two was a six-year-old photo of Neil Miller taken when he was only sixteen. The second was of another man. The detective recalled instructing her, “[I]f she had a first impression, that the best thing to do was go with her first impression.”101 The victim then identified Neil Miller’s photo, and Miller was arrested.102 A second array was conducted two months later, with a more recent photo of Miller, and the victim picked his photo.103 Neil Miller’s defense lawyer then made a motion to request a new photo array at the upcoming pretrial hearing.104

However, just before the hearing was to take place, the prosecutor and a detective walked the victim past Neil Miller in the hallway outside the courtroom.105 Even after having being told that her attacker might be in that hallway, when she saw him there, she was not sure. She followed Miller into the courtroom (where it was obvious who he was), looked at him again, and said, “This is him.”106 Now the hearing to request a new lineup was in effect moot. Even if the judge ordered that a new photo array be conducted, due to both of

100. Id. at 37–38, 68–69 (Dec. 17, 1990).
101. Id. at 72.
102. Id. at 41.
103. Id. at 42–43, 53.
105. Id. at 6–7; Miller Trial Transcript, supra note 99, at 126 (Dec. 17, 1990).
the prior suggestive procedures, the victim would likely again pick out Miller and then testify with confidence before the jury. The judge granted the defendant’s motion to suppress the identification the morning of the hearing and ruled that the jury could not hear about it. However, the judge was still willing to let the jury hear about the first identification from the photo array where the police officer made the suggestions; of course the defense would want to bring out that conduct. Further, the judge let the jury observe the victim on the stand identifying Miller. The judge ruled that the courtroom identification had an “independent basis” based on the witness’s original view of the perpetrator. Even though the victim was initially not sure that Miller was the right man, the jury saw the victim identify him in court and say she was “positive” he was the attacker.

There was no other evidence at trial, aside from some very limited forensics. The jury convicted Miller and sentenced him to twenty-six to forty-five years in prison. Neil Miller was an innocent man. He was exonerated by postconviction DNA testing in 2000 after serving almost ten years in prison. Moreover, the DNA tests matched another man. The testimony in Miller’s case and in the other 249 cases illustrates how police suggestion can increase the confidence of eyewitnesses, even if they are wrong. Courts readily admitted those identifications, despite sometimes glaring evidence of suggestion or unreliability.

All but a handful of the eyewitnesses who we now know misidentified innocent people were certain at the time of trial. For example, an eyewitness in Steven Avery’s case testified, “[T]here is absolutely no question in my mind.” In Thomas Doswell’s case, the victim testified, “This is the man or it is his twin brother” and “That is one face I will never forget . . . .” In Dean Cage’s case, the victim

107. Id. at 104–05.
108. Id. at 128–29; see also Brief and Record Appendix, supra note 104, at 23–24.
110. The crime lab analyst (incorrectly) described the forensics as including Neil Miller but also forty-five percent of the population (in fact, no man could be excluded). See Brandon L. Garrett & Peter J. Neufeld, Invalid Forensic Science Testimony and Wrongful Convictions, 95 Va. L. Rev. 1, 41–42 (2009) (explaining invalid testimony concerning the phenomenon of “masking” and non-quantification in that case and others).
111. Neil Miller, supra note 98.
112. Id.
was “a hundred percent sure.” In Willie Otis “Pete” Williams’s case, the victim said she was “one hundred and twenty” percent sure. What explains the false confidence of those eyewitnesses? In seventy-eight percent of those trials (125 of the 161 cases involving eyewitnesses in which trial records could be located), there was evidence that police contaminated the identifications. Many of those eyewitnesses were asked to pick out the suspect using suggestive methods long known to increase risks of error. Police made remarks that indicated who should be selected, used unnecessary showups, or used lineups that made the defendant stand out. Suggestion is related to the second problem, that of false certainty. In fifty-seven percent of the trials studied (92 of 161 cases), witnesses reported they had not been certain at the earlier identifications, or identified other people.

These high-profile wrongful convictions have made more salient what criminal practitioners, judges, and social scientists have known for years—eyewitness memory is malleable and can be strongly affected by police suggestion. The Supreme Court’s due process cases acknowledge a problem but offer no solution.

Nor is the Court likely to reform its due process test. If anything, the majority in Perry v. New Hampshire expressed a view that the application of that due process test should be narrowed to avoid regulating all eyewitness identifications, despite the “fallibility” of eyewitness evidence. The Court in making that point even noted the problem of courtroom identifications, stating: “Most eyewitness identifications involve some element of suggestion. Indeed, all in-court identifications do.” Of course, the suggestion inherent in such procedures should cause the Justices to consider whether jurors are in an adequate position to assess the reliability of that evidence. The Court’s mention of courtroom identifications and unwillingness to question their use is symptomatic of a larger problem. Justice Sotomayor in dissent highlighted how: “At trial, an eyewitness’[s] artificially inflated confidence in an identification’s accuracy complicates the jury’s task of assessing witness credibility and reliability. It also impairs the defendant’s ability to attack the eyewitness’[s] credibility.” Still more problematic, as I discuss next, state and federal courts interpret the Court’s rulings to provide nearly unfettered use of the most problematic courtroom identifications.

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118. Id. at 727.
119. Id. at 732 (Sotomayor, J., dissenting).
II. THE PERSISTENCE OF “INDEPENDENT SOURCE” RULES

Social scientists that carefully studied flaws in the Supreme Court’s due process test for admissibility of eyewitness identifications may have taken the letter of the law too seriously. They have studied each of the factors in the Manson test and have critiqued their reliability with the assumption that courts actually follow the test as promulgated by the Court. One cannot blame anyone for assuming that lower courts would follow the precise language of a Supreme Court ruling. However, in practice, courts do not, and to a surprising degree. Not only is the Manson test flawed because of its focus on “reliability” factors that are not independent of police suggestion, but in practice the test is often not carefully applied, particularly to courtroom identifications. Commentators have observed that, in general, judges apply the Manson test very deferentially if not carelessly. After all, the factors are quite flexible, and they excuse even extreme and unnecessary police suggestion based on flimsy evidence of “reliability” under a totality of the circumstances test. Appellate judges defer to trial judge discretion in applying those five broad factors. There is still another defect in the case law. A crucial but largely unnoticed loophole can short-circuit the Manson inquiry in the most pressing situation where the identification procedure conducted before trial was suggestive—indeed independent source rules.

A. “Independent Source” Rules

Even after a suggestive pretrial identification procedure, courts still permit a courtroom identification by citing to its “independent” source or “independent” reliability. That courtroom identification may be pretrial, in which case it may shape what the eyewitness says at trial. Or, that courtroom identification may occur at trial. As noted, courts hold that the Due Process Clause does not forbid courtroom identifications, despite their inherent suggestiveness. They cite to

120. See O’Toole & Shay, supra note 1, at 129 (“The Manson rule of decision also produces rote and unconvincing analysis in state court opinions.”).

121. See State v. Smith, 512 A.2d 189, 193 (Conn. 1986) (“The manner in which in-court identifications are conducted is not of constitutional magnitude but rests within the sound discretion of the trial court”); Middleton v. United States, 401 A.2d 109, 132 (D.C. 1979) (noting that in-court identifications are “less threatening of the due process guarantee” than one-on-one confrontations in the police station); Ralston v. State, 309 S.E.2d 135, 136 (Ga. 1983) (reasoning that in-court identifications are not scrutinized for reliability because they are under the supervision of the court); State v. Clausell, 580 A.2d 221, 235 (N.J. 1990) (holding that an in-court identification was “constitutionally valid” despite the fact that the witness had not been
the “supervision” provided by the trial judge to ensure an “impartial” identification in court. Nor do courts typically require special procedures to test eyewitness memory in the courtroom. Still more troubling, courts adopt a permissive approach to allowing courtroom identifications despite prior suggestive or illegal identifications.

The vast majority of state courts, when applying the Due Process Clause, rule that an identification, and particularly a courtroom identification, may be allowed even where a prior identification might be suppressed, citing to its “independent source.” This is not casual language adopted by outlier jurisdictions. Rather, this language is adopted by courts of thirty-eight states and the District of Columbia, with six more states adopting similar language and three states with mixed rulings. Nor do state courts appear to revisit their leading rulings on the problem of eyewitness identifications frequently, perhaps because the U.S. Supreme Court has not revisited the problem either.

To be sure, most of those written decisions on appeal did not confront the situation where the prior identification was in fact suppressed, but the courtroom identification was permitted. It is very rare for a court to suppress identifications, because the Manson test is already so deferential. However, not only did several states explicitly allow the courtroom identification while excluding the prior identifications, but the others describe how they need not examine whether the prior identifications are suggestive. They assume, for the sake of argument, that the prior identifications could be excluded but emphasize how the courtroom identification would be allowed. After able to identify the defendant previously in a photo array). Mandery, supra note 39, provides an excellent discussion of these cases at 402–03.


123. Such language has been adopted by courts in thirty-eight states and Washington D.C.: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New York, New Mexico, North Carolina, Ohio, Oregon, Pennsylvania, South Carolina, South Dakota, Texas, Virginia, Washington, West Virginia, Wisconsin. The Appendix contains one or more citations to leading cases from each of those states.

all, the “independent source” language is designed to permit a separate inquiry for a courtroom identification that would give trial courts considerable leeway to find an “independent source” for the courtroom identification, regardless of whether the prior identifications were suggestive and might be excluded.

Thus, the Pennsylvania Supreme Court asked “whether there exists a basis for identification which is independent of the allegedly suggestive showup.”125 How could there be such a basis? The same eyewitness is testifying at trial with a memory affected by the showup. Similarly, a South Carolina appellate court noted that “[t]he in-court identification is admissible if based on information independent of the out-of-court procedure.”126 What “information” does that eyewitness have that is “independent” where nothing has transpired except that the eyewitness is now confronted with the same person in a courtroom setting? The Virginia Supreme Court found “that the in-court identifications had independent sources free from taint” but made explicit that the supposedly “independent” information was just “the ample opportunities the victims availed themselves of” to observe the attacker.127 The North Carolina Supreme Court explained that it need not inquire whether pretrial suggestion tainted in-court identifications because “the trial judge concluded that the witnesses’ in-court identifications of defendant were of ‘independent origin, based solely upon what the witnesses saw at the time of the crime.’ “128 Also remarkable, the Alaska Supreme Court held that the trial court need not inquire into a suggestive identification at a preliminary hearing because the courtroom identification at trial had an “independent source” from the earlier in-court identification.129 In one final example, the Supreme Court of Kansas stated, “A reliable in-court identification will stand on its own regardless of whether it was preceded by a deficient pretrial identification.”130 How can it stand on its own when that same eyewitness was subjected to suggestive pretrial procedures?

The list of such holdings goes on and on, as the Appendix details, providing examples of leading and typical rulings from each

129. Gipson v. State, 575 P.2d 782, 787 (Alaska 1978) (“The foregoing evidence of identification, which we consider overwhelming, had an ‘independent source’ from the tainted in-court identification which occurred at the first preliminary hearing.”).
state. In addition to the thirty-eight states adopting independent source rules, six more states and some federal courts discuss “independent reliability” of an identification (but federal courts otherwise follow the proper due process test and do not cite to “independent source” outside of the Sixth Amendment context). In doing so, those courts follow Manson but use the word “independent” to refer to the “reliability” factors or to highlight how a courtroom identification may be considered reliable despite what came before. Only five states adopt no language suggesting a different standard for courtroom identifications. At least one more state adopts the correct

131. Those six states are Delaware, Kentuck, Oklahoma, Rhode Island, Utah, and Vermont. See State v. Johnson, No. K91-06-0069, 1991 WL 302644, at *2 (Del. Super. Ct. Dec. 18, 1991) (“A court may admit evidence based on an otherwise ‘unnecessarily suggestive’ identification procedure if counsel can show the independent reliability of the identification testimony.”); Grady v. Commonwealth, 325 S.W.3d 333, 354 (Ky. 2010) (“The unduly suggestive nature of the pre-trial lineup becomes totally irrelevant if a court determines that there is an independent basis of reliability for the in-court identification.”); Berry v. State, 834 P.2d 1002, 1005 (Okla. Crim. App. 1992) (“A courtroom identification will not be invalidated if it can be established that it was independently reliable under the totality of the circumstances.” (citing Cole v. State, 766 P.2d 538, 359 (Okla. Crim. App. 1988))); State v. Patel, 949 A.2d 401, 410 (R.I. 2008) (“If the procedure is found to have been unnecessarily suggestive, the second step requires a determination of whether the identification still has independent reliability despite the suggestive nature of the identification procedure.” (citing State v. Camirand, 572 A.2d 290, 293 (R.I. 1990))); State v. Thamer, 777 P.2d 432, 435 (Utah 1989) (“If the photo array is impermissibly suggestive, then the in-court identification must be based on an untainted, independent foundation to be reliable.”); State v. Savo, 446 A.2d 786, 791 (Vt. 1982) (“An in-court identification, even where it has been preceded by a suggestive pretrial identification, may still be admissible where its reliability can be independently established.”).

132. See, e.g., Raheem v. Kelly, 257 F.3d 122, 135 (2d Cir. 2001) (citing Manson v. Brathwaite and discussing the need to weigh factors suggesting independent reliability); see also United States v. Wise, 515 F.3d 207, 215 (3d Cir. 2008) (in-court identification admissible though police showed witness photo of defendant with words “Harrisburg Police Department” printed above his head because witness had previously lived with defendant and thus in-court identification was independently reliable); United States v. McCabe, No. 89-30271, 1990 WL 61969902, at *1 (9th Cir. May 14, 1990) (“Because the procedure used in this case was not impermissibly suggestive, the defendant’s due process claim fails, and inquiry into the independent reliability factors set forth in Manson v. Brathwaite is not required.” (citation omitted)).

133. I have found no due process cases providing “independent source” or “independent reliability” language in five states: Hawaii, Montana, North Dakota, Tennessee, or Wyoming. See, e.g., State v. Atkins, No. 03C01-0302-CR-00058, 1994 WL 81524, at *9 (Tenn. Crim. App. Mar. 3, 1994) (“If a court determines that under the Biggers standard a pretrial confrontation was so impermissibly suggestive that it violated an accused’s due process rights, the independent origin of the in-court identification is irrelevant. Both out-of-court and in-court identifications are automatically excluded.”). One Montana decision is ambiguous on this point. State v. Hedrick, 745 P.2d 355, 358 (Mont. 1987) (“The independent basis for the victim’s in court identification also prevents the possibility of a substantial likelihood of irreparable misidentification.”). North Dakota had one case citing to an independent basis for admitting an in-court identification, but the case predated Manson, and, absent any more recent rulings, North Dakota was not included. State v. McKay, 234 N.W.2d 853, 858 (N.D. 1975) (“[I]n-court identification of the defendant was not based on a suggestive viewing of him at the police station, but had a basis independent of
language in some decisions but adopts “independent source” language in others.\textsuperscript{134} Very few judges recognize that the \textit{Manson}/\textit{Biggers} test has superseded such inquiries into “independent source.”\textsuperscript{135}

Most of these courts, if they provide an explanation of what it means to ask whether a suggestive identification has an “independent source” or “independent reliability,” follow a “totality of the circumstances” inquiry. They may then follow the correct \textit{Manson} test in form, but only by ignoring the effect of the prior identifications on the courtroom identification.\textsuperscript{136} To be sure, these judges are not applying a standard that is formally more demanding than the \textit{Manson} test (despite language that the prosecution has the burden to show an independent source by “clear and convincing evidence”).\textsuperscript{137} On
appeal or postconviction, judges defer to the trial court’s exercise of discretion and accept trial court factual findings. As a result, appellate or postconviction judges do not typically explain their analysis with much detail or rigor. They may simply note, after citing to an “independent source,” that the identifications appear reliable under the circumstances, again without considering the impact of prior identifications on the courtroom identification.

Courts do not actually insist on some independent source in the sense of a truly independent event that created a more reliable identification. Situations like that can occur. For example, the fact that an eyewitness had already been well acquainted with the suspect could be evidence of greater reliability that is truly “independent” of any suggestion at the police lineup. Some courts do treat identifications by acquaintances differently, although the question of how much familiarity should suffice to assure greater reliability poses complex practical and theoretical problems.  

In a different sense, an...
identification that is not the product of police suggestion, but of the eyewitness’s own actions, like viewing a photo of the defendant in a newspaper or a yearbook, might be seen as “independent” of police efforts to test the eyewitness’s memory, although such identifications might nevertheless be unreliable.\(^{139}\)

While these decisions occur in the context of deferential appellate and postconviction review, what is troubling about the decisions is the notion, implicitly rejected by *Manson*, that there is something “independent” about a courtroom identification. They do not say that evidence of reliability overcomes or excuses suggestion but that they have independent access to the reliability of the witness. Courts speak of the witnesses’ “independent recollection” of the culprit’s appearance. Indeed, the problem extends beyond the question of admissibility. Trial judges even instruct jurors on such a standard in some states, when explaining what weight they should give to a courtroom identification.\(^{140}\)

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\(^{139}\). See, e.g., United States v. DeJesus, 912 F. Supp. 129, 139 (E.D. Pa. 1995) (holding that a newspaper photograph which jogged the victim’s image was not unduly suggestive); Utley v. State, 589 N.E.2d 232, 237–38 (Ind. 1992) (upholding the trial court’s finding that a photographic array with the defendant appearing twice was not unduly suggestive); People v. Whitaker, 126 A.D.2d 688, 688–89 (N.Y. App. Div. 2d Dept’ 1987) (noting that identifying the assailant in a yearbook photograph was not tainted by police procedures). *But see* State v. Atwood, 832 P.2d 593, 603 (Ariz. 1992) (upholding the trial courts determination that only two of fourteen witnesses’ pretrial viewings of press coverage were unduly suggestive); People v. Prast, 319 N.W.2d 627, 634–35 (Mich. Ct. App. 1982) (“Where an identification of a defendant is based upon a newspaper photograph rather than the witness’s own perceptions, it should be excluded.”); Rogers v. State, 774 S.W.2d 247, 259–60 (Tex. Crim. App. 1989) (“Since the police procedure was not itself suggestive, the fact that several eyewitnesses were exposed to a media photo of appellant one day before attending a police lineup might, at most, be taken to affect the weight, although not the admissibility, of their trial testimony”), *overruled by* Peek v. State, 106 S.W. 3d 72 (Tex. Crim. App. 2003); *see also* Lynn M. Talutis, Annotation, *Admissibility of In-Court Identification as Affected by Pretrial Encounter that was not Result of Action by Police, Prosecutors, and the Like*, 86 A.L.R. 5th 463, Part III.B. (2001) (citing cases that allowed media identifications as admissible evidence, but also citing others that claimed the evidence was inadmissible).

\(^{140}\). See State v. Cannon, 713 P.2d 273, 281 (Ariz. 1985) (approving jury instruction stating, “[y]ou are instructed that you must be satisfied beyond a reasonable doubt that the in-Court identification was independent [sic] of the previous pre-trial identification or, if not derived from an independent source, you must find from other evidence in the case that the defendant is the guilty person beyond a reasonable doubt”).
B. Crossing Two Lines of Eyewitness Decisions

This independent source concept arises from a confusion of the two lines of Supreme Court eyewitness identification cases that developed in the late 1960s through the 1970s. Courts may simply be befuddled by the tangled case law leading up to the *Manson* decision, in which different standards applied for admitting an in-court versus an out-of-court identification. Some of those courts, as noted, hearken back to the *Wade/Gilbert* line of cases and still cite to the “independent source” doctrine, in which even if a judge concludes that an identification was illegal, the judge may allow an in-court identification. That doctrine now ostensibly only applies to Sixth Amendment violations of the right to counsel at postindictment lineups. Recall that *Simmons* began to make such a distinction in the due process and police suggestion context, but the Court undid that distinction in *Manson* by ruling that the standard for any identification is whether it is “reliable” despite any police suggestion.

The independent source concept used in *Wade* and *Gilbert* came from an unlikely and inapposite source—exclusionary rule doctrine. In the search and seizure context, an illegal arrest may lead to a search that uncovers valuable evidence. Courts may exclude all of the evidence as “fruit of the poisonous tree.” However, there are three exceptions to the “fruit of the poisonous tree” implication of the exclusionary rule: inevitable discovery, attenuation doctrine (neither is analogous in any way), and independent source doctrine. The independent source doctrine is less problematic when the source was known to police before the illegality, though “[t]he problem, of course, is that there is no way to get the cat back into the bag.” In the typical case, though, an illegal arrest leads to a search that uncovers evidence of guilt. Such cases go to the heart of concern with the exclusionary rule. Police uncover reliable evidence of guilt but through illegal means.

In other contexts, the Court has held that a person’s own independent actions may create a source independent of law enforcement illegality. For example, a confession is not something with an independent source when the suspect is questioned immediately following an illegal search. Passage of time, the Court has ruled, can “dissipate the taint” of the illegal search, or even of an

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initial coercive interrogation.144 Similarly, if an eyewitness identifies a defendant in a lineup after an illegal arrest, a court might have good reasons to allow that eyewitness to identify the defendant at trial. The victim’s identification was not tainted by the illegal arrest, since the defendant is “not himself a suppressible ‘fruit.’”145

Perhaps because police suggestion is not an independent act, in Manson the Court abandoned the fiction of an “independent source” for a courtroom identification even where the out-of-court identification would be suppressed. The Wade/Gilbert line of cases is different. After all, in the Sixth Amendment context, even if the identification in court cannot be truly said to be “independent,” at least the violation of the right to counsel likely did not affect the reliability of the identification. The inquiry into whether the identification was reliable is distinct. Further, the same policy concern is present as in exclusionary rule cases generally. A procedural violation, the failure to provide counsel at a postindictment lineup, may result in the exclusion of reliable evidence of guilt. The purpose of the exclusionary rule was to deter police misconduct, but as in the Fourth Amendment context, the Court in the Sixth Amendment context created exceptions to allow reliable cases to go forward.146

In contrast, in the due process context, the illegal means are precisely what makes the evidence unreliable. In the eyewitness context, neither time nor unrelated events can “dissipate the taint.” In addition, the Court does not adopt the same approach toward deterring police misconduct in the eyewitness context, noting that police may not need a strong deterrent since “[t]he interest in obtaining convictions of the guilty also urges the police to adopt procedures that show the resulting identification to be accurate.”147

The very idea that a courtroom identification could be seen as “independent” is anomalous. But that has not stopped nearly all courts in the country from seizing on language from the Court admitted confusing early due process case law to justify departing from Manson and encouraging the admission of courtroom identifications despite earlier suggestion.

146. United States v. Calandra, 414 U.S. 338, 348 (1974) (“[T]he rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect. . . . As with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served.”).
147. Manson v. Brathwaite, 432 U.S. 98, 112 & n.12 (1977) (“Although the per se approach has the more significant deterrent effect, the totality approach also has an influence on police behavior.”).
Indeed, as noted, some courts outright conflate the lines of cases and cite to Wade when they apply the “independent source” rule in cases claiming due process (not Sixth Amendment) violations.\footnote{Solomon v. Smith, 645 F.2d 1179, 1188 (2d Cir. 1981) (“The tests of ‘independent origin’ set forth in Wade appear to be functionally identical to the reliability tests articulated in Neil v. Biggers . . . .”).} The one piece of commentary mentioning this flaw in the “independent source” case law, a Texas criminal practice guide, noted such “analysis is properly used only when the pretrial procedure is tainted by a violation of the Sixth Amendment right to counsel.”\footnote{See DIX & DAWSON, supra note 22, § 14.39 (“[T]he Texas courts have almost certainly erred in uncritically assuming that in-court identification testimony offered despite an earlier identification made at an unnecessarily suggestive procedure is sometimes admissible under the independent source analysis.”). They add, “Since the situation must present a very substantial risk of misidentification as a result of the unnecessarily suggestive procedure, surely it cannot be said that the in-court identification can have a source independent of that procedure.” \textit{Id}.} In practice, it appears that courts ask whether under the “totality of the circumstances” an identification appears reliable. While the test may be “technically, but not practically” different from the \textit{Manson v. Brathwaite} analysis,\footnote{LOFTUS ET AL., supra note 21, §§8-18, at 194 n.107.} the important difference is that there is no meaningful assessment of the reduced reliability of the courtroom or other subsequent identifications. Instead, courts look back to the original view the eyewitness had as an “independent source.”

\section*{C. What Is Independent About the Source?}

What is the independent source that courts are referring to? Courts treat an eyewitness almost like an object that can simply be shown to the jury. They discuss eyewitness memory as if it were a fixed image, like a photo or a video. However, as social scientists have demonstrated over many hundreds of studies, eyewitness memory is highly malleable and is nothing like a photo or a video. An eyewitness’s memory must be carefully preserved or it can become contaminated. Each effort to test an eyewitness’s memory will reshape that memory.\footnote{See infra Part I.C.} In the courtroom, the eyewitness cannot access a memory of what happened that is “independent” of the suggestive lineups that came before. While courts discuss the “independent recollection” of the eyewitness at trial, there is nothing independent about that recollection at trial. Indeed, the Supreme Court recognized as much early on. In \textit{Simmons}, the Court noted that “the witness thereafter is apt to retain in his memory the image of the photograph
rather than of the person actually seen, reducing the trustworthiness of subsequent lineup or courtroom identification.”

As Elizabeth Loftus, James Doyle, and Jennifer Dysart note in their treatise, while in theory prosecutors have a burden to show an independent source by “clear and convincing evidence” (in fact only some of the jurisdictions mention such a burden), in practice, courts “have gone to truly extraordinary lengths” to find that such independent sources exist. In fact, courts have found that the eyewitness’s original perception was an “independent” assurance of the validity of the identification in remarkable cases where eyewitnesses saw perpetrators for “less than ten seconds, running, at night,” or “while temporarily blinded by liquor,” or when “choked from behind.”

Recall how in Wade, the Court recognized that unless the courtroom identification is suppressed, a rule suppressing the out-of-court identification would serve little purpose since “[t]he State may then rest upon the witnesses’ unequivocal courtroom identifications.” At trial, litigating the “possible unfairness at the lineup may be the sole means of attack upon the unequivocal courtroom identification.”

We also note the obvious tactical reason for not filing a motion to suppress. If the out-of-court procedure was suppressed, leaving only an in-court identification, assuming the Commonwealth was able to meet its burden, the defense would not have been able to exploit certain weaknesses in the identification procedure.

That may actually not be a good tactical reason to not file a motion to suppress. If the Court suppresses the out-of-court identification, the defense lawyer may still choose to introduce it, although the identification cannot be presented by the State. It may be far more favorable for the defense to introduce it to elicit how the in-court identification is the product of a prior flawed identification procedure. Regardless, the lenient treatment of in-court identifications means that complete suppression of “all identification testimony” seldom occurs (except maybe in rare cases where the eyewitness never had any view of the culprit at all). This creates poor general incentives for the defense to vigorously litigate motions to suppress.

153. LOFTUS ET AL., supra note 21, at § 8-18, at 194–95.
154. Id. §8-18, at 194–95 & nn.108–09, 111 (citing cases).
157. Id.
Why are courts so lax about courtroom identifications? Some of those courts are aware of and cite to social science research on eyewitness memory. It may simply not occur to them that the courtroom identification is not just a bit of theater, but it is in fact highly suggestive and influential to jurors. Judges may be used to courtroom identifications of documents, nonstrangers, or objects—circumstances that are not problematic. Perhaps they believe that “juries are inclined to be skeptical of courtroom identifications, on account of the inherent suggestiveness in a defendant’s location next to his counsel at trial.”  

As noted, they cite to the ability of counsel to cross-examine after a courtroom identification. Or courts may be eager to avoid excluding the identification, which may be central evidence supporting the prosecution’s case. Sandra Guerra Thompson suggests that this may explain rulings in some states, pointing to, for example, a New York Court of Appeals decision stating that “[e]xcluding evidence of a suggestive show-up does not deprive the prosecutor of reliable evidence of guilt. The witness would still be permitted to identify the defendant in court if that identification is based on an independent source.” Of course, that reluctance to exclude is most problematic where the prior identifications were so suggestive that the court recognizes that they should be excluded, but still admits the courtroom identification.

There is an additional feature of the doctrine that is still more problematic. Several state and federal courts add another guilt-based factor nowhere to be found in the Manson test. They cite to other evidence in the case as another “independent” basis for allowing the in-court identification. They explain that all other unrelated evidence of guilt in the case can buttress the eyewitness identification and help to show that it was reliable or “independent” of any suggestive police conduct.

In such cases, courts again short-circuit the due process
inquiry and do so for the explicit reason that they do not want to deny the prosecution access to evidence against a likely guilty defendant. It is an ends-justifying-the-means approach, and it is not an approach in which “reliability is the linchpin.”

III. A PARTIAL EXCLUSION APPROACH

Although judges may seek to avoid exclusion at all costs, there is a middle ground that avoids excluding eyewitness testimony entirely while still safeguarding the reliability of trial evidence. That is to per se exclude courtroom identifications: ban them entirely when prior identifications are conducted. At the same time, courts could admit the prior identifications and allow any flaws in those procedures to be explored by the defense when questioning the eyewitness. Although the larger problem is beyond the scope of this Article, I emphasize that policymakers and judges should also address the array of deficiencies surrounding the admissibility rules for eyewitness evidence. The Henderson decision in New Jersey, while not perfect, provides a “social science framework”\(^\text{161}\) for encouraging proper lineups in the first instance, evaluating eyewitness evidence at hearings pretrial, admitting them in court, and instructing jurors on how to weight eyewitness identifications.\(^\text{162}\)

A. Limiting Courtroom Identifications

Some evidence, like that obtained after a search, can raise an all or nothing question: Should the judge admit the evidence? Moreover, the legality of the search has no bearing on the reliability of the evidence; an illegal search can turn up damning evidence of guilt. Other types of evidence lack such an all-or-nothing character. The testimony of an eyewitness is complex. It can include, among other things, a series of recollections, not all of which should necessarily be admissible. As Gary Wells and Deah Quinlivan suggest, “[T]otal exclusion is not the only option.”\(^\text{163}\)


\(^{163}\) Wells & Quinlivan, supra note 32, at 20 (describing situations in which limiting testimony might be appropriate).
Commentators have argued that the *Manson* test should be modified or that stronger limits should be placed on the admissibility of identifications. I agree with those criticisms but argue that the focus of such efforts should be broadened to not only revise (or scrap) the due process and “reliability” test, but to also ask when courtroom or subsequent identifications may be admitted despite earlier suggestive procedures. I argue that courtroom identifications should be per se excluded, perhaps with a heavy burden on the prosecution to show why it is absolutely necessary. After all, as courts acknowledge, “the in-court testimony of an eyewitness can be devastatingly persuasive,” and “of all the evidence that may be presented to a jury, a witness'[s] in-court statement that he is the one is probably the most dramatic and persuasive.”

Perhaps the eyewitness could still identify the defendant’s photo as the one previously identified in a photo array. Then again, the police officer could just as readily authenticate the photo array as the one administered and describe which photo was that of the defendant. Particularly important is that the eyewitness would not be permitted make an in-court identification of the defendant or additional testify about confidence at the time of trial that the identification is correct. As discussed, confidence on the day of trial is not a sound measure of accuracy and is prejudicial. Allowing the eyewitness to point to the defendant in the courtroom permits a display of such confidence.

If the prior identification is not suppressed as unduly suggestive, the eyewitness should be permitted to describe the out-of-court identification and be cross-examined concerning any suggestion or unreliability of that procedure. As Justice Marshall put it,

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165. Sandra Guerra Thompson, one of the few scholars to discuss the problematic standard, has noted, “simply tightening the test for determining whether there is an independent basis may not suffice to safeguard against the admission of unreliable in-court identifications.” Thompson, *supra* note 21, at 628.

166. Nor do I argue that in-court identifications should be barred as inherently suggestive, as one commentator has. Manderly, *supra* note 39, at 392. Instead, I ask the question what procedure should be used where prior lineups were conducted. Should police evade such a rule by conducting no pretrial identification procedure at all, however, courts should exclude an in-court identification as unnecessarily suggestive.


dissenting in Manson, “[T]he issue is whether the witness is identifying the defendant solely on the basis of his memory of events at the time of the crime, or whether he is merely remembering the person he picked out in a pretrial procedure.”169

Such a rule would give police strong incentives to conduct lineups and identification procedures before the trial. Regardless, police have every reason to test an eyewitness’s memory to be sure that they have the right person. Indeed, in a typical case, they may not be able to make an arrest since, without an eyewitness identification, they would lack probable cause. Further, although judges do not often order lineup procedures at a trial, as noted, when they do, it is typically because the police did not conduct an identification procedure before trial.

This approach could be seen as flowing from a strict reading of Manson. One must separately ask whether the courtroom identification is unduly suggestive or reliable. If an eyewitness recounts a prior identification in the courtroom, then the eyewitness is describing more reliable evidence. However, unless a lineup is conducted in court, an identification in the courtroom is not only inherently suggestive, but it is also less reliable. The courtroom identification has no independent reliability, contrary to the language adopted by so many state and federal courts. Courts simply get it wrong when they suggest that there is less to be worried about when the identification is conducted in court.170

Are there circumstances in which courtroom identifications should be allowed, perhaps if prosecutors satisfied some burden in showing that the identification was necessary? Certainly, if there was no challenge to the courtroom identification, it could be allowed. Routine identifications by a police officer of a person arrested or of a relative or acquaintance are not controversial, and perhaps in such circumstances no prior lineup would have been conducted. Nor are those identifications based on an eyewitness’s memory of a single encounter. Police have separate written records of whom they arrest, and the prior familiarity of a witness with a relative can similarly be established without a courtroom identification.

A rule barring courtroom identifications encourages litigation and development of the most probative eyewitness evidence. That is, what happened at the initial identification? How certain was the

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170. See, e.g., United States v. Brown, 200 F.3d 700, 707–08 (10th Cir. 1999) (finding that, while the victim’s identification of the defendants at trial was suggestive, it happened in the presence of a jury and included a full and fair cross-examination of the victim about the process).
eyewitness when first viewing the lineup? How was that initial lineup conducted? Perhaps in part due to “independent source” case law, few defendants contest in-court identifications.\textsuperscript{171} The jurisprudence of eyewitness identifications may itself improve if separate identifications are treated separately.\textsuperscript{172}

In some cases, there may not have been a prior identification. Sometimes this may be because the identification was routine. The police officer may identify the person whom she arrested, for example. However, in a case involving a contested identification, the defense should have, and in many jurisdictions will have, the ability to formally request that a lineup be conducted before trial. If there is a dispute about the reliability of an identification, the courtroom is no place for an identification to first occur. Such an approach could be adopted as to other aspects of eyewitness testimony as well. If police, for example, fail to record the eyewitness’s initial confidence upon viewing a lineup, then at trial a judge could exclude as unreliable any testimony about the witness’s confidence.

\textit{B. Rethinking State Procedure}

States are increasingly revisiting criminal procedure rules regulating trial evidence, such as confessions, eyewitnesses, and forensics, in response to scientific research and wrongful convictions.\textsuperscript{173} In each of those contexts, states must revisit rules for excluding trial evidence. After all, if the new procedures are not followed, the state law question arises whether an exclusionary rule attaches to the breach. Typically, however, states have shied away from specifying consequences for failure to follow such new criminal procedures; thus, new statutes have tended not to speak to the exclusion of an eyewitness identification should the court find that best practices were not complied with. The two leading statutes, in North Carolina and Ohio, provide that failure to comply with a set of procedures, including double-blind and sequential administration of

\textsuperscript{171} See Mandery, \textit{supra} note 39, at 389 (“The lack of appellate-level case law on the subject may be partially explained by the fact that few defendants ever object to the suggestiveness of in-court identifications.”). In contrast, I observe substantial appellate caselaw, which poses additional obstacles to challenging in-court identifications.

\textsuperscript{172} Also problematic, some courts conduct a suppression hearing in front of the jury, making a suppression remedy less effective. See Watkins v. Sowders, 449 U.S. 341, 349 (1981) (holding that a trial court may conduct reliability hearings in presence of the jury); see also \textit{LaFAVE ET AL., supra} note 143, § 24.4, at 1161 (noting that victims are typically not sequestered at a criminal trial).

\textsuperscript{173} See \textit{GARRETT, supra} note 7, ch. 9.
lineups, “shall be considered” in a motion to suppress an identification.\textsuperscript{174} That is very mild language and a weak remedy.

State courts have also altered the \textit{Manson} test to reform its application.\textsuperscript{175} For example, the Georgia Supreme Court concluded in 2005 that eyewitness certainty should no longer be considered as a relevant factor when evaluating the reliability of eyewitness identifications, stating that “[i]n the 32 years since the decision in \textit{Neil v. Biggers}, the idea that a witness’s certainty in his or her identification of a person as a perpetrator reflected the witness’s accuracy has been ‘flatly contradicted by well-respected and essentially unchallenged empirical studies.’ ”\textsuperscript{176} Yet, Georgia and many other reform states are jurisdictions that adopt “independent source” language for admitting in-court identifications.\textsuperscript{177} States using double-blind identifications similarly fail to discuss the standard for excluding noncomplying or courtroom identifications.\textsuperscript{178} Local efforts

\textsuperscript{174} The North Carolina statute provides: “(1) Failure to comply with any of the requirements of this section shall be considered by the court in adjudicating motions to suppress eyewitness identification.” N.C. GEN. STAT. ANN. § 15A-284.52(d)(1) (West 2008). The Ohio statute reads:

(1) Evidence of a failure to comply with any of the provisions of this section or with any procedure for conducting lineups that has been adopted by a law enforcement agency or criminal justice agency pursuant to division (B) of this section and that conforms to any provision of divisions (B)(1) to (5) of this section shall be considered by trial courts in adjudicating motions to suppress eyewitness identification resulting from or related to the lineup.


\textsuperscript{175} Those states include Connecticut, Georgia, Kentucky, New Jersey, New York, Massachusetts, Utah and Wisconsin. See State v. Ramirez, 817 P.2d 774, 780–81 (Utah 1991) (altering three of the “reliability” factors to focus on effects of suggestion); see also State v. Marquez, 967 A.2d 56, 69–71 (Conn. 2009) (adopting detailed criteria for assessing suggestion); Brodes v. State, 614 S.E.2d 766, 771 & n.8 (Ga. 2005) (rejecting use of eyewitness certainty jury instruction); State v. Hunt, 69 P.3d 571, 576 (Kan. 2003) (adopting Utah’s five factor “refinement” of the \textit{Biggers} factors); Commonwealth v. Johnson, 650 N.E.2d 1257, 1261 (Mass. 1995) (adopting a per se exclusion approach to showup identifications); State v. Cromedy, 727 A.2d 457, 467 (N.J. 1999) (requiring in some circumstances instruction on dangers of cross-racial misidentifications); People v. Adams, 423 N.E.2d 379, 383–84 (N.Y. 1981) (adopting a per se exclusion approach to showup identifications); State v. Dubose, 699 N.W.2d 582, 593–94 (Wis. 2005) (“[E]vidence 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. A showup will not be necessary, however, unless the police lacked probable cause to make an arrest or, as a result of other exigent circumstances, could not have conducted a lineup or photo array.”).

\textsuperscript{176} \textit{Brodes}, 614 S.E.2d at 770.

\textsuperscript{177} See Kruse, supra note 21, at 722 n.367 ([A]lthough the Wisconsin Supreme Court adopted a strict test regarding showups, “use of the independent-source doctrine runs the risk of reintroducing the \textit{Brathwaite/Biggers} reliability factors.”)

similarly focus on best practices for eyewitness identifications without discussing admissibility.  

The one exception is the New Jersey Supreme Court’s Henderson decision adopting far-reaching changes to procedures concerning eyewitness identifications. Those procedures are an important model and provide a social science framework for admissibility of eyewitness identifications. I note, though, that in addition to certain other limitations, those procedures do not carefully address the problem of courtroom identifications. Indeed, an appellate decision in that case instructed the trial court to consider whether there was an “independent source” for a courtroom identification should the suggestive pretrial identifications be excluded. On the other hand, the Henderson decision does note that in “rare cases” judges “may use their discretion to redact parts of identification testimony,” including by barring “potentially distorted and unduly prejudicial statements about the witness’ level of confidence from being introduced at trial.”

Statutory jury instructions describing risks of eyewitness misidentifications typically fail to consider admissibility standards.

administration and difficulties in its implementation, but not discussing exclusion of noncomplying or courtroom identifications); Otto H. MacLin, Laura A. Zimmerman & Roy S. Malpass, PC Eyewitness and Sequential Superiority Effect: Computer-Based Lineup Administration, 3 LAW & HUM. BEHAV. 303, 305–308 (2005) (explaining how computer-based lineup administration can reduce administrator bias, but not discussing noncomplying or courtroom identifications); cf. Loftus et al., supra note 21, § 4-10 (describing double-blind administration in the context of lineups).


182. Henderson, 27 A.3d at 925.

183. North Carolina puts it as follows: “(3) When evidence of compliance or noncompliance with the requirements of this section has been presented at trial, the jury shall be instructed that it may consider credible evidence of compliance or noncompliance to determine the reliability of eyewitness identifications.” N.C. GEN. STAT. ANN. § 15A-284.52(d)(3) (West 2008). The Ohio language is very similar:

(3) When evidence of a failure to comply with any of the provisions of this section, or with any procedure for conducting lineups that has been adopted by a law enforcement agency or criminal justice agency pursuant to division (B) of this section and that conforms to any provision of divisions (B)(1) to (5) of this section, is presented at trial, the jury shall be instructed that it may consider credible evidence of noncompliance in determining the reliability of any eyewitness identification resulting from or related to the lineup.

OHIO REV. CODE ANN. § 2933.83(C)(3) (West 2011).
As Justice Brennan wrote, “To expect a jury to engage in the collective mental gymnastic of segregating and ignoring such testimony upon instruction is utterly unrealistic.”\textsuperscript{184} Research on jury instructions and eyewitness testimony supports that view.\textsuperscript{185} This is all the more problematic when a jury is given instructions that highlight factors that do not correspond to the reliability of the identification or even instructions on “independent source” for a courtroom identification.\textsuperscript{186} However, as the Henderson decision explains, tailored jury instructions highlighting factors relevant in a particular case, or even provided just before the witness testifies, may have a greater ability to educate jurors.\textsuperscript{187} More research should be done to study the effect of such jury instructions.

Perhaps one reason that new procedures studiously avoid any robust remedies for failure to adhere to best practices is a concern that a heightened standard for exclusion would derail prosecutions that rely on eyewitnesses as crucial evidence in serious cases. However, by distinguishing between in-court and out-of-court identifications, exclusion is no longer an all-or-nothing question. Judges could adopt a rebuttable presumption that a courtroom identification would not be allowed if earlier identification procedures were flawed, but they could still allow full litigation of the prior procedures. Reforms should make clear what consequences flow from a departure from best practices. Again, the Henderson decision in New Jersey provides a roadmap for how to structure those procedures.


\textsuperscript{185} See Brian L. Cutler & Steve D. Penrod, Mistaken Identification: The Eyewitness, Psychology, and the Law 11, 263–64 (1995) (“[T]he experiments we have reviewed here provide little evidence that judges’ instructions concerning the reliability of eyewitness identification enhance juror sensitivity to eyewitness identification evidence.”).

\textsuperscript{186} See supra note 131.

\textsuperscript{187} Henderson, 27 A.3d at 924 (“[W]e direct that enhanced instructions be given to guide juries about the various factors that may affect the reliability of an identification in a particular case.”); see also Wells & Quinlivan, supra note 32, at 20–21 (discussing benefits of jury instruction that is tailored to specifics of case). While jury instructions that seek to limit consideration of evidence and “blindfold” the jury may fail, efforts to more completely inform the jury using instructions that explain rationales for admonitions may produce more accurate results. See David P. Leonard, The New Wigmore: A Treatise on Evidence Selected Rules of Limited Admissibility: Regulation of Evidence to Promote Extrinsic Policies and Values § 1.11.5 (2010) (explaining that jury instructions should clearly convey both the applicable legal rules and the importance of abiding by them); Shari Seidman Diamond & Neil Vidmar, Jury Room Ruminations on Forbidden Topics, 87 Va. L. Rev. 1857, 1858 (2001) (discussing limits of blindfolding techniques given active nature of juries and advocating for reason-based explanatory instructions). On the value of offering instructions earlier in the trial, see Joel D. Lieberman & Jamie Arndt, Understanding the Limits of Limiting Instructions: Social Psychological Explanations for the Failures of Instructions to Disregard Pretrial Publicity and Other Inadmissible Evidence, 6 Psychol. Pub. Pol'y & L. 677, 705 (2000).
Judges could partially reorient the jurisprudence just by correctly reading *Manson*. The Court’s due process test does not include an “independent source” rule. It requires separate analysis of whether a given identification procedure should be admitted as suggestive or reliable. A courtroom identification is not a “reliable” test of the eyewitness’s memory, and a courtroom identification is inherently suggestive. Similarly, statutes could codify per se exclusion for courtroom identifications that follow prior out-of-court identification procedures.

Criminal procedure rules could more broadly focus on excluding tainted aspects of evidence, such as a confession, an informant statement, or a forensic report, without imposing an all-or-nothing exclusion. The Supreme Court in *Perry* was unwilling to expand due process regulation of eyewitness identifications not arranged by police, but the Court did emphasize that jury instructions and other tools may more usefully ensure the reliability of trial evidence. However, the Court may continue to step back toward a more reliability-oriented Confrontation Clause approach. The Court’s ruling in *Missouri v. Siebert* can also be seen as a ruling recognizing the need to partially exclude later evidence contaminated by earlier evidence (although there, the focus was on police coercion and not on reliability.) An approach geared toward reliability might instead look at whether a confession was contaminated by disclosed facts, and it might exclude portions of an interrogation where the suspect was not volunteering answers but simply repeating

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189. None of the examples discussed above necessarily involve absent witnesses and thus can avoid Confrontation Clause problems. The Supreme Court had earlier adopted a reliability-oriented approach to the Confrontation Clause problem, permitting nonconfrontation of witnesses if the evidence was reliable or had “particular guarantees of trustworthiness.” *Ohio v. Roberts*, 448 U.S. 56, 66 (1980). The Court rejected that approach in *Crawford v. Washington*, focusing instead on whether the evidence was testimonial in nature. 541 U.S. 36, 68–69 (2004). However, the Court’s recent ruling on the “excited utterance” and “ongoing emergency” exception to hearsay returned to a reliability rationale, noting “the prospect of fabrication” is greatly diminished when a person is seeking law enforcement help. *Michigan v. Bryant*, 131 S. Ct. 1143, 1157 (2011).

190. 542 U.S. 600, 608–09 (2004) (plurality opinion). In *Siebert*, the Court ruled that when police interrogate a suspect in custody without having given the *Miranda* warnings, but then after obtaining a confession, give the warnings and ask the same questions again, that the repeated statement is not admissible. *Id.* at 604. The plurality emphasized that that the earlier statement, made without the *Miranda* warnings, would naturally impact the second statement. *Id.* at 613–14. As Justice O’Connor pointed out in dissent, the Court also considered the “psychological impact” the first unwarned statement would have on the second *Mirandaized* statement. *Id.* at 627 (O’Connor, J., dissenting). She would consider the same factors, but for a different purpose, to ask whether the second statement might be independently reliable and therefore not subject to exclusion. *Id.* at 627–28 (O’Connor, J., dissenting).
information that police provided, or it might simply exclude portions of an interrogation that were not electronically recorded. Similarly, a series of courts have responded to challenges to the validity and reliability of a series of forensic techniques, such as fingerprint analysis, firearms and toolmark analysis, and handwriting comparisons, by limiting the ability of analysts to testify to invalid conclusions, such as that the evidence could only have come from the defendant to the exclusion of all others in the world. As courts and legislatures focus on reliability in other contexts, they might consider whether evidence could similarly be treated in separate parts. In addition, courts could fashion tailored jury instructions, together with


192. See, e.g., TEX. CODE CRIM. PROC. ANN. art. 38.22(3)(a)–(c) (West 2011) (stating that “[n]o oral or sign language statement of an accused made as a result of custodial interrogation shall be admissible against the accused in a criminal proceeding unless” there is an “electronic recording” made of it, although containing an exception for “any statement which contains assertions of facts or circumstances that are found to be true and which conduce to establish the guilt of the accused, such as the finding of secreted or stolen property or the instrument with which he states the offense was committed”). Such rules raise additional questions. For example, that Texas statute does not offer a remedy in the situation in which statements were selectively recorded. Id. In addition, while the statute exempts certain unrecorded corroborated admissions, it does not make clear that recorded statements be excluded should they document police contamination of the confession or other evidence of unreliability. Id.

193. See, e.g., United States v. Green, 405 F. Supp. 2d 62, 67–68 (D. Mass. 1999) (ruling that handwriting examiner was limited to testifying about “similarities” in documents); see also Simon A. Cole, Splitting Hairs? Evaluating ‘Split Testimony’ as an Approach to the Problem of Forensic Expert Evidence, 33 SIDNEY L. REV. 459 (2011) (evaluating emerging approach by courts restricting testimonial claims of forensic experts); Jennifer L. Mnookin, The Courts, the NAS, and the Future of Forensic Science, 75 BROOK. L. REV. 1209, 1242 (2010) (arguing that as an “interim solution” courts limit fingerprint evidence “by restricting it to description of similarities and differences” rather than permit individualization claims); Jennifer L. Mnookin et al., The Need for a Research Culture in the Forensic Sciences, 58 UCLA L. REV. 725, 750 (2011) (“Forensic analysts have often failed to recognize the limits of what conclusions are actually warranted by a given research result.”); David M. Siegel et al., The Reliability of Latent Print Individualization: Brief of Amici Curiae submitted on Behalf of Scientists and Scholars by The New England Innocence Project, Commonwealth v. Patterson, 42 CRIM. L. BULL. art. 2 (2006) (“[T]estimony in terms of ‘individualization’ or ‘matches,’ without the underlying study of the base rates of the characteristics from which such conclusions are ostensibly drawn, or proficiency tests data for examiners, is misleading and fundamentally unsound. This does not mean that testimony detailing the comparison of prints by examiners would have to be excluded.”); cf. Simon A. Cole, Where the Rubber Meets the Road: Thinking About Expert Evidence as Expert Testimony, 52 VILL. L. REV. 803, 838 (2007) (“[J]udges and legal scholars need to shift their focus from the admissibility of evidence to control of testimony.”).
reliability hearings, to provide a comprehensive framework regulating the admissibility of evidence.

CONCLUSION

The Supreme Court’s due process test, confused in the courts by misplaced borrowing from Sixth Amendment right-to-counsel cases and Fourth Amendment exclusionary rule doctrine, has handled exclusion and eyewitness identifications backwards. Most recently, the Court blithely noted in Perry v. New Hampshire that “all in-court identifications” involve “some elements of suggestion,” identifying this as one reason to leave the problem of unreliable eyewitness identification evidence to the states and to jurors.194 Yet, state courts permit courtroom displays to obscure the reliability of eyewitness identifications and to mislead the jury. From tangled origins in the Court’s rulings, the doctrine developed in an odd and unforeseen way. Almost without exception in state courts, a judge may find that the courtroom identification has an “independent source” or has “independent reliability” based on the eyewitness’s memory of what she saw. There is nothing independent about the courtroom identification. Eyewitness memory is not “independent” of prior events and courts do not have “independent” access to the memory of an eyewitness. If the prior procedures were suggestive, then, at minimum, the courtroom identification should be per se excluded.

In contrast, evidence law recognizes in a host of ways that evidence can be separated into parts for admissibility purposes. Eyewitnesses typically confront multiple identification procedures, in court and out of court. Evidence rules admit prior identifications, which far better capture the eyewitness’s memory. What evidence rules do not do, however, is relegate courtroom identifications to a least-favored status. As a result, the ready use of courtroom identifications has frustrated efforts to reform eyewitness identifications in response to decades of social science research and troubling lessons from DNA exonerations. Now that judges and legislatures have begun to reshape eyewitness identification law, a partial exclusion approach could play an important role. The regulation of eyewitness identifications should start with the fundamental requirement that law enforcement follow best practices when conducting identification procedures in the first instance, and it could include per se exclusion of courtroom identifications that follow prior identifications. Perhaps then criminal procedure rules will

accomplish their goal of safeguarding the reliability of eyewitness identifications. Until the doctrine is reoriented, courtroom identifications will undermine due process jurisprudence and obscure the reliable evidence that eyewitnesses can provide to our criminal justice system.
APPENDIX

States Citing to Independent Source Rules for Admissibility of In-Court Eyewitness Identifications

Alabama

See Hull v. State, 581 So. 2d 1202, 1204 (Ala. Crim. App. 1990) (“[T]he suggestiveness of the identification procedures must be balanced against factors indicating that the in-court identification was independently reliable.” (citing Dickerson v. Fogg, 692 F.2d 238, 244 (2d Cir. 1982))); Speigner v. State, 369 So. 2d 39, 42 (Ala. Crim. App. 1979) (“[W]here allegations are made that the due process standards were violated by an unfair pretrial confrontation, it becomes the burden of the prosecution to show by clear and convincing evidence that the in-court identification testimony had an independent source and did not stem from the alleged unfair pretrial confrontation.”).

Alaska

See Gipson v. State, 575 P.2d 782, 787 (Alaska Ct. App. 1978) (“The foregoing evidence of identification, which we consider overwhelming, had an ‘independent source’ from the tainted in-court identification which occurred at the first preliminary hearing.”); Gruber v. State, 1984 WL 908688, at *2, n.2 (Alaska App. 1984) (stating that an “in-court identification is admissible, even if the photographic display was suggestive, if it stems from his memory of the assault independent of the suggestive display” (emphasis in original)).

Arizona

See State v. Marquez, 558 P.2d 692, 695 (Ariz. 1976) (“If the record shows that a pre-trial identification was unduly suggestive, then the in-court identification must be shown to have had an independent source other than the improper pre-trial identification.”).

Arkansas

See Van Pelt v. State, 816 S.W.2d 607, 610 (Ark. 1991) (“Even had the pre-trial identification been impermissibly suggestive, the taint of an improper ‘show-up’ was removed by the clear and convincing evidence that the in-court identification was based upon [the witness’s] independent observations of the suspect.”).
California

See People v. Cooks, 190 Cal. Rptr. 211, 270 (Ct. App. 1983) (“In California, the burden shifts to the People to prove by clear and convincing evidence that the in-court identifications were based on the witness'[s] observations of the accused at the scene of the crime, that is, independent of the suggestive pretrial identification.”).

Colorado

See People v. Walker, 666 P.2d 113, 119 (Colo. 1983) (“The People have the burden of establishing by clear and convincing evidence that in-court identification is not the product of an unduly suggestive confrontation, but is based upon the witness'[s] independent observations of the defendant during the commission of the crime.”).

Connecticut

See State v. Doolittle, 455 A.2d 843, 851 (Conn. 1983) (citing to the courtroom identification as “a strong independent source for the identification of the defendant as the robber apart from the photo identifications”).

Florida

See Allen v. State, 326 So. 2d 419, 410 (Fla. 1975) (“Viewing the trial testimony of the witnesses in its entirety, there were sufficient independent sources for the in-court identification. There is nothing in the record that shows the in-court identification was tainted by the prior improper out-of-court identification procedure.”).

Georgia

See Sharp v. State, 692 S.E.2d 325, 330 (Ga. 2010) (“[E]ven if an out-of-court identification is impermissibly suggestive, a subsequent in-court identification is admissible if it did not depend upon the prior identification[ ] but had an independent origin.” (internal quotations omitted)); Shabazz v. State, 667 S.E.2d 414, 417 (Ga. Ct. App. 2008) (“[E]ven a ‘right guy’ reference will not taint a subsequent in-court identification if that identification ‘does not depend upon the prior identification but has an independent source.’ ”).
Idaho

See State v. Sadler, 511 P.2d 806, 813 (Idaho 1973) (“Since the witness’s in-court identification had an independent origin exclusive of any connection with events occurring in the police station, we conclude that the trial court properly admitted this identification into evidence.” (internal quotations and citation omitted)).

Illinois

See People v. DeJesus, 516 N.E.2d 801, 803 (Ill. App. Ct. 1987) (“If a violation of a defendant’s rights is found, the court must then determine whether the in-court identification nevertheless is admissible because it has an independent source.”).

Indiana

See Brown v. State, 577 N.E.2d 221, 225 (Ind. 1991) (“This Court has repeatedly held, however, that ‘an in-court identification by a witness who has participated in an impermissibly suggestive out-of-court identification is admissible if the witness has an independent basis for the in-court identification.’ ”).

Iowa

See State v. Webb, 516 N.W.2d 824, 829 (Iowa 1994) (“We have stated that even where a pretrial identification is obtained by an illegal procedure, ‘the same witness may nevertheless identify a defendant at trial if such identification has an independent origin . . . .’ ” (quoting State v. Ash, 244 N.W.2d 812, 814 (Iowa 1976))).

Kansas

See State v. Skelton, 795 P.2d 349, 356 (Kan. 1990) (“[A]n in-court identification is capable of standing on its own even though a pretrial confrontation was deficient.”).

Louisiana

See State v. Cheathon, 682 So. 2d 823, 826 (La. App. 1996) (“In the present case, even if we disregard the contrary evidence and assume arguendo that the pre-trial identification represented an
impermissibly suggestive activity, the record discloses an independent basis for admitting the in-court identifications by the two victims.

Maine

See State v. Broucher, 388 A.2d 907, 909 (Me. 1978) (analyzing “(1) whether the pre-trial identifications were so suggestive as to be inherently unreliable; and (2) if so, whether the in-court identification had an independent source”).

Massachusetts

See Commonwealth v. Delrio, 2003 WL 21028648, at *8 (Mass. Super. 2003) (“Notwithstanding the suppression of the identification following the showup, the witness should be permitted to make an in-court identification based on the doctrine of independent source.”).

Michigan

See People v. Gray, 577 N.W.2d 92, 96 (Mich. 1998) (“Our inquiry does not end once we have found an invalid identification procedure. The second step in our analysis is to determine whether the victim had an independent basis to identify the defendant in court.”).

Minnesota

See State v. Taylor, 594 N.W.2d 158, 161 (Minn. 1999) (“[I]f the totality of the circumstances shows the witness’s identification has an adequate independent origin, it is considered to be reliable despite the suggestive procedure.” (quoting State v. Ostrem, 535 N.W.2d 916, 921 (Minn. 1995))).

Mississippi

See Lattimore v. State, 958 So. 2d 192, 198 (Miss. 2007) (“Where constitutional error in pre-trial identification has occurred, the state must show by clear and convincing evidence that subsequent in-court identifications are not based upon the offensive lineup, but instead have an independent origin.”).
Missouri

See State v. Gates, 637 S.W.2d 280, 285 (Mo. Ct. App. 1982) (“The question remains, therefore, whether the prelineup eyewitness identification was sufficiently reliable as an independent source for the trial identification . . . .”); State v. Morgan, 593 S.W.2d 256, 258 (Mo. Ct. App. 1980) (“The presence of an independent source will serve to remove any taint that might result from a suggestive confrontation.” (quoting State v. Davis, 529 S.W.2d 10, 14 (Mo. Ct. App. 1975))).

Nebraska


Nevada

See Hicks v. State, 605 P.2d 219, 221 (Nev. 1980) (“Moreover, the [witness] made independent, positive, and unequivocal in-court identifications of [defendant] at the preliminary examination and trial which were sufficient to render any possible error in the photographic identification procedure harmless.”).

New Hampshire

See State v. Preston, 442 A.2d. 992, 994–95 (N.H. 1982) (“Once an out-of-court identification has been suppressed, in order for a subsequent in-court identification to be allowed, the State must prove by clear and convincing evidence that ‘the in-court identification ha[d] an independent source and [was] not influenced by the out-of-court viewing . . . .’”) (quoting State v. Leclair, 385 A.2d 831, 835 (1978)).

New Jersey

New Mexico

See State v. Leyba, 2009 WL 6608373, at *4 (N.M. 2009) (deciding that a trial court should “hear and consider testimony regarding the suggestive context, the reasons for any suggestivity, and whether or not, as in this case, there may have been an independent source for a reliable courtroom identification.”).

New York

See People v. Dell, 784 N.Y.S.2d 114, 116 (App. Div. 2004) (“The testimony at an independent source hearing established that the victims had multiple opportunities to observe the defendant at close range for a lengthy period of time during the commission of the crime. Therefore, the Supreme Court correctly determined that there was an independent source for the identifications.”).

North Carolina

See State v. Freeman, 330 S.E.2d 465, 471 (N.C. 1985) (“[W]e need not decide whether the improper display of the photographs to the State’s witnesses by one other than the State tainted their in-court identifications. This is so because the trial judge concluded that the witnesses’ in-court identifications of defendant were of ‘independent origin, based solely upon what the witnesses saw at the time of the crime.’”).

Ohio

See State v. Jenksin, 2004 WL 63937, at *5 (Ohio Ct. App. 2004) (“This court has held that, even presuming a pretrial identification procedure is impermissibly suggestive, an in-court identification is permissible where the prosecution establishes by clear and convincing evidence that the witness had a reliable, independent basis for the identification based on prior independent observations made at the scene of the crime.”); State v. Moss, 1989 WL 10253, at *10 (Ohio Ct. App. 1989) (“[W]e find that these eyewitnesses had an independent source for their in-court identifications.”).

Oregon

See State v. Lawson, 244 P.3d 860, 866 (Or. Ct. App. 2010) (asking “whether the identification had a source independent of the suggestive
identification procedures . . .”), review allowed, 258 P.3d 526 (Or. 2011).

Pennsylvania

See Commonwealth v. McGaghey, 507 A.2d 357, 359 (Pa. 1986) (stating that the judge must examine whether “the in-court identification resulted from the criminal act and not the suggestive encounter”); Commonwealth v. Bradford, 451 A.2d 1035, 1037 (Pa. Super. Ct. 1982) (“A consideration of the totality of the circumstances in this case leads us to conclude that the identification testimony supplied by the victim at the trial was sufficiently independent of the suggestive pre-trial identification procedure that had been employed by the police.”).

South Carolina


South Dakota

See State v. Iron Necklace, 430 N.W.2d 66, 84 (S.D. 1988) (“[T]he proof shifts to the State to then prove by clear and convincing evidence that the in-court identification had an independent origin.”).

Texas

See Buxton v. State, 699 S.W.2d 212, 216 (Tex. Crim. App. 1985) (“[W]e find the in-court identification was shown to have an origin independent from the lineup.”).

Virginia

See McCary v. Commonwealth, 321 S.E.2d 637, 645 (Va. 1984) (“We conclude that the in-court identifications had independent sources free from taint, specifically the ample opportunities the victims availed themselves of to observe [the Defendant] in his activities before and during the crimes.”).
Washington

See State v. Johnson, 132 P.3d 767, 769 (Wash. Ct. App. 2006) (“Even if an identification procedure was impermissibly suggestive, courts will uphold an in-court identification if it has an ‘independent source.’”).

West Virginia

See State v. Watson, 318 S.E.2d 603, 613 (W.Va. 1984) (holding that a court must ask “if the witness had an independent basis for his identification other than an impermissible out-of-court identification”).

Wisconsin

See State v. Dubose, 699 N.W.2d 582, 596 (Wis. 2005) (“The witness would still be permitted to identify the defendant in court if that identification is based on an independent source.” (quoting People v. Adams, 423 N.E.2d 379, 384 (N.Y. 1981))); Powell v. State, 271 N.W.2d 610, 617 (Wis. 1978) (“[T]he state has the burden of showing that the subsequent in-court identification derived from an independent source and was thus free of taint.”).

Washington, D.C.

Collins v. United States, 491 A.2d 480, 489 (D.C. 1985) (noting that the judge found “independent source” for lineup and in-court identifications).
Preface

Eyewitness identifications play an important role in the investigation and prosecution of crimes, but they have also led to erroneous convictions. In the fall of 2013, the Laura and John Arnold Foundation called upon the National Academy of Sciences (NAS) to assess the state of research on eyewitness identification and, when appropriate, make recommendations. In response to this request, the NAS appointed an ad hoc study committee that we have been privileged to co-chair.

The committee’s review analyzed relevant published and unpublished research, external submissions, and presentations made by various experts and interested parties. The research examined fell into two general categories: (1) basic research on vision and memory and (2) applied research directed at the specific problem of eyewitness identification. Basic research has progressed for many decades, is of high quality, and is largely definitive. Research of this category identifies principled and insurmountable limits of vision and memory that inevitably affect eyewitness accounts, bear on conclusions regarding accuracy, and provide a broad foundation for the committee’s recommendations.

Through its review, the committee came to recognize that applied eyewitness identification research has identified key variables affecting the accuracy of eyewitness identifications. This research has been instrumental in informing law enforcement, the bar, and the judiciary of the frailties of eyewitness identification testimony. Such past research has appropriately identified the variables that may affect an individual’s ability to make an accurate identification. However, given the complexity of the problem, the practical difficulties it poses for experimental research, and the still ongoing evolution of statistical procedures in the field of eyewitness identification research, there remains at the time of this review substantial uncertainty about the effect and the interplay of these variables on eyewitness identification. Nonetheless, a range of practices has been validated by scientific methods and research and represents a starting place for efforts to improve eyewitness identification procedures.

In this report, the committee offers recommendations on how law enforcement and the courts may increase the accuracy and utility of eyewitness identifications. In addition, the committee identifies areas for future research and for collaboration between the scientific and law enforcement communities.

We are indebted to those who addressed the committee and to those who submitted materials to the committee; and we are particularly indebted to the members of the committee. These individuals devoted untold hours to their reviews of materials, meetings, conference calls, analyses, and report writing. This report is very much the result of the enormous contributions of an engaged community of scholars and practitioners who reached their findings and recommendations after many vigorous and thoughtful discussions. We also would like to thank the project staff, Karolina Konarzewska, Steven Kendall, Arlene Lee, and Anne-Marie Mazza and editor Susanna Carey for their dedication to the project and to the work of the committee.

Thomas D. Albright and Jed S. Rakoff
Committee Co-chairs
Summary

Eyewitnesses play an important role in criminal cases when they can identify culprits. Yet it is well known that eyewitnesses make mistakes, and their memories can be affected by various factors including the very law enforcement procedures designed to test their memories. For several decades, scientists have conducted research on the factors that affect the accuracy of eyewitness identification procedures. Basic research on the processes that underlie human visual perception and memory have given us an increasingly clear picture of how eyewitness identifications are made and, more important, an improved understanding of the principled limits on vision and memory that may lead to failures of identification. Basic research has been complemented by a growing body of applied research on eyewitness identification, which has examined those variables that particularly affect eyewitnesses to crimes: system variables (conditions such as the procedures followed to obtain identifications that can be controlled by law enforcement) and estimator variables (conditions associated with the actual crime, such as viewing conditions, or factors specific to the eyewitness, such as the race of the victim relative to that of the perpetrator, that cannot be controlled by law enforcement).

Through such scientific research, we have learned that many factors influence the visual perceptual experience: dim illumination and brief viewing times, large viewing distances, duress, elevated emotions, and the presence of a visually distracting element such as a gun or a knife. Gaps in sensory input are filled by expectations that are based on prior experiences with the world. Prior experiences are capable of biasing the visual perceptual experience and reinforcing an individual’s conception of what was seen. We also have learned that these qualified perceptual experiences are stored by a system of memory that is highly malleable and continuously evolving, neither retaining nor divulging content in an informational vacuum. The fidelity of our memories to actual events may be compromised by many factors at all stages of processing, from encoding to storage to retrieval. Unknown to the individual, memories are forgotten, reconstructed, updated, and distorted. Therefore, caution must be exercised when utilizing eyewitness procedures and when relying on eyewitness identifications in a judicial context.

In 2013, the Laura and John Arnold Foundation called on the National Academy of Sciences (NAS) to appoint an ad hoc study committee to:

1. critically assess the existing body of scientific research as it relates to eyewitness identification;
2. identify any gaps in the existing body of literature and suggest appropriate research questions to pursue that will further our understanding of eyewitness identification and that might offer additional insight into law enforcement and courtroom practice;
3. provide an assessment of what can be learned from research fields outside of eyewitness identification;
4. offer recommendations for best practices in the handling of eyewitness identifications by law enforcement;
5. offer recommendations for developing jury instructions;
6. offer advice regarding the scope of a Phase II consideration of neuroscience research as well as any other areas of research that might have a bearing on eyewitness identification; and
7. write a consensus report with appropriate findings and recommendations.

The committee heard from numerous experts, practitioners, and stakeholders and reviewed relevant published and unpublished literature as well as submissions provided to the committee. In this report, the committee offers its findings and recommendations for:

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1Throughout this report, the term identification denotes person recognition. Eyewitness identification refers to recognition by a witness to a crime of a culprit unknown to the witness.
• identifying and facilitating best practices in eyewitness procedures for the law enforcement community;
• strengthening the value of eyewitness identification evidence in court; and
• improving the scientific foundation underpinning eyewitness identification.

OVERARCHING FINDINGS

The committee is confident that the law enforcement community, while operating under considerable pressure and resource constraints, is working to improve the accuracy of eyewitness identifications. These efforts, however, have not been uniform and often fall short as a result of insufficient training, the absence of standard operating procedures, and the continuing presence of actions and statements at the crime scene and elsewhere that may intentionally or unintentionally influence eyewitness’ identifications.

Basic scientific research on human visual perception and memory has provided an increasingly sophisticated understanding of how these systems work and how they place principled limits on the accuracy of eyewitness identification. Basic research alone is insufficient for understanding conditions in the field, and thus has been augmented by studies applied to the specific practical problem of eyewitness identification. Applied research has identified key variables that affect the accuracy and reliability of eyewitness identifications and has been instrumental in informing law enforcement, the bar, and the judiciary of the frailties of eyewitness identification testimony.

A range of best practices has been validated by scientific methods and research and represents a starting place for efforts to improve eyewitness identification procedures. A number of law enforcement agencies have, in fact, adopted research-based best practices. This report makes actionable recommendations on, for example, the importance of adopting “blinded” eyewitness identification procedures. It further recommends that standardized and easily understood instructions be provided to eyewitnesses and calls for the careful documentation of eyewitness’ confidence statements. Such improvements may be broadly implemented by law enforcement now. It is important to recognize, however, that, in certain cases, the state of scientific research on eyewitness identification is unsettled. For example, the relative superiority of competing identification procedures (i.e., simultaneous versus sequential lineups) is unresolved.

The field would benefit from collaborative research among scientists and law enforcement personnel in the identification and validation of new best practices that can improve eyewitness identification procedures. Such a foundation can be solidified through the use of more effective research designs (for example, those that consider more than one variable at a time, and in different study populations to ensure reproducibility and generalizability), more informative statistical measures and analyses (i.e., methods from statistical machine learning and signal detection theory to evaluate the performance of binary classification tasks), more probing analyses of research findings (such as analyses of consequences of data uncertainties), and more sophisticated systematic reviews and meta-analyses (that take account of current guidelines, including transparency and reproducibility of methods).

In view of the complexity of the effects of both system and estimator variables and their interactions on eyewitness identification accuracy, better experimental designs that incorporate selected combinations of these variables (e.g., presence or absence of a weapon, lighting conditions, etc.) will elucidate those variables with meaningful influence on eyewitness performance, which can, in turn, inform law enforcement practice of eyewitness identification procedures. To date, the eyewitness literature has

Basic research on vision and memory seeks a comprehensive understanding of how these systems are organized and how they operate generally. The understanding derived from basic research includes principles that enable one to predict how a system (such as vision or memory) might behave under specific conditions (such as those associated with witnessing a crime), and to identify the conditions under which it will operate most effectively and those under which it will fail. Applied research, by contrast, empirically evaluates specific hypotheses about how a system will behave under a particular set of real-world conditions.
evaluated procedures mostly in terms of a single diagnosticity ratio or an ROC (Receiver Operating Characteristic) curve; even if uncertainty is incorporated into the analysis, many other powerful tools for evaluating a “binary classifier” are available and worthy of consideration. Finally, syntheses of eyewitness research has been limited to meta-analyses that have not been conducted in the context of systematic reviews. Systematic reviews of stronger research studies need to conform to current standards and be translated into terms that are useful for decision makers.

The committee here offers a summary of its key recommendations to strengthen the effectiveness of policies and procedures used to obtain accurate eyewitness identifications.

RECOMMENDATIONS TO ESTABLISH BEST PRACTICES FOR THE LAW ENFORCEMENT COMMUNITY

The committee’s review of law enforcement practices and procedures, coupled with its consideration of the scientific literature, has identified a number of areas where eyewitness identification procedures could be strengthened. The practices and procedures considered here involve acquisition of data that reflect a witness’ identification and the contextual factors that bear on that identification. A recurrent theme underlying the committee’s recommendations is development of and adherence to guidelines that are consistent with scientific standards for data collection and reporting.

Recommendation #1: Train All Law Enforcement Officers in Eyewitness Identification

The committee recommends that all law enforcement agencies provide their officers and agents with training on vision and memory and the variables that affect them, on practices for minimizing contamination, and on effective eyewitness identification protocols.

Recommendation #2: Implement Double-Blind Lineup and Photo Array Procedures

The committee recommends blind (double-blind or blinded) administration of both photo arrays and live lineups and the adoption of clear, written policies and training on photo array and live lineup administration.

Recommendation #3: Develop and Use Standardized Witness Instructions

The committee recommends the development of a standard set of easily understood instructions to use when engaging a witness in an identification procedure.

Recommendation #4: Document Witness Confidence Judgments

The committee recommends that law enforcement document the witness’ level of confidence verbatim at the time when she or he first identifies a suspect.

Recommendation #5: Videotape the Witness Identification Process

The committee recommends that the video recording of eyewitness identification procedures become standard practice.

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RECOMMENDATIONS TO STRENGTHEN THE VALUE OF EYEWITNESS IDENTIFICATION EVIDENCE IN COURT

The best guidance for legal regulation of eyewitness identification evidence comes not from constitutional rulings, but from the careful use and understanding of scientific evidence to guide fact-finders and decision-makers. The *Manson v. Brathwaite* test under the Due Process Clause of the U.S. Constitution for assessing eyewitness identification evidence was established in 1977, before much applied research on eyewitness identification had been conducted. This test evaluates the “reliability” of eyewitness identifications using factors derived from prior rulings and not from empirically validated sources. As critics have pointed out, the *Manson v. Brathwaite* test includes factors that are not diagnostic of reliability. Moreover, the test treats factors such as the confidence of a witness as independent markers of reliability when, in fact, it is now well established that confidence judgments may vary over time and can be powerfully swayed by many factors. While some states have made minor changes to the due process framework, wholesale reconsideration of this framework is only a recent development.

**Recommendation #6: Conduct Pretrial Judicial Inquiry**

The committee recommends that, as appropriate, a judge make basic inquiries when eyewitness identification evidence is offered.

**Recommendation #7: Make Juries Aware of Prior Identifications**

The committee recommends that judges take all necessary steps to make juries aware of prior identifications, the manner and time frame in which they were conducted, and the confidence level expressed by the eyewitness at the time.

**Recommendation #8: Use Scientific Framework Expert Testimony**

The committee recommends that judges have the discretion to allow expert testimony on relevant precepts of eyewitness memory and identifications.

**Recommendation #9: Use Jury Instructions as an Alternative Means to Convey Information**

The committee recommends the use of clear and concise jury instructions as an alternative means of conveying information regarding the factors that the jury should consider.

RECOMMENDATIONS TO IMPROVE THE SCIENTIFIC FOUNDATION UNDERPINNING EYEWITNESS IDENTIFICATION RESEARCH

Basic scientific research on visual perception and memory provides important insight into the factors that can limit the fidelity of eyewitness identification. Research targeting the specific problem of eyewitness identification complements basic scientific research. However, this strong scientific foundation remains insufficient for understanding the strengths and limitations of eyewitness identification procedures in the field. Many of the applied studies on key factors that directly affect eyewitness performance in the laboratory are not readily applicable to actual practice and policy. Applied research falls short because of a lack of reliable or standardized data from the field, a failure to include a range of practitioners in the establishment of research agendas, the use of disparate research methodologies, failure to use transparent and reproducible research procedures, and inadequate reporting of research data. The task of guiding eyewitness identification research toward the goal of evidence-based policy and practice will require collaboration in the setting of research agendas and agreement on methods for acquiring, handling, and sharing of data.
Recommendation #10: Establish a National Research Initiative on Eyewitness Identification

The committee recommends the establishment of a National Research Initiative on Eyewitness Identification.

Recommendation #11: Conduct Additional Research on System and Estimator Variables

The committee recommends broad use of statistical tools that can render a discriminability measure to evaluate eyewitness performance and a rigorous exploration of methods that can lead to more conservative responding. The committee further recommends that caution and care be used when considering changes to any existing lineup procedure, until such time as there is clear evidence for the advantages of doing so.

CONCLUSION

Eyewitness identification can be a powerful tool. As this report indicates, however, the malleable nature of human visual perception, memory, and confidence; the imperfect ability to recognize individuals; and policies governing law enforcement procedures can result in mistaken identifications with significant consequences. New law enforcement training protocols, standardized procedures for administering lineups, improvements in the handling of eyewitness identification in court, and better data collection and research on eyewitness identification, can improve the accuracy of eyewitness identifications.
Eyewitness Identification Procedures

Police in the United States investigate millions of crimes each year. Only a small percentage of the police-investigated crimes involve the use of police-arranged identification procedures. Identification procedures are unnecessary when, for example, the perpetrator is caught during the commission of the criminal act, as in the crime of driving while intoxicated, or when the victim knows the perpetrator, as in crimes of domestic violence.

Police use identification procedures for numerous reasons. In some circumstances, the police identify a suspect during an investigation and use the identification procedure to test a witness’ ability to identify the suspect as the perpetrator. In other instances, the identification procedure is used as an investigative tool to further an investigation. A positive identification might form probable cause for a search warrant or the apprehension and subsequent questioning of a suspect, or both. Most significant for the purposes of this report are the circumstances in which a witness positively identifies the police suspect as the perpetrator, and the identification serves as compelling evidence in the prosecution of a case.

Data on the number of eyewitness identification procedures are not systematically or uniformly collected. While the exact number of eyewitness identification procedures related to crimes involving strangers is unknown, mistaken identifications have disastrous effects for those wrongly accused of crimes and for society should a guilty person go free. Mistaken identifications may also erode public confidence in the criminal justice system as a whole. Recently, some police departments and prosecutors have implemented stringent eyewitness identification procedures in an effort to reduce erroneous convictions.

Police-arranged eyewitness identification procedures vary greatly depending on the nature of the case. In some cases, a police-arranged identification is conducted at the very early stages of an investigation. For instance, consider the circumstance in which police respond to a bank robbery in progress. The perpetrator is described as a white male, approximately 6 feet, 2 inches in height wearing an orange shirt. As the police arrive at the crime scene, an officer observes and apprehends a man fleeing the bank wearing an orange shirt and exhibiting similar physical characteristics. In this situation, a police-arranged identification procedure may be conducted on the scene and prior to any significant investigation. At the other extreme are, for example, lengthy homicide or rape cases that include extensive investigations, forensic testing, and eyewitness interviews conducted over a protracted period of time. Such efforts may culminate in the identification of a suspect and the suspect’s inclusion in a photo array identification procedure. In such a circumstance, an eyewitness may not be asked to identify a perpetrator.

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2Throughout Chapter 2, the terms law enforcement and police are used interchangeably and refer to all law enforcement agencies at the local, state, and federal levels.


until months after the commission of the crime—and often after repeated probes of their memory by, for example, police, family members, and others.

Identification procedures may be used in different ways for different purposes. They are not always used to identify an unknown perpetrator of a crime. The police may, for example, use photo arrays and confirmatory single photographs to clarify the legal identity (birth name/government name) of an individual who is well known to a witness, but only by a street name. In such examples, a witness may know (and may have known) the perpetrator for years but may only be able to identify him by a common street name, like “Prince.” The police typically will use an identification procedure to identify to which “Prince” the witness is referring before they make an arrest or take other investigative measures such as the execution of a search warrant.

This chapter reviews the eyewitness identification procedures commonly used by the police and concludes with a brief discussion of situations in which citizens engage in identifying perpetrators without police assistance.

**PHOTOGRAPHIC ARRAY**

The photo array is the most common police-arranged identification procedure used in the United States.  

A photo array consists of six to nine photographs displayed to a witness. An officer might create an array by selecting photographs of persons deemed to resemble the perpetrator. Officers might then display the photographs one at a time to the witness and ask whether she or he recognizes each one. This method is known as a sequential procedure. Officers might also create photo arrays by cutting six square holes in a folder and taping the photographs to the back of the folder so that the faces of the fillers (non-suspects) and suspect are displayed together. When such photographs are presented simultaneously as a two by three matrix, this type of array is referred to as a “six pack.” When, as in this instance, photographs are displayed together, this is referred to as a simultaneous procedure.

In 1999, Attorney General Janet Reno released the U.S. Department of Justice *Eyewitness Evidence: A Guide for Law Enforcement,* one of the earliest efforts to establish standardized procedures for police-arranged eyewitness identification. The guide set forth rigorous criteria and basic procedures to promote accuracy in eyewitness evidence. However, after the guide was released most police departments in the United States did not adopt these procedures.

Today, many police departments use computer systems to access image databases and assemble photo arrays. Officers enter physical characteristics (e.g., race, gender, hair color) specific to the suspect into a computer, and the system retrieves filler photographs with the desired attributes. If an officer determines that a photograph in the array is suggestive or otherwise inappropriate, she or he can reject one or more fillers and instruct the system to provide alternate photographs. Departments may conduct the procedure without revealing to the witness how many photographs she or he will view.

In recent decades, many police agencies and prosecutors have adopted sequential presentation of photographs, based on the belief that this approach improves the performance of an eyewitness. Currently, however, there is no consensus among law enforcement professionals as to whether the sequential presentation procedure is superior to the simultaneous procedure (see Chapter 5). The District of Columbia Metropolitan Police Department, for example, does not endorse either simultaneous or sequential procedures in its *Procedures for Obtaining Pretrial Eyewitness Identification.* The District

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5Police Executive Research Forum, p. 48.
6Historically, the photographs were mug shots in the possession of a police department.
Attorneys Association of the State of New York in 2010 adopted recommended policies for New York State and endorsed the simultaneous method. On the other hand, in North Carolina, legislation was passed that requires that lineup photographs be presented sequentially, and in Massachusetts, the Supreme Judicial Court Study Group on Eyewitness Identification recommended sequential procedures as best practice for Massachusetts Police Departments.

The committee was presented with information regarding improvement efforts from states including New Jersey, Oregon, Rhode Island, Texas, New York and Massachusetts. However, the committee is unable to determine the percentage of police departments that have adopted policies for eyewitness identification procedures and instituted training in these procedures. Some police departments require that photo arrays be presented to the witness during a procedure that is either “double blind” or “blinded.” (See Box 2-1 for a discussion of blinding as used in scientific practice and blinding as used in an eyewitness identification procedures.) Blinding is used to prevent conscious and unconscious cues from being given to the witness. In a double-blinding procedure, an individual who does not know the identity of the suspect or the suspect’s position in the photo array shows a photo array to the eyewitness. In cases where such a double-blind procedure is not feasible, a “blinded” procedure will approximate the condition of double-blinding. For example, the photo array may be administered by an individual who knows who the suspect is, but is unable to tell when the witness is looking at the suspect’s photo and so is unable to provide even subconscious feedback to the witness. In one common “blinded” procedure, the officer places each photo in a separate envelope or folder and then shuffles the envelopes/folders so only the witness sees the images therein. Additional recommendations to minimize the possibility of biasing feedback to the witness include requiring that the officer read instructions to the witness from a preprinted form.

If the witness identifies someone from the photo array, some departments ask the witness for a confidence statement. Based on information presented to the committee, it would appear that police departments do not always document identification procedures in instances when an identification is not made. Further, if a witness does make an identification, practices differ as to how such information is documented and preserved. Some agencies, for example, require officers to document this information in a written report. Others make audio or video recordings of the identification procedure.

**LIVE LINEUP**

A live lineup is a police-arranged identification procedure in which the physical suspect and fillers/foils stand or sit in front of the witness (either individually, i.e., sequentially or en masse, i.e., simultaneously). The police generally use at least five fillers. Fillers are selected for their physical similarities to the suspect (gender, race, hair length and color, facial hair, height, skin tone, and other distinguishing features). The fillers are presumed to be unknown to the witness. Traditionally, the suspect

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10 See New York State District Attorneys Association Best Practice Committee, *New York State Photo Identification Guidelines*, October 2010.
13 The Police Executive Research Forum’s 2013 survey of eyewitness identification procedures in law enforcement agencies [Police Executive Research Forum, *A National Survey of Eyewitness Identification Procedures in Law Enforcement Agencies*, (2013)], notes that most agencies that completed the survey have no written policy for eyewitness identification procedures and that more agencies provide training to their employees than have written policies. See pp. 79–80.
14 Police Executive Research Forum, p. 64.
15 As discussed in Chapter 3, the courts have been sensitive to the potential for misidentification resulting from “suggestive” identification procedures, and have set standards for admissibility of evidence.
and fillers are seated or standing in a row and the witness views the lineup from behind a two-way mirror. Police use both simultaneous and sequential procedures for live lineups.

**BOX 2-1 Blinding**

Empirical evidence\(^a\) has shown that the beliefs, desires and expectations of researchers can influence, often subconsciously, how they observe and interpret the phenomena they study and thus the outcomes of experiments. This evidence has influenced how scientists carry out their experiments, resulting in the use of blind or double-blind procedures to control for this form of bias. Blind assessment\(^b\) has been used since the late 18th century; an early medical trial in 1835 used double-blind assessment, and psychologists started using it in the 20th century.\(^c\) By the 1950s, blind assessment in randomized controlled trials was considered standard procedure in both psychological and medical research. Currently, virtually all of science uses some form of blinding.

In single-blind experiments, participants do not know which treatment they are receiving; this form of blinding is used widely across scientific fields. In experiments involving humans, as in medical or psychological research, double-blind procedures are used to guard against “expectancy effects” for both participants and researchers. In a classic double-blind clinical trial, some patients will receive active medication and others are given an alternative (either a “standard treatment” or a similar-looking placebo without the active ingredients), but neither researchers nor participants know who is receiving which treatment.

In an eyewitness identification setting, double-blinding can be used to prevent a lineup administrator from either intentionally or unintentionally influencing a witness. In these cases, neither the eyewitness nor the administrator knows which persons in a photo array or live lineup are the suspected culprits and which are the “fillers.”\(^d\) In eyewitness identification procedures, as in science, the purpose of double-blinding is to prevent the conscious or subconscious expectations of the administrator from influencing the witness or research outcomes.

In a double-blind photo array, the officer or detective conducting the investigation reads a set of standard instructions to the witness. The instructions may include an advisory that the officer about to show the photos does not know whether any of the photos are of the person who committed the crime. The officer then leaves the room and a second officer—perhaps a patrol officer—displays the photos. It is the duty of this second officer (the “blind administrator”) to show the photos and, if an identification is made, document what the witness said and ask the witness how certain she or he is of their identification. Once all photos have been shown, the officer reports the result of the procedure to the investigating officer (preferably out of earshot from the witness).

As an alternative to a “double-blind” array, some departments use “blinded” procedures. A blinded procedure prevents an officer from knowing when the witness is viewing a photo of the suspect, but can be conducted by the investigating officer. A common approach is the so-called “folder shuffle.” With a six-photo array, an officer uses eight manila folders. A photograph of a filler is placed in the top folder and a photograph of the suspect and four additional fillers are placed in the next five folders. The six folders are then shuffled so that the officer does not know which folder contains the image of the suspect. Two folders with blank paper are placed on the bottom of the stack so that the witness is led to believe that there are more than five images in the array (this is referred to as back-loading, and it prevents the witness from knowing when she or he is about to view the last photograph). The five folders are placed on top of the two folders without images, and the folder containing the image of the known filler is placed on top of the stack. After reading instructions to the witness, the administering officer sits to the witness’ left and hands him or her one folder at a time and instructs him/her to open each folder and look at the enclosed photo. The cover of the folder blocks the officer from viewing the photo that the witness is viewing. When an identification occurs, the officer notes the witness’ words and reaction and asks about the witness’ confidence in his/her identification.


\(^{d}\)P. Kilmartin, Presentation to the committee, February 6, 2014.

\(^{e}\)K. Hamann, Presentation to the committee, December 2, 2013.
Live lineups are used in some jurisdictions, but they are not the predominant method used by law enforcement.\(^{16}\) The use of these police identification procedures is limited for a variety of reasons. First, in certain circumstances, legal counsel may be required at a lineup, thereby making it less attractive to police and prosecutors. Second, in smaller jurisdictions, it is difficult to obtain suitable fillers (e.g., those with appropriate physical similarities to the suspect). Third, conducting a lineup requires a significant amount of time and labor, thereby making photo arrays a more attractive alternative that may be undertaken promptly and with less demand on department resources.\(^{17}\)

**SHOWUP**

A showup is a police-arranged identification procedure in which the police show one person to a witness and ask if she or he recognizes that person. This procedure typically is used when the police locate the suspect shortly after the commission of the crime and within close proximity to the scene. Case law limits the time and distance from a crime during which such a procedure will pass legal standards. In response to such case law, police typically restrict showups to a two-hour time period after the commission of a crime. Ideally, officials take the witness to the location where the suspect has been detained and do not display the suspect in a suggestive manner (e.g., not in a police car, not handcuffed, without drawn weapons). However, as chases, fights, or disarmaments frequently precede showups, the apprehension of a suspect can raise safety issues that make it difficult to adhere to recommended procedures. Further, the nature of a showup does not lend itself to the use of a blinded procedure. A showup is used to promptly clear innocent suspects, thereby sparing them from a prolonged period of detention as the investigation continues. Delaying the showup to locate an uninvolved officer may defeat that purpose. While some law enforcement agencies use a standard procedure with written instructions when conducting a showup, there is no indication that such procedures are used uniformly. Courts consider showups highly suggestive, and prosecutors urge the police to exercise caution when conducting them.

**CONFIRMATORY PHOTOGRAPH**

Police will, on occasion, display a single photograph to a witness in an effort to confirm the identity of a perpetrator. Police typically limit this method to situations in which the perpetrator is previously known to or acquainted with the witness.

**FIELD VIEW**

The police also use field views in attempts to identify perpetrators. The method, which involves inviting a witness to view many people in a context where the perpetrator is thought likely to appear, is used when the police do not have a suspect but believe that the offender frequents a particular location. For example, police investigating a purse snatching may obtain information that the perpetrator frequents a particular recreation site during the lunch hour. A plainclothes officer or investigator might take the eyewitness to the site and walk around with him or her during the lunch hour without directing his or her attention to any specific individual.

**OTHER PROCEDURES – MUG BOOKS AND YEARBOOKS**

At times, police use other means to identify perpetrators. In the past, police sometimes had witnesses review mug shot books. Mug books have since been largely replaced by digitized images

\(^{16}\)Police Executive Research Forum, p. 48.

\(^{17}\)Live lineup construction may be further constrained by the inability to hold a suspect in custody without probable cause. See Chapter 3.
displayed on computer screens. Nonetheless, there are situations in which the police will have a witness review a large collection of photographs in an effort to identify a perpetrator. Witnesses who identify a perpetrator as being a student at a specific school might be asked to review a yearbook for that school in an effort to identify the perpetrator. When using this method, police typically attempt to mask the names of the students. Similarly, if the offender is believed to be an individual from a certain profession, the police might have the witness review photographs from the suspect’s professional society. Social media sites also serve as the catalyst for novel police-arranged identification procedures. If a witness knows that the perpetrator is a “friend” of Jane Doe through social media, the police might have the witness review all friends of Jane Doe to see if she or he recognizes the individual.

All of these additional procedures (confirmatory photo, field view, mug books, yearbooks) have the potential to introduce biases of the sort that blind lineup procedures are designed to avoid.

NON-POLICE IDENTIFICATION PROCEDURES

In some cases, the victims or witnesses, or both, identify suspects without involving the police. A private citizen, organization, or corporation may conduct its own investigation before, during, or even after reporting a crime to the police. The identification of suspects by entities other than law enforcement has become increasingly common as more businesses and private citizens use security cameras to identify criminal actors. High-resolution cameras coupled with high capacity hard drives allow for real-time streaming of video with superior clarity. Such systems are relatively inexpensive and within financial reach of many home and business owners. Additionally, the proliferation of smart phones puts the ability to create a spontaneous, high quality video record of an event into the hands of more and more people. The rise of social media has resulted in the rise of private investigations and identifications using this resource. In one recent case, a stabbing victim drew a picture of her assailant and showed it to her husband. Upon viewing the picture, the husband believed that the assailant looked familiar and might be his ex-girlfriend. He obtained several pictures of the ex-girlfriend from her personal website and showed them to the victim who, after looking at those and other photographs online, identified the suspect at a lineup and at trial.

CONCLUSION

Many local, state, and federal law enforcement agencies have adopted policies and practices to address the issue of misidentification. However, efforts are not uniform or systemic. Many agencies are unfamiliar with the science that has emerged during the past few decades of research on eyewitness identifications. Questions remain about the optimal design of photo array procedures, including the size of the array, the contents of the photographs, and their relationship to the context of the crime scene. Similar questions apply to the design of live lineups. Eyewitness identification is further complicated by the increasing number of situations in which victims and witnesses seek to identify the perpetrator of a crime without the aid of law enforcement. Such identifications raise new concerns about reliability and accuracy of the identification of individuals. Inconsistent and nonstandard practices might easily add noise to the eyewitness identification process, contaminate the witness, and bias the outcome of an identification procedure.

20The design of a live lineup is subject to more practical constraints than a photo array.
The Legal Framework for Assessment of Eyewitness Identification Evidence

The admissibility of eyewitness testimony at a criminal trial may be challenged on the basis of procedures used by law enforcement officials in obtaining the eyewitness identification. The U.S. Supreme Court, in its 1977 ruling in Manson v. Brathwaite, set out the modern test under the Due Process Clause of the U.S. Constitution that regulates the fairness and the reliability of eyewitness identification evidence. The Court also specified five reliability factors, discussed below, that a judge must consider when deciding whether to exclude the identification evidence at trial.

Although the constitutional standards for assessing eyewitness testimony have remained unchanged in the decades since the Manson v. Brathwaite decision, a body of research has shed light on the extent to which each of the five reliability factors supports a reliable eyewitness identification. Research has cast doubt, for instance, on the belief that the apparent certainty displayed in the courtroom by an eyewitness is an indicator of an accurate identification, and has found that a number of factors may enhance the certainty of the eyewitness.

Recently state courts and lower federal courts have taken the lead in developing standards relating to the admissibility of expert evidence, jury instructions, and judicial notice of scientific evidence. Some states have adopted more stringent standards for regulating eyewitness identification evidence than the U.S. Constitution requires, either by legislative statutes or by state court decisions, and have modified or entirely supplanted the Manson v. Brathwaite test to take account of advances in the growing body of scientific research. This chapter describes the changes in the legal standards for eyewitness identification and explores the relationship between the state of the scientific research and the law regulating procedures and evidence.

EYEWITNESS EVIDENCE AND DUE PROCESS UNDER THE U.S. CONSTITUTION

Beginning with rulings in 1967, the U.S. Supreme Court set out a standard under the Due Process Clause of the Fourteenth Amendment for reviewing eyewitness identification evidence. In Manson v. Brathwaite, the Court emphasized that “reliability is the linchpin in determining the admissibility of identification testimony.” First, the Court instructed judges to examine whether the identification procedures were unnecessarily suggestive. Second, to assess whether an identification is reliable, judges were instructed to examine the following five factors: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness’ degree of attention; (3) the accuracy of the witness’ prior description of the criminal; (4) the level of certainty demonstrated at the confrontation; and (5) the

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2Manson v. Brathwaite at 114.
4Brathwaite, 423 U.S. at 114.
time between the crime and the identification procedure.\(^5\) The five factors were drawn from earlier judicial rulings and not from scientific research.\(^5\)

Eyewitness identification evidence continues to be litigated primarily under the flexible two-part \textit{Manson v. Brathwaite} Due Process test.\(^7\) It is important to note, however, that the vast majority of criminal cases are settled through plea bargaining. The role that evidence type and strength play in plea bargaining is complex and necessarily difficult to study. Because eyewitness identification evidence may never be tested at trial, it is doubly important for lawyers and judges to understand the credibility of the proffered evidence.\(^8\)

In the most recent U.S. Supreme Court ruling addressing a challenge to an eyewitness identification (\textit{Perry v. New Hampshire}),\(^9\) the Court ruled that a due process analysis was not triggered. In that case, while the police were obtaining a description of the suspect, the eyewitness looked out of the apartment window and recognized the suspect standing outside. The police had not intended to conduct an identification procedure. In those circumstances, the Court ruled that the Due Process Clause does not require a preliminary judicial review of the reliability of an eyewitness identification.\(^10\)

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\(^5\)Id. at 114.

\(^6\)Id. at 114. Justice Thurgood Marshall dissented, noting studies indicated that unnecessarily suggestive eyewitness identifications had resulted in “repeated miscarriages of justice resulting from juries’ willingness to credit inaccurate eyewitness testimony.” 432 U.S. at 125–27 (Marshall, J., dissenting).

\(^7\)Due process is the most important constitutional right that arises in challenges to eyewitness identification, but rights under the Fourth and Sixth Amendments also may be implicated. The Fourth Amendment protects individuals “against unreasonable searches and seizures,” and the probable cause typically required to seize and arrest a suspect may arise from an eyewitness identification. U.S. Const. Amend. IV. The few lower courts to address the question are divided on whether probable cause is needed to place individuals in a live lineup procedure. \textit{Biehunik v. Felicetta}, 441 F.2d 228, 230 (2d Cir. 1971); but see, e.g., \textit{Wise v. Murphy}, 275 A.2d 205, 212–15 (D.C. 1971); \textit{State v. Hall}, 461 A.2d 1155 (N.J. 1983). In contrast, probable cause is not required to place a person’s photograph in an array, since doing so does not involve a seizure. However, courts may also rule that an illegal stop or seizure renders a subsequent identification inadmissible, absent an “independent” source for the courtroom identification. \textit{U.S. v. Crews}, 445 U.S. 463, 473 (1980).

In addition, the Sixth Amendment provides that in all criminal prosecutions, the accused has the right “to have the assistance of counsel for his defense.” In \textit{United States v. Wade}, the Supreme Court held that, once indicted, a person has a right to have a lawyer present at a lineup, reasoning that the right to counsel applies at all “critical” stages of the criminal process. 388 U.S. 218, 235–37 (1967). However, the Court subsequently held that a photo array procedure, of the type now most commonly used by police agencies, does not implicate the \textit{Wade} right to counsel. \textit{U.S. v. Ash}, 413 U.S. 300, 321 (1973).

\(^8\)As the current report demonstrates, a comparative consideration of evidence value is particularly important in the case of eyewitness identification evidence. Similar consideration should be given when other adjudication mechanisms are used (e.g., bench trials).

\(^9\)\textit{Perry v. New Hampshire}, 132 S. Ct. 716, 718 (2012). In that case, the eyewitness happened to look out her window and see the suspect standing at the crime scene where the police had told him to wait. The Court held that the Due Process Clause did not regulate such a situation, since the police did not intend to conduct an identification procedure. \textit{Id.} at 729. The Court indicated that the reliability of the evidence could be addressed by federal and state evidentiary standards, and added: “In appropriate cases, some States also permit defendants to present expert testimony on the hazards of eyewitness identification evidence.” \textit{Id.}

\(^10\)Justice Sotomayor dissented, arguing, “Our due process concern . . . arises not from the act of suggestion, but rather from the corrosive effects of suggestion on the reliability of the resulting identification,” and the manner in which “[a]t trial, an eyewitness’ artificially inflated confidence in an identification’s accuracy complicates the jury’s task of assessing witness credibility and reliability.” \textit{Perry}, 132 S. Ct. at 731–32 (Sotomayor, J., dissenting). Justice Sotomayor also emphasized: “A vast body of scientific literature has reinforced every concern our precedents articulated nearly a half-century ago.” \textit{Id.} at 738.
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STATE LAW REGULATION OF EYEWITNESS EVIDENCE

State Supreme Court Standards

Several state supreme courts have altered or supplemented the federal *Manson v. Brathwaite* due process rule to focus more on the effects of suggestion, to emphasize certain factors in specific circumstances, or to focus on showup identifications in particular. New Jersey and Oregon have now supplemented the *Manson v. Brathwaite* test with separate state law standards regulating eyewitness identification evidence.

In 2011, the New Jersey Supreme Court issued a unanimous decision in *State v. Larry R. Henderson* that revised the legal framework for admitting eyewitness identification evidence and directed that revised jury instructions be prepared to help jurors evaluate such evidence. The new framework was based on the record of hearings before a Special Master that considered an extensive review of scientific research regarding eyewitness identifications. The legal framework established by the *Henderson* opinion relies on pretrial hearings to review eyewitness evidence and more comprehensive jury instructions at trial. To obtain a pretrial hearing, a defendant must show some evidence of suggestiveness related to either estimator or system variables that could lead to mistaken identification. At the pretrial hearing, the State must offer proof that the eyewitness identification is reliable. However, the ultimate burden of proving a “very substantial likelihood of irreparable misidentification” is on the defendant.

In July 2012, the New Jersey Supreme Court released an expanded set of jury instructions and related rules that govern the use of suggestive identifications. The jury instructions state that, “[r]esearch has shown that there are risks of making mistaken identifications” and noted that eyewitness evidence

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15In the companion case, *State v. Chen*, 27 A.3d 930, 932 (N.J. 2011), the New Jersey Supreme Court took an approach that departed from that of the U.S. Supreme Court in *Perry*, ruling that the defendant may be entitled to a hearing in a case in which the eyewitness identified the defendant using social media, not a police-orchestrated identification procedure.

16*Henderson*, 27 A.3d. at 878.

17Id.


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“must be scrutinized carefully.” Human memory involves three stages—encoding, storage, and retrieval. At “each of these stages, memory can be affected by a variety of factors.” The Court identified a set of factors that jurors should consider when deciding whether eyewitness identification evidence is reliable, including estimator variables (stress, duration, weapon focus, distance, lighting, intoxication, disguises or changed appearance of the perpetrator, time since the incident, and cross-racial effects) and system variables (lineup composition, fillers, use of multiple viewings, presence of feedback, use of double-blind procedures, and use of showup identifications). The instructions also noted the possible influence of outside opinions, descriptions or identifications by other witnesses, and photographs or media accounts.

In 2012, in Oregon v. Lawson, the Oregon Supreme Court established a new procedure for evaluating the admissibility of eyewitness identifications. In a unanimous decision, the Court found “serious questions” about the reliability of eyewitness identification, citing research conducted over the past thirty years. The Court determined that the Manson v. Brathwaite two-step process for weighing eyewitness identification “does not accomplish its goal of ensuring that only sufficiently reliable identifications are admitted into evidence,” because it relies on an eyewitness’ self-reports to determine whether the threshold level of suggestiveness is reached, rendering the identification unreliable. The Court set forth a process that requires the trial court to examine whether investigators used “suggestive” identification procedures and whether other factors, such as estimator variables, may have affected the reliability of the identification. The Court ruled that “intermediate remedies,” including the use of expert testimony, should be available even if the trial judge concludes that the identification is admissible. The Court also briefly noted that judges might use “case-specific jury instructions.”

Other states continue to explore possible changes to the judicial review of eyewitness identification evidence. In 2013, the Massachusetts Supreme Judicial Court Study Group on Eyewitness Identification offered guidance on the adjudication of eyewitness identification evidence. The report adopted Lawson’s approach of taking judicial notice of “certain scientifically-established facts about eyewitness identification.” The report recommended that trial judges conduct pretrial hearings to determine whether suggestive identification procedures were used, and if so, whether these procedures impaired the reliability of identification evidence. Pretrial hearings would consider the effects of both estimator variables (relating to viewing at the crime scene) and system variables (relating to the lineup or showup procedures) on the identification. The report also recommended that the state adopt a set of recommended practices for conducting identification procedures, create new model jury instructions on eyewitness identifications, and set limitations on the admissibility of certainty statements and in-court identifications.

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19 See New Jersey Criminal Model Jury Instructions, Identification, supra, at 2.
20 Id.
21 Id. at 9.
22 State v. Lawson, 352 Ore. 724 (Or. 2012).
23 Id. at 746–48.
24 Id. at 747–48, 755–56.
25 Id. at 759, 763.
26 See Massachusetts Supreme Judicial Court Study Group on Eyewitness Evidence, Report and Recommendations to the Justices.
27 Id. at 48.
28 Id. at 28. In the courtroom, the eyewitness can easily see where the defendant is sitting. Thus, in-court identifications do not reliably test an eyewitness’ memory. Nevertheless, courts have shown great tolerance of in-court identifications, deeming them based on “independent” memory, and even following suggestive out-of-court procedures. Garrett, Eyewitnesses and Exclusion, supra. For example, the New York Court of Appeals ruled that “[e]xcluding evidence of a suggestive showup does not deprive the prosecutor of reliable evidence of guilt. The witness would still be permitted to identify the defendant in court if that identification is based on an independent source.” People v. Adams, 423 N.E.2d 379, 384 (N.Y. 1981).
State Statutes Regulating Identification Procedures

Judicial rulings regulating admissibility of eyewitness evidence in the courtroom do not specify the identification procedures to be used by law enforcement officials. However, fourteen states have adopted legislation regarding eyewitness identification procedures. Of the fourteen, eleven states (Connecticut, Illinois, Maryland, North Carolina, Ohio, Texas, Virginia, West Virginia, Wisconsin, Utah, and Vermont) have enacted statutes directly requiring that law enforcement officials adopt written procedures for eyewitness identifications and regulating the particular procedures to be used. These states (Georgia, Nevada, and Rhode Island) have passed statutes recommending further study, tasking a group with developing best practices, or requiring some form of written policy.

State statutes typically assert that a trial judge may consider the failure to follow the prescribed procedures as a factor in assessing admissibility and informing the jury. The statutes rarely require that a trial judge exclude such identification evidence from consideration by the jury. However, some of the more detailed statutes, such as those in Ohio, North Carolina, and West Virginia, require that law enforcement officials use particular practices (e.g., eyewitness instructions, a blind administrator). Other statutes require adherence to model policies or guidelines. Utah requires that lineup procedures be recorded. Some jurisdictions and departments also have voluntarily adopted guidelines or policies regulating eyewitness identifications.

AIDING JURORS IN ASSESSMENT OF EYEWITNESS TESTIMONY

Expert Witness Testimony Regarding Eyewitness Identification

The standards for assessing the admissibility of testimony by expert witnesses have undergone great changes in the past two decades. Before 1993, the Frye test allowed scientific expert testimony in federal courts if it met the standard of “general acceptance” in the relevant scientific community. In 1993, the Supreme Court, in Daubert v. Merrell Dow Pharmaceuticals, Inc., ruled that, under Federal Rule of Evidence 702, a “trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.” Judges determine reliability by assessing the scientific foundation of the expert’s testimony prior to trial, so that “evidentiary reliability will be based upon scientific validity.” Many states have adopted Daubert, and many of those that have not formally adopted Daubert have revised their Frye test to adopt much of the Daubert standard. In turn, Federal Rule of Evidence 702 has

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35Id. at 589.

36Id. at 590 n.9.
been revised to incorporate the holding in Daubert. Federal and state courts remain divided on whether expert testimony on eyewitness identifications is admissible under Daubert or Frye, and on the proper exercise of trial court discretion when deciding whether to admit such expert testimony. Appellate rulings emphasize that a trial judge should use discretion when deciding whether proffered expert evidence satisfies the Daubert or Frye standards. An increasing number of rulings emphasize the value of presenting expert testimony regarding eyewitness identification. Some courts have held that it can be an abuse of discretion for a trial judge to bar the defense from admitting such testimony. Detailed descriptions of the relevant scientific research findings accompany such decisions. There are many federal and state courts that continue to follow the traditional approach, emphasizing that credibility of eyewitnesses is a matter within the “province of the jury” and insisting that information regarding valid scientific research in this area will not assist the jury in its task. The trend is toward greater acceptance of expert testimony regarding the factors that may affect eyewitness identification. In a 2012 decision, the Connecticut Supreme Court disavowed earlier rulings restricting expert testimony and stated that such rulings are now “out of step with the widespread judicial recognition that eyewitness identifications are potentially unreliable in a variety of ways unknown to the average juror.” Similarly, the Pennsylvania Supreme Court recently held that expert testimony on eyewitness identifications was no longer per se inadmissible, emphasizing that “courts in 44 states and the District of Columbia have permitted such testimony at the discretion of the trial judge,” and that “all federal circuits that have considered the issue, with the possible exception of the 11th Circuit, have embraced this approach.” As the Seventh Circuit Court of Appeals recently explained:

> It will not do to reply that jurors know from their daily lives that memory is fallible. The question that social science can address is how fallible, and thus how deeply any given identification should be discounted. That jurors have beliefs about this does not make expert evidence irrelevant; to the contrary, it may make such evidence vital, for if jurors’ beliefs are mistaken then they may reach incorrect conclusions. Expert evidence can help jurors evaluate whether their beliefs about the reliability of eyewitness testimony are correct.

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37. Fed. R. Evid. 702. Rule 702 now provides:

    A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.


39. See, e.g., State v. Copeland, 226 S.W.3d 287, 299-300 (Tenn.2007); Tillman, 354 S.W.3d at 441; Clopton, 223 P.3d at 1108.


41. State v. Guilbert, 306 Conn. 218, 234 (Conn. 2012). Prior to that decision, the Connecticut Supreme Court had long ruled that “the reliability of eyewitness identification is within the knowledge of jurors and expert testimony generally would not assist them in determining the question” (State v. Kemp, supra, 199 Conn. at 473, 477), and that factors affecting eyewitness memory are “nothing outside the common experience of mankind” (State v. McClendon, supra, 248 Conn. at 572, 586).


43. U.S. v. Bartless, 567 F.3d 901, 906 (7th Cir. 2009). Other federal courts have found it a proper exercise of discretion to exclude expert testimony on eyewitness identifications. See, e.g., United States v. Lumpkin, 192 F.3d 280, 289 (2d Cir. 1999). Most federal courts treat the subject as one of considerable trial discretion; see, e.g. United...
Courts also have allowed expert witnesses to testify about particular issues concerning eyewitness identifications, such as cross-race effects, stress, weapons focus, suggestive lineup procedures, and the like.\(^44\) Rarely have experts conducted eyewitness identification research related to the specific case before the court. However, in one such case, in which an experiment was conducted with the actual photo array used in the case, the federal courts found expert testimony admissible where it was directed not just to general research, but to the question of whether suggestive procedures affected the identification in that case.\(^45\)

Expert witnesses who explain the complications of eyewitness identification can be expensive. Most criminal defendants are indigent and cannot afford such assistance.\(^46\) In *Ake v. Oklahoma*, the Supreme Court held that an indigent defendant has a constitutional due process right to assistance by an expert witness only if that expert assistance is so crucial to the defense (or such a “significant factor”) that its denial would deprive the defendant of a fundamentally fair trial.\(^47\) In federal courts, funding for expert witnesses is available, and requests by indigent defendants are common.\(^48\) In state courts, such assistance is uncommon, especially in state courts that rarely find denial of expert assistance on eyewitness matters to be a due process violation.

Expert testimony on eyewitness memory and identifications has many advantages over jury instructions as a method to explain relevant scientific framework evidence to the jury: (1) Expert witnesses can explain scientific research in a more flexible manner, by presenting only the relevant research to the jury; (2) Expert witnesses are familiar with the research and can describe it in detail; (3) Expert witnesses can convey the state of the research at the time of the trial; (4) Expert witnesses can be cross-examined by the other side; and (5) Expert witnesses can more clearly describe the limitations of the research. The benefits of expert testimony are offset somewhat by the expense. In addition, conflicting testimony by opposing experts may lead to confusion among the jurors. Trial judges have discretion to determine whether the potential benefits of expert testimony outweigh the cost.

**Jury Instructions Regarding Eyewitness Identification**

Some courts restricting expert testimony have found jury instructions regarding the fallible nature of eyewitness identifications to be an acceptable substitute for expert testimony.\(^49\) At the conclusion of a criminal trial, the trial judge can instruct jurors on the factors that may result in an erroneous identification while also offering instructions on the legal principles jurors must apply when assessing the factual record. Such instructions may be given when the witness testifies. Judges tend to rely on model or pattern instructions, because any departure from these standard instructions may be a ground for appellate reversal.

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\(^{45}\) *Newsome v. McCabe*, 319 F.3d 301 (7th Cir.2003).


\(^{47}\) 470 U.S. 68, 82–83 (1985). Even if an indigent defendant receives funding to retain an expert, the judge may ultimately decide that the expert testimony is not admissible at trial.


\(^{49}\) See, e.g., *U.S. v. Jones*, 689 F.3d 12, 20 (1st Cir. 2012) (“The judge was fully entitled to conclude that this general information could be more reliably and efficiently conveyed by instructions rather than through dueling experts.”).
Identifying the Culprit: Assessing Eyewitness Identification

The New Jersey Supreme Court viewed jury instructions as preferable to expert testimony. The New Jersey instructions adopted, following the Henderson decision, are by far the most detailed set of jury instructions regarding eyewitness identification evidence. Traditionally, instructions regarding eyewitness identifications have been brief, and remind the jurors to consider the following: (1) the credibility of an eyewitness is like that of any other witness, and (2) any eyewitness identification is part of the prosecutor’s burden of proof in a criminal case. Many state courts have held that, although general jury instructions regarding credibility and the burden of proof are appropriate, more specific instructions on eyewitness identifications are considered an inappropriate judicial comment on the evidence. Following the U.S. Supreme Court’s decision in Manson v. Brathwaite, some state courts supplemented their jury instructions by including the five reliability factors named by the Supreme Court.

In 1972, in U.S. v. Telfaire, the D.C. Circuit Court of Appeals adopted a set of influential model jury instructions to be used in appropriate federal cases involving eyewitness identifications. The instructions emphasized the following:

You must consider the credibility of each identification witness in the same way as any other witness, consider whether he is truthful, and consider whether he had the capacity and opportunity to make a reliable observation on the matter covered in his testimony.

The Telfaire instructions departed from the brief traditional instruction by adding that the jury should consider factors related to the initial sighting, including “how long or short a time was available, how far or close the witness was, how good were lighting conditions, [and] whether the witness had had occasion to see or know the person in the past.” The decision also noted that an identification is more reliable if the witness is able to pick the defendant out of a group, rather than at a showup, and that the jury should consider the length of time between the crime and the identification.

Some states have adopted cautionary instructions on specific issues related to eyewitness identification evidence. In State v. Ledbetter, the Connecticut Supreme Court ordered lower courts to use a special instruction in cases in which law enforcement failed to instruct the eyewitness that the perpetrator may or may not be present in a lineup. The Georgia Supreme Court concluded in 2005 that

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50 The New Jersey Supreme Court indicated: “Jury charges offer a number of advantages: they are focused and concise, authoritative (in that juries hear them from the trial judge, not a witness called by one side), and cost-free; they avoid possible confusion to jurors created by dueling experts; and they eliminate the risk of an expert invading the jury’s role or opining on an eyewitness’ credibility.” Henderson, 27 A.3d at 925.


55 U.S. v. Telfaire, 469 F.2d at 559.

56 Id. at 558.

57 State v. Ledbetter, 275 Conn. 534, 579–80 (2005) (The instruction reads, in part, “the individual conducting the procedure either indicated to the witness that a suspect was present in the procedure or failed to warn the witness that the perpetrator may or may not be in the procedure. Psychological studies have shown that indicating to a witness that a suspect is present in an identification procedure or failing to warn the witness that the perpetrator may or may not be in the procedure increases the likelihood that the witness will select one of the individuals in the procedure, even when the perpetrator is not present. Thus, such behavior on the part of the procedure administrator tends to increase the probability of a misidentification.”).
one particular use of the Manson v. Brathwaite factors must no longer be permitted: “we can no longer endorse an instruction authorizing jurors to consider the witness’ certainty in his/her identification as a factor to be used in deciding the reliability of that identification.” Other courts have done the same. In 1999, the New Jersey Supreme Court ruled in State v. Cromedy that instructions on cross-racial identifications are required in certain cases.

Expert testimony on eyewitness memory and identifications appears to have many advantages when used as a method to explain relevant scientific framework evidence to the jury. However, when expert testimony is not available to the defense, jury instructions may be a preferable alternative means to inform the jury of the findings of scientific research in this area. Brief instructions may not, however, provide sufficient guidance to explain the relevant scientific evidence to the jury, but lengthy instructions may be cumbersome and complex.

More research is warranted to better understand how best to communicate to jurors the factors that may affect the validity of eyewitness testimony and support a more sensitive discrimination of the strengths and weaknesses of eyewitness testimony in individual cases. Indeed, research findings on the effectiveness of jury instructions on assessment of eyewitness identification evidence have been mixed. In general, such studies find that jury instructions cause jurors to become more suspicious of all eyewitness identification evidence. A recent study of the effect of the New Jersey jury instructions used in Henderson found that the instructions reduced juror reliance on both strong and weak eyewitness identification evidence. Among the few studies finding that jury instructions succeed in increasing jurors’ sensitivity to the strength of such evidence are those that study the effect of jury instructions presented before the eyewitness testimony rather than at the end of the case before deliberation. Such studies also have examined instructions that use visual aids rather than rely on a judge’s recitation of written instructions. In addition, research studies might explore the use of videotape as an alternative way to present such information and the effects of moving jury instructions to precede the introduction of the testimony by the eyewitness.

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58 Brodes, 279 Ga. at 442.
60 State v. Cromedy, 158 N.J.112 (1999); see also Innocence Project, Know the Cases: McKinley Cromedy, at http://www.innocenceproject.org/Content/McKinley_Cromedy.php.
61 For a review of this research, see K. A. Martire and R. I. Kemp, “The Impact of Eyewitness Expert Evidence and Judicial Instruction on Juror Ability to Evaluate Eyewitness Testimony,” Law and Human Behavior 33:225–36, 226 (reviewing studies of jury instructions on eyewitness identification and concluding that increased skepticism and confusion is a common result); see also J. L. Devenport, C. D. Kimbrough, and B. L. Cutler, “Effectiveness of traditional safeguards against erroneous conviction arising from mistaken eyewitness identification,” in Expert testimony on the psychology of eyewitness identification, ed. B. L. Cutler (New York: Oxford University Press, 2009), 51–68 (summarizing research studying the Telfair jury instruction and concluding that “cautionary jury instructions may be an ineffective safeguard against erroneous convictions resulting from mistaken eyewitness identifications.”).
64 Pawlenko et al., supra note 107.
In this case, defendant claims that an eyewitness mistakenly identified him as an accomplice to a murder. Defendant argues that the identification was not reliable because the officers investigating the case intervened during the identification process and unduly influenced the eyewitness. [W]e [a]ppointed a Special Master to evaluate scientific and other evidence about eyewitness identifications. The Special Master presided over a hearing that probed testimony by seven experts and produced more than 2,000 pages of transcripts along with hundreds of scientific studies. [S]tudy after study revealed a troubling lack of reliability in eyewitness identifications. From social science research to the review of actual police lineups, from laboratory experiments to DNA exonerations, the record proves that the possibility of mistaken identification is real. Indeed, it is now widely known that eyewitness misidentification is the leading cause of wrongful convictions across the country.

How Memory Works

The process of remembering consists of three stages: acquisition—“the perception of the original event”; retention—“the period of time that passes between the event and the eventual recollection of a particular piece of information”; and retrieval—the “stage during which a person recalls stored information.” Elizabeth F. Loftus, Eyewitness Testimony 21 (2d ed. 1996).

[S]cience has proven that memory is malleable. The body of eyewitness identification research further reveals that an array of variables can affect and dilute memory and lead to misidentifications. Scientific literature divides those variables into two categories: system and estimator variables. System variables are factors like lineup procedures which are within the control of the criminal justice system. Gary L. Wells, Applied Eyewitness-Testimony Research: System Variables and Estimator Variables, 36 J. Personality & Soc. Psychol. 1546, 1546 (1978). Estimator variables are factors related to the witness, the perpetrator, or the event itself—like distance, lighting, or stress—over which the legal system has no control.

A. System Variables

We begin with variables within the State’s control.

1. Blind Administration

An identification may be unreliable if the lineup procedure is not administered in double-blind or blind fashion. Double-blind administrators do not know who the actual suspect is. Blind administrators are aware of that information but shield themselves from knowing where the suspect is located in the lineup or photo array. Dr. [Gary] Wells testified that double-blind lineup administration is “the single most important characteristic that should apply to eyewitness identification” procedures. Its purpose is to prevent an administrator from intentionally or unintentionally influencing a witness’ identification decision. [W]e find that the failure to perform blind lineup procedures can increase the likelihood of misidentification.

2. Pre-identification Instructions
Identification procedures should begin with instructions to the witness that the suspect may or may not be in the lineup or array and that the witness should not feel compelled to make an identification. There is a broad consensus for that conclusion. Without an appropriate warning, witnesses may misidentify innocent suspects who look more like the perpetrator than other lineup members.

3. Lineup Construction

The way that a live or photo lineup is constructed can also affect the reliability of an identification. Properly constructed lineups test a witness’ memory and decrease the chance that a witness is simply guessing. A number of features affect the construction of a fair lineup. First, the Special Master found that “mistaken identifications are more likely to occur when the suspect stands out from other members of a live or photo lineup.” As a result, a suspect should be included in a lineup comprised of look-alikes. The reason is simple: an array of look-alikes forces witnesses to examine their memory. In addition, a biased lineup may inflate a witness’ confidence in the identification because the selection process seemed easy.

Second, lineups should include a minimum number of fillers. The greater the number of choices, the more likely the procedure will serve as a reliable test of the witness’ ability to distinguish the culprit from an innocent person. As Dr. Wells testified, no magic number exists, but there appears to be general agreement that a minimum of five fillers should be used.

Third, based on the same reasoning, lineups should not feature more than one suspect. As the Special Master found, “if multiple suspects are in the lineup, the reliability of a positive identification is difficult to assess, for the possibility of ‘lucky’ guesses is magnified.”

We find that courts should consider whether a lineup is poorly constructed when evaluating the admissibility of an identification. When appropriate, jurors should be told that poorly constructed or biased lineups can affect the reliability of an identification and enhance a witness’ confidence.

4. Avoiding Feedback and Recording Confidence

Confirmatory or post-identification feedback occurs when police signal to eyewitnesses that they correctly identified the suspect. That confirmation can reduce doubt and engender a false sense of confidence in a witness. Feedback can also falsely enhance a witness’ recollection of the quality of his or her view of an event.

There is substantial research about confirmatory feedback. A meta-analysis of twenty studies encompassing 2,400 identifications found that witnesses who received feedback “expressed significantly more . . . confidence in their decision compared with participants who received no feedback.” Douglass & Steblay, [Memory Distortion in Eyewitnesses: A MetaAnalysis of the Post-identification Feedback Effect, 20 Applied Cognitive Psychol. 859, 863 (2006)]. The analysis also revealed that “those who receive a simple post-identification confirmation regarding the accuracy of their identification significantly inflate their reports to suggest better witnessing conditions at the time of the crime, stronger memory at the time of the lineup, and sharper memory abilities in general.”
We find that feedback affects the reliability of an identification in that it can distort memory, create a false sense of confidence, and alter a witness’ report of how he or she viewed an event.

5. Multiple viewings

Viewing a suspect more than once during an investigation can affect the reliability of the later identification. The problem, as the Special Master found, is that successive views of the same person can make it difficult to know whether the later identification stems from a memory of the original event or a memory of the earlier identification procedure.

It is typical for eyewitnesses to look through mugshot books in search of a suspect. Multiple identification procedures that involve more than one viewing of the same suspect, though, can create a risk of “mugshot exposure.” Mugshot exposure can affect the reliability of the witness’ ultimate identification and create a greater risk of misidentification. As a result, law enforcement officials should attempt to shield witnesses from viewing suspects or fillers more than once.

6. Simultaneous v. Sequential Lineups

Lineups are presented either simultaneously or sequentially. Traditional, simultaneous lineups present all suspects at the same time, allowing for side-by-side comparisons. In sequential lineups, eyewitnesses view suspects one at a time. Defendant and amici submit that sequential lineups are preferable because they lead to fewer misidentifications when the culprit is not in the lineup, but the State points to recent studies that have called that preference into doubt. Because the science supporting one procedure over the other remains inconclusive, we are unable to find a preference for either.

7. Composites

When a suspect is unknown, eyewitnesses sometimes work with artists who draw composite sketches. Composites can also be prepared with the aid of computer software or non-computerized “tool kits” that contain picture libraries of facial features.

As the Special Master observed, based on the record, “composites produce poor results.” Researchers attribute those results to a mismatch between how composites are made and how memory works. See Wells & Hasel, [Facial Composite Production by Eyewitnesses, 16 Current Directions Psychol. Sci. 6, 9 (2007)]. Evidence suggests that people perceive and remember faces “holistically” and not “at the level of individual facial features.” Thus, creating a composite feature-by-feature may not comport with the holistic way that memories for faces “are generally processed, stored, and retrieved.” It is not clear, though, what effect the process of making a composite has on a witness’ memory—that is, whether it contaminates or confuses a witness’ memory of what he or she actually saw. Without more accepted research, courts cannot make a finding on the effect the process of making a composite has on a witness. We thus do not limit the use of composites in investigations.

8. Showups

Showups are essentially single-person lineups: a single suspect is presented to a witness to make an identification. Showups often occur at the scene of a crime soon after its commission. The
Special Master noted that they are a “useful—and necessary—technique when used in appropriate circumstances,” but they carry their “own risks of misidentifications.” By their nature, showups are suggestive and cannot be performed blind or double-blind. Nonetheless, as the Special Master found, “the risk of misidentification is not heightened if a showup is conducted immediately after the witnessed event, ideally within two hours” because “the benefits of a fresh memory seem to balance the risks of undue suggestion.”

Thus, the record casts doubt on the reliability of showups conducted more than two hours after an event, which present a heightened risk of misidentification. As with lineups, showup administrators should instruct witnesses that the person they are about to view may or may not be the culprit and that they should not feel compelled to make an identification.

B. Estimator variables

Unlike system variables, estimator variables are factors beyond the control of the criminal justice system. They can include factors related to the incident, the witness, or the perpetrator. Estimator variables are equally capable of affecting an eyewitness’ ability to perceive and remember an event.

1. Stress

Even under the best viewing conditions, high levels of stress can diminish an eyewitness’ ability to recall and make an accurate identification. The Special Master found that “while moderate levels of stress improve cognitive processing and might improve accuracy, an eyewitness under high stress is less likely to make a reliable identification of the perpetrator.” The State agrees that high levels of stress are more likely than low levels to impair an identification. [T]here is no precise measure for what constitutes “high” stress, which must be assessed based on the facts presented in individual cases.

2. Weapon Focus

When a visible weapon is used during a crime, it can distract a witness and draw his or her attention away from the culprit. “Weapon focus” can thus impair a witness’ ability to make a reliable identification and describe what the culprit looks like if the crime is of short duration. [T]hus, when the interaction is brief, the presence of a visible weapon can affect the reliability of an identification and the accuracy of a witness’ description of the perpetrator.

3. Duration

Not surprisingly, the amount of time an eyewitness has to observe an event may affect the reliability of an identification. The Special Master found that “while there is no minimum time required to make an accurate identification, a brief or fleeting contact is less likely to produce an accurate identification than a more prolonged exposure.” There is no measure to determine exactly how long a view is needed to be able to make a reliable identification. Dr. [Roy] Malpass testified that very brief but good views can produce accurate identifications, and Dr. Wells suggested that the quality of a witness’ memory may have as much to do with the absence of other distractions as with duration.
Whatever the threshold, studies have shown, and the Special Master found, “that witnesses consistently tend to overestimate short durations, particularly where much was going on or the event was particularly stressful.”

4. Distance and Lighting

It is obvious that a person is easier to recognize when close by, and that clarity decreases with distance. We also know that poor lighting makes it harder to see well. Thus, greater distance between a witness and a perpetrator and poor lighting conditions can diminish the reliability of an identification. Scientists have refined those common-sense notions with further study.

5. Witness Characteristics

Characteristics like a witness’ age and level of intoxication can affect the reliability of an identification. The Special Master found that “the effects of alcohol on identification accuracy show that high levels of alcohol promote false identifications” and that “low alcohol intake produces fewer misidentifications than high alcohol intake.” That finding is undisputed.

The Special Master also found that “[a] witness’s age . . . bears on the reliability of an identification.” [S]ome research [s]hows that witness accuracy declines with age. Across twelve studies, young witnesses -- ranging from nineteen to twenty-four years old—were more accurate when viewing target-absent lineups than older witnesses—ranging from sixty-eight to seventy-four years old. See James C. Bartlett & Amina Memon, Eyewitness Memory in Young and Older Adults, in 2 The Handbook of Eyewitness Psychology: Memory for People, [(R.C.L. Lindsay et al. eds., 2007), at 309, 317-19.

[B]ased on the record before us, we cannot conclude that a standard jury instruction questioning the reliability of identifications by all older eyewitnesses would be appropriate for use in all cases.

6. Characteristics of Perpetrator

Disguises and changes in facial features can affect a witness’ ability to remember and identify a perpetrator. The Special Master found that “[d]isguises (e.g., hats, sunglasses, masks) are confounding to witnesses and reduce the accuracy of identifications.” According to the State, those findings are “so well-known that criminals employ them in their work.”

7. Memory Decay

Memories fade with time. And as the Special Master observed, memory decay “is irreversible”; memories never improve. As a result, delays between the commission of a crime and the time an identification is made can affect reliability. That basic principle is not in dispute. [H]owever, researchers cannot pinpoint precisely when a person’s recall becomes unreliable.

8. Race-bias

“A cross-racial identification occurs when an eyewitness is asked to identify a person of another race.” Cromedy, [158 N.J. 112, 120 (1999)]. In Cromedy, after citing multiple social science sources, this Court recognized that a witness may have more difficulty making a cross-racial identification. A meta-analysis conducted after Cromedy, involving thirty-nine studies and nearly

9. Private Actors

[P]rivate—that is, non-State—actors can affect the reliability of eyewitness identifications, just as the police can. [S]tudies show that witness memories can be altered when co-eyewitnesses share information about what they observed. Those studies bolster the broader finding “that post-identification feedback does not have to be presented by the experimenter or an authoritative figure (e.g. police officer) in order to affect a witness’ subsequent crime-related judgments.” See Elin M. Skagerberg, Co-Witness Feedback in Line-ups, 21 Applied Cognitive Psychol. 489, 494 (2007).

[T]o uncover relevant information about possible feedback from co-witnesses and other sources, we direct that police officers ask witnesses, as part of the identification process, questions designed to elicit (a) whether the witness has spoken with anyone about the identification and, if so, (b) what was discussed. That information should be recorded and disclosed to defendants.

10. Speed of Identification

The Special Master also noted that the speed with which a witness makes an identification can be a reliable indicator of accuracy. The State agrees. Laboratory studies offer mixed results. [B]ecause of the lack of consensus in the scientific community, we make no finding on this issue. To the extent speed is relevant in any event, researchers also caution that it may only be considered if the lineup is fair and unbiased.

C. Juror Understanding

Some of the findings described above are intuitive. Everyone knows, for instance, that bad lighting conditions make it more difficult to perceive the details of a person’s face. Some findings are less obvious. Although many may believe that witnesses to a highly stressful, threatening event will “never forget a face” because of their intense focus at the time, the research suggests that is not necessarily so.

Using survey questionnaires and mock-jury studies, experts have attempted to discern what lay people understand, and what information about perception and memory are beyond the ken of the average juror. Based on those studies, the Special Master found “that laypersons are largely unfamiliar” with scientific findings and “often hold beliefs to the contrary.”

[N]either juror surveys nor mock-jury studies can offer definitive proof of what jurors know or believe about memory. But they reveal generally that people do not intuitively understand all of the relevant scientific findings. As a result, there is a need to promote greater juror understanding of those issues.

D. Consensus Among Experts

The Special Master found broad consensus within the scientific community on the relevant scientific issues. [A]mong the experts who testified on remand, there was broad consensus regarding the Special Master’s findings. The State’s expert, Dr. Malpass, agreed with nearly all of the
conclusions offered by Drs. Wells and [Steven] Penrod. As Dr. Malpass wrote in 2009, “there is general agreement about the scientific findings of the eyewitness community,” as evidenced by meta-analytic reviews, primary texts, and surveys of scientific experts, and “[a] review of these areas suggests that it would be very difficult to sustain the position that many of the findings in research on eyewitness memory lack general agreement within the scientific community.” Malpass et al., The Need for Expert Psychological Testimony on Eyewitness Identification, in Expert Testimony on the Psychology of Eyewitness Identification 3, 15 (Brian L. Cutler ed., 2009).

Legal Conclusions

A. Scientific Evidence

The research presented on remand is not only extensive, but as Dr. [John] Monahan testified, it represents the “gold standard in terms of the applicability of social science research to the law.” Experimental methods and findings have been tested and retested, subjected to scientific scrutiny through peer-reviewed journals, evaluated through the lens of meta-analyses, and replicated at times in real-world settings.

When social scientific experiments in the field of eyewitness identification produce “an impressive consistency in results,” those results can constitute adequate data on which to base a ruling. See Cromedy, supra, at 132. Thus, based on the testimony and ample record developed at the hearing, we recognize that a number of system and estimator variables can affect the reliability of eyewitness identifications.

B. Revised Framework

Changes to the current system are needed[:] First, to obtain a pretrial hearing, a defendant has the initial burden of showing some evidence of suggestiveness that could lead to a mistaken identification. That evidence, in general, must be tied to a system—and not an estimator—variable.

Second, the State must then offer proof to show that the proffered eyewitness identification is reliable—accounting for system and estimator variables.

Third, the ultimate burden remains on the defendant to prove a very substantial likelihood of irreparable misidentification. To do so, a defendant can cross-examine eye-witnesses and police officials and present witnesses and other relevant evidence linked to system and estimator variables.

Fourth, if after weighing the evidence presented a court finds from the totality of the circumstances that defendant has demonstrated a very substantial likelihood of irreparable misidentification, the court should suppress the identification evidence. If the evidence is admitted, the court should provide appropriate, tailored jury instructions.

To evaluate whether there is evidence of suggestiveness to trigger a hearing, courts should consider the following non-exhaustive list of system variables [described above]:

The court should conduct a hearing only if defendant offers some evidence of suggestiveness. [If such evidence is offered,] courts should consider the above system variables as well as the following non-exhaustive list of estimator variables [described above] to evaluate the overall reliability of an identification and determine its admissibility:


[T]he above factors are not exclusive. Nor are they intended to be frozen in time. We recognize that scientific research relating to the reliability of eyewitness evidence is dynamic; the field is very different today than it was in 1977, and it will likely be quite different thirty years from now. By providing the above lists, we do not intend to hamstring police departments or limit them from improving practices. Likewise, we do not limit trial courts from reviewing evolving, substantial, and generally accepted scientific research.

[C]. Trial

When identification is at issue in a case, trial courts will continue to “provide[] appropriate guidelines to focus the jury’s attention on how to analyze and consider the trustworthiness of eyewitness identification.” Cromedy, supra, at 128. Based on the record developed on remand, we direct that enhanced instructions be given to guide juries about the various factors that may affect the reliability of an identification in a particular case.

Those instructions are to be included in the court’s comprehensive jury charge at the close of evidence. In addition, instructions may be given during trial if warranted. For example, if evidence of heightened stress emerges during important testimony, a party may ask the court to instruct the jury midtrial about that variable and its effect on memory. Trial courts retain discretion to decide when to offer instructions.

Expert testimony may also be introduced at trial, but only if otherwise appropriate. The Rules of Evidence permit expert testimony to “assist the trier of fact to understand the evidence or to determine a fact in issue.” N.J.R.E. 702. Expert testimony is admissible if it meets three criteria:

(1) the intended testimony must concern a subject matter that is beyond the ken of the average juror; (2) the field testified to must be at a state of the art such that an expert’s testimony could be sufficiently reliable; and (3) the witness must have sufficient expertise to offer the intended testimony. [State v. Jenewicz, 193 N.J. 440, 454 (2008).]

Those criteria can be met in some cases by qualified experts seeking to testify about the import and effect of certain variables. [W]e anticipate, however, that with enhanced jury instructions, there will be less need for expert testimony. Jury charges offer a number of advantages: they are focused and concise, authoritative (in that juries hear them from the trial judge, not a witness called by one side), and cost-free; they avoid possible confusion to jurors created by dueling experts; and they eliminate the risk of an expert invading the jury’s role or opining on an eyewitness’ credibility. That said, there will be times when expert testimony will benefit the trier of fact. We leave to the trial court the decision whether to allow expert testimony in an individual case.


Make-Believe Memories
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Research on memory distortion has shown that postevent suggestion can contaminate what a person remembers. Moreover, suggestion can lead to false memories being injected outright into the minds of people. These findings have implications for police investigation, clinical practice, and other settings in which memory reports are solicited.

In the spring of 2003, Alan Alda visited the University of California, Irvine (UC Irvine), to film segments for an upcoming series as part of his Scientific American Frontiers program. Many know him from his role as Hawkeye Pierce in the classic TV series M*A*S*H. Alda wrote and directed many of the M*A*S*H episodes, and during his 11 years with the show, he won the Emmy Award five times. What you may not realize that he is a lifelong science buff and loves hosting Scientific American Frontiers in part because he gets to travel the globe in the name of science and in part because he gets the chance to meet scientists everywhere. On this particular day in April, Alan Alda visited a number of memory scientists at UC Irvine, and we all had a chance to demonstrate our research paradigms.

A week earlier, Alan had filled out some questionnaires ostensibly designed to gather information about his lifelong history with foods and his personality. He thought my students and I were interested in the relationship between eating behavior and personality. Once in the lab, we tried to convince him that when he was a child he had gotten sick eating too many hard-boiled eggs. We explained that a sophisticated computer program had analyzed all of his data and discovered several facts to be true about him, including the “gotten sick” fact. An hour or so later, he had a picnic in the park with students, postdocs, and other members of my lab. There were many foods from which to choose: sandwiches, pickles, shrimp cocktail, hard-boiled eggs, deviled eggs, and more. He refused to eat the eggs.

Alan Alda’s reluctance to eat a hard-boiled egg at that particular picnic could be due to many causes, of course. But his avoidance on that day was in part because he gets to travel the globe in the name of science. And in part because he gets the chance to meet scientists everywhere. On this particular day in April, Alan Alda visited a number of memory scientists at UC Irvine, and we all had a chance to demonstrate our research paradigms.

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When this happens, it will constitute a unique opportunity to illustrate some new discoveries about human memory. I will get to these later, but first some background.

Eyewitness Memory

For more than three decades, I have been studying memory and the ways it can go awry. My first studies of eyewitness testimony addressed several key questions: When someone sees a crime or accident, how accurate is his or her memory? What happens when this person is questioned by police officers, and what if those questions are leading in some way? While others in the field of memory were studying memory for words or nonsense syllables, or sometimes sentences, I began showing people films of traffic accidents and questioning them in various ways. The question “Did you see the broken headlight?” led to more false reports of a broken headlight than the same question asked with the verb hit. “How fast were the cars going
when they smashed into each other?” led to higher estimates of speed than a more neutral question that used the verb hit. Moreover, the “smashed” question led more people to later falsely claim that they had seen broken glass when there was none. My early papers concluded that leading questions could contaminate or distort a witness’s memory (see Loftus, 1979/1996, for a summary of this early research).

In fact, leading questions are only one way to distort memory. Related studies showed that memory could become skewed with various techniques that fed misinformation to unsuspecting individuals. The studies used a simple procedure. Participants first see a complex event, such as a simulated automobile accident. Next, half of the participants receive misleading information about the accident, whereas the other half receive no misinformation. Finally, all of the participants try to remember the original accident. In one actual study using this paradigm, participants saw an accident, and later some of them received misinformation about the traffic sign used to control the intersection. The misled participants got the false suggestion that the stop sign that they had actually seen was a yield sign. When asked later what kind of traffic sign they personally remembered, seeing at the intersection, those who had been given the false suggestion tended to adopt it as their memory and now claimed that they had seen a yield sign. Those who had not received the phony information had much more accurate memories.

Today, hundreds of studies have been published documenting memory distortion induced by exposure to misinformation. In these studies, not only have people recalled stop signs as yield signs but they have also recalled nonexistent broken glass and tape recorders, a blue vehicle used in a crime scene as white, Minnie Mouse when they really saw Mickey Mouse, and, most recently, wounded animals (that were not there) near the scene of a tragic terrorist bombing that actually had occurred in Russia a few years earlier (Nourkova, Bernstein, & Loftus, 2003). Taken together, these studies show that misinformation can change an individual’s recollection in predictable, and sometimes very powerful, ways.

Misinformation can influence people’s memories when they are interrogated in a suggestive fashion or when they talk to other people who give their version of the events. Misinformation can sway people when they see biased media coverage about some event that they may have experienced themselves. This phenomenon would ultimately be called the misinformation effect (Loftus & Hoffman, 1989).

It might be tempting to suggest that memory distortion observed in the safety and pallid world of a laboratory setting would not generalize to the outside world or real events (as Yuille & Cutshall, 1986, have suggested). Indeed there are differences in the active/passive role, in the opportunity to observe, in the degree of emotional arousal, and more. To explore this issue, a Norwegian research group recently exposed participants to a “live” crime and compared their memory performance with those who watched a video of the same crime (Ihlebaek, Love, Eilertsen, & Magnussen, 2003). The “live” group were participants in a course designed to teach them to cope with dangerous and violent armed-robbery situations and to cope with the psychological effects of experiencing such traumas. Robberies were staged, and participants experienced them live. Videotapes of those same robberies were shown to comparable participants. The results showed that participants who watched the videos reported more details and with higher accuracy than those who saw the live events, suggesting that laboratory experiments may actually overestimate memory performance.

After more than two decades exploring the misinformation effect, many psychological scientists have contributed to the knowledge, and collectively we have learned a great deal about the conditions of its power. One group showed that postevent information can even affect the memories of three-month-old infants (Rovee-Collier, Borza, Adler, & Boller, 1993). Another group showed that one can even get the misinformation effect with pigeons (Harper & Garry, 2000). Fortunately, we have also learned that warning people about misinformation effects can sometimes enable them to successfully resist those effects (Highhouse & Bottrill, 1995). Many highly sophisticated models have been developed that specify when memory impairments will and will not be expected (Metcalfe, 1990).

The misinformation research tradition continues today. For example, one group showed that people who thought they were drinking alcohol, but actually drank plain tonic water, were more swayed by misinformation than those who were not under the influence of an alcohol placebo (Assei & Garry, 2002). Another research group recently examined the relative suggestive power of misinformation versus hypnosis (Scoboria, Mazzoni, Kirsch, & Milling, 2002). Participants heard a story and were later asked either neutral or misleading questions, either in or out of hypnosis. When tested later, the use of hypnosis increased memory errors, but the misleading questions produced even more errors. Moreover, the combination of the two (hypnosis and misleading questions) produced more errors than either method by itself. The particular kind of error made by those who were asked misleading questions was to shift from reporting not knowing an answer to questions to reporting false information about the past. From this example, it becomes evident that researchers are learning a great deal about the precise way in which misinformation has immediate and persisting deleterious effects on memory. That misleading questions might have more pernicious effects than prior exposure to hypnosis led Scoboria et al. (2002) to question existing legal practices concerning the
circumstances under which witness testimony is admitted or excluded in court cases.

**Planting False Memories**

It is one thing to change a stop sign into a yield sign, to turn Mickey into Minnie, or to add a detail to a memory report for something that actually did happen. But could one create an entire memory for an event that never happened? My first attempt to do this used a procedure whereby participants were given short narrative descriptions of childhood events and encouraged to try to remember those events. While participants believed that all of the descriptions were true and had been provided by family members, one was actually a pseudoevent that had not occurred. In this study, approximately 25% of participants were led to believe, wholly or partially, that at age 5 or 6 they had been lost in a shopping mall for an extended time, were highly upset, and were ultimately rescued by an elderly person and reunited with their family (Loftus & Pickrell, 1995). Many added embellishing details to their accounts.

The method of using family members to help plant false memories has been dubbed the *familial informant false-narrative procedure* (Lindsay, Hagen, Read, Wade, & Garry, in press), but it is probably easier to call it simply the *lost-in-the-mall* technique. Many investigators have used the lost-in-the-mall technique to plant false memories of events that would have been far more unusual, bizarre, painful, or even traumatic had they actually occurred. Participants have been led to believe that they had been hospitalized overnight or that they had an accident at a family wedding (Hyman, Husband, & Billings, 1995; Hyman & Pentland, 1996). They have been convinced that they had nearly drowned and had to be rescued by a lifeguard (Heaps & Nash, 2001). They have fallen sway to the suggestion that they were once the victims of a vicious animal attack (Porter, Yuille, & Lehman, 1999). Most studies find that a significant minority of participants will develop partial or complete false memories. In a set of studies reviewed by Lindsay et al. (in press), the average false-memory rate was 31%, but in individual studies, of course, the figures can vary. Sometimes people have been resistant to suggestions, as they were when investigators tried to plant false memories of having received a rectal enema (Pezdek, Finger, & Hodge, 1997). Conversely, sometimes false memories have been planted in the minds of more than 50% of exposed individuals, as they were when investigators tried to plant false memories of having gone up in a hot-air balloon ride (Wade, Garry, Read, & Lindsay, 2002). Particularly striking are the complete false memories, or what might be termed *rich false memories*, which are experiences about which a person can feel confident, provide details, even express emotion about made-up events that never happened (Loftus & Bernstein, in press).

**Rich False Memories**

One interpretative issue that recurs in this memory distortion research is whether we are truly planting a false memory. Perhaps the suggestive manipulation is leading people to discover a true memory rather than leading them to embrace a false one. To investigate this issue, researchers have adopted several methods, including one that attempts to create a false memory for a recent event (e.g., “What you did on a particular day?”). If you as a researcher know precisely what happened that day and you lead the participant to “remember” doing something else, you have fairly good evidence that you have created a false report. This strategy was first adopted by Goff and Roediger (1998) and later modified by my colleague and me (Thomas & Loftus, 2002). In one study, participants sat in front of a large table filled with numerous objects. They heard a series of statements (e.g., “flip the coin”) and then had to perform or imagine performing the called-for actions. The next time they came to the lab, there were no objects in front of them, but they simply imagined that they performed various actions. In a final session, their memory for what they did that first day was tested. After a few imaginations, participants occasionally remembered performing actions that they had not performed. They falsely claimed that they did things that would have been common (e.g., roll the dice), but they also claimed that they did things that would have been rather bizarre or unusual, such as “rub the chalk on your head” or “kiss a plastic frog” (Thomas, Bulevich, & Loftus, in press; Thomas & Loftus, 2002).

Imagination can not only make people believe they have done simple things that they have not done but can also lead people to believe that they have experienced more complex events. In one study, participants watched a video clip of a drunk-driving incident. Later, some participants imagined a scene that was not part of the presented scenario. They imagined seeing a policeman stop the car and ask the driver to step out but the driver refuse. Later, 15% of “imagine” participants mentioned seeing the false details when tested with free recall, and an astonishing 41% claimed to have seen these false details when tested with recognition-type memory items (Wright, Loftus, & Hall, 2001).

Another method for assessing whether the suggestive manipulations are planting false memories is to try to plant memories for things that would be implausible or even impossible. For instance, it has been possible to plant beliefs or false memories of witnessing demonic possession as a child (Mazzoni, Loftus, & Kirsch, 2001). And it has been even easier to plant a false memory of meeting Bugs Bunny at a Disney Resort (Braun, Ellis, & Loftus, 2002). The latter was accomplished by presenting participants with fake ads for Disney that featured Bugs Bunny.

In one study, exposure to the fake ad led 16% of participants to later claim that they had personally met Bugs at
Disneyland. This could not have occurred because Bugs Bunny is a Warner Brothers character and would not be found at Disneyland. This impossibility was far more colorfully put by Andrew Malcolm in his unsigned (voice of the paper) editorial in the Los Angeles Times: “the wascally Warner Bros. Wabbit would be awestruck on sight” at Disney (“You Must Remember This,” 2003, p. 10). Follow-up studies showed that even more individuals (25% in one study; 36% in another) fell sway to the suggestion about meeting Bugs after multiple exposures to fake ads featuring Bugs Bunny (Grinley, 2002). What do people remember about their encounter with this character whom they could not have met? Of those recalling a personal encounter with Bugs, 62% said they shook his hand, and 46% remembered hugging him. Others remembered touching his ear or tail, or even hearing him speak (“What’s up, Doc?”). These false memories, thus, were imbued with sensory detail, just the kind of sensory detail that people use as a cue to decide whether a memory is true or false.

Alan Alda looked at our fake ads for Disney. He closely examined the one featuring Bugs and compared it with our generic ad for Disney that did not mention the cartoon character. He explained that he preferred the generic ad, mostly because of its colors. Later, while picnicking in the park, he was asked about his own childhood trip to Disney and which characters he met there. When asked specifically about Bugs Bunny, he said, “No way, he’s a Warner Brothers character.” Thus, he resisted the suggestion in the fake ad, as did most of our real experimental participants. But, as I explain later, his resistance did not appear to be operating when it came to the hard-boiled egg.

**False Memories Matter**

True memories seem to have consequences for people. If you remember that someone insulted you in the past, you might avoid encounters with that unpleasant individual in the future. But what if you had a false memory of being insulted? Would you similarly avoid that person later? It seems like this would be the case, but virtually all of the false-memory research stops when the affected individual accepts the scenario. Occasionally, there have been efforts to find out if the person has merely a belief that the event happened with no accompanying feelings of recollection. Sometimes that is all there is to the experience, simply a false belief. But sometimes the person has the subjective sense of recollection, replete with sensory details. It is this experience that is more akin to what has been called a rich false memory. In the typical study, debriefing of participants occurs after probing for a memory report, and the study is soon over. Now, what if debriefing could be delayed so that one could see whether the false memory affects the thoughts or behaviors of the person down the road? One might then be able to show that false memories have consequences, that they do matter.

Another way to think about this issue is to realize that suggestions can render an individual willing to make a new, possibly false memory report. This has been amply demonstrated. But are there memory correlates? Are there other mental processes or behaviors that also are affected in the process of exposure to suggestive influences? If so, one might be seeing an even deeper effect of those influences.

This was the rationale behind one study designed to see if planting the suggestion about meeting Bugs Bunny at Disney would affect the recipient’s thought processes (Grinley, 2002). In this study, participants were first convinced that they had met Bugs Bunny at a Disney resort. Later, they were given a new test: They saw the names of pairs of cartoon characters, such as Mickey Mouse and Donald Duck, and had to indicate how related the characters were to one another. Some pairs were highly related, like Mickey and Minnie Mouse. Some pairs were not particularly related, like Donald Duck and Sleeping Beauty. After being exposed to the fake Disney ads featuring Bugs Bunny, people rated the pair Mickey Mouse and Bugs Bunny to be more closely related. For a time, then, the thought processes or semantic structures of ad-exposed individuals were influenced.

A further investigation of the consequences of false beliefs or memories involves a recent ongoing collaboration with postdoctoral fellow Daniel Bernstein and two graduate students, Cara Laney and Erin Morris. We induced participants to believe that when they were children they got sick eating hard-boiled eggs (or, for other participants, that they got sick eating dill pickles). We accomplished this mental feat by gathering data from the participants and plying them with false feedback. We told them that a sophisticated computer program had analyzed their data and determined that they had had one of these “sick” experiences as a child. We found that those given the “dill pickle” feedback became more confident that they had had the experience as a child and those given the “hard-boiled egg” feedback became more confident of that experience.

But would the increase in belief translate into subsequent behavior change? Would they, for example, avoid these foods when given the opportunity to eat them? To find out, we gave participants a “Party Behavior” questionnaire. They imagined themselves at a large barbecue and had to indicate which foods they would like to eat. Those who were seduced by the dill pickle feedback reported being less likely to want to eat pickles, whereas those who fell for the egg feedback reported being less likely to want to eat eggs.

When we demonstrated our methodology for Alan Alda during his visit to UC Irvine, he showed increased confidence that he had gotten sick eating hard-boiled eggs as a child. When later offered hard-boiled eggs and deviled eggs at a picnic in the park, Alda declined to eat them. Our
findings in the “food” study constitute the beginning of a method for studying false memories and their consequences. But they also hint at unexpected applications: what a potentially easy way to make people avoid certain foods.

In The Tragedy of King Richard the Second, Shakespeare asked a simple question: “Who can . . . cloy the hungry edge of appetite by bare imagination of a feast?” We cannot do this, he suggested, any more than we can easily walk “naked in December snow by thinking on fantastic summer’s heat.” Thinking about the good, Shakespeare noted, makes us feel worse. Our results would give Shakespeare food for thought (excuse the pun). It is not a feast that one should imagine but getting sick on that feast.

More generally, our results are showing that changing a belief or memory can have important consequences for subsequent thoughts or behaviors. When you change memory, it changes you.

**True Versus False Memories**

In the ideal world, people would have a means of distinguishing true and false memories. Statistically, one occasionally can do this. In an effort to plant false memories of being lost in a shopping mall, we showed that true memories were held with more confidence than the false ones (Loftus & Pickrell, 1995). Other researchers have also found group differences. Wade et al. (2002), who planted false memories of taking a hot-air balloon ride as a child by showing participants doctored photographs, also showed that the true events they asked about were recalled with greater confidence than the false one. Porter et al. (1999), who planted false memories of being victimized by a serious animal attack as a child, found that the planted memories were rated as less coherent than real memories.

There have also been promising efforts to use neurophysiological measures to distinguish true and false memories. Some differences have been reported using human lateralized brain potentials (Fabiana, Stadler, & Wessels, 2000), using the P300 component of event-related potentials (Miller, Baratta, Wynveen, & Rosenfeld, 2000), and using neuroimaging techniques (Schacter, Buckner, Koutstaal, Dale, & Rosen, 1997). By necessity, these studies have been done with true and false memories of words heard in a word list rather than with the eyewitness details or rich false memories. While promising, these preliminary efforts are still a long way from allowing researchers to take one individual memory and reliably classify it as being true or false.

**Theoretical and Practical Implications**

Collectively, researchers have learned a great deal about how false memories develop and are almost at the point of being able to write a recipe. First, the individual gets convinced that the false event is plausible. Even events that start out being rather implausible can be made to seem more plausible by simple suggestion. Next, the individual gets convinced that the false event was personally experienced. Plying the person with false feedback is a particularly effective way to accomplish this. At this point, the individual might merely believe that the event is true but have no sense of recollection. But with guided imagination, with visualization of the stories of others, and with suggestive feedback and other sorts of manipulations, a rich false memory can develop.

The research on false beliefs and memories has enormous relevance to everyday life. Analyses of the growing number of wrongful convictions, proven wrong by DNA evidence, have taught us that faulty eyewitness memory is the major cause (Technical Working Group for Eyewitness Evidence, 1999). This revelation has led to numerous recommendations for the legal system to protect the fact-finding process from the tragedies of mistaken memory, both in the United States and Canada (Yarmey, 2003). Analyses of the hundreds of cases in which patients were led to believe falsely that they were molested for years in satanic rituals or that they were abducted by aliens and taken up in spaceships have taught us that suggestion is a key factor leading to these beliefs (McNally, 2003). Moreover, once they take hold, these “memories” can be expressed with great confidence, detail, and emotion. In one study, individuals who believed they had been abducted by aliens were as emotionally aroused by thinking of their terrifying abductions as they were about other stressful experiences, or as “nonabducted” individuals were when they recalled personal traumas (McNally, 2003). Two take-home lessons flow from this research: (a) Suggestion can lead to rich false memories, and (b) just because a memory report is expressed with confidence, detail, and emotion does not necessarily mean the underlying event actually happened. McNally (2003) expressed his faith in the value of cognitive psychology to help resolve some of the controversies in this area. It is with the methods of cognitive psychology, he argued, that scientists will be able to test their hypotheses not only about how people may forget traumatic events but also about how people “come to believe they have been traumatized when, in fact, they have not” (McNally, 2003, p. 274).

My efforts to write about the power of suggestion to create false memories have been with the hope of encouraging changes in procedures and practices (Loftus, 2002, 2003; Loftus & Ketcham, 1991, 1994). Aggressive efforts to unearth presumably recalcitrant trauma memories can lead to false-memory reports. Uncritical acceptance of every trauma memory report can harm the false victims and, also sadly, trivialize the experiences of the true victims.

Outside the world of litigation or psychotherapy, the findings about memory distortion have implications for ordinary life. Take the reading of autobiographies and
memories. The pioneering physicist Edward Teller recently wrote one (Teller, 2001) and was resoundingly criticized for his “notorious” selective memory, and specifically for “vividly remembering events that never happened.” A more charitable analysis of Teller’s work might involve appreciating it not as a deliberately self-serving untruthful chronicle but for its possible insights into normal memory-distortion processes. Untruths are not necessarily lies. As for the “memoir” of Binjamin Wilkomirski in Fragments—the false account of a small child’s ordeal in the Holocaust—was it a deliberate lie, or did he somehow come to convince himself it was true? (See Eskin, 2002.) A different area of psychological science is needed to distinguish the deliberate lie from the “honest” lie. But sometimes what starts as a deliberate lie becomes the person’s “truth.” The story creates a memory rather than the other way around.

It has been said that we are sum of our memories, that all that we have ever experienced goes into that end product. But after three decades of my research on memory in general and memory distortion in particular, it makes sense to consider the reverse of this statement. People’s memories are not only the sum of all that they have done, but there is more to them: The memories are also the sum of what they have thought, what they have been told, what they believe. Who we are may be shaped by our memories, but our memories are shaped by who we are and what we have been led to believe. Or as the psychiatrist Sally Satel (2003) said, “We are always angling the prism of memory” (p. 31). We seem to reinvent our memories, and in doing so, we become the person of our own imagination.

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