2012

# Manson and Its Progeny: An Empirical Analysis of American Eyewitness Law

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# *MANSON* AND ITS PROGENY: AN EMPIRICAL ANALYSIS OF AMERICAN EYEWITNESS LAW

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ABSTRACT

*Since the Supreme Court established the current constitutional framework for determining the admissibility of eyewitness identification evidence in* Manson v. Brathwaite *in 1977, scientists and scholars who have evaluated the opinion have uniformly criticized it as insufficient to deter police from using flawed identification procedures and inconsistent with scientific evidence of the best ways to assess the reliability of evidence tainted by such procedures. Until now, however, the work of these scientists and scholars has been based primarily on simulation experiments and on a selective assortment of easily criticized judicial decisions applying* Manson. *This study provides the first in-depth, systematic analysis of judicial treatment of eyewitness identification evidence under* Manson, *including examination of all federal criminal cases and habeas corpus decisions available on Westlaw that cited the opinion in considering the admissibility of eyewitness evidence through January 31, 2010. Data from the 1,471 cases in the final data set confirms much of what scientists and legal academics have been saying for the last thirty-four years and reinforces past critiques with significant empirical data, including a time-trend analysis of the quality of judicial decision-making since* Manson. *Specifically, federal courts evaluating the admissibility of eyewitness evidence under* Manson *rarely suppress in-court identifications, and they frequently analyze the evidence before them in ways that are inconsistent with the science. In the cases in the data set, courts regularly held clearly unnecessarily suggestive identification procedures to be acceptable or failed to make definitive determinations on whether such procedures were improper, and they often analyzed* Manson*'s reliability factors in a manner that undermines the integrity of the inquiry. The study shows that courts evaluating the reliability of evidence from flawed identification procedures frequently relied on witnesses' certainty after exposure to suggestion, even though science shows that such exposure is likely to enhance a witness's confidence; in fact, a large number of the opinions reveal increases in witness confidence after witnesses viewed suggestive procedures. Time-trend analysis shows that in the thirty-three years after* Manson, *while scientific data relevant to the* Manson *standard was published and accepted in scientific communities, the quality of judicial analysis did not improve in response to the new generation of scientific developments, and federal courts became significantly less likely to use* Manson *to suppress eyewitness identification evidence.*

## I. INTRODUCTION

In 1977, in *Manson v. Brathwaite*, the Supreme Court established the current framework for analyzing whether admission of eyewitness evidence violates a defendant's due process rights.[1] Since then, scholars and scientists studying eyewitness identification have uniformly criticized the *Manson* test as doctrinally flawed and inconsistent with what psychological research has taught us about the nature of human memory. Legal academics and practitioners have denounced *Manson* as insufficient to deter police from using unreliable procedures to elicit eyewitness identifications and have suggested reforms ranging from automatic exclusion of evidence from tainted procedures to curative jury instructions.[2] Psychologists have drawn on decades of experimental data to reveal the most and least reliable methods for conducting eyewitness identification procedures and to show that the reliability factors *Manson* adopted to evaluate evidence from suggestive procedures are actually poor indicators of the quality of eyewitness evidence.[3] This research has provided valuable insight into *Manson*'s shortcomings and the injustices that result from its application. Nonetheless, the research has, thus far, relied almost entirely on data from experiments and on selective, anecdotal accounts of bad cases. This Article adds to the current body of scholarship by providing the first in-depth, systematic analysis of federal cases that used the *Manson* test to assess eyewitness evidence.

This systematic analysis, involving data from 1,471 federal cases, including criminal trial-court opinions, appeals, and habeas corpus decisions, over the course of thirty-three years, confirms the results of psychological experiments and supports the claims of scholars who have argued that *Manson* regularly results in admission of unsound evidence. First, the cases reveal that in the vast majority of challenges to the admissibility of eyewitness evidence courts allow witnesses to make in-court identifications. This, in and of itself, is unsurprising given the *Manson* Court's explicit preference for admission of reliable evidence over deterring police from using flawed procedures.[4] The data also show, however, that in

1. Manson v. Brathwaite, 432 U.S. 98 (1977).

2. *See, e.g.*, David E. Paseltiner, *Twenty Years of Diminishing Protection: A Proposal to Return to the* Wade *Trilogy's Standards*, 15 HOFSTRA L. REV. 583 (1987) (urging the use of a per se exclusionary rule for evidence from unnecessarily suggestive identification procedures); Cindy J. O'Hagan, *When Seeing Is Not Believing: The Case for Eyewitness Expert Testimony*, 81 GEO. L.J. 741, 754-55 (1993) (promoting the use of jury instructions to complement expert testimony on eyewitness identification evidence).

3. *See, e.g.*, 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 (2009) (summarizing thirty years of scientific developments shedding light on best practices for conducting eyewitness identification procedures and on problems with using the *Manson* factors to evaluate eyewitness evidence).

4. *Manson*, 432 U.S. at 112-13.

most of the federal cases, defendants who challenged the admissibility of eyewitness identification evidence had valid claims that identification evidence in their cases had some suspect feature. Moreover, the cases reveal that courts regularly disregard the last generation of social science by concluding that unsound identification procedures are perfectly acceptable. The cases also demonstrate, as suggested by psychologists, that witnesses' certainty in their identifications often increases after exposure to suggestive identification procedures. Compounding this problem, federal courts frequently use witness certainty after exposure to suggestion, when certainty is likely to have increased in response to that suggestion, to support findings that eyewitness evidence is reliable. Taken together, these conclusions demonstrate a terrible disconnect between science and law and suggest that courts may be suppressing eyewitness evidence far less frequently than they should.

It is clear that remedying this disconnect is imperative. Eyewitness misidentification is a leading cause of wrongful conviction, and of the 280 DNA exonerations in the United States,[5] misidentification by an eyewitness contributed to approximately 75% of the initial convictions.[6] Many more wrongfully convicted people with no chance of exoneration through DNA evidence are certainly languishing in prison as a result of eyewitness misidentification.[7] Yet perhaps the most unsettling aspect of the federal data is that a time-sensitive analysis of the federal cases shows no improvement in the quality of judicial decision-making over time, even as scientific evidence on eyewitness identification mounts and as attorneys and academicians continue to advocate for sensible reform. This willful blindness to uncontested scientific evidence is inexcusable and is a discredit to the federal judiciary. Poor jurisprudence, however, is not solely responsible for the lack of reform. Perusal of the federal cases also reveals that defense lawyers rarely take issue with some of the most fundamental and basic flaws in identification procedures. It is incumbent upon the defense bar to contest unreliable identification procedures; for without vigorous, informed advocacy there can be no reform.

In Part II of this Article, I will provide a history of the development of eyewitness identification law in the United States up through the *Manson* decision. In Part III, I will summarize the development of the psychologi-

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5. *Know the Cases*, INNOCENCE PROJECT (May 25, 2012, 3:20 PM), http://www.innocenceproject.org/ know/.

6. *Understand the Causes: Eyewitness Misidentification*, INNOCENCE PROJECT (Dec. 18, 2011, 2:40 PM), http: //www.innocenceproject.org/ understand/ Eyewitness-Misidentification.php.

7. Rape cases tend to be the only category of case likely to yield testable DNA evidence that can prove innocence definitively. Yet each year there are far more cases in which eyewitness evidence is likely to be crucial but that do not involve sexual assault. In 2009, for example, Federal Bureau of Investigation statistics show there were more than five times as many reported robberies as rapes in the United States. FED. BUREAU OF INVESTIGATION, *Crime in the United States*, Table 12 (2009), *available at* http: // www2.fbi.gov/ ucr/ cius2009/ data/ table_12.html.

cal science that has informed appeals for reform of the *Manson* test, and I will discuss legal developments in response to that science, including a brief analysis of cases from the few states that have rejected *Manson*. In Part IV, I will present and discuss empirical data from the federal cases that have cited *Manson*. The original data set included 1,761 cases, the entire body of federal cases available on Westlaw that cited *Manson* between the issuance of the opinion in 1977 and January 31, 2010. The ultimate data set of 1,471 cases includes all of those cases in which a federal court presiding over a criminal trial or appeal or a habeas corpus petition cited *Manson* in considering the admissibility of eyewitness identification evidence. Analysis of these cases adds significantly to previous scientific and legal scholarship by providing systematic evaluation of a large number of real cases, confirming the results of laboratory experiments and validating anecdotal accounts of flawed judicial opinions. Part V will conclude the Article.

## II. LEGAL DEVELOPMENTS THROUGH *MANSON*

Modern eyewitness law began with a trilogy of cases the Supreme Court decided on the same day in 1967, in which the Court held for the first time that due process and the Sixth Amendment require exclusion of some eyewitness identification evidence.[8] Until then, there was no constitutional regulation of such evidence, and the general rule in the United States was that any imperfections in the manner in which an eyewitness identified a suspect would affect only the weight and not the admissibility of an eyewitness's identification.[9] These three cases, *United States v. Wade*, *Gilbert v. California*, and *Stovall v. Denno*, all authored by Justice Brennan, thus marked a radical departure from the status quo and offered the promise of a new era of protection against admission of suspect and unreliable evidence.

In *Wade*, the Court held that a post-indictment lineup is a critical stage in the criminal process and that, unless there is intelligent waiver, the absence of defense counsel at such a procedure requires exclusion of evidence from the lineup at trial.[10] In *Gilbert*, Justice Brennan's majority opinion held, however, that even if the absence of defense counsel requires suppression of the lineup evidence, if the prosecution can prove an independent source for the identification, the eyewitness may nonetheless identify the defendant in court.[11] In *Stovall*, the Court recognized that

8. United States v. Wade, 388 U.S. 218 (1967); Gilbert v. California, 388 U.S. 263 (1967); Stovall v. Denno, 388 U.S. 293 (1967).

9. Simmons v. United States, 390 U.S. 377, 382 (1968).

10. *Wade*, 388 U.S. at 236-42

11. *Gilbert*, 388 U.S. at 272.

some pre-trial identification procedures might be "so unnecessarily suggestive and conducive to irreparable mistaken identification" as to deny a defendant due process of law and that courts must suppress evidence resulting from such procedures.[12] The *Stovall* Court also explicitly approved the use, in some circumstances, of showups, at which police present a suspect singly, rather than as part of a lineup, to an eyewitness for identification.[13] The *Stovall* Court noted that showups had been "widely condemned," but held a hospital-room showup to have been imperative in the case, in which police displayed the defendant alone to the witness while her prognosis was uncertain the day after a surgery to treat her for eleven stab wounds.[14] Since *Stovall*, courts have frequently parroted Justice Brennan's language about showups being "widely condemned" before going on to approve the procedures in a variety of situations, including, regularly, in cases in which police conduct a showup shortly after the commission of a crime.[15]

In any case, just nine months after *Stovall*, the Supreme Court seemed to retreat from the case's central holding that some identification procedures may be so suggestive in and of themselves as to violate due process. In *Simmons v. United States*, the Court, in considering the admissibility of in-court identifications the defendant claimed resulted from flawed photographic identifications, stressed the likelihood the defendant was actually guilty as the foundation of its holding that there had been no due process violation.[16] Emphasizing the witnesses' opportunities to view the perpetrator and their high levels of certainty in their identifications at trial, the Court asserted that the circumstances "leave little room for doubt that the identification of Simmons was correct, even though the identification procedure employed may have in some respects fallen short of the ideal."[17] Since *Simmons*, legal scholars have frequently argued that *Stovall*'s holding that problematic procedures could violate due process in and of themselves provided robust protection of the due process rights of criminal defendants and that *Simmons* represented the beginning of the Court's unraveling of that protection.[18] As early as 1974, Professor Charles Pulaski

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12. *Stovall*, 388 U.S. at 302.

13. *Id.*

14. *Id.*

15. Johnson v. Dugger, 817 F.2d 726, 729 (11th Cir. 1987); United States v. Rice, 652 F.2d 521, 528 (5th Cir. 1981) (citing *Stovall* in noting that showups have been "widely condemned," but asserting that various exigencies, including the interest in rapid crime solution, can justify the use of showups); Rodriguez v. Artus, 2010 WL1543857, 17 (W.D.N.Y. 2010) (citing *Stovall* in noting that showups have been "widely condemned," but holding that exigent circumstances, including the need to quickly confirm the identity of a suspect or to release an innocent suspect, justify the use of showups).

16. *Simmons*, 390 U.S. at 385-86.

17. *Id.*

18. Jessica Lee, Note, *No Exigency, No Consent: Protecting Innocent Suspects from the Consequences of Non-Exigent Show-Ups*, 36 COLUM. HUM. RTS. L. REV. 755, 785-89 (2005); Timothy P. O'Toole & Giovanna Shay, Manson v. Brathwaite *Revisited: Towards a New Rule of Decision for Due*

noted that *Stovall* was a strict test, focusing on the unreliability of flawed procedures, while *Simmons* endorsed a broader notion of reliability by examining the overall likelihood that witnesses had correctly identified the defendant.[19] As I have previously argued, the notion that *Stovall*'s per se exclusionary rule for evidence derived from unnecessarily suggestive procedures provided significantly better protection against the introduction of tainted evidence is simplistic and empirically incorrect.[20] I will discuss this further in Part III below.

In 1972, the Supreme Court reinforced its shift toward emphasis on the overall reliability of an eyewitness's identification rather than on flaws in the initial pre-trial identification procedure. In *Neil v. Biggers*, the Court held that even if an identification procedure is unnecessarily suggestive, courts should assess reliability and admissibility under the totality of the circumstances, using a five-factor reliability test for guidance.[21] According to the *Biggers* Court, courts examining the reliability of eyewitness evidence should consider:

> [(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 by the witness at the confrontation, and [(5)] the length of time between the crime and the confrontation.[22]

The *Biggers* Court stated unequivocally that it is the likelihood of misidentification, rather than the use of a suggestive procedure in and of itself, that jeopardizes a defendant's due process rights.[23]

Because Biggers's trial had taken place before *Stovall*, the Supreme Court had occasion to revisit the issue again five years later in *Manson v.*

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*Process Challenges to Eyewitness Identification Procedures*, 41 VAL. U. L. REV. 109, 122-25 (2006); Paseltiner, *supra* note 2, at 589-90; Charles A. Pulaski, Neil v. Biggers*: The Supreme Court Dismantles the* Wade *Trilogy's Due Process Protection*, 26 STAN. L. REV. 1097, 1103-09 (1974); Benjamin E. Rosenberg, *Rethinking the Right to Due Process in Connection with Pretrial Identification Procedures: An Anaysis and a Proposal*, 79 KY. L.J. 259, 264-68 (1991); Dori Lynn Yob, Comment, Mistaken Identifications Cause Wrongful Convictions: New Jersey's Lineup Guidelines Restore Hope, But Are They Enough?, 43 SANTA CLARA L. REV. 213, 229-30 (2002). *But see* Ofer Raban, *On Suggestive and Necessary Identification Procedures*, 37 AM. J. CRIM. L. 53, 58-59 (2009) (arguing that unreliable identification evidence should be suppressed whether or not a challenged pre-trial procedure was necessary and that *Simmons* thus improved on *Stovall* by focusing in part on whether the evidence was reliable, rather than simply on unnecessary suggestion).

19. Pulaski, *supra* note 18, at 1104-09; *See also*, Lee, *supra*, note 18, at 786-87.

20. Nicholas A. Kahn-Fogel, *Beyond* Manson *and* Lukolongo*: A Critique of American and Zambian Eyewitness Law with Recommendations for Reform in the Developing World*, 20 FLA. J. INT'L L. 279, 302-09 (2008).

21. Neil v. Biggers, 409 U.S. 188, 198-200 (1972).

22. *Id.* at 199-200.

23. *Id.* at 198.

*Brathwaite* to decide whether the logic of *Biggers* would also apply to post-*Stovall* cases.[24] In *Manson*, the Court noted a circuit split in which the Second and Fourth Circuit Courts of Appeals had adopted per se exclusionary rules for any unnecessarily suggestive pre-trial identification procedures.[25] These courts emphasized the importance of deterring police from using tainted identification procedures and of suppressing evidence of uncertain reliability.[26] On the other hand, the Seventh Circuit used a totality of the circumstances approach, which, according to the Court, could "limit the societal costs imposed by a sanction that excludes relevant evidence from consideration and evaluation by the trier of fact."[27]

The *Manson* Court noted a "surprising unanimity among scholars" that the per se approach was "essential to avoid serious risk of miscarriage of justice."[28] Nonetheless, the Court endorsed the totality of the circumstances approach, adopting the factors it had articulated in *Biggers* as guidelines for courts analyzing the reliability of identification evidence.[29] In doing so, the Court noted that although the per se approach would have a greater deterrent effect against law enforcement use of suggestive identification procedures, the totality approach would also deter use of such practices because it would still include a possibility of suppression of unreliable identification evidence.[30] Moreover, the Court asserted that the per se approach would detract from accurate administration of justice by excluding some reliable and relevant evidence.[31] While the *Manson* Court did not explicitly require it, courts have generally interpreted *Manson* as establishing a two-part test. According to this reading of the decision, courts applying *Manson* must first determine whether challenged procedures were unnecessarily suggestive.[32] If not, the inquiry ends, and the evidence is admissible.[33] If the court determines the procedures were, in fact, unnecessarily suggestive, however, it must then go on to evaluate the reliability of the identification evidence using the *Manson/Biggers* factors.[34]

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24. *Manson*, 432 U.S. at 106-07.
25. *Id.* at 110.
26. *Id.* (citing Brathwaite v. Manson, 527 F.2d 363, 371 (2d Cir. 1975); Smith v. Coiner, 473 F.2d. 877, 882 (4th Cir. 1973)).
27. *Manson*, 432 U.S. at 110 (quoting Kirby v. Sturges, 510 F.2d 397, 407-08 (7th Cir. 1975)).
28. *Id.* at 111 (quoting Kirby, 510 F.2d at 405).
29. *Id.* at 114.
30. *Id.* at 112.
31. *Id.* at 112-13.
32. *See e.g.*, United States v. Lawson, 410 F.3d 735, 739 (D.C. Cir. 2005); United States v. Rogers, 387 F.3d 925, 937 (7th Cir. 2004); United States v. Williams, 340 F.3d 563, 567 (8th Cir. 2003).
33. *See e.g.*, *Lawson*, 410 F.3d at 739; *Rogers*, 387 F.3d at 937; *Williams*, 340 F.3d at 563.
34. *See e.g.*, *Lawson*, 410 F.3d at 739; *Rogers*, 387 F.3d at 937; *Williams*, 340 F.3d at 563.

Since 1977, scholars have often characterized *Manson* as the final dismantling of the superior protections of *Stovall*'s per se approach.[35] Again, this view is overly simplistic, but for other reasons, *Manson* did represent an intuitively appealing, though deeply flawed approach to assessing the quality of eyewitness evidence. First, as I will discuss in Part IV below, empirical data show that courts applying *Manson* regularly fail to correctly identify tainted identification procedures as undesirable methods for eliciting identifications. Despite a generation of scientific development identifying the best and worst ways to conduct identification procedures, without sufficient legal guidance on the kinds of procedures that should be considered "unnecessarily suggestive" in the first place, courts have continued to rely on intuition in making such determinations and, too frequently, have held improper procedures to be acceptable or refrained from making definitive decisions on the issue. Second, the last generation of psychological science has demonstrated problems with *Manson*'s reliability factors that can undermine the trustworthiness of the underlying inquiry into the dependability of the evidence. I will discuss these scientific developments, and the limited legal responses to them, in the next part of the article.

## III. THE DEVELOPMENT OF THE SCIENCE AND LEGAL RESPONSES

The science of eyewitness identification began to develop over 100 years ago with the work of Hugo Münsterberg, a German psychologist who came to the United States in the 1890s to head Harvard's psychology laboratory.[36] In 1908, Münsterberg published *On the Witness Stand*, in which he catalogued the results of extensive experiments that revealed, for the first time, troubling inaccuracies in the ways eyewitnesses remember and report events they have seen.[37] Münsterberg's work revealed not only that eyewitnesses were likely to forget important features of what they viewed, but also that they frequently remembered things that had not actually happened.[38] Moreover, Münsterberg's work demonstrated the tenuous relationship between an eyewitness's certainty in his identification of a suspect and the accuracy of the identification.[39]

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35. Margery Malkin Koosed, *Reforming Eyewitness Identification Law and Practices to Protect the Innocent*, 42 CREIGHTON L. REV. 595, 627-28 (2010); Lee, *supra* note 18, at 788-89; O'Toole & Shay, *supra* note 18, at 125; Paseltiner, *supra* note 18, at 592-93; Rosenberg, *supra* note 18, at 261; Yob, *supra* note 18, at 230.

36. Richard H. Ward, *Preface to the New Edition* of HUGO MÜNSTERBERG, ON THE WITNESS STAND: ESSAYS ON PSYCHOLOGY AND CRIME (1908).

37. HUGO MÜNSTERBERG, ON THE WITNESS STAND: ESSAYS ON PSYCHOLOGY AND CRIME (1908).

38. *Id.* at 50-51.

39. *Id.* at 55-56.

Legal criticism of Münsterberg's work began almost immediately. John Henry Wigmore, the legal scholar and Dean of Northwestern Law School, wrote the most prominent of these commentaries.[40] Wigmore acknowledged the flaws in eyewitness memory but noted, correctly, that Münsterberg's research provided no insight on how to evaluate the accuracy of any particular eyewitness's testimony and, consequently, how to reach more reliable verdicts.[41] Despite Münsterberg's work, and despite early legal work recognizing misidentification by eyewitnesses as a primary cause of wrongful conviction,[42] the science of eyewitness identification remained largely stagnant until the late 1970s, just around the time the Supreme Court was articulating the current due process standard for admission of eyewitness evidence in *Manson*.[43] Since *Manson*, however, psychological experiments have produced a wealth of data both on the kinds of procedures that can best reduce the risks of misidentification and on problems with using the *Manson* factors to assess the reliability of identification evidence.[44]

### *A. System Variables: Best Practices for Eyewitness Identification Procedures*

Perhaps the most important aspect of the new wave of psychological science that began in the late 1970s was the development of experiments to test how system variables, factors within the control of law enforcement, might influence the accuracy of eyewitnesses.[45] By demonstrating the kinds of identification procedures most likely to lead to misidentification, this research provided a powerful response to Wigmore's old criticism that eyewitness science provided no means for evaluating the reliability of a particular witness's testimony. The primary concern of research on system variables has been the discovery of identification techniques that reduce reliability by suggesting to an eyewitness the identity of the suspect or pressuring the eyewitness to make an identification even in cases in which the real perpetrator is absent.

Several of the discoveries from research on system variables have led psychologists to make recommendations to counteract the relative judgment process, a term scientists have used to describe the tendency of eye-

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40. John H. Wigmore, *Professor Muensterberg and the Psychology of Testimony: Being a Report of the Case of* Cokestone v. Muensterberg, 3 ILL. L. REV. 399 (1909).

41. *Id.* at 421-24.

42. EDWIN M. BORCHARD, CONVICTING THE INNOCENT: SIXTY-FIVE ACTUAL ERRORS OF CRIMINAL JUSTICE 367 (1932).

43. JAMES M. DOYLE, TRUE WITNESS: COPS, COURTS, SCIENCE, AND THE BATTLE AGAINST MISIDENTIFICATION 49-63, 83-99 (2005); Wells & Quinlivan, *supra* note 3, at 5.

44. Gary Wells and Deah Quinlivan have provided an excellent summary of these scientific developments. *See* Wells & Quinlivan, *supra* note 3.

45. DOYLE, *supra* note 43, at 49-63, 83-99.

witnesses to identify the person in a lineup or other identification procedure who most resembles the perpetrator, whether or not that person is, in fact, the actual criminal.[46] To reduce the likelihood of an eyewitness identifying an innocent suspect who bears some resemblance to the perpetrator, psychologists have urged police to warn eyewitnesses that the actual perpetrator may not be present at the identification procedures they view.[47] Experiments have proven that implementing this recommendation counteracts the observed propensity of eyewitnesses to use the relative judgment process to make identifications from culprit-absent procedures, without appreciably affecting the rate of accurate identifications in cases in which the perpetrator is present.[48] It may be unsurprising that police telling an eyewitness before an identification procedure that they believe they have apprehended the criminal increases the likelihood of the eyewitness attempting to identify someone from the procedure, even if the criminal is not there. But the science has also demonstrated that mere silence from police before an identification procedure increases the odds that eyewitnesses will mistakenly identify an innocent suspect when the perpetrator is absent.[49] It is natural that witnesses will believe any lineup or other identification procedure they view is likely to contain the perpetrator, and without explicit warnings from police that the criminal might not be present, the likelihood of eyewitnesses using relative judgment to misidentify an innocent suspect in a culprit-absent procedure goes up.[50]

One of the most obvious ways to protect against the dangers of relative judgment is to take steps to ensure the suspect is not the only participant in an identification procedure who resembles witness descriptions of the actual perpetrator. Because relative judgment is a comparative process by which witnesses tend to identify the person who most closely fits their memories of how the perpetrator looked, it is important that police build lineups and photo arrays with such descriptions in mind.[51] If police

46. Steven M. Smith et al., *Postdictors of Eyewitness Errors: Can False Identifications be Diagnosed in the Cross-Race Situation?*, 7 PSYCHOL. PUB. POL'Y & L. 153, 155 (2001); Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photo Arrays*, 22 LAW & HUM. BEHAV. 603, 609-10 (1998) [hereinafter Wells et al., *Eyewitness Identification Procedures*]; Gary L. Wells & Eric P. Seelau, *Eyewitness Identification: Psychological Research and Legal Policy on Lineups*, 1 PSYCHOL. PUB. POL'Y & L. 765, 768-69 (1995).

47. *See, e.g.*, Robert S. Malpass & Patricia G. Devine, *Eyewitness Identification: Lineup Instructions and the Absence of the Offender*, 66 J. APPLIED PSYCHOL., 482 (1981); Nancy Mehrkens Steblay, *Social Influence in Eyewitness Recall: A Meta-Analytic Review of Lineup Instruction Effects*, 21 LAW & HUM. BEHAV. 283, 287-89 (1997); Wells et al., *Eyewitness Identification Procedures*, *supra* note 46, at 629.

48. Wells, et al, *Eyewitness Identification Procedures*, *supra* note 46, at 629; *see also* Malpass & Devine, *supra* note 47, at 487; Steblay, *supra* note 47, at 287-89.

49. Wells et al., *Eyewitness Identification Procedures*, *supra* note 46 at 629.

50. *Id.*

51. David A. Sonenshein & Robin Nilon, *Eyewitness Errors and Wrongful Convictions: Let's Give Science a Chance*, 89 OR. L. REV. 263, 272 (2010); *see* Wells et al., *Eyewitness Identification Procedures*, *supra* note 46, at 630.

choose fillers, participants who police know to be innocent, according to witnesses' descriptions of perpetrators, they reduce the chances that an innocent suspect will be the member of a lineup who looks most like the real criminal and, thus, that an eyewitness will mistakenly identify him.[52] Of course, there are some situations in which it will not be desirable or feasible to construct a lineup according to witness descriptions of a perpetrator. If, for example, the perpetrator has a unique distinguishing characteristic such as a birthmark, a tattoo, or some disfiguration that witnesses have described in detail, it would be neither necessary nor practicable for police to design a procedure in which all fillers shared the exceptional feature.[53] Alternatively, if police identify a suspect because of his similarities to the image of a culprit captured on surveillance video, they should choose fillers based on the image from the video rather than merely based on witnesses' descriptions of the culprit.[54] Nonetheless, as a general rule, picking fillers according to witness descriptions of the perpetrator dramatically reduces the chances of misidentification of an innocent suspect who fits those descriptions.[55]

Eyewitness scientists have also frequently recommended presenting witnesses with lineup participants or photos sequentially, rather than in unison, to reduce the effects of the relative judgment process.[56] Witnesses who view identification procedures with sequential presentation might compare each participant individually to their memories of the actual perpetrator to make absolute judgments about whether any participant is the culprit.[57] On the other hand, when police present lineup participants to witnesses all at once, witnesses may be more likely to engage in the typical relative judgment process, comparing all participants to each other to see which one most closely resembles their memories of the perpetrator and to identify that person, whether or not he is the actual culprit.[58] Nonetheless, scientists have suggested that, in some circumstances, sequential presentation might actually reduce the reliability of an identification procedure,[59] and recent controversy over an Illinois study of sequential pres-

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52. Sonenshein & Nilon, *supra* note 51, at 272; *see* Wells et al., *Eyewitness Identification Procedures*, *supra* note 46, at 630; Wells & Quinlivan, *supra* note 3, at 7.

53. *See* Wells et al., *Eyewitness Identification Procedures*, *supra* note 46, at 633-34.

54. Wells & Quinlivan, *supra* note 3, at 7.

55. *See* Sonenshein & Nilon, *supra* note 51, at 272; *see* Wells et al., *Eyewitness Identification Procedures*, *supra* note 46, at 632.

56. *See generally* R.C.L. Lindsay & Gary L. Wells, *Improving Eyewitness Identification From Lineups: Simultaneous Versus Sequential Lineup Presentations*, 70 J. APPLIED PSYCHOL. 556 (1985); Sonenshein & Nilon, *supra* note 51, at 272-73; Nancy Steblay et al., *Eyewitness Accuracy Rates in Sequential and Simultaneous Lineup Presentations: A Meta-Analytic Comparison*, 25 LAW & HUM. BEHAV. 459, 460 (2001).

57. *See* Steblay et al., *supra* note 56, at 460.

58. Lindsay & Wells, *supra* note 56, at 562; Steblay et al., *supra* note 56, at 459; Wells et al., *Eyewitness Identification Procedures*, *supra* note 46, at 639.

59. Wells et al., *Eyewitness Identification Procedures*, *supra* note 46, at 640.

entation has led to a lack of consensus in the scientific community about the overall efficacy of the practice.[60]

Of course, aside from the dangers of relative judgment, police should generally take measures in constructing identification procedures to prevent the suspect from standing out in any way that would suggest his identity as the suspect to eyewitnesses. Such suggestion can result from presenting witnesses with multiple procedures in which the suspect is the only person to appear repeatedly from one procedure to the next.[61] Suggestion might also entail the administrators of identification procedures communicating, either intentionally or subconsciously, the identity of the suspect to witnesses or signaling to a witness that she has failed to identify the suspect when the witness picks a filler.[62] Accordingly, one of the most basic and fundamental recommendations from scholars of eyewitness identification has been to use double-blind administration for identification procedures.[63] In other words, neither the witness herself nor the administrator should know which participant is the suspect in advance of the procedure.

Ultimately, a lineup or photo array is a kind of experiment in which police are testing the hypothesis that the suspect is, in fact, the culprit.[64] A primary tenet of experimental design is that the administrator of an experiment must not know the hypothesis, given the risk that she might subconsciously influence the outcome.[65] Yet, the norm in eyewitness identification is for the detective on a case to administer identification proce-

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60. *See generally* Roy S. Malpass, *A Policy Evaluation of Simultaneous and Sequential Lineups*, 12 PSYCHOL. PUB. POL'Y & L. 394 (2006) (arguing that in most situations simultaneous lineups are superior to sequential lineups). A 2006 study of an Illinois pilot project reported higher rates of false negatives with sequential lineups than with simultaneous lineups. *See* Sheri H. Mecklenberg, REPORT TO THE LEGISLATURE OF THE STATE OF ILLINOIS: THE ILLINOIS PILOT PROGRAM ON SEQUENTIAL DOUBLE-BLIND IDENTIFICATION PROCEDURES (2006), *available at* http: // www.psychology.iastate.edu/ faculty/ gwells/ Illinois_Report.pdf. However, another study of the use of sequential double-blind identification procedures in Hennepin County, Minnesota found the sequential double-blind procedures used in that jurisdiction worked well and yielded suspect identification rates comparable to laboratory tests and comparable to rates in simultaneous lineups in other jurisdictions. Amy Klobuchar, Nancy K. Mehrkens Steblay & Hilary Lindell Caligiuri, *Improving Eyewitness Identifications: Hennepin County's Blind Sequential Lineup Pilot Project*, 4 CARDOZO PUB. L. POL'Y & ETHICS J. 381, 411 (2006). Moreover, the Illinois report has been criticized as flawed because, while the sequential procedures in the study were conducted by blind administrators, the administrators of the simultaneous lineups knew the identities of the suspects. *See, e.g.*, Daniel L. Schacter et al., *Policy Forum: Studying Eyewitness Investigations in the Field*, 32 LAW & HUM. BEHAV. 3, 4 (2008). Daniel Schacter and colleagues conclude more field studies are necessary to "produce a final blueprint for procedural reform." *Id.* at 5.

61. Wells & Quinlivan, *supra* note 3, at 8.

62. *See* Amy L. Bradfield et al., *The Damaging Effect of Confirming Feedback on the Relation Between Eyewitness Certainty and Identification Accuracy*, 87 J. APPLIED PSYCHOL. 112, 118 (2002); Wells et al., *Eyewitness Identification Procedures*, *supra* note 46, at 627.

63. Wells et al., *Eyewitness Identification Procedures*, *supra* note 46, at 618.

64. *Id.* at 627.

65. *Id.*; *see also* ROBERT ROSENTHAL, EXPERIMENTER EFFECTS IN BEHAVIORAL RESEARCH 143-281 (1976).

dures.[66] Psychologists have shown that this does, in fact, influence the behavior of witnesses and increases the odds of misidentification, and double-blind administration of identification procedures could solve the problem.[67]

Needless to say, the kind of one-on-one showup identification the *Stovall* Court approved inherently entails both the administrator and the witness knowing the identity of the suspect because the suspect is the only person on display at such a procedure. Nonetheless, police continue to use showups regularly, and courts applying *Manson* often accept evidence from them. I will discuss my treatment of evidence from showup identifications in detail in Part IV.

Finally, eyewitness scholars have recommended that police take confidence statements from eyewitnesses at the time of identification, to account for the possibility of post-identification suggestion artificially inflating witness certainty after the fact.[68] As I have argued before, I would add to this a recommendation that police take statements on witnesses' opportunity to view at the time of the crime and degree of attention at the time of the crime before administering any identification procedure.[69] I will discuss these recommendations in more detail in the next sub-part on the insights psychologists have gained on the probative value of the *Manson* reliability factors. Ultimately, as I will discuss in Part IV, despite immensely valuable scientific work showing the variety of ways an identification procedure might be rife with hidden flaws, courts applying *Manson* have regularly disregarded the science and held unsound procedures to be acceptable.

### *B. The Reliability Factors*

Since *Manson*, scientists have also conducted extensive research on the factors the *Manson* and *Biggers* Courts used to assess the reliability of identification evidence. That research casts significant doubt on the value of several of those factors and on the manner in which courts have evaluated them. Possibly the most troubling discovery from this research is that the use of suggestive identification procedures artificially inflates witnesses' certainty in their identifications and artificially enhances their

66. Keith A. Findley, *Reforming Eyewitness Identification Procedures to Enhance Reliability and Protect the Innocent*, *in* ADAPTING TO NEW EYEWITNESS IDENTIFICATION PROCEDURES: LEADING EXPERTS ON CHALLENGING TRADITIONAL PROCESSES AND INTEGRATING NEW TECHNIQUES, 103-10 (2010) (noting that a limited number of jurisdictions now use double-blind identification procedures); Nilon & Sonenshein, *supra* note 51, at 271; Wells et al., *Eyewitness Identification Procedures*, *supra* note 46, at 627.

67. Wells & Quinlivan, *supra* note 3, at 8.

68. *See, e.g.*, Sonenshein & Nilon, *supra* note 51, at 274; Wells et al., *Eyewitness Identification Procedures*, *supra* note 46, at 635; Yob, *supra* note 18, at 225-26.

69. Kahn-Fogel, *supra* note 20, at 296-97.

memories of the degree of attention they paid to perpetrators at the time of a crime and of their opportunities to view perpetrators during crimes.[70] Perversely, then, the very suggestiveness that triggers reliability analysis can bolster the ostensible reliability of the evidence by altering eyewitnesses' memories of their experiences during crimes and at the time of identification procedures.

But while the analysis is not straightforward, all three of the self-reporting reliability factors can have positive correlations with accuracy in the absence of suggestive identification procedures.[71] This has led scientists to recommend that administrators of identification procedures take confidence statements from witnesses at the time of their initial pre-trial identifications.[72] Taking such statements could counter the effects post-identification confirming feedback, which involves the administrator of an identification procedure saying or doing something to reinforce an eyewitness's choice.[73] Such feedback might include a statement as straightforward as, "Good job. You identified the suspect." Alternatively, it might entail much more subtle forms of reinforcement, but, in either case, it falsely enhances not only a witness's subsequent certainty in his identification but also his memory of his previous certainty at the time of the pre-trial identification.[74] Thus, documentation of the witness's confidence at the time of the first pre-trial identification procedure can negate this effect. Unfortunately, however, police often fail to take certainty statements at the time of identification procedures, leaving courts with their first impressions of witnesses' confidence in their identifications at the time of trial or, at best, at a pre-trial hearing.[75]

Yet even recording witness confidence at the time of a pre-trial identification has limited benefits. While such practices can account for inflated

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70. *See generally, e.g.*, Amy B. Douglass & Nancy Steblay, *Memory Distortion in Eyewitnesses: A Meta-Analysis of the Post-Identification Feedback Effect*, 20 APPLIED COGNITIVE PSYCHOL. 859 (2006); Jeffrey S. Neuschatz et al., *The Effects of Post-Identification Feedback and Age on Retrospective Eyewitness Memory*, 19 APPLIED COGNITIVE PSYCHOL. 435, 441 (2005) (describing effects of post-identification confirming feedback); Wells et al., *Eyewitness Identification Procedures*, *supra* note 46, at 626; Gary L. Wells & Amy L. Bradfield, *"Good, You Identified the Suspect": Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience*, 83 J. APPLIED PSYCHOL. 360 (1998); Wells & Quinlivan, *supra* note 3, at 9-12.

71. *See supra* note 70.

72. *See, e.g.*, Sonenshein & Nilon, *supra* note 51, at 274; Wells et al., *Eyewitness Identification Procedures*, *supra* note 46, at 635; Wells & Quinlivan, *supra* note 3, at 18; Yob, *supra* note 18, at 225-26.

73. *See, e.g.*, Sonenshein & Nilon, *supra* note 51, at 274; Wells et al., *Eyewitness Identification Procedures*, *supra* note 46, at 635; Wells & Quinlivan, *supra* note 3, at 18; Yob, *supra* note 18, at 225-26.

74. *See* Bradfield et al., *supra* note 62, at 13; Koosed, *supra* note 35, at 621; Neuschatz et al., *supra* note 70, at 441; Wells et al., *Eyewitness Identification Procedures*, *supra* note 46, at 635; Wells & Quinvlian, *supra* note 3, at 8.

75. *See, e.g.*, Wells & Quinlivan, *supra* note 3, at 18 (noting that in some jurisdictions police simply choose not to take certainty statements from witnesses who seem tentative in their identifications because they know the witnesses' certainty is likely to go up as the case progresses).

certainty after post-identification confirming feedback, recording pre-trial certainty cannot account for the effects of other kinds of suggestion in an identification procedure. For example, when the suspect stands out in a lineup because he is the only participant who fits the description of the perpetrator, witnesses' certainty in their identifications of that suspect also increases.[76] But taking confidence statements at the time of identification under such circumstances would have little beneficial effect, given that the suggestion inherent in the construction of the procedure is likely already to have affected the witness's confidence. Thus, courts that continue to rely on eyewitness certainty to evaluate the reliability of procedures fraught with any suggestion other than post-identification feedback risk undermining the integrity of the inquiry.

Nonetheless, making sure to take detailed statements from witnesses concerning their opportunities to view and degrees of attention at the time of crimes before they view pre-trial identification procedures would completely account for the inflationary effects of any suggestion inherent in identification procedures themselves and of any suggestion from post-identification feedback. Police should take such statements early in the case to avoid potential taint from suggestion, including, if possible, at the scene of a crime if they plan to use an on-the-scene showup procedure to attempt to identify the perpetrator. Doing so will preserve the initial impressions of witnesses concerning the general quality of their opportunities to view and of the degree of attention they paid to perpetrators during crimes.

Even taking all these precautions would not erase the complexity of applying the *Manson* factors to effectively assess reliability or, in some respects, the inherent insufficiency of those factors. As mentioned above, even the precaution of taking confidence statements at the time a witness makes a pre-trial identification cannot compensate for suggestive elements in the identification procedure itself. Moreover, although suggestion has no statistically significant inflationary effect on some objective aspects of a witness's memory of her opportunity to view, such as the amount of time of exposure to the perpetrator,[77] even without suggestion, witnesses tend to overestimate the length of time they had to view culprits during crimes.[78] And while a witness's degree of attention is certainly relevant in some respects, assessing its relevance is more complex than might be apparent to anyone not versed in the science. For example, witnesses who pay particular attention to the specific features of a criminal's face are better able

76. *Id.* at 12.

77. *See* Douglass & Steblay, *supra* note 70, at 864.

78. H.R. Shiffman & Douglas J. Bobko, *Effects of Stimulus Complexity on the Perception of Brief Temporal Intervals*, 103 J. EXPERIMENTAL PSYCHOL. 156 (1974); Wells & Quinlivan, *supra* note 3, at 10.

to describe those features but worse at recognizing the criminal after the crime, and witnesses who make global assessments about a criminal's face are better at recognizing the criminal from a lineup but worse at giving detailed descriptions of the culprit's facial features.[79] Finally, though there is some correlation between the consistency of a witness's description of a criminal with the suspect's features and the accuracy of the witness's identification, that sort of consistency would not necessarily indicate the suspect is the real culprit in a case in which a lineup is suggestive, because the suspect is the only participant who resembles the witness's description.[80] Despite all this, taking detailed, early statements from witnesses on their impressions related to the *Manson* factors that involve subjective-self reports would address many of the shortcomings of the *Manson* test.

### *C. Legal Responses to Eyewitness Science*

Even before the *Manson* Court adopted the logic of *Biggers*, scholars had begun to reject *Manson*'s rationale and to endorse a return to the per se approach of *Stovall*.[81] Since *Manson*, legal scholars have continued what that court noted was already unanimous opposition to its approach to eyewitness evidence.[82] These scholars have recognized the findings of eyewitness scientists and have endorsed a variety of potential reforms, including: return to *Stovall*'s per se approach;[83] reform of the reliability factors;[84] and automatic issuance of cautionary jury instructions when police use problematic identification techniques.[85] Nonetheless, the Supreme Court has not modified the *Manson* standard, and the vast majority of state courts also continue to use that standard to evaluate eyewitness evidence.[86]

A few states have deviated from the *Manson* approach in attempts to provide greater protection against admission of unreliable evidence. Yet it is far from clear that at least some of these innovations have actually improved on the federal standard. New York and Massachusetts, for example, have both reverted to a *Stovall*-like inquiry involving per se exclusion of evidence from unnecessarily suggestive pre-trial identification proce-

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79. *See* Wells & Quinlivan, *supra* note 3, at 10-11.

80. *See id.* at 13.

81. *Manson*, 432 U.S. at 111; *Pulaski*, *supra* note 18.

82. *See, e.g.*, Koosed, *supra* note 35; Lee, *supra* note 18; O'Toole & Shay, *supra* note 18; Sonenshein & Nilon, *supra* note 51; Paseltiner, *supra* note 2; Rosenberg, *supra* note 18; Yob, *supra* note 18.

83. *See, e.g.*, Koosed, *supra* note 35, at 627-28; Paseltiner, *supra* note 2; Sonenshein & Nilon, *supra* note 51, at 302.

84. Anne E. Whitehead, Note, State v. Ramirez*: Strenghtening Utah's Standard for Admitting Eyewitness Identification Evidence*, 1992 UTAH L. REV. 647, 689 (1992).

85. Gary Wells, *Eyewitness Identification Evidence: Science and Reform*, 29 CHAMPION 12, 20.

86. Sonenshein & Nilon, *supra* note 51, at 287.

dures.[87] Despite the considerable support this approach has garnered from scholars, the available evidence suggests it is not a panacea for *Manson*'s shortcomings. First, evidence from early application of *Stovall* shows that use of a per se exclusionary rule for evidence from unnecessarily suggestive procedures, without clear guidance on the kinds of procedures courts should categorize as unnecessarily suggestive, can result in admission of evidence from terribly tainted identification procedures.[88] In the nine months between the *Stovall* opinion and its supposed unraveling with the issuance of *Simmons*, federal courts cited the opinion in considering whether due process required suppression of eyewitness evidence in ten cases.[89] In nine of those cases, including three cases involving showup identifications, the courts held there had been no due process violation, and in one case the court remanded to the district court for further development of the facts.[90] In that same nine-month period, state courts considered the admissibility of eyewitness evidence under *Stovall* in thirty-one cases.[91] Although three of those courts found that police had used unnecessarily suggestive procedures, none of the opinions reveal suppression of in-court identification evidence.[92] In two of the three cases, the courts gave prosecutors an additional chance to prove an independent source for in-court identifications,[93] and in the third, the court found the admission of tainted evidence had been harmless error.[94]

Moreover, in most cases, the state courts applying *Stovall* found no unnecessary suggestiveness in the first place. In many of these cases, police had used terribly flawed procedures, including *State v. Batchelor*,[95] in which the eyewitness identified the defendant in a lineup in which she was the only woman, appearing with three men; *People v. Brown*,[96] in which the eyewitness identified the defendants at a showup at which they were

87. Commonwealth v. Johnson, 650 N.E.2d 1257, 1260 (Mass. 1995) ("In cases involving an unnecessarily suggestive identification, we have adhered to the stricter rule of per se exclusion previously followed by the Supreme Court and first set forth in the *Wade-Gilbert-Stovall* trilogy of cases."); People v. Adams, 423 N.E.2d 379, 384 (N.Y. 1981).

88. I documented pre-*Simmons* judicial treatment of *Stovall* comprehensively in a previous article. *See* Kahn-Fogel, *supra* note 20, at 302-07.

89. *Id.* at 303.

90. *Id.* at 304.

91. *Id.*

92. People v. Caruso, 436 P.2d 336, 336 (Cal. 1968) (finding a due process violation under *Stovall* where defendant did not resemble any of the other four men in the lineup and reversing with option for state to prosecute again and prove independent source); People v. Slutts, 66 Cal. Rptr. 862, 862 (Cal. Ct. App. 1968) (holding there was due process violation where officer drew beard on defendant's picture and no other pictures from photo array before one of witnesses made an identification, and, ultimately, that the violation was harmless error and, thus, did not require reversal); People v. Ballott, 233 N.E.2d 103, 103 (N.Y. 1967) (remanding for decision on whether there was an independent source despite an unnecessary showup identification).

93. *Caruso*, 436 P.2d at 336; *Ballott*, 233 N.E.2d at 103.

94. *Slutts*, 66 Cal. Rptr. at 862.

95. State v. Batchelor, 418 S.W.2d 929 (Mo. 1967).

96. People v. Brown, 229 N.E.2d 192 (N.Y. 1967).

the only black men in the room, accompanied by a white police officer, two to three weeks after the crime; *Commonwealth v. Choice*,[97] in which the eyewitness identified the defendant at a showup in an interrogation room after observing police interrogate the defendant; *Fogg v. Commonwealth*,[98] in which the eyewitness admitted the commonwealth's attorney may have said, "The next man the police bring through that door will be the man in the pictures," prior to the identification; *Bowman v. State*,[99] in which the eyewitness identified the defendant and his co-defendant at a showup in which they were the only black men in the room; *People v. Harris*,[100] in which a police officer told the eyewitness, "We got him," before the showup identification; *State v. Blevins*,[101] in which a police officer told one witness, "We got the man," before the identification procedure; *State v. Hill*,[102] in which the eyewitness identified the defendant in a showup at the police station seven days after the crime; *Burton v. State*,[103] in which four of the six participants in the lineup were suspects; and *Calbert v. State*,[104] in which a police officer told witnesses there was a possible suspect in the lineup. These cases demonstrate clearly that without unequivocal guidance on the kinds of practices that undermine reliability, even a per se exclusionary rule can be insufficient to prevent the admission of tainted evidence.

Additionally, the state courts that allowed for the possibility of in-court identifications, despite the use of unnecessarily suggestive procedures, by giving prosecutors the opportunity to prove an independent source, reveal an ambiguity in *Stovall* itself. Although the *Manson* Court clearly stated its framework would apply to assessment of both pre-trial and in-court identification evidence,[105] the *Stovall* Court never explicitly decided whether a finding that police had used unnecessarily suggestive procedures would require suppression of both pre-trial and in-court identification evidence or, alternatively, whether the per se exclusion applied only to the pre-trial evidence, with the possibility of in-court identification after an independent source inquiry, as in *Wade* and *Gilbert*.[106] Yet, as Richard Rosen has pointed out, suppression of tainted pre-trial identifica-

97. Commonwealth v. Choice, 235 A.2d 173 (Pa. 1967).

98. Fogg v. Commonwealth, 159 S.E.2d 616, 621 (Va. 1968), *vacated in part*, Fogg v. Slayton, 408 U.S. 937 (1972).

99. Bowman v. State, 208 So. 2d 241 (Ala. Ct. App. 1968).

100. People v. Harris, 236 N.E.2d 281, 282 (Ill. App. Ct. 1968).

101. State v. Blevins, 421 S.W.2d 263, 265 (Mo. 1967).

102. State v. Hill, 419 S.W.2d 46 (Mo. 1967).

103. Burton v. State, 437 P.2d 861 (Nev. 1968).

104. Calbert v. State, 437 P.2d 628 (Nev. 1968).

105. *Manson*, 432 U.S. at 106-07 n.9.

106. Rudolph Koch, Note, *Process v. Outcome: The Proper Role of Corroborative Evidence in Due Process Analysis of Eyewitness Identification Testimony*, 88 CORNELL L. REV. 1097, 1110 (2003); Rosenberg, *supra* note 18, at 265-66.

tion evidence while allowing the eyewitness to identify the defendant in court does little to protect the defendant or to deter police from using unreliable identification techniques.[107] Prosecutors are generally perfectly content to introduce only the in-court identification, and when an eyewitness who identifies a defendant in court has viewed suggestive pre-trial procedures, it is usually the defense that will want to introduce such evidence to attempt to undermine the effect of the in-court identification.[108] The in-court identification, however, will almost always be satisfactory to the prosecution, for, as Elizabeth Loftus has noted, "[a]ll the evidence points rather strikingly to the conclusion that there is almost nothing more convincing than a live human being who takes the stand, points a finger at the defendant, and says, 'That's the one!'"[109]

Both New York and Massachusetts's versions of the *Stovall* rule include the possibility of admission of in-court identifications, even in cases in which the pre-trial procedure was unnecessarily suggestive,[110] and examination of those states' applications of their eyewitness law reveals that their courts rarely prevent witnesses from identifying defendants in court. In New York, the Court of Appeals rejected the *Manson* standard in favor of per se exclusion of evidence from unnecessarily suggestive pre-trial identification procedures in 1981 in *People v. Adams*.[111] Inspection of opinions available on Westlaw reveals, however, that between 1981 and the end of 2009, New York courts suppressed in-court identifications in only eighteen of two hundred fifty cases in which courts that cited *Adams* decided on the admissibility of eyewitness identification evidence.[112] This represents a mere 7.2% of the cases in which New York courts considered suppression and less than one-fifth of the ninety-three cases in which those courts found there had, in fact, been an unnecessarily suggestive identification procedure.[113] In other words, even after *Adams*, more than 80% of New York courts that find unnecessary suggestion still allow the witnesses exposed to that suggestion to make in-court identifications. Similarly, in Massachusetts, the Supreme Judicial Court decided in *Commonwealth v. Johnson* in 1995 that it would return to *Stovall*'s per se exclusionary rule for unnecessarily suggestive pre-trial identification evidence.[114] With a significantly smaller data set of seventy-seven cases available on Westlaw through 2009 that cited *Johnson* in making determinations on the admissibility of eyewitness identification evidence, Massachusetts courts found

107. Richard A. Rosen, *Reflections on Innocence*, 2006 WIS. L. REV. 237, 249 (2006).
108. *Id.*
109. ELIZABETH LOFTUS, EYEWITNESS TESTIMONY 19 (1979).
110. *Johnson*, 650 N.E.2d at 1260; *Adams*, 423 N.E.2d at 384.
111. *Adams*, 423 N.E.2d at 384.
112. Data on file with author.
113. *Id.*
114. *Johnson*, 650 N.E.2d at 1260.

pre-trial evidence unnecessarily suggestive in only fifteen of those cases and suppressed in-court identification evidence in only seven cases.[115]

Other than New York and Massachusetts, only Utah, Kansas, and Wisconsin have altered the *Manson* standard at all.[116] In Utah and Kansas, courts have adopted a variation of *Manson* that incorporates reliability factors more in accord with eyewitness science, including the elimination of eyewitness certainty as an explicit consideration for courts determining the admissibility of eyewitness identification evidence.[117] The Wisconsin Supreme Court held that, unless exigent circumstances justify a showup, courts must suppress evidence from such procedures.[118]

Courts in some states have, without abandoning *Manson*, required cautionary jury instructions in some cases involving suspect evidence. In 2005, the Connecticut Supreme Court required the use of cautionary instructions in all cases in which police tell witnesses a suspect is present at an identification procedure or fail to warn witnesses the perpetrator may not be present.[119] A small number of states have required cautionary instructions in all cases involving a cross-racial identification, which increases the chances of misidentification.[120] In Georgia, the state supreme court ruled that jurors should not be instructed to consider eyewitness certainty in evaluating identification evidence.[121] Finally, several states have adopted non-judicial reforms to improve the manner in which police conduct identification procedures.[122]

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115. Data on file with author.

116. On August 24, 2011, after the submission of this paper, the Supreme Court of New Jersey issued a landmark decision that could significantly improve the plight of defendants facing possible conviction by eyewitness evidence. The ruling requires judges to conduct hearings on the admissibility of eyewitness evidence in cases in which a defendant can show some evidence of suggestiveness, tied to a system variable, in the manner in which an eyewitness identified him. Furthermore, in assessing the reliability of eyewitness evidence, courts must consider a broad range of factors in accord with scientific discoveries about the kinds of procedures that reduce reliability, including whether there was blind administration of a procedure, the quality of pre-identification instructions, the possibility of confirming feedback, whether confidence was recorded contemporaneously with the identification, and whether there were multiple viewings. New Jersey courts must also consider estimator variables including stress, weapon focus, and race bias. The Court also required enhanced jury instructions providing guidance on the range of factors that can affect the reliability of eyewitness identification evidence. State v. Henderson, 27 A.3d 872 (N.J. 2011).

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

118. State v. Dubose, 699 N.W.2d 582, 584-85 (Wis. 2005).

119. State v. Ledbetter, 881 A.2d 290, 313 (Conn. 2005).

120. As of 2008, those states were California, Massachusetts, New Jersey, and Utah. *See* Stephen J. Saltzburg, *Report to House of Delegates*, 2008 AMER. BAR ASS'N CRIM. JUST. SEC. 1, 12 *available at* http:// www.abanet.org/ crimjust/ policy/ am08104d.pdf.

121. Brodes v. State, 614 S.E.2d 766, 771 (Ga. 2005).

122. In 2001, the New Jersey Attorney General mandated the use of sequential, double-blind lineups in that state. STATE OF NEW JERSEY, OFFICE OF THE ATTORNEY GENERAL, ATTY. GEN. GUIDELINES FOR PREPARING AND CONDUCTING PHOTO AND LIVE LINEUP IDENTIFICATION PROCEDURES 1-2 (2001), *available at* http:// www.state.nj.us/ lps/ dcj/ agguide/ photoid.pdf. Likewise, the North Carolina legislature enacted legislation in 2007 requiring the use of sequential, double-blind procedures. Eyewitness ID Reform Act, 2007 N.C. Sess. Laws 421. The police department in

Despite the limited improvements on *Manson* in a few jurisdictions, federal courts and most states continue to use *Manson* to determine the reliability and admissibility of eyewitness identification evidence. Thirty-four years of scientific evidence and legal arguments have demonstrated the insufficiency of that framework. In the next Part, I will provide a systematic analysis of cases applying *Manson*. That analysis confirms the problems inherent in *Manson* and underscores the dire need for reform of the *Manson* Court's unreliable standard.

## IV. EMPIRICAL DATA FROM THE FEDERAL CASES

The last thirty-four years of scientific and legal scholarship have provided compelling evidence and convincing logic demonstrating the crucial need for reform of the *Manson* test. The research in this article strengthens previously available scientific data by confirming, based on information from a large number of real cases, what psychologists have previously concluded through controlled laboratory experiments. Furthermore, the research enhances the value of previous legal evaluations by proving, through systematic analysis, what earlier scholars have argued based on selective, anecdotal accounts of flawed opinions. Ultimately, this research demonstrates that *Manson*'s formula for evaluating eyewitness evidence is insufficient to deter police from using suggestive identification procedures. First, the research verifies that federal courts very rarely use *Manson* to prevent witnesses from making in-court identifications, even when defendants contest legitimately suspect procedures. Second, without formal guidance as to the kinds of procedures likely to lead to misidentification, federal courts applying *Manson* regularly fail even to find flawed procedures to be defective, even when more reliable alternatives are clearly and readily available. Additionally, the research corroborates scientific experiments showing that witnesses exposed to suggestive procedures often experience subsequently inflated levels of certainty in the accuracy of their identifications. Federal courts applying *Manson* commonly compound this problem when they assess the reliability of identification evidence by gauging witness certainty after police have exposed witnesses to suggestive procedures, when certainty is least correlated with accuracy.

Significantly, the conclusions of the research are conservative; they certainly underestimate the incidence of suggestive procedures in the data set, the number of cases in which witnesses' certainty went up in the wake

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Dallas, Texas also recently said it would begin using sequential, double-blind identification procedures. Illinois, Virginia, and West Virginia have each required their police forces to record the details of identification procedures they conduct, by photograph or otherwise. *See* Sonenshein & Nilon, *supra* note 51, at 279-81. Several other states are considering reforms of the way police conduct identification procedures. *Id.* at 281-83.

of such procedures, and the number of cases in which courts relied on post-exposure certainty to find identification evidence reliable. Moreover, because most cases do not create clear records of whether witnesses who viewed suggestive procedures experienced distorted memories of their opportunities to view a perpetrator at the time of the crime or the degree of attention they paid during the crime, the data does not account for these variables. I will discuss the details of these findings in depth below. First, however, I will describe the methodology for the collection and categorization of the data.

### *A. Methodology*

#### *1. Data set*

As mentioned above, the original data set included all federal cases available on Westlaw that cited *Manson* between the Supreme Court's publication of the opinion in 1977 and January 31, 2010. This included 1,761 cases. From this group, I eliminated all cases other than criminal cases and habeas corpus cases. Though federal courts sometimes cited *Manson* in other contexts, including civil rights claims[123] and actions to revoke United States citizenship,[124] I chose to concentrate on criminal matters, which have been the focus of the Supreme Court's crucial eyewitness jurisprudence and which are the cases in which the most fundamental rights are at stake. From the remaining data set, I eliminated any cases that cited *Manson* for reasons unrelated to the admissibility of evidence of an eyewitness's identification of a criminal defendant.[125] I also eliminated cases in which courts refused to consider *Manson* claims because they were procedurally barred,[126] though I included cases in which courts noted a *Manson* claim was barred but proceeded to engage in substantive analysis of the claim anyway. Finally, I eliminated duplicate cases, in which more

123. *See, e.g.*, Antonio v. Moore, No. 05-6272, 174 F. App'x 131, 134-36 (4th Cir. Mar. 9, 2006); Hutsell v. Sayre, 5 F.3d 996, 1005 (6th Cir. 1993); Hensley v. Carey, 818 F.2d 646, 648 (7th Cir. 1987).

124. United States v. Walus, 616 F.2d 283 (7th Cir. 1980) (reversing a district court decision to revoke the citizenship of a man accused of being a member of the Gestapo and a Nazi war criminal); United States v. Demjanjuk, 518 F. Supp. 1362, 1371-75 (N.D. Ohio 1981) (revoking citizenship of defendant in case in which witnesses claimed defendant was Nazi war criminal "Ivan the Terrible," and one witness failed to identify defendant from a photo book but identified him in open court).

125. *See, e.g.*, United States v. Johnson, No. 97-10411, 1998 WL 808009 (9th Cir. Nov 18, 1998) (citing *Manson* in connection with a claim involving only voice identification and not eyewitness identification); United States v. Capers, 685 F.2d 249, 252 (8th Cir. 1982) (citing *Manson* in connection with a defendant's claim that physical evidence and statements he made should have been suppressed as fruits of an illegal detention); United States v. Newell, 578 F.2d 827, 835 (9th Cir. 1978) (citing *Manson* for general principles on exclusionary rules).

126. *See, e.g.*, Dobson v. Walker, No. 04-2714-PR, 150 F. App'x. 49, 50-52 (2d Cir. Sept. 30, 2005); Young v. Herring, 938 F.2d 543, 552 (5th Cir. 1991); Norris v. United States, 687 F.2d 899, 901 (7th Cir. 1982).

than one court considered the same person's claim or in which one court considered the same person's claim on more than one occasion, and I included only the most recent opinion in each case.

I included some claims in which the defendant did not directly attack the admissibility of identification evidence, but the defendant's claims required the court to consider the admissibility of such evidence. Frequently, such cases involved claims of ineffective assistance of counsel, focusing on an attorney's failure to move to suppress identification evidence. In considering the performance and prejudice prongs of *Strickland v. Washington*,[127] courts evaluating these claims necessarily analyzed the admissibility of the underlying evidence.[128] If the defendant's claim was a request for a pre-trial hearing to determine admissibility of identification evidence or a claim, on appeal, that such a hearing should have been granted, I did not include the case in the data set if the court decided that a hearing should be granted. In such cases, the reviewing court was not making a final ruling on the admissibility of identification evidence but was merely holding that a hearing should be conducted to determine admissibility. This resulted in elimination of only eight cases from the original data set.[129] On the other hand, if the court determined no hearing was warranted, I included the case in the data set because these holdings invariably included substantive evaluation of the underlying identification evidence.[130] Finally, I included two cases in which defendants did not

127. Strickland v. Washington, 466 U.S. 668 (1984).

128. *See, e.g.*, Hart v. Dexter, 2008 WL 2224542, at *11 (C.D. Cal. 2008) (finding no ineffective assistance for failure to object to witness's in-court identification in case in which witness failed to identify petitioner from a photo array and initially could not identify him in court, but witness identified petitioner when he showed his teeth, revealing a gap); Chappel v. Garcia, 2006 WL 1748424, at *20-25 (E.D. Cal. 2006) (granting habeas relief in case in which petitioner claimed ineffective assistance of counsel for counsel's failure to challenge identification evidence when witness failed to identify petitioner from a photo array and identified him only after police helped arrange a highly suggestive identification at petitioner's preliminary hearing); King v. Grams, 2006 WL 1598679, *15-17 (E.D. Wis. 2006) (finding against habeas petitioner who raised an ineffective assistance of counsel claim based on counsel's failure to file a motion to suppress evidence from a showup identification because state court found the showup was not unnecessarily suggestive, and, even if the state court had moved to the next step to assess reliability, it surely would have concluded the identification evidence was reliable).

129. Escalera v. Coombe, 826 F.2d 185 (2d Cir. 1987) (reversing district court decision and determining habeas petition should be granted unless state conducted another *Wade* hearing to determine timing and possible suggestiveness of a photo identification), *vacated and remanded on other grounds by* Coombe v. Escalera, 484 U.S. 1054 (1988); Fortenberry v. Maggio, 664 F.2d 1288, 1290 (5th Cir. 1982); United States v. Gonzalez, 2010 WL 339698, at *1 (S.D.N.Y. 2010); United States v. Zhou, 2009 WL 1585825, at *2 (S.D. N.Y. 2009); United States v. Rodriguez, 2002 WL 313894, at *3-4 (S.D. N.Y. 2002); United States v. Volpe, 42 F. Supp. 2d 204, 222 (E.D.N.Y. 1999); United States v. Escobar, 842 F. Supp. 1519, 1531 (E.D. N.Y. 1994); United States v. Williams, 1993 WL 22183, at *4 (E.D. N.Y. 1993).

130. Snipes v. New Jersey, 2006 WL 1517738, at *4-5 (D. N.J. 2006) (finding that petitioner was not entitled to a *Wade* hearing to determine whether eyewitness evidence should be suppressed because the totality of the circumstances showed the showup identification was reliable, despite police telling the witness they had the person who robbed her and despite witness's subsequent inability to identify petitioner at trial); Carter v. Goord, 2003 WL 23198762, at *4-5 (E.D.N.Y. 2003) (finding that peti-

seem to raise a *Manson* claim themselves, but the courts took up the issue *sua sponte*.[131] As mentioned above, this paring process led to the creation of a final data set of 1,471 cases.

### 2. *Variables Identified for Each Case in the Data Set*

I collected several pieces of information from each case in the data set. First, the data accounts for cases in which the opinions revealed that defendants challenged truly flawed identification evidence, including A) cases in which the challenged procedure was unnecessarily suggestive, and the court recognized it as such; B) cases in which the challenged procedure was unnecessarily suggestive, and the court made no definitive determination as to whether the procedure was unnecessarily suggestive; C) cases in which the challenged procedure was unnecessarily suggestive, but the court found that it was not unnecessarily suggestive; D) all cases involving on-the-scene showup identifications; and E) cases in which the identification was suggestive, but it was difficult to classify it as "unnecessarily" suggestive. It is worth providing some further explanation of how and why I organized the data into these categories.

An overarching inquiry was whether each case involved an unequivocally unnecessarily suggestive identification procedure, reflected in variables A), B), and C) above. These variables represent a sub-division of cases with undeniably unnecessarily suggestive procedures, based on each court's classification of the procedure, taking account of whether the court specifically determined the procedure was, in fact, unnecessarily suggestive; whether, alternatively, the court decided the procedure was not unnecessarily suggestive, or whether the court made no definitive determination on the issue. In making the initial determination as to whether a procedure was unnecessarily suggestive, I was conservative; I classified procedures as unnecessarily suggestive only if the aspects of the procedure a defendant challenged were essentially free from any scientific controversy as to their invalidity and free from any colorable legal claim that they were necessary. To that end, I did not classify a failure to use sequential presentation of lineup participants as unnecessarily suggestive.[132]

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tioner was not entitled to a *Wade* hearing in case in which he was identified at a showup three hours after the crime); United States v. Shakur, 1987 WL 5368, at *1-3 (S.D.N.Y. 1987) (finding no need to conduct a *Wade* hearing to determine the admissibility of identification testimony in case in which some witnesses identified defendant at a photo showup).

131. Thomas v. Cowley, No. 90-6105, 1991 WL 151773, at *7-8 (10th Cir. Aug. 8, 1991) (finding *sua sponte* that petitioner was not denied due process by admission of the eyewitness testimony in case in which petitioner challenged trial court's failure to issue a cautionary instruction on eyewitness evidence); Walker v. Cain, 2006 WL 2356016, at *9-10 (W.D. La. 2006).

132. *See, e.g.*, Klobuchar et al., *supra* note 60; Malpass, *supra* note 60; Mecklenberg, *supra* note 60; Schacter et al., *supra* note 60.

Further, because the Supreme Court has insisted that showup identifications may be permissible in some circumstances, I did not classify all showup identifications as unnecessarily suggestive. In *Stovall*, the Supreme Court found that the need for a severely injured witness to make a quick identification made a hospital showup proper.[133] Since then, many courts have held that prompt, on-the-scene showups are allowable because they provide the possibility of a quick identification before the witness's memory has degraded and before the perpetrator has a chance to change his appearance and because they can provide for the immediate release of innocent suspects.[134] To accommodate this perspective, I did not classify on-the-scene showups as unnecessarily suggestive unless some other feature of the identifications made them so, or unless the reviewing court itself determined the procedure to be unnecessarily suggestive. Instead, recognizing that showups are undeniably suggestive procedures, more likely to lead to misidentification than lineups,[135] I classified on-the-scene showups separately, reflected in variable D) above, to ensure an accounting of as many cases as possible in which defendants accurately attacked suggestive identification techniques. While the logic of courts holding that on-the-scene showups are not unnecessarily suggestive is dubious, even that tenuous rationale cannot apply to station-house showups, which occur at a time when police could just as easily photograph the suspect to preserve his appearance and could display the photograph along with other pictures matching the witness's description of the perpetrator. Thus, I categorized station-house showups as unnecessarily suggestive, whether or not the reviewing court agreed.

Additionally, because there has been no consensus on the optimal number of lineup fillers, I did not classify procedures with more than one participant other than the suspect as unnecessarily suggestive.[136] Nonetheless, eyewitness experts have correctly noted that using more fillers reduces the chances of a witness using the relative judgment process to incorrectly identify a suspect.[137] Ultimately, given the lack of agreement on

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133. *Stovall*, 388 U.S. at 302.

134. *See, e.g.*, Drew v. Parker, No. 05-6473, 244 F.App'x. 23, 28 (6th Cir. June 19, 2007); Page v. Hendricks, 2005 WL 2665678, at *8 (D.N.J. 2005); United States v. Sleet, 54 F.3d 303, 309 (7th Cir. 1995); *Johnson*, 817 F.2d at 729.

135. Dawn J. Dekle, Carole R. Beale, Rogers Elliot & Dominique Huneycutt, *Children as Witnesses: A Comparison of Lineup Versus Showup Identification Methods*, 10 APPLIED COGNITIVE PSYCHOL. 1 (1996); Richard Gonzalez, Phoebe C. Ellsworth & Maceo Pembroke, *Response Biases in Lineups and Showups*, 64 J. PERSONALITY & SOC. PSYCHOL. 525 (1993); Gary L. Wells, *Police Lineups: Data, Theory, and Policy*, 7 PSYCHOL. PUB. POL'Y & L. 791, 795 (2001); A. Daniel Yarmey, Meagan J. Yarmey & A. Linda Yarmey, *Accuracy of Eyewitness Identifications in Showups and Lineups*, 20 LAW & HUM. BEHAV. 459 (1996).

136. R.C.L. Lindsay, John Turtle & Gary L. Wells, *Best Practice Recommendations for Eyewitness Evidence Procedures: New Ideas for the Oldest Way to Solve a Case*, 1 CANADIAN J. POLICE & SECURITY SERVICES 5, 10 (2003).

137. *See, e.g.*, Wells, *Police Lineups*, *supra* note 135, at 798.

the precise number of fillers police should use, and in the interest of caution, I have not classified procedures with two or more fillers as suggestive merely because of the small number of fillers, but it is certain that procedures using very few fillers increase the odds of misidentification.

Finally, I did categorize cases as involving unnecessarily suggestive procedures if a witness failed to identify a defendant at a pre-trial identification procedure but then identified the defendant in court for the first time,[138] or if a witness identified a defendant in court for the first time after police failed to conduct any pre-trial identification procedure at all. Although the Supreme Court has not definitively determined whether *Manson* applies to cases in which police never used a suggestive pre-trial procedure or failed to conduct any pre-trial identification procedure,[139] it has said that *Manson* applies both to pre-trial and in-court identification evidence.[140] And courts have frequently applied *Manson* analysis even to the second situation in which the first attempted identification was in court.[141] Moreover, both situations above are clearly unnecessarily suggestive. In-court identifications almost invariably amount to showups,[142] for it is generally clear to the witness where the defense table is located and who the defendant is, and to allow witnesses to make such identifications after having failed to identify the defendant from a lineup or after police failed to conduct any lineup at all is undeniably both suggestive and unnecessary.

Of course, with the guidelines I used, I have refrained from classifying many procedures as being unnecessarily suggestive even though many

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138. At least one court has held this scenario to be unnecessarily suggestive even when the pre-trial procedure itself was apparently flawless. United States v. Beeler, 62 F. Supp. 2d 136, 140-45 (D. Me. 1999) (granting defendant's motion to suppress in-court identification in case in which witness failed to identify defendant from a pre-trial photo array, and finding that although the photo array was not suggestive, allowing an in-court identification after a failed attempt to identify the perpetrator from a photo array in which defendant's picture appeared would be impermissibly suggestive in itself).

139. Nash v. Ercole, 2009 WL 2778247, *11 (S.D.N.Y. 2009).

140. *Manson*, 432 U.S. at 106-07 n.9.

141. *See, e.g.*, United States v. Hawkins, No. 96-4914, 1997 WL 328708, at *1-2 (4th Cir. June 17, 1997) (finding no due process violation in case in which witnesses identified defendant at trial without having attended any pre-trial procedure and in which one witness was shown a mugshot of defendant before testifying); United States v. Kime, 99 F.3d 870, 882-83 (8th Cir. 1996) (finding no impermissible suggestiveness in case in which witness identified defendant for the first time in court); United States v. Hill, 967 F.2d 226, 229-333 (6th Cir. 1992) (assuming without deciding that in-court identification over five years after the crime, by a witness who had never previously identified defendant, was unnecessarily suggestive but finding the identification evidence reliable under the totality of the circumstances); Chapman v. Meachum, 790 F. Supp. 63, 66-68 (D. Conn. 1992) (finding no due process violation in case in which witness identified petitioner for the first time in court, and witness had not attempted to identify petitioner at any pre-trial procedure).

142. *See, e.g.*, Ralph Norman Haber & Lyn Haber, *Experiencing, Remembering, and Reporting Events*, 6 PSYCHOL. PUB. POL'Y & L. 1057, 1082 (2000); Evan J. Mandery, *Due Process Considerations of In-Court Identifications*, 60 ALB. L. REV. 389, 390 (1996); Sandra Guerra Thompson, *Eyewitness Identifications and State Courts as Guardians Against Wrongful Conviction*, 7 OHIO ST. J. CRIM. L. 603, 627 (2010).

scientists would very reasonably argue the procedures were impermissibly flawed. Nonetheless, by exercising such caution in my classification, I hope to avoid any reasonable criticism that I have taken liberty with the available science. Every procedure I classified as unnecessarily suggestive involved characteristics universally agreed in the scientific community to reduce the reliability of identification evidence and every one was unaccompanied by explanations of why a more reliable technique could not have been substituted. Finally, to account for all suggestive identifications, I included a separate category for identifications, other than on-the-scene showups, that were clearly suggestive but that would be difficult to classify as "unnecessarily" suggestive, reflected in variable E) above. Such cases generally did not involve law enforcement officials actively mishandling identification procedures and often included witness exposure to media reports that identified defendants as suspects.[143]

The results certainly fail to account for many cases in which police used flawed identification procedures. First, as noted, I took a conservative approach to classifying procedures as "unnecessarily suggestive." Second, reading judicial opinions provides no means of independently assessing conflicting arguments about whether the appearance of lineup fillers caused a defendant to stand out. When a defendant made such a claim and a court disagreed with the defendant's contention, then, absent any other objective indicia, I was unable to reach my own conclusion. Third, it is often difficult to ascertain whether a procedure was suggestive after the fact because there is usually no record of subtle forms of suggestion from administrators of identification procedures, such as non-verbal cues about the identity of a suspect.[144] Finally, in the vast majority of the cases in the data set, courts simply did not address some of the most common and fundamental flaws in identification procedures, perhaps because defense counsel failed to raise objections to them. For example, in only one case of the 1,471 in the data set was it clear from reading the opinion that part of the defendant's argument was that pre-trial identification procedures had been suggestive because police failed to use double-blind administration of a lineup or photo array.[145] Yet, as mentioned

143. *See, e.g.*, Figueroa v. Comm'r of Corr., 596 F. Supp. 2d 482, 488-90 (D. Conn. 2009) (finding no due process violation in case in which victim was unable to identify petitioner from a photo array, and victim identified petitioner from a second photo array after seeing his picture in the newspaper along with an article identifying him as the perpetrator of a sexual assault); Gary v. Schofield, 336 F. Supp. 2d 1337, 1374-76 (M.D. Ga. 2004) (finding identification evidence reliable in case in which rape victim identified petitioner seven years after the crime after seeing him on television in police custody).

144. Wells & Quinlivan, *supra* note 3, at 15.

145. United States v. Boston, 494 F.3d 660, 666 (8th Cir. 2007) (finding no requirement of blind administration of identification procedures in a case in which defendant challenged admission of evidence from a photo array in part because the officer who administered the procedure had extensive involvement with the case).

above, the norm in the United States is for law enforcement officials familiar with a case to administer identification procedures for that case.[146] This is a strong indication that defense lawyers are not adequately attacking the use of flawed procedures. Ultimately, in any case, although the information from the 1,471 cases in the data set reveals a large number of cases in which police used tainted procedures, the results, without doubt, underestimate the total percentage of cases involving unnecessarily suggestive identification techniques.

In addition to noting whether each case involved discernibly imperfect identification procedures, I documented all cases in which the opinions revealed that an eyewitness's certainty went up after exposure to suggestive procedures. In light of the abundance of experimental data demonstrating that suggestive procedures artificially enhance eyewitness certainty,[147] this investigation offered potential to confirm those results with information from a large number of actual cases. Again, the conclusions are conservative, as they certainly fail to take account of some cases in which witnesses' certainty increased after viewing suggestive procedures. As discussed above, in many cases police do not take certainty statements at the time of pre-trial identification techniques.[148] Thus, it is often impossible to know for sure how confident witnesses were when they made their initial identifications, and sometimes a court's first indication of a witness's confidence comes during the witness's testimony.

Although psychological experiments have demonstrated that witnesses' memories of their opportunities to view perpetrators at the time of a crime and of the degree of attention they paid to perpetrators during crimes also increase artificially in the wake of suggestive identification procedures,[149] this research does not account for those variables. First, although some aspects of a witness's memory of her opportunity to view are likely to inflate in the wake of suggestive identification techniques, others are not. For example, confirming feedback after an identification procedure distorts a witness's memory of the quality of the view she had but not of the length of time she had to view the perpetrator or her distance from the perpetrator at the time of the crime.[150] This increased the complexity of any potential effort to meaningfully categorize cases in which a witness

146. Findley, *supra* note 66, at 103; Nilon & Sonenshein, *supra* note 51, at 271; Wells & Quinlivan, *supra* note 3, at 8.

147. Neuschatz et al., *supra* note 70, at 441 (describing effects of post-identification confirming feedback); Wells et al., *supra* note 3, at 635; Wells & Bradfield, *supra* note 70, at 366-67 (describing effects of post-identification confirming feedback); Gary L. Wells, Sheila M. Rydell & Eric P. Seelau, *The Selection of Distractors for Eyewitness Lineups*, 78 J. APPLIED PSYCHOL., 835, 840 (1993)

148. Wells & Quinlivan, *supra* note 3, at 18.

149. *See generally* Douglass & Steblay, *supra* note 70; Neuschatz et al., *supra* note 70, at 441 (2005); Wells & Quinlivan, *supra* note 3, at 9-12; Wells & Bradfield, *supra* note 70.

150. Douglass & Steblay, *supra* note 70, at 864.

remembered having had a better opportunity to view a perpetrator after suggestion as a likely result of that suggestion.

Furthermore, it is much less common for there to be any pre-trial information concerning a witness's degree of attention than concerning a witness's certainty. The witness's degree of certainty is, by definition, a post-crime metric, and the pre-trial identification procedure is an event independent of the crime at which at least the witness and an administrator are present to gauge that certainty. Though suggestiveness in such procedures is likely to distort a witness's recollection of his certainty,[151] and though administrators' memories about witnesses' pre-trial certainty may also be flawed, there are often, nonetheless, at least two witnesses available (the eyewitness herself and the administrator) to provide some evidence of how confident the witness was at the time of an initial identification attempt. In fact, in the cases in which the data reveal enhanced certainty, it is just such testimony that provides evidence of increased confidence. On the other hand, the opinions generally reveal no indication of witnesses' accounts of their degrees of attention before the commencement of judicial proceedings, making it difficult to know whether witnesses recollected having paid more attention at the time of the crime after viewing suggestive procedures.

It is for precisely this reason that it is important, as I suggested above, and in a previous article, for law enforcement to take official statements of witnesses' senses of their opportunities to view and degrees of attention at the time of a crime at or before conducting identification procedures.[152] Only by doing so can courts assess whether witnesses have likely experienced inflated memories in response to suggestion. Similarly, as many scholars have previously argued, police should take certainty statements at the time of pre-trial identification procedures to help courts determine whether confidence went up as a result of improper suggestion.[153]

In this regard, I also accounted for all cases in the data set in which it was clear that courts placed primary importance on a witness's expressions of certainty after the witness had already been exposed to allegedly suggestive identification procedures, or, alternatively, at the time of a suggestive identification procedure but after an increase in the witness's certainty. In the first case, courts measuring certainty at a point after a suggestive confrontation have likely misread *Manson*, compounding the problems inherent in the Supreme Court's flawed analysis. In *Manson* itself, the Court stated that courts applying *Manson* should consider "certainty

151. *See generally*, Douglass & Steblay, *supra* note 70; Neuschatz et al., *supra* note 70, at 441 (2005); Wells & Bradfield, *supra* note 70; Wells & Quinlivan, *supra* note 3, at 9-12.

152. Kahn-Fogel, *supra* note 20, at 296-97.

153. *See, e.g.*, Nilon & Sonenshein, *supra* note 51, at 274; Nancy K. Steblay, *Maintaining the Reliability of Eyewitness Evidence: After the Lineup*, 42 CREIGHTON L. REV. 643 (2006); Wells et al., *Eyewitness Identification Procedures*, *supra* note 46, at 635.

demonstrated at the confrontation."[154] Presumably, then, Justice Blackmun meant that courts should consider witnesses' certainty at the time of the initial, pre-trial identification, understanding that such certainty might subsequently increase as a result of suggestion and reinforcement from law enforcement officials.[155] Nonetheless, even courts ostensibly gauging witness certainty at the time of the pre-trial procedure often rely on a witness's subsequent testimony about his previous certainty.[156] As numerous experiments have shown, witnesses exposed to suggestion are likely not only to have higher degrees of confidence in their identifications afterward, but they are also likely to remember having had greater levels of certainty even at the initial pre-trial procedures.[157] Yet the Supreme Court has never clarified this issue or given lower courts any explicit guidance on how to apply the certainty factor in a way that comports with the science.

It is unlikely that the *Manson* court explicitly considered the second scenario in which a witness may have viewed a non-suggestive procedure initially and then identified a defendant with increased certainty upon viewing a subsequent, suggestive procedure. In this situation, however, it would make little sense to use the witness's greater certainty at the second procedure, the suggestiveness of which is likely to have caused the enhancement of the witness's confidence, as a measure of the reliability of the identification evidence. Again, however, the Supreme Court has never clarified or addressed the issue since *Manson*.

Again, the approach to classification of the data was conservative. If, for example, a court mentioned a witness's certainty at trial but also discussed pre-suggestion certainty levels and did not seem to place primary importance on the latter expression, I did not categorize the case as involving primary reliance on post-exposure certainty. This process necessarily involved some subjective judgments. Again, I also did not account for cases in which courts measured opportunity to view and degree of atten-

154. *Manson*, 432 U.S. at 114.

155. Wells & Quinlivan, *supra* note 3, at 18.

156. *See, e.g.*, Jells v. Mitchell, 538 F.3d 478, 511-13 (6th Cir. 2008) (finding lineup impermissibly suggestive because petitioner was by far the youngest participant and because he was the only participant wearing a jail jumpsuit while all the other participants wore street clothes, but finding the state court's determination that the identification was reliable to be reasonable, and relying in part on witness's testimony at trial that he had been certain at the time of his pre-trial identification to support reliability finding); United States v. Frank, 1998 WL 292320, at *1-5 (S.D.N.Y. 1998) (finding no due process violation in case in which one witness initially told police she did not get a good look at the perpetrator and viewed defendant's photo in a newspaper article and on television before identifying him from a lineup, and relying in part on witness's in-court testimony that she was certain at the time of her pre-trial identification to support conclusion that evidence was reliable); Easter v. Stainer, 1994 WL 173912, at *13-17 (N.D. Cal. 1994) (finding no due process violation in case in which a witness identified petitioner after seeing his photo in a newspaper along with an article describing his arrest, and relying on witness's testimony about his certainty in concluding that evidence was reliable).

157. *See, e.g.*, Wells & Bradfield, supra note 70, at 362; Douglass & Steblay, *supra* note 70, at 864-66.

tion after witnesses viewed suggestive procedures. First, as mentioned above, witnesses do not tend to experience inflated senses of their opportunities to view in some respects, even after exposure to suggestive identification procedures.[158] Moreover, opportunity to view is at least partially an objective inquiry, determinable with reference to data that is frequently verifiable, such as lighting conditions and approximate distance between a witness and a perpetrator. In other words, courts often make determinations about a witness's opportunity to view by assessing data other than the witness's own assertions, and this kind of assessment is frequently mixed with subjective self-reports of opportunity to view in ways that are difficult to untangle. Finally, scientists and scholars have not broadly emphasized the importance of recording witnesses' beliefs about their opportunities to view and degrees of attention before exposure to suggestive procedures, giving courts less reason to know of the importance of such measures.[159] In any case, the cases in which courts measured certainty after allegedly suggestive procedures give an indication of the likelihood of courts to take account of witnesses' subjective accounts at times when suggestion is likely to have distorted their memories. Together with the cases in which courts held that unnecessarily suggestive procedures were not improper, the cases in which courts measured certainty after exposure to possible suggestion provide a glimpse of the extent to which courts applying *Manson* have done so in ways contrary to uncontroverted scientific evidence and likely to lead to admission of unreliable evidence.

Lastly, I accounted for all cases in the data set in which courts used *Manson* to prohibit witnesses from identifying defendants in court or, on appeal, held that a lower court should have suppressed an in-court identification. In some cases, courts applying *Manson* suppressed evidence of pre-trial identifications but allowed the witness or witnesses to make in-court identifications.[160] However, given that the only truly effective means of shielding a defendant from a tainted pre-trial identification procedure is to suppress both evidence of the pre-trial procedure and the in-court identi-

158. Douglass & Steblay, *supra* note 70, at 859.

159. *But see* Kahn-Fogel, *supra* note 20, at 296-97; Wells & Quinlivan, *supra* note 3, at 20.

160. *See, e.g.*, Dooley v. Duckworth, 832 F.2d 445, 447-50 (7th Cir. 1987) (finding no due process violation in allowing in-court identification of petitioner, despite suppression of evidence from a pre-trial lineup the state had agreed was impermissibly suggestive); United States v. Goodman, 797 F.2d 468, 469-71 (7th Cir. 1986) (upholding determination that in-court identification was admissible despite suppression of an unnecessarily suggestive pre-trial identification in which witness identified defendant from a photo array after postal inspector told witness that suspects were in custody and that witness's property had been recovered, and witness had seen all other photos in the array from a previous array that did not contain defendant's picture); Dove v. New Jersey, No. 08-3215, 2010 WL 323509, at *14-15 (D.N.J. Jan. 20, 2010) (denying habeas relief in a case in which a New Jersey court had suppressed an impermissibly suggestive pre-trial photo showup but admitted the in-court identification).

fication itself,[161] I systematically coded only cases in which courts suppressed an in-court identification.[162]

In coding the data, I took measures to determine whether the type of case had an effect on outcome. To that end, I marked the last decade of habeas corpus decisions separately. Since 1996, the Anti-Terrorism and Effective Death Penalty Act (AEDPA) has prohibited habeas courts from overturning convictions unless they determine the convicting court's decision to have been either contrary to clearly established federal law, as established by the Supreme Court, or, alternatively, an unreasonable application of such law.[163] In 2000, in *Williams v. Taylor*, the Supreme Court, interpreting the AEDPA, made clear that a habeas court cannot overturn a conviction as resulting from an "unreasonable application" of federal law simply because the habeas court disagrees with the convicting court's interpretation of that law; rather, the habeas court may grant relief only if it determines the convicting court's decision to have been objectively unreasonable.[164] This standard, although ambiguous, clearly abolished the previous approach in which habeas courts could conduct de novo review of convicting courts' legal decisions, and it bound habeas courts to uphold even some decisions they believe to have been incorrectly decided.[165] Under such circumstances, one might reasonably argue that modern habeas decisions addressing *Manson* claims do not represent true application of the *Manson* standard. To account for the possible effect of the AEDPA and *Williams* on recent decisions in which habeas courts reviewed *Manson* claims, I coded post-*Williams* habeas decisions separately.

Similarly, I examined criminal appeals separately. If, as scholars have suggested, courts rarely rule that eyewitness evidence should be suppressed,[166] one would expect the majority of appeals to involve claims in which a district court already determined the eyewitness evidence was admissible and, possibly, for the suppression rate to be lower in this group

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161. *See, e.g.*, LOFTUS, *supra* note 109, at 19; Rosen, *supra* note 107, at 249.

162. My final accounting of suppression cases also includes one case in which the court held the pre-trial identification evidence to be unduly suggestive and unreliable, and the witness himself had said he could not identify the defendant in court, thus effectively precluding admission of all of the identification evidence. United States v. Palmieri, 623 F. Supp. 405, 407-09 (S.D.N.Y. 1985) (holding that evidence of pre-trial photo identification must be suppressed in case in which a detective conducted an unduly suggestive photo showup at which he told the witness the picture was of the defendant, indicating to the witness that defendant was the culprit, the witness had a limited opportunity to view the culprit at the time of the crime, and the witness subsequently could not identify defendant as the culprit).

163. 28 U.S.C. § 2254(d)(1) (2006).

164. Williams v. Taylor, 529 U.S. 362, 409 (2000).

165. Adam N. Steinman, *Reconceptualizing Federal Habeas Corpus for State Prisoners: How Should AEDPA's Standard of Review Operate after* Williams v. Taylor, 2001 WIS. L. REV. 1493, 1505 (2001).

166. *See, e.g.*, ELIZABETH F. LOFTUS & JAMES M. DOYLE, EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL (1997); Wells & Quinlivan, *supra* note 3, at 1.

of cases. Therefore, it was worth determining whether these cases yielded a different suppression rate from the rest of the data set.

It is important to acknowledge the potential for selection bias in the data set. As several authors have noted in the context of studies of civil cases, the Westlaw database provides an incomplete record because the vast majority of cases are not published on the website.[167] If there were reason to believe the criminal cases available on Westlaw are unrepresentative of the kinds of claims defendants raise in challenging eyewitness evidence or of the manner in which courts dispose of those claims, then conclusions drawn from those cases would be questionable. In considering the rate at which courts suppress eyewitness evidence, for example, it is worth noting the federal prohibition on interlocutory prosecutorial appeals of evidentiary rulings after jeopardy has attached.[168] This prohibition decreases the likelihood of seeing prosecutorial appeals of trial-court suppressions, given that some trial courts rule on the admissibility of eyewitness evidence during trial, rather than at pre-trial hearings.[169] Therefore, in cases in which trial courts ruled after jeopardy attached that identification evidence should be suppressed, if the trial court did not publish an opinion, there would be no record of that suppression on Westlaw. This is because, if the defendant were acquitted, double jeopardy would prevent the prosecutor from appealing the ruling.[170] If the defendant were convicted, the prosecutor would have no incentive to do so.[171] Thus, data from the appellate cases might under-represent, to some extent, the overall rate at which federal courts suppress eyewitness identification evidence. Similarly, however, there is no way of knowing how many judicial refusals to suppress evidence never ended up in published opinions that Westlaw catalogued.

Furthermore, the primary analysis in this article is limited to federal cases, even though the majority of cases that have cited *Manson* are state cases.[172] In that regard, there may be reason to believe the cases in the

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167. *See, e.g.*, Stephen M. Bainbridge, *Abolishing Veil Piercing*, 26 J. CORP. L. 479, 505 (2001); Jessica Erickson, *Corporate Governance in the Courtroom: An Empirical Analysis*, 51 WM. & MARY L. REV. 1749, 1753 (2010); Richmond McPherson & Nader Raja, *Corporate Justice: An Empirical Study of Piercing Rates and Factors Courts Consider When Piercing the Corporate Veil*, 45 WAKE FOREST L. REV. 931, 942-43 (2010).

168. 18 U.S.C. § 3731 (2006).

169. *See* Watkins v. Sowders, 449 U.S. 341 (1981) (holding there is no constitutional right to a pre-trial hearing to determine the admissibility of eyewitness identification evidence).

170. *See* Scott J. Shapiro, Note, *Reviewing the Unreviewable Judge: Federal Prosecution Appeals of Midtrial Evidentiary Rulings*, 99 YALE L.J. 905 (1990).

171. *Id.*

172. Between the issuance of the *Manson* opinion and January 31, 2010, state courts cited *Manson* in 3,294 cases available on Westlaw. In a 2009 survey of 96 state appellate decisions considering admissibility of eyewitness evidence, Professor Sandra Thompson noted that several of the cases involved flawed judicial analysis, including failure to characterize as unduly suggestive police telling a witness they had arrested a suspect and failure to condemn post-identification, confirming feedback by police. Sandra G. Thompson, *Judicial Blindness to Eyewitness Misidentification,* 93 MARQ. L. REV.

study, to the extent they might be unrepresentative, over-represent the quality of judicial decision-making in eyewitness cases; the jurisprudence of federal judges may be of greater quality than that of state judges because the higher prestige associated with federal judgeships and the rigors of Senate confirmation may lead to better qualified candidates for those positions.[173] Additionally, the elected status of many state judges may create popular pressure to be "tough on crime" and may detract from judicial independence.[174]

### *B. Analysis and Conclusions*[175]

For many years, scientists and legal scholars have asserted that courts conducting *Manson* analysis rarely suppress identification evidence.[176] Data from the federal cases that have applied *Manson* in the thirty-three years after the decision confirm those assertions. In fact, of the 1,471 cases in the data set, federal courts prevented eyewitnesses from making in-court identifications or held that lower courts should have done so, only fifty-two times, or 3.54% of the cases.[177] Isolating data only from criminal appeals, the results are very similar, with eleven suppressions in 359 cases, a 3.06% suppression rate. Amongst the 200 criminal trial court opinions, there were also eleven suppressions, a 5.5% suppression rate. Of course, these figures alone do not demonstrate problems with *Manson*. It could, for example, have been the case that the vast majority of defendants in the data set were challenging procedures that were not truly flawed. Alternatively, it could have been the case that, even if there were some suggestive components of most challenged procedures, there was usually strong evidence of reliability.

Yet the federal cases reveal troubling trends. First, in at least 840 (57.10%) of the cases, defendants challenged undeniably suggestive procedures. Thus, even in cases where defendants contested procedures that

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639, 661-62 (2009).

173. In an empirical analysis by Stephen Choi, G. Mitu Gulati, and Eric Posner, the authors, who noted that judges face some kind of election in 38 states, concluded that appointed judges write higher quality opinions, as measured by number of out-of-state citations. Stephen J. Choi, G. Mitu Gulati & Eric A. Posner, *Professionals or Politicians: The Uncertain Empirical Case for and Elected Rather than Appointed Judiciary*, 26 J. L. ECON. & ORG. 290, 315-16 (2010).

174. At least one study has concluded that appointed judges decide cases more favorably toward criminal defendants than elected judges. DANIEL R. PINELLO, THE IMPACT OF JUDICIAL-SELECTION METHOD ON STATE SUPREME COURT POLICY: INNOVATION, REACTION, AND ATROPHY (1995).

175. All of the case data supporting the analysis and conclusions in this section are on file with the author and are available for inspection.

176. *See, e.g.*, LOFTUS & DOYLE, *supra* note 166; Wells & Quinlivan, *supra* note 3, at 1.

177. In addition to *Palmieri*, 623 F. Supp. 405, in which the court suppressed pre-trial evidence and the witness himself said he was unable to make an in-court identification, the fifty-two suppression cases include nine cases in which an appellate court held the identification evidence should have been suppressed but that the error was harmless or a habeas court held the identification evidence should have been suppressed but that the error had no "substantial and injurious effect."

unquestionably reduce the likelihood of accurate identification, courts chose to suppress in-court identifications only 6.19% of the time. To accommodate the notion that some on-the-scene showups may be suggestive, but not "unnecessarily" so and to address the perspective of some courts that identifications resulting from media reports and other identifications lacking state action do not raise due process concerns,[178] it is worth examining as well only cases in which an identification procedure was incontrovertibly unnecessarily suggestive in a manner that raised due process concerns. These cases include all cases in which reviewing courts themselves determined a procedure to have been improper and all cases in which courts failed to make such determinations but that nonetheless involved procedures universally agreed in the scientific community to be suggestive, without any possible justification for the suggestiveness, as described above in the methodology section. Accordingly, at least 627 of the cases (42.62%) involved unnecessarily suggestive procedures. Yet, even amongst these cases, courts suppressed in-court identification evidence only 8.29% of the time. In other words, most cases in the data set involved defendants with legitimate claims that eyewitnesses had identified them under suspect circumstances, and a large percentage involved incontrovertibly unnecessarily suggestive procedures, yet in the vast majority of those cases, courts failed to prevent eyewitnesses from identifying defendants in court.

Even in cases in which courts using *Manson* to evaluate eyewitness evidence agreed with defendants that identification procedures had been unnecessarily suggestive, the courts were very unlikely to prevent eyewitnesses from making in-court identifications. In 288 cases (19.57% of the data set), courts found the identification procedures used to have been un-

178. *See, e.g.*, United States v. Peele, 574 F.2d 489, 490-91 (9th Cir. 1978) (finding the due process balancing test inapplicable in a case in which one witness viewed a newspaper photo of defendant and an article describing his apprehension before identifying him in a lineup, and the witness stated that the newspaper photo had aided her in her identification); D'Alessandro v. MacFarland, No. Civ.A.04-6128 2006 WL 2226330, at *3-6 (D.N.J. Aug. 3, 2006) (finding no due process violation in case in which one witness tentatively identified petitioner from a photo array and then positively identified him in court and a second witness failed to identify petitioner from a photo array but identified him positively in court after seeing his photo in a newspaper article about the robbery, which the court held could not lead to suppression because there was no state action); United States v. Edwards, 816 F. Supp. 272, 279 (D. Del. 1993) (finding that witness's viewing of a single photo of defendant committing an unrelated credit card fraud could not be unduly suggestive because there was no state action). *But see* United States v. Bouthot, 878 F.2d 1506, 1513-16 (1st Cir. 1989) (holding that, because due process in the identification context concerns the fairness of the trial, all suggestive identification procedures, rather than only those involving state action, trigger the due process inquiry). On May 31st, 2011, the Supreme Court accepted certiorari on a case raising the issue of whether due process concerns arise in eyewitness cases lacking state action. Perry v. New Hampshire, Case No. 2009-0590 (N.H. 2010) *cert. granted*, 80 U.S.L.W. 3237 (U.S. May 31, 2011) (No. 10-8974). On January 11, 2012, the Court issued its opinion, holding that due process does not require preliminary judicial inquiry into the reliability of eyewitness identification evidence obtained "without the taint of improper state conduct." Perry v. New Hampshire, 132 S. Ct 716, 728 (2012).

necessarily suggestive. This represents 45.93% of cases in which the opinions reveal definitively that unnecessarily suggestive procedures were, in fact, used. Yet the fifty-two suppressions represent only 18.05% of those 288 cases. Thus, in the thirty-three years of decisions since *Manson*, even after deciding an eyewitness identified a defendant through improper procedures, there has been a greater than 80% chance that federal courts would not suppress in-court identification evidence.

Table 1 below summarizes much of the data described above.

*Table 1*

| | Number of Cases/% of Total Data set | Suppression Cases as a Percentage of Cases in Previous Column |
|---|---|---|
| Cases in Data set | 1471/NA | 3.54 |
| Some Element of Suggestion Apparent from Reading of Opinion | 840/57.10 | 6.19 |
| Clear Evidence of Unnecessary Suggestiveness by Objective Standards | 627/42.62 | 8.29 |
| Court Held Procedures Unnecessarily Suggestive | 288/19.57 | 18.05 |

It was also troubling to note that many of the cases seemed to confirm scientific experiments showing that eyewitness certainty increases as a result of suggestive identification procedures. In 180 of the cases (12.23% of the data set), the opinions showed definitively that an eyewitness's certainty in her identification increased after exposure to suggestive identification techniques. This figure represents 21.42% of all cases in which witnesses had indisputably been exposed to some form of suggestion.

Nonetheless, one might question whether suppression was warranted in these cases. After all, the Supreme Court decided in *Manson* that use of unnecessarily suggestive procedures should not require suppression of identification evidence unless that evidence is also unreliable under the totality of the circumstances. Putting aside the wealth of scientific evidence demonstrating the unreliability of *Manson*'s reliability factors, the data still reveal serious flaws in the manner in which courts have evaluated *Manson* claims. First, in 130 of the cases (8.83% of the data set), courts reviewing *Manson* claims specifically found that unnecessarily suggestive procedures were not improper. The figure represents 20.73% of all cases.

involving indisputably unnecessarily suggestive procedures. This alone is deeply troubling. By finding unnecessarily suggestive procedures not to be unnecessarily suggestive, courts preclude the possibility of suppression, for under most interpretations of *Manson*, suppression is not available to a defendant unless the procedure was unnecessarily suggestive *and* the evidence is unreliable.[179] Moreover, by regularly finding defective procedures to be acceptable, courts fail to provide any guidance to police that might steer them toward best identification practices, let alone provide effective deterrence against use of unsound identification procedures.

Related to this problem, in 221 of the cases (15.02% of the data set), courts failed to decide definitively whether an indisputably unnecessarily suggestive procedure was improper. This figure represents 35.24 % of all cases involving unnecessary suggestion. While it is true that *Manson* does not formally require courts applying its analysis to make clear determinations on suggestiveness, courts that fail to do so seriously undermine what little positive influence *Manson* might have on the identification practices law enforcement officials employ. The Supreme Court could strengthen protection for defendants facing defective procedures simply by requiring courts to make clear rulings on suggestiveness before moving on to reliability analysis. Combining the two variables, including one case in which they overlapped, courts in 350 of the federal cases either specifically held an unnecessarily suggestive procedure to be adequate or failed to make a definitive determination, representing 55.82 % of cases involving indisputably unnecessarily suggestive procedures.

In addition to these problems, in 141 of the cases (9.58% of the data set) it was clear that courts placed primary importance on a witness's assertion that he was certain in his identification after the witness had already encountered procedures the defendant challenged as suggestive. In twenty-two of the cases in which courts measured certainty after alleged suggestiveness, I could not independently verify that the procedures were, in fact, suggestive. Nonetheless, the remaining 119 cases comprise 14.16% of all cases in which the opinions reveal some suggestive aspect. In other words, in almost one out of seven cases in which courts dealt with incontrovertibly suggestive identification techniques, those courts measured certainty at a time when suggestion was likely to have artificially enhanced a witness's confidence in his identification.

In forty-eight of those 141 cases (3.26% of the total data set), it was also clear that the witness's certainty had, in fact, increased after the suggestion. None of those cases involved suppression. That is, in 3.26% of cases, the opinions show that a witness's certainty went up after exposure to a flawed procedure, and the court reviewing the identification evidence

179. *See, e.g.*, *Lawson*, 410 F.3d at 739; *Rogers*, 387 F.3d at 937; *Williams*, 340 F.3d at 563.

then cited the latter expression of enhanced certainty to support a conclusion that the evidence was reliable. The figure represents a somewhat larger percentage (5.71%) of cases in which some suggestiveness was evident from the opinion itself.

A much higher percentage of cases involved some discernible error on the part of courts assessing *Manson* claims. After accounting for cases in which the two variables overlapped, there were 248 cases in the data set in which courts either held an unquestionably unnecessarily suggestive procedure to be acceptable or made a primary measure of certainty after a witness had faced alleged suggestion or both. This figure represents 16.85% of the total data set. Again, in twenty-two of the cases in which courts measured certainty after claimed suggestion, I could not verify definitively that the procedures in question had been flawed. Nonetheless, even counting only the remaining 226 cases in which clear suggestion was present, this figure represents 26.9% of cases in which the opinion revealed some element of suggestiveness. In more than one out of four cases involving clear suggestiveness, that is, the opinions themselves reveal that federal courts applied *Manson*'s reliability test in a manner that undermines the integrity of the process and increases the likelihood of wrongful conviction, even disregarding scientific evidence about the intrinsic value of the reliability factors themselves.

Table 2 summarizes data on witness certainty and judicial errors in applying *Manson*.

*Table 2*

| | Number of Cases/% of Total Data set | Cases in Previous Column as a Percentage of Cases in Which Some Suggestiveness was Evident from Opinion |
|---|---|---|
| Witness Certainty Increased After Exposure to Suggestion | 180/12.23 | 21.42 |
| In Conducting Reliability Analysis, Court Relied on Witness's Certainty After Exposure to Alleged Suggestion | 141/9.58 | 14.16 percent when including only cases in which suggestion was verifiable from reading opinion. |

| | | |
|---|---|---|
| Certainty Increased After Suggestion AND Court Relied on Subsequently Enhanced Certainty to Support Reliability Finding | 48/3.26 | 5.71 |
| Court Held that Unnecessarily Suggestive Procedures Were Not Unnecessarily Suggestive | 130/8.83 | 15.47 (20.73 percent of cases involving unnecessarily suggestive procedures) |
| Procedures Were Unnecessarily Suggestive, but Court Failed to Make Any Definitive Determination on the Issue | 221/15.02 | 26.3 (35.24 percent of cases involving unnecessarily suggestive procedures) |
| Court Held Unnecessarily Suggestive Procedures Acceptable AND/OR Relied on Certainty After Alleged Suggestion in Conducting Reliability Analysis. | 248/16.85 | 26.9 percent when including only cases from previous column in which suggestion was verifiable from reading opinion. |

It is worth emphasizing again that the figures are conservative. Without doubt, they underestimate the true number of cases in the data set in which certainty increased after suggestive procedures, and they disregard judicial treatment of witness expressions of opportunity to view and degree of attention. Recall also that the category of unnecessarily suggestive procedures does not include any on-the-scene showups that lacked other suggestive features, unless the reviewing court itself held the showup to be unnecessarily suggestive. In 170 additional cases in which police used on-the-scene showup identifications but there was no other clear evidence of unnecessary suggestion, courts evaluating the evidence did not find the procedures to be impermissibly suggestive. Many would argue that such procedures were improper, but in the interests of categorizing the data in a manner that would be accepted as broadly as possible, I did not classify these procedures as unnecessarily suggestive. Furthermore, in collecting the data from judicial opinions, there was no objective way to resolve a court's disagreement with a defendant's assertion that he stood out in some way in a lineup or photo array. Finally, it is impossible to account for

undocumented, subtle forms of suggestion in identification procedures with non-blind administrators, which comprise most identification procedures in the United States.[180]

Given mounting scientific evidence over the course of the last thirty-four years on the types of procedures that increase the odds of misidentification and on the limited value of reliability factors like eyewitness certainty, one might have expected to observe an increase in the quality of judicial decision-making during that time period. Unfortunately, that does not seem to have happened. First, the probability of suppression amongst cases in the data set declined significantly over time.[181] Although the probability of suppression was about 4% near the middle of the time period (1991-1995), it hovered around 7.66% near the beginning of the time period and was only about 2% near the end. Table 3 and Figure 1 below show the frequency of in-court suppressions between 1977 and 2010.

*Table 3: Suppressions by Year*

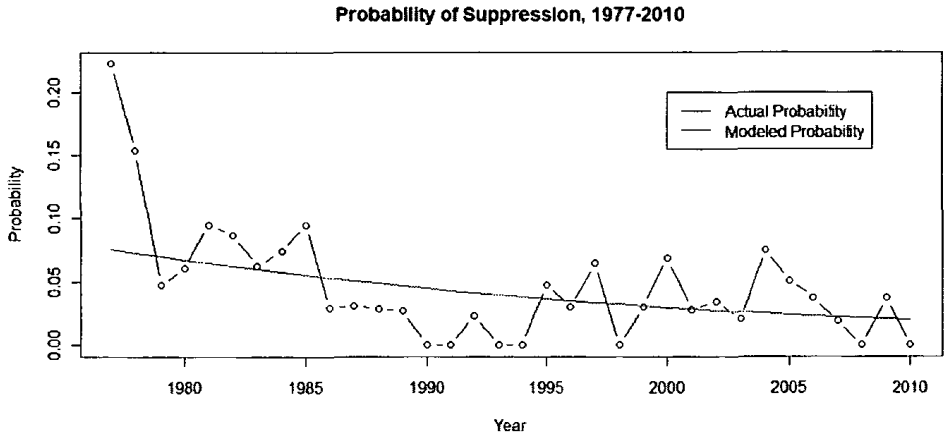
| Year | No Suppression | Suppression | Total |
|---|---|---|---|
| 1977 | 7 | 2 | 9 |
| 1978 | 22 | 4 | 26 |
| 1979 | 20 | 1 | 21 |
| 1980 | 31 | 2 | 33 |
| 1981 | 19 | 2 | 21 |
| 1982 | 21 | 2 | 23 |
| 1983 | 30 | 2 | 32 |
| 1984 | 25 | 2 | 27 |
| 1985 | 19 | 2 | 21 |
| 1986 | 33 | 1 | 34 |
| 1987 | 31 | 1 | 32 |
| 1988 | 34 | 1 | 35 |
| 1989 | 36 | 1 | 37 |
| 1990 | 38 | 0 | 38 |
| 1991 | 40 | 0 | 40 |
| 1992 | 42 | 1 | 43 |
| 1993 | 37 | 0 | 37 |
| 1994 | 32 | 0 | 32 |

180. Findley, *supra* note 66, at 3; Nilon & Sonenshein, *supra* note 51, at 271; Wells et al., *Eyewitness Identification Procedures*, *supra* note 46, at 627.

181. The best fitting logistic regression equation to test this trend was: $\ln(P/Q) = -3.1833 - .0429*(\text{Year} - 1993)$, where $P$ = Prob(Suppression), and $Q = 1 - P$. The slope (-.0429) is significantly negative, with a $P$-value of .002. This means that the log-odds ratio decreases, on average, about .0429 units per year.

| | | | |
|---|---|---|---|
| 1995 | 40 | 2 | 42 |
| 1996 | 32 | 1 | 33 |
| 1997 | 29 | 2 | 31 |
| 1998 | 42 | 0 | 42 |
| 1999 | 32 | 1 | 33 |
| 2000 | 28 | 2 | 30 |
| 2001 | 35 | 1 | 36 |
| 2002 | 28 | 1 | 29 |
| 2003 | 48 | 1 | 49 |
| 2004 | 37 | 3 | 40 |
| 2005 | 56 | 3 | 59 |
| 2006 | 103 | 4 | 107 |
| 2007 | 104 | 2 | 106 |
| 2008 | 144 | 0 | 144 |
| 2009 | 130 | 5 | 135 |
| 2010 | 14 | 0 | 14 |
| Total | 1419 | 52 | 1471 |
| | 96.46% | 3.54% | 100.00% |

*Figure 1*




To determine whether the declining percentage of suppressions over time might have resulted from some confounding variable, such as the stringent standard of recent habeas decisions or a coinciding decline in the number of cases involving suggestion, it was worth accounting for these possibilities. As discussed above, one might reasonably argue that habeas corpus decisions dealing with *Manson* after the passage of the AEDPA and *Williams* do not represent true application of *Manson*, since these habeas courts must uphold even some decisions of convicting courts with which

they disagree.[182] Nonetheless, these cases do not appear to have had a significant effect on the overall trend.

First, a logistic regression to test the effect of the 520 post-*Williams* habeas decisions in the data set demonstrates those cases had no significant influence on the trend of declining suppressions over time.[183] Although the probability of suppression was slightly lower for these cases, the p-value of 0.9954 for this value indicates the difference is very statistically insignificant. Therefore, the probability of suppression does not appear to depend on whether the case in question was a post-*Williams* habeas case.

Moreover, examination of only the 951 cases in the data set that were not post-*Williams* habeas decisions reveals a trend very similar to the suppression trend when examining all 1,471 cases in the data set.[184] In practical terms, near the middle of the time period, the probability of suppression in these cases was about 4%, but it was estimated to be 7.32% near the beginning of the time period and only 2.08% near the end. As when looking at all cases regardless of whether they were post-*Williams* habeas decisions, there is a lot of individual variability due to the small sample sizes in some years, but the general trend fit by the model is a significantly decreasing probability of suppression among the examined cases over the thirty-three-year period. Figure 2 below demonstrates the similarity in the models for all cases in the data set and a subset of the data including only cases that were not post-*Williams* habeas decisions.

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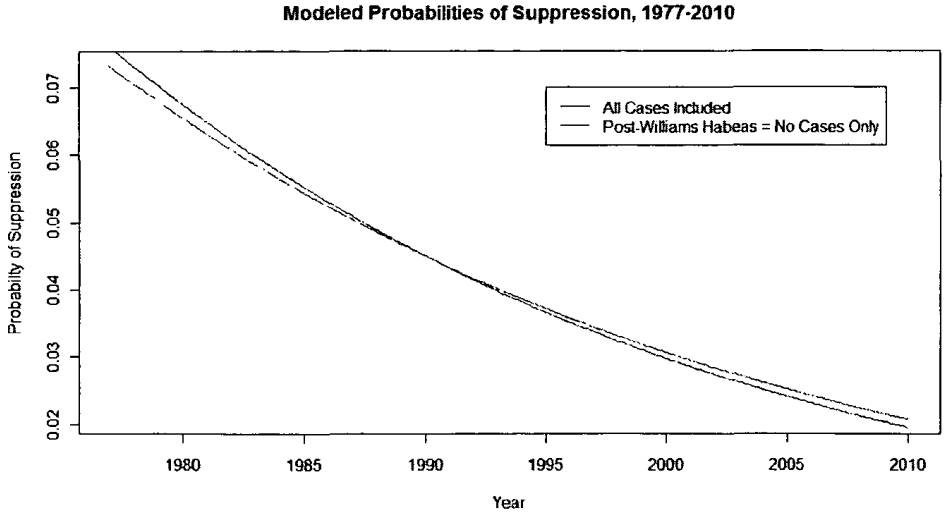
182. *Williams*, 529 U.S. at 409.

183. The best fitting logistic regression to test this influence was $\ln(P/Q) = -3.1852 - .0430 * (\text{Year} - 1993) - 0.0013 * (1 \text{ if Post-AEDPA Habeas} = \text{"Yes," } 0 \text{ otherwise})$, where $P$ = Prob(Suppression), and $Q = 1 - P$. The slope is significantly negative and very similar to the slope from the model in Figure 1, with a $P$-value of 0.022. The value of -0.0013 in this model means that if the case was a post-*Williams* habeas decision, the log-odds ratio was lower by 0.0013 units.

184. The best-fitting logistic regression equation for these 951 cases was $\ln(P/Q) = -3.1751 - .0398 * (\text{Year} - 1993)$, where $P$ = Prob(Suppression), and $Q = 1 - P$. The slope (-.0398) is significantly negative, with a $P$-value of .035. This means that the log-odds ratio decreases, on average, about .0398 units per year.

*Figure 2*




Additionally, a decrease in the percentage of cases clearly involving suggestive procedures does not account for the decreasing suppression rate. First, cases including some discernible element of suggestion did decrease significantly in the data set over time. As discussed above, these 840 cases included all cases in which there was some undeniably unnecessarily suggestive procedure (including cases in which courts recognized the impropriety of the procedure, cases in which courts held improper procedures acceptable, and cases in which courts did not definitively decide the issue), all cases in which police used an on-the-scene showup identification but the court did not conclude the identification was unnecessarily suggestive, and all other cases involving some element of suggestion difficult to characterize as "unnecessary." Table 4 below shows some evidence by eye of the declining incidence over time of cases evidencing some element of suggestion.

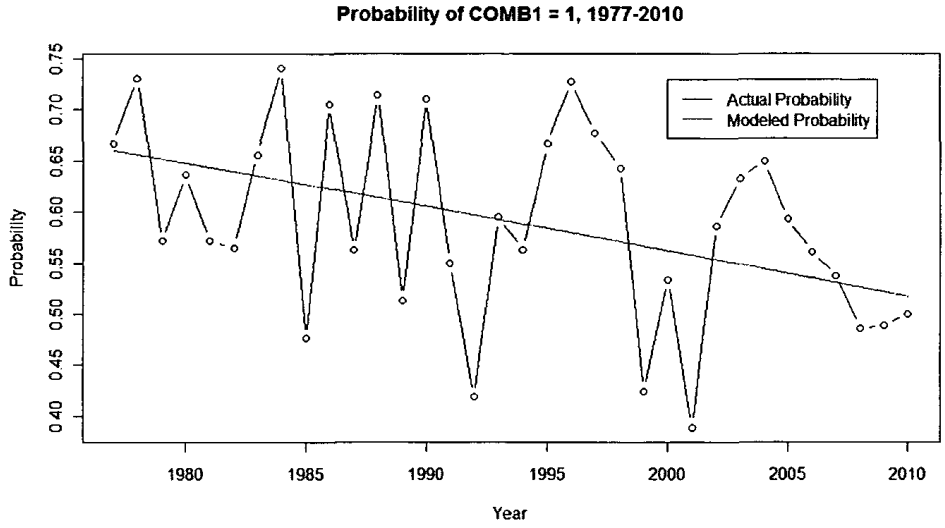
*Table 4*

| Some Element of Suggestion | | | |
|---|---|---|---|
| Year | N | Y | To |
| 1977 | 3 | 6 | 9 |
| 1978 | 8 | 18 | 26 |
| 1979 | 11 | 10 | 21 |
| 1980 | 17 | 16 | 33 |
| 1981 | 9 | 12 | 21 |
| 1982 | 13 | 10 | 23 |
| 1983 | 15 | 17 | 32 |

| Some Element of Suggestion | | | |
|---|---|---|---|
| Year | N | Y | To |
| 1984 | 9 | 18 | 27 |
| 1985 | 15 | 6 | 21 |
| 1986 | 14 | 20 | 34 |
| 1987 | 15 | 17 | 32 |
| 1988 | 15 | 20 | 35 |
| 1989 | 22 | 15 | 37 |
| 1990 | 18 | 20 | 38 |
| 1991 | 24 | 16 | 40 |
| 1992 | 30 | 13 | 43 |
| 1993 | 21 | 16 | 37 |
| 1994 | 19 | 13 | 32 |
| 1995 | 23 | 19 | 42 |
| 1996 | 15 | 18 | 33 |
| 1997 | 14 | 17 | 31 |
| 1998 | 21 | 21 | 42 |
| 1999 | 20 | 13 | 33 |
| 2000 | 20 | 10 | 30 |
| 2001 | 26 | 10 | 36 |
| 2002 | 18 | 11 | 29 |
| 2003 | 26 | 23 | 49 |
| 2004 | 23 | 17 | 40 |
| 2005 | 36 | 23 | 59 |
| 2006 | 66 | 41 | 10 |
| 2007 | 66 | 40 | 10 |
| 2008 | 92 | 52 | 14 |
| 2009 | 91 | 44 | 13 |
| 2010 | 9 | 5 | 14 |
| Total | 84 | 62 | 14 |

A logistic regression confirms the trend.[185] In practical terms, near the middle of the time period, the probability of a case in the data set involving verifiable suggestion was about 60%, but it was about 66% near the beginning of the time period and only about 52% near the end. Again, there is a lot of year-to-year variability due to the small sample sizes in some years, with the observed P ranging from 39% to 74%, but the general trend fit by the model is a significantly decreasing probability of cases involving clearly suggestive elements (among the examined cases) over the 33-year period. This variability and the overall trend can be seen in Figure 3 below.

*Figure 3*



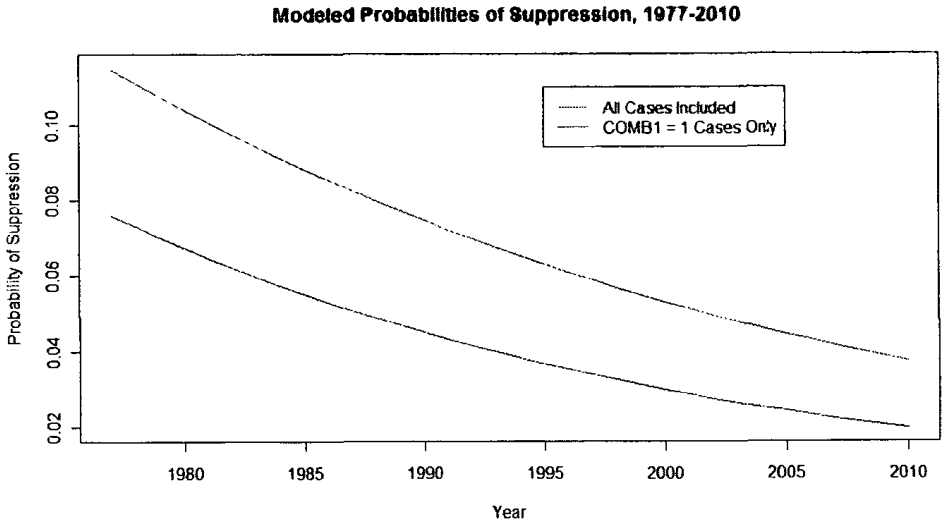

Nonetheless, even isolating only the 840 cases in which suggestion was evident, courts were significantly less likely to suppress in-court identification evidence as time went on.[186] While the probability of suppression in cases involving verifiable suggestion was about 6.7% near the middle of the time period, it was approximately 11.5% near the beginning of the time period and only about 3.7% near the end. As when examining the suppression trend for all cases regardless of suggestiveness, there is a lot of individual variability due to the small sample sizes in some years,

185. The best fitting logistic regression equation was $\ln(P/Q) = 0.3755 - 0.0180 * (\text{Year} - 1993)$, where COMB1 = the combination of all variables signifying any apparent element of suggestion in a case, $P$ = Prob(COMB1 = Yes), and $Q = 1\text{-}P$. The slope (-0.0180) is significantly negative, with a $P$-value of 0.0011. This means that the log-odds ratio decreases, on average, about 0.0180 units per year.

186. The best-fitting logistic regression equation for cases where COMB1 = Yes is $\ln(P/Q) = -2.6258 - 0.0365 * (\text{Year} - 1993)$, where $P$ = Prob(Suppression), and $Q = 1 - P$. The slope (-0.0365) is significantly negative, with a $P$-value of 0.0105. This means the log-odds ratio decreases, on average, about 0.0365 units per year.

but the general trend fit by the model is still a significantly decreasing probability of suppression among the examined cases over the thirty-three year period. Figure 4 provides a comparison of the suppression trend when analyzing all cases in the data set to the model when analyzing only cases where there was verifiable suggestion.

*Figure 4*




In sum, then, the likelihood of courts in the data set suppressing in-court identifications declined significantly over time, and this remained the case even after controlling for the possible effects of modern habeas corpus law and of the declining incidence of cases in the data set involving clearly suggestive procedures. Yet the data also suggest federal courts have made no improvements over time in the way they evaluate eyewitness evidence, which is at least as disturbing as the declining likelihood that courts will suppress identification evidence in cases involving unquestionably suggestive procedures. Examination of the cases in which courts found unnecessarily suggestive procedures adequate or measured eyewitness certainty after exposure to alleged suggestion (or at the time of suggestion but after certainty had already increased) shows no significant trend over time. Table 5, depicting the combination of these variables, designated as COMB2 below, shows the incidence of poor decision-making by courts by year.

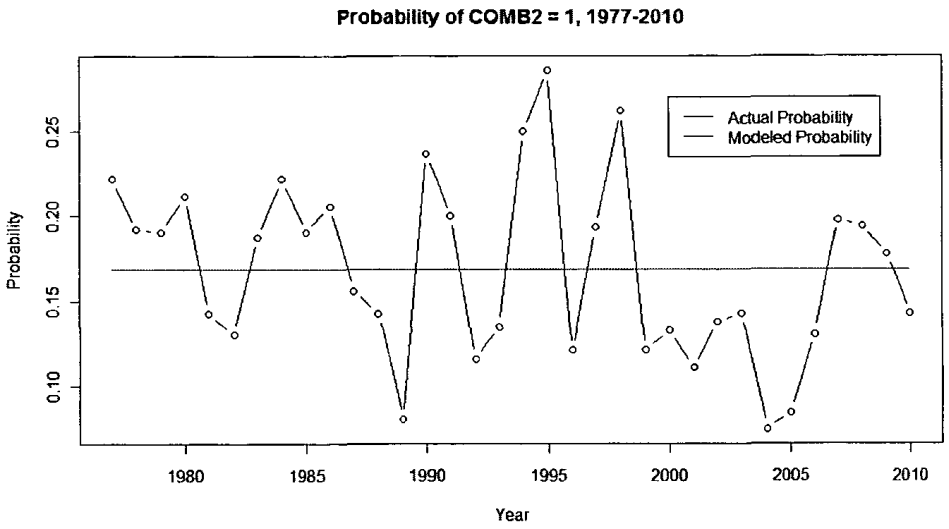
*Table 5*

| COMB2 | | | |
|---|---|---|---|
| Year | N | Y | To |
| 1977 | 7 | 2 | 9 |
| 1978 | 21 | 5 | 26 |
| 1979 | 17 | 4 | 21 |
| 1980 | 26 | 7 | 33 |
| 1981 | 18 | 3 | 21 |
| 1982 | 20 | 3 | 23 |
| 1983 | 26 | 6 | 32 |
| 1984 | 21 | 6 | 27 |
| 1985 | 17 | 4 | 21 |
| 1986 | 27 | 7 | 34 |
| 1987 | 27 | 5 | 32 |
| 1988 | 30 | 5 | 35 |
| 1989 | 34 | 3 | 37 |
| 1990 | 29 | 9 | 38 |
| 1991 | 32 | 8 | 40 |
| 1992 | 38 | 5 | 43 |
| 1993 | 32 | 5 | 37 |
| 1994 | 24 | 8 | 32 |
| 1995 | 30 | 12 | 42 |
| 1996 | 29 | 4 | 33 |
| 1997 | 25 | 6 | 31 |
| 1998 | 31 | 11 | 42 |
| 1999 | 29 | 4 | 33 |
| 2000 | 26 | 4 | 30 |
| 2001 | 32 | 4 | 36 |
| 2002 | 25 | 4 | 29 |
| 2003 | 42 | 7 | 49 |
| 2004 | 37 | 3 | 40 |
| 2005 | 54 | 5 | 59 |
| 2006 | 93 | 14 | 10 |
| 2007 | 85 | 21 | 10 |
| 2008 | 11 | 28 | 14 |

| COMB2 | | | |
|---|---|---|---|
| Year | N | Y | To |
| 2009 | 11 | 24 | 13 |
| 2010 | 12 | 2 | 14 |
| Total | 12 | 24 | 14 |

A logistic regression confirms visual evidence that there is no significant trend.[187] While there was a large amount of variability from year to year, because of small sample sizes in some years, the percentage of cases in which courts evaluated the evidence before them in ways that directly contradict indisputable scientific evidence hovered around 17% throughout the entire time period. This trend is depicted in Figure 5 below.

*Figure 5: Cases in Which Courts Found Unnecessarily Suggestive Procedures Adequate or Measured Certainty after Alleged Exposure to Suggestion*




Overall, the federal cases dealing with *Manson* claims depict a depressing failure to integrate scientific developments into judicial decision-making. Again, at least some of the responsibility for the failure of *Manson* must rest with the defense bar. Courts can begin to address the full range of flawed identification procedures only if zealous, informed law-

187. The best-fitting logistic regression equation is: $\ln(P/Q) = -1.5697 - 0.00557 * (\text{Year} - 1993)$, where $P$ = Prob(COMB2 = 1), and $Q = 1\text{-}P$. The slope (-0.00557) is negative, but has a high $P$-value of 0.4341. This means that the log-odds ratio of COMB2 does not significantly decrease over time. Fitting the model without the year term leaves us with $\ln(P/Q) = -1.5956$, which in practical terms indicates that throughout the entire time period the percentage of cases where COMB2 = 1 is close to 17%.

yers bring those flaws to their attention. Ultimately, however, courts themselves must eschew the false appeal of intuitive jurisprudence when intuition stands in direct opposition to conclusions of decades of science. Intuitive jurisprudence makes sense in the absence of available scientific proof, either because the science is not yet available or because the jurisprudence covers an issue not susceptible to verification through the scientific method. However, in the face of indisputable scientific proof, adherence to contrary approaches based on their intuitive appeal represents a denial of truth and an endorsement of superstition, laziness, or both.

## V. CONCLUSION

In the final analysis, the record is discouraging, and it reveals flaws both in *Manson* itself and in the ways federal courts have applied *Manson*. First, despite the *Manson* Court's insistence that the decision would provide deterrence against police using suggestive identification procedures, this seems unlikely. Amongst the federal cases, courts evaluating evidence of clearly unnecessarily suggestive procedures allowed eyewitnesses exposed to those procedures to identify defendants in court more than nine times out of ten. Additionally, most courts assessing clear evidence of unnecessarily suggestive procedures either held the procedures to be acceptable or failed to make a definitive determination as to whether the procedures were improper. By failing to specifically require courts to decide whether challenged procedures are unnecessarily suggestive and by failing to give lower courts any guidance on the kinds of procedures that are unacceptable, the Supreme Court in *Manson* and since has ensured that *Manson* would, in fact, provide little deterrence against law enforcement use of inadequate identification techniques.

Furthermore, a lack of clarity in the Court's prescription for assessing eyewitness certainty has led many courts to examine certainty after the eyewitness is likely to have experienced an inflated sense of confidence as a result of suggestion. In about one of every seven of the federal cases in which courts examined definitively suggestive procedures, those courts clearly relied on eyewitnesses' expressions of their certainty after the eyewitnesses had already viewed the suspect procedures. This unresponsiveness of federal courts to scientific evidence showing the lack of a correlation between certainty and accuracy under such circumstances is due at least in part to the failure of the Supreme Court to correct or clarify its muddled prescription for evaluating reliability in *Manson*. Without doubt, federal courts have also often made similar errors in their measurements of eyewitnesses' subjective accounts of opportunity to view and degree of attention.

The data from the 1,471 federal cases thus show that *Manson* has been an inadequate mechanism for protecting against the admission of unreli-

able eyewitness evidence. Not only have federal courts very rarely suppressed in-court identifications, but they have regularly evaluated eyewitness evidence in ways that contradict undeniable scientific proof of the best means of assessing the evidence before them, and they have made no discernible improvements in their jurisprudence despite the ever-increasing body of scientific data available to them. By verifying data from scientific experiments and anecdotal accounts from decades of previous legal scholarship, this study provides powerful new evidence of what psychologists, lawyers, and legal academicians have now been arguing for decades: *Manson*, at least as it is currently applied, is an inadequate tool for protecting against the admission of tainted procedures and unreliable evidence.

In crafting remedies for this crisis, it is important to concentrate on the specifics of the problem and to avoid the false promise of facile solutions. For example, merely implementing a prophylactic rule of exclusion for unnecessarily suggestive procedures, without also providing specific guidance on the kinds of procedures that should qualify as unnecessarily suggestive in the first place, will not suffice. As the federal cases demonstrate, such a rule, without more, would still regularly result in courts finding problematic procedures to be acceptable. My previously published analysis of all cases that cited *Stovall* in the nine months between the issuance of that opinion and *Simmons* also provides some evidence that a per se exclusionary rule for unnecessarily suggestive procedures alone is not enough to prevent regular admission of deeply flawed evidence. Similarly, rules like those in New York and Massachusetts, which purport to follow the *Stovall* tradition, very rarely result in suppression of an in-court eyewitness identification, which is the most damning evidence possible against a criminal defendant.

Any credible solution to *Manson*'s inadequacies must, at the very least, include particularized guidance on the specific kinds of procedures that are generally impermissible. Federal courts applying *Manson* in the last thirty-four years without such guidance have proven themselves incapable of making those decisions on their own. Moreover, whether courts seeking reform adopt *Stovall*-like exclusionary rules or retain *Manson*-like balancing tests, the application of any new legal directive must be informed by the science. If, for example, courts seeking reform wish to retain reliability tests, they should provide specific guidance on how to apply reliability factors in ways that promote, rather than undermine, the integrity of the examination.

Ultimately, despite a generation of scientific data proving the best means of conducting identification procedures and showing the lack of probative value of eyewitness certainty after exposure to suggestive procedures, federal courts evaluating eyewitness evidence under *Manson* have not managed to incorporate that data into their decision-making. This is inexcusable. Given ever-mounting evidence of the range of procedures

that undermine the reliability of identification evidence, defense lawyers must take responsibility for bringing these procedures to the attention of courts, and courts must take responsibility for recognizing the value of science over intuition about the propriety of such procedures. Given ever-mounting proof of the ways that flawed analysis of the reliability of identification evidence can lead to admission of evidence that is, in fact, unreliable, courts must take responsibility for improving their evaluative frameworks to avoid undermining the validity of the conclusions they draw. Finally, given unanimous criticism and irrefutable proof from scientists and legal scholars that *Manson* has been inadequate to guard against admission of unreliable evidence, the Supreme Court must take responsibility for replacing its flawed standard with a workable due process test.