

Eyewitnesses and Exclusion

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INTRODUCTION

The U.S. Supreme Court’s due process jurisprudence regulating the eyewitness identifications used in tens of thousands of criminal cases each year is not just flawed, but backwards. The Court’s highly deferential due process test uses factors that have been

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the subject of longstanding legal and scientific criticism.¹ In this Article, I argue that the test has a different fundamental flaw. While ostensibly focused on the problem of reliability, the Court's test, as interpreted under a well-established line of cases, encourages the judge to admit the least reliable evidence: an eyewitness identification in the courtroom. In the courtroom, there is no lineup. It is all too obvious who the defendant is, sitting at counsel's table. Yet, as Justice William Brennan wrote, "[T]here is almost nothing more convincing than a live human being who takes the stand, points a finger at the defendant, and says 'That's the one!'"²

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

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

1. See, e.g., Timothy P. O'Toole & Giovanna Shay, *Manson v. Brathwaite Revisited: Towards a New Rule of Decision for Due Process Challenges to Eyewitness Identification Procedures*, 41 VAL. U. L. REV. 109, 122–26 (2006); Charles A. Pulaski, *Neil v. Biggers: The Supreme Court Dismantles the Wade Trilogy's Due Process Protection*, 26 STAN. L. REV. 1097, 1104–10 (1974); Benjamin E. Rosenberg, *Rethinking the Right to Due Process in Connection with Pretrial Identification Procedures: An Analysis and a Proposal to Return to the Wade Trilogy's Standard*, 79 KY. L.J. 259, 275–97 (1991); Richard A. Wise et al., *A Tripartite Solution to Eyewitness Error*, 97 J. CRIM. L. & CRIMINOLOGY 807, 870 (2007); David E. Pasetiner, Note, *Twenty-Years of Diminishing Protection: A Proposal to Return to the Wade Trilogy's Standards*, 15 HOFSTRA L. REV. 583, 589–90 (1987); 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, 229–31 (2002).

2. *Watkins v. Sowders*, 449 U.S. 341, 352 (1981) (Brennan, J., dissenting) (emphasis in original omitted) (quoting ELIZABETH F. LOFTUS, *EYEWITNESS TESTIMONY* (1979)).

3. Bill Stuntz has most prominently criticized the priority of procedure over substance in modern criminal procedure. See William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 37–45 (1997).

4. *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977).

procedural right to counsel at postindictment lineups.⁵ The second, adopted in *Manson*, barred unduly suggestive identification techniques if the identification was also deemed unreliable.

The Court's reliability-based due process test was on a collision course with reality. When *Manson* was decided, social scientists had just embarked on a course of experimental research that would revolutionize our understanding of human memory. As John Monahan has observed, of "all the substantive uses [of] social science in law . . . nowhere is there a larger body of research than in the area of eyewitness identification."⁶ Social scientists showed how memory is not like a videotape, but rather is constructed in a dynamic fashion. As a result, commonly used identification procedures can distort memory and can even produce false identifications. Following the *Manson* test, a judge may excuse the most blatant coaching of an eyewitness by citing to "reliability" factors. Yet, social scientists showed that the factors judges use do not correspond with reliability. For example, one factor, eyewitness confidence, is not a sign of reliability, but it is highly malleable and may be the product of police suggestion.⁷ Even modestly comforting feedback after the identification, like telling an eyewitness, "Good, you identified the suspect," can make the eyewitness far more confident.⁸

In the decades after *Manson* was decided, hundreds of individuals would be convicted based on eyewitness identifications, but these individuals would later be proven innocent by DNA testing. Those high-profile wrongful convictions made the dangers of eyewitness misidentifications more salient than ever before.⁹ In a

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

6. See GEOFFREY GAULKIN, REPORT OF THE SPECIAL MASTER: STATE OF NEW JERSEY V. LARRY E. HENDERSON 9 (2010) [hereinafter HENDERSON REPORT], available at [http://www.judiciary.state.nj.us/pressrel/HENDERSON%20FINAL%20BRIEF%20.PDF%20\(00621142\).PDF](http://www.judiciary.state.nj.us/pressrel/HENDERSON%20FINAL%20BRIEF%20.PDF%20(00621142).PDF) (the New Jersey Supreme Court instructed a special master to consider "the current validity of our state law standards on the admissibility of eyewitness identification").

7. See, e.g., BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 63–72 (2011).

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

9. For example, the Department of Justice convened in 1998 a task force that played a crucial role in creating awareness about the need to adopt sound eyewitness identification procedures. The report cited as its impetus both a "growing body" of social science research and "[r]ecent cases in which DNA evidence has been used to exonerate individuals convicted primarily on the basis of eyewitness testimony." See DEPARTMENT OF JUSTICE, TECHNICAL WORKING GROUP FOR EYEWITNESS EVIDENCE, NCJ 178240, EYEWITNESS IDENTIFICATIONS: A GUIDE FOR LAW ENFORCEMENT, at iii (1999), available at <https://www.ncjrs.gov/pdffiles1/nij/178240.pdf> ("Recent cases in which DNA evidence has been used to exonerate individuals convicted primarily on the basis of eyewitness testimony have shown us that eyewitness evidence

recent book, I present a study exploring the role that eyewitness evidence played in the trials of the first 250 DNA exonerees.¹⁰ Just as social scientists would have predicted, the vast majority were convicted following suggestive identification procedures and initially uncertain eyewitnesses became absolutely certain by the time of trial.¹¹ If jurors had fully appreciated how tentative those eyewitnesses were initially and the potential impact of suggestive procedures, they might not have so readily convicted the defendants.

Responding to these developments, there has been a nationwide movement to reform criminal procedure to promote greater accuracy and to prevent wrongful convictions.¹² The Supreme Court has taken note of, but has not responded to, these developments; in its recent decision in *Perry v. New Hampshire*, the Justices showed little interest in thinking about the due process test, much less rethinking it.¹³ That case did not involve a lineup, but rather a situation in which police claimed they did not intentionally arrange a one-on-one identification. Most troubling, though, was that the majority opinion suggested, in ruling that the *Manson* test did not apply, that eyewitness testimony did not deserve different treatment than other forms of potentially unreliable evidence. The Court noted that “all in-court identifications” involve “some elements of suggestion,” but suggested that such “potential unreliability” does not counsel additional due process regulation.¹⁴ On the other hand the Court emphasized: “We do not doubt either the importance or the fallibility of eyewitness identifications.”¹⁵ Eyewitness evidence poses a unique problem in that jurors see a seemingly powerful but suggestive in-court identification, while standard tools like cross-examination cannot show how the very memory of an eyewitness may have been altered by unsound identification procedures; Justice Sotomayor countered in dissent that suggestion impairs “meaningful cross-examination.”¹⁶ The majority did, however, suggest that careful jury instructions and expert testimony are important “safeguards” in the

is not infallible.”). See generally JAMES M. DOYLE, TRUE WITNESS: COPS, COURTS, SCIENCE AND THE BATTLE AGAINST MISIDENTIFICATION, at xi–xiii (2005).

10. GARRETT, *supra* note 7, at 45–83.

11. See *id.* at 48; *infra* Part I.D.

12. See, e.g., Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 122–25 (2008) (describing reforms advanced and adopted to improve accuracy in criminal investigations and prosecutions).

13. 132 S. Ct. 716 (2012).

14. *Id.* at 727.

15. *Id.* at 728.

16. *Id.* at 732 (Sotomayor, J., dissenting).

States.¹⁷ Law enforcement, state courts and legislatures do not have the luxury of remaining aloof from the problem, since they confront the consequences of eyewitness misidentifications first-hand. Many have improved their identification procedures.¹⁸ Some states and many more local jurisdictions have adopted double-blind lineups, which psychologists have long recommended.¹⁹ In a double-blind lineup, the officer does not know which person is the suspect, and the eyewitness is told that the officer does not know. That simple procedure can effectively prevent suggestion from contaminating identifications. An important field study has also now confirmed the advantage of conducting identification procedures in a sequential fashion so that images are shown to the subject one at a time.²⁰ However, the Court's interventions, intended to modestly improve accuracy, may now perversely undermine such reforms.

What happens if the police do not follow best practices, and the police fail to use, say, a double-blind lineup? At that point, the question for a judge is whether to exclude that identification or to admit it. Yet, a judge may exclude the prior identification but still allow the eyewitness to identify the defendant in the courtroom. As I will develop, state courts have used "independent source" rules to allow courtroom identifications despite inadmissible out-of-court identifications by the same eyewitness. These rules have gone largely unnoticed by scholars but have been adopted almost universally.²¹ In

17. *Id.* at 729.

18. *See infra* Part III.B.

19. *See infra* Part I.C (discussing this practice and other recommendations).

20. *See* GARY L. WELLS, MANCY K. STEBLAY & JENNIFER E. DYSART, AM. JUDICATURE SOC'Y, A TEST OF THE SIMULTANEOUS VS. SEQUENTIAL LINEUP METHODS, at x (2011), available at www.ajs.org/wc/pdfs/EWID_PrintFriendly.pdf (finding that using a sequential procedure, rather than simultaneous, reduces mistaken identifications with little or no reduction in accurate identifications).

21. No one has carefully examined state and federal rulings adopting this so-called "independent source" or "independent reliability" test for admitting subsequent or in-court eyewitness identifications. The leading practice guide to eyewitness testimony provides the only account of the doctrine of independent source as a more general "pivotal strategic problem," and briefly discusses the "extraordinary lengths" courts may go to admit in-court identifications. *See* ELIZABETH F. LOFTUS, JAMES M. DOYLE & JENNIFER E. DYSART, EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL § 8-18 (4th ed. 2007) ("[C]ourts have gone to truly extraordinary lengths to accept very limited opportunities to observe independent sources."). I have located two scholars who have written about the potential danger of such rulings. Sandra Guerra Thompson, in an important article on the role of state courts in reforming criminal procedure more generally, discusses such decisions in several states. *See* Sandra Guerra Thompson, *Eyewitness Identifications and State Courts as Guardians Against Wrongful Conviction*, 7 OHIO ST. J. CRIM. L. 603, 628-31 (2010). Katherine Kruse, in an insightful analysis of reform efforts in Wisconsin, cites to the potential corrosive effect of such "independent source" rules. *See* Katherine R. Kruse, *Instituting Innocence Reform: Wisconsin's New Governance Experiment*, 2006 WIS. L. REV. 645, 722 n.367. Moreover, very few commentators have discussed in-court identifications generally.

no uncertain terms, judges explain that they allow the courtroom identification because of the “independent” memory that the eyewitness supposedly has from the time of the crime.

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

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

Infra note 44. *But see* LOFTUS ET AL., *supra*, §8-17(d) (advising lawyers on how to best litigate an in-court identification).

22. I have found one reference, in a state practice guide, to the questionable origins of this so called “independent” analysis. *See* 41 GEORGE E. DIX & ROBERT O. DAWSON, TEXAS PRACTICE: CRIMINAL PRACTICE & PROCEDURE § 14.39 (2d ed. 2001) (“The Texas case law shows some tendency to interject independent source considerations into analysis of defendants’ due process claims. This unfortunately confuses the differences between the two constitutional concerns at issue . . .”). Few judges have noted the flaws in such an approach, although a few dissenting judges have done so. *See infra* notes 134–35.

23. *See* FED. R. EVID. 801(d)(1)(C) (stating hearsay exception for prior statement that is “one of identification of a person made after perceiving the person”).

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

25. Perry v. New Hampshire, 132 S. Ct. 716, 730 (2012).

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

I am not sanguine that this change will occur, given careless judicial rulings and, as a result, limited incentives of defense counsel to properly litigate these issues. However, improved eyewitness procedures are increasingly required by state courts and statutes. Directing my observations to criminal procedure reformers, I argue that courtroom identifications following prior identifications should be per se excluded.²⁶ More broadly, eyewitness identification testimony should be regulated by factors informed by social science. First and foremost, jurisdictions should ensure that proper identification procedures are conducted in the first instance. Second, they should task judges with evaluating reliability of the evidence at hearings pretrial based on a social science framework and not the *Manson* test, and then at trial, if identification evidence is admitted, providing detailed instructions to educate jurors. Social scientists have for some time outlined best practices for conducting sound identification procedures, and as a second step, the *Henderson* decision in New Jersey provides an early model for a framework to govern the use of eyewitness evidence in court.²⁷ Finally, I suggest that an accuracy-oriented approach to regulation of criminal trial evidence has broader applications for criminal procedure and for future scholarship.

I. EYEWITNESS PROCEDURE AND PSYCHOLOGY

A. *Eyewitness Identification Procedures*

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

26. See *infra* Part III.B.

27. See *State v. Henderson*, 27 A.3d 872 (N.J. 2011); see *infra* Part I.C.

cases where eyewitnesses do make identifications.²⁸ Eyewitnesses can be crucial evidence of guilt in robbery, assault, rape, and other commonly prosecuted offenses. How do police determine whether an eyewitness can identify a culprit? Police know full well that eyewitness memory is fallible, just as judges, lawyers, and social scientists have long known this fact.²⁹ Police try to test the eyewitness's memory. Police use a range of techniques. If a suspect is found shortly after the crime, police may present that suspect to the eyewitness directly. Such a one-on-one procedure, called a showup, is inherently suggestive. Police may use such a procedure only in the hours immediately following an incident, in order to quickly identify the perpetrator or rule out the suspect and continue their investigation.³⁰ Showups are particularly risky for the police. Because there are no fillers, or other known-innocent people included in addition to the suspect, a mistake is more likely to result in the witness identifying an innocent person as the guilty party. And if the eyewitness is unsure, there is a greater risk that a guilty person might not be identified.³¹

If police do not immediately locate a suspect, they may try to show an eyewitness books or computerized collections of mug shots. If

28. Alvin G. Goldstein, June E. Chance & Gregory R. Schneller, *Frequency of Eyewitness Identification in Criminal Cases: A Survey of Prosecutors*, 27 BULL. PSYCHONOMIC SOC'Y 71, 73 (1989). That survey is now dated, but hopefully new efforts to survey police and prosecutors will provide more complete data.

29. See, e.g., EDWIN M. BORCHARD, CONVICTING THE INNOCENT 367 (1932) (describing how, in the first collection of accounts of "criminal prosecutions and convictions of completely innocent people," that "[p]erhaps the major source of these tragic errors is an identification of the accused by the victim of a crime of violence"); FELIX FRANKFURTER, THE CASE OF SACCO AND VANZETTI 30 (1927) ("The identification of strangers is proverbially untrustworthy."); HUGO MUNSTERBERG, ON THE WITNESS STAND: ESSAYS ON PSYCHOLOGY AND CRIME 39, 50-69 (1908) (describing early psychological research on malleability and unreliability of eyewitness memory); see also WELLS ET AL., *supra* note 20, at 16 (noting a thirty-one percent rate of filler identifications).

30. Cf. *Manson v. Brathwaite*, 432 U.S. 98, 131 & n.11 (1977) (Marshall, J., dissenting) (stating that "the greatest memory loss occurs within hours after an event" and citing a holding from the Court of Appeals for the District of Columbia that a showup four hours after the crime was not permissible); 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, 759-62 (2005) ("Unlike 'stationhouse' show-ups, show-ups conducted in the field are often admissible due to their spatial and temporal proximity to the crime.").

31. See Richard Gonzalez, Phoebe C. Ellsworth & Maceo Pembroke, *Response Biases in Lineups and Showups*, 64 J. PERSONALITY & SOC. PSYCHOL. 525 (1993) (finding subjects tested with showups only identified the perpetrator thirty percent of the time whereas when tested with lineups they correctly identified the perpetrator sixty-seven percent of the time). In addition, "there is clear evidence that showups are more likely to yield false identifications than are properly constructed lineups." See Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 LAW & HUM. BEHAV. 603, 630-31 (1998) (citing multiple sources).

that also fails, police may ask the witness to work with a police sketch artist or with a computer program to generate a composite image that can be used in “wanted” postings. When police eventually locate a suspect, they conduct an identification procedure to test the eyewitness’s memory. In a live lineup, a suspect stands in a row of “filler” individuals and the witness looks at the group from behind one-way glass. In the past few decades, police have mostly stopped using live lineups because it is so difficult and time-consuming to find people who look similar to a suspect. Instead, they use photo arrays, typically a standard set of six photos (called a “six-pack”).³²

Procedures for creating photo arrays and conducting lineups were traditionally passed on by senior officers through word of mouth. Although police departments have detailed procedures, manuals, and training on a host of subjects—ranging from traffic stops to use of force—many, if not most, police departments still do not have any written procedures or formal training on how to conduct lineups or photo arrays. Perhaps, however, this is starting to change in reaction to high-profile eyewitness misidentifications.³³ Unfortunately, archival

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

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

studies also suggest that unnecessary showups are quite common together with other flawed identification procedures.³⁴

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

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

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

34. Bruce W. Behrman & Sherrie L. Davey, *Eyewitness Identification in Actual Criminal Cases: An Archival Analysis*, 25 LAW & HUM. BEHAV. 475, 479 (2001) (noting that in 271 cases analyzed, 258 field showups were used; however, multiple showups could occur in each case); Gonzalez et al., *supra* note 31, at 535 ("In our sample showup identifications were over three times more common than lineups, and follow-up research currently underway in Washington and Michigan suggests that showups are frequently used."); Sandra Guerra Thompson, *Judicial Blindness To Eyewitness Misidentification*, 93 MARQ. L. REV. 639, 646 (2009) ("[S]how-ups constitute one of the most commonly used identification procedures.").

35. See Richard A. Wise, Clifford S. Fishman & Martin A. Safer, *How to Analyze the Accuracy of Eyewitness Testimony in a Criminal Case*, 42 CONN. L. REV. 450–52 (2009) (describing how eyewitness identifications are litigated in criminal cases).

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

37. See, e.g., *People ex rel. Blassick v. Callahan*, 279 N.E.2d 1, 3 (Ill. 1972) ("We have specifically rejected the contention that on [sic] in-court identification of an accused without a lineup denies due process of law."); *People v. Bradley*, 546 N.Y.S.2d 437, 437 (App. Div. 1989) ("A criminal defendant does not have a constitutional right to participate in a lineup whenever he requests one."); *People v. Grady*, 506 N.Y.S.2d 922, 932 (Sup. Ct. 1986) ("[I]t is undisputed that there is no constitutional requirement that a defense-requested in-court lineup be conducted.").

Second, judges could also require the use of a lineup in the courtroom in order to make the courtroom identification a more meaningful test of the eyewitness's memory. Courts rarely require the use of such "special procedures," however, though they are more willing to do so where the eyewitness had never been asked to view a lineup before trial.³⁸ Courts generally reject arguments that in-court identifications are inherently suggestive.³⁹ Judges may reject requests by defense lawyers to order a double-blind lineup.⁴⁰ Judges may view the courtroom identification as pure theater or a witness demonstration, but, as we will see, they also seem to think that the presence of counsel and the solemnity of testimony under oath in a courtroom makes the courtroom identification more, not less, reliable.

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

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

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

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

40. People v. Martinez, Nos. 6403/01, 6402/01, 2001 WL 1789315 (N.Y. Sup. Ct. Nov. 28, 2001).

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

42. United States v. Sabater, 830 F.2d 7, 9 (2d Cir. 1987).

conviction for doing so, calling the conduct “unprofessional” but also an “actual obstruction of justice.” Several state courts have followed suit.⁴³

In contrast, certain evidentiary rules recognize the inherent limitations of courtroom identifications preceded by prior identifications. For routine identifications of documents or acquaintances, there would be no reason to have tested the witness’s memory using a lineup. However, for stranger identifications, police will typically have conducted a prior identification to test the witness’s memory. Those prior identifications will generally be admissible. This is because the Federal Rules of Evidence recognize prior identifications as a special hearsay exception, for the reason that they are understood to be far more reliable than courtroom identifications. The Advisory Committee Notes to Federal Rule of Evidence 801(D)(1) explain, “The basis [for the hearsay exception] is the generally unsatisfactory and inconclusive nature of courtroom identifications as compared with those made at an earlier time under less suggestive conditions.”⁴⁴ While traditionally such out-of-court prior statements were treated as hearsay, the modern rule is to admit them, and nearly all states that previously did not admit them changed their rules in response to the 1975 federal revisions.⁴⁵

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

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

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

45. *See* MICHAEL H. GRAHAM, 3 HANDBOOK OF FEDERAL EVIDENCE § 801:11 (6th ed. 2006).

time.”⁴⁶ The Report also explained that suggestion could “influence the witness to change his mind” between the time of the earlier identification and trial.⁴⁷ Finally, the Report noted a strategic concern that “if any discrepancy occurs between the witness’[s] in-court and out-of-court testimony, the opportunity is available to probe, with the witness under oath, the reasons for that discrepancy so that the trier of fact might determine which statement is to be believed.”⁴⁸ Unless the prior identification is admissible, the defense attorney has no means to explore how the eyewitness came to identify the defendant at trial.

Perhaps because courtroom identification procedures are so thinly regulated, very little scholarship has examined the special problems that courtroom identifications raise or the way that these problems undermine the jurisprudence of eyewitness identifications. Evan Mandery has argued that courtroom identifications should be per se excluded and certainly should not be treated more deferentially than out-of-court identifications, and I agree.⁴⁹ As I will argue, the problem runs deeper. We cannot understand due process rules surrounding eyewitness identification procedures apart from the problem of courtroom identifications. In a case that goes to trial, there may be both prior lineups and a courtroom identification. There may even be a courtroom identification at a preliminary hearing and another at trial before the jury. (In the vast majority of cases that are resolved by a guilty plea, there may sometimes be multiple identification procedures conducted, but admissibility issues do not arise.) As I will describe, over time, the Court’s jurisprudence failed to differentiate those multiple identifications, and lower courts have since exacerbated the problem. Next, I try to untangle those rulings.

B. From Stovall to Manson

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

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

46. S. REP. NO. 94-199, at 2 (1975).

47. *Id.*

48. *Id.*

49. See Mandery, *supra* note 39, at 389 (“[W]hile the constitutional issues surrounding pre-trial identifications have been widely litigated and explored by scholars, little attention has been paid to the issues raised by in-court identifications.”).

with instances of mistaken identification.”⁵⁰ The Court added that “a major factor contributing to the high incidence of miscarriage of justice from mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification.”⁵¹ In a trilogy of decisions announced in 1967, the Court began to regulate eyewitness identifications to help avert misidentifications. At the time, the Court’s intervention looked like the beginnings of a new approach toward regulating the reliability of trial evidence. The Court adopted the following two different approaches to the problem: a Sixth Amendment right-to-counsel approach and a due process approach. In each of the two lines of cases the Court had to reckon with the problems posed by courtroom identifications.

In *Stovall v. Denno*, the Court examined a showup procedure in which the suspect was taken to the hospital where a victim was recovering, was presented to the victim alone, and handcuffed to police officers.⁵² Though noting a showup is inherently suggestive, and for that reason the procedure has been “widely condemned,” the Court acknowledged that showups may sometimes be necessary in exigent circumstances. However, the Court then held that an “unnecessarily suggestive” procedure that is “conducive to irreparable mistaken identification” denies due process of law and results in exclusion of the identification from the jury. This was new. Prior to *Stovall*, any police use of suggestion was just evidence for the jury to weigh when assessing the weight of the eyewitness identification.⁵³

In two other cases the Court also discussed police suggestion, but it adopted a different approach to the problem, one that recognized a right to counsel at a lineup procedure. In *United States v. Wade*, the Court held that, once indicted, an accused has a right to a lawyer present at a lineup. As a result, any lineup lacking counsel must be excluded and not introduced into evidence at trial.⁵⁴ However, the prosecutors would have “the opportunity to establish by clear and convincing evidence that the in-court identifications were based upon observations of the suspect other than the lineup identification.”⁵⁵

50. *United States v. Wade*, 388 U.S. 218, 228 (1967).

51. *Id.*

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

53. *See, e.g., United States ex rel. Kirby v. Sturges*, 510 F.2d 397, 407 n.32 (7th Cir. 1975).

54. *Wade*, 388 U.S. at 235–36.

55. *Id.* at 240.

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

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

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

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

56. *Id.* at 240–41.

57. *Id.* at 241.

58. *Id.* at 242.

59. *Id.* at 235.

fillers all dressed with strips of tape similar to that worn by the bank robber.⁶⁰ The defect was the procedural failure to provide counsel.

In *Gilbert v. California*, the Court similarly dealt with whether a courtroom identification could take place.⁶¹ A series of suggestive identifications took place postindictment and without counsel; over one hundred witnesses viewed the same lineup at the same time in a large auditorium and everyone discussed their identifications.⁶² The Court remanded and ordered the state court to determine whether such an identification, conducted without counsel in violation of *Wade*, had an independent source. The Court explained, “The admission of the in-court identifications without first determining that they were not tainted by the illegal lineup but were of independent origin was constitutional error.”⁶³ Thus, the Court established a rule that an “independent” basis could result in the admission of the in-court identifications, even, in theory, following suggestive prior lineups. The Court has repeatedly reaffirmed this ruling.⁶⁴

The *Wade/Gilbert* rule is of limited significance today. After all, having the right to a lawyer present at a lineup is not a significant protection. Other right-to-counsel protections are far more consequential. Suspects who invoke their *Miranda* rights and obtain an attorney can cut off an interrogation that might have otherwise resulted in a confession. In contrast, having a lawyer present at a lineup will not prevent the lineup from occurring. At best, it may discourage police from making any obviously suggestive cues during the lineup itself, though with the cost of potentially turning the lawyer into a trial witness disqualified from further representation.⁶⁵ Nor does the rule do any work in the vast majority of cases involving eyewitnesses. That is because the Court has repeatedly weakened the

60. *Id.* at 220.

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

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

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

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

65. See Sandra Guerra Thompson, *Beyond a Reasonable Doubt? Reconsidering Uncorroborated Eyewitness Identification Testimony*, 41 U.C. DAVIS L. REV. 1487, 1511 (2008) (developing “the shortcomings of an attorney’s presence as a remedy”).

rule—in part, by subsequently holding that there is no right to counsel for a photo array.⁶⁶ The vast majority of identifications are not live but are now chiefly conducted using photo arrays.⁶⁷

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

In decisions immediately following the 1967 trilogy, the Court indicated that an identification should be suppressed if the police engage in egregious suggestion. In *Foster v. California*, the Court ruled that, because a “tentative” witness only became sure after repeated suggestive showups and lineups, all identifications should be suppressed; “[i]n effect, the police repeatedly said to the witness, ‘This is the man.’”⁶⁸ For a short time, the *Wade/Gilbert* line of cases began to converge with the *Stovall* line. In *Simmons v. United States* the Court held that, when deciding whether to allow a courtroom identification following a suggestive pretrial identification, the judge should examine whether the earlier identification was “so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.”⁶⁹ As Justice Marshall later explained,

The inquiry mandated by *Simmons* is similar to the independent-source test used in *Wade* where an in-court identification is sought following an uncounseled lineup. In both cases, the issue is whether the witness is identifying the defendant solely on the basis of his memory of events at the time of the crime, or whether he is merely remembering the person he picked out in a pretrial procedure.⁷⁰

However, the cases then diverged as the Court took a different tack in due process cases not raising Sixth Amendment right-to-counsel violations. The Court became concerned that a rule excluding out-of-court identifications that resulted from unnecessary suggestion would lead to the exclusion of reliable eyewitness evidence. The Court proposed a new two-step inquiry in *Neil v. Biggers*,⁷¹ which was then adopted in 1977 by the Court in *Manson*.⁷² That *Manson* test is the current due process test that courts must follow.

66. *United States v. Ash*, 413 U.S. 300, 321 (1973).

67. *Wells et al.*, *supra* note 31, at 608.

68. *Foster v. California*, 394 U.S. 440, 442–43 (1969).

69. *Simmons v. United States*, 390 U.S. 377, 384 (1968).

70. *Manson v. Brathwaite*, 432 U.S. 98, 122 (1977) (Marshall, J., dissenting).

71. *Neil v. Biggers*, 409 U.S. 188, 199 (1972). The Court did not have occasion to rule on whether that test should supplant the *Stovall* test in that case, since the lineup in question predated the Court’s *Stovall* ruling. *Id.* at 200.

72. *Manson*, 432 U.S. at 113–14.

First, following the *Manson* test, a court asks whether the procedure used was “unnecessarily suggestive.”⁷³ Then the court asks whether the identification was nevertheless “reliable.”⁷⁴ A judge has broad discretion to evaluate the record and decide whether there is evidence that the identification is “reliable.”⁷⁵ The *Biggers* factors adopted by the Court in *Manson* include: (1) the eyewitness’s opportunity to view at the time of the crime itself; (2) the eyewitness’s degree of attention; (3) the accuracy of the description that the eyewitness gave of the criminal; (4) the eyewitness’s level of certainty at the time of the identification procedure; and (5) the length of time between the crime and the identification procedure.⁷⁶

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

C. Social Science Research

The *Manson* Court emphasized that “reliability is the linchpin in determining the admissibility of identification testimony.”⁷⁷ In the decades since the Court settled on its due process test, however, social scientists have shown just how unhelpful and flawed each of the *Manson* factors are for evaluating the reliability of an identification. Their findings demonstrated just how susceptible eyewitness memory is to cues or suggestions, intended or not, by the administrator of a lineup.

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

73. *Id.* at 113.

74. *Id.*

75. *See id.* (directing judges to weigh the *Biggers* factors against the “corrupting effect of the suggestive identification itself”).

76. *Id.* at 114; *Biggers*, 409 U.S. at 199–200.

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

now vast body of social science research has demonstrated that most of the five *Manson* “reliability” factors do not correlate at all with the reliability of an eyewitness’s identification.⁷⁸ One factor—the passage of time from the crime to the identification—strongly affects reliability; however, the effects are so pronounced in the immediate hours and days following the crime that judges would have to exclude a large number of identifications if they emphasized that factor.⁷⁹ In contrast, the seemingly objective factor, the ability of a person to describe another accurately, is not correlated one way or another with reliability.⁸⁰ The remaining factors are particularly crucial to the analysis—and they are deeply flawed. The certainty of an eyewitness, the opportunity of a witness to view the attacker, and the degree of attention paid by the eyewitness are not independent measures of reliability. Instead, the procedures police use affect the so-called reliability factors.

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

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

79. ELIZABETH F. LOFTUS, EYEWITNESS TESTIMONY 52–54 (1996); A. DANIEL YARMEY, UNDERSTANDING POLICE WORK: PSYCHOSOCIAL ISSUES 298–300 (1990).

80. *See* Melissa Pigott & John C. Brigham, *Relationship Between Accuracy of Prior Description and Facial Recognition*, 70 J. APPLIED PSYCHOL. 547, 547–548 (1985) (finding congruence and accuracy of eyewitness reports not highly related); Gary L. Wells, *Verbal Descriptions of Faces from Memory: Are They Diagnostic of Identification Accuracy?*, 70 J. APPLIED PSYCHOL. 619, 623 (1985) (finding low relation between congruence and accuracy of eyewitness reports).

81. *E.g.*, Brian L. Cutler, Steven D. Penrod & Hedy Red Dexter, *Juror Sensitivity to Eyewitness Identification Evidence*, 14 LAW & HUM. BEHAV. 190 (1990); Samuel R. Gross, *Loss of Innocence: Eyewitness Identification and Proof of Guilt*, 16 J. LEGAL STUD. 395, 400–01 (1987); Richard S. Schmechel, Timothy P. O’Toole, Catharine Easterly & Elizabeth F. Loftus, *Beyond The Ken? Testing Jurors’ Understanding of Eyewitness Reliability Evidence*, 46 JURIMETRICS J. 177, 195–96 (2006); Wells et al., *supra* note 26, 619–621; Gary L. Wells, *How Adequate is Human Intuition for Judging Eyewitness Testimony?*, in EYEWITNESS TESTIMONY: PSYCHOLOGICAL PERSPECTIVES (Gary L. Wells & Elizabeth F. Loftus eds., 1984).

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

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

82. Wells et al., *supra* note 31, at 627–29.

83. LOFTUS ET AL., *supra* note 21, § 4–9. For an important field study documenting advantages of a sequential procedure, showing lineup members to witnesses one at a time rather than simultaneously, see WELLS, STEBLAY & DYSART, *supra* note 20.

84. See LOFTUS ET AL., *supra* note 21, § 4–8(b) (describing study by Roy Malpass and Patricia Devine, and noting eighteen other studies demonstrating higher false identification when such biased instructions were provided); Amy Douglass & Nancy Steblay, *Memory Distortion in Eyewitnesses: A Meta-Analysis of the Post-Identification Feedback Effect*, 20 APPLIED COGNITIVE PSYCHOL. 859, 864–65 (2006) (discussing how positive post-identification feedback increases witness confidence in identification).

85. Nancy K. Steblay, *Maintaining The Reliability of Eyewitness Evidence: After the Lineup*, 42 CREIGHTON L. REV. 643, 647–51 (2009) (discussing data from studies of repeated lineups); see, e.g., Gabriel W. Gorenstein & Phoebe C. Ellsworth, *Effect of Choosing an Incorrect Photograph on a Later Identification by an Eyewitness*, 65 J. APPLIED PSYCHOL. 616, 620–21 (1980) (studying commitment effect of using a photo showup before a live lineup); Tiffany Hinz & Kathy Pezdek, *The Effect of Exposure to Multiple Lineups on Face Identification Accuracy*, 25 LAW & HUM. BEHAV. 185, 194–96 (2001) (assessing accuracy of identifications when intervening lineups occur).

86. See, e.g., Nancy K. Steblay et al., *Sequential Lineup Laps and Eyewitness Accuracy*, 35 LAW & HUM. BEHAV. 262, 271 (2011) (describing studies that find repeat viewings, or “laps,” increase choosing rates and error rates, with particularly high error rates among witnesses who choose to view a second time).

87. LOFTUS ET AL., *supra* note 21, § 6-2; Steven Penrod & Brian Cutler, *Witness Confidence and Witness Accuracy: Assessing Their Forensic Relation*, 1 PSYCHOL. PUB. POL'Y & L. 817, 827 (1995).

affect the details that an eyewitness remembers.⁸⁸ The eyewitness may recall having seen the culprit for a longer period of time and will recall having had a better look at the culprit.⁸⁹ The five *Manson* factors poorly assess “reliability.” They are circular, and highlight the very features of eyewitness memory that may be most profoundly affected by suggestion. Yet, a court may excuse serious police suggestion by saying that an eyewitness identification is nonetheless “reliable.”

Still more problematic, in the situation where there are multiple eyewitness identifications, a court may allow a courtroom identification despite an earlier suggestive identification. The jury then sees the now-confident eyewitness in court pointing at the defendant. As Gary Wells puts it, “[E]yewitness identification evidence is among the least reliable forms of evidence and yet is persuasive to juries.”⁹⁰ One reason is that the jury does not see what occurred before. The earlier lineups may not even have been documented. The jury will instead hear the eyewitness describe what he saw.

In the typical situation in which the eyewitness is a victim, the jury will hear the details of a stressful, if not frightening, encounter. The eyewitness may then briefly recount the photo arrays or lineups, but she may not remember the details of those procedures. The eyewitness then will be asked how sure she is that the defendant is the culprit. Finally, the eyewitness will point out the defendant in the courtroom. The courtroom identification that the jurors see will be more dramatic, and may be made with more confidence, than the identifications that came before the trial. Further, the trial setting is inherently suggestive, as well as public. While there have not been field studies of courtroom identifications, there is every reason to think that in a courtroom setting “conformity is at its peak” since “pressure is high and . . . judgments are made without anonymity.”⁹¹

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

88. Gary L. Wells & D.M. Murray, *What Can Psychology Say About the Neil vs. Biggers Criteria for Judging Eyewitness Identification Accuracy?*, 68 J. APPLIED PSYCHOL. 347, 357–58 (1983).

89. Wells & Bradfield, *supra* note 8, at 374.

90. Wells et al., *supra* note 31, at 605.

91. Mandery, *supra* note 39, at 416; *see also* Wells & Quinlivan, *supra* note 32 (“Although experiments have not directly tested the question of in-court identifications that occur after a pretrial lineup, our understanding of transference and commitment effects leads to the reasonable inference that a mistaken identification prior to trial is likely to be replicated during an in-court identification.”).

carelessly apply if not distort the *Manson* test.⁹² Justice Sotomayor, dissenting in *Perry*, argued that concerns with the adequacy of the due process rule “should have deepened” based on a “vast body of scientific literature” and concluded that “[i]t would be one thing if the passage of time had cast doubt on the empirical premises of our precedents. But just the opposite has happened.”⁹³

Although we now know far more about the sources of eyewitness unreliability, long before social scientists began investigating eyewitness misidentification it was, as Samuel Gross put it, “an old and famous problem.”⁹⁴ Police are most familiar with the problem because it significantly affects their investigations. In actual police lineups, eyewitnesses choose known innocent fillers an average of thirty percent of the time, according to available archival and field studies.⁹⁵ Those common misidentifications are of less consequence because it is obvious there is an error when a filler is picked. However, they harm police investigations since an eyewitness who has selected a filler may be “burned,” or viewed by jurors with more suspicion should that eyewitness later identify a true suspect. If an eyewitness picks an innocent suspect and not a filler, the consequences may be more serious. DNA exonerations have raised the profile of eyewitness errors in cases that went further, resulting in convictions overturned only years later through DNA testing.

In *Convicting the Innocent*, I examine the trial transcripts of the first 250 DNA exonerees.⁹⁶ Eyewitnesses misidentified seventy-six percent of the exonerees (190 of 250 cases).⁹⁷ I expected to see a large body of eyewitness misidentifications in these cases. After all, DNA testing is most readily used to exonerate individuals convicted of rape, and such cases often involve a victim eyewitness. However, when I began studying those unusual trials, I feared that I would not be able to say very much about the eyewitness misidentifications. After all, we

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

93. *Perry v. New Hampshire*, 132 S. Ct. 716, 738 (2012) (Sotomayor, J., dissenting).

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

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

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

97. *Id.* at 9.

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

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

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

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

98. See *Neil Miller*, FRONTLINE, THE BURDEN OF INNOCENCE, PROFILES (May 1, 2003), <http://www.pbs.org/wgbh/pages/frontline/shows/burden/profiles/miller.html>.

99. Trial Transcript at 3-14, *Commonwealth v. Miller*, No. 085602-04 (Mass. Sup. Ct. Dec. 18, 1990) [hereinafter *Miller Trial Transcript*].

100. *Id.* at 37-38, 68-69 (Dec. 17, 1990).

101. *Id.* at 72.

102. *Id.* at 41.

103. *Id.* at 42-43, 53.

104. Brief and Record Appendix for the Defendant on Appeal at 7 n.7, *Commonwealth v. Miller*, 609 N.E.2d 1251 (Mass. App. Ct. Oct. 1992) (No. 92-P-612).

105. *Id.* at 6-7; *Miller Trial Transcript*, *supra* note 99, at 126 (Dec. 17, 1990).

106. *Miller Trial Transcript*, *supra* note 99, at 123-34 (Dec. 17, 1990).

the prior suggestive procedures, the victim would likely again pick out Miller and then testify with confidence before the jury. The judge granted the defendant's motion to suppress the identification the morning of the hearing and ruled that the jury could not hear about it. However, the judge was still willing to let the jury hear about the first identification from the photo array where the police officer made the suggestions; of course the defense would want to bring out that conduct. Further, the judge let the jury observe the victim on the stand identifying Miller.¹⁰⁷ The judge ruled that the courtroom identification had an "independent basis" based on the witness's original view of the perpetrator.¹⁰⁸ Even though the victim was initially not sure that Miller was the right man, the jury saw the victim identify him in court and say she was "positive" he was the attacker.¹⁰⁹

There was no other evidence at trial, aside from some very limited forensics.¹¹⁰ The jury convicted Miller and sentenced him to twenty-six to forty-five years in prison.¹¹¹ Neil Miller was an innocent man. He was exonerated by postconviction DNA testing in 2000 after serving almost ten years in prison. Moreover, the DNA tests matched another man.¹¹² The testimony in Miller's case and in the other 249 cases illustrates how police suggestion can increase the confidence of eyewitnesses, even if they are wrong. Courts readily admitted those identifications, despite sometimes glaring evidence of suggestion or unreliability.

All but a handful of the eyewitnesses who we now know misidentified innocent people were certain at the time of trial. For example, an eyewitness in Steven Avery's case testified, "[T]here is absolutely no question in my mind."¹¹³ In Thomas Doswell's case, the victim testified, "This is the man or it is his twin brother" and "That is one face I will never forget . . ."¹¹⁴ In Dean Cage's case, the victim

107. *Id.* at 104–05.

108. *Id.* at 128–29; see also Brief and Record Appendix, *supra* note 104, at 23–24.

109. Miller Trial Transcript, *supra* note 99, at 105 (Dec. 17, 1990).

110. The crime lab analyst (incorrectly) described the forensics as including Neil Miller but also forty-five percent of the population (in fact, no man could be excluded). See Brandon L. Garrett & Peter J. Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 VA. L. REV. 1, 41–42 (2009) (explaining invalid testimony concerning the phenomenon of "masking" and non-quantification in that case and others).

111. *Neil Miller*, *supra* note 98.

112. *Id.*

113. Trial Transcript at 304, *State v. Avery*, No. 85 FE 118 (Wis. Cir. Ct. Dec. 10, 1985).

114. Trial Transcript at 11, 62, *Commonwealth v. Doswell*, No. CC 8603467 (Pa. Ct. Com. Pl. Nov. 19, 1986).

was “a hundred percent sure.”¹¹⁵ In Willie Otis “Pete” Williams’s case, the victim said she was “one hundred and twenty” percent sure.¹¹⁶ What explains the false confidence of those eyewitnesses? In seventy-eight percent of those trials (125 of the 161 cases involving eyewitnesses in which trial records could be located), there was evidence that police contaminated the identifications. Many of those eyewitnesses were asked to pick out the suspect using suggestive methods long known to increase risks of error. Police made remarks that indicated who should be selected, used unnecessary showups, or used lineups that made the defendant stand out. Suggestion is related to the second problem, that of false certainty. In fifty-seven percent of the trials studied (92 of 161 cases), witnesses reported they had not been certain at the earlier identifications, or identified other people.

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

Nor is the Court likely to reform its due process test. If anything, the majority in *Perry v. New Hampshire* expressed a view that the application of that due process test should be narrowed to avoid regulating all eyewitness identifications, despite the “fallibility” of eyewitness evidence.¹¹⁷ The Court in making that point even noted the problem of courtroom identifications, stating: “Most eyewitness identifications involve some element of suggestion. Indeed, all in-court identifications do.”¹¹⁸ Of course, the suggestion inherent in such procedures should cause the Justices to consider whether jurors are in an adequate position to assess the reliability of that evidence. The Court’s mention of courtroom identifications and unwillingness to question their use is symptomatic of a larger problem. Justice Sotomayor in dissent highlighted how: “At trial, an eyewitness[s] artificially inflated confidence in an identification’s accuracy complicates the jury’s task of assessing witness credibility and reliability. It also impairs the defendant’s ability to attack the eyewitness[s] credibility.”¹¹⁹ Still more problematic, as I discuss next, state and federal courts interpret the Court’s rulings to provide nearly unfettered use of the most problematic courtroom identifications.

115. Trial Transcript at J-128, *People v. Cage*, 94 29467 (Ill. Cir. Ct. January 9, 1995).

116. See Bill Rankin, *Exonerations Urge Changes for Eyewitnesses*, ATLANTA J-CONST., Dec. 25, 2008, at C1 (quoting from victim’s testimony).

117. *Perry v. New Hampshire*, 132 S. Ct. 716, 728 (2012).

118. *Id.* at 727.

119. *Id.* at 732 (Sotomayor, J., dissenting).

II. THE PERSISTENCE OF “INDEPENDENT SOURCE” RULES

Social scientists that carefully studied flaws in the Supreme Court’s due process test for admissibility of eyewitness identifications may have taken the letter of the law too seriously. They have studied each of the factors in the *Manson* test and have critiqued their reliability with the assumption that courts actually follow the test as promulgated by the Court. One cannot blame anyone for assuming that lower courts would follow the precise language of a Supreme Court ruling. However, in practice, courts do not, and to a surprising degree. Not only is the *Manson* test flawed because of its focus on “reliability” factors that are not independent of police suggestion, but in practice the test is often not carefully applied, particularly to courtroom identifications. Commentators have observed that, in general, judges apply the *Manson* test very deferentially if not carelessly.¹²⁰ After all, the factors are quite flexible, and they excuse even extreme and unnecessary police suggestion based on flimsy evidence of “reliability” under a totality of the circumstances test. Appellate judges defer to trial judge discretion in applying those five broad factors. There is still another defect in the case law. A crucial but largely unnoticed loophole can short-circuit the *Manson* inquiry in the most pressing situation where the identification procedure conducted before trial was suggestive—independent source rules.

A. “Independent Source” Rules

Even after a suggestive pretrial identification procedure, courts still permit a courtroom identification by citing to its “independent” source or “independent” reliability. That courtroom identification may be pretrial, in which case it may shape what the eyewitness says at trial. Or, that courtroom identification may occur at trial. As noted, courts hold that the Due Process Clause does not forbid courtroom identifications, despite their inherent suggestiveness.¹²¹ They cite to

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

121. See; *State v. Smith*, 512 A.2d 189, 193 (Conn. 1986) (“The manner in which in-court identifications are conducted is not of constitutional magnitude but rests within the sound discretion of the trial court”); *Middleton v. United States*, 401 A.2d 109, 132 (D.C. 1979) (noting that in-court identifications are “less threatening of the due process guarantee” than one-on-one confrontations in the police station); *Ralston v. State*, 309 S.E.2d 135, 136 (Ga. 1983) (reasoning that in-court identifications are not scrutinized for reliability because they are under the supervision of the court); *State v. Clausell*, 580 A.2d 221, 235 (N.J. 1990) (holding that an in-court identification was “constitutionally valid” despite the fact that the witness had not been

the “supervision” provided by the trial judge to ensure an “impartial” identification in court.¹²² Nor do courts typically require special procedures to test eyewitness memory in the courtroom. Still more troubling, courts adopt a permissive approach to allowing courtroom identifications despite prior suggestive or illegal identifications.

The vast majority of state courts, when applying the Due Process Clause, rule that an identification, and particularly a courtroom identification, may be allowed even where a prior identification might be suppressed, citing to its “independent source.”¹²³ This is not casual language adopted by outlier jurisdictions. Rather, this language is adopted by courts of thirty-eight states and the District of Columbia, with six more states adopting similar language and three states with mixed rulings. Nor do state courts appear to revisit their leading rulings on the problem of eyewitness identifications frequently, perhaps because the U.S. Supreme Court has not revisited the problem either.

To be sure, most of those written decisions on appeal did not confront the situation where the prior identification was in fact suppressed, but the courtroom identification was permitted.¹²⁴ It is very rare for a court to suppress identifications, because the *Manson* test is already so deferential. However, not only did several states explicitly allow the courtroom identification while excluding the prior identifications, but the others describe how they need not examine whether the prior identifications are suggestive. They assume, for the sake of argument, that the prior identifications could be excluded but emphasize how the courtroom identification would be allowed. After

able to identify the defendant previously in a photo array). Mandery, *supra* note 39, provides an excellent discussion of these cases at 402–03.

122. *Ralston*, 309 S.E.2d at 136; *People v. Rodriguez*, 480 N.E.2d 1147, 1151 (Ill. App. Ct. 1985).

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

124. Rulings in Massachusetts, South Carolina and Wisconsin all provide examples. See *Commonwealth v. Delrio*, 2003 WL 21028648, at *8 (Mass. Super. Ct. 2003) (“Notwithstanding the suppression of the identification following the showup, the witness should be permitted to make an in court identification based on the doctrine of independent source.”); *State v. Carlson*, 611 S.E.2d 283, 290 (S.C. Ct. App. 2005) (“The in-court identification is admissible if based on information independent of the out-of-court procedure.”); *State v. Dubose*, 699 N.W.2d 582, 596 (Wis. 2005) (“The witness would still be permitted to identify the defendant in court if that identification is based on an independent source.” (quoting *People v. Adams*, 423 N.E.2d 379, 384 (N.Y. 1981))).

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

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

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

125. *Commonwealth v. Rollins*, 738 A.2d 435, 443 (Pa. 1999).

126. *State v. Carlson*, 611 S.E.2d 283, 290 (S.C. Ct. App. 2005) (citing *State v. Rogers* 210 S.E.2d 604 (S.C. 1974)).

127. *McCary v. Commonwealth*, 321 S.E.2d 637, 645 (Va. 1984).

128. *State v. Freeman*, 330 S.E.2d 465, 471 (N.C. 1985).

129. *Gipson v. State*, 575 P.2d 782, 787 (Alaska 1978) (“The foregoing evidence of identification, which we consider overwhelming, had an ‘independent source’ from the tainted in-court identification which occurred at the first preliminary hearing.”).

130. *State v. Trammel*, 92 P.3d 1101, 1110 (Kan. 2004) (citing *State v. Edwards*, 955 P.2d 1276 (Kan. 1998)).

state. In addition to the thirty-eight states adopting independent source rules, six more states and some federal courts discuss “independent reliability” of an identification (but federal courts otherwise follow the proper due process test and do not cite to “independent source” outside of the Sixth Amendment context).¹³¹ In doing so, those courts follow *Manson* but use the word “independent” to refer to the “reliability” factors or to highlight how a courtroom identification may be considered reliable despite what came before.¹³² Only five states adopt no language suggesting a different standard for courtroom identifications.¹³³ At least one more state adopts the correct

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

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

133. I have found no due process cases providing “independent source” or “independent reliability” language in five states: Hawaii, Montana, North Dakota, Tennessee, or Wyoming. See, e.g., *State v. Atkins*, No. 03C01-9302-CR-00058, 1994 WL 81524, at *9 (Tenn. Crim. App. Mar. 3, 1994) (“If a court determines that under the *Biggers* standard a pretrial confrontation was so impermissibly suggestive that it violated an accused’s due process rights, the independent origin of the in-court identification is irrelevant. Both out-of-court and in-court identifications are automatically excluded.”). One Montana decision is ambiguous on this point. *State v. Hedrick*, 745 P.2d 355, 358 (Mont. 1987) (“The independent basis for the victim’s in court identification also prevents the possibility of a substantial likelihood of irreparable misidentification.”). North Dakota had one case citing to an independent basis for admitting an in-court identification, but the case predated *Manson*, and, absent any more recent rulings, North Dakota was not included. *State v. McKay*, 234 N.W.2d 853, 858 (N.D. 1975) (“[I]n-court identification of the defendant was not based on a suggestive viewing of him at the police station, but had a basis independent of

language in some decisions but adopts “independent source” language in others.¹³⁴ Very few judges recognize that the *Manson/Biggers* test has superseded such inquiries into “independent source.”¹³⁵

Most of these courts, if they provide an explanation of what it means to ask whether a suggestive identification has an “independent source” or “independent reliability,” follow a “totality of the circumstances” inquiry. They may then follow the correct *Manson* test in form, but only by ignoring the effect of the prior identifications on the courtroom identification.¹³⁶ To be sure, these judges are not applying a standard that is formally *more* demanding than the *Manson* test (despite language that the prosecution has the burden to show an independent source by “clear and convincing evidence”).¹³⁷ On

that viewing.”). A more recent ruling failed to reach the issue. *State v. Lewis*, 302 N.W.2d 396, 399 (N.D. 1981).

134. See *Webster v. State*, 474 A.2d 1305, 1316 (Md. 1984) (“[T]he trial court] looked to the ‘independent source’ rule of *Wade-Gilbert*, but, as we have pointed out *supra*, that rule is concerned only with a lineup which is illegal on Sixth Amendment right to counsel grounds. It is not the test for the admissibility of identification evidence challenged on Fourteenth Amendment due process grounds.”). *But see Barrow v. State*, 474 A.2d 967, 976 (Md. Ct. Spec. App. 1984) (“Even if the State fails to satisfy the legality of a pre-trial confrontation or viewing, the State may still secure the admissibility of a *courtroom identification* by the same identifying witness if it establishes by clear and convincing evidence that a courtroom identification had a source independent of the prior illegal confrontation or viewing.”); *Alston v. State*, 934 A.2d 949, 967 (Md. Ct. Spec. App. 2007) (asking “whether the courtroom identification has an independent source”).

135. *Graham v. Solem*, 728 F.2d 1533, 1549 (8th Cir. 1984) (McMillian, J., dissenting) (“[C]oncepts of ‘purged taint’ and ‘independent origin’ have been blended into, and superseded by, the two-step process of weighing reliability against suggestiveness articulated in *Biggers*.”); *United States v. Batista Ferrer*, 842 F. Supp. 40, 42 (D.P.R. 1994); *State v. McMorris*, 570 N.W.2d 384, 393 (Wis. 1997) (“[T]he *Wade* and *Biggers* tests are derived from different constitutional amendments and are intended to achieve different purposes.”); see also *Bernal v. People*, 44 P.3d 184, 204–05 (Colo. 2002) (Coats, J., dissenting) (“By analogy to a violation of the Sixth Amendment right to counsel, many jurisdictions, including this one, considered the witness’s independent ability to make an identification only as an ‘independent source’ or ‘independent basis’ for allowing an in-court identification, despite an ‘unduly,’ ‘impermissibly,’ ‘unnecessarily,’ or ‘unconstitutionally’ suggestive out-of-court procedure.”). The judge added: “Unlike violations of the Fourth or Sixth Amendment, from which the ‘independent source’ doctrine is clearly borrowed, however, the due process test applies to both the “derivative” in-court identification and the challenged pretrial identification itself . . .” *Id.* at 206.

136. See, e.g., *People v. Gray*, 577 N.W.2d 92, 96 n.8 (Mich. 1998) (“The remedy for a violation of the right to counsel is the same as the remedy for an unduly suggestive identification procedure: suppression of the in-court identification unless there is an independent basis for its admission.”).

137. Doing so might in theory create an elevated standard, where a prosecutor could only overcome a *per se* exclusion of the evidence could by a showing of clear and convincing evidence that the identification had an “independent source” and was reliable. See, e.g., *Commonwealth v. Botelho*, 343 N.E.2d 876, 880 (Mass. 1976) (“[T]he prosecution is limited to introducing at trial only such identifications by the witness as are shown at the suppression hearing not to be the product of the suggestive confrontation-the later identifications, to be usable, must have an independent source.”); *State v. Iron Necklace*, 430 N.W.2d 66, 84 (S.D. 1988) (“[T]he proof shifts

appeal or postconviction, judges defer to the trial court's exercise of discretion and accept trial court factual findings. As a result, appellate or postconviction judges do not typically explain their analysis with much detail or rigor. They may simply note, after citing to an "independent source," that the identifications appear reliable under the circumstances, again without considering the impact of prior identifications on the courtroom identification.

Courts do not actually insist on some independent source in the sense of a truly independent event that created a more reliable identification. Situations like that can occur. For example, the fact that an eyewitness had already been well acquainted with the suspect could be evidence of greater reliability that is truly "independent" of any suggestion at the police lineup. Some courts do treat identifications by acquaintances differently, although the question of how much familiarity should suffice to assure greater reliability poses complex practical and theoretical problems.¹³⁸ In a different sense, an

to the State to then prove by clear and convincing evidence that the in-court identification had an independent origin."); *Powell v. State*, 271 N.W.2d 610, 617 (Wis. 1978) ("In cases which involve the validity of subsequent in-court identifications the rule is clear: once the defendant shows that the out-of-court identification was improper, the state has the burden of showing that the subsequent in-court identification derived from an independent source and was thus free of taint."). However, in practice courts conduct the same "totality of the circumstances" inquiry, but without considering the prior identifications as a critical part of the relevant circumstances.

138. Complex questions can be raised by assertions that the eyewitness was previously familiar with the suspect. While I do not address the subject here, I note that there are, for instance, underlying questions whether and when familiarity leads to greater reliability—or perhaps reduced reliability under some circumstances. See Lisa J. Steele, *Who Was That Masked Man?*, 48 CRIM. L. BULL., Winter 2012 (reviewing social science literature and noting that "[f]amiliarity affects eyewitness testimony in 'nuanced, complex, and often counterintuitive ways.'" (citation omitted)). There are questions of proof as to how familiar an eyewitness really was. In addition, courts adopt a range of approaches. Some courts merely note a spectrum of familiarity; some demand strong evidence of familiarity, while others appear to find familiarity present even based on very brief prior encounters. See *People v. Sheppard*, No. 241766, 2003 WL 22717987, at *3 (Mich. App. Nov. 8, 2003) (noting that to determine whether there is an independent basis for identification, one can look to, inter alia, "the witness's prior knowledge of the defendant."); *People v. Yara*, No. 9479/00, 2002 WL 31627019, at *2 (N.Y. Sup. Ct. Nov. 6, 2002) ("[T]he courts have carved out a 'confirmatory identification exception.' The rationale for this exception is premised on the principle that due to the familiarity between the witness and the suspect, there is little or no risk that police suggestion can lead to mis-identification. . . . The exception may confidently be applied where the protagonists are family members, friends, or acquaintances; at the other extreme, it clearly does not apply when the familiarity emanates from a brief encounter."); see also *State v. Marquez*, 967 A.2d 56, 82 (Conn. 2009) (finding "independent source" where eyewitness saw defendant at parole office prior to lineup); *Dang v. United States*, 741 A.2d 1039, 1042 (D.C. 1999) (finding enough evidence for independent basis from the witness's close contact with the robbers in adequate lighting for an extended period of time); *Butler v. State*, 382 S.E.2d 616, 620 (Ga. Ct. App. 1989) ("In the instant case there was lengthy testimony as to the independent origin of the victim's identification of Butler; he had visited her apartment in the past, she knew him from his place of employment, she recognized his voice, and [she] got a glimpse of his face when it was lighted by the street light."); *State v.*

identification that is not the product of police suggestion, but of the eyewitness's own actions, like viewing a photo of the defendant in a newspaper or a yearbook, might be seen as "independent" of police efforts to test the eyewitness's memory, although such identifications might nevertheless be unreliable.¹³⁹

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

Tann, 273 S.E.2d 720, 726 (N.C. 1981) (holding that the "one-man show-up" and the victim's identification before the defendant was produced by the officers was ample evidence of independent origin); *State v. Jaeb*, 442 N.W.2d 463, 465 (S.D. 1989) (upholding the lower court's holding that seeing the assailant on several occasions in good light and identifying her in a fair lineup was enough evidence of independent source).

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

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

B. Crossing Two Lines of Eyewitness Decisions

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

The independent source concept used in *Wade* and *Gilbert* came from an unlikely and inapposite source—exclusionary rule doctrine. In the search and seizure context, an illegal arrest may lead to a search that uncovers valuable evidence. Courts may exclude all of the evidence as “fruit of the poisonous tree.”¹⁴¹ However, there are three exceptions to the “fruit of the poisonous tree” implication of the exclusionary rule: inevitable discovery, attenuation doctrine (neither is analogous in any way), and independent source doctrine.¹⁴² The independent source doctrine is less problematic when the source was known to police before the illegality, though “[t]he problem, of course, is that there is no way to get the cat back into the bag.”¹⁴³ In the typical case, though, an illegal arrest leads to a search that uncovers evidence of guilt. Such cases go to the heart of concern with the exclusionary rule. Police uncover reliable evidence of guilt but through illegal means.

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

141. *Nardone v. United States*, 308 U.S. 338, 341 (1939).

142. *Nix v. Williams*, 467 U.S. 431, 443–44 (1984) (adopting inevitable discovery theory); *Brown v. Illinois*, 422 U.S. 590, 608–10 (1975) (discussing attenuation theory).

143. WAYNE R. LAFAVE, JEROLD H. ISRAEL & NANCY J. KING, *CRIMINAL PROCEDURE* § 9.3(d), at 528–29 (5th ed. 2009).

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

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

In contrast, in the due process context, the illegal means are precisely what makes the evidence unreliable. In the eyewitness context, neither time nor unrelated events can "dissipate the taint." In addition, the Court does not adopt the same approach toward deterring police misconduct in the eyewitness context, noting that police may not need a strong deterrent since "[t]he interest in obtaining convictions of the guilty also urges the police to adopt procedures that show the resulting identification to be accurate."¹⁴⁷ The very idea that a courtroom identification could be seen as "independent" is anomalous. But that has not stopped nearly all courts in the country from seizing on language from the Court admittedly confusing early due process case law to justify departing from *Manson* and encouraging the admission of courtroom identifications despite earlier suggestion.

144. *Wong Sun v. United States*, 371 U.S. 471, 487 (1963).

145. *United States v. Crews*, 455 U.S. 463, 474 (1980).

146. *United States v. Calandra*, 414 U.S. 338, 348 (1974) ("[T]he rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect. . . . As with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served.")

147. *Manson v. Brathwaite*, 432 U.S. 98, 112 & n.12 (1977) ("Although the per se approach has the more significant deterrent effect, the totality approach also has an influence on police behavior.")

Indeed, as noted, some courts outright conflate the lines of cases and cite to *Wade* when they apply the “independent source” rule in cases claiming due process (not Sixth Amendment) violations.¹⁴⁸ The one piece of commentary mentioning this flaw in the “independent source” case law, a Texas criminal practice guide, noted such “analysis is properly used only when the pretrial procedure is tainted by a violation of the Sixth Amendment right to counsel.”¹⁴⁹ In practice, it appears that courts ask whether under the “totality of the circumstances” an identification appears reliable. While the test may be “technically, but not practically” different from the *Manson v. Brathwaite* analysis,¹⁵⁰ the important difference is that there is no meaningful assessment of the reduced reliability of the courtroom or other subsequent identifications. Instead, courts look back to the original view the eyewitness had as an “independent source.”

C. What Is Independent About the Source?

What is the independent source that courts are referring to? Courts treat an eyewitness almost like an object that can simply be shown to the jury. They discuss eyewitness memory as if it were a fixed image, like a photo or a video. However, as social scientists have demonstrated over many hundreds of studies, eyewitness memory is highly malleable and is nothing like a photo or a video. An eyewitness’s memory must be carefully preserved or it can become contaminated. Each effort to test an eyewitness’s memory will reshape that memory.¹⁵¹ In the courtroom, the eyewitness cannot access a memory of what happened that is “independent” of the suggestive lineups that came before. While courts discuss the “independent recollection” of the eyewitness at trial, there is nothing independent about that recollection at trial. Indeed, the Supreme Court recognized as much early on. In *Simmons*, the Court noted that “the witness thereafter is apt to retain in his memory the image of the photograph

148. *Solomon v. Smith*, 645 F.2d 1179, 1188 (2d Cir. 1981) (“The tests of ‘independent origin’ set forth in *Wade* appear to be functionally identical to the reliability tests articulated in *Neil v. Biggers* . . .”).

149. See *DIX & DAWSON*, *supra* note 22, § 14.39 (“[T]he Texas courts have almost certainly erred in uncritically assuming that in-court identification testimony offered despite an earlier identification made at an unnecessarily suggestive procedure is sometimes admissible under the independent source analysis.”). They add, “Since the situation must present a very substantial risk of misidentification as a result of the unnecessarily suggestive procedure, surely it cannot be said that the in-court identification can have a source independent of that procedure.” *Id.*

150. *LOFTUS ET AL.*, *supra* note 21, §8-18, at 194 n.107.

151. See *infra* Part I.C.

rather than of the person actually seen, reducing the trustworthiness of subsequent lineup or courtroom identification.”¹⁵²

As Elizabeth Loftus, James Doyle, and Jennifer Dysart note in their treatise, while in theory prosecutors have a burden to show an independent source by “clear and convincing evidence” (in fact only some of the jurisdictions mention such a burden), in practice, courts “have gone to truly extraordinary lengths” to find that such independent sources exist.¹⁵³ In fact, courts have found that the eyewitness’s original perception was an “independent” assurance of the validity of the identification in remarkable cases where eyewitnesses saw perpetrators for “less than ten seconds, running, at night,” or “while temporarily blinded by liquor,” or when “choked from behind.”¹⁵⁴

Recall how in *Wade*, the Court recognized that unless the courtroom identification is suppressed, a rule suppressing the out-of-court identification would serve little purpose since “[t]he State may then rest upon the witnesses’ unequivocal courtroom identifications.” At trial, litigating the “possible unfairness at the lineup may be the sole means of attack upon the unequivocal courtroom identification.”¹⁵⁵ A Massachusetts appellate court highlighted:

We also note the obvious tactical reason for not filing a motion to suppress. If the out-of-court procedure was suppressed, leaving only an in-court identification, assuming the Commonwealth was able to meet its burden, the defense would not have been able to exploit certain weaknesses in the identification procedure.¹⁵⁶

That may actually not be a good tactical reason to not file a motion to suppress. If the Court suppresses the out-of-court identification, the defense lawyer may still choose to introduce it, although the identification cannot be presented by the State. It may be far more favorable for the defense to introduce it to elicit how the in-court identification is the product of a prior flawed identification procedure. Regardless, the lenient treatment of in-court identifications means that complete suppression of “*all* identification testimony” seldom occurs (except maybe in rare cases where the eyewitness never had any view of the culprit at all).¹⁵⁷ This creates poor general incentives for the defense to vigorously litigate motions to suppress.

152. *Simmons v. United States*, 390 U.S. 377, 383 (1968).

153. LOFTUS ET AL., *supra* note 21, at § 8-18, at 194–95.

154. *Id.* §8-18, at 194–95 & nn.108–09, 111 (citing cases).

155. *United States v. Wade*, 388 U.S. 218, 240-41 (1967).

156. *Commonwealth v. Graham*, No. 03-P-357, 2004 WL 840557, at *1 (Mass. App. Ct. Apr. 20, 2004).

157. *Id.*

Why are courts so lax about courtroom identifications? Some of those courts are aware of and cite to social science research on eyewitness memory. It may simply not occur to them that the courtroom identification is not just a bit of theater, but it is in fact highly suggestive and influential to jurors. Judges may be used to courtroom identifications of documents, nonstrangers, or objects—circumstances that are not problematic. Perhaps they believe that “juries are inclined to be skeptical of courtroom identifications, on account of the inherent suggestiveness in a defendant’s location next to his counsel at trial.”¹⁵⁸ As noted, they cite to the ability of counsel to cross-examine after a courtroom identification. Or courts may be eager to avoid excluding the identification, which may be central evidence supporting the prosecution’s case. Sandra Guerra Thompson suggests that this may explain rulings in some states, pointing to, for example, a New York Court of Appeals decision stating that “[e]xcluding evidence of a suggestive show-up does not deprive the prosecutor of reliable evidence of guilt. The witness would still be permitted to identify the defendant in court if that identification is based on an independent source.”¹⁵⁹ Of course, that reluctance to exclude is most problematic where the prior identifications were so suggestive that the court recognizes that they should be excluded, but still admits the courtroom identification.

There is an additional feature of the doctrine that is still more problematic. Several state and federal courts add another guilt-based factor nowhere to be found in the *Manson* test. They cite to other evidence in the case as another “independent” basis for allowing the in-court identification. They explain that all other unrelated evidence of guilt in the case can buttress the eyewitness identification and help to show that it was reliable or “independent” of any suggestive police conduct.¹⁶⁰ In such cases, courts again short-circuit the due process

158. *Ellis v. United States*, 941 A.2d 1042, 1049 (D.C. 2008) (citations omitted).

159. Thompson, *supra* note 21, at 627 (quoting *People v. Adams*, 423 N.E.2d 379, 384 (N.Y. 1981)).

160. *See, e.g.*, *Powell v. State*, 925 So. 2d 878, 884 (Miss. Ct. App. 2005) (holding that the testimony of three witnesses and the discovery of stolen property from the defendant’s truck was additional independent evidence); *State v. Valentine*, 785 A.2d 940, 943–44 (N.J. Super. Ct. App. Div. 2001) (finding evidence of independent reliability from the testimony of a witness, the retrieval of a gun from the defendant’s apartment, and the defendant’s flight after officers arrived constituted evidence that gave the identification independent reliability); *see also* Suzannah B. Gambell, *The Need to Revisit the Neil v. Biggers Factors: Suppressing Unreliable Eyewitness Identifications*, 6 WYO. L. REV. 189, 211 (2006) (discussing states that add corroborative evidence of general guilt as a *Biggers* factor); Brandon L. Garrett, *Innocence, Harmless Error and Federal Wrongful Conviction Law*, 2005 WIS. L. REV. 35, 84–85 (citing federal cases and noting, “The Supreme Court has not intervened as many of the circuits, taking the hint from *Manson*, have made no secret of their holdings that corroborating evidence of guilt

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

III. A PARTIAL EXCLUSION APPROACH

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

A. Limiting Courtroom Identifications

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

can render an eyewitness identification ‘reliable,’ some even calling such independent evidence of guilt a ‘sixth factor’ as to reliability”); Rudolf Koch, Note, *Process v. Outcome: The Proper Role of Corroborative Evidence in Due Process Analysis of Eyewitness Identification Testimony*, 88 CORNELL L. REV. 1097, 1102 (2003) (“[C]orroborative evidence of general guilt should be considered only in any post-trial harmless error analysis.”).

161. Laurens Walker & John Monahan, *Social Frameworks: A New Use of Social Science in Law*, 73 VA. L. REV. 559 (1987).

162. *State v. Henderson*, 27 A.3d 872, 292–93 (N.J. 2011).

163. Wells & Quinlivan, *supra* note 32, at 20 (describing situations in which limiting testimony might be appropriate).

Commentators have argued that the *Manson* test should be modified or that stronger limits should be placed on the admissibility of identifications.¹⁶⁴ I agree with those criticisms but argue that the focus of such efforts should be broadened to not only revise (or scrap) the due process and “reliability” test, but to also ask when courtroom or subsequent identifications may be admitted despite earlier suggestive procedures.¹⁶⁵ I argue that courtroom identifications should be per se excluded, perhaps with a heavy burden on the prosecution to show why it is absolutely necessary.¹⁶⁶ After all, as courts acknowledge, “the in-court testimony of an eyewitness can be devastatingly persuasive,”¹⁶⁷ and “of all the evidence that may be presented to a jury, a witness[s] in-court statement that he is the one is probably the most dramatic and persuasive.”¹⁶⁸

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

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

164. See, e.g., O’Toole & Shay, *supra* note 1 at 136–38 (discussing need for alternative rule to “discredited” *Manson* reliability checklist, and proposing rule that imposes minimum affirmative guidelines for identification procedures); Susan R. Klein, *Identifying and (Re)Formulating Prophylactic Rules, Safe Harbors, and Incidental Rights in Constitutional Criminal Procedure*, 99 MICH. L. REV. 1030, 1064–65 (2001) (discussing alternative rules that could counter injustices of unreliable identifications).

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

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

167. *United States v. Greene*, 591 F.2d 471, 475 (8th Cir. 1979).

168. *United States v. Russell*, 532 F.2d 1063, 1067 (6th Cir. 1976).

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

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

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

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

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

169. *Manson v. Brathwaite*, 432 U.S. 98, 122 (1977) (Marshall, J., dissenting).

170. *See, e.g., United States v. Brown*, 200 F.3d 700, 707–08 (10th Cir. 1999) (finding that, while the victim’s identification of the defendants at trial was suggestive, it happened in the presence of a jury and included a full and fair cross-examination of the victim about the process).

eyewitness when first viewing the lineup? How was that initial lineup conducted? Perhaps in part due to “independent source” case law, few defendants contest in-court identifications.¹⁷¹ The jurisprudence of eyewitness identifications may itself improve if separate identifications are treated separately.¹⁷²

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

B. Rethinking State Procedure

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

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

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

173. See GARRETT, *supra* note 7, ch. 9.

lineups, “shall be considered” in a motion to suppress an identification.¹⁷⁴ That is very mild language and a weak remedy.

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

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

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

OHIO REV. CODE ANN. § 2933.83(C)(1) (West 2011).

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

176. *Brodes*, 614 S.E.2d at 770.

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

178. *See* 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, 405–410 (2006) (discussing benefits of double-blind

similarly focus on best practices for eyewitness identifications without discussing admissibility.¹⁷⁹

The one exception is the New Jersey Supreme Court's *Henderson* decision adopting far-reaching changes to procedures concerning eyewitness identifications.¹⁸⁰ Those procedures are an important model and provide a social science framework for admissibility of eyewitness identifications. I note, though, that in addition to certain other limitations, those procedures do not carefully address the problem of courtroom identifications. Indeed, an appellate decision in that case instructed the trial court to consider whether there was an "independent source" for a courtroom identification should the suggestive pretrial identifications be excluded.¹⁸¹ On the other hand, the *Henderson* decision does note that in "rare cases" judges "may use their discretion to redact parts of identification testimony," including by barring "potentially distorted and unduly prejudicial statements about the witness'[s] level of confidence from being introduced at trial."¹⁸²

Statutory jury instructions describing risks of eyewitness misidentifications typically fail to consider admissibility standards.¹⁸³

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

179. See, e.g., *Report of the Task Force on Eyewitness Evidence*, SUFFOLK COUNTY DISTRICT ATTORNEY, July 15, 2004, <http://www.suffolkdistrictattorney.com/press-office/reports-and-official-correspondance/report-of-the-task-force-on-eyewitness-evidence/>.

180. *State v. Henderson*, 27 A.3d 872, 877–79 (N.J. 2011).

181. *State v. Henderson*, 937 A.2d 988, 999 (N.J. Super. Ct. App. Div. 2008) ("[I]f the determinations made at the new Wade hearing require the exclusion of the out-of-court identification made by Womble, then the judge should also determine whether Womble is able to make an in-court identification of defendant from an independent source.").

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

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

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

OHIO REV. CODE ANN. § 2933.83(C)(3) (West 2011).

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

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

184. *Watkins v. Sowders*, 449 U.S. 341, 356 (1981) (Brennan, J., dissenting).

185. See BRIAN L. CUTLER & STEVE D. PENROD, MISTAKEN IDENTIFICATION: THE EYEWITNESS, PSYCHOLOGY, AND THE LAW 11, 263–64 (1995) (“[T]he experiments we have reviewed here provide little evidence that judges’ instructions concerning the reliability of eyewitness identification enhance juror sensitivity to eyewitness identification evidence.”).

186. See *supra* note 131.

187. *Henderson*, 27 A.3d at 924 (“[W]e direct that enhanced instructions be given to guide juries about the various factors that may affect the reliability of an identification in a particular case.”); see also Wells & Quinlivan, *supra* note 32, at 20–21 (discussing benefits of jury instruction that is tailored to specifics of case). While jury instructions that seek to limit consideration of evidence and “blindfold” the jury may fail, efforts to more completely inform the jury using instructions that explain rationales for admonitions may produce more accurate results. See DAVID P. LEONARD, THE NEW WIGMORE: A TREATISE ON EVIDENCE SELECTED RULES OF LIMITED ADMISSIBILITY: REGULATION OF EVIDENCE TO PROMOTE EXTRINSIC POLICIES AND VALUES § 1.11.5 (2010) (explaining that jury instructions should clearly convey both the applicable legal rules and the importance of abiding by them); Shari Seidman Diamond & Neil Vidmar, *Jury Room Ruminations on Forbidden Topics*, 87 VA. L. REV. 1857, 1858 (2001) (discussing limits of blindfolding techniques given active nature of juries and advocating for reason-based explanatory instructions). On the value of offering instructions earlier in the trial, see Joel D. Lieberman & Jamie Arndt, *Understanding the Limits of Limiting Instructions: Social Psychological Explanations for the Failures of Instructions to Disregard Pretrial Publicity and Other Inadmissible Evidence*, 6 PSYCHOL. PUB. POL’Y & L. 677, 705 (2000).

Judges could partially reorient the jurisprudence just by correctly reading *Manson*. The Court's due process test does not include an "independent source" rule. It requires separate analysis of whether a given identification procedure should be admitted as suggestive or reliable. A courtroom identification is not a "reliable" test of the eyewitness's memory, and a courtroom identification is inherently suggestive. Similarly, statutes could codify per se exclusion for courtroom identifications that follow prior out-of-court identification procedures.

Criminal procedure rules could more broadly focus on excluding tainted aspects of evidence, such as a confession, an informant statement, or a forensic report, without imposing an all-or-nothing exclusion. The Supreme Court in *Perry* was unwilling to expand due process regulation of eyewitness identifications not arranged by police, but the Court did emphasize that jury instructions and other tools may more usefully ensure the reliability of trial evidence.¹⁸⁸ However, the Court may continue to step back toward a more reliability-oriented Confrontation Clause approach.¹⁸⁹ The Court's ruling in *Missouri v. Siebert* can also be seen as a ruling recognizing the need to partially exclude later evidence contaminated by earlier evidence (although there, the focus was on police coercion and not on reliability).¹⁹⁰ An approach geared toward reliability might instead look at whether a confession was contaminated by disclosed facts, and it might exclude portions of an interrogation where the suspect was not volunteering answers but simply repeating

188. *Perry v. New Hampshire*, 132 S. Ct. 716, 727–28 (2012).

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

190. 542 U.S. 600, 608–09 (2004) (plurality opinion). In *Siebert*, the Court ruled that when police interrogate a suspect in custody without having given the *Miranda* warnings, but then after obtaining a confession, give the warnings and ask the same questions again, that the repeated statement is not admissible. *Id.* at 604. The plurality emphasized that the earlier statement, made without the *Miranda* warnings, would naturally impact the second statement. *Id.* at 613–14. As Justice O'Connor pointed out in dissent, the Court also considered the "psychological impact" the first unwarned statement would have on the second *Mirandized* statement. *Id.* at 627 (O'Connor, J., dissenting). She would consider the same factors, but for a different purpose, to ask whether the second statement might be independently reliable and therefore not subject to exclusion. *Id.* at 627–28 (O'Connor, J., dissenting).

information that police provided,¹⁹¹ or it might simply exclude portions of an interrogation that were not electronically recorded.¹⁹² Similarly, a series of courts have responded to challenges to the validity and reliability of a series of forensic techniques, such as fingerprint analysis, firearms and toolmark analysis, and handwriting comparisons, by limiting the ability of analysts to testify to invalid conclusions, such as that the evidence could only have come from the defendant to the exclusion of all others in the world.¹⁹³ As courts and legislatures focus on reliability in other contexts, they might consider whether evidence could similarly be treated in separate parts. In addition, courts could fashion tailored jury instructions, together with

191. See Brandon L. Garrett, *The Substance of False Confessions*, 62 STAN. L. REV. 1051, 1109–11 (2010) (arguing that constitutional criminal procedure should consider reliability and, in particular, should assess whether suspects actually volunteered crucial facts).

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

193. See, e.g., United States v. Green, 405 F. Supp. 2d 104, 107–109, 120 (D. Mass. 2005) (limiting firearms comparison testimony to conclusions expressing similarities and, interestingly, analogizing the problem of observer bias of a firearms examiner given only a single firearm to examine to the problem of showup eyewitness identifications); United States v. Hines, 55 F. Supp. 2d 62, 67–68 (D. Mass. 1999) (ruling that handwriting examiner was limited to testifying about “similarities” in documents); see also Simon A. Cole, *Splitting Hairs? Evaluating ‘Split Testimony’ as an Approach to the Problem of Forensic Expert Evidence*, 33 SIDNEY L. REV. 459 (2011) (evaluating emerging approach by courts restricting testimonial claims of forensic experts); Jennifer L. Mnookin, *The Courts, the NAS, and the Future of Forensic Science*, 75 BROOK. L. REV. 1209, 1242 (2010) (arguing that as an “interim solution” courts limit fingerprint evidence “by restricting it to description of similarities and differences” rather than permit individualization claims); Jennifer L. Mnookin et al., *The Need for a Research Culture in the Forensic Sciences*, 58 UCLA L. REV. 725, 750 (2011) (“Forensic analysts have often failed to recognize the limits of what conclusions are actually warranted by a given research result.”); David M. Siegel et al., *The Reliability of Latent Print Individualization: Brief of Amici Curiae submitted on Behalf of Scientists and Scholars by The New England Innocence Project*, Commonwealth v. Patterson, 42 CRIM. L. BULL. art. 2 (2006) (“[T]estimony in terms of ‘individualization’ or ‘matches,’ without the underlying study of the base rates of the characteristics from which such conclusions are ostensibly drawn, or proficiency tests data for examiners, is misleading and fundamentally unsound. This does not mean that testimony detailing the comparison of prints by examiners would have to be excluded.”); cf. Simon A. Cole, *Where the Rubber Meets the Road: Thinking About Expert Evidence as Expert Testimony*, 52 VILL. L. REV. 803, 838 (2007) (“[J]udges and legal scholars need to shift their focus from the admissibility of evidence to control of testimony.”).

reliability hearings, to provide a comprehensive framework regulating the admissibility of evidence.

CONCLUSION

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

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

194. *Perry v. New Hampshire*, 132 S. Ct. 716, 727 (2012).

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

APPENDIX

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

Alabama

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

Alaska

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

Arizona

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

Arkansas

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

California

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

Colorado

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

Connecticut

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

Florida

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

Georgia

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

Idaho

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

Illinois

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

Indiana

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

Iowa

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

Kansas

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

Louisiana

See State v. Cheathon, 682 So. 2d 823, 826 (La. App. 1996) (“In the present case, even if we disregard the contrary evidence and assume *arguendo* that the pre-trial identification represented an

impermissibly suggestive activity, the record discloses an independent basis for admitting the in-court identifications by the two victims.”).

Maine

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

Massachusetts

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

Michigan

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

Minnesota

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

Mississippi

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

Missouri

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

Nebraska

See State v. Smith, 696 N.W.2d 871, 883 (Neb. 2005) (“An in-court identification may properly be received in evidence when it is independent of and untainted by illegal pretrial identification procedures” (quoting *State v. Auger*, 262 N.W.2d 187, 189 (Neb. 1978))).

Nevada

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

New Hampshire

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

New Jersey

See State v. Peterkin, 543 A.2d 466, 476 (N.J. Super. Ct. App. Div. 1988) (“[T]he State should bear the burden of proving, by clear and convincing evidence, that any in-court identification . . . is derived from an independent source.”).

New Mexico

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

New York

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

North Carolina

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

Ohio

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

Oregon

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

identification procedures”), *review allowed*, 258 P.3d 526 (Or. 2011).

Pennsylvania

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

South Carolina

See State v. Carlson, 611 S.E.2d 283, 290 (S.C. Ct. App. 2005) (“The in-court identification is admissible if based on information independent of the out-of-court procedure.”).

South Dakota

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

Texas

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

Virginia

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

Washington

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

West Virginia

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

Wisconsin

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

Washington, D.C.

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